



[2019] JMSC Civ 64

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2017HCV00013**

<b>BETWEEN</b>	<b>ROBERT TAYLOR</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CAPTAIN'S WATERSPORTS LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Shantal English, instructed by Banjoko Law, for the claimant.**

**Gavin Goffe and Jahmar Clarke, instructed by Myers, Fletcher & Gordon, for the defendant.**

**July 4, 2017 & April 5, 2019**

**APPLICATION FOR SUMMARY JUDGMENT – THE PRINCIPLES TO BE CONSIDERED UPON AN APPLICATION FOR SUMMARY JUDGMENT – CONTRACTUAL AGREEMENT EXCLUDING LIABILITY FOR NEGLIGENCE - WHETHER THE CONSUMER PROTECTION ACT APPLIES – SECTION 37 OF THE CONSUMER PROTECTION ACT – WHETHER THE CLAIM WAS PROPERLY INSTITUTED – APPLICATION FOR SECURITY FOR COSTS – CONSIDERATIONS OF THE COURT IN RESPECT OF AN APPLICATION FOR SECURITY FOR COSTS.**

**ANDERSON, K., J**

**Introduction**

**[1]** These reasons are in respect of two applications, which came on for hearing before this court, on July 4, 2017. The first of those two applications, being earlier in time,

was made by the defendant, and it was filed on March 7, 2017. In that application, the defendant sought the following orders:

- I. *The court does not have jurisdiction to try the claim; or in the alternative,*
- II. *The claim be struck as the claim has not been validly commenced; or in the alternative,*
- III. *Summary Judgment for the Defendant against the Claimant; or in the alternative,*
- IV. *The Claimant Robert Taylor gives security for the Defendant's costs in the sum of \$2,000,000 to be delivered within 30 days from the date hereof to the Defendant's attorneys-at-law and held by them in escrow in an interest bearing account in a licensed financial institution pending the determination of this matter or further order of the court;*
- V. *The claimant's claim shall be dismissed with costs if the said sum of \$2,000,000 for security for the Defendant's costs is not provided in the manner set out in paragraph (iv) above,*
- VI. *Costs of the application to the Defendant to be taxed if not agreed.*

The grounds upon which the defendant has sought the relief above are that, *inter alia*, the Particulars of Claim was not properly filed, sealed and served with the Claim Form and, consequently, proceedings have not been validly commenced, the claimant has no real prospect of being successful in the claim, and the claimant is ordinarily a resident outside of the jurisdiction and there is no evidence of the existence of assets, within this jurisdiction, belonging to him.

**[2]** The other application, being later in time, was made by the claimant and was filed on March 18, 2017. In that application, the claimant sought the following orders:

1. *That the Court have [sic] jurisdiction to try the Claim filed on January 4, 2017.*
2. *That the Claim Form and the Particulars of Claim was validly filed in the Supreme of Jamaica, [sic] in the Civil Registry.*
3. *The Claimant be granted permission to have the Particulars of Claim that was filed in the Civil Registry to be sealed and re-served on the defendants.*

4. *That the application be heard at the same time as the Application to be made by the defendant on the 4<sup>th</sup> July, 2017 at 10:00am.*
5. *Such further and other Order as the Court deems fit.*

The grounds upon which the claimant sought those orders are, *inter alia*, that the Particulars of Claim delivered by the claimant to the Civil Registry of the Supreme Court was properly filed pursuant to Part 3.7 of the Civil Procedure Rules.

- [3] Both of those applications were, 'heard' by this court, on paper once they had come before this court for hearing, on July 4, 2017. The first in time of those applications was the defendant's application. It will readily be recognized that there was no necessity for the claimant's application to have be filed, since the defendant's application required this court to decide as to whether it had jurisdiction to try this claim. That is so, especially since the respective grounds put forward by the parties, as to why this court, either does not, or does have jurisdiction to try this claim, are very closely related to each other.
- [4] Both applications can and will therefore, in these reasons be addressed collectively. The following constitutes this court's reasoning and ruling.

## **Background**

- [5] The claimant, a resident of Canada, visited Jamaica for vacation on or around January 6, 2011. Whilst in Jamaica, he and his family were guests at the Holiday Inn Sunspree Resort. During his stay at that resort, on or about January 7, 2011, the claimant engaged the resort's water sports activity of parasailing, being operated by the defendant company. The claimant was harnessed to the parasailing apparatus by the agents of the defendant, which was then tethered to the boat, in preparation for the execution of the parasailing activity.
- [6] At the completion of the preparatory steps of securing the claimant to the parasailing mechanism, the boat was set in motion to hoist the claimant and thereby generating the lift of the parasail. Following this, the claimant was raised approximately ten (10)

to fifteen (15) feet in altitude, above sea level. After that, the claimant suddenly lost altitude, struck the water and was dragged under water, whilst he was still secured to the parasail. The claimant averred that this was caused by the negligence of the servant of the defendant, and as a result, he suffered injuries.

- [7] The claimant filed a claim, on January 4, 2017, along with all supporting documentation. An Acknowledgment of Service was filed by the defendant on February 2, 2017, and in it they acknowledged receipt of the Claim Form, but denied ever receiving the Particulars of Claim. As a result, the defendant has not filed any defence to the claim, but instead has filed the application at paragraph [1] herein.
- [8] The defendant's application was supported by the affidavit of Bryan Langford, the owner and manager of the defendant, and filed on March 7, 2017. The defendant's application was also supported by an Affidavit of Search, deponed to by Phillip Gayle, a legal clerk of the law firm Myers, Fletcher & Gordon, who represents the defendant in these proceedings, and filed on March 8, 2017. At paragraph 2 of the affidavit of Bryan Langford, it was stated that, before the claimant engaged the claimant's parasailing activities, the claimant signed a '*Parasailing Release of Liability, Waiver of Claims, Express Assumption of Risk and Indemnity Agreement.*' Further, it was stated at paragraph 3 in the said affidavit that, by virtue of the claimant signing the said agreement, he has agreed to '*release the Defendant company and its agents from liability and responsibility from any claim or cause of action.*'
- [9] It was also deponed to, in the affidavit of Bryan Langford, at paragraphs 6 and 7, that on January 27, 2017, the defendant's representative, was served with the Claim Form of this claim, which was duly stamped and sealed by the Supreme Court. Among the accompanying documents, was another document headed 'Particulars of Claim' which was not stamped by the Court. Also stated in that affidavit was, the fact that the claimant is a Canadian resident, and that he has no assets in Jamaica, and therefore, in the event of the defendant's success in the claim, the defendant is unlikely to recover its legal costs, which amounts to, approximately, two million dollars (\$2,000,000.00). Additionally, the Affidavit of Search, deponed to by Phillip

Gayle, sought to confirm that there was no Particulars of Claim of the court's file, when said file was searched by that deponent, on May 8, 2017.

[10] On May 18, 2017, two affidavits were filed on behalf of the claimant, they are: the affidavit of Brenton Brown, and the affidavit of Shantal English. In the affidavit of Brenton Brown, he (Brenton Brown) testified that he was the bearer of the office of counsel for the claimant. He deponed, at paragraph 4, that on January 4, 2017, he delivered three (3) sets of the Claim Form, the Particulars of Claim, and all of the accompanying documents of the claimant's claim, to the Supreme Court's registry to be filed, and that said documents were stamped by the clerk. He further deponed, at paragraph 5:

*'I subsequently learned that the registry's stamp was not affixed to the Particulars of Claim which I received from the registry and which was subsequently delivered to the Defendant. It was oversight and omission but I can, and do hereby verify that three (3) copies of the Particulars of Claim were delivered to the registry.'*

[11] Further, at paragraph 13 of the affidavit of Shantal English, it was stated that, the claimant's counsel received a letter, which was exhibited to this affidavit, from the Supreme Court's Registrar, which confirmed that, a document headed 'Particulars of Claim' was indeed on the court's file of this matter. The content of that letter is as follows:

*'Further to request made in correspondence dated April 3, 2017, I am confirming that there is a document headed "Particulars of Claim" on the Court's file.'*

## **Submissions**

### **The defendant's submissions**

[12] As earlier stated, counsel for the defendant contended that court does not have jurisdiction to try this matter as the Particulars of Claim is not before the court. In that regard, counsel placed reliance on **rule 8.1 of the Civil Procedure Rules (CPR)**, which instructs that for a claim to commence, a Claim Form and a Particulars

of Claim, must be filed in the registry of the Supreme Court for sealing. The absence of the court's stamp on the document headed 'Particulars of Claim,' meant that there was no evidence that the claimant's claim has properly commenced.

[13] Defence counsel also argued that, as regards the claimant having signed the Parasailing Release of Liability, Waiver of Claims, Express Assumption of Risk and Indemnity Agreement, the claimant voluntarily agreed to release the defendant from any and all responsibility or liability to him, whilst he was engaged in parasailing with the defendant's company. In that regard, counsel submitted, the claimant had no real prospect of succeeding in his claim.

[14] Further, counsel argued, the claimant is ordinarily resident outside of Jamaica, there is no evidence that the claimant has any assets within this jurisdiction, and that the claimant has been declared bankrupt and as such, the court should award security for the defendant's legal costs of \$2,000,000.00. Further, counsel for the defendant argued that the provisions of the **Consumer Protection Act** do not apply to this case, as the claimant contracted out of the provisions of that Act, in that, the claimant has waived his right, by that agreement, to bring any claim against the defendant to recover damages for negligence.

### **The claimant's submissions**

[15] Counsel for the claimant, on the other hand, submitted that the Claim Form and the Particulars of Claim were both filed, and the claim properly commenced. Counsel asked that the court take judicial notice of that fact. Counsel for the defendant also argued that, this is not a proper claim for summary judgment to be awarded. This, counsel submitted, as **section 37(1)** of the **Consumer Protection Act**, barred the defendant from excluding liability for negligence, that led to the claimant receiving injuries.

[16] Counsel further argued that, **section 43(3)** of the said Act, requires the defendant to show that the terms of the said agreement, signed by the defendant, were

reasonable in order for it to take effect. Counsel also made the argument that it would be unjust to make an order for security for costs, as the applicant has not presented any cogent reason why it should receive security for costs and especially for the sum of \$2,000,000.00.

### **Issues to be determined**

[17] The issues to be determined by the court are: (i) Whether the claim was properly instituted; (ii) Whether the defendant should obtain summary judgment; and (iii) Whether, in the alternative, an order of security for costs may be granted to the defendant in the circumstances.

### **The law and analysis**

#### **Whether the claim was properly instituted**

[18] In order to determine whether the claim was properly instituted, it is necessary to review **rule 8.1(1) and (2) of the CPR**, which states as follows:

*'1) A claimant who wishes to start proceedings must file in the registry of the court at The Supreme Court, King Street, Kingston (or at such other place as the Rules Committee may determine) the original and not less than one copy for each defendant (for sealing) of-*

*(a) the claim form; and*

*(b) unless either rule 8.2(1)(b) or 8.2(2) applies*

*(i) the particulars of claim; or*

*(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part.*

*2) Proceedings are started when the claim form is filed.'*

[19] The question to be asked at this juncture is: Were the Claim Form and Particulars of Claim, properly filed? As stated in the affidavit of Brenton Brown, those documents were delivered to the court's registry where they were affixed with the court's stamp and thus were, as appeared to that affiant, filed. The documents that were subsequently served on the defendant, however, contained among those

documents, a copy of the Particulars of Claim that was not affixed with the court's stamp. The subsequent correspondence with the Registrar of the Supreme Court however, showed that there was indeed, upon the court's file, a copy of the Particulars of Claim which was duly filed.

[20] The court can always take judicial notice of all documents upon the file of all matters, before the court, for its consideration. Therefore, this court takes judicial notice of the fact that upon the file of this matter, there is a Particulars of Claim affixed with the court's stamp, the said stamp bearing the date 'January 4, 2017,' the same date contained within the court stamp which was stamped on the Claim Form, and therefore, I find that this claim has been properly commenced. It follows then, that this court has the requisite jurisdiction to hear this matter.

### **The issue of Summary Judgement**

[21] The other relief being sought by the defendant, in the alternative to the relief of the striking out of this claim, was that summary judgment ought to be awarded to the defendant, as the claimant has no real prospect of being successful in his claim for damages. The defendant placed reliance on, what it termed a '*Parasailing Release of Liability, Waiver of Claims, Express Assumption of Risk and Indemnity Agreement*,' which, the defendant submitted, the claimant signed, of his own volition, to release all liability and responsibility of the defendant, in relation to the claimant, for any '*liability and responsibility from any claim or cause of action.*'

[22] In response to this argument, the claimant placed reliance on the **Consumer Protection Act**, specially **sections 37(1) and 43(3)**. For the purposes of these reasons, it is only necessary to set out the provisions of **section 37(1) of the Consumer Protection Act**. To my mind, **section 43** of that Act, does not apply, because that section pertains to 'other loss or damage,' whereas **section 37** relates specifically to, 'liability for death or personal injury, resulting from negligence.' This is a claim for damages for personal injury, resulting from alleged negligence. In the circumstances, the claimant is not claiming for any loss or damage, other than

arising from that. Considered in that context, section 43 is undoubtedly, inapplicable. **Section 37(1) and (2)** state as follows:

*'37--(1) A person shall not by reference to –*

- a) Any term of a contract;*
- b) A notice given to persons generally; or*
- c) Particular persons,*

*Exclude or restrict his liability for death or personal injury resulting from negligence.*

*(2) In the case of other loss or damage, a person shall not so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness as provided for in section 43.'*

The words, 'other loss or damage,' in **section 37(2)** therefore, must relate to loss or damage other than arising from death or personal injury. The defendant, on the other hand, argued that the provisions of that Act, do not apply to the present claim, as the claimant, by signing to that agreement, has waived his right to bring any claim against the defendant to recover damages for negligence. How then should the court treat with this issue, at this stage of the claim, upon the defendant's application for summary judgment?

**[23]** Firstly, **Part 15 of the C.P.R** empowers the court to determine a claim or a particular issue in a claim without a trial. Further, **Rule 15.2 of the C.P.R** permits the court to grant summary judgment on a claim, or on a particular issue of the claim, where the court considers that the claimant has no real prospect of succeeding on that claim, or issue, or the defendant has no real prospect of successfully defending the claim or issue, as the case may be. **Rule 15.2 of the C.P.R** states as follows:

*'15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*

*(a) the claimant has no real prospect of succeeding on the claim or the issue; or*

*(b) the defendant has no real prospect of successfully defending the claim or the issue.'*

[24] Additionally, **rule 15.6 of the C.P.R** outlines the court's powers in granting summary judgment. That rule reads as follows:

*'15.6 (1) On hearing an application for summary judgment the court may-*

- (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
- (b) strike out or dismiss the claim in whole or in part;*
- (c) dismiss the application;*
- (d) make a conditional order; or*
- (e) make such other order as may seem fit.'*

[25] In **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4, Harris JA, at paragraph 31 stated:

*'A court, in the exercise of its discretionary powers must pay due regard to the phrase "no real prospect of succeeding" as specified in Rule 15.2. These words are critical. They lay down the criterion which influences a decision as to whether a party has shown that his claim or defence, as the case may be, has a realistic possibility of success, should the case proceed to trial. The applicable test is that it must be demonstrated that the relevant party's prospect of success is realistic and not fanciful. In **Swain v Hillman** [2001] All ER 91, 92 at paragraph [10] Lord Woolf recognized the test in the following context:*

*"The words 'no real prospect of being successful or succeeding do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospect of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

[26] Further, at paragraph 34, Harris JA, referred to the House of Lords' judgment in the case: **Three Rivers District Council v Governor and Company of the Bank of England** [2001] 2 All ER 513, where Lord Hutton, at paragraph 158, stated the approach a judge should adopt when dealing with the applicable test. Lord Hutton stated the following:

*'the important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect," he may decide the case accordingly.'*

[27] The party opposing an application for summary judgment, is not required to adduce compelling evidence, but instead, may successfully oppose same by putting forward

enough evidence to raise a real prospect of a contrary case: See **Korea National Insurance Corporate v Allianz Global Corporate and Specialty AG** - [2007] EWCA Civ. 1066. Where a respondent puts forward a prima facie case in answer, then the matter should ordinarily be allowed to continue to trial. Further, where the court is called upon to decide upon an application for summary judgment, the court must consider same, taking into account very carefully, the overriding objective of dealing with the case justly.

[28] Applying the above learning to the present claim, can it properly be said that the claimant has no real prospect of being successful in this claim? The claimant placed reliance on the **Consumer Protection Act** for the proposition that the defendant is not entitled to rely upon the terms of the '*Parasailing Release of Liability, Waiver of Claims, Express Assumption of Risk and Indemnity Agreement*,' which restricts any '*liability and responsibility from any claim or cause of action*' against the defendant, arising from the claimant engaging in parasailing activities being provided by the defendant. The defendant made the argument that this Act does not apply, in light of the claimant signing said agreement, of his own volition, and having purportedly waived his right to bring a claim against the defendant, to recover damages for negligence.

[29] It is my view, however, that it is not plainly clear, at this stage, as to whether or not the **Consumer Protection Act** does not apply, in light of **section 37(1)** of that Act, and that issue should not be determined, without a trial. Also, it cannot be said that the claimant has a fanciful prospect of success, in the face of the provisions of the said Act. A similar issue of the applicability of the **Consumer Protection Act**, was raised in the recent case of **National Commercial Bank Jamaica Limited v Surrey Hotel Management Limited** [2018] JMCA Civ 28, where Brooks JA, made the following observation at paragraphs 42 to 43:

*'[42] [The respondent] relied on the Consumer Protection Act 2005 for the proposition that, as [the appellant]'s customer, it was entitled to the benefit of having the contract examined to determine whether it unreasonably excluded or placed a limit on liability. [The appellant] contended that the*

*Consumer Protection Act had no application to a case such as this. It argued that the Act was not intended to apply to commercial entities, which had entered freely into a commercial contract.*

*[43] There is no decided case on the point, which has been brought to the court's attention in this case. None was provided to Sykes J. The learned judge was entitled to say, as he did, that this was an issue which should be determined at a trial. He cannot be said to have been plainly wrong.'*

## **Security for Costs**

**[30]** The further alternative relief, being sought by the defendant, was that an order be granted for security for costs, in the sum of \$2,000,000.00. The conditions to be satisfied before an order for security for costs may be granted are set out in **rule 24.3 of the CPR**, as follows:

*'24.3 The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that –*

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

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

*(c) the claimant:*

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

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

*(iii) 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.'*

[31] In the judgment of the Court of Appeal in **Symsure Limited v Kevin Moore** [2016] JMCA Civ 8, Phillips, JA, at paragraph 40, stated the following:

*‘[40] As stated above, rule 24.3 of the CPR stipulates the conditions under which the court is at liberty to make an order against a claimant for security for costs. However, since the justice of the case, in the light of all the circumstances forms a significant consideration, the learned judge has been given a discretion in refusing or granting the order for security for costs. The principles distilled by Lord Diplock in *Hadmor Productions Ltd and others v Hamilton and others* [1982] 1 All ER 1042, with regard to the exercise of the discretion of the single judge in the court below, are well known. That dictum although made with regard to interlocutory injunctions applies to interlocutory applications generally and thus to the instant application. Lord Diplock stated at page 1046 of the judgment that:*

*“...It [the appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.”*

*Thus the appellate court will only interfere with the learned judge's decision where it is demonstrated that the judge has gone palpably wrong.’*

[32] In the case at bar, the applicable conditions listed under **rule 24.3 of the CPR**, to the present case, are those listed in (a) and (d). It is clear from the claim, that the claimant is ordinarily resident outside of the jurisdiction, and further, at paragraph 22, of the Particulars of Claim, the claimant averred that, by virtue of the injuries he sustained, he was unable to operate his business and as such, was declared bankrupt in or about June, 2012. Notwithstanding those factors, the justice of the case, in light of all the circumstances, forms a significant consideration, which influences the refusal or granting of an order for security for costs. Phillips, JA, again, stated in **Symsure Limited v Kevin Moore**, *op. cit.*, at paragraph 47:

*'[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.'*

[33] It follows therefore, that I must endeavour to ascertain, whether it is just to make this order in this present claim. In light of the issue raised above, as regards the applicability of the **Consumer Protection Act**, I am of the view that the claimant's claim cannot properly be considered a sham claim, or one that has a fanciful prospect of success. Further, Phillips, JA continued at paragraph 50 in **Symsure Limited**, that:

*'[50] As a consequence, at the end of the day, the court is really being asked to conduct a balancing exercise weighing the injustice to the claimant, on the one hand, if prevented from proving a genuine claim, as against the injustice to the defendant, on the other hand, if no security is obtained and the defendant's costs cannot be paid at the end of the trial if the defendant is successful. It is the role of the court to ensure that the exercise of its discretion is not used as an instrument of oppression stifling a genuine claim of an indigent person. But, equally, a court should not permit an indigent person to use his/her impecuniosities as a weapon to pursue a claim which is a sham and cause costs to be incurred which can never be paid.'*

[34] Since, as I have found, the claim is a genuine and not a fanciful one, I am bound to weigh the possible injustice to the parties, should the order for security for costs be refused or awarded. I am of the view that greater injustice will be occasioned to the claimant if the order for security for costs was to be granted. The defendant has advanced that the claimant is bankrupt and, therefore expresses the view that it may not be able to recover its costs if it were to be successful at trial. The claimant has however averred, that the reason for his bankruptcy was as a result of the injuries he sustained which prevented him from attending upon his business.

[35] In light of this averment, it seems to me, that an order for security for costs will most likely, serve as an instrument of oppression, stifling a genuine claim of an indigent

person. Further, the defendant has not stated how, it arrived at the sum of \$2,000,000.00 for its costs, and there was no breakdown of the expenses it will, or has, incurred, in defending this claim. Neither is there any material or evidence which could justify a smaller sum being granted, and, in any event, no other sum was sought as an alternative to the sum of \$2,000,000.00 to be awarded as security for the defendant's costs. Consequently, pursuant to **rule 11.13 of the CPR**, this court is precluded from granting such alternative sum as it was never sought by the defendant in their application. As such, I will refuse to grant this relief being sought by the defendant.

## **Conclusion**

**[36]** In the round, the defendant has not shown that the claimant's claim is one which does not have a real prospect of success at trial, and this court is clothed with the requisite jurisdiction to try this claim as the commencement documents have been properly filed. Further, the relief of security for costs is also refused, as that relief, should it be granted, would not be furthering the justice of this claim.

## **Orders**

- 1) The defendant's application, filed on March 7, 2017, is refused. Costs of that application are awarded to the claimant, with such costs to be taxed, if not sooner agreed.
- 2) The claimant's application for court orders, which was filed on May 18, 2017, is not granted, and the costs of that application are awarded to the defendant, with such costs to be taxed, if not sooner agreed.
- 3) The defendant shall file its defence within forty-two (42) days of the date of this order.
- 4) Subject to the defendant's compliance with Order 3 herein, this matter shall proceed to mediation.

5) The defendant shall file and serve this order.

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**Hon. K. Anderson, J.**