[2022] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020HCV03634

BETWEEN	**MIRIPAR LIMITED**	**CLAIMANT**
AND	**JENNIFER REID**	**1ST DEFENDANT**
AND	**ROBERT TAYLOR**	**2ND DEFENDANT**

IN CHAMBERS

Miss Kereda Lowe instructed by JNW Taylor & Associates for the Claimant

Mrs Dian Watson for the 1st Defendant

Heard: June 27 and July 29, 2022

Security for costs – Part 24 of the Civil Procedure Rules – Company incorporated outside the jurisdiction – Counterclaim- Crabtree Tree Principle.

M. JACKSON, J (Ag.)

INTRODUCTION

[1] Before me is the 1st Defendant's application for security for costs. The application is brought by Notice of Application for Court Orders filed on June 13, 2022.

[2] By this application, the 1st Defendant is seeking to ensure that, if she is successful in defending the action brought against her and costs is awarded in her favour, she will have a fund available within the jurisdiction of the court against which she can recover her costs. Against this backdrop, the 1st

Defendant has asked the court to exercise its discretion in her favour and to grant the following order:

> *"That the Claimant, a limited liability company registered in the Cayman Islands, posts Security for Costs in the amount of Four Million, Three Hundred and Eighty-One Thousand, Three Hundred and Sixty-Six Dollars and Fifty Cents ($4,381,366.50), or any amount deemed reasonable by this Honourable Court."*

[3] The main ground relied on to support the application is framed as follows:

> *"That the Claimant is a limited liability company, incorporated and registered outside the jurisdiction of this Honourable Court and the Applicant/1st Defendant is entitled to the Order sought pursuant to Rule 24.3(b) to permit the recovery of costs awarded in the event she prevails at the trial of this matter."*

[4] As is expected, the Claimant stood in strong opposition to the application.

[5] After a careful assessment of the evidence and the submissions of counsel for both parties, I conclude that there is no basis to grant the application.

[6] Before delving into the details of my findings, I consider it worthwhile that I provide context to the substantive proceedings that led to this application before me.

THE BACKGROUND

[7] The details of the claim and counterclaim made in this action are captured in the pleadings that the parties have exchanged. The following summary is sufficient for the purposes of this application:

(i) The Claimant is a limited liability company incorporated in the Cayman Islands. It has brought an action for breach of contract against the Defendants.

(ii) The alleged breach of the contract arose from a purchase agreement between the Defendants and the Claimant's Principal, Mr Michael

Parodie in relation to two properties owned by the Claimant in Cardiff Hall, Saint Ann. The purchase price was agreed at US$587,500.00.

(iii) The Claimant contends that the Defendants have failed to honour and complete the terms of the purchase agreement and have paid only US$180,000.00 leaving a balance of US$407,500.00

(iv) The 1st Defendant is currently in possession of the properties and has lodged a caveat against the said properties challenging the sum said to be owed by her and the involvement of the Claimant in the contract.

(v) The 1st Defendant contends that the contract was with Mr Michael Parodie in his personal capacity and that she paid him approximately 70% of the purchase price or US$405,000.00. She further alleges that notwithstanding the sum paid by her, Mr Parodie has failed to complete the contract.

(vi) The 1st Defendant has also filed a counterclaim seeking an order that she is entitled to be repaid in full the amount paid to Mr Parodie, plus 3% interest under the agreement or, in the alternative, that she is entitled to possession and ownership of the properties and that the transfer should be effected to her having regard to the amount paid by her under the agreement.

THE APPLICABLE LAW

[8] The governing law in respect of this application falls under the consideration of two regimes: section 388 of the Companies Act and Part 24 of the Supreme Court of Jamaica Civil Procedure Rules, 2002 ("CPR").

[9] Section 388 of the **Companies Act** provides that:

> *"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."

[10] 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 costs 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 for 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 of the CPR establishes a two-pronged test which must be met before the court can exercise its discretion to grant an order for security for costs. At least one of the conditions identified at rule 24.3(a) to (g) must be met, and the court must be satisfied, having regard to all the circumstances of the case, that it is just to make such an order. Rule 24.3 of the CPR provides that:

> *"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 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 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."

THE ISSUES

[12] In determining the application, three primary issues arise for the resolution of this court:

(i) whether any of the conditions specified in rule 24.3(a) to (g) of the CPR has been satisfied;

(ii) whether, having regard to all the circumstances of the case, it would be just to make an order for security for costs; and if so

(iii) whether the amount sought by the 1st Defendant is appropriate so as not to stifle the claim.

THE AFFIDAVIT EVIDENCE

[13] The issues that arise for my determination in respect of this application require that I have regard to rule 24.2(3) of the CPR that "[a]n application for security for costs must be supported by affidavit evidence on affidavit". The cases have interpreted this to mean that in an application for security for costs, the relevant

grounds should always be identified and the relevant evidence aimed at each ground must be clearly stated (see **Somerset–Leeke & Anor v Kay Trustees & Anor** [2003] EWHC 1243 (Ch)).

[14] Consistent with rule, 24.2(3), the 1st Defendant detailed the evidence on which she relied. The relevant portions of her affidavit, will be highlighted later in this judgment.

[15] In opposition to the application, the Claimant relied on the affidavit evidence of Miss Janet Taylor, a member of the legal team of the firm on record for the Claimant. The use of and reliance on this evidence was vigorously objected to by the 1st Defendant. In objecting to the affidavit, Mrs Watson rested her submissions on the organic theory of company law. The main plank of her submission was that Miss Taylor, not being an authorised officer of the Claimant, is unable to provide such evidence without the written requisite authority exhibited before this court. She also submitted that in the absence of such evidence, the affidavit would not be properly before the court and would be of no evidential value. In support of her contention, Mrs Watson relied on the cases of **Somerset Enterprises Limited & Anor v National Export Import Bank of Jamaica Limited** [2021] JMCA Civ 12 (para. 30) and **HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd** [1957] 1 QB 159 **("HL Bolton")** (page 172).

[16] Being mindful of this objection, the court is required to carefully assess the evidence contained in Miss Janet Taylor's affidavit to see whether there is sound basis to reject her affidavit evidence.

[17] A summary of relevant aspects of Miss Taylor's affidavit is as follows:

> *"I, Janet P. Taylor, being duly sworn make oath and say as follows:*
>
> 1. *That… I am an Attorney-at- Law having conduct of this matter*
>
> 2. *That my knowledge of this matter is by virtue of my having conduct of the file and the information contained herein is*

within my personal knowledge and as so far as they are not within my personal knowledge, are to the best of my information and belief to be true.

3. *That I am aware that the defendant has made application for security for costs under Rule 24.3 (b) of the Civil Procedure Rules and posits in her application that she is entitled to the orders sought.*

4. *…*

5. *That while it is admitted that the claimant company is incorporated and registered outside the jurisdiction does not hinder any judgement made against it from being enforced.*

6. *Should any judgment be made against the claimant company, it can easily be enforced under the Cayman Island's Reciprocal Enforcement Law…*

7. *That the claimant has a real prospect of being successful as there is no defence before the court that is substantial to defeat the claimant's claim.*

…

14. *Furthermore, the 1st defendant has made admissions to the claimant's claim and has admitted to not completing the purchase price of the property at paragraph 13 of her further affidavit filed February 28th, 2022.*

15. *That despite not completing payment of the properties and blatantly breaching the agreement for sale, constructed by her, the 1st defendant lodged a caveat on the property in September 2020, some three years after the agreement was due to be completed…*

…

19. *That the claimant's claim is a bone fide one and should proceed to trial…*

20. *That the claimant's property values far more than the amount the 1st defendant requires for security for costs and has other assets in the jurisdiction of even greater value.*

> *21. That even on the 1st defendant's case, the amount purported to be owed, far exceeds the Four Million dollars requested as security for costs, from the court…"*

[18] After a careful assessment of the evidence outlined in the affidavit and the submissions advanced, the court finds itself in disagreement with the submissions of Mrs Watson. Based on the organic theory of company law, the organs of a company, namely the board of directors and the managers who represent the directing mind and will of the company, are regarded in law as the company itself when acting within the limits of powers conferred on them by the company's constitution, and not merely as servants or agents of the company. This was also noted by Mrs Watson in her submissions where she argued that the organic theory of company law was explained by Lord Denning in **HL Bolton** at page 172 as:

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represents the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such."*

[19] I consider the organic theory of company law to be wholly irrelevant to the circumstances of this case. The application of this theory has no relevance to the interlocutory proceedings before this court. The facts of **HL Bolton**, makes this clear.

[20] Additionally, in the court's view, the objections raised by Mrs Watson are not in keeping with the established principle provided for in rule 30.3(2) of the CPR, that an affidavit in interlocutory proceedings may contain hearsay statements and statements of belief, once certain conditions are met. Rule 30.3 of the CPR states, in part, that:

> *"30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief –*
>
> *(a) where any of these Rules so allows; and*
>
> *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –*
>
> *(i) which of the statements in it are made from the deponents own knowledge and which are matters of information and belief; and*
>
> *(ii) the source for any matters of information and belief.*
>
> *(3)…*
>
> *(4)…"*

[21] This court also takes guidance from McDonald- Bishop J (Ag), as she then was, in **Marcia Jarrett v South East Regional Health Authority, Robert Wan & The Attorney General** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 00816, judgment delivered November 3, 2006. The learned judge, provided clarity on the provision by declaring that:

> *"29. It must be noted, however, that under the CPR there is an exception to the general rule that an affidavit may contain only facts within the personal knowledge of the deponent. Rule 30.3 (2) (like its predecessor- s.408 of the CPC) allows for an affidavit containing information and belief to be utilized in interlocutory proceedings of this nature, of course, subject to specified conditions (see r 30.3 (2) (b). This reflects and serves to confirm the principle enunciated as far back as 1972 in the Trinidad and Tobago case of* ***Water & Sewage Authority v Waite*** *(1972) 21 W.I.R 498…*
>
> *30. Our Court of Appeal has also given effect to this principle …In* ***D & L H Services Limited et al v The Attorney- General et al****…"*

[22] I will now turn my attention to the issues earlier identified.

Issue1: Whether any of the conditions specified in rule 24.3(a) to (g) of the CPR has been satisfied

[23] This requires no lengthy discourse as it is commonly accepted by the parties that the Claimant is a company incorporated in the Cayman Islands. Rule 24.3(b) is, therefore, satisfied.

Issue 2: Whether, having regard to all the circumstances of the case, it would be just to make an order for security for costs

[24] It is well established that the court has a wide discretion whether to impose an order for security for costs. In **Symsure Limited v Kevin Moore** [2016] JMCA Civ 8 ("**Symsure**"), Phillips JA, in delivering a very comprehensive judgment on the subject, provided a timely reminder of this discretionary power. At paragraph [42] she states that:

> *"[42] My first comment on the law relative to the application before us, is that on any canvassing of the relevant authorities, it is clear that the court has a wide discretion whether or not to impose the order for security for costs, and the principles on which the discretion is exercised are dependent on the circumstances of each case. The discretion of course must be exercised judicially, taking certain factors into account."*

[25] In **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074, Lord Browne-Wilkinson, Vice-Chancellor, also outlined this discretionary power. At pages 1076 and 1077 of the judgment, he opined 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 plaintiff's 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 mine)*

[26] This court, I might add, is required to carefully scrutinise the evidence, while at the same time bearing in mind the overriding objective of the CPR as contained in rule 1.1. This was aptly stated in **Blackstone's Civil Practice 2014** 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 by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in question"*

[27] In embarking on this journey in deciding whether it is just in all the circumstances of the case to grant the order, a useful starting point is an examination of the assertion made by the 1st Defendant at paragraph 3 of her affidavit. At that paragraph she laid the foundation for this application and stated:

> *"That in light of the foregoing, I am advised and do verily believe that pursuant to Rule 24.3(b) of the Civil Procedure Rules (2002) the Claimant, which by its own admission, is incorporated in the Cayman Islands* ***is required to post Security for Costs so as to enable me to recover costs paid by me to defend the matter****." (Emphasis mine)*

[28] Miss Lowe, in response on behalf of the Claimant, vigorously challenged this assertion. She argued that an order for security for costs is not an entitlement as of right to the 1st Defendant merely because the condition under rule 24.3(b) is satisfied. The court is in agreement with Miss Lowe on this point. In its true construct, rule 24.3 of the CPR does not create an entitlement, it is also not automatic. In **Symsure**, Phillips JA, provided clarity on the true construction of the provision. She opined that:

> *"[47] 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." (Emphasis mine)*

[29] It is clear that a company being incorporated outside of this jurisdiction does not create an entitlement nor is it a single determining factor for this court to exercise

its discretion. It merely puts the applicant in the running to make the application. As previously stated, rule 24.3 of the CPR creates a two-pronged test. An order for security for costs cannot be made on the sole basis that the condition under rule 24.3(b) is satisfied. The court must also have regard to all the circumstances of the case and be satisfied that it is just to make the Order.

[30] From the principles elucidated and extracted from the cases, it is commonly accepted that it is impossible to list the various factors that may influence a court in exercising the wide discretion afforded to it under the CPR in making an order for security of costs. Each case has to be considered at according to its individual or peculiar set of circumstances. In **Symsure**, Phillips JA, relying on the guidance provided by Belgrave J in **Harnett, Sorrel and Sons Ltd v Smithfield Foods Ltd** BB 1987 HC 15, outlined some of these factors. These include**:**

(i) Whether the Claimant's claim is *bona fide* and not a sham.

(ii) Whether the Claimant has a reasonably good prospect of success.

(iii) Whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.

(iv) Whether there is a substantial payment into court or an "open offer" of a substantial amount.

(v) Whether the application for security for costs was being used oppressively so as to stifle a genuine claim.

(vi) Whether the Claimant'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.

(vii) Whether the application for security is made at a late stage of the proceedings.

[31] Based on the factual circumstances of the case, Miss Lowe in her submissions, has asked the court to take into account two other factors. These are:

(a) whether the remaining 30% of the purchase price, which is the sum the 1st Defendant says she owes to the Claimant, can be deemed to be asset within the jurisdiction; and

(b) whether the presence of the 1st Defendant's counterclaim would make it unfair to grant the order.

[32] This court will now endeavour to consider each of these factors in so far as they bear relevance to the circumstances of the case.

(i) Is the claim *bona fide* and not a sham?

[33] This is a claim for breach of contract. The facts and the competing issues outlined by both sides are sufficient to demonstrate to this court the soundness of the claim brought by the Claimant and that it is not a sham.

(ii) Whether the Claimant has a reasonably good prospect of success

[34] At paragraph 4 of the 1st Defendant's affidavit, she has stated that:

> *"I am advised by my Attorney-at-law and do verily believe that on a balance of probabilities the Claimant will not successfully prosecute its claim and in such an instance I will be entitled to an order from this Honourable Court entitling me to recover the costs I expended to defend this claim."*

[35] This assertion is devoid of an explanation of the circumstances giving rise to such a conclusion. The law is quite clear that mere bald assertions are not enough.

[36] In response to this assertion, Miss Taylor in her affidavit on behalf of the Claimant, deposed that the Claimant has a real prospect of success as the 1st Defendant has not advanced a defence that is substantial to defeat its claim. Miss Taylor further deposed that the 1st Defendant has admitted to not completing payment of the purchase price of the property.

[37] The question as to whether a court in dealing with these kinds of applications should embark upon a journey to predict or state where the prospect of success lies, has not only been the subject of legal discourse but the cases have also discouraged it. The cases have made it clear that the court should not venture into the merits of the case unless it can clearly be demonstrated that there is a

high probability of success or failure. I refer to the oft-cited case of **Porzelack KG v Porzelack (UK) Ltd,** where Sir Browne-Wilkinson Vice Chancellor opined at page 1077:

> *"…This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that 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 plaintiff 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."*

[38] With regard to this application before me and the success of the claim, I would not say that "it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure" for either party. In this court's view, the success of this matter will depend on the credibility of the witnesses and or the efficacy of documentation and correspondence signed and exchanged between the parties. At this stage, there is no such evidence before this court and even if there was, it would not be for this court to consider or determine those issues at this stage (see paragraph 61 of **Symsure**).

(iii) Whether there is an admission by the 1st Defendant on the pleadings or elsewhere that money is due

[39] It is not in dispute that there is an admission by the 1st Defendant on the pleadings that she has money owing to the Claimant. The dispute is regarding the amount that is actually owed. The 1st Defendants says she owes 30% of the purchase price. This admission has to be given weighty consideration and also

be weighed in the balance, whether in all the circumstances of the case it would be just to make the order sought by 1st Defendant.

[40] A consideration for this court is whether that the sum owed by the 1st Defendant to the Claimant can properly be treated as an asset of the Claimant within the jurisdiction which can satisfy the payment of costs to the 1st Defendant in the event that the 1st Defendant is awarded costs in the matter.

(iv) Whether the Claimant has assets within the jurisdiction to satisfy an order for security for costs

[41] The 1st Defendant in seeking to discharge the evidential burden cast upon her in relation to this factor has stated at paragraph 2 of her affidavit the following:

> *"That the Claimant in this matter, by its own admission as set out in paragraphs 1 in both the Fixed Date Claim Form and the Particulars of Claim filed herein, is a company duly registered outside the jurisdiction of this Honourable Court in the Cayman Islands* ***with no known business operation in this jurisdiction****." (Emphasis mine)*

[42] This court considers it worthwhile, at this juncture, to state that the Claimant's Fixed Date Claim Form and Particulars of Claim did not say that it has "no known business operation in the jurisdiction". This is a statement that clearly emanated from the 1st Defendant. Notwithstanding, the issue for me is whether the 1st Defendant's assertion that the Claimant has "no known business operation in this jurisdiction" can be equated to mean that the Claimant has no known assets within the jurisdiction.

[43] This court finds such an assertion to be very wide and lacking in specificity for the purpose of this application. I do not find that having "no known business operation" and having "no known asset" equate to the same thing. This is so because one may have a business operation but no assets, as well as one may have assets but no business operation. Nonetheless, I have given it due consideration and take it to mean that the Claimant has no assets in this jurisdiction to satisfy an order for security for costs.

[44] In **Symsure,** Phillips JA provided clarity in respect of who has the burden of proving that there is asset within the jurisdiction of the court to satisfy an order for security for costs. She opined that the burden rests with a Claimant/Respondent.

[45] It is, therefore, now settled in law that a Claimant who seeks to avoid an order for security for costs on the basis that it has assets within the jurisdiction, must state evidence of this. The rationale behind this is that such evidence would be in the knowledge of the Claimant and not the defendant (see **Morton v Canada (Attorney General)** 2005 CanLII 6052 (ON SC), 75 OR (3d) 63 at paragraph 32).

[46] Miss Taylor in her affidavit, on behalf of the Claimant, deposed the following:

> "*15. That despite not completing payment of the properties and blatantly breaching the agreement for sale, constructed by her, the 1st defendant lodged a caveat on the property in September 2020, some three years after the agreement was due to be completed…*
>
> *20. That the claimant's property values far more than the amount the 1st defendant requires for security for costs and has other assets in the jurisdiction of even greater value.*
>
> *21. That even on the 1st defendant's case, the amount purported to be owed, far exceeds the Four Million dollars requested as security for costs, from the court."*

[47] In her submissions on behalf of the Claimant, Miss Lowe asked the court to accept that the Claimant not only has other assets within the jurisdiction, but that the 30% of the purchase price which the 1st Defendant says she owes to the Claimant, can be constituted as a fund within the jurisdiction available to settle any order for costs in favour of the 1st Defendant.

[48] Mrs Watson, on the other hand, strongly argued that the two properties referred to by the Claimant are the subject of the dispute and as such they should not be seen as assets of the Claimant within the jurisdiction of the court.

[49] She relied on **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**") where Brooks J, as he then was, at page 19 stated that, "the first Plaintiff can point to no assets within the jurisdiction which are clearly its own and are not the subject of the dispute".

[50] I have given due consideration to the submissions advanced on behalf of both parties and, I find that the Claimant has assets in this jurisdiction. This too, in light of the 1st Defendant's admission that she owes the Claimant a percentage of the purchase price, the court is of the view that this represents a fund which at the appropriate time can be used to satisfy an order for security for costs. I find that even though the sum owing is attached to the properties in dispute, it has a level of independence from the said properties. I say this because if the 1st Defendant is successful in defending the claim, then it means that the court would have accepted the 1st Defendant's defence that she owes 30% of the purchase price and not more. In such a case, the 30% owned to the Claimant would be an asset of the Claimant and a sum in the possession of the 1st Defendant. Accordingly, the 1st Defendant would have clear access to a fund within the jurisdiction of the court from which she would be able to enforce any order for costs in her favour.

[51] Therefore, I find the facts of the instant case to be wholly different from the facts in **Mannings Industries Inc** where in that case the defendant did not owe the Claimant any money which could have been considered as an asset. I find that the sum owed to the Claimant by the 1st Defendant, at its very least, is a complete answer that a fund already exists in the jurisdiction. Even if the court were to find that all that is owed by the 1st Defendant is 30% of the purchase price of US$585,000.00, this sum would far exceed the JA$4,381,366.50 sought by the 1st Defendant as security for costs.

(v) Whether the application for security is made at a late stage of the proceedings

[52] Rule 24.2(2) of the CPR states that "where practicable [an application for security for costs] must be made at a case management conference or pre-trial review". In supporting her position that the application was made within the framework of the CPR, Mrs Watson submitted that:

> *"The application was made at the Pre-Trial Review as it was the most opportune time and is being made at a time clearly set out within the Civil Procedure Rules (2002). On that date scheduled for the first hearing, the matter was not heard and no date was set for an inordinate period. The 1st Defendant made an application to have water supply restored to the property, which was disconnected on the instructions of Mr Parodie. This act, the 1st Defendant contends, is an effort to constructively evict her from the property, thereby usurping the function of the court. This submission on behalf of Counsel for the Claimant that applications are being made to stifle the Claimant's claim is spurious and without merit."*

[53] A point to note is that none of these assertions was contained in the affidavit of the 1st Defendant, nonetheless, they formed a core part of counsel's submissions. Be that as it may, this court will address the substantive issue of the timing of the application.

[54] There is no dispute that this application was made at the pre-trial review. Therefore, on the face of it, it is in keeping with rule 24.2(2) of the CPR. However, as is evident, the application is being heard just a few weeks before the fixed trial date of September 26, 2022.

[55] As with all applications for interim relief, an application for security for costs should be made as soon as it becomes apparent that it is necessary or desirable to make it, taking into account the overriding objective and the need to act with speed, economy and proportionality. The entire tenor and spirit of the CPR regime promotes acting with promptitude to achieve the overriding objective. This is because "court and the parties should strive to avoid those tactics which bedevilled the old rules which cause delays and disproportionate expense:

wasting time and effort on side issues by striving to deliver a knock-out blow pre-trial" (see O'Hare & Browne, Civil Litigation, 13th Edition, para. 1.008).

[56] In determining the issue of the timing of an application, it was held in **Vedatech Corporation v Crystal Decisions (UK) Ltd & Anor** [2002] EWCA Civ 356**,** that the court is required to take into account the stage at which the application is made, and if it is made too close to the hearing of the trial, the application may be dismissed as being oppressive. Further, in the case of **Bryan E Fencott & Associate Pty Ltd v Eretta Pty Ltd (1987)** 16 FCR 497 at page 514, French J opined that:

> *"The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur within steps being taken to apply for an order for costs, the more difficult it will to persuade the court that such an order is not, in the circumstances, unfair or oppressive."*

[57] This court is obliged to consider the chronology of events leading up to this application:

a. The Claim was filed on September 24, 2020.

b. The 1st Defendant entered an acknowledgment of service on December 7, 2020.

c. The 1st Defendant filed a Defence and Counterclaim on January 4, 2021.

d. The 1st Defendant made its first interim application on May 12, 2021.That application was heard and refused on June 30, 2021.

e. A case management conference was scheduled for February 7, 2022.

f. On February 7, 2022 the relevant Case Management Orders were made including fixing a trial date for September 26 – 27, 2022 and a pre-trial review date.

g. The 1st Defendant filed a further affidavit on February 28, 2022 in which it was disclosed for the first time that she successfully lodged a caveat against the properties on 23rd day of September 2020.

h. A pre-trial review date was set for June 27, 2022.

i. On June 13, 2022, the 1st Defendant filed a Notice of Application for Court Orders for the hearing of an application for Security for Costs.

j. The Notice of Application for Security for Costs was heard by me on June 27, 2022 at the pre-trial review.

[58] Mrs Watson, in her submissions, made the point that the application was heard at the pre-trial review in keeping with the CPR. She also alluded to several administrative glitches of the court, which she said hindered the application being made at an earlier time. However, no evidence was placed before this court of any attempts made by the 1st Defendant to file this application prior to June 13, 2022. Further, the Application and the affidavit in support of the application were both dated June 13, 2022, which is the same date the application was filed. In any event, as Judge Grenfell pointed out in **Nolan v Devonport and Anor** [2006] EWHC 2025:

> *"[20] …It is not enough for a party to sit back and to await further directions of the court, albeit that the court is under a duty to manage the application. If there is a delay, Pt. 1.3 makes it clear that the parties do have a duty to prompt the court."*

[59] I do accept that the application was made at the pre-trial review which is allowed by the CPR "where practicable". However, when considered as a whole and having regard to the antecedent of the matter, I do not agree with the submission of Mrs Watson that it was a timely and an efficient use of time. There has been no change of circumstances since the claim was filed. It was common knowledge from at least December 2020, when the 1st Defendant filed acknowledgment of service, that the Claimant was incorporated in the Cayman Islands.

[60] In the circumstances, I cannot say that it was most economical use of time for the application to be made at this late stage when the pre-trial review is a few weeks away from the trial of the matter. Given the trial date of September 16, 2022, this application for security for costs could well operate to stifle the claim.

(vi) The existence of the counterclaim

[61] This issue was never addressed by Mrs Watson in her submissions. Miss Lowe, on the other hand, submitted that the counterclaim in these proceedings gives rise to judicial consideration whether it would be just to make the order. In support of her submissions, she relied on the "Crabtree principle" named after the judgment in **BJ Crabtree v GPT Communication Systems** (1990) 59 BLR 43. Counsel cited the case of **Abbotswood Shipping Corp v Air Pacific Ltd** [2019] EWHC 1641, where at paragraph 27, the court stated that:

> *"27. This point of principle, sometimes referred to as 'the Crabtree principle' has been applied in subsequent cases. In Dumrul v Standard Chartered Bank [2010] EWHC 2625 (Comm). Hamblen J summarised the position as follows, at [5]*
>
> > *'As a general rule, the court will not exercise its discretion under CPR Part 25, to make an order for security of the costs of a claim if the same issues arise on the claim and counterclaim and the costs incurred in defending that would also be incurred in prosecuting the counterclaim…'"*

[62] Miss Lowe contended that the issues in the claim and counterclaim are the same and the same costs would be incurred by the 1st Defendant in prosecuting the counterclaim.

[63] The learned author Mark Friston in his book, **Friston on Costs**, 3rd Edition, notes the following:

> *"Where a defendant seeks (or where both parties seek) security for costs, the fact that there is a counterclaim maybe relevant. Security will usually not be ordered, where, if it were to be ordered, but unpaid, and the claim were to be struck out, the issues would be litigated anyway on the counterclaim – colloquially known as the "Crabtree principle". This principle is intended to avoid the creation of one-sided litigation. In any event, it would normally not be appropriate to make an order for security*

> *of costs in favour of either party if to do so would, for practical purposes, give that party security for costs of its own claim or counterclaim."*

[64] The learned author also addressed the issue of 'independent vitality'. He declared that:

> *"Much will depend on whether the counterclaim can be said to have "independent vitality". If it does not have independent vitality (that is, if the counterclaim can be said to be, in substance, a mere defence to the claim), then an order may be made against the claimant; if it does have independent vitality, the appropriate order will ordinarily be that both parties provide security (where this appropriate) or that neither party does so".*

[65] The independent vitality test was defined in **Hniadzdzilau v Vajgel and Others** [2015] EWHC 1582 (Ch) at paragraph [17], where Richard Millett QC, (sitting as Deputy Judge of the High Court) said:

> *"…The whole point about the independent vitality test is that you can say even if the Claimant had not sued, the Defendant could and would have made his own claim, such that it can continue if the claim is dismissed or falls away."*

[66] Given the entire circumstances of this case, I have carefully considered this factor and find myself in agreement with Miss Lowe. Though the matters for determination in the counterclaim arose from the same issue on the claim, the counterclaim can also be said to be independent of the claim. The 1st Defendant could have made her own claim and asked the court to enforce the contract. This is evident from her counterclaim, in which she is seeking an order that she is entitled to be repaid in full the amount paid to Mr Parodie, plus 3% interest under the agreement or, in the alternative, that she is entitled to possession and ownership of the properties and that the transfer should be effected to her having regard to the amount paid by her under the agreement.

[67] This court concludes that it would not be fair and just to make an order for security for costs against the Claimant. In doing so, I also give much weight to the views expressed by Bingham LJ in **BJ Crabtree v GPT Communications Systems**, that:

> *"[Making an order for security] would have the effect… of preventing the plaintiffs from pursing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed… [In the] course of defending the counterclaim all the same matters would be canvassed as [they] would be canvassed if the plaintiffs were to pursue their claim, but on the basis that would defend the claim and advance their own in* ***a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation."*** (My Emphasis)

[68] Based on the foregoing, I do not find it necessary to enter into a discourse on issue 3.

[69] Also, I will not go into a finding in respect of section 388 of the Companies Act, except to say that section 388 deals with circumstances of alleged impecuniosity and would require credible evidence in support of such an allegation to be placed before this court (see **C&H Property Development Company Limited v Capital and Credit Merchant Bank Limited** [2012] JMCC Comm No. 6). The 1st Defendant has provided no such evidence.

CONCLUSION

[70] Having thoroughly examined the evidence placed before this court, I have determined that in all the circumstances of this case, it would not be just and fair to grant the order as prayed.

[71] I say so for the following reasons:

(1) The Claimant has assets within the jurisdiction, the value of which are greater than the sum requested as security for costs.

(2) The 1st Defendant has admitted on the pleadings that she owes 30% of the purchase price. If the 1st Defendant is successful in the claim, then this 30% will be a fund available within the jurisdiction of this court against which she can enforce an order for costs.

(3) It is not clear, at this time, that the 1st Defendant has a reasonably good prospect of success.

(4) The application was made at a late stage of the proceedings and operate as an intention to stifle the claim.

(5) In light of the counterclaim, it would not be a fair, just or proper exercise of the court's discretion in all the circumstances of the case to grant the order as prayed.

DISPOSITION

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

1. The Notice of Application for Court Orders filed the 13th day of June 2022 by the 1st Defendant for Security for Costs is refused.

2. The Costs of this Application is for the Claimant, to be taxed if not agreed.