[2019] JMSC Civ. 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV02508

BETWEEN	**SHAUNETTE NUNES**	**CLAIMANT**
AND	**THE BOARD OF SHORTWOOD TEACHER'S COLLEGE**	**1ST DEFENDANT**
AND	**THE MINISTRY OF EDUCATION**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**3RD DEFENDANT**

Disclosure – Unless order – Whether there has been compliance – Application for security for costs – Rules 28 and 24 of the Civil Procedure Rules 2002.

IN CHAMBERS

Richard Reitzin instructed by Reitzin & Hernandez for the Claimant

Monroe Wisdom instructed by Nunes, Scholfield, DeLeon & Co. for the 1st Defendant

Heard: June 5, 2019 and delivered on August 12, 2019

D. PALMER, J

[1] The issues relate to a Claim filed by Ms. Nunes on April 23, 2013 seeking damages for injuries, loss and damage she suffered as a result of the alleged negligence of the 1st Defendant in causing her to slip and fall on November 2, 2011. The first issue that concerns the Court is whether or not the 1st Defendant has complied with an order for standard disclosure as directed by the learned Master in Chambers. The consequence of non-compliance would be that the 1st Defendant's defence would stand as struck out and the matter would proceed to an assessment of damages. The

secondary issue concerns an application for security for costs made by the 1st Defendant, and its consideration will depend on my ruling on the Claimant's contention that the unless order has taken effect. It would be a useful starting place to give a brief history of the claim and the circumstances that gave rise to the first issue.

Background

[2] The Claimant, Shaunette Nunes, was at the material time employed to the Shortwood Teacher's College as a pantry maid and alleges that she slipped and fell while lawfully traversing a ramp located on the premises of the College in November 2011. Subsequent to the incident, she sought medical care and attention for injuries she sustained from the fall. She commenced legal proceedings against the 1st Defendant and others in April 2013, and currently resides abroad having left the employ of the College. Her claim sought, *inter alia*, damages for negligence, breach of duty of care under the Occupier's Liability Act and breach of employer's duty of care relating to the incident. In its Defence, the 1st Defendant has denied liability for the incident and say that the fall and any consequences alleged to have flowed from it were caused solely, or materially contributed to, by Ms. Nunes' own negligence.

[3] At the Case Management Conference ("CMC") on September 24, 2018, orders were made *inter alia* for standard disclosure. The learned Master in Chambers also adjourned the CMC and directed that any application for specific disclosure be filed by November 30, 2018. That application was filed in compliance with that order, and is pending. At the adjourned CMC on December 19, 2018, Master Mason made orders that unless the 1st Defendant filed and serve a new List of Documents by January 25, 2019 that complied in all respects with the Civil Procedure Rules ("CPR"), including rule 28.8 (3), and to furnish the Claimant with a copy of a particular memo by December 12, 2018, the defence would stand as struck out.

[4] An amended List of Documents was filed by the date directed, but on January 28, 2019, the Claimant's Attorneys-at-law wrote to the 1st Defendant's Attorneys-at-Law indicating that the defence was considered as struck out due to the 1st Defendant's

failure to comply with the learned Master's order; in particular, regarding the filing of the amended List of Documents. There appears to have been no reply to this letter and thereafter the issue of whether the 1st Defendant had in fact fully complied with the order was raised before Thompson-James, J who made the following order, *inter alia*:

> *Submissions and List of authorities relating to (i) question as to whether or not the First Defendant has complied with orders 1 & 2 made by Master Mason on December 19, 2008; (ii) Security for costs…*

[5] Affidavits were filed on the Claimant's behalf outlining the reasons for the belief that the 'unless order' had taken effect and the defence stands as struck out. The Court has been invited to enter judgment for the Claimant and to have a date fixed for an assessment of damages. I must therefore first determine whether there has been non-compliance with the order with the result that the 1st Defendant's defence stands struck out, and then, if not, to consider the application for security for costs.

Issue 1: Is the 1st Defendant in breach of the unless order and defence struck out

[6] The case for the Claimant is that the 1st Defendant has flouted Master Mason's unless order by reason of the fact that its amended List of Documents cannot be said to comply "in all respects with the rules", as required by the order. Specifically, the Claimant avers that the 1st Defendant has failed to disclose critical documents which are "directly relevant", within the meaning of rule 28.1(4) of the CPR, to the matters in question in the proceedings because they tend to support the Claimant's case and damage the Defendant's case. In addition, according to the Claimant, the Defendant's defence does not satisfy the certification requirements prescribed in the CPR, and so cannot be said to be in compliance with the dictates of the rules.

[7] The 1st Defendant's position is that it has fully complied with the unless order insofar as it served on the Claimant a copy of the memo referenced in the order and also filed and served an amended List of Documents conforming to the stipulations of the order on the prescribed date. For this reason, the 1st Defendant maintains that its defence does not stand as struck out.

The Claimant's Submissions

[8] The Claimant contends that neither the List of Documents filed on January 25, 2019 pursuant to Master Mason's unless order, nor predecessor List, have complied with the rules regarding standard disclosure. Counsel, Mr. Reitzin, submitted that a critical distinction ought to be made between standard disclosure and specific disclosure; this is not the latter where the court would need to satisfy itself as to the relevance of the documents sought, that they are or have been in the party's control, or at least that there is a prima facie case that the requirements will be met.

[9] It was further submitted that pursuant to rule 28.4 (1) of the CPR, a party is mandated under an order for standard disclosure to disclose all documents which are "directly relevant" to the matters in question in the proceedings. Under rule 28.1(3) of the CPR, a party "discloses" a document by revealing that the document exists or has existed. In line with Rules 28.1 (4) (a)-(c), to be "directly relevant" the document must be one that the party with control of the document intends to rely on; that tends to adversely affect that party's case; or tends to support another party's case.

[10] Counsel therefore argued that because the 1st Defendant was under an order to give standard disclosure, it was duty-bound to reveal the past or present existence of all documents upon which it intended to rely, including those which tended to adversely affect its case and those which tended to support its case. In support for his proposition, Counsel relied upon the dictum of Morrison JA (as he then was) in ***Marcia Jarrett v South East Regional Health Authority, Dr. Robert Wan and The Attorney General of Jamaica*** [2010] JMCA Civ 15 on rule 28.1(4), that disclosure has within its contemplation:

> *"every document… which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring [discovery] either to advance his own case or to damage the case of his adversary."*

[11] Counsel submitted that documents relating to the following, ought to have been disclosed:

- previous slips and falls on the same ramp;
- previous complaints about the safety of the ramp;
- requests for a central hand rail;
- remedial action by way of remodeling the ramp undertaken within about 5 months of the claimant's slip and fall; and
- the claimant's statement made shortly after her slip and fall;
- documents relating to the alleged issuing of appropriate footwear;
- documents relating to refitting the ramp with anti-slip tiles several years before the claimant's slip and fall;
- the attendance register;
- the claimant's letter to the Principal of Shortwood Teacher's College and copied to Mrs. Arlene Hewitt;
- sick leave and fitness certificates issued by the claimant's medical practitioner;
- correspondence and/or claim forms prior to the drafting of the Report of West Indies Alliance Insurance Company Limited on Employers (sic) Liability dated 3 March 2012.

[12] Counsel submitted further that it would be reasonable to suppose that these documents might directly or indirectly enable the Claimant to advance her case or damage the Defendant's case. He also pointed out that the qualifying words "tends to" as expressed in rule 28.1(4) of the CPR, have the effect of relieving the party seeking standard disclosure of definitively proving, or being capable of proving, that the documents are adverse to the case of their opponent or definitively supportive of their own case. Instead, it is enough if it merely has that tendency to be adverse or be supportive, and once it did, the party required to give disclosure of that evidence is duty bound to reveal its existence.

[13] For this reason, Mr. Reitzin reiterated that the aforementioned documents, some of which have yet to be disclosed, should have been disclosed, as they are directly relevant to the matters in question in the. Counsel argued that having received reports from other employees, relating to multiple slip and fall incidents on the same ramp, prior to the Claimant's own fall, documents reflecting the said reports would show or tend to show, that the 1st Defendant had actual notice of the risk. The risk had actually materialized in that others person, including one Mr. Murphy, who had been injured after slipping and falling while lawfully traversing the ramp. The cases of ***Susan Ellis v Bristol City Council*** [2007] EWCA Civ 685, ***Jackson v KAH_Australia Pty Ltd t/as Bayview Boulevard Sydney*** [2017] NSWSC 747 (23 June 2017), and ***Sheila Peskett v Portsmouth City Council*** [2002] EWCA Civ 1175 were cited as authorities for the proposition that documents relating to previous accidents of slips and falls are relevant and admissible, and for this reason, ought to be disclosed. The argument is that such complaints ought to have called the 1st Defendant's attention to the safety risks posed by the ramp; that it was a safety hazard, and that remedial action ought to have been taken by it at the time of such complaints, and certainly in advance of Ms. Nunes' fall.

[14] Reliance was placed on ***Targett v Torfaen Borough Council*** [1992] PIQR P125, where evidence was led that the Plaintiff had complained of lack of lighting before moving into a council house but that nothing had been done to correct or improve the lighting conditions. Moreover, given that the 1st Defendant has never, according to Ms. Nunes, denied the existence of documents relating to previous complaints about the state of the ramp, this would be a cogent factor militating in favour of the disclosure of any such documents, so long as they exist or have previously existed.

[15] The question of whether the ramp upon which the Claimant slipped and fell was safe or dangerous, it was submitted, was "a matter in question in the proceedings", as the Defendants alleged in their defence, at paragraph 7, that the 1st Defendant had taken all reasonable steps to ensure the safety of all invitees. In view of the fact that it remains unchallenged that some five (5) months following the Claimant's slip and fall, the 1st Defendant carried out remedial work by remodelling one side of the ramp into a set of long, wide steps, Counsel asserted that this claim by the 1st Defendant of having

taken reasonable steps prior to the Claimant's fall, questionable. Counsel further submitted that the Court can conclude from the foregoing that the Defendants were aware that the ramp posed a substantial risk to all persons who lawfully traversed it and that it was dangerous. This would, it was submitted, overcome the 1st Defendant's assertion that it had already taken all reasonable steps to make the ramp safe by the time of Ms. Nunes's incident, but would rather tend to show (adversely to the Defendants' case and supportive of the Claimant's) that it would have been reasonable, or not unreasonable, for the 1st Defendant to have taken remedial action before Ms. Nunes' fall.

[16] Against the backdrop of the 1st Defendant's contentions that Ms. Nunes failed to exercise due care, failed to keep her balance and caused herself to fall, it is indisputable, it was submitted for the Claimant, that her written statement concerning the fall, which both parties agree was made and signed in its immediate aftermath, calls the veracity of any contention of regarding the Claimant's negligence, into question. The written statement was potential evidence that would tend to support Ms. Nunes' case as well as to adversely affect the Defendants' case, according to the submission.

[17] The attendance register was also an item that Counsel contended ought also to have been disclosed, as it would very possibly reveal the absence of a number of employees at the time of the Claimant's slip and fall incident; tending to adversely affect the Defendant's case while bolstering the Claimant's case. There was also documentation that would tend to prove or disprove the assertion by the 1st Defendant that appropriate footwear was issued to the Claimant.

[18] It was also contended that the Defendant's assertion as to reasonable steps taken to ensure the safety of the Claimant by providing hand-rails and refitting the area with anti-slip tiles, several years prior to the alleged accident, is suspect. Documents relating such steps would have revealed: i) when the alleged refitting took place; ii) which anti-slip tiles were allegedly used; and iii) the cost of the alleged refit and (iv) whether it was reasonable for the 1st Defendant to have carried out such work.

[19] Written correspondence between the Defendants and the West Indies Alliance Insurance Company Limited preceded the preparation of a report by the Insurer on March 3, 2012. In addition, the fact that remedial work was undertaken on the ramp a mere one (1) month after the finalization of the report in April 2012 would tend to support, Counsel submitted, a conclusion that the report of West Indies Alliance Insurance Company Limited contained a recommendation that the ramp be modified. The disclosure of the aforementioned report in the 1st Defendant's amended List of Documents, Counsel submitted, did not conform to the requirements of the rules, as the 1st Defendant's description of the said report is insufficient as to the author of the report, to whom it was addressed, to whom it was furnished and the dominant purpose for which the report was prepared.

The 1st Defendant's Submissions

[20] Mr. Wisdom submitted that on a literal construction of the unless order, it is plain that what the learned Master sought to ensure, was that the form of the 1st Defendant's List of Documents was in conformity with the rule. In support of this contention, Counsel pointed to the fact that the order specifically referenced rule 28.8 (3) of the CPR; identified the particular categories into which the documents were to be divided; and indicated the need to include the commencement and ending dates of each category of documents listed. Rule 28.3 (3) simply requires that the list "identify the documents or categories of documents in a convenient order and manner as concisely as possible."

[21] Counsel submitted that an "unless order" must be clear and unambiguous as it is critical that the party who is in jeopardy of a sanction is specifically aware of what is required of it, so that the said party is not inadvertently in breach, thereby incurring the sanction which the order imposes. As such, the submission was that the unless order ought to be interpreted in a manner that is commensurate with the specific context and words of the order, as too broad a construction of the said order would result in uncertainty as to what was required of the 1st Defendant to avoid the imposition of the said sanction. Reliance was placed on the case of ***Denton & Others v TH White***

Limited & Another [2014] EWCA Civ 906 in which the English Court of Appeal opined that it should be made plain that:

> *"it is inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage."*

[22] In that regard, Counsel submitted that the intention behind the unless order was not to provide an opportunity for the Claimant to take advantage of any possible mistakes or potential defects in the List of Documents so that she could then use same to urge the Court to strike out the defence. Counsel argued further that a purposive and clear construction of Master Mason's order would reveal that the court was primarily concerned with the 1st Defendant disaggregating the categories of documents in the List of Documents so as to provide additional information about them. In light of this, he submitted that the 1st Defendant's defence would only be struck out where there was non-compliance with the unless order in that it failed to comply with the rules to the extent that the documents were not properly categorized and it was not filed by the stated date. Mr. Wisdom posited that a comparison of the List of Documents filed by the 1st Defendant on December 13, 2018 and its Amended List of Documents, filed on January 25, 2019, demonstrates that there has been compliance with the relevant rules and the unless order in this respect and accordingly that its defence ought not to stand as struck out.

[23] Mr. Wisdom also sought to address the following issues raised in the affidavits filed on behalf of the Claimant regarding the disclosing of additional documents.

- That with the exception of the memo to Mrs. Arlene Hewitt attached to the defence, the documents disclosed in relation to the slip and fall incident dated back to May 13, 2013 and did not include the document that precipitated the preparation of the Insurance Company's Report, dated March 3, 2012.

- That the 1st Defendant failed to disclose information regarding the recipient of the aforementioned Report;

- That the said Insurance Company's Report was prepared before the Attorneys were brought into the matter;

- That the 1st Defendant had failed to amend the List of Documents to disclose anything relating to incidents which allegedly occurred on the ramp earlier;

- That the amended List of Documents did not include any documents pertaining to modifications of the ramp that have been carried out by the 1st Defendant.

[24] Mr. Wisdom submitted that these are issues to be contemplated in the pending application for specific disclosure, which concerned all the documents referenced in Mr. Reitzin's January 28, 2019 letter. Mr. Wisdom asserted that the crux of the dispute regarding the referenced documents turns on the question of whether they are "directly relevant" to the proceedings within the meaning of rule 28.1(4) of the CPR and would therefore warrant disclosure. The application for Specific Disclosure was not heard at the December 19, 2018 CMC despite the fact that both parties filed submissions and written authorities in respect of it. Neither, it was submitted, did the Claimant take steps to have the application listed to be heard at the June 5, 2019 hearing of CMC. As such, Counsel argued, the absence or presence of these documents in the 1st Defendant's amended List of Documents did not impact upon the issue of compliance with Master Mason's unless order.

[25] In connection with this point, Mr. Wisdom submitted that the documents referenced in Mr. Reitzin's affidavit do not properly qualify as being "directly relevant" to the present claim within the meaning of rule 28.1 (4) of the CPR, which provides that a document will only qualify or be regarded as being directly relevant to a claim if:

> *"(a) the party with control of the document intends to rely on it; (b) it tends to adversely affect that party's case; or (c) it tends to support another party's case."*

Counsel submitted that no indication was given to the Court as to how a personal accident claim made by or on behalf of the Claimant can adversely affect that party's case where there is no significant dispute that the incident occurred.

[26] It was submitted that no reliance can be placed on a letter written by the Claimant to the Principal of the College, as this letter would be inadmissible as a self-serving previous statement made by the Claimant in the matter, at best, and no reliance is being placed on it by the 1st Defendant. In light of this, it was further submitted that neither the fact of, nor the actual documents referenced in Mr. Reitzin's affidavit dated May 1, 2019, were discovered by the 1st Defendant upon making reasonable searches in the process of providing disclosure, which would account their exclusion from its List of Documents. It was argued that this would not amount to a breach of the learned Master's order, which was specific as to the form of the documents to be disclosed within the List of Documents. Further Counsel argued, the CPR is clear about the result of failing to disclose documents in compliance with one's duty for standard disclosure, which is that party will be prohibited from producing or otherwise relying on the document or documents with which the order is concerned.

[27] Mr. Wisdom made the point that the documents to which Mr. Reitzin referred in his affidavit were only disclosed by the Claimant in her amended List of Documents filed May 1, 2019. The Claimant is said to have had possession of these documents at the relevant time and this is supposedly evidenced by the fact that they were ultimately produced by her as the matter progressed. In light of this, Counsel contended, the duty to disclose would have fallen on the Claimant as much as it would have on the Defendant. The Claimant, it was submitted, ought not to be permitted to present this purported failure to disclose, as a legitimate basis for adverse steps to be taken against the Defendants particularly in circumstances where the order did not explicitly reference these documents or class of documents; their existence or whereabouts were not readily known to the Defendants; and there is a dispute as to whether they are "directly relevant" to the proceedings.

[28] It was submitted therefore that the Defendants have complied with unless order and as a result, their statement of case should not stand as struck out. However, in the alternative, given the circumstances and risk of jeopardy faced by the Defendants, Counsel submitted that this would be an exceptional circumstance in which the Court was free to exercise its discretion, on its own initiative, to grant relief from any sanction

that may have been imposed by the unless order. ***Marcan Shipping (London) Limited v Kefalas & Anor*** [2007] EWCA Civ 463 was advanced in support of this proposition.

Claimant's Reply

[29] Mr. Reitzin submitted that the real question to which the Court should address its mind is whether the documents which the Claimant insists ought to have been included in the 1st Defendant's List of Documents, filed pursuant to the unless order, are directly relevant to the matters in question in the proceedings or not. Did any one or more of them, tend to adversely affect the Defendant's case or to support the Claimant's case? If the answer is yes, Counsel submitted, Master Mason's unless order will have taken effect, if such documents were in fact excluded.

[30] Mr. Reitzin submitted that the approach taken by the 1st Defendant in relation to this issue is identical to that which it has adopted with respect to applications for specific disclosure; that the documents which the Claimant maintains are directly relevant to any matter in question in the proceedings are not in fact so relevant. This argument has been advanced by the 1st Defendant, Counsel maintained, not because the documents concerned do not tend to adversely affect the 1st Defendant's case or tend to support the Claimant's case, but because the Claimant has not given evidence of the contents of documents which she has not seen.

[31] In relation to the contention that the Claimant is receiving the benefit of an order for specific disclosure, the application for which had not yet been heard, Counsel maintained that this submission implies that on an application for specific disclosure the party seeking disclosure has the onus of proving the direct relevance of the documents of which disclosure is sought. Mr. Reitzin contended that the party seeking disclosure never has the onus of proving direct relevance. Rather, it is the opposing party who has the duty to disclose all directly relevant documents; a duty which remains throughout.

[32] Mr. Reitzin submitted that not only was it objectionable that Mr. Wisdom's was seeking to give evidence from the 'bar table' about having recently appreciated the true

nature of the Claimant's complaint, but it an irrelevant consideration in any event because:

- The rules placed on the 1st Defendant a duty to disclose, completely and voluntarily, all directly relevant documents when giving standard disclosure, from the beginning;
- That duty was entirely independent of anything that the Claimant said or did not say or do;
- The duty to comply and the question off compliance had nothing to do with what Counsel realized or did not realize;
- Counsel duty was to explain to the maker of the List of Documents the necessity of making full disclosure in accordance with the terms of the order and the CPR (see rule 28.9 (a) (i) of CPR);
- It was for the 1st Defendant to decide for itself, based upon the said explanation provided, the nature of the Claimant's claim and of the issues arising on the pleadings, and the state of the law, what documents were directly relevant;
- It was unnecessary for the Claimant to to tell the 1st Defendant which documents ought to have been disclosed.

[33] It was further submitted that Mr. Wisdom, and by imputation, the 1st Defendant, were already aware of the nature of the documents which the Claimant said were 'directly relevant' and the assertion that it was not until May 1, 2019 that Mr. Wisdom realized the true nature of the Claimant's complaint is tantamount to an admission that the documents referred to Mr. Reitzin's affidavit of 1 May 2019 were, indeed, 'directly relevant'.

[34] On the issue of interpretation of the unless order, Mr. Reitzin submitted that the best, and the only legitimate, source of guidance as to Master Mason's intention in making her unless order was to determine the ordinary and natural meaning of the words she chose to employ. He maintained that given the background and context of her order, and also given the woefully inadequate initial List of Documents, as well as the learned Master in Chamber's very strong admonition, it is quite reasonable to infer

that she meant precisely what she said when she ordered the 1st Defendant to file a List of Documents "which complied in all respects with the rules", failing which the Defendant's defence would stand as struck out.

[35] To Mr. Wisdom's argument that it was unfair to point to minor breaches in an attempt to take advantage of them, it was submitted that there has been no breach which can be described as 'minor' and the 1st Defendant's failure to give full disclosure of all "directly relevant" documents amounts to a total abrogation of its duty under the CPR. He submitted that Defendants who elect to conduct their litigation in a perverse and obstructive manner well deserve to have their statements of case struck out.

[36] Mr. Reitzin sought to challenge the submission that there is no evidence that the documents exist or existed. He submitted that the 1st Defendant, acting on Mr. Wisdom's advice, does not appear to appreciate the fundamental truth that it had the duty to fully disclose all directly relevant documents as required by rules 28.4 (1) and 28.9 (a) (i) of the CPR. Further he argued, the party seeking standard disclosure bears no onus of proof, and accordingly it was never for the Claimant to furnish evidence of the existence of the documents as a condition precedent to the 1st Defendant disclosing them. Also he submitted, while Mr. Wisdom's submission suggests that the Claimant was capable of furnishing, and ought to have furnished, sworn evidence of the existence of documents which she has never seen, the 1st Defendant has never said that the documents do not exist or have never existed. He therefore posited that there is unchallenged evidence before the Court that the Claimant handed sick leave and fitness certificates to Mrs. Arlene Hewitt, the 1st Defendant's Personnel Manager, on or about the dates that they bear which ought to have been disclosed in Schedule 1 or 2 of the List of Documents. By reason of the failure to so disclose, the 1st Defendant has not, it was submitted, complied with the rules and by extension the unless order, and the consequences stipulated by the Learned Master in Chambers have taken effect.

[37] In regards to the contention that the Claimant was merely speculating that certain documents exist, Mr. Reitzin submitted that there are two general categories of documents in question within this context: those which were reasonably supposed to

exist and to contain directly relevant information and those the existence of which the Claimant proved by exhibiting them to the affidavit filed on May 1, 2019. Reliance was placed on the case of ***Compagnie Financiere et Commercial de Pacificque v Peruvian Guano Co.*** (1882) 11 QBD 55 in which 'reasonable suspicion' was described as being far from mere speculation. Instead, it was said to be based upon an analysis by legal minds of the nature of the claim, the issues as delineated in the pleadings, the nature of the documents sought and the available evidence if any. Mr. Reitzin submitted that there is no speculation in relation to the documents which have already been exhibited by the Claimant.

[38] Mr. Reitzin strongly refuted the contention that is a reasonable inference that the documents referred to in the 1st Defendant's amended List of Documents are the only documents which exist. The failure, he submitted, of the Defendants to give evidence as well as to explain why they did not do so entitled the court to draw the inference that had they given evidence, that evidence would not have assisted them on the assertion that the documents disclosed were the only ones which existed or, indeed, on any assertion advanced on their behalf. Further it was at variance, Counsel opined, with an earlier assertion expressed by Mr. Wisdom in his submissions filed on May 15, 2019; not that the documents did not exist, but that the Defendants and the Claimant each had equal access to them.

[39] Mr. Reitzin challenged the 1st Defendant's claim that the certification of a List of Documents proved that a reasonable search has been carried out. He argued that the certificate given by Mrs. Arlene Hewitt that she has complied with her duty is false because none of the documents exhibited to his (Mr. Reitzin's) affidavit of May 1, 2019 have been disclosed. Secondly, a claim of 'completeness' in an affidavit verifying a List of Documents for discovery is not inviolate. Were that to be so there would, as Lockhart J noted in ***National Crime Authority v A*** (1991) 29 FCR 203 at 211, be "potential for abuse". The case of ***Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd*** (No 4) [2010] FCA 863 (12 August 2010) was cited by Mr. Reitzin in support of this proposition. Thirdly, a certificate of compliance did not transform the List of Documents into actual evidence that a reasonable search has been carried out, he argued, nor that

certain documents do not exist or have never existed. Further, Counsel submitted, if a certificate of compliance turned a List of Documents into evidence, then a certificate of truth in a statement of case would turn the pleading into evidence. However, it is well known and it is beyond argument that it does not do so. Similarly, as enunciated by the court in ***Attorney General v John McKay*** [2012] JMCA App 1 at par. 8, a defence is not evidence.

[40] Mr. Reitzin also challenged Mr. Wisdom's contention that the present case is not one in which the nuance of each document should be considered, and claimed that the 1st Defendant's failure to give full disclosure has prevented any consideration of the contents of documents other than those exhibited to the affidavit of May 1, 2019. Accordingly, the 1st Defendant's recalcitrance has rendered the question of whether the documents are nuanced or not incapable of determination.

The Law

[41] Rule 26.4 (1) of the CPR empowers the court to make an "unless order" in circumstances where there has been non-compliance with the rules or any court order. Specifically, this rule provides that:

> *"[w]here a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'".*

[42] Further, rule 26.4 (7) stipulates that a failure by the defaulting party to comply with the terms of any "unless order" made by the court will result in that party's statement of case being struck out. The essential nature of an unless order was discussed by Sykes J (as he then was) in the case of ***R.E. Forrester, R.E. Forrester Electrical Contractors Limited v Holiday Inn (Jamaica)*** [2005] Claim No CL. 1997/F — 138. There, he described it as:

> *"…a peremptory order directing a party to the litigation to do a specified act, within a specified time, which, if not done, is visited by sanctions prescribed by the order."*

The learned judge went further to say that:

> *"[i]t is fundamental principle that a litigant who fails to comply with such an order should suffer the penalty prescribed by the order unless he can show good reason why the stated consequences should not follow…"*

[43] In ***Fairacres Ltd v Mohamed*** [2008] EWCA Civ 1637 the Court stated that "[t]he court will take a robust view of failure to comply. It stated:

> *"Technical breaches alone will not necessarily save the defaulting party especially where there is a history of disregard for the court rules".*

It is therefore imperative that an "unless order" be framed in explicit terms so as to enable the party to whom it applies, and is potentially in jeopardy of the sanction that it imposes for non-compliance, to be in no doubt as to what the order expects of it.

[44] Upon a breach the "unless order", the sanction(s) imposed thereby take effect automatically as of the date of non-compliance (See ***Dale Austin and Public Service Commission and the Attorney- General*** [2016] JMCA Civ 46). In such a case, rule 26.7 (2) of the CPR directs that:

> *"[w]here a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction..."*

[45] Pursuant to rule 26.8 (1), any such application must be made promptly and supported by evidence on affidavit. The court may grant relief from sanctions only if it is satisfied that: (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) the party in default has generally complied with all other relevant rules. However, the court retains the discretion to grant the defaulting party relief from sanctions, on its own motion, even in the absence of any application for relief from sanctions (***Marcan Shipping (London) Limited v Kefalas & Anor*** [2007] EWCA Civ 463). In considering whether to grant relief under rule 26.8(2) of the CPR,

the court is obliged to take account of: (a) the interests of the administration of justice; (b) whether the failure to comply was due to the party or that party's attorney-at-law; (c) whether the failure to comply has been or can be remedied within a reasonable time; (d) whether the trial date or any likely trial date can still be met if relief is granted; and (e) the effect which the granting of relief or not would have on each party.

[46] It is the 1st Defendant's view, that an unless order must be construed purposively with a generous eye not merely to the precise terms of the order, but also, to the broad context in which it was made, including the circumstances which precipitated the making of the order as well as its implicit and explicit intentions as discerned from the words used. The Claimant however argues that from the circumstances, the only legitimate source of interpretation is a literal one which considers the ordinary and natural meaning of the words. It falls to this Court to determine the proper construction of the order having regard to its terms, its contextual background as well as the unique facts and supporting evidence of the case before it.

Analysis

[47] It has been accepted that on a true construction of Master Mason's unless order that the 1st Defendant was required, among other things, to file an amended List of Documents that complies in all respects the rules, including rule 28.8(3), to the extent that it categorized the documents referenced therein as letters, emails, reports, investigative reports and with the commencement and ending dates for each category being specified, by January 25, 2019; failing which, their defence was to be struck out. The Claimant endeavoured to persuade this Court that the 1st Defendant has failed to comply with unless order and should therefore have its defence struck out. In supporting its reasoning on this point, the Claimant makes extensive reference to the 1st Defendant's purported failure to disclose a number of documents which are said to be directly relevant to the matters in question in the proceedings and ought to have been disclosed. The failure to make this disclosure in accordance with the dictates of the standard disclosure requirement expressed in rule 28.1 (4) of the CPR, the Claimant maintains, would mean that the 1st Defendant has not complied with order because it

explicitly prescribed that the Defendant's amended List of Documents must comply in all respects with the rules.

[48] While there may be merit to such arguments in another context, it is my considered view that what operated on the learned Master in Chamber's mind, was that the substantive procedural question of the manner and form in which the documents were to be disclosed and disaggregated in that List of Documents, not so much with the nature of documents referenced in the List of Documents. Indeed, the contextual background would tend to suggest that the manner and form of the 1st Defendant's List of Documents were of the utmost importance to Master Mason at the time of the making of the order, based on the concerns raised on behalf of the Claimant.

[49] This conclusion is fortified by the fact that the order of the learned Master in Chambers is explicit in its reference to rule 28.8 (3) which requires that the List of Documents be prepared and served in compliance with the requirement for disclosure under part 28 and must "identify the documents or categories of documents in a convenient order and manner and as concisely as possible". At no point did the learned Master in Chamber's order, require or even mention the need for any of the specific documents, referenced on behalf of the Claimant, to be disclosed in the 1st Defendants amended List of Documents. As such, the Claimant's contentions concerning the disclosure of those specific documents would be more appropriately advanced in support of an application for specific disclosure.

[50] In compliance with the unless order, the 1st Defendant duly prepared and filed an amended List of Documents that sought to particularize the documents referenced in it, in the manner and form prescribed by the order, by the stipulated date. A cursory glance at the initial List of Documents and the amended List of Documents revealed a stark contrast between the two, and more specifically, that the latter document reflected the disaggregation, more or less, stipulated by the order.

[51] I find that even if mistakes or omissions were made by the 1st Defendant in the compliance with the order, that they are so minor that the 1st Defendant cannot truly be

said to have flouted learned Master in Chamber's order. I therefore rule that the 1st Defendant, having been in compliance with the unless order of the Master in Chambers, made on December 19, 2018, that its defence does not stand as struck out. I therefore proceed to deal with the issue of the 1st Defendant's application for security for costs.

Issue 2: Application for security for costs

[52] By Notice of Application for Court Orders filed on December 13, 2018, the 1st Defendant sought orders for security for costs. The application was made pursuant to rule 24.2(1) of the Civil Procedure Rules and was supported by an affidavit sworn to by Mr. Lowel G. Morgan (a partner in the firm which has conduct of the matter on behalf of the 1st Defendant). In its Notice of Application for Court Orders, the 1st Defendant sought the following orders, that:

> ***(i)*** *The Claimant, on or before January 17, 2019 do provide security for the Defendant's costs in the sum of* ***Three Million and Fifty-Eight Thousand One Hundred and Twenty-Five Dollars ($3,058,125.00)****;*
>
> ***(ii)*** *The abovementioned sum be paid as a lump sum payment into an interest bearing account at the Bank of Nova Scotia Jamaica Limited, Scotia Centre situate at Duke & Port Royal Street in the name of the Attorneys-at-Law for the parties and be held in escrow as security for the Defendant's costs of this action within twenty-eight (28) days of the order herein or further order off the Court in relation to same;*
>
> ***(iii)*** *The Claimant's claim be stayed against the Defendant until such time as security for costs is provided in accordance with the terms of the order;*
>
> ***(iv)*** *That in the event the Claimant fails to pay the sum of* ***Three Million and Fifty Eight Thousand One Hundred and Twenty-Five Dollars ($3,058,125.00)*** *within twenty-eight (28) days of the date of the Order herein, the claim against the Defendant be struck out.*
>
> ***(v)*** *Costs to the Defendant to be taxed, if not agreed.*

[53] The 1st Defendant grounds the application on the following bases:

- that pursuant to Rule 24.2 (1) of the CPR, the Defendant in any proceedings may apply for an order requiring the Claimant to give security for the Defendant's costs;
- that the Court is empowered to make an order for security for costs where in all the circumstances of the case it is just to make such an order;
- that pursuant to Rule 24.3(b) the Claimant is ordinarily resident out of the jurisdiction;
- that pursuant to Rule 24.2(4), where the court makes an order for security for costs it will determine the amount of security and the date by which the security is to be given;
- and pursuant to Rule 24.4, where the court makes an order for security for costs, it must order that the claim be stayed until such time as the security for costs is provided by a specified date failing which the claim be struck out;
- to enable the Court to deal fairly with the claim and further the overriding objective.

[54] The Claimant asks that the Court rejects the 1st Defendant's application for an order for security for costs against her. Owing in part to the slip and fall incident which is the subject these proceedings, her financial position is very precarious at the moment, thereby making it impossible for her to provide security of costs as requested by the 1st Defendant. In the Affidavit of Shaunette Nunes filed in opposition to Application for Security for Costs she stated:

- that her claim is a genuine one;
- she cannot afford to provide security for costs;
- her claim has a very high probability of success;
- the defendants have no real prospects of success;
- an order requiring her to provide security for costs or her claim could be struck out, would stifle her claim as it would be oppressive to her, be seriously and unfairly burdensome, prejudicial and damaging;

- and in all of the circumstances of this case, an order for security for costs would be unjust and contrary to the overriding objective which includes ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial positions.

[55] Ms. Nunes' affidavit evidence is that she is currently employed by a Wal-Mart retail outlet in West Palm Beach Florida, USA, as a stocker, from she which earns a fortnightly net income of US $531.95; her only source of income. She works a limited number of hours but is unable to work for any longer than she currently works due the pain and disabilities she currently experiences resulting from her slip and fall accident; the subject of these proceedings. She resides with her husband who does not work, but who receives a disability income of US $771.00 per month. He also receives assistance with paying rent through a rental assistance programme and the cost of food is offset by food stamps. The sum total of Ms. Nunes' monthly expenses, which include rent, telephone, internet & cable fees, a car loan, life insurance, and health insurance, is $1,451.00 and neither she nor her husband have any savings. By contrast she said that the 1st Defendant on the other hand, is insured by West Indies Alliance Insurance Company Limited under an Employer's Liability Policy in respect of risks that may give rise to claims such as this.

[56] In answer to paragraphs 11, 12, 13 and 14 regarding her attendance, Ms. Nunes stated that she would not have been expected to attend on any application for permission to call and/or put in expert evidence or an application to dispense with mediation. She however "attended" the mediation by being on a WhatsApp call for the whole of the mediation and she participated by listening and speaking almost as though she was there. Further she stated that she was reliably informed by her Counsel on September 24, 2018, at the CMC, the order was that if she could attend the further CMC fixed for December 19, 2018, she should attend. She did, in fact, attend on that adjourned December CMC date and both parties were excused. According her requested was that the Court declines to make the order for her to provide security for costs.

[57] The 1st Defendant's case is that the making of an order for security for costs by the Court is necessary to ensure that it is able to recover the exorbitant costs that it has expended in defending the suit, should the claim fail. This is especially so, given that the Claimant is ordinarily resident outside of the jurisdiction, is indigent, and has shown a propensity for adopting a leisurely and ambivalent approach to advancing her claim which has caused the Defendant to incur significant costs in the process. Additionally, on its face, the Claimant's case does not have reasonable prospects of succeeding as she has made a number of bald assertions which are, and remain, more or less unsubstantiated by any evidence she has adduced to support them.

[58] By affidavit filed on December 13, 2018, and sworn to by Mr. Lowel Morgan, partner in the firm of Nunes, Scholefield, Deleon & Co. which has conduct of this matter for the 1st Defendant, the view was espoused that the 1st Defendant does in fact have real prospects of successfully defending this claim. He also questioned the veracity of statements made by the Claimant in her own claim form which was filed in April 2013 where she stated that she resides at 3 Alburn Street, Kingston 2. This statement he says was at variance with Mr. Reitzin's averment in his affidavit dated February 28, 2018 that the claimant resides in West Palm Beach. In the face of this glaring discrepancy, Mr. Morgan expressed his preference for the facts deposed to in Mr. Reitzin's affidavit insofar as the Claimant's residential address is concerned, which clearly indicates that the Claimant is in fact ordinarily resident in the United States of America.

[59] Mr. Morgan also stated that he is unaware of the Claimant having and/or holding any assets in this jurisdiction which are capable of satisfying an order for cost made against her in these proceedings. Additionally, he stated that the 1st Defendant has already been put to significant expense in the defence of the present suit and even further costs were expected to be incurred after the CMC. He also maintained that it is the Claimant's indecisiveness and indolence in advancing her claim as well as in making numerous and unnecessary applications that have caused the defendant to incur significant expenses in defending a suit which has not progressed beyond the interlocutory stage.

[60] The legal fees that the 1st Defendant claims it is likely to incur in defending this claim, based on a two (2) day trial is approximately **Three Million and Fifty Eight Thousand One Hundred and Twenty-Five Dollars ($3,058,125.00)**. A copy of the Draft Bill of Costs containing a schedule of the minimum fees likely to be incurred by the Defendant was exhibited to the affidavit. Against that background, Mr. Morgan said that the 1st Defendant is fearful of being unduly prejudiced if the defence to the claim succeeds and at the end of a lengthy trial they find themselves unable to enforce any order for costs or secure payment of the said costs awarded in their favour against the Claimant, and asked that he Court granted the orders sought.

The Claimant's Submissions

[61] Counsel for the Claimant, made the point that an order for security for costs does not infringe article 6 (1) of the European Convention on Human Rights, although the right of access to the courts has to be taken into account. This proposition is said to find support in the case of ***Nasser v United Bank of Kuwait*** [2002] 1 All ER 410. Reference is also made by to section 13 (3) (g) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, which provides that the Constitution of Jamaica guarantees the right to equality before the law. In making the contention that no security for costs is to be ordered against a natural person, Mr. Reitzin cited the case of ***Pearson v Naydler*** [1977] 1 WLR 899 in which the court observed at page 901 that:

> *"[t]he basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established."*

[62] The case of ***Cowell v Taylor*** (1885) 31 Ch D34 was also cited for its endorsement, at page 38 of the judgment, of the principle that poverty "is no bar to a litigant." Additionally, reference was made to the case of ***Sykes v Intermediate Capital Asia Pacific 2008 GP Limited*** [2018] FCA 1848 (27 November 2018) in which Besanko, J stated that the applicants are private individuals, not corporations. In ***Pearson v Naydler*** [1977] 3 All ER 531; [1977] 1 WLR 899, Megarry V-C said at 902:

> *"The basic rule that a natural person who sues will not be ordered to give security for costs however poor he is, is ancient and well established. As Bowen LJ said in* ***Cowell v Taylor*** *(1885) 31 Ch DD34 at 38, both at law and in equity, 'the general rule is that poverty is no bar to a litigant."*

[63] This passage was cited by Toohey, J with approval in ***James v Australia and New Zealand Banking Group Ltd*** (No 1) (1985) 9 FCR 442. Mr. Reitzin submitted that despite rule 24.3 (a) of the CPR, the aforementioned cases are relevant since the Claimant is a natural person who has no assets. According to Counsel, the Claimant, in a real sense, is substantially in the same position as she would be if she were ordinarily resident in Jamaica. Concomitantly, the 1st Defendant is in the same position it would be in if the Claimant was ordinarily resident in Jamaica. While rule 24.3 (a) of the CPR permits an application for costs to be filed in the circumstances of the case, for all practical purposes, both the Claimant and the 1st Defendant are in the identical position that they would be in whether the Claimant was ordinarily resident in Jamaica or elsewhere. Moreover, there would be no prospect of the Claimant providing security for costs whether she were living in Jamaica or living abroad.

[64] Citing ***Jamaica Edible Oils & Fats Co. Ltd v M.S.A. Tire (Jamaica) Limited*** and ***Jeane Lavan*** [2018] JMCA App 8 which adumbrated a number of factors that may guide the exercise off the Court's discretion in deciding whether to grant an application for security for costs. Morrison P at paragraph [27] said –

> *"I was referred by counsel to* ***Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd*** *[2014] JMCA Ap 30, paragraph [11], in which Brooks JA specifically adopted the following principles set out in the earlier decision of* ***Cablemax Limited and Others v Logic One Limited****, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No. 203/2009, judgment delivered 21 January 2010:*

> *"(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances;*
>
> *(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security;*
>
> *(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal;*
>
> *(iv) 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;*
>
> *(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled;*
>
> *(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be simply a nominal amount;*
>
> *(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."*

[65] According to Mr. Reitzin, the Claimant has a high degree of probability of success, based in part on the unchallenged facts she outlined in her affidavit in opposition to the application, which was filed and served on January 31, 2019. Conversely, there is no evidence capable of supporting the assertion that the

Defendants have real prospects of success or to support any of the allegations stated in the defence. Thus, in carrying out the necessary balancing exercise, Mr. Reitzin submitted that this Court will find that the evidence weighs heavily in favour of the Claimant.

[66] Mr. Reitzin relied upon the English authority of ***Sir Lindsay Parkinson & Co. v Triplan Limited*** [1973] QB 609; [1973] 2 All ER 273 which delineates a number of relevant factors to which the court may have regard when considering applications for security for costs. Such factors are said to include:

> *(i) whether the claimant's claim is a bona fide one and not a sham;*
>
> *(ii) whether the claimant has reasonably good prospects of success;*
>
> *(iii) whether the defendant has made any admissions in its statements of case or elsewhere;*
>
> *(iv) whether there has been a substantial payment into court (as opposed to a small payment in to get rid of a nuisance claim);*
>
> *(v) whether the defendant is using the application for security oppressively so as to stifle a genuine claim;*
>
> *(vi) delay in making the application.*

[67] It is acknowledged by Mr. Reitzin that the Claimant's prospects of success at trial is one of the matters that may sometimes be taken into account on the application and the case of ***Trident International Freight Service Ltd v Mancheser Ship Canal Co.*** [1990] BCLC 263 was cited in support of this position. In that case, the Court of Appeal approved a passage from ***Porzelack KG v Porzelack (UK) Ltd*** [1987] 1 WLR 420 in which Browne- Wilkinson V-C at page 423 opined that if it can be demonstrated that the claimant is likely to succeed, in the sense that there is a very high probability of success, then this is a matter that can properly be weighed in the balance — with the same being true for the defendant. However, the learned judge expressed his disdain

for any attempt to go into the merits of the case, unless it can be clearly demonstrated in one way or another that there is a high degree of probability of success or failure. Relying on Stuart Sime's: **A Practical Approach to Civil Procedure**, it was advanced by Mr. Reitzin that the policy of the law protects Claimants with genuine claims.

[68] Further reliance was placed on the Australian cases of ***Oceanic Sun Line Special Shipping Co Inc v Fay*** (1988) 165 CLR 197 and ***Voth v Manildra Flour Mills Pty Ltd*** (1990) 171 CLR 538 for key understandings of the terms "oppressive" and "vexatious" in the context of applications of the kind which has been made in the instant case. For instance, in ***Oceanic Sun Line***, Deane J posits "oppressive" to mean seriously and unfairly burdensome, prejudicial or damaging, while "vexatious" is said to mean productive of serious or unjustified trouble and harassment. In light of the circumstances of this case, Mr. Reitzin submits, an order requiring the Claimant to provide security for costs would be oppressive to her.

The 1st Defendant's Submissions

[69] Rule 24.2 (1) states that a defendant in any proceedings may apply for an order requiring the Claimant to give security for the defendant's costs of the proceedings and that:

> *The court may make an order 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-*
>
> *The claimant is ordinarily resident out of the jurisdiction.*

[70] It was submitted that the Court must satisfy a two-pronged test in seeking to exercise its jurisdiction with regard to an application for security for costs: Firstly, to determine whether any of the criteria set out in rule 24.3 of the CPR has been satisfied; and secondly, to determine whether it is just in the circumstances to grant such an application. Concerning the Claimant's residence, there is no dispute that the Claimant is ordinarily resident out of the jurisdiction. Accordingly, the remaining question is as to whether it is just in the circumstances to make an award for security for costs.

[71] On the question of whether it would be just to make an award for security for costs, Mr. Wisdom referred the Court to the case of ***Symsure Limited v Kevin Moore*** [2016] JMCA Civ 8 in which our Court of Appeal outlined a suite of principles which should be considered in determining whether to make an order for security of costs:

- *Whether the plaintiff's claim is bona fide and not sham;*
- *Whether the plaintiff has a reasonably good prospect of success;*
- *Whether there is an admission by the defendant on the pleadings or elsewhere that money is due;*
- *Whether there is a substantial payment into court on an "open offer" of a substantial amount;*
- *Whether the application for security was being used oppressively so as to stifle a genuine claim;*
- *Whether the plaintiff's want of means has been brought about by any conduct of the defendant, such as delay in payment or in doing their part of the work;*
- *Whether the application for security is made at a late stage of the proceedings.*

[72] In respect of the question of whether the award will be a deterrent to or otherwise stifle a genuine claim, Mr. Wisdom made the point that the court in ***Keary Development v Tarmac Construction*** [1995] 3 All ER stated that the mere fact of the award possibly being a deterrent from pursuing a claim is not a sufficient reason for not granting an award for security for costs. He argued that the court should consider whether the order would stifle a genuine claim and further submitted that when read in conjunction, the ***Keary Development*** and ***Symsure Limited*** authorities suggest that the motive more than the effect is the relevant consideration as it regards stifling a genuine claim. The Claimant contended that the 1st Defendant intended to use the making of the order as an oppressive tool to stifle a genuine claim, Which the 1st Defendant submitted is unsubstantiated.

[73] In the instant case, the incident is alleged to have occurred in November 2011 while the suit was not filed until April 2013. The Claimant has in fact made an application to dispense with mediation in or about July 8, 2014, which Mr. Wisdom intimated was a clear sign of the Claimant's unwillingness to mediate the matter. Mediation did not take place until May 2018, at which time the Claimant did not attend in person. Moreover, according to Mr. Wisdom several years have passed since the matter was commenced and the CMC has not yet been completed. In the interim, the Claimant has filed a number of applications and has exhibited a clear propensity to rack up costs and drag the proceedings along causing the Defendant to incur significant costs. He asserted that it is therefore reasonable in the circumstances for the 1st Defendant to be concerned about its likelihood of recovering costs should it be successful in the matter.

[74] In his response to Mr. Reitzin's contention that the Claimant has a reasonable prospect of succeeding in the claim, Mr. Wisdom cited ***Symsure Limited*** in which the court decried the approach of parties seeking to investigate in considerable detail the likelihood or otherwise of the success of the action given that: "…A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of money and time…". In addition, according to Mr. Wisdom, the lengthy and copious details about the incident which were included the Claimant's affidavit are unverified allegations about separate incidents which would turn on their own facts and other assertions that are best left to a witness statement. Essentially, by including such details, Mr. Wisdom submitted that the Claimant is inviting the Court to venture into the merits of her case where, on the face of the matter, she does not have a strong case. Furthermore, the Claimant's pleadings are said to suggest that she was walking along the ramp and she slipped and fell. She does not however, Mr. Wisdom maintained, give any cause for her fall nor asserts that there was any foreign substance on the ramp that resulted in her fall but simply posits that the tiles are slippery and that the ramp is inherently dangerous.

[75] Additionally, Mr. Wisdom submitted that the Claimant's assertions that the ramp is inherently dangerous is a bald assertion and unsupported by expert or other evidence

that bring the construction of the ramp into question. In the Defence, it was indicated that at the time of the incident, the ramp was fitted with non-slip titles, handrails and there was a system in place for the clean-up of the ramp. In light of the foregoing, Mr. Wisdom submitted that the Claimant's application is an attempt to escalate into a large interlocutory hearing involving great expenditure of both money and time. He further submitted that the Claimant cannot demonstrate that she has a high probability of succeeding and as such, there should not be an exploration of the merits of the case. Still further, Mr. Wisdom submitted that the Claimant's inability to demonstrate a clear case that shows that she will be successful is even the more reason for an award of security for costs in circumstances where she resides out of the jurisdiction, has no known assets within the jurisdiction and consequently the 1st Defendant would have an unreasonably difficult time seeking to enforce an order for costs were it to be successful.

[76] Mr. Wisdom maintained that the 1st Defendant has been put to great expense in seeking to defend a matter of some antiquity that is proceeding slowly and is being littered with premature and superfluous applications instead of being advanced purposefully and in a timely manner. The Claimant, he said, has only shown sporadic interest in advancing the claim. This, he argued, is evidenced by the delay and unwillingness to attend the mediation which only took place in May 2018, as well as by the fact that the matter has only reached the CMC stage despite the incident having allegedly occurred in November 2011 and the suit having been filed in April 2013. Moreover, the Claimant has provided a speculative claim at best and the 1st Defendant has a probable defence in the matter. Also, Counsel argued that the Claimant is ordinarily resident out of the jurisdiction and does not possess any assets from which an award for cost can be settled if the Defendant is to succeed in the matter and/or in respect of any issue concerning costs.

[77] Mr. Wisdom also submitted that the case of ***Keary Developments v Tarmac Construction*** [1995] 3 All ER 534 assumes particular importance especially in light of its endorsement of the fact that the court, in considering the amount of security that might be ordered, can order any amount up to the full amount being claimed by way of

security, provided that it is more than a simply nominal amount. Accordingly, Mr. Wisdom submitted that it would be just and reasonable in the circumstances to make an award for security for costs in favour of the 1st Defendant for the full sum or, in the alternative, for a part thereof having regard to the circumstances of the case and the conduct of the parties.

The Law

[78] Pursuant to rule 24.2 (1) of the CPR a defendant in any proceedings is permitted to apply for an order requiring a claimant to give security for the defendant's costs of the proceedings. Rule 24.2 (2) requires that such an application must, where practicable, be made at a CMC or a pre-trial review. The application for security for costs must also be supported by evidence on affidavit. Before acceding to such an application, the Court must be satisfied that the conditions outlined in rule 24.3 of the CPR have been established. This rule provides as follows:

> *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.*

[79] In ***Symsure Limited v Kevin Moore*** [2016] JMCA Civ., Phillips JA construed CPR r 24.3 in this way:

> *"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 cots and unnecessary expenses if the claimant in the case is unsuccessful."*

[80] Moreover, rule 24.2 (4) of the CPR confers upon the court the discretion to determine the amount of security; and direct the manner in which as well as the date by which the security is to be given where it makes an order for security for costs. The rationale behind making an order for security against a Claimant who is ordinarily resident out of the jurisdiction was discussed by Sir Nicholas Browne-Wilkinson, Vice Chancellor in ***Porzelack v Porzelack (UK) Limited*** [1987] 1 WLR 420 at pages 1076 and 1077 of the judgment where he said:

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside of 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 judgment for costs…"*

[81] However, it is firmly the law's position that "…a natural person who sues will not be ordered to give security for costs however poor…" (***Pearson and another v Naydler and others*** [1977] 1 W.L.R. 899 (Ch D)) for as Bowen LJ opined in ***Cowell v Taylor*** (1885) 31 Ch D 34 at 38 "the general rule is that poverty is no bar to a litigant" both at law and in equity***.*** The term "ordinarily resident" within the meaning of rule 24.3 of the CPR is to be looked at as a question of fact, and the length of time that a litigant resides in a country is not determinative of this question.

[82] In making a determination as to whether to make an order for security for, the court may be guided by the following principles as enunciated by the court in the case of ***Cablemax Limited and Others v Logic One Limited***, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No. 203/2009 and adopted by Brooks JA in the case of **Continental *Baking Co. Ltd v Super Plus Stores Ltd and Tikal Ltd*** [2014] JMCA App. 30 :

> *"(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances;*
>
> *(ii) The possibility or probability of that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security;*
>
> *(iii) In considering an application for security for cost, the courts must carry out balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal;*

> *(iv) 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;*
>
> *(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled;*
>
> *(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should be a simply nominal amount;*
>
> *(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."*

[83] At this juncture, it is must also be mentioned that before the court refuses to order security on the ground that it would unfairly stifle a genuine claim, it must be satisfied that in all the circumstances it is probable that the claim would be stifled (See ***Keary Developments Limited v Tarmac Construction Limited*** [1995] All E.R. 535). In respect of the issue of delay in filing the application for security, Phillips JA in **Symsure Limited** observed that:

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

[84] Additionally, should the court be minded to accede to an application for security for costs, any amount so awarded "should neither be oppressive nor illusory" (per Phillips JA in **Symsure Limited**). Finally, pursuant to rule 24.4 of the CPR**:**

> *"On making an order for security for costs the court must also order that —the claim (or counterclaim) be stayed until such time as*

> *security for costs is provided in accordance with the terms of the order; and/or that if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out."*

Analysis

[85] The 1st Defendant asks the Court to make an order directing the Claimant to give security for its costs in the proceedings. Its application is said to be fuelled by legitimate concerns regarding the likelihood of recovering their costs in the event that the claim fails especially since the Claimant is ordinarily resident outside of the jurisdiction and is in a precarious financial position. However, before any determination is made as to whether it would be just in the circumstances to make an order for security for costs against the Claimant, the question of whether any or all of the conditions set out in rule 24.3 of the CPR must be settled conclusively. As it stands, the rule lays down a number of conditions which, if demonstrably established, would entitle a defendant to orders pursuant to rule 24.2. As to whether the Claimant is ordinarily resident outside of the jurisdiction, there is no dispute as the Claimant's affidavit evidence and that of her Attorney-at-law, confirm that the Claimant's ordinary place of residence is in Florida in the United States where she works and lives with her husband. As such, the first condition enumerated in rule 24.3 of the CPR has been irrefutably established.

[86] Having settled that issue, it would now be appropriate to consider the specific principles identified by Brooks JA in ***Continental Banking Co. Ltd v Super Plus Stores Ltd and Tikal Ltd*** as being helpful in guiding the exercise by the Court of its discretion to make an order for security. In particular, it is critical that, among other things, any balancing exercise to be carried out must devote thoughtful attention to the potential risks of injustice to either the Applicant or the Respondent that could materialize if the Court makes or refuses to make an order for security for costs.

[87] In the case at bar, the 1st Defendant maintains that a refusal by the Court to make an order requiring the Claimant to give security for the costs that it has incurred in defending this claim will have serious implications for its ability to recover those costs

should the claim fail. The Claimant on the other hand avers that, owing in part to the injuries she sustained in consequence of her slip and fall incident, she is barely managing to make ends meet and is not currently able to improve her financial standing by working longer hours as a stocker at Wal-Mart in large part because of the very incident; the subject of this claim. In addition, it is her contention that should she be ordered to pay security for costs, her genuine claim, which has a high probability of success, will be stifled as any failure to provide security in compliance with an order of the court will result in her claim being struck out.

[88] In turning now to the guiding principles quoted with approval by Brooks JA in ***Continental Banking Co. Ltd***, it is important to determine the following: Will the Claimantbe deterred from pursuing her claim by an order for security? Does the Claimant have a reasonable prospect of successfully prosecuting her claim? Would an order for security for costs stifle a valid claim? Was the application for security made timeously?

Will the Claimant be deterred from pursuing her claim by an order for security for costs?

[89] This question can be unreservedly answered in the affirmative particularly since the Claimant herself has averred that an order requiring her to give security for the 1st Defendant's costs in the proceedings would have grave implications for her ability to advance her claim. However, this fact is not, without more, a sufficient reason for granting the application especially in light of the prejudice that may befall the 1st Defendant if such an order were not made by the Court (***Continental Banking Co. Ltd v Super Plus Stores Ltd and Tikal Ltd***).

Does the Claimant have a reasonable prospect of successfully prosecuting her claim?

[90] In assessing the probability of success of the Claimant's or Defendant's case, the Court is not required to go into the merits in any detail unless it can be demonstrated that there is a high degree of probability of success or failure. I am of the view that the cogency of evidence adduced in support of the Claimant's case would tend to suggest that she has a high prospect of succeeding on the claim, particularly since a number of

the 1st Defendant's denials in relation to liability for her fall have not been persuasively substantiated either by evidence on affidavit or otherwise. (***Continental Banking Co. Ltd v Super Plus Stores Ltd and Tikal Ltd***).

Would the order for security stifle a valid claim?

[91] As it stands, the claim appears to be a valid one that is neither frivolous nor vexatious. In light of her financial state, any order for security for the 1st Defendant's costs made against her would unavoidably stifle her claim for the simple reason that, pursuant to rule 24.4 of the CPR, a failure to provide security in accordance with the terms of the order, which in her peculiar circumstances seems distinctly probable, will occasion an automatic striking out of her claim. For this reason, it can be said that the order for security for costs would undoubtedly stifle a genuine claim and effectively deny the Claimant access to seat of justice. Accordingly, I find that the instant case is one in which it is likely that a valid claim would be stifled were an order for security for costs to be made against the Claimant.

Was the application for security made timeously?

[92] This is one question which Phillips JA in ***Symsure Limited v Kevin Moore*** acknowledged as being a pertinent question because it can have significant bearing on whether the application for security is refused, particularly if the application is made very close to the trial date and the sum that is being asked for is exorbitant. This matter is still at the interlocutory stage and a trial has been set in 2021, but the claim was commenced more than six (6) years ago in April of 2013. The 1st Defendant only filed its application for security for costs in this matter in December of 2018. No reason was advanced for the delay by the 1st Defendant in its affidavit supporting the application for security for costs. The clear, and unexplained, delay on the part of the 1st Defendant in filing the claim would therefore operate, together with the aforementioned factors, to militate against the making of an order for security against the Claimant.

[93] Any determination of this kind demands, as underscored in ***Continental Banking Co. Ltd v Super Plus Stores Ltd and Tikal Ltd***, the carrying out of a

balancing exercise which weighs the possibility of injustice to the Claimant if prevented from pursuing a proper claim by an order for security against the possibility of injustice to the 1st Defendant if no security is ordered, the claim ultimately fails and the it is unable to recover from the Claimant the costs incurred in resisting the claim.

[94] On the face of it, and particularly in light of the paucity of evidence it has adduced in support of its application, it cannot be said persuasively that the 1st Defendant's prospects of successfully defending the claim prevails over the Claimant's prospects of successfully prosecuting her claim. While I will make no attempt to delve too deeply into the merits of each party's case at this stage of the present proceedings, the prima facie strengths and weaknesses of each party's case versus each other will have to be taken at face value for the purposes of this balancing exercise.

[95] In addition, in any civil litigation the overriding objectives of the CPR, a major tenet of which concerns itself with ensuring that the parties to the litigation are, to the greatest extent possible, on equal footing regardless of their respective financial positions, must be taken into consideration. Having regard to the relevant legal principles distilled from the leading authorities above as well as their application to the facts of the instant case, I find that it would not be just and fair for an order for security for costs to be made against the Claimant particularly for the following reasons:

(i) There is a strong possibility that she will be deterred from pursing her claim should the order for security be made against her;

(ii) The order would have the effect of stifling a valid (and genuine) claim;

(iii) The Claimant's prospects of succeeding on her claim are high whereas the 1st Defendant's prospects of successfully defending the claim are not, at least on the face of it, as impressive;

(iv) There was a considerable delay by the 1st Defendant in filing the application for security which has not, even at this stage of the proceedings, been explained or justified;

(v) The justice of the case demands that the Claimant, even in spite of her impecuniosity, be afforded access to the court to prosecute her claim.

Conclusion

[96] Based therefore on foregoing, the orders of the Court on both issues are as follows:

(i) The 1st Defendant is adjudged to be in compliance with the "unless order" of Master Mason and its defence does not stand as struck out;

(ii) The 1st Defendant's application for security for costs is refused;

(iii) Costs of the hearing on the striking out of the defence and application for security for costs to be costs in the Claim;

(iv) Case Management Conference fixed for January 9, 2020 at 3pm for 1 hour;

(v) Leave to appeal granted on the issues of the unless order, security for costs and costs;

(vi) The Claimants Attorneys-at-law to prepare, file and serve the Orders herein.