[2012] JMCC Comm. No. 6

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

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2012 CD 00001**

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|---|---|---|
| **BETWEEN** | **C&H PROPERTY DEVELOPMENT COMPANY LIMITED** | **CLAIMANT** |
| **AND** | **CAPITAL AND CREDIT MERCHANT BANK LIMITED** | **DEFENDANT** |

**Mr. Leonard Green and Mr. Sean Hanson instructed by Chen Green & Co. for the Claimant.**

**Mrs. Georgia Gibson-Henlin and Ms. Taneisha Brown instructed by Henlin Gibson-Henlin for the Defendant.**

**IN CHAMBERS**

**HEARD: 17 and 26 April and 4 May 2012.**

**Company Law - Security for costs application under Section 388 Companies Act- What constitutes credible testimony of reason to believe company will be unable to pay costs - Sub-sections 221(a) and 221(c) Companies Act - Different requirements - When company deemed to be unable to pay debts - Inability/failure to pay debts more crucial test of insolvency than whether liabilites exceed assets**

**Mangatal J:**

[1] The application before me is an application filed by way of Notice of Application for Court Orders dated December 12 2011 filed on behalf of the Defendant Capital and Credit Merchant Bank Limited. The Defendant seeks, amongst other relief, security for costs. Specifically, at paragraphs 2,3,4 and 6 the Notice asks the Court to grant the following:

*...*

2. *An order that the Defendant provide security for costs in the sum of $7,500,000.00 within 7 days of the date hereof ;*
3. *The said security be paid into an account in the name of the parties' Attorneys-at-Law in a licensed financial institution to abide the outcome of the proceedings or further order of the court.*
4. *The Claim is stayed until the security for costs is paid…*

*…..*

*6. That the costs of this application be the Defendant's.*

[2] The grounds for the application for security for costs are stated to be:

(a) That the application for security for costs is made pursuant to section 388 of the Companies Act;

(b) That the Defendant has served on the Claimant statutory notices under section 220 of the Companies Act.

[3] The Claimant is a limited liability company duly incorporated under the Companies Act of Jamaica, with registered offices at 6 Hampton Close, Kingston 10. It is common ground that the Claimant is the developer of property known as Vista Ambassador Resort and Spa situated at Gloucester Avenue, Montego Bay, St. James.

[4] The Defendant is a limited liability company duly incorporated under the laws of Jamaica, with registered office at 6 – 8 Grenada Way, Kingston 5, St. Andrew. It is also common ground that the Defendant is a merchant bank that lends money on terms to its customers, operating under and pursuant to the Financial Institutions Act and other relevant laws and regulations.

[5] This claim is based upon loan agreements between the Claimant and the Defendant and includes several restructured agreements. Whereas the Defendant avers that the ordinary relationship of Banker and Customer exists between itself and the Claimant, the Claimant maintains that the Defendant owed it fiduciary duties which the Defendant breached, causing the Claimant

extensive loss and damage. The Defendant Bank has denied such claims and has counterclaimed for sums which it says are outstanding.

[6] The Defendant also has a mortgage by way of security in respect of the said loans over lands registered at Volume 1443 Folio 525 of the Register Book of Titles owned by the Claimant. The Defendant had attempted to exercise its powers of sale until the Claimant obtained ex parte court orders restraining such exercise. On the 12th of January 2012 the ex parte injunction as extended was discharged. The Claimant has since, on April 5 2012, filed a new application for an injunction restraining the Defendant from dealing with the said land. That application has not yet been heard.

[7] The application is supported by the Affidavit of Curtis Martin, the President and CEO of the Defendant, filed December 12, 2011, the Affidavit of Marc Jones, Attorney-at-Law and Associate of the firm Henlin, Gibson-Henlin, Attorneys-at-Law for the Defendant, filed April 12, 2012, and the Fourth Affidavit of Marc Jones filed April 20th 2012.

[8] The application has been vigorously opposed and the Affidavits of Constantine Hinds, the Managing Director of the Claimant, filed on the 5th and 25th April 2012 respectively have been filed in opposition to the application.

[9] On the 17th of April when I initially heard this matter, I had completed hearing submissions and indicated that I would deliver my decision on the 26th of April 2012. However, I had ordered that a Further Affidavit be filed by the Claimant by the 25th of April 2012 exhibiting the signed financial statements, if any, since Counsel for the Defendant had pointed out the unsigned, unaudited nature of the financial statements exhibited to Mr. Hinds Affidavit of the 5th April 2012.

[10] In the interim, the Defendant filed and served, without the Court's permission, two further Affidavits of Mr. Marc Jones, one filed on the 18th of April and one on the 20th of April respectively. Counsel Mrs. Henlin informed the Court that the Affidavit of the 18th had been filed to give a breakdown not

previously provided of the estimate of costs indicated at paragraph 17 of Mr. Martin's Affidavit. The Affidavit of the 20th, Counsel advised, concerned a charging order made by the Court in respect of a judgment debt owed by the Claimant. I disallowed the use of the Affidavit of the 18th as I did not think that it would be fair to the Claimant to allow its use. This is because it came after arguments had been closed, and after Mr. Green, Counsel for the Claimant, had been at pains to point out alleged lack of detail and excessiveness in relation to the costs claimed by the Defendant as an estimate. In addition it was filed after my decision had been reserved; it would not be fair to permit the Defendant to have another bite at the cherry, so to speak. However, I asked Counsel Mr. Green whether his client would be embarrassed or prejudiced by the admission of the evidence of the charging order, since I was of the view that if it related to other relevant court proceedings, and if Mr. Hinds or the Claimant were aware of this matter, that the Affidavit evidence ought to be admitted. Mr. Hinds candidly admitted that he was aware of the Law Suit and of the charging order and thus I admitted Mr. Jones' Affidavit of 20th April.

[11] Section 388 of the Companies Act states as follows:

> *Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for these costs, and may stay all proceedings until security is given.*

[12] Sections 220 and 221 of the Companies Act, in so far as relevant, state as follows:

> *Circumstances in which companies may be wound up by court*
>
> *220. A company may be wound up by the Court if-*
>
> *……*
>
> *(d) the company is unable to pay its debts;….*
>
> *……*
>
> *Definition of inability to pay debts*

*221*

*A company shall be deemed to be unable to pay its debts-*

*(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred thousand dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or*

*…..*

*(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company*

[13] In his Affidavit supporting the application for security for costs, Mr. Curtis Martin at paragraphs 5-15 gives evidence that:

(a) the Claimant has had a winding up order made against it in the past, albeit that order has since been discharged (both events occurred in 1986) ;

(b) the Defendant has made a demand requiring the Claimant to pay (i) the sum of US$349,279.33 being principal and late charges in respect of the restructured loan which it made to the Claimant; and (ii) in respect of the recoverable accounts, the sums of J$1,324,279.33 and US$68,061.88, and that the Claimant has not paid these sums which are due. It is the Defendant‘s evidence that the demand was contained in a letter dated 16th September 2011, which was delivered to the Claimant:

(i) By leaving it at the registered address of the company (which appears to be abandoned), and

(ii) By sending it by registered post to the registered address. A copy of the registered slip is exhibited.

Attempts were also made to serve a copy of the letter on Mr. Hinds at the address set out in the last annual return filed by the Claimant but that address appeared abandoned also.

(c ) The Claimant failed to disclose that he did not pay a judgment debt due to Oswald James and Oswald James & Co. in Claim No. 2007 HCV04756, as a result of which the Claimant was placed in court-ordered receivership on the 4th of October 2011. On that date it is alleged that the Claimant's principal Mr. Hinds failed to appear in Court when the Claimant should have paid $3,500,000.00. The judgment creditor also obtained an order for the sale of land and charging order in respect of the land the subject of the mortgage and the law suit.

[14] In his Affidavit of April 20 2012, Mr. Jones states that he has obtained a copy of a provisional charging order made by Edwards J. on January 12 2012 in Claim No. 2009 HCV 4198 over the property registered at Volume 1443 Folio 525 of the Register book of Titles, which is the subject of the Defendant's mortgages and this law suit. The charge was made to cover a debt of approximately $4,000,000.00 owed by the Claimant to Donovan Simpson and Associates, Commissioned Land Surveyors. The hearing for the making of a final charging order is fixed for the 25th of June 2012.

[15] In his Affidavit filed April 5 2012, Mr. Hinds has indicated that there is no longer a receiver/manager in respect of Claim No. 2007 HCV 04756 and that the Claimant has settled the indebtedness. It is common ground that the Defendant paid a portion of the judgment debt, i.e. J$5,668,266.00 on behalf of the Claimant. The Claimant paid the $3,500,000.00 some time after. At some point, arrangements were made for the charging order to be lifted.

[16] As regards the matter of the charging order imposed in Claim No. HCV 2009 HCV 4198 Mr. Hinds admitted in Chambers quite candidly through his Counsel that he was aware of this charging order. There is no evidence that the judgment debt of approximately $4,000,000.00 has been paid.

[17] In relation to the evidence as to the Claimant's registered office, Mr. Hinds stated that the registered office of the company is currently 3 Mountain Spring Drive Kingston 6. However, in Mr. Jones Affidavit filed April 12, he depones on behalf of the Defendant that he made checks on April 11 2012 at the Company's Registry and that search revealed and confirmed that the only address notified as the registered office of the Claimant is 6 Hampton Close Kingston 10.

[18] Mr. Hinds admits that he did receive the Notice of Demand amongst other papers delivered to him by the Defendant at 4 Dumfries Road, Kgn 5, an address at which he states that the Defendant knows the Claimant operated offices and to which the Defendant has from time to time delivered mail.

**[**19] At paragraphs 32 and 43 of his Affidavit of the 5th April, Mr. Hinds states:

> *32) That the property was valued at United States Sixteen Million Dollars(US$16,000,000.00) in September 2010 by Edwin Tulloch-Reid & Associates and I would expect that the value has increased since then and as such the Defendant will in no way be disadvantaged by an injunction restraining them from selling the property if upon the hearing of this matter they should be successful, as the value of the property is well in excess of its interest in same, and if sold would be able to fulfil any order as to costs made by this Honourable Court and provides adequate protection for an order as to costs. Exhibited hereto marked "HC-5" is a copy of the Valuation Report dated September 2010.*
>
> ……
>
> *43) That in further support of the Claimant's ability to fulfil an order as to costs I wish to attach the Financial Statements for the Claimant as at July 31, 2011. Exhibited hereto marked "CH-6" for identification is a copy of the Claimants Financial Statements.*

[20] In his later Affidavit filed on April 25th 2012, Mr. Hinds exhibited a signed copy of the Claimant's financial statements. He also attached dated

April 19 2012, an analysis of the Financial Statements by Chartered Accountants Blake Livingston & Co.

**THE DEFENDANT /APPLICANT'S SUBMISSIONS**

[21] Mrs. Gibson-Henlin, on behalf of the Defendant, submitted that unlike the security for costs provisions at Part 24 of the Civil Procedure Rules, impecuniosity *per se* is a ground for an order for security for costs against a limited liability company under s.388. Therefore the Court has the discretion to grant an order for security for costs where it has reason to believe that should the Claimant company be unsuccessful, it would be unable to pay the Defendant's costs. In such cases, the Court can require that the Claimant give sufficient security and the Court's discretion, Mrs. Henlin submits, is to be exercised having regard to all the circumstances of the case.

[22] Counsel submitted that this case is an appropriate case in which to order security for costs based principally upon the matters and evidence set out at paragraphs 13 and 14 above, which, it was submitted, show that the Claimant has had a history of insolvency.

[23] Reference was made to two of our Court of Appeal's decisions, **The Shell Company (WI) Ltd. v. Fun Snax Ltd. and Midel Distributors** (Unreported) [2011] JMCA App 6, and **Cablemax Limited & Ors v. Logic One Limited** SCCA No. 91/09, judgment delivered 21 January 2010, where the guiding principles, and relevant considerations are ably set out.

**THE CLAIMANT/RESPONDENT'S SUBMISSIONS**

[24] Mr. Green, on behalf of the Claimant, submitted that the Claimant has valuable assets from which the Defendant's costs could be settled and has a realistic prospect of succeeding in its claim. He argues that the Claimant is, in essence, saying that the mortgage given to the Defendant has been affected by the subsequent conduct of the Defendant. He submits that there is a fiduciary relationship between the Claimant and the Bank which duty has been breached.

[25] Mr. Green pointed to the fact that the property the subject of the mortgage has been valued by Edwin Tulloch-Reid and Associates at an open market value of US$16 Million, with a forced sale value of US$12.8 Million.

[26] He also points to the Financial Statements where the assets, property, plant and equipment are stated to be of a value in excess of 1.5 Billion dollars for 2011 and where the operational income is stated to be $23 Million.

[27] It is also Mr. Green's submission that the amount put forward as an estimate of costs is excessive. Further, that the Defendant must not be allowed to make a security for costs application in order to stifle a claim.

**RESOLUTION OF THE ISSUES**

[28] The Court must in an application such as this, balance the injustice to the Claimant if prevented from pursuing a proper claim by an order for security for costs against the injustice to the defendant if no security is ordered and at the trial the Claimant's claim fails and the defendant finds itself unable to recover the costs which have been incurred by it in defending the claim-**Keary Development Ltd. v. Tamac Construction** [1995] 3 All E.R. 574.

[29] Whilst the Court should not allow an order for security for costs to stifle a claim, this is but one of a number of factors to be considered-**Keary**, **Shell v. Funsnax**, and the **Cablemax** decision. In any event, I am not satisfied that the evidence here rises to such a level (paragraph 17 of Mr. Hinds Affidavit of 5th April), and Mr. Hinds has not expressly said that an order for security for costs would stifle the claim. I am not satisfied in the circumstances that it is probable that the claim would be stifled.

[30] In this type of application, the central issue is whether there is credible evidence/testimony of a reasonable belief that the Claimant Company will be unable to pay the Defendant's costs if successful. In the old, but nevertheless still useful English case of **Northampton Coal , Iron & Wagon Co v. Midland Wagon Co.** Vol. VIL L.R. 500, in examining a provision in the old English

Companies Act similar to our section 388, Lord Jessel M.R. stated at page 503:

> *I should say that the fact of the Plaintiff Company being in liquidation would be sufficient "reason to believe" the assets to be insufficient unless evidence to the contrary was given.* (My emphasis)

[31] The case report notes that "[His Lordship then referred to the evidence as not rebutting but strengthening this prima facie case]."

[32] I found the analysis afforded by Phillips J,A, in the **Shell Co v. Fun Snax** case, most helpful. In the instant case, I like Phillips J.A. at paragraph 9 of the **Fun Snax** case, find that, "on the face of it, it would appear that the Claimant is not in a good financial position at this point in time." (My emphasis)

[33] Whilst it may well be, that as stated by Mr. Hinds in his most recent affidavit, there is no longer a receiver/manager in respect of Claim No. 2007 HCV 04756, and the Claimant has settled that indebtedness, the point is that he was assisted by the Defendant making a substantial payment on his behalf, and that he did not settle the indebtedness in a timely manner. Further, the evidence is that the charging order remains in place, and the undisputed indebtedness of $4,000,000.00 remains outstanding in respect of Claim No. 2009 HCV 4198. In addition, the Claimant has previously had a winding up order made against it, albeit that was in the distant past and has been discharged. Since this order happened so long ago, I do not attach much weight to it, but it does form part of the Claimant's financial antecedents.

[34] However, importantly, in paragraph 57 of his Affidavit of the 5th of April, and elsewhere, it is clear that Mr. Hinds admits receiving millions of US dollars from the Defendant by way of loan. At paragraph 9, the Claimant admits that "it has not paid the debt due to the Defendant", but gives the explanation that it has taken issue with the Defendant's handling of the loan portfolio. In order to succeed at trial, the Claimant will have to prove there is

no ordinary relationship of Banker and customer in this case, and that this is a case falling within a narrow and special category of cases where it could be said that the Defendant Bank owes fiduciary duties to the Claimant. "In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure" per Morrison J.A. in the **Cablemax** case, applying the dicta in **Keary Developments Ltd. v Tarmac Construction Ltd** [1995] 3 All E.R. 534 at 539.

[35] In the instant case, whilst not looking into the merits of this matter in great depth, it seems to me that there is a high degree of probability that the Claimant will be found to owe the Defendant some not insubstantial sums, at any rate, a sum in excess of the J$500,000.00 requirement in sub-section 221(a) of the Companies Act. Therefore, I have looked to see what are the considerations in relation to a sub-section such as s.221(a). In that regard, I found the decision of the Supreme Court of Malaysia, in **Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd** [1992] 1 M.L.J. 313,cited by Mrs. Gibson-Henlin, instructive and persuasive. On the evidence before me, I am satisfied that the requirements of section 221(a) of the Companies Act have been met. I am in other words satisfied that the Claimant is indebted to the Defendant in at least the sum of J$500,000.00, has served a demand for payment of the amounts stated in letter dated 16th September 2011, and has left it at the registered office of the company. Further, that for three weeks thereafter, indeed up to the present time, the Claimant has not paid the sum demanded, or any sum at all. By virtue of section 221(a), a company is deemed to be unable to pay its debts in those circumstances. It was pointed out that in relation to sub-sections similar to our sub-sections 221(a) and 221(c), whilst in relation to sub-section 221(c), it is necessary to prove to the satisfaction of a Court that the company is unable to pay its debts, and to take into account, in determining whether a company is unable to pay its debts, the contingent and prospective liabilities of the company, this is not necessary under s. 221(a). This is because under s. 221(a) there is a presumption of insolvency which arises when the requirements of the sub-section are

satisfied. As stated at paragraph 12 of the **Sri Hartamas** case, in those circumstances, it is for the company to prove that it is able to pay its debts. This in fact sounds similar to the statement in the **Northampton Coal** case, dealing with the matter of credible testimony as referred to in section 388 of the Companies Act.

[36] It is also plain that the Claimant has not provided proof that it is able to pay its debts. On the contrary, in addition to the conditions in s.221(a) being satisfied, there are the matters set out at paragraph 33 above. The evidence contained in the financial statements does not at all suggest that the Claimant can pay its debts, indeed, at page 4, it is stated that the Claimant suffered a net loss of over $87 Million as at July 31, 2011. I am not therefore satisfied that the Claimant can pay its debts as and when they fall due.

[37] In addition, whilst it is true that the valuation report of the property reflects a substantial value in US dollars, at the same time the amount allegedly due to the Defendant represents a significant portion of the alleged value of the property. Further, there is also a charging order on the land the subject of the mortgage in respect of Claim No. 2009 HCV 4198. There are therefore other demands on the property. In Suit No. 2002/M058 **Manning Industries and another v. JPS** unreported, judgment delivered May 30, 2003, Brooks J., as he then was, did comment (perhaps obiter as Counsel describes it) about the suitability, or rather the lack thereof, of relying on the disputed assets to answer an application for security for costs. Here, however, as Mr. Green submitted in his supplementary written submissions, the situation may be somewhat different as this is not a dispute as to ownership or entitlement to the subject property. Nevertheless, the underlying point still remains that if there are claims on the property which is being put forward as providing a source/ asset/ fund or security from which costs could be paid, including the claim in the case before the Court, that would be a relevant consideration since there would then be liabilities or claims competing with any quantum found due for costs. From what I have seen in the Valuation Report, and the letter from Blake Livingston & Co, it does appear that the hotel is not yet trading. Further, that the valuation was prepared on the basis

of disposal by way of sale as a hotel enterprise, which would be different than that arrived at if performing the valuation of the property on the basis of land and buildings. The valuation on the basis of land and buildings would be lower. – see point 2.0 of the Valuation report as well as the penultimate paragraph of the letter from Blake Livingston & Co.

[38] However, there is an even more fundamental reason why the values of the Claimant's assets do not in my judgment assist the Claimant. Mrs. Gibson-Henlin referred me to the work of Derek French, entitled **Applications To Wind Up Companies**, 2nd Edition, in which the **Sri Harmatas** case is referred to. At paragraph 6.3.3., under the heading "Methods of Proving That a Company is Unable to Pay its Debts", at pages 405-406, the learned author states:

*A company is deemed unable to pay its debts if any one of the six circumstances is proved and even though one or more of the other circumstances cannot be proved. In particular, a company which fails to comply with a statutory demand or is proved to be unable to pay its debts as they fall due is deemed to be unable to pay its debts even though, according to its balance sheet, its assets are larger than its liabilities. This reflects the fact that failure to pay an undisputed debt when it is demanded is a more crucial test of insolvency than whether liabilities exceed assets, because there is always doubt whether assets will achieve their stated value if they have to be sold to meet liabilities. In practice a company whose assets are greater than its liabilities should be able to borrow money to pay debts as they fall due, and the fact that a company is able to pay its debts only with borrowed money does not show that it is unable to pay its debts. In Malayan Plant (Pte) Ltd. v.Moscow Narodny Bank Ltd. the Privy Council (per Lord Edmund-Davies) described as 'impeccable' the following statement commenting on what is now IA 1986, s. 123(1)(a) to (d) (failure to comply with statutory demand; failure of execution):*

*"The particular indications of insolvency mentioned in [s. 123(1)(a) to (d) are all instances of commercial insolvency , that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound; this is*

*not the test.* *A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this is so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.*

*It is submitted that proof that a company is unable to pay its debts is proof that it is unable to pay its debts as they fall due as required by s. 123(1)(e).*

( My emphasis)

[39] I accept this reasoning as being eminently sound and logical commercially and that ought in my view to be the approach that is adopted here. This is perhaps one of the ways in which the criteria for the exercise of the discretion in relation to applications for security for costs against companies under section 388 of the Companies Act, and applications for security for costs under Part 24 of the CPR differ. As Mrs. Henlin contended, in relation to section 388 the question of insolvency (she used the word "impecuniosity"), is itself directly and expressly the foundation for the application. This is as opposed, for example to the availability of assets belonging to a foreign company within the jurisdiction as was the subject of the application in the **Manning** case.

[40] In the **Sri Hartamas** case, the company claimed to own land worth more than $500 million but was wound up for failure to pay a debt of $5 Million. In relation to the facts of this case, I find that even if the Claimant's assets are valued at in excess of $1.5 Billion, (which may well be overstated, for the reasons set out in paragraph [37] above) its failure to comply with the Defendant's statutory demand, or its inability to pay its debts as and when they fall due, is a better measure of solvency than the question of whether its assets exceed its liabilities. This is because of the uncertainty as to whether the assets will achieve their stated value.

[41] Mr. Green is in my view correct that in this case we are not dealing with a winding up application, and the court does have a wide discretion as to whether an order for security for costs should be made. However, at the same time, the Defendant has material upon which a winding up Petition could

potentially be made. There is evidence upon which the Claimant can be deemed to be unable to pay its debts under section 221(a) and(c). It seems logical to take all of those factors into account, in addition to the matters set out at paragraph 33 above, and the fact that there has been no evidence forthcoming from the Claimant that shows that it would be able to pay its debts. In so doing, the conclusion may reasonably be drawn that there is credible testimony of reason to believe that the company would be unable to pay the Defendants costs, which costs would become yet another debt of the Claimant's, if the Defendant is successful. The Defendant is therefore at risk of not being able to recover its costs in the event that it is successful against the Claimant.

[42] Weighing all of the relevant factors, I am of the view that my discretion ought to be exercised by making an order for security for costs against the Claimant. This in my judgment is the course that achieves the best justice, or the least injustice, in the circumstances.

[43] I will now turn to look at what is an appropriate amount to order as security. In my view, although at paragraph 17 of Mr. Martin's Affidavit the figure of $7,500,000.00 is put forward as an estimate of costs in relation to defending the claim, including costs on appeal, I do not think that there has been sufficient basis provided for putting forward this very high figure. Whilst it is stated that this is a commercial matter with facts going back to 2006, and it is estimated that the trial will last five days, I think that the estimate could have been more detailed and broken down, for example to show hourly rates or the fees attributable to Counsel's fees at trial.

[44] In any event, I bear in mind the guidance provided by Morrison J.A. at paragraph 14 of **Cablemax**, and by Peter Gibson L.J. in **Keary**. In considering the amount of security that might be ordered the court will bear in mind that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount. The amount should however not be a nominal amount. In all of the circumstances, I am minded to order Three Million Dollars ($3,000,000.00) by way of security for costs.

[45] I therefore make the following order that:

(a) The Claimant provides security for costs in the sum of Three Million Dollars ($3,000,000.00) by the 1st of June 2012.

(b) The said security is to be paid into an account in the names of the parties' Attorneys-at-Law in a licensed financial institution to abide 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.