[2013] JMCC Comm. 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. 2012 CD 00091

BETWEEN	**CYBERVALE LIMITED**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LTD**	**DEFENDANT**

Mr. Paul Beswick, Mr. Kayode Smith, Ms. Carissa Bryan, Ms. Taniesha Rowe instructed by Henlin Gibson Henlin for the Claimant.

Mrs. Denise Kitson, Q.C, Ms. Susan Risden Foster instructed by Grant, Stewart, Phillips & Co for the Defendant.

Heard: 8th, 17th, 31st May 2013, and 16th September 2013.

CIVIL PRACTICE AND PROCEDURE - SECURITY FOR COSTS APPLICATION- SECTION 388 OF COMPANIES ACT- COURT'S POWER TO STIPULATE TIME- PART 24 OF THE CPR - DELAY IN MAKING APPLICATION - RELEVANCE OF RELATIVE IMPECUNIOSITY OF CLAIMANT COMPANY TO MORE PROSPEROUS DEFENDANT - AVOIDANCE OF BOTH OPPRESSIVE USE OF SECURITY FOR COSTS APPLICATION AND OF STATE OF IMPECUNIOSITY - WHETHER CLAIM ONLY OR WHOLE OF PROCEEDINGS STAYED - APPROPRIATE ORDER FOR COSTS ON SUCCESSFUL APPLICATION FOR SECURITY FOR COSTS

Mangatal J.

[1] The Applicant/Defendant by way of an amended Notice of Application filed April 24, 2013 seeks the following orders:

1. That the Respondent/Claimant do within fourteen (14) days of the date of this Order give security for the Applicant/Defendant's costs of and occasioned by these proceedings and this application in the sum of $6, 612, 213.80 inclusive of General Consumption Tax.

2. That the said sum of $6, 612, 213.80 inclusive of GCT representing security for costs is to be paid into an interest bearing account at First Global Bank Limited, New Kingston Branch in the joint names of Grant Stewart Phillips & Co. and the legal representative of the Respondent/Claimant pending the outcome of this action or further Order by the Court within FOURTEEN (14) days of the date of this Order.

3. Should the Respondent/Claimant fail to pay such security (for) costs within the stipulated period the claim is to be struck out without further Order with costs to the Applicant/Defendant to be agreed or taxed.

4. Liberty to Apply.

5.

6. Further or other relief.

[2] The grounds on which the Applicant/Defendant is seeking the above orders are:

1. The Application is made pursuant to section 388 of the Companies Act and Rule 24.2(1) of the Civil Procedure Rules (CPR).

2. The Respondent/ Claimant is a limited liability company which no longer trades within the jurisdiction of Jamaica.

3. There is reason to believe that the Respondent/Claimant will be unable to pay the Applicant/Defendant's costs if ordered so to do.

4. The Respondent/Claimant has taken steps with a view to placing its assets beyond the jurisdiction of this Honourable Court.

[3] The Application for Security of Costs was supported by the Affidavit of Derrick Nelson, Vice President of the Defendant's Carrier Services, filed April 12, 2013, while the Affidavit of Rohan Pottinger, one of the Claimant company's directors, filed April 24th, 2013 opposed the Application.

[4] For ease of reference the relevant Section of the Companies Act and the Civil Procedure Rule have been set out below:

> ***388. 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 those costs, and may stay all proceedings until the security is given.***
>
> ***Civil Procedure Rule: 24.3: The Court may make an order for security of 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) 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 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 costs 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 costs order against the assignor;

(f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share in 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.

DEFENDANT'S SUBMISSION

[5] Counsel for the Applicant, Mrs. Kitson Q.C submitted that pursuant to Section 388 of the Companies Act 2004, the Defendant has provided credible evidence that demonstrates that Cybervale will be unable to pay its costs in the event that it is successful at trial. She relies on the affidavit of Derrick Nelson. Mr. Nelson in his affidavit sets out certain happenings which have caused the Defendant to come to this conclusion. At paragraph 6, he made reference to an order made by the Honourable Mr. Justice Dukharan JA in which the Claimant was ordered to lodge the sum of $1, 450,000.00 into an escrow account, failing which the appeal filed in relation to the Judgment of the Honourable Ms. Justice Straw would be struck out and the interim injunction pending appeal discharged. At paragraph 7, he outlined that the Claimant only lodged the sum of $700,000 into the joint escrow account and consequently the appeal was struck out. Mr. Nelson in the said paragraph 7, states that the Claimant continues to be indebted to the Defendant in the sum of $17, 254, 192.20 plus interest as no payments have been made to the Defendant in the interim. He further states that the Claimant had presented several cheques to the Defendant for payment which were not honoured by the Claimant's Bank. Consequently he deponed that it is evident that the Claimant is unable to pay the debts owed to the Defendant. Additionally at paragraph 9 of his affidavit, he referred to a Final Costs Certificate dated 26th June 2012 that was issued in respect of the abandoned appeal in which costs were taxed and

awarded to the Defendant in the amount of $334, 383.07. That Costs Certificate was served on the Claimant's Attorneys on July 3, 2012, but to date it has not been paid.

[6] Ms. Kitson, Q.C. relied on the principles extracted from the decisions of ***Pearson and Another v Naydler and Others [1977] 1 WLR 899*** and ***Keary Developments Limited v Tarmac Construction Limited and Anor [1995] 3 All ER 534*** to buttress her submission as to why this is an appropriate case for the Court to make an order for security for costs in the amount stated. In applying the principles from the cases, she submitted firstly that the possibility that Cybervale will be deterred from pursuing its claim if an order for security for costs was ordered is not without more, a sufficient reason for the Court not to order it. She argued that Parliament must have envisaged that such an order would be made against a Claimant company that would have difficulty in providing security. She also urged the Court that in weighing the factors, the Court must have regard to the injustice to the Defendant if no security is ordered and at the trial, Cybervale's case fails, and it is unable to recover the costs incurred in its defence of the Claim. Counsel also submitted that whilst the Court is not required to embark on an analysis of the merits of the case, the Claim brought by the Claimant is at most arguable and has a limited prospect of success.

[7] Mrs. Kitson Q.C. has also sought to have the order for security for costs made pursuant to Part 24.3(g) of the Civil Procedure Rules on the ground that the Claimant has taken steps with a view to placing its assets beyond the jurisdiction of the Court. At paragraph 10 of the Affidavit of Mr. Nelson, he states that the Claimant has taken steps to put its assets beyond the jurisdiction of the Court by seeking to sell them for $4, 953,301.32 as evidenced by the information contained in the Judgment of Haynes J in ***Cybervale Limited v Infochannel Limited: Claim 2011 CD 00087***. Counsel relied on the decisions of ***Aoun v Bahri & Anor [2002] CLC 776*** and ***Patrick Harris v Leonard Wallis [2006] EWHC 630 (Ch)*** as supporting her argument that this sort of conduct by the Claimant falls within the ambit of the rule. She submitted that based on these authorities, the issue is not Cybervale's motivation, but is rather the effect of the steps which it had taken in relation to the sale of its business. It was Counsel's submission that taking steps to enter into a contract for the sale of its business amounts to a step

taken to remove the assets from the jurisdiction of the Court. She further submitted that the fact that that contract is the subject of an appeal by which the Claimant is seeking to enforce the contract is even more compelling evidence of steps taken by the Claimant in accordance with the rule.

CLAIMANT'S SUBMISSION

[8] Counsel for the Claimant, Mr. Kayode Smith urged the Court that in deciding whether to make an order for security for costs it must first consider whether the Claimant's circumstances come within Part 24(a)-(g) of the Civil Procedure Rules. If it does, the Court must then go on to consider whether it would be just to make an award for security for costs having regard to all the circumstances of the case. Mr. Smith dissected the substantive grounds as set out in the amended Notice of Application for Court Orders. As it relates to the first ground, Counsel submitted that this ground does not satisfy any of the criteria set out in Rule 24.3 (a)-(g). As it relates to the 2nd ground, Counsel argued that the Defendant has not put forward any evidence on which this Honourable Court would be able to find that the Claimant is a "nominal claimant". Furthermore, as it relates to the issue of whether the Claimant would not be able to pay the Defendant's costs if successful, Counsel submitted again that the evidence put forward that the Claimant is unwilling or unable to pay its debts is weak at best. In relation to the order made by Dukharan JA where the Claimant only lodged $700,000, Counsel submitted that failure to lodge the full some was done pursuant to advice it received from its Senior Counsel and should not be viewed as the Claimant's inability to pay its debts. Counsel also submitted that it is inconceivable that the sum owing could properly be taken into consideration by the Court as reflecting the Claimant's inability to pay its debts. He argued that the alleged debt is the very heart of the litigation between the parties and it is the Claimant's contention that it does not in any way speak to its ability to pay its debts at all.

[9] Counsel also vigorously opposed the Defendant's assertion that the Claimant had taken steps with a view to placing the assets beyond the jurisdiction of the court. He submitted that rule 24.3(g) must be construed *ejusdem generis* with the other items in the list. He argued that if this approach is taken, it becomes clear that rule 24.3(g) is

speaking to situations where a party to litigation would attempt to remove an asset or rights to an asset to a foreign jurisdiction, which would be outside the jurisdiction of this Honourable Court. It was his argument that it would be incorrect and misleading to suggest that the Claimant has moved its assets offshore or to another jurisdiction where the Claimant has sold the remnants of its business to a third party, Infochannel Limited right here in Jamaica. He argued that this differs from the interpretation to be accorded to rule 24.3(g), as the Claimant is or will be the recipient of the proceeds of sale.

[10] Mr. Smith submits that in the event the Court is minded to find that the circumstances of this case falls within any of the enumerated category in Rule 24.3(a)-(g), the Court should then consider whether it is just in all the circumstances of the case to make an order for security for costs. Having regard to all the particular facts of the case, it was Counsel's submission that such an order would not be appropriate in this case. For one, Counsel argued that it was the anti-competitive behaviour of the Defendant that led to the demise of the Claimant and it would be a grave injustice to allow the Defendant to railroad Cybervale out of business and then allow the Defendant to use security for costs as a means of stifling the Claimant's claim. Counsel also urged the Court to consider the impact of granting or refusing an order for security for costs on the parties. Relying on the case of ***Classic Catering Ltd v Donnington Park Leisure Ltd [2000] All ER (D) 1769,*** Counsel argued that if the Defendant's application was to be denied and the defendant goes on to successfully defend the claim and is unable to recover any of its costs from the Claimant, the impact will be minimal on the defendant's profit margin. Reference was made to the 2012 Annual Report of the Defendant, containing its most current financial statements. However, the submission continues, if the Claimant was not allowed to proceed with this claim, owing to an order for security for costs, that would prevent the Claimant from ventilating what it alleges are anti-competitive practices by the Defendant and seeking the compensation which it alleges it is entitled to.

RESOLUTION OF THE ISSUES

[11] This Application by the Defendant is made pursuant to Section 388 of the Companies Act and Rule 24.3(g) of the Civil Procedure. Section 388 and Rule 24.3(g)

each have individual criteria that have to be met before a Court may be moved to make an order for security for costs. In my judgment, one of the major differences between the two discretions which the court has to make an award for security for costs, is that under the Companies' Act provision the Claimant company's impecuniosity per se is a ground for making the order for security for costs.

[12] Section 388 of the Companies Act provides that the Defendant may obtain an order for security for costs where there is "***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***." Here it is expected that evidence will be presented to the Court by the Applicant, illustrating that the Claimant Company is in or potentially in a parlous financial situation at this point in time. In the Affidavit of Derrick Nelson, it was pointed out that the Claimant's continued indebtedness to the Defendant Company, the Claimant's inability to fulfill the monetary condition stipulated by the order of the Honourable Mr. Justice Dukharan JA as well as its non-compliance with the order for costs which was made and taxed by the Court of Appeal, supports its contention that the Claimant would be unable to pay its Costs. The Claimant proffered excuses as to why it did not pay the amount in full as ordered by the Court of Appeal, with inability to pay not being one of them. However, I accept Learned Queen's Counsel's argument that alleged reliance on the Claimant's Senior Counsel's advice not to pursue the appeal was not raised by the Claimant before the appeal was struck out and that has to be factored into the equation. However, some insight into the financial health of the company can be gleaned from the fact that where the Claimant has attempted to settle its debts to the Defendant by means of cheques, several of such cheques have not been cleared by the Claimant's Bank. Whatever may be the status or strength of the Claimant's alleged right of Set-Off or Counterclaim, quite obviously if one draws a cheque on one's bank account, the person in whose favour the cheque is drawn ought to be able to expect that it would be honoured. The fact of dishonour in the absence of any other reason proffered suggests that the Claimant did not have sufficient funds for the cheques to be honoured. In the face of these allegations, the Claimant Company has not used the opportunity to demonstrate that it would be able to satisfy the Defendant's costs, if that party was successful. At paragraph 11 of the Affidavit of

Derrick Nelson, he stated that the Claimant was no longer trading or operating as a going concern. The Claimant has not presented any evidence which denies this statement. It seems to me that whilst the overall burden of proof is on the Defendant applicant, once credible testimony is presented that the Claimant may be unable to pay the Defendant's costs, an evidential burden is placed upon the Claimant to provide if it can, some evidence that it can so meet an order for costs, or refuting the allegations that it cannot. When one has regard to these uncontested factual allegations, coupled with the Claimant's antecedent conduct in not fulfilling or complying in full with orders made by the Court, this does in my mind demonstrate that the Claimant may not be able to meet the Defendant's costs at the end of the trial.

[13] The fact that it may appear that the Claimant may be impecunious does not automatically entitle the Defendant to an order for security for costs. The Court has been conferred with a discretion under Section 388 of the Companies Act which will not be exercised if the justice of the case dictates otherwise. In the English Court of Appeal decision ***of Keary Development Ltd and Tarmac Construction Ltd and Another*** which was cited with approval by Morrison JA in ***Cablemax Limited et al v Logic One Limited delivered 21st January 2010***, Peter Gibson LJ enumerated several factors which the Court should consider in deciding whether to exercise its discretion. In summary, these include:

1) The strength of the Claimant's case and the prospects of success.

2) Whether an order for security would have the effect of stifling a genuine claim or be of oppressive effect.

3) Weighing the possibility of injustice to the Claimant if prevented from pursing a proper claim against the possibility of injustice to the Defendant if no security is ordered and the Claim ultimately fails and the Respondents finds himself unable to recover from the claimant.

4) Any delay in the making of the application.

Strength of the Claimant's Case

[14] The essence of the Claimant's claim is that the Defendant holds a dominant position or a position of economic strength in the market for wholesale and resale of internet services. It argues that the Defendant has used this position of dominance to engage in several acts of anti-competitive conduct, among which was disconnecting the Claimant's access to its services. While the Claimant has acknowledged that it is indebted to the Defendant, it disputes the amount, and argues that it is entitled to a Revenue Share as agreed by the parties. It is further argued that the amount to be generated from this should be sufficient to set off against that which is owed to the Defendant. In its Defence the Defendant has dismissed the allegation that it is to be regarded as a dominant player, as described by the Claimant. It argued that it had not engaged in anti-competitive behaviour, but merely disconnected the Claimant's service for failing to honour its financial obligations over a protracted period of time. The Defendant also denied the existence of a Revenue Sharing agreement between the parties as the Claimant did not sign such an agreement when presented to it. On a reading of the extensive pleadings, I will not at this stage of the proceedings, without more and with the trial date so close, i.e.15th-17th July 2013, comment in detail on the relative strength of the parties' case. Suffice it to say that there is no demonstrably high degree of probability that Cybervale will emerge successful, at trial.

Whether ordering security for costs would stifle the claim

[15] No claim that is genuine should be chased away from the judgment seat, consequently where the making of an order for security for costs will force a claimant to abandon his reasonable claim the Court may be minded to refuse making the order. In any event, it is a very important factor to be weighed in the balance. In ***E.Phil and Sons A/s v West Indies Contractor Limited and Maritime and Transport Services Limited [2012] JMSC Civ No. 83*** and ***C&H Property Development Company Limited v Capital and Credit Merchant Bank Limited [2012] JMCC Comm. No. 6*** I held that there must be evidence from which a conclusion can be drawn or inferred that the claim will be stifled if an order for security for costs is made. Whilst in **Keary** it was pointed out (at page 540 g) that there may be cases where this may properly be inferred without

any direct evidence, there must be an evidential basis upon which such an inference can be raised. At paragraph 7 of the Affidavit of Rohan Pottinger, he stated that "if regard was to be had to the dishonoured cheques that it is likely to stifle the claimant's claim." Here there is no specific connection made between the order for security for costs and the regard to dishonoured cheques stifling of the claim. Even during the course of his argument, Counsel for the Claimant did not put forward anything concrete to show how ordering security for costs would throttle the Claimant's ability to pursue this action. In addition, as pointed out in **Keary** (at page 540j), there may be relevant information peculiarly within the knowledge of the Claimant, as to whether there are any resources outside of its own that it may have access to. There is no evidence forthcoming from the Claimant to satisfy me that it would be prevented by an order for security from continuing the litigation.

Weighing Injustice to Claimant against Injustice to Defendant

[16] In deciding where the scales of justice will tip, it has been argued by Counsel for the Claimant that the Court should have regard to the relative positions of the parties and their ability to withstand the granting or denial of the application for security for costs. He relied on the first instance decision of ***Classic Catering Ltd v Donnington Park Leisure Ltd [2000] ALL ER (D) 1769*** to support his argument. In that case, the Claimant was a relatively small company with two shareholders, carrying on catering services at Donnington Park. The Defendant, a much larger company, was now the beneficiary of a 25 year lease of Donnington Park and now had monopoly as to who would do the catering for various events. The Defendant subsequently wrote to the Claimant requesting them to leave the property or face proceedings if they failed to comply. The Claimant subsequently issued proceedings and an order for the Claimant to provide security for costs was later made by the Deputy Master. The order was appealed and came up for consideration before Weeks J. The learned judge considered several factors relevant to the exercise of the Court's discretion. The importance of the case and the importance of the application to each party was one such factor. Weeks J at page 8 said :

> ***"The Claimant, as I said, is a relatively small company with two shareholders, whose only source of income, apart from its activities on a small field next to Donnington Park, is from Donnington Park itself and is in jeopardy in the present proceedings. The defendant, on the other hand, is a company in a much more substantial way of business, with net assets of three quarters of a million pounds. It would, of course, be very unpleasant for it not to recover its costs if it were successful in the action and the Claimant was wound up and the defendant got little or no dividend in the winding up. But that is not a life threatening experience for the defendant. It would presumably make a dent in its annual accounts, but not a dent that would have a serious effect on the company's continued trading or viability, so far as I can see. The company would be able to re-let the premises at Donnington Park to another catering company and would be in a better position than it would if the claimant's claim had succeeded, notwithstanding its failure to recover the costs. On the other hand, the consequences for the defendant, if the action is stifled, are devastating. The action is central to its existence and that, in my judgment is another factor to be taken into account in considering all the circumstances of the case and whether it is just to make an order for security for costs."***

I have already formed the view that there is no evidence put forward to suggest that the Claim would be stifled if an order for security for costs was made. Even if it could be said that the action would be stifled, what could be said is that, the Claimant would suffer the loss of not being able to ventilate the issues surrounding anti-competitive behavior by the Defendant, as well as losing the opportunity to argue its entitlement to the Revenue Share. Whilst these are very important issues, it does not appear to me on the state of the evidence that they are crucial to the existence of the Claimant Company, neither does it appear that resolution of the issues will resuscitate the Claimant back into operation. This is evident from the fact that the Claimant has entered into agreement with a third party, the subject of which is on appeal, to have its assets

sold to them. As stated by Peter Gibson LJ at page 540 b, c, "the court will be properly concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see ***Farrer v. Lacy, Hartland & Co.*** (1885) 28 Ch. D482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see ***Pearson v. Naydler*** [1977] 3All E.R.531 at 537...." If this matter were to proceed to trial without any security, there appears to be uncertainty as to whether the Defendant will recoup its costs. The Claimant has referred to the potential proceeds from the sale. However, the result of the appeal is by no means clear and at this point one can only speculate as to the outcome. In addition, even if the Court of the Appeal were to upheld that agreement, there is no certainty that the proceeds would be available to meet the Defendant's costs or be invested in any assets which would be available for the Defendants to meet the costs order from.

[17] I think the fair and appropriate thing to do is to require the Claimant to provide some security in all the circumstances.

Delay

[18] Delay is a consideration that the Courts will factor in when deciding whether to make an order for security for costs. It may also play a role in the amount of security that is ordered. Part 24.2(2) provides that "where practicable" such an application must be made at a case management conference or pre-trial. It does not necessarily mean that the application cannot be prior to CMC or after a pre-trial review even though in the case of the latter, that would defeat the efficacy of the rule. However, it is expected that once there is sufficient evidence that the Claimant would not be able to meet any adverse costs orders, the application should be made. This claim commenced from June 2008, an appeal was subsequently filed and by virtue of not complying with an order of the Court of Appeal, it was subsequently struck out. The parties have been before the court upon numerous occasions since 2008 for the hearing of chambers

applications, particularly the hotly contested application for an interlocutory injunction. All of this occurred before the application to transfer the matter to the Commercial Court filed in June 2012 and which was granted on July 17th 2012. A Costs certificate in respect of the abandoned appeal was issued and served on the Claimant July 3, 2012 in the amount of $334, 383.07. That has not yet been paid. Since that order, the parties have been engaged in mediation efforts, but those efforts have yielded no fruits. When the parties appeared for Case Management in February 2013, the fact that the Court of Appeal cost orders remained unpaid, and the other factors now enlisted by the Defendant, should have prompted the Defendant to make the application for security for costs at that time, if not before. The Application was first filed April 19th, 2013, with an amended notice filed 24th April 2013. As stated previously, this matter was fixed for trial during the fast-approaching period July 15th-17th 2013. Whilst in my view the wording of the Rule to include the application being made at a pre-trial review, does mean that the Court may have to take account of delay in a reduced or modified way, this application seems to be cutting it close to the trial. In addition, I am minded to grant this application pursuant to section 388 of the Companies Act, as opposed to Rule 24 of the CPR. The Court in either situation may take delay into account as a basis for refusing the order for security altogether, or alternatively, it may present as a factor in reducing the amount of the security to be granted. In this case, I think it would seem just to award security in an amount that reflects the lateness, including having regard mainly to the costs to be incurred in the future, at trial.

Taking steps with a view to placing assets beyond Courts Jurisdiction

[19] The Defendant has argued that pursuant to Rule 24.3(g) of the CPR, the Claimant has taken steps with a view to placing its assets beyond the jurisdiction of the Court. This belief they argued is triggered by the Claimants agreement with Infochannel Limited to sell its assets to them. Within Rule 24.3, the words "with a view" is mentioned twice- at rule 24.3 (c) (iii), 24.3(e) and at 24.3 (g). Mrs. Kitson Q.C. has directed the Court to the decision of ***Aoun*** in which that Court had ruled that 25.13(g) of their rules which reads- "the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him"- should be approached objectively.

However, it seems to me that in relation to our rules which use the words, "with a view", such an approach cannot be taken. In the said decision, the Court construed their rule 25.13(d) which states –"the claimant has changed his address since the claim was commenced **with a view** to evading the consequences of litigation" and found that in applying that rule, regard must be had to the motivation/intention of the claimants. Rule 24.3(g) is subjectively worded, requiring the court to assess from the circumstance the intention of the Claimant's alleged conduct to which the Defendant refers. At paragraph 9 of the Affidavit of Mr. Pottinger, he indicates that the agreement with Infocharınel Limited was done to save the company. On the face of it, this does seem to be a practical step to be taken by a Company confronted by challenging circumstances. I am therefore not satisfied that such an action by the Claimant was carried out with the intention of placing its assets beyond the jurisdiction of the Court.

[20] Before I move on from this issue however, I must address an issue that was raised by Counsel for the Claimant during the course of submissions. Mr. Smith seemed to have suggested that "beyond the court's jurisdiction" was limited to a situation where the assets are moved to a foreign territory. I am not at this time prepared to accept that the meaning of the words "beyond the court's jurisdiction" in Rule 24.3(g) is dependent upon the operation of the *ejusdem generis* principle of statutory interpretation, since no authorities in support of that particular submission were cited to me. However, I do find and agree that the meaning of the phrase is that the assets have been placed beyond the territorial jurisdiction of the Jamaican Court, i.e. that they have been placed in a foreign territory.

[21] As was suggested by Brooks J in ***Manning Industries Inc et al v Jamaica Public Service Co Ltd (Suit No. C.L. 2002/M058***), which was cited by Mr. Smith, the Defendant having not satisfied the Court that the step taken by the Claimant was carried out with a view to placing the assets beyond the jurisdiction of the Court, prevents me from being satisfied of the circumstantial matrix required to ground an application for security for costs under Rule 24.3(g) of the CPR.

[22] Having reviewed the circumstances of this case, and weighed all of the relevant considerations pointing towards or away from the grant of the application, it is my view

that the Claimant should be required to provide security for costs pursuant to Section 388 of the Companies Act. This appears to be the just approach to take in exercising my discretion in all of the circumstances.

The size of the security

[23] As stated by Morrison JA at paragraph 14 of ***Cablemax*** and by Peter Gibson, L.J. in ***Keary***, in considering the amount of security that the Court may order the Court 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. Neither should the amount be nominal. The amount being claimed as security by the Defendant no doubt represents the level of industry and professional expertise and personnel required for the matter. However, any amount ordered by the Court should strike a reasonable balance and must not be so great so as to be oppressive to the Claimant. Given the fact that this application was made so close to the trial, and therefore is to some extent being made at a late stage, I would make an order that the Claimant provide security in the amount of $2,000,000.00. This is an amount that I consider not insubstantial, and not nominal and appropriate in all of the circumstances.

[24] The Defendant had also asked that the matter be struck out in the event that the Claimant does not comply with an order to pay security for costs. I agree with Mr. Beswick that there is no power to make provision for this under the application made pursuant to the relevant section of the Companies Act. Unlike Rule 24.4(b) which gives the Court that specific power, Section 388 is not so worded. Since I am minded to make the order pursuant to section 388 of the Companies Act, I therefore do not intend to accede to the striking out order sought, though I will instead grant a stay. As to whether the Defendant could subsequently make a separate application to strike out the matter in the event that the security for costs is not provided in the time ordered, or within some other time period thereafter, that is an entirely different matter, which I will leave open since it does not arise for consideration at this time.

[25] On the 31st of May 2013, in a draft written judgment, I made the following initial draft orders:

a. The Claimant is to provide security for costs in the sum of $2,000,000 by the 21st June 2013.

b. The said security is to be paid into an interest-bearing account in the joint names of the parties' Attorneys-at-Law in a licensed financial institution pending the outcome of the proceedings or further order of the court.

c. The claim is stayed until the Security for Costs is paid.

d. Costs of this application to the Defendant to be taxed if not agreed.

e. Defendant's Attorneys-at-Law are to prepare, file and serve the formal order.

THREE NEW ISSUES RAISED- THE CLAIMANT'S SUBMISSIONS

[26] However, Mr. Paul Beswick on the occasion of the handing down of these draft orders, asked me to reconsider the orders at (a) and (d) above. I then substituted the following orders, that:

a. The Claimant is to provide security of costs in the sum of $2,000,000.00.

b. The said security is to be paid into an interest- bearing account in the joint names of the parties' Attorneys-at-law in a licensed financial institution pending the outcome of the proceedings or further order of the court.

c. The claim is stayed until the Security for Costs is paid.

d. The questions of (a) whether the court should order a time by which the security for costs is to be paid, and (b) costs of this application, are reserved and are to be decided after written submissions and copies of any relevant authorities are provided, same to be provided by the 14th of June 2013.

e. Defendant's Attorneys-at-Law to prepare, file and serve the formal order.

[27] I received the Defendant's submissions within the time ordered, but unfortunately, due to some email error on the part of the Claimant, I did not receive the Claimant's submissions until the 21st of June 2013. I was unable to complete my decision on these newly raised issues in time for the trial date and thus those dates

were vacated. This part of my judgment is directed at the additional arguments and submissions made.

[28] As regards order (a), Mr. Beswick argued, that given the intention and construction of section 388 of the Companies Act, a judge does not have the authority to stipulate that the security be paid by a specific time/date. He submitted that while this authority is conferred under Rule 24.4, (indeed, that Rule 24.2(4) requires the court to stipulate a date by which the security is to be given when making an order for security for costs), this is not the case where section 388 of the Companies Act is concerned. It was Counsel's submission that the section only allows a judge to stay the proceedings "until the security is given". The Claimant submits that at its height, the claim may be stayed indefinitely if the security for costs is not provided in a timely fashion. Further, that on a proper analysis and purposive construction of section 388, no deadline should be attached.

[29] As regards the order for costs, Mr. Beswick conceded that, as Rule 64.6(1) indicates, costs generally follow the event. However, Counsel submitted that the Court has a discretion to exercise and can order otherwise, having regard to all of the circumstances of the case. In this regard, it was submitted that in the same manner that the Court had decided to order a reduced amount for security for costs because of the Defendant's delay in making the application, the court should take delay into account as a basis for making an exception to the general rule as to costs. It was submitted that the more appropriate and just order is an order that the costs be the Defendant's costs in the claim.

[30] Mr. Beswick also submitted that the reason for the Defendant/Applicant making the application for security for costs is not as a result of any fault of the Claimant/Respondent, and therefore that the Applicant should only be allowed to recover costs for the application if it is successful on the trial of the matter.

[31] It was also the Claimant's further submission that here the claimant has had to respond to the defendant's application for security for costs, based on the alleged impecunious nature of the Claimant. In the circumstances, the submission continues,

assistance can be derived from the UK Civil Procedure Rules "UK CPR". Reference was made to paragraph 66.29 of Blackstone's Civil Procedure, under the heading "Meaning of Costs Orders", where Counsel say that it is stated:

"9. Claimant's costs in the case	**This is an order half-way between 3 and 7 above. It is typically used where the claimant has met with partial success on an interim application. It means that if the claimant is awarded its costs of the proceedings on the final disposal of the claim, it will be entitled to be paid its costs of the interim application, but if the defendant is awarded costs on the final disposal of the claim, each party bears its own costs of the interim application.**
11. Defendant's costs in the case	**This is the reverse of 9 above. If the defendant is awarded its costs of the proceedings on the final disposal of the claim, it will be entitled to be paid its costs of the interim application, but if the claimant is awarded costs on the final disposal of the claim, each party bears its own costs of the interim application."**

[32] Mr. Beswick submits that it is the last order described in the Blackstone's at paragraph 11 that is the just and appropriate order to make in the overall circumstances of the case.

The Third Issue – Subject Matter of Stay

[33] A third issue has also been raised. This issue concerns the question of whether it is the "claim" or "all proceedings" that should be stayed. It should be noted that on the first hearing date on the 8th of May 2013, learned Queen's Counsel Mrs. Kitson had on behalf of the Defendant, sought an amendment to the application seeking that the "claim" be struck out instead of "the action". Originally, the application had stated "the

action". That application to amend was granted, with no objection. Indeed, Mrs. Kitson had actually indicated that the reason for her application was that the defendant has a Counterclaim that it would wish to pursue. However, Mr. Beswick, lead Counsel for the Claimant was not present at the time of the application to amend and thus, it would seem that the significance of the amendment was not appreciated until after I had given my draft ruling.

[34] Mr. Beswick contends that when one uses the golden rule of interpretation which means looking at the ordinary words of a Statute, section 388 speaks about staying "all proceedings". The ordinary meaning of those words, on the face of it, is a power to stay all proceedings, not only a part of them. Furthermore, Counsel argues, those words are not in conflict with the intention of the Statute and do not lead to an absurdity. The contention was also put to me that the Court is not granted power by section 388 to stay the originating claim and allow an ancillary claim to proceed where the Court has decided to exercise discretion under that statutory section.

[35] Mr. Beswick next argued that it is also clear that if solely the Claimant's claim is stayed, and the applicant's ancillary claim is permitted to proceed independently, the possibility of inconsistent rulings will then arise. It was submitted that, even on the applicant's Counterclaim, the Claimant/ Respondent's claim will arise, as its Counterclaim and Defence of Set-off relies on the same facts and issues in its Claim. Mr. Beswick advances the interesting argument that if these factual issues in the Counterclaim were the subject of a ruling at a trial, when the Claim is later tried, the issues of the previous findings of facts as well as *res judicata* will necessarily arise. There would therefore be a grave danger of prejudice to the Claimant's case if it were tried independently, or worse, subsequent to the Defendant's Counterclaim.

[36] Thirdly on this point, Mr. Beswick submits that since the Companies Act ante-dates the CPR, Parliament must be presumed to have been aware of the latter when it brought the former into existence. He therefore submits, that it follows then that if there had been an intention to grant a judge power to stay the claim independently of any ancillary claim, this would have been clearly and expressly stated.

[37] The argument continues, that consequently, an ancillary claim is procedurally and inextricably bound to the underlying proceeding and cannot be separated for the purposes of a stay. In the current circumstances, Counsel comments that the Defendant has been "hoisted by its own petard"; having successfully obtained a stay of the proceeding, the Defendant cannot proceed with its ancillary claim until the stay is lifted.

[38] Mr. Beswick in conclusion submitted that the Court has no power to stay only a part of these proceedings, and the proper order if the Court is minded to order a stay is to use the statutory language and order that the proceedings are stayed until the satisfaction of the order for security for costs.

THE DEFENDANT'S SUBMISSIONS

[39] The Defendant submits that when a party makes an application for security for costs, the fact that the Statute relied upon does not expressly specify that the Court may specify a time for compliance with the order does not erase the Court's inherent jurisdiction to specify a time for compliance as recognized in the Civil Procedure Rules and the authorities. Reliance was placed upon the Privy Council's decision in a case emanating from the Cayman Islands, **GFN SA v. Liquidators of Bancredit Cayman Limited** (in Official Liquidation) [2009] UKPC 39.

[40]] In relation to the issue of costs, the Defendant subrnits that it is entitled to the costs of the application in accordance with the general rule that the unsuccessful party who had opposed an application, should pay the costs of the successful party. Reliance was placed on the English Court of Appeal's decisions in **Re Elgindata Ltd** (No. 2) [1992] 1 W.L.R. 1207 and **Hutchinson Telephone (UK) Ltd. v. Ultimate Response Ltd. 1993** WL 965434 (CA) and our own Court of Appeal's decision in **Cash Plus Ltd. v. Madam A** [2012] JMCA Civ 40. It was submitted that in the instant case the Defendant ought to recover its costs in any event.

[41] In relation to the issue of the effect of the stay of Cybervale's claim on the Defendant's counterclaim, the term "proceedings" and its meaning, the Defendant

submits that the stay of the claim by Cybervale falls within the definition of "proceedings" . However, that this does not have the effect of automatically staying the Defendant's ancillary claim and that the Defendant can choose to pursue its ancillary claim if it wishes so to do. Reliance was placed on a number of cases, including **GFN Sa** , **Hutchinson Telephone**, **C.T. Bowring & Co. Insurance Ltd. v. Corsi & Partners Ltd.** [1994] 2 Lloyd's Rep. 567, and **Nicholas C. Jones v. Environcom Limited** [2009] EWHC 16 (Comm). The Defendant also referred to Rules 18.9, and 26.1(f) and (i) of the CPR.

RESOLUTION OF THE THREE ADDITIONAL ISSUES

(A) Whether the Court has jurisdiction to stipulate a time for compliance with the order for security for costs under section 388 of the Companies Act

[42] In my judgment, the reasoning in the Privy Council's decision in **GFN Sa** makes it clear that the court has an inherent power to order security for costs. It is not Statute or Rules of Court that create or confer the power to make orders for security for costs. It is apparent from the dicta of the Board (see in particular pages 5-6 of the Internet Report cited to me, per Lord Scott) that the power of the court to order security for costs is not merely statutory but rather is a part of the inherent jurisdiction of the court to control its proceedings. The effect of statutory provisions such as that examined in **GFN Sa.** (the equivalent of section 388 Companies Act) is not to confer a jurisdiction that the court did not previously have. Instead, what such statutory provisions do is to add an additional circumstance in which it can be exercised, that circumstance being that impecuniosity would now be a ground for ordering security for costs against a company incorporated within the jurisdiction. The Court's inherent jurisdiction has always included a power to stipulate a time from which the order is to take effect. The fact that the statutory provisions do not expressly address this issue does not affect or diminish the court's general inherent powers in that regard. Indeed it is a well known principle of statutory construction that a court should only hold the inherent jurisdiction of the court to be restricted if that is the clear intention of the legislature.

[43] Rules 42.8, and 42.9 of the CPR, referred to by the Defendant's Counsel in their submissions, are also instructive, and so far as relevant, state as follows:

> **"Time when judgment or order takes effect**
>
> **42.8 A judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date.**
>
> **Time for complying with judgment or order**
>
> **42.9 A party must comply with a judgment or order immediately, unless**
>
> **(a) the judgment or order specifies some other date for compliance;**
>
> **(b) the court varies the time for compliance including specifying payment by instalments; or**
>
> **....."**

[44] In addition, as pointed out by learned Queen's Counsel Mrs. Kitson, the English Court of Appeal in **Hutchinson Telephone** and **Eurocross Sales** appear to have recognized and/ or accepted the principle of the court fixing a time for compliance with an order for security for costs made under the statutory company law provisions. Indeed, I too made such a time stipulation in my own recent decision in **C & H Property Development Company Limited v. Capital and Credit Merchant Bank Limited** [2012] JMCC Comm. No. 6.

[45] In my judgment, it is therefore fully within my jurisdiction to make an order for the costs to be secured by a date further in time than the date upon which the order is made.

[B] What is the appropriate costs order?

[46] At one point, I had been of the preliminary view that the costs order in relation to this application could be made on a basis that is similar to that made in favour of a defendant who successfully opposes an application for an interim injunction. That is the type of order canvassed for by learned Counsel Mr. Beswick, i.e. the costs to be the Defendant's costs in the claim. However, upon reflection, it appears to me that the correct order is that which was approved, or rather not interfered with, in **Hutchinson**

Telephone i.e that the costs should be the defendant's costs in any event. This is because there is no true analogy to an interim injunction application, where no one knows whether the injunction is "right" or "wrong" at the interim stage, and where it is only after the trial or final hearing that the true entitlement or lack thereof becomes clear. In the security for costs application, the court has to form its view once and for all as to whether there is reason to believe that the claimant will be unable to pay the costs if the defendant proves successful in his defence. Thus whilst it is a risk assessment, it is not a risk assessment of the same kind as is involved in an interim injunction application where the party has only met with partial success. This is because the assessment will not get put to the test again thereafter, which it will do in the case of an application for an interim injunction which is ultimately followed by trial. Once, therefore, the application for security for costs was opposed, as it has been here, and the defendant succeeds in its application, it succeeds on that issue once and for all, and "in any event", whether it ultimately wins or loses at trial. In all the circumstances, therefore, in my judgment the appropriate order for costs is that the costs be awarded to the Defendant, in any event.

C. Meaning of "proceedings" or "all proceedings" in section 388 and whether Defendant's ancillary claim or counterclaim is stayed or should be stayed

[47] This is a very interesting question. It is true that the stated power is a power to "stay all proceedings" as Mr. Beswick has argued. However, I do not agree with Mr. Beswick that the court is not granted power by section 388 to stay the original claim and allow an ancillary claim to proceed in circumstances where a judge has decided to exercise their jurisdiction under section 388. I do not agree that the section means that if the judge is making an order to stay a claim, that means that a counterclaim, or ancillary claim must also automatically be stayed as being part of "all proceedings". The operative word is "may." In other words, the court has a discretion to exercise.

[48] In my judgment, a number of principles are at play here. Firstly, the general rule is that security for costs will not be ordered against a defendant. Further, under the court's original inherent jurisdiction, an order for security for costs would not be made against an impecunious claimant but that rule was varied by statute in the case of

impecunious corporate claimants. A Counterclaim, or ancillary claim is treated as if it were a claim, except as provided in Part 18 of the CPR. The general rule is that a claim and counterclaim should be dealt with together and not separately. The court has to have regard to all of the circumstances, including the connection between the claim and counterclaim, and other circumstances set out in Rule 18.9(2) of the CPR when considering whether to require an ancillary claim to be dealt with separately from the claim. The Court has power to order that part of any proceedings, such as a counterclaim or other ancillary claim be dealt with as separate proceedings-see Rule 26.1(2)(i) of the CPR.

[49] In addition, it is clear that a counterclaiming impecunious corporate defendant can be ordered to give security for costs under section 388. This stands to reason from the fact that a counterclaim is to be treated as a claim. It is plain that an impecunious company which makes a counterclaim which is more than a mere formulation of its defence can be ordered to give security for the claimant's costs of the counterclaim pursuant to section 388 of the Companies Act-see page 5 of the internet report of **CT Bowring**. This is so, although, per Dillon L.J. " ... the word "counterclaim" is not used in s.726 or its predecessors -no doubt because the counterclaim, as we have long known it, did not exist as a form of procedure in 1857 or 1862....".

[50] However, as stated by Bingham L.J at pages 9-10 of the internet report of **Hutchinson Telephone** :

> **"At that point, one moves on to the largely discretionary area. The trend of authority makes it plain that, even though a counterclaiming defendant may technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own?**

It appears to me that Mr. Justice Field put his finger on the appropriate question when he pithily observed in Mapleson v. Masini (1879) 5 Q.B.D. 144 at page 147:

" The substantial position of the parties must always be looked at".

For my part, I think that no simple rule of thumb exists to determine the answer to the question. An order for security against a counterclaiming defendant is not precluded because the counterclaim arises out of the same transaction as the claim. Otherwise, no order could have been made in The "Silver Fir". It is again not conclusive that the counterclaim overtops the claim, although I venture to think that the relative quantum of the counterclaim and the claim is not in all the circumstances irrelevant. It is clearly a relevant consideration that, if the plaintiffs had not issued proceedings, the defendants would have done, as in The "Silver Fir", because in such a case it may be almost a matter of chance whether a party happens to be the plaintiff or the defendant; and if the proper inference is that the defendants would have sued anyway, that fortifies the inference that the counterclaim has an independent vitality of its own and is not a mere matter of defence."

[51] In **Hutchinson**, the claimant indicated its intention to proceed to trial on the claim even though the counterclaim was stayed until the security for costs was paid. This demonstrates that the power to stay does not mean that staying a claim automatically means staying a counterclaim, or vice versa. It seems clear to me, that if a claim can be allowed to continue even if a counterclaim is stayed, then a counterclaim can be allowed to continue even if a claim is stayed. Rule 18.7 of the CPR expressly states:

" Counterclaim may survive claim

18.7 The defendant may continue a counterclaim even if-

(a) the court gives judgment on the claim for the claimant; or

(b) the claim is stayed, discontinued or dismissed."

(My emphasis)

[52] In my judgment, the question is therefore whether it would be just in all the circumstances to allow the claim to be stayed and the counterclaim not be stayed. It seems clear to me that in so far as the rule is that a claim and a counterclaim are two separate aspects of the proceedings, and each could be separately stayed, there would need to be some reason that would make it unjust for the counterclaim to proceed and not also be stayed along with the claim. In my judgment, to a substantial extent the claim and the counterclaim may be said to arise out of the same facts and transactions. Indeed, Cybervale claim to be entitled to set-off all amounts to be found due to it as damages in respect of its Claim against paragraph 62 and other general reliefs sought in the Defendant's Counterclaim. Although the issue of returned cheques has been referred to in the Counterclaim, the sum was not separately quantified and nor was a claim made or pleaded in respect of these cheques as a separate cause of action under the Bills of Exchange Act. Mr. Beswick has raised the spectre of possible inconsistent rulings if the claim and counterclaim were to proceed independently of each other. However, I do not agree. If appropriate, the principle of issue estoppel would apply to prevent the re-litigation of any issues decided in the counterclaim that also arise in the claim. In any event, the court will only be ordering a conditional stay of the claim on condition of providing the security for costs and therefore to that extent the progress and advance of the claim is within the control of Cybervale itself. Thus, the Defendant is not in my view hoisted by its own petard. This is because different considerations apply to the Defendant's own right to pursue its claim in circumstances where there is no application against it for security for costs and plainly no claim of impecuniosity on its part. Indeed, Cybervale will have an opportunity to mount its defence to the counterclaim and to proceed with it even if it fails to, or is unable to comply with, the order for security for costs of the claim. In all the circumstances, I therefore take the view that there is no automatic stay of the counterclaim and nor is there any valid reason for it to be stayed. I will therefore have the matter set for pre-trial review so that a new trial date, at any rate, for the trial of the Counterclaim, and any other necessary matters, can be fixed and dealt with.

[53] I therefore finalize the orders as follows:

a. The Claimant is to provide security for costs in the sum of $2,000,000.00 by the 7th October 2013.

b. The said security is to be paid into an interest bearing account in the joint names of the parties' Attorneys-at-law in a licensed financial institution pending the outcome of the proceedings or further order of the court.

c. The claim is stayed until the security for costs is paid.

d. Costs of this application to be the Defendant's in any event.

e. The Registrar of the Commercial Court is to fix a date for a pre-trial review in consultation with Counsel.

f. Defendant's Attorneys-at-Law to prepare, file and serve the formal order.