[2022] **JMSC Civ 129**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV03257

BETWEEN	**TEISHA COMBES**	**CLAIMANT**
AND	**RUSSELL INVESTMENTS LIMITED t/a PIER 1**	**DEFENDANT**

IN CHAMBERS

Miss Marsha Grant instructed by Nigel Jones & Company for the Claimant

Miss Lesley Ann Stewart instructed by Mayhewlaw for the Defendant

Heard: 26th May 2022 and 22nd July 2022

Security for costs – Claimant ordinarily resident outside the jurisdiction – Factors to be considered – Part 24 of the Civil Procedure Rules.

M. JACKSON, J (Ag.)

THE APPLICATION

[1] This is an application for security for costs. This type of application runs counter to the ordinary rule that costs follow the event. In explaining this exception, the learned editors of **Blackstone's Civil Practice, 2014, The Commentary**, at paragraph 67.1, pointed out that:

> *"Generally, the question of who pays for the costs of a claim is not determined until the claim is finally disposed of, whether by means of consent, interim process or trial. This is because the rule is that the successful party recovers costs order from the loser and the outcome on the merits is only known when the judgment is*

obtained. It is for this reason that the parties are not generally allowed to anticipate the eventual costs order by asking for interim orders that their opponents provide funds as security to pay for the costs of the action. Despite this, it is accepted that there have to be exceptions for cases where there is significant risk of defendants suffering the injustice of having to defend proceedings with no real prospect of success of being able to recover costs if they are ultimately successful."

[2] Against that background, the Defendant (Applicant) has applied for these orders:

> "(a) *The Claimant gives security for costs in the sum of Two Million Six Hundred and Twenty Thousand Dollars ($ 2,622,000.00) within thirty (30) days of the Order herein;*
>
> (b) *The said sum be paid into an interest bearing account in the names of Nigel Jones and Company and Symone Mayhew to be held until after the trial of this action or further orders of the Court;*
>
> (c) *The Claimant's claim herein be stayed until the payment of the amount ordered in paragraph one; and*
>
> (d) *If the security for costs is not paid in accordance with the terms of the order, the Claimant's claim shall be struck out."*

[3] The grounds relied on in support of the application were formulated as follows:

> *"(a) Pursuant to Rule 24.3 (a) of the Civil Procedure Rules, ("CPR") an order for security for costs may be made against a claimant who is ordinarily resident out of the jurisdiction;*
>
> (b) *The Claimant is a resident out of the jurisdiction;*
>
> (c) *The Applicant is unaware of any assets belonging to the Claimant within the jurisdiction against which an order for costs made in favour of the Applicant may be enforced;*
>
> (d) *That Pursuant to Rule 24.4 of the CPR, on making an order for security for costs the Court must also order that the claim be stayed until such time as security for costs is provided in accordance with the terms of the order; and/or that if the security is not provided in*

accordance with the order by a specified date, the claim be struck out;

(e) *The Applicant has a good prospect of successfully defending the claim; and*

(f) *The above orders are necessary for the just, fair and effective disposal of these proceedings."*

[4] As is expected, the Claimant (Respondent) vehemently opposed the application.

THE BACKGROUND

[5] The application for security for costs arises from a claim brought by the Claimant in negligence and for breach of occupier's liability. The facts averred by the parties that form the background to these proceedings are contained in their respective pleadings. Those facts are straightforward and succinct. I will endeavour to keep them so while providing the factual background to the application before me.

[6] The Claimant is a retired nurse and resides in Florida, United States of America ("USA"). She stated that around January 16, 2014, during heavy rains, she disembarked an excursion bus in Montego Bay, Saint James, to use the restroom at the Defendant's business place. She was given permission by a member of staff to use the facility. While making her way to the bathroom, she slipped and fell. Her fall, she alleged, was as a result of the area leading to the bathroom being wet coupled with the presence of an uncovered board floor ramp.

[7] The Defendant totally denies the incident. It avers that the incident was never brought to its attention at the material time and that it only became aware of the incident after the Claim was filed. The Claim was filed on August 28, 2018.

[8] The Defendant has also refuted the structural layout of its business place as described by the Claimant, and contends that at the material time, the ramp leading to the bathroom was finished with exterior grade tiles and overlaid with

non-skid asphalt strips. In addition, there was a handrail along the ramp that visitors to the premises were able to use in order to ensure their safety.

[9] Finally, the Defendant further states that the property was refurbished in 2013 and so by January 16, 2014, the alleged date of the incident, the premises would have had no wooden structures. In short, it avers that there is no breach of duty and it puts the Claimant to strict proof.

THE APPLICABLE LAW

[10] Part 24 of the Civil Procedure Rules 2002 ("CPR") enumerates a number of conditions which enables a defendant to make an application for security for costs against a claimant. Rule 24.2 of the CPR provides that:

> *"24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's cost of the proceedings.*
>
> *(2) Where practicable such an application must be made at a case management conference or pre-trial review*
>
> *(3) An application for security of costs must be supported by evidence on affidavit.*
>
> *(4) Where the court makes an order for security for costs, it will –*
>
> *(a) determine the amount of security; and*
>
> *(b) direct –*
>
> *(i) the manner in which; and*
>
> *(ii) the date by which*
>
> *the security is to be given."*

[11] Rule 24.3 outlines the conditions to be satisfied before the court may make an order for security for costs. This rule provides as follows:

> *"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 –*
>
> *(a) the claimant is ordinarily resident out of the jurisdiction;*

(b) the claimant is a company incorporated outside the jurisdiction;

(c) the claimant –

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

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

(iii) or has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's cost if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a cost order against the assignor;

(f) some person other than the claimant has contributed or agreed to contribute to the claimant's cost in return for a share of any money or property which the claimant may recover; or

(g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court."

[12] Rule 24.4 provides that:

"24.4 On making an order for security for costs the court must also order that –

(a) the claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; and/or

(b) that if the security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out."

[13] Rule 24.3, understandably, represents the most significant part of the regime. It provides two prerequisites which must be satisfied before the court may exercise its discretion to make an order for security for costs. These two prerequisites are that: (1) the court must be satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (2) at least one of the conditions

identified at rule 24.3 (a) to (g) is satisfied. In other words, security for costs cannot be ordered solely on the basis that one or more of the conditions listed at rule 24.3 (a) to (g) apply. The court must also be satisfied that, having regard to all the circumstances of the case, it is just to make the order.

[14] In this regard, I readily agree with Brooks J (as he then was) when he stated in **Mannings Industries Inc. and Manning Mobile Co. Ltd. v Jamaica Public Service Co. Ltd.** (unreported), Supreme Court, Jamaica, Suit No. C.L. 2002/M058, judgment delivered 30th May 2003 ("**Mannings Industries Inc.**") at page 16 that:

> *"The structure of the rule seems to indicate that the justice of the case is to be first considered and then a determination made as to whether the authority existed in 23.4 (a) to (f). It would seem, however, that logically, a court should approach it the other way round, that is to say, to determine whether any of the conditions stipulated in paragraphs (a) to (f) applied and then, having determined that the authority did exist, to then consider the circumstances of the particular case to be determined if an order for security for costs should justly be made."*

[15] Before moving on, I must point out that the case of **Mannings Industries Inc.** was decided during the transitional period between the Judicature (Civil Procedure Code) Law and the introduction of the CPR. Nonetheless, the above observation by Brooks J, still bears relevance in the interpretation of rule 24.3 of the CPR.

[16] It has long been established that "the court has a wide discretion whether or not to impose [an] order for security for costs, and the principles on which the discretion is to be exercised are dependent on the circumstances of each case" (see paragraph [42] of **Symsure Limited v Kevin Moore [2016] JMCA Civ 8** ("**Symsure**")). Therefore, in discharging this obligation, the court must carefully scrutinise the evidence placed before it and carry out a balancing exercise in order to determine whether having regard to all the relevant facts and the circumstances of the case, it would be just to make the order.

[17] Also, regard must be had to the overriding objective of the CPR which embodies the principles of proportionality, equality and economy. The learned editors of **Blackstone's Civil Practice 2014, The Commentaries**, at paragraph 67.16, fittingly explained the importance of doing so, by stating that:

> *"…. the substantial body of pre CPR case law on the subject is consigned to history. Instead the discretion has to be exercised applying the overriding objective and affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in question."*

[18] Also, applicable to the consideration of this application is the principle that even though an order for security for costs does not infringe the right to due process under article 6 (1) of the European Convention on Human Rights, it can be regarded as a fetter on a claimant's access to justice (see **Nasser v United Bank of Kuwait** [2002] 1 All ER 401. The right to due process is a fundamental right enshrined in section 16 the **Constitution of Jamaica** as part of the Charter of Fundamental Rights and Freedoms. Accordingly, a court is also obliged to take that right into account and to ensure that it is not violated or infringed, unless it is just having regard to all the circumstances of the case

THE ISSUES

[19] In determining the application, three primary issues arise for the resolution of this court. These are:

(i) whether any of the conditions for ordering security for costs as outlined in Part 24.3 of the CPR is satisfied; and if so

(ii) whether having regard to all the circumstances of the case, it would be just to exercise the court's discretion in favour of making the order; and

(iii) whether the amount sought by the Defendant is appropriate so as not to stifle the claim.

THE AFFIDAVIT EVIDENCE

[20] In determining the issues that arise for consideration on the application by reference to the applicable law, it is also imperative that I bear in mind rule 24.2(3). The rule explicitly provides that "[a]n application for security for costs must be supported by evidence on affidavit". Therefore, mere bald assertions would not be sufficient for me to exercise my discretion. Jacob J, in ***Somerset-Leeke & Anor v Kay Trustees & Anor*** [2003] EWHC 1243 (Ch), at paragraph 5 was also of a similar view. He carefully noted that:

> *"In applications for security, the relevant ground should always be identified and the relevant evidence aimed at that ground. In fact in this case it seems to me that the defendants are running something of a mélange of the grounds. To some extent that is understandable because factors which can affect one ground may affect another ground too. But none the less is it [sic] essential to be clear which ground is being talked about and what factors are being used in support of that ground, both as a matter of law to establish that the ground exists, and secondly as a matter of fact to be taken into account in exercising a discretion."*

[21] Therefore, it is the evidence, as presented in the affidavits, that will provide the platform on which I must exercise my discretion.

The Defendant's evidence in support of the application

[22] The affidavit on behalf of the Defendant was sworn to on September 29, 2020, by Jason Russell, its Managing Director. He deposed in so far as is immediately relevant:

> *"1. …*
>
> *2. …*
>
> *3. This Claim arises from an alleged incident at Pier 1 which is a restaurant bar located in Montego Bay, Saint James. The Defendant was at all material time the operator of the restaurant and bar.*
>
> *4. The Claimant alleges that she was a visitor to the premises on or about January 16, 2014. She alleges that while she was walking along a wooden ramp to the bathroom she slipped and fell because the ground was wet due to rainfall. She states that she has suffered*

personal injuries, loss, damage and expenses which she attributes to the negligence and or a breach of statutory duty by the Defendant.

5. *The Defendant has defended the claim on the basis that it received no complaint. Further, the ramp leading to the bathroom was not wooden, as at the date of the alleged incident was finished with exterior tiles that were overlaid with non-skid asphalt strips. Additionally, there was a handrail along the ramp for the use of visitors to the premises, to ensure the safety of all persons using the ramp. The Defendant also states that in the alternative if the accident had occurred, the Claimant was not paying careful attention to ascending the ramp, and as a result she fell.*

6. *The property was refurbished in October 2013 such that by January 16, 2014, the alleged date of the accident, there was no longer any wooden structures.*

7. *I am informed by the Defendant's attorney-at-law Mrs Symone Mayhew, and verily believe that in the circumstances, the Defendant has a good prospect of successfully defending the claim.*

8. *The Claimant cites her address in the Claim form as being… Florida 34655 in the United States of America. As such, it appears that she is ordinarily resident outside of Jamaica.*

9. *The Defendant is not aware of any assets belonging to the Claimant within the jurisdiction against which an order for cost made in favour of the Defendant may be enforced.*

10. *To date, the Defendant has incurred significant expenses in defending the claim and foresees that it may ultimately incur expenses up Two Million Six Hundred and Twenty-Two Thousand Dollars ($2,622,00.00) in costs up to the end of the trial. Exhibited hereto and marked "JR1" is a draft bill of cost.*

11. *This figure is arrived at, taking into account the costs to date, and of the Case Management Conference and the Pre-trial, and the usual costs incurred in preparation for, and attendance at a Trial, which spans over a period of 2 days.*

12. *In the circumstances, I respectfully ask that this Honourable Court grants the orders sought in the Notice of Application filed herewith, failing which the Defendant is likely to suffer great prejudice."*

The Claimant's evidence opposing the application

[23] The affidavit on behalf of the Claimant was sworn to by Kimberly Morris, an Associate at the firm of Nigel Jones and Company. The material facts deposed by her are as follows:

"1. …

2. …

3. …

4. I have read the Affidavit in Support of the Application for Security of Costs filed October 6, 2020 hereinafter referred to as the Affidavit, and crave leave of this Honourable Court to respond.

5. In response to paragraphs 5-6 of the Affidavit, I am advised by the Claimant, Ms Teisha Combes and do verily believe that at the material time of the incident, the ramp on the Defendant's premises which leads to the bathroom was of wooden flooring and there were no exterior grade tiles that were overlaid with non-skid asphalt strips. I am further advised by the Claimant, Ms Teisha Combes and verily believe that she took care in ascending the ramp.

6. As it relates to paragraph 7 of the Affidavit, I state that the Defendant does not have a good prospect of successfully defending the claim.

7. In response to paragraphs 10-11 of the Affidavit, I state that the amount of Two Million Six Hundred and Twenty –Two Thousand Dollars (J$2,622,000.00) is excessive and unreasonable. Further, this matter is not a complex one and does not require Senior Counsel as a Junior Counsel is capable and competent to have conduct of this matter.

8. Further, I do verily believe that it would be unjust for the Court to make an order for Security for Costs in the amount Two Million Six Hundred and Twenty –Two Thousand Dollars (J$2,622,000.00) as this application is being made oppressively and in order to stifle a genuine claim brought by the Claimant which has a reasonably good prospect of success.

9. Further, the year in which Junior Counsel was called to the Bar is unknown, as such the hourly rate is unknown. In light of this, the cost to be recovered for the work done by the Defendant's Attorney should be determined in accordance with Appendices B and C of Part 65 of the Civil Procedure Rules and or Practice Direction Assessment of Costs, PD No. 2 of 2018 in the circumstances.

10. The table below represents a proposed draft bill of cost: …

11. In the circumstances, the Claimant asks that this Honourable Court refuses the Orders sought in the notice of Application for Court Orders by the Defendant herein, as there will be no prejudice suffered by the defendant if the application is not granted."

Issue 1: Whether any of the conditions for ordering security for cost, as outlined in Part 24.3 of the CPR, is satisfied

[24] Based on the grounds relied on by the Defendant in support of its application, the court must be satisfied that the condition under rule 24.3(a) of the CPR is met, that is, the Claimant is ordinarily resident out of the jurisdiction. In so far as the evidence reveals, there is no doubt that the Claimant ordinarily resides outside the jurisdiction. This has been readily accepted by both sides. Rule 24.3(a) is plainly met and requires no further discussion.

Issue 2: Whether having regard to all the circumstances of the case it would be just to exercise the court's discretion in favour of making the order

[25] In this regard, I will rely on the able guidance of Phillips JA in **Symsure,** which was also urged on me for my consideration by both counsel. At paragraph [47], the Learned Judge of Appeal stated that:

> *"Once one or more of the factors stated in the rules have been satisfied, then the court must endeavour to ascertain whether it was just to make the order. The Court ought to consider, though not in any great detail, the success of the claim, and also whether the order could stifle a genuine claim. The order clearly ought not to do that, however the defendant should not be forced to defend a claim that is a sham, and one in respect of which he may not be able to recover his costs and unnecessary expenses if the claimant in the case is unsuccessful."*

[26] As gleaned from the cases, it is not possible or appropriate to list all the matters relevant to the exercise of the court's discretion. The factors will vary from case to case. The weight to be given to any circumstance very much depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed.

[27] In elaborating on such wide discretion, Ruch J, in **King v The Commercial Bank of Australia Limited** [1920] 28 CLR 289**,** a case from the High Court of Australia stated at 292:

> *"The Legislature, however, has left absolute discretion to the Court, and has done so without prescribing any rules for its exercise. In these circumstances no rule can be formulated in advance by any Judge as to*

> *how the discretion shall be exercised. It depends entirely on the circumstances of each particular case. This discretion must, of course, be exercised judicially, which means that in each case the Judge has to inquire how, on the whole, justice will be best served…"*

[28] In **Symsure,** at paragraph [44], Phillips JA, made reference to several factors that over time were extracted from several authorities to assist a court in determining whether it would be just to make an order for security for costs. She stated as follows:

> *"In **Harnett, Sorrel and Sons Ltd v Smithfield Foods Limited,** in reviewing The Supreme Court Practice, 1982, volume 1, page 435, Belgrave J, suggested that there are several factors which the court may take into account when considering applications for security for costs, namely:*
>
> *(1) Whether the plaintiff's claim is bona fide and not a sham.*
>
> *(2) Whether the plaintiff has a reasonably good prospect of success.*
>
> *(3) Whether there is admission by the defendant on the pleadings or elsewhere that money is due.*
>
> *(4) Whether there is a substantial payment into court or an "open offer" of a substantial amount.*
>
> *(5) Whether the application for security was being used oppressively so as to stifle a genuine claim.*
>
> *(6) Whether the plaintiff's want of means had been brought about by any conduct of by the defendant, such as delay in payment or in doing their part of the work.*
>
> *(7) Whether the application for security is made at a late stage of the proceedings."*

[29] Both Miss Grant and Miss Stewart, also referred to the cases of **Sir Lindsay Parkinson & Company Ltd v Triplan Ltd** [1973] 2 All ER 273 and **Nicholas Grant v G. Anthony Levy** [2017] JMSC Civ 65. Similar principles were also outlined in **Keary Developments Ltd v Tarmac Construction Ltd and Anor** [1995] 3 All ER 534 ("**Keary Developments Ltd**"), which was also relied on and discussed by Harris J (as she then was) in **Nicholas Grant v G. Anthony Levy**.

[30] The Defendant, in support of its application, has contended that the application was made out of a genuine concern and that the justice of the case demands it. This is because the Claimant resides outside the jurisdiction and she has no known asset within the jurisdiction against which the Defendant could enforce an order for costs if its defence were to be successful. It also argued that the defence has a good prospect of success.

[31] Consideration for this position was highlighted in a very detailed fashion in **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074 and adopted by Phillips JA in **Symsure**. Sir Nicolas Browne-Wilkinson V-C, in giving the judgement, articulated an approach which espoused the necessary balancing exercise in the adjudication of these cases. He opined, at pages 1076 and 1077 that:

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgement or costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction. There is only one exception to that, so far as I know, namely in the case of limited companies, where there is provision under the Companies Act, 1985, s 726 for security for costs…*
>
> *Under Ord 23, r 1(1)(a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff**. The question is what, in all the circumstances of the case, is the just answer**." [Emphasis added]*

[32] Succinctly, the arguments advanced by the Claimant, in response, may be summarised as follows: (a) the claim is not a sham; (b) the sum sought is oppressive; and (c) if the court grants the order as prayed, it would stifle the claim, remove her from the seat of judgment and ultimately denying her access to justice.

[33] These arguments are not without sound legal compass. In the case **Marjorie Knox v John Deane and others** [2012] CCJ 4 (AJ), adopted by Harris J (as she then was) in **Nicholas Grant v G. Anthony Levy,** Nelson JCCJ, at paragraph [40], held that:

> *"...the award of security for costs must, in the final analysis, be 'just' in all the circumstances. In the instance case, in this respect the courts are anxious to preserve access to justice for persons resident abroad or impecunious who are brought before the courts to defend litigation… foreignness and poverty are no longer per se automatic grounds for ordering security for costs. It is well to recall the discretionary terms in which Rule 62.17 is cast and two statements of the proposition at first instance:*
>
> *(a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs: Aeronave S.P.A. v Westland Charters Ltd 3 [1971] 1 WLR 1447 (CA):*
>
> *(b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable: Cowell v Taylor (1885) 31 Ch. D 34."*

[34] Having considered the contention of the parties and the cases they rely on for support, I have examined the factors identified in **Symsure** in determining whether an order for security for costs is appropriate in the circumstances of the case.

(a) Is the Claimant's claim bona fide and not a sham?

[35] Miss Grant, on behalf of the Claimant, commenced her submission with this factor. It is understandable, because if there were to be a finding that the case is a sham, then that would be the end of the matter. In addressing this factor, Miss Grant strenuously made the point that the Defendant in its defence admitted that the Claimant was a lawful visitor to the premises. Miss Stewart, on the other hand, on behalf of the Defendant, made it clear that while the Defendant may not be denying that the Claimant may have been at the Defendant's premises, the Defendant was never made aware of the incident until after the Claim was filed in

2018. She ended by stating that in this regard, the Claimant would be put to strict proof.

[36] With all that said, I am required to determine whether the claim is genuine and not a sham. In **Snook v London & West Riding Investments Ltd.** [1967] 2 QB 786, the issue of what is a sham was dealt with. At page 802, Lord Diplock opined:

> *"…it is, I think, necessary to consider what, if any legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."*

[37] A sham, therefore, exists where the parties say one thing intending another: **Donald v Baldwyn** [1953] NZLR 313, 321, per FB Adams J, cited by Bingham LJ in **AG Securities v Vaughan** [1990] 1 AC 417**.** Having reviewed the cases and the affidavit evidence before me, neither party has pointed me to any such "evidence".

[38] I do not have any clear evidence before me to come to a finding that the claim is a sham. The case is likely to be determined on issues of credibility. On the evidence before me, I come to a finding that the case is not a sham.

(b) Whether the application for security was made at a late stage of the proceedings

[39] Rule 24.2(2) of the CPR states that "where practicable such an application must be made at a case management conference or pre-trial review". The authorities have stated that delay in making the application is one of the circumstances that the court will have regard, when exercising its discretion. The court is likely to refuse an order for security, where delay in making the application has been proven to be a factor.

[40] This position was reiterated by Phillips JA in **Symsure,** where she stated, at paragraph [48], that:

> *"Delay in making the application… is also a factor to be considered. As indicated, the application ought to be made at a very early stage of the proceedings. It has been said that lateness itself may be a reason to refuse the application, particularly if the application is made very close to the trial date and the sum asked for is exorbitant, or in any event, very high, as it may cause suspicion as to the genuineness of the claim."*

[41] The Notice of Application was filed by the Defendant on October 6, 2020, immediately after the conclusion of the mandatory period for mediation and before the case management conference date had been fixed. With such clear evidence, it was agreed by all, that the issue of delay did not arise for consideration. I, therefore, conclude that Rule 24.2(2) has not been breached.

[42] Though the evidence has established that delay is not an arguable factor, I am, nonetheless, required to fully scrutinise the entire circumstances of the case to ascertain whether the application was intended to be used as an instrument of oppression, and to stifle the claim.

[43] In the light of the competing arguments, I will proceed to consider the factors of impecuniosity and absence of assets in the jurisdiction.

(c) Impecuniosity and absence of assets in the jurisdiction

[44] In her submission, Miss Stewart referred the Court to paragraph 9 of the affidavit filed on behalf of the Defendant where Jason Russell deposed that the Defendant is unaware of any assets in the jurisdiction belonging to the Claimant.

[45] The Claimant did not provide a response to this averment in her affidavit. However, in her submission, Miss Grant stated that the Claimant's **income base was not much** [emphasis added]. That submission, though not evidence, can be interpreted to mean that the Claimant is relying on either the absence of funding or impecuniosity. Miss Grant went on to rely on several authorities that dealt with these factors. She, first, referred the Court to **Aquila Design (GRP Products)**

Ltd v Cornhill Insurance plc [1988] BCLC 134, where Fox LJ stated at page 137 that:

> *"It is necessary for the court, in looking at the whole matter, to take into account the burden on the plaintiff of having to provide security, with the result that it may have to abandon the action altogether in consequences of impecuniosity and an inability to provide the amount ordered by the court. In such cases there is a danger of oppression as a consequence of making an order for security."*

[46] She further relied on Sir Nicholas Browne-Wilkinson, Vice Chancellor in **Porzelack KG v Porzelack (UK) Ltd**, that an order for security for costs "is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to Claimant's resident within the jurisdiction".

[47] Miss Stewart, in advancing the argument of the Defendant, relied on the pronouncements of Phillips JA in **Symsure.** She vigorously argued that the assertion by the Defendant "cried out for a response" from the Claimant.

[48] The facts of **Symsure** is necessary at this stage. In that case, the applicant, a Company, as in this case, had deposed that it was unaware of any asset within the jurisdiction for the Claimant, who resided in Florida, USA (similar to the Claimant in this case). Morrison J, refused the application for security for costs and, among other things, expressed the Court's disapproval of the defendant's failure to provide the court with evidence in support of such assertion. Morrison J, was of the view that the defendant needed to have substantiated its assertion with evidence. Phillips JA disagreed with Morrison J. She settled this very significant issue by stating that:

> *"[56] The learned judge was concerned about the statement made by the appellant that the respondent had no assets in the jurisdiction…." There was no proof", he said, "of these bald assertions. The respondent had claimed that the sum asked for was excessive and oppressive but he had given the court no assistance on that assertion either. It is clear that it is the appellant who should provide the court with some information as to the breakdown of the costs claimed which the appellant had failed to do...*

> *…*
>
> *[59] However, with regard to the statement as to the assets in the jurisdiction, in my view, this information is within the knowledge of the respondent, who could have placed information before the court countering the statement of the appellant that he had no assets in this jurisdiction, if he had wished to do so…* ***It was therefore not within its knowledge that the respondent had any assets in the jurisdiction and that statement made by the appellant cried out for a response and or a challenge from the respondent, which had not occurred****." (Emphasis added)*

[49] It stands to reason that based on the guidance of the Learned Judge of Appeal in respect of these factors, a Claimant resisting an application for security for costs must extend his or her response beyond mere bald assertions and or insufficient details. Rather, the Claimant must provide evidence of his or her own financial circumstances with robust particularity, such that there are no unanswered material questions.

[50] Therefore, the submission that the Claimant has a 'low income base', is not evidence before me, and equally very unhelpful, even if the court were to consider it. I am of the view that the Claimant must provide the necessary evidence so that the court can objectively weigh in the balance in the exercise of its discretion. Evidence such as a list of all income, liabilities and significant expenses, as well as, an indication of the extent of the ability to secure funds, would have assisted the Court in assessing the Claimant's assertion.

[51] In the Canadian case of **Hallum v Canadian Memorial Chiropractic College** 1989 CanLII 4354 (ON SC) a similar position was articulated. In that case the court held that:

> *"A litigant… who relies on his impecuniosity to avoid an order requiring that he post security, must do more than adduce some evidence of impecuniosity. The onus rests on him to satisfy the court that he is impecunious…. The onus rests on the party relying on impecuniosity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniosity as a shield against an order as to security for costs…"*

[52] In **Shaunette Nunes v The Board of Shortwood Teachers' College and others** [2019] JMSC Civ. 167**,** a decision of this Court, D. Palmer J, dealt with a similar issue. In that the case, the Claimant had provided evidence of her circumstances. At paragraphs [54] – [55], Palmer J noted:

> *"54. The Claimant asks the Court to reject the 1st Defendant's application for an order for security for costs against her. Owing in part to the slip and fall accident which is the subject [of] these proceedings, her financial position is very precarious at the moment, thereby making it impossible for her to provide security [for] costs as requested by the 1st Defendant. In the Affidavit of Shaunette Nunes filed in opposition to the Application for Security for Cost, she stated:*
>
> - *that her claim is a genuine one;*
> - *she cannot afford to provide security for costs;*
> - *her claim has a very high probability of success;*
> - *the defendants have no real prospect of success;*
> - *an order requiring her to provide security for costs or her claim could be struck out, would stifle her claim, as it would be oppressive to her, be seriously and unfairly burdensome, prejudicial and damaging;*
> - *and in all of the circumstances of this case, an order for security for costs would be unjust and contrary to the overriding objective which includes ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial positions.*
>
> *55. Ms. Nunes' affidavit evidence is that she is currently employed by a Wal-Mart retail outlet in West Palm Beach Florida, USA, as a stocker, from which she earns a fortnightly net income of US $531.95; her only source of income. She works a limited number of hours but is unable to work for any longer than she currently works due to the pain and disabilities resulting from her slip and fall accident; the subject of these proceedings. She resides with her husband who does not work, but who receives a disability income of US $771.00 per month. He also receives assistance with paying rent through a rental assistance programme and the cost of food is offset by food stamps. The sum total of Miss Nunes' monthly expenses, which include rent, telephone, internet & cable fees, car loan, life insurance, and health insurance, is $1,451.00 and neither she nor or her husband have any savings. By contrast she said that the 1st Defendant on the other hand, is insured by the West Indies Alliance Insurance Company Limited under an Employer's Liability Policy in respect of risks that may give rise to claims such as this."*

[53] It is clear, that unlike the application presented before this court, Palmer J had evidence before him regarding the financial status of the claimant in that case. He was therefore placed in a position to evaluate the circumstances of the case in keeping with rule 24.3 and to determine whether it would be just to make an order for security for costs. Palmer J, was not left with mere bald statements.

[54] At the end of the day, Palmer J had no difficulty in refusing the application. In doing so, at paragraph [89], he stated as follows:

> *"Will the Claimant be deterred from pursuing her claim by an order of security of costs?*
>
> *[89] This question can be unreservedly answered in the affirmative particularly since the Claimant herself has averred that an order requiring her to give security for the 1st Defendant's cost in the proceedings would have grave implications for her ability to advance her claim…"*

[55] In the instant case, the Claimant was a visitor to the island and presumably on vacation. It would be fair to say that she has no known ties to Jamaica. More importantly, her financial status would not be within the knowledge of the Defendant. Therefore, it would be up to her to say whether she has any ties or assets within the jurisdiction or anywhere else which can satisfy an order for costs, should the need arise (see **Symsure**).

[56] Therefore, even if the Defendant were to embark on a journey to try and locate the Claimant's assets, such an investigation, to my mind, would result in additional burden and costs. Furthermore, given the intrusive nature of such an investigation, the Defendant is prevented from doing so or may encounter obstacles along the way.

[57] I am, therefore, in agreement with Miss Stewart, that the assertion by the Defendant cries out for a response from the Claimant. This is a factor intrinsic to the Claimant. The failure to respond is striking.

(d) Stifling the claim

[58] It has been established that before a court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied, that in all the circumstances, it is probable that the claim will be stifled (see **Keary Developments Ltd**).

[59] The affidavit filed on behalf of the Claimant also averred that the amount of Two Million Six Hundred and Twenty–Two Thousand Dollars (J$2,622,000.00) is oppressive and was done in an attempt to stifle a genuine claim brought by the Claimant which has a reasonably good prospect of success. As can be seen above, the affidavit provided no further information on this.

[60] The learned author, Mark Friston, in his book **Friston on Costs,** at paragraphs 15.80 and 15.81, in addressing the issue of oppression and stifling of a genuine claim had this to say:

> *"…In considering whether the claimant would be able to provide security, the court is able to take into account the resources of third parties who could reasonably be expected to assist, which may, in the case of a corporate claimant, include shareholders or associated companies; in the case of an individual claimant, this may include friends and relatives…*
>
> *Where the claimant seeks to avoid an order on the grounds that it would stifle a claim, the onus is on the Claimant to prove the assertion. They do not need to show with certainty that the claim would be stifled; it would be sufficient to show that this was more likely than not. Merely showing that there would be a risk of the claim being stifled however, would not be sufficient, the claimant is required to show more than a mere discouraging effect.*
>
> *Because these are things that are peculiarly within the respondent's knowledge, the respondent will bear the burden of proving matters in that regard."*

[61] The Claimant's affidavit was bereft of an explanation indicating how the claim would be stifled. I am, therefore, again, in agreement with Miss Stewart that the affidavit evidence and the submissions made on behalf of the Claimant do not demonstrate any real effort to discharge this burden outside of a mere bald

assertion. I find the affidavit evidence to be laconic. A deafening silence on the matter is regrettable. An answer in the circumstances, was obligatory.

[62] The court cannot and must not be left to speculate. The Claimant has failed to place before this court evidence to satisfy me that, in all the circumstances, it is probable that the claim will be stifled. The court has a balancing exercise to carry out and is required to be placed in a position to objectively carry out that exercise.

[63] Notwithstanding the absence of such evidence, I am aware that the authorities have declared that it is no longer an inflexible rule that persons who are ordinarily resident outside of the Jurisdiction and are impecunious must provide security for costs (see **Nicholas Grant v G. Anthony Levy**, where Harris J (as she then was) relied on **Shurendy Adelson Quant v The Minister of National Security and the Attorney General of Jamaica** [2015] JMCA Civ 50).

[64] The cases have also established that even if the court finds the Claimant to be impecunious, the court should not make an order on that ground solely. The rationale is that an individual should not be prevented from seeking justice through want of means.

[65] The court is also obliged to consider the merits of the case. This is because where the case is a strong one for the Claimant, the court is not obliged to grant an order for costs. Essentially, where a Claimant's claim has a good chance of success (there being no need for anything higher), the court will hesitate before making an order which will have the practical effect of preventing the Claimant from proceeding with her claim or be denied access to justice.

(e) <u>Reasonably good prospect of success</u>

[66] On this aspect of the application, I rely on the guidance helpfully outlined in **Blackstone's Civil Practice, 2014, The Commentary** at paragraph 67.18 that:

> *"There is no doubt that the prospect of success at trial can sometimes be taken into account on the application… If this is taken too far, an application for security may be blown up to an investigation similar to a trial. Robert Walker LJ in Zappia Middle East Construction Co. Ltd v Clifford Chance [2001] EWCA Civ 946, and …. said that evidence as to the merits of the claim or appeal is seldom helpful in an application for security for cost, and is rarely decisive unless it makes out an exceptionally strong case that a meritorious claim or appeal is likely to be stifled if security for costs is ordered…*
>
> *…*
>
> *If there is no defence to the claim, it will almost certainly be unjust to order security. In such a case the defendant is highly unlikely to recover costs in any event, and ordering security often has the practical effect of preventing the claimant from proceeding with the claim."*

[67] I also take guidance from the dicta of Sir Browne-Wilkinson V-C in **Porzelack KG v Porzelack (UK) Ltd** which was also endorsed and adopted in this jurisdiction by Phillips JA in **Symsure**, where at paragraph [43] she said:

> *"In spite of the fact that the Supreme Court Practice 1985, volume 1, paragraphs 23/1- 3/2 states that in dealing with applications for security for costs "a major matter for consideration is the likelihood of the plaintiff succeeding", the learned Vice Chancellor in Porzelack KG v Porzelack (UK) Ltd frowned on the approach of parties seeking to investigate in considerable detail the likelihood or otherwise of the success in the action. Accordingly, at page 1077, he expressed his view as follows:*
>
> > *'I do not think that it is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time*
> >
> > *Undoubtedly, if it can clearly be demonstrated that the claimant is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can be clearly demonstrated one way or another that*

there is a high degree of probability of success or failure.'"

[68] At paragraphs 3 – 7 of his affidavit, Jason Russell, on behalf of the Defendant, outlined the circumstances of the Claimant's claim. In addition to raising a defence, reference was made to the conduct of the Claimant immediately after the incident and the fact that no report of the incident was made to anyone at the material time.

[69] Miss Grant in her submission contended that the incident was reported by the Claimant in a guest report elsewhere. That bit of information, did not form part of the Claimant's pleadings in 2018 or in the affidavit evidence opposing the application. Again, this court holds that at this stage, this assertion is in breach of the hearsay rule and can serve no useful purpose in this proceeding. At best, even if the court were to consider it, it raises an issue of credibility. This would not be a matter for me at this stage but a matter for the trial Judge.

[70] Miss Stewart contends that the Claimant's claim does not have a real prospect of success. She argued that the clear divergence of the facts averred by the parties is significant and that in those circumstances, the Claimant would be put to strict proof.

[71] On the face of it, as I said before, the claim is very straightforward. There are no technical or complex issues to be resolved. The Defendant has raised a defence and also highlighted the conduct of the Claimant immediately after the incident. These are matters of credibility and or documentary evidence, which a trial court will have to resolve.

[72] In the case of **Kp Cable Investments Pty Ltd v Meltglow Pty Ltd,** 56 FCR 189 at page 197; and **Staff Development & Training Centre Pty Ltd v Commonwealth of Australia** [2005] FCA 1643 at paragraphs [12] – [13], it was established that as a general rule, where a claim is *prima facie* regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary,

the court should proceed on the basis that the claim is *bona fide* and has reasonable prospects of success.

[73] Additionally, with respect to determining whether a claim has a "good chance of success", Master Short, in **Dynacorp Canada Inc. v Levine, Sherkin, Boussidan,** 2017 ONSC 1462 stated at paragraph [27] that he interpreted "'good' odds as being at the very least better than the 50-50."

[74] Turning to the case at hand, whether the Claimant's case is a strong one is largely dependent upon the evidence to be presented at the trial. At this stage, I am not required to, and will not endeavour, to embark on any such investigation which may have the potential to be likened to that of a trial. However, I do not interpret the Claimant's odds to be better than 50-50 or even at 50-50.

(f) The enforcement of the judgment in the USA

[75] In **Symsure**, Phillips JA made the observation that:

> *"[49] The question of the enforcement of the costs is also important, as efforts which may have to be made to obtain recovery of the costs can influence the court's discretion as to whether to grant the order. A review of the relevant reciprocal enforcement legislation will always be useful."*

[76] As in **Symsure**, the Claimant in the instant case lives in Florida, USA. At first instant, Morrison J made the point that there were no reciprocal arrangements between states to enforce judgments.

[77] Neither party has provided the court with any evidence in relation to the possibility of enforcing the judgment in the USA and the challenges that may be incurred, if any.

[78] When asked by the Court, Miss Stewart did allude to the **Judgments (Foreign) (Reciprocal Enforcement) Act**. However, she argued that before the Court can consider the legislation and any relevant enforcement protocols, there must, at least be evidence of assets owned by the Claimant, wherever located. She

posited there was no such evidence before the Court. Miss Stewart further argued that the Defendant would have to go through additional expense to obtain enforcement, even if assets were available outside of Jamaica. This she said, would not be just in all the circumstances.

[79] Similar concerns were raised by Brooks J (as he then was) in **Mannings Industries Inc.** and Lord Mance in **Nasser v United Bank of Kuwait** at paragraphs 64 – 67. In both cases the courts expressly raised concerns with regard to the added costs that a defendant is likely to face should he or she attempt to enforce judgment outside his jurisdiction.

Issue 3: Whether the amount sought by the Defendant is appropriate in order to not stifle the claim

[80] The Defendant in justifying the sum of Two Million Six Hundred and Twenty-Two Thousand Dollars (JA $2,622,000.00) provided a draft bill of costs. The practice of setting out a bill of costs is in keeping with the authorities (see **Symsure**).

[81] In support of the draft bill of costs attached to Jason Russell's affidavit the Defendant states the following:

(a) The costs awarded under Appendix B Tables 1 and 2 of the CPR, are insufficient given the particular circumstances of the defendant's case.

(b) That it requires the registrar to consider the following facts:

(i) The responsibility required of and the time and labour expended by Counsel;

(ii) The costs claimed are fair, reasonable and justified;

(iii) The nature of the claim/application required legal research;

(iv) The relative seniority of the Attorney- at- Law appearing; and

(v) The importance of the matter to the parties.

[82] In **Procon (Great Britain) Ltd v Provincial Building Co. Ltd.** [1984] 1 WLR 557, it was established that the amount should neither be illusory nor oppressive. I also bear in mind the pronouncements made in **Porzelack KG v Porzelack (UK) Ltd** that the sum requested should not be such as to cause the Claimant to be driven from judgment seat unless the justice of the case makes it imperative.

[83] Miss Grant in her submissions argued that:

(i) the claim is not a complex one;

(ii) does not raise difficult or novel questions of law;

(iii) there is absence of the year junior counsel was called to the bar;

(iv) there is no need for a Queen's Counsel as junior counsel has always had conduct of the matter and is competent and capable to handle the matter;

(v) the sum sought is oppressive;

(vi) the claimant would be driven from the judgment seat and not able to receive the justice she deserves; and

(vii) the sum of Four Hundred and Fourteen Thousand Eight Hundred and Fifty Dollars ($414,850.00) is a reasonable amount.

[84] Weighing the balance in regard to the evidence placed before the court and having regard to the type of case and the issues called upon to be determined, I find the amount sought by the Defendant to be high. This court holds the view that the case is not complex and the issues to be determined are simple and

straight forward. Additionally, the case, on the face of it, does not raise or is likely to raise any novel questions of law.

[85] In **Innovare Displays plc v Corporate Broking Services Ltd** [1991] BCC 174, it was highlighted that the difficulties faced by the Claimant in providing security may be considered by the court. In the instant case, the Court is left without such assistance. For the court to accept the amount provided by Miss Grant as being an appropriate amount and not a mere nominal amount, some evidence to measure it against, is necessary. The Court should not be left in the dark.

[86] Miss Grant also relied on the case of **Keary Developments Ltd** where the court stated that:

> *"…In considering the amount of security that might be ordered the court will have regard to the fact that it is not required to order the full amount by way of security and is not even bound to make an order of a substantial amount..."*

[87] The court should only make an award for security for costs if it is just in all the circumstances. In addition, the amount ordered should neither be illusionary or oppressive.

[88] This approach was also adopted by Morrison JA (as he then was) in **Cablemax Limited and others v Logic One Limited** (unreported), Court of Appeal**,** Jamaica, Supreme Court Civil Appeal No. 91/09, Application No. 203/09, judgment delivered 21st January, 2010, where at paragraph [14] (vi) he stated that, '"[i]n 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, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount". I will adopt this guidance.

[89] After careful consideration, I consider a figure of half the amount sought to be appropriate having regard to the issues in the case.

Conclusion

[90] When I consider all the circumstances of this case and bearing in mind the principle of proportionality, as well as, taking into consideration all the relevant facts and matters, I am satisfied that it is just to make the order for security for costs.

[91] Accordingly, I make the order having found that:

(a) The Claimant has not demonstrated by way of evidence how her claim would be stifled by the making of the order;

(b) The Claimant has not indicated or provided any evidence that she has any assets to satisfy any award for costs;

(c) Being a resident outside the jurisdiction will impose an added layer of burden on the Defendant to incur costs in the enforceability and recoverability of its costs, if it were successful in its defence;

(d) The Claimant has no known assets within the jurisdiction;

(e) The application was made at an early stage of the proceedings and there is no evidence that it was done with a motive to stifle the claim;

(f) The application was made out of a genuine concern and not with any oblique intent.

(g) The Claimant's claim does not evince a reasonable good prospect of success;

(h) The overall justice of the case demands that an order for security costs should be made; and

(i) The sum of Two Million Six Hundred and Twenty-Two Thousand Dollars ($2,622,000.00), given the nature of the substantive claim, is high.

DISPOSITION

[92] The Orders of this Court are as follows:

1. The Claimant shall provide security for costs for the Defendant's/Applicant's costs in the sum of One Million, Three Hundred and Eleven Thousand Dollars ($1,311,000.00) by Thursday, October 27th, 2022.

2. The amount of One Million, Three Hundred and Eleven Thousand Dollars ($1,311,000.00) is to be paid in an interest- bearing account in the names of Nigel Jones and Company and Symone Mayhew and is to be held in that account until the trial of this action is determined or until further orders of the Court.

3. All further proceedings in this claim are stayed from today until the security has been given, as ordered.

4. Unless the security of costs is given as ordered:

    (i) the claim is struck out without further orders of the court;

    (ii) Upon the Defendant/Applicant producing evidence of default, there shall be judgment for the Defendant without further orders with costs to the Defendant to be taxed if not agreed.

5. Costs to be costs in the claim.