[2020] JMCC Comm 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2019 CD 00054

BETWEEN	**TRAILLE CARIBBEAN LIMITED**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Sylvester Hemmings and Richard Hemmings instructed by Sylvester Hemmings & Associates for the claimant/applicant

Mrs Denise Kitson Q.C., Kevin Williams and David Ellis instructed by Grant, Stewart, Phillips & Company for the defendant/respondent

8 January and 13 July 2020

Civil procedure and practice - Application for security for costs – Companies Act, section 388 – Civil Procedure Rules, 2002, rule 24.2

SIMMONS J

[1] By this application the defendant seeks the following orders:

1. Security for costs in the sum of thirteen million four hundred and seventeen thousand three hundred and five dollars ($13,417,305.00) or such amount as the court thinks fit.

2. The security for costs ordered pursuant to paragraph 1 hereof be provided by the claimant within fourteen (14) days of this order.

3. If the claimant fails to provide the security for costs so ordered by the court within the said fourteen (14) days the claimant's claim shall be struck out.

4. The security for costs ordered pursuant to paragraph 1 hereof shall be paid into an interest bearing account at First Global Bank in the joint names of the Attorneys-at-Law for the claimant and the defendant subject to such further order and/or directions from the court.

5. That in any event, this matter be stayed pending the payment of the judgment debt and costs outstanding in claim No. 2014 CD 00124 ***Traille Caribbean Limited v Cable & Wireless Jamaica Limited*** (***Traille***).

6. Costs to be costs in the claim.

[2] The grounds on which the orders are sought are set out hereunder:

(a) Section 388 of the **Companies Act** provides that the court may order the claimant to pay security for the defendant's costs, in the event that it appears that it is reasonable to believe that the claimant may not be able pay the defendant's costs if the defendant is successful.

(b) The defendant is not aware of any asset that the claimant has in the jurisdiction. Therefore, any order for costs awarded against it may be frustrated.

(c) The claimant does not have any real prospect of success in this claim as the defendant has not breached any term of the interconnection agreement neither has the defendant been negligent in providing its services to the claimant. The matters complained of by the claimant are as a result of congestion on the defendant's network due to the volumes of local and international calls transiting the said network and the failure/refusal of Digicel Jamaica Limited to comply with a directive

of the Office of Utilities Regulation to provide the defendant with additional capacity to accommodate the call traffic being sent to its network.

(d) The claimant has been guilty of a breach of the interconnection agreement between the parties as it has displayed a wilful and contumelious refusal to comply with the judgment of the court in 2014 CD 00124 ***Traille Caribbean Limited v Cable & Wireless Jamaica Limited***. To date, the claimant has failed to pay the judgment debt of $22,600,680.19 plus interest thereon and taxed costs of $11, 921, 852.93 in circumstances in which the Court of Appeal has refused to grant a stay of the judgment pending the appeal of the same. Additionally, the claimant is further indebted to the defendant in the amount of $1,093,087.47 for charges for international call traffic which the claimant terminated on the defendant's network or which transited the defendant's network to third parties' networks. That this claim and the 2014 claim arise out of the same interconnection agreement between the claimant and the defendant.

(e) The defendant would be prejudiced in expending sums to defend a tenuous claim with no hope of recovering same.

(f) In all the circumstances *it is just to order that the claimant provide security for costs.*

(g) In any event the matter ought to be stayed pending payment of the said judgment debt in ***Traille***

[3] The application is supported by the first affidavit of Sola Hines[1] sworn to on 4 March 2019 and her second affidavit sworn to on 31 July 2019.

[4] The claimant has relied on the affidavit of Rory Robinson, its Managing Director sworn to on 30 July 2019

Background

[5] The claimant and the defendant are companies duly registered under the laws of Jamaica and are engaged in the telecommunications industry.

[6] By way of Claim Form dated 7 February 2019, the claimant commenced proceedings against the defendant for breach of contract and or negligence.

[7] It is alleged that the defendant in breach the Interconnection Agreement (ICA) between the parties for the provision of telecommunications services, failed to provide quality services which resulted in a poor answer seizure ratio. As a result, the claimant has suffered loss in revenue and goodwill.

[8] In its defence which was filed after this application the defendant denied that it failed to provide quality service in keeping with its obligations under the ICA. A defence was filed on 27 March 2019. However, prior to filing its defence, on 4 March 2019, the defendant filed an application for security for costs and stay of proceedings.

[9] The defendant asked that the court order the claimant to provide security for costs to the defendant in the amount of thirteen million four hundred and seventeen thousand three hundred and five dollars ($13,417,305.00) or such other amount as the court thinks fit.

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[1] Director of Legal Affairs and the Company Secretary for the defendant

[10] The defendant also asked, inter alia, that the matter be stayed pending the payment of the judgment debt and costs outstanding in Claim No. 2014 CD 00124 ***Traille Caribbean Limited v Cable & Wireless Jamaica Limited***.

[11] Section 388 of the **Companies Act** provides 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 defendant company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."*

[12] Rule 24.2 of the **Civil Procedure Rules**, 2002, (CPR) states as follows:

> *"(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.*
>
> *(2) Where practicable such an application must be made at a case management conference or pre-trial review.*
>
> *(3) An application for security for costs must be supported by evidence on affidavit.*
>
> *(4) Where the court makes an order for security for costs, it will -*
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> *(a) determine the amount of security; and*
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> *(b) direct -*
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> > *(i) the manner in which; and*
> >
> > *(ii) the date by which*
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> *the security is to be given."*

Defendant's/applicant's submissions

[13] Mrs Kitson submitted that the claimant is impecunious and unable to pay its debts. Reference was made to ***Traille*** in which the claimant's applications for a stay of

execution of the judgment in favour of the defendant pending appeal, made to Batts J, in the Supreme Court and to Sinclair-Haynes JA, in the Court of Appeal (who granted a limited order which she thereafter refused to extend), have been refused. The claimant has failed and/or refused to pay, or in the alternative pay the judgment debt into an interest bearing account. The claimant has also failed and/or refused to pay the costs in ***Traille*** which were taxed in favour of the defendant**.** Additionally, the claimant is further indebted to the defendant in the amount of approximately one million ninety-three thousand and eighty-seven dollars and forty-seven cents ($1,093,087.47) for charges for international call traffic which the claimant terminated on the defendant's network or which transited the defendant's network to third parties' networks.

[14] Learned Queen's Counsel also referred to the proceedings before Edwards J the details of which need not be repeated. She concluded that in light of the fact that the claimant is already indebted to the defendant for the judgment debt which is quite significant, plus termination charges**,** which from all indications it is unable to satisfy from its main accounts held at First Global Bank Limited, it can be inferred that it will be unable to satisfy any further awards of costs made in the defendant's favour in this suit.

[15] Learned Queen's Counsel directed the court's attention to section 388 of the **Companies Act** which deals with the court's power to make an order for security for costs. She submitted that the statutory requirements have been satisfied as credible evidence has been presented to the court of the claimant's impecuniosity.

[16] She stated that based on ***Manning Industries Inc and another v Jamaica Public Service Co Ltd*** (unreported) Supreme Court, Jamaica, suit no. 2002/M 058, judgment delivered 30 May 2003, the court should first determine whether the applicant has satisfied the requirements of rule 24.3 of the **Civil Procedure Rules, 2002** before proceeding to consider the justice of the case.

[17] It was submitted that court has an unfettered discretion under section 388 of the **Companies Act** whether or not to order security for costs. In this regard she relied on ***Sir Lindsay Parkinson Ltd v Triplan Ltd*** [1973] 2 All E.R. 273 at 285 e & g in which Lord Denning MR, in interpreting section 448 of the UK Companies Act 1948 which is similar to section 388 of the Jamaican legislation stated:

> *"I would add a case in 1962 in the Supreme Court of Eire. It is* ***Peppard and Co Ltd v Bogoff*****. Kingsmill** *Moore J said ([1962] IR at 188):*
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> > *'… the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances.'*
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> *Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case."*

[18] Mrs. Kitson stated that the decision in ***Sir Lindsay Parkinson Ltd v Triplan Ltd*** (supra) was endorsed by the Court of Appeal in ***Cablemax Limited & Ors v. Logic One Limited*** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 91/09, judgment delivered 21 January 2010. Reference was also made to ***Monica Harris v Atkinson and others*** (unreported) Supreme Court Jamaica, Claim No. 2004 HCV 00213, judgment delivered 8 October 2010 in which Hibbert J stated that the court was required to examine the circumstances of the case in order to determine whether it was just to make the order.

[19] It was submitted that the applicant/defendant has satisfied the requirement under section 388 of the **Companies Act** by presenting credible evidence that the claimant/respondent will be unable to pay the applicant/defendant's costs. In this regard Mrs Kitson relied on ***C & H Property Development Company Limited v Capital and Credit Merchant Bank Limited*** [2012] JMCC Comm. No. 6 and ***Shell Company (WI) Ltd v Fun Snax Ltd and Midel Distributors Ltd*** [2011] JMCA

App 6. She stated that there is reason to believe that the claimant is unable to pay its debts based on the fact that it has not satisfied the judgment in ***Traille*** and has outstanding invoices. In addition, reference was made to Mr Robinson's affidavit in opposition to the defendant's application for a final charging order which was said to contain an admission that the claimant is impecunious.

[20] Mrs. Kitson stated that the court in its consideration of the matter was required to carry out a balancing exercise in order to determine what was just in the circumstances. Reference was made to ***Sir Lindsay Parkinson Ltd v Triplan Ltd*** (supra) in which *Lord* Denning MR identified a number of factors that should be taken into account. ***Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd***, High Court, Barbados, Nos 605, 639 and 641/1986, judgment delivered 6 March 1987, in which Belgrave J stated that the factors which may be taken into account are listed in the **Supreme Court Practice** 1982 Volume 1 at page 435. They are as follows:

a. Whether the claim was bona fide or a sham;
b. Whether the claim has a reasonably good prospect of success (though the court should not normally embark on a detailed examination of the merits);
c. Whether the defendant has made any admissions of the Claimant's claim;
d. Whether the Defendant has made any substantial payment (not merely a payment into court to get rid of a nuisance claim) into court or open offer of payment in settlement;
e. Whether the claimant's lack of funds has been caused by the Defendant's conduct;
f. Whether the application for security is being made oppressively in order to stifle the claim; and

g. Whether there has been a delay in making the application which should be made as early as possible.[2]

[21] Reference was also made to ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 3 All ER 534 in which ***Sir Lindsay Parkinson Ltd v Triplan Ltd*** (supra) was cited with approval (see also ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** [2013] JMCC Comm. 13).

[22] It was submitted that in assessing whether a claim is likely to be stifled by an order for security for costs, the court should also consider the ability of the claimant to raise money to pay the costs.

[23] Mrs. Kitson asserted that when all of the relevant factors are considered, the scales are tipped in favour of the grant of the order. In this regard it was submitted that the claim is not a bona fide one and the claimant's prospect of success is very low if not non-existent. She submitted that the claimant has no realistic prospect of success as the defendant has not breached any term of the ICA neither has it been negligent in providing services to the claimant. It was asserted that the alleged low Answer Seizure Ratio (ASR) being experienced was due to congestion on the defendant's network and lack of capacity. She stated that since about 2015 the Office of Utilities Regulation (OUR) had directed Digicel to supply the defendant with additional capacity but to date, that directive had not been complied with.

[24] It was also indicated that there are outstanding invoices on the claimant's account which in keeping with clause 24.3 of the Legal Framework to the ICA would have entitled the defendant to suspend all services to the claimant but it has not yet done so.

[25] Mrs. Kitson stated that the defendant is being prejudiced as it has been forced to to expend funds to defend tenuous claims continuously filed by the claimant, with

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[2] See also ***Dwayne McGaw v Jamaica Infrastructure Operator Ltd and another*** [2017] JMSC Civ 22

no hope of recovery of its costs. In addition, it would be unjust to allow the claimant to proceed with this claim without making any provision for the claimant to satisfy its indebtedness to the defendant, particularly when its claim has a low prospect of success.

[26] It was submitted that the grant of the order is not likely to stifle the claim and in any event the defendant is not the cause of the claimant's impecuniosity. She stated that based on ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** (supra), once the defendant has presented credible testimony that the claimant is unable to pay the defendant's costs, there is an evidential burden on the defendant to refute that allegation. Learned Queen's counsel also pointed out that based on ***New Tasty Bakery v MA Enterprise*** [2016] EWHC 1038, the claimant who alleges that an order for security will stifle the claim is obliged to adduce satisfactory evidence that "*he not only does not have the means to provide security but also cannot obtain the necessary financial assistance from a third party who might reasonably be expected to provide such assistance if it could."* [3]

[27] Mrs. Kitson stated that the claimant's affidavit in response has provided no evidence that it is unable to pay security for costs and makes no allegation that an order for security for costs is likely to stifle the claim.

[28] It was also submitted that the claim does not affect the existence of the claimant company. Mrs. Kitson stated that Mangatal J in ***Cybervale Ltd v Cable & Wireless Jamaica Ltd*** (supra) at paragraph 16 determined that the court should only be inclined to refuse to make an order for security for costs where the claim is central to the existence of the claimant company or where the defendant is the material cause of the claimant company's impecuniosity. It is not sufficient that the defendant's conduct: (i) contributed to the claimant company's impecuniosity (see

[3] Paragraph 9. See also ***Al-Koronky and another v Time Life Entertainment Group Limited*** [2005] EWHC 1688 paragraphs 31 and 32.

Dalma Formwork Pty Ltd (Administrator Appointed) v Concrete Constructions Grp Ltd)[4]; or (ii) that it merely diminished an opportunity to cure the plaintiff's original impecuniosity (see ***Tradestock Pty Ltd v TNT (Management) Pty Ltd*** **(No 1)**[5]. She asserted that the claimant has not been in good financial standing before the accrual of the alleged cause of action as it has failed to pay sums due to the defendant for a considerable period.

[29] The claimant's case, it was argued, is tenuous at best and there is therefore no question of a genuine claim being stifled by an order for security for costs.

[30] With respect to the timing of the application, it was argued that it has been made promptly as it was filed shortly after the filing of the defence and prior to the case management conference. Reference was made to ***Brainbox Digital Ltd v Backboard Media GMBH*** [2017] EWHC 2465 (QB) at paragraphs 54, 55 and 58, which dealt with this issue.

[31] Reference was also made to ***Continental Baking Co Ltd v Super Plus Food Stores Ltd and another*** [2014] JMCA App 30 in which the application for security for costs was refused based on the late stage of the proceedings when it was made.6 It was submitted that there was no delay in making the application in the instant case.

[32] It was submitted that when it is considered that the claimant has filed this action in circumstances where it is in breach of a condition precedent of the ICA, has no material assets in the jurisdiction sufficient to satisfy an order for costs, has provided no evidence that its claim is likely to be stifled and the prospect of succeeding in its claim are tenuous, it would be unfair for the claim to be allowed to proceed without an order for security for costs.

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[4] [1998] NSWSC 472 9700735

[5] *(1977) 30 FLR 343*

[6] See paragraphs [33] and [34]

[33] Where the amount is concerned, it was submitted that the amount detailed in the affidavit of Ms Sola Hines is a conservative estimate of the costs which are likely to be incurred. As such full amount requested should be ordered. Reference was made to ***BRL Limited v The Attorney General of Jamaica*** [2017] JMCC Comm 05 in which the court made an order for the full amount. Mrs. Kitson did indicate however, that although the amount which is to be ordered is a matter that is entirely within the court's discretion, it should not be a nominal sum (see ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** (supra)). There is also no rule of practice that the sum should be reduced by one third (see ***Procon (GB) Ltd v Provincial Building Co Ltd*** [1984] 2 All ER 368 at 375f – 377 and 379b – 380a).

Claimant's/respondent's submissions

[34] Mr Hemmings submitted that Ms Wynter's assertion that Mr Robinson had deponed in an affidavit that payment of the judgment in ***Traille*** would result in the claimant's insolvency was false. He also pointed out that the judgment in ***Traille*** was being appealed on the basis that the call tax was not lawful. In the circumstances the judgment was null and void. Mr Hemmings stated that there has been no request by the defendant for the settlement of the judgment sum. He also indicated that the issue of the constitutionality of the call tax is also the subject of a Constitutional motion. The appeal he said, is likely to succeed and the defendant will be entitled to a refund of the call tax that was paid.

[35] It was asserted that the claim is a strong one which is likely to succeed as clause 9.5 of the ICA requires performance even where there is a dispute. It was also asserted that the grant of the order to likely to stifle the claim. In this regard he referred to paragraphs 10 and 11 of the affidavit of Rory Robinson which state:

> *"10. In respect of paragraph 10, the claimant expresses confidence in the claim herein, as having a very good chance of success. Traille Caribbean is entitled to the services as per contract.*
>
> *11. The points at issue are self evident. The Claimant seeks service as per contract. The defendant fails and continues to resist*

> *providing the service on grounds contracted which cannot be sustained on false basis being that sums of money are owed. The defendant only seeks to stifle competition."*

[36] It was also submitted that the grant of the order would be contrary to public policy which requires the defendant as the dominant player in the industry to ensure the delivery of service and defeat the ends of justice.

[37] Counsel asserted that the weight of the evidence was in the claimant's favour and as such the application should be refused.

Discussion and analysis

[38] Section 388 of the **Companies Act** which gives the court the power to order security for costs against a company, states:

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

[39] Rule 24.2 of the **Civil Procedure Rules**, 2002, (**CPR**) states as follows:

> *"(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.*
>
> *(2) Where practicable such an application must be made at a case management conference or pre-trial review.*
>
> *(3) An application for security for costs must be supported by evidence on affidavit.*
>
> *(4) Where the court makes an order for security for costs, it will -*
>
> *(a) determine the amount of security; and*

(b) direct -

(i) the manner in which; and

(ii) the date by which

the security is to be given."

[40] In this matter, the procedural requirements have been satisfied and there is no issue of delay.

[41] In ***C & H Property Development Company Limited v Capital and Credit Merchant Bank Limited*** (supra), Mangatal J, in dealing with the factors which may be taken into account under section 388 stated:

> *"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:*
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> > *'I should say that the fact that the Plaintiff Company being liquidation would be sufficient "reason to believe" the assets to be insufficient'."*[7]

[42] The learned Judge found that the "claimant's failure to comply with the defendant's statutory demand, or its inability to pay its debts as and when they fall due, [was] a better measure of solvency than the question of whether its assets [exceeded] its liabilities". [8]

[43] In this matter as was the case in ***C & H Property Development Company Limited v Capital and Credit Merchant Bank Limited*** (supra), no evidence has been

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[7] Paragraph [30]
[8] Paragraph [40]

presented by the respondent/claimant that it is able to satisfy its debts. As was stated by Mangatal J in ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** (supra), *"whilst the overall burden of proof is on the [applicant], once credible testimony is presented that the [respondent] may be unable to pay the [applicant's] costs, an evidential burden is placed upon the [respondent] to provide if it can, some evidence that it can so meet an order for costs, or refuting the allegations that it cannot."*[9]

[44] In ***Salthill Properties Limited and Brian Cunningham v Royal Bank of Scotland plc, First Active plc, and Bernard Duffy*** [2011] 2 IR 441, Clarke J said:

> *"**Legal principles relevant to the first plaintiff***
>
> *[14] Section 390 of the Companies Act 1963 provides:-*
>
> *"Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."*
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> *[15] There are a number of points to be made about s 390 of the Act of 1963. The section only applies to proceedings where the plaintiff is a limited liability company. **There must be "credible testimony" to show that, if the defendant is successful in his defence, the plaintiff company will be unable to pay the defendant's costs. A prima facie defence is further required. After a prima facie defence has been established by the defendant, the burden shifts to the plaintiff company to assert circumstances that would justify the refusal of the order.** The approach to ordering security for costs was summarised by Morris J in Inter Finance Group Ltd v KPMG Peat Marwick (Unreported, High Court, Morris J, 29th June, 1998) at p 4 as follows:-*

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[9] Paragraph [12]

"From these authorities it emerges that to succeed there is an onus on the moving party, the defendant, to establish (a) that he has a prima facie defence to the plaintiff's claim and (b) that the plaintiff will not be able to pay the defendant's costs if successful in his defence.

On establishing these two facts then the order sought should be made unless it can be shown that there are specific circumstances in the case which would cause the court to exercise its discretion not to make the order sought. Such special circumstances might be:-

(I) that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the parties seeking the security; or

(II) there has been delay by the moving party in seeking the relief now claimed;

(III) some other circumstance which might arise in the case."

[My emphasis]

[45] In ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** (supra), Mangatal J said:

"[11] This Application by the Defendant is made pursuant to Section 388 of the Companies Act and Rule 24.3 (g) of the Civil Procedure. Section 388 and Rule 24.3 (g) each have individual criteria that have to be met before a Court may be moved to make an order for security for costs. In my judgment, one of the major differences between the two discretions which the court has to make an award for security of costs, is that under the Companies' Act provision the Claimant company's impecuniosity per se is a ground for making the order for security for costs.

*[12] Section 388 of the Companies Act provides that the Defendant may obtain an order for security for costs where "**there is credible testimony that there is a reason to believe that the Company will be unable to pay the costs of the Defendant if successful in his Defence**." Here it is expected that evidence will be presented to the Court by the Applicant, illustrating that the Claimant Company is in or potentially in a parlous financial situation at this point in time. In*

the Affidavit of Derrick Nelson, it was pointed out that the Claimant's continued indebtedness to the Defendant company, the Claimant's inability to fulfill the monetary condition of the order of the Honourable Mr. Justice Dukharan JA as well as its non-compliance with the order for costs which was made and taxed by the Court of Appeal, supports its contention that the Claimant would be unable to pay its Costs."

[My emphasis]

[46] Further in paragraph [12], she declared:

> *"[12] …..**It seems to me that while the overall burden of proof is on the Defendant applicant, once credible testimony is presented that the Claimant may be unable to pay the Defendant's costs, an evidential burden is placed upon the Claimant to provide if it can, some evidence that it can so meet an order for costs, or refuting the allegations that it cannot**. When one has regard to these uncontested factual allegations, coupled with the Claimant's antecedent conduct in not fulfilling or complying in full with orders made by the Court, this does in my mind demonstrate that the Claimant may not be able to meet the Defendant's at the end of the trial."*

[My emphasis]

[47] It must also be highlighted that at paragraph 13 of her judgment, the learned judge said:

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

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

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

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

4) Any delay in making the application."

[48] It is clear from the judgments in ***Cybervale Limited*** (supra) and ***Salthill Properties Limited*** (supra) that while the overall burden of proof is on the applicant, in this case the defendant, once it has been discharged, the burden shifts to the respondent to assert circumstances that would justify the refusal of the order. In ***Cybervale Limited v Cable & Wireless Jamaica Ltd*** Mangatal J states clearly that the burden on the claimant is an evidential one. This requires *"a party to adduce sufficient evidence of a fact to justify a finding on that fact in favour of the party so obliged."*[10]

[49] It seems to me that the first question is, therefore, whether the defendant/applicant has discharged the onus which rests on it to establish impecuniosity. This, of course, takes me to the affidavit filed in support of the application.

[50] Ms. Hines, in her affidavit stated that the defendant seeks an order for security for costs on account of the fact that the claimant has been indebted to the defendant since 2014 and it is reasonable to believe that if the defendant is successful in defending the claim, the claimant will not be able to pay the defendant's costs.

[51] She stated that the claimant has failed to pay the judgment debt in ***Traille*** of twenty-two million six hundred thousand and six hundred and eighty dollars and

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[10] See **The Modern Law of Evidence**' by Adrian Keane and Paul McKeown, 9th ed at page 82

nineteen cents ($22,600,680.19) to the defendant. It was also stated that the claimant:

(a) has also failed to pay the costs for the said matter in the amount of eleven million nine hundred and twenty-one thousand, eight hundred and fifty-two thousand dollars and ninety-three cents ($11,921,852.93); and

(b) is further indebted to the defendant in the amount of one million, ninety-three thousand and eighty-seven dollars and forty-seven cents ($1,093,087.47)

[52] In Ms Hines' affidavit, she informed the court that in seeking to enforce the judgment debt, the defendant made an application for an order charging the claimant's main bank accounts. In opposing the application, the claimant's Managing Director, Mr. Robinson, deponed to an affidavit which was filed on 23 February 2018 in which he stated that the imposition of a final charging order was likely to have serious consequences. He stated that "*the freezing and execution of the judgments will put the claimant at great risk of defaulting on the payment [of telephone call tax]*."[11] Ms. Hines asserted that given these statements by Mr. Robinson, it is reasonable to believe that the claimant would not be able to satisfy any further costs awards made in the defendant's favour.

[53] Ms. Hines averred that an estimate of the reasonable and likely costs in this matter is thirteen million four hundred and seventeen thousand three hundred and five dollars ($13,417,305.00). A schedule which revealed the cost breakdown was outlined in Ms. Hines' affidavit.

[54] In her affidavit, Ms. Hines also stated that the claimant's claim has no realistic prospect of success as the defendant has not breached any term of the

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[11] Paragraph 33

interconnection agreement it has with the claimant, neither has the defendant been negligent in providing its services to the claimant. She stated that the issues with the alleged low ASR which the claimant is experiencing are due to the congestion on the defendant's network and the lack of capacity thereon. It was further stated that the Office of Utilities Regulations (OUR) has directed another service provider to supply the defendant with additional capacity, however the OUR's directive has not been complied with.

[55] Ms. Hines stated that the defendant continues to be prejudiced by being forced to expend sums to defend tenuous claims continuously filed by the claimant with no hope of recovery of its costs.

[56] I wish to mention that though the defendant's Notice of Application states that the defendant is not aware of any asset that the claimant has in the jurisdiction, this was not addressed in the affidavits in support of the application.

[57] Turning now to Mr. Robinson's affidavit which was filed in opposition of the application. In this affidavit, Mr. Robinson asserts that, with respect to paragraph four of Ms. Hines' affidavit, the claimant is not indebted at all to the defendant. He further states that the amount which the defendant claims that the claimant owes in respect of invoices has fluctuated significantly as a result of faulty calculations deduced.

[58] Mr. Robinson also stated that:

> *"5…The judgment of Batts J and all ancillary claims arising from his judgments are consolidated and/or on appeal to be heard starting on 7th October 2019 for nine hours. This includes the award of damages and the judgment for cost which the Defendant says owes. Traille Caribbean is confident that it succeeds on the review of its appeal in the honourable appeal Court (sic). Additionally Traille Caribbean as (sic) applied for stay of the Judgment cost hearing."*

[59] Broadly speaking, the affidavit filed by Mr. Robinson indicates that sums claimed are not truly owed and that the claimant is confident that its appeal will be

successful. Mr. Robinson, at paragraph 10 of his affidavit, states that the instant claim has a very good chance of success as the claimant is entitled to the services as per contract.

[60] In Ms. Hines' July affidavit, importantly, she stated that as it stands, there has been no stay of the judgment in ***Traille***.

[61] Again, quite significantly, she stated that the claimant is indebted to the defendant for an amount in the vicinity of one million five hundred thousand dollars ($1,500,000.00) in respect of invoices which were issued monthly to the claimant since September 2014 to present for interconnection charges. She stated that the claimant has refused and/or willingly failed to pay the full amounts owed on each invoice, resulting in a balance being brought forward throughout the period. She referred to affidavits of Ms. Simone Wynter[12] which detail the defendant's calculations.

[62] I have also noted that in respect to the application for a charging order, in Mr. Robinson's opposing affidavit, at paragraph 58 he states:

> *"The Claimant/Judgment Debtor will be able to pay any court judgement after due process* ***and timely scheduling and the Claimant is in business for the long haul*** *and must extricable (sic) partner with the Defendant/Judgment Creditor to continue its business…"*

[My emphasis]

[63] The above statement, without more, appears to support the defendant's contention that it is likely that the claimant will be unable to pay its costs. In my view, the defendant has provided credible testimony that the claimant may be unable to pay its costs. The defendant has not sought to give the court some insight into its

[12] See for example, the third affidavit of Simone Wynter sworn to on July 30, 2019 and filed July 31, 2019

financial health or its ability to source funds. I find that the claimant has not discharged its evidential burden as it has not adduced sufficient evidence of its ability to pay the costs which may be awarded in the event that the claim is decided in the defendant's favour.

[64] It is indisputable that an order for security for costs may result in a party being barred from proceeding with its case. The claimant's perceived impecuniosity is therefore not the end of the matter. The court is required to consider the justice of the case which may or may not support the grant of an order for security for costs.

[65] There are a number a number of factors which arise for the court's consideration. In ***Hernett, Sorrell and Sons Ltd v Smithfield Foods Ltd*** (supra), which was cited by the defendant, Belgrave J stated that there are several factors which the court may take into account when considering applications for security for costs. They are:

(1) Whether the plaintiff's claim is bona fide and not a sham.

(2) Whether the plaintiff has a reasonably good prospect of success.

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

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

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

(6) Whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work.

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

Does the claimant have a reasonably good prospect of success?

[66] The determination of this issue does require the court to conduct a detailed examination of the merits of the case. In ***Cablemax Limited & Ors v. Logic One Limited*** (supra), Morrison JA (as he then was) stated:

> *"In* ***Keary Developments Ltd and Tarmac Construction Ltd and another*** *[1995] 3 ALL ER 534, the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the equivalent provision of the UK Companies Act 1 985 were reviewed and restated by Peter Gibson LJ (at pages 539 — 542) These principles, which are in my view equally applicable to an application made under rule 2.12 of the CAR, may be summarised as follows:*
>
> > *(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 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."*[13]

[67] In ***Traille Caribbean v Cable & Wireless Jamaica Limited*** [2020] JMCC Comm 16, I concluded that the claim does not have a good prospect of success. For ease of clarity I will set out the basis for that conclusion in this judgment.

[68] The contract between the parties is contained in the ICA which was signed by the parties on 4 March 2014. The Legal Framework, the Service Schedule, Service Descriptions, Tariff Schedule, Parameter Schedule and the Joint Working Manual are all a part of that agreement.

[69] According to the claimant, since April 2016, by contractual agreement, the defendant has been providing telephone traffic to the claimant in its delivery of international mobile calls. It alleges that contractually, the protocol between the parties is to ensure delivery of quality service which requires the parties to constantly monitor the performance of the interconnection facilities and technical network interconnected with the defendant's network. It further states that this involves a reporting mechanism and the parties have established a Network Operation Centre which does the critical monitoring of the Joint Network for the delivery of quality service to the claimant's customers.

[70] The claimant stated that it has compiled a record of activities with respect to the failure of the defendant to provide quality service. These were appended to its

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[13] Paragraph [14]

particulars. It referred to a contractual and an industry benchmark which is used to determine the quality of the service, the Answer Seizure Ratio (ASR). It mentioned its experience of low ASR and low average length of calls and referred to the defendant's lack of compliance with requirements as set out in the Parameter schedule of the contract, which among other things, speaks to the time within which faults ought to be repaired. The claimant stated that it suffered lost minutes, revenues, and call termination for the period as at June 14, 2016 and continuing. It asserted that the defendant consistently fails to provide the minimum required delivery of service which has resulted in loss of revenue and goodwill.

[71] In its defence, the defendant denies failing to provide quality service. It states as follows:

> *"The Defendant puts the Claimant to strict proof of its record of activities appended as schedules 1-5 and further states that save for the reasons provided to the Office of Utilities Regulation (OUR) in the report to them as set out in paragraph 24 hereof, it has not failed to provide quality service in keeping with its obligations under the ICA."*

[72] The defendant agreed that the ASR, which is a measurement of network quality and call success rates and is the percentage of answered telephone call with respect to the total call volume, is a telecommunications industry benchmark. It stated that the quality of service for the services the defendant offers to the claimant is not contrary to the ASR minimum levels. It further stated that low ASR may be caused by a number of factors, resultantly, it denied any liability to the claimant as a result of a low ASR.

[73] In paragraph 24 of the defence, the defendant states:

> *"….the Defendant says that it did not fail to provide expected service over a protracted period as alleged or at all. The Defendant says that it has over several years experienced difficulty in delivering call traffic to Digicel resulting from the refusal of Digicel to provide appropriate capacity for call traffic being sent by the Defendant and other interconnected parties such as the Claimant. The Defendant*

reported the matter to the OUR which gave directions to Digicel to increase capacity. Digicel has failed or refused to do so. Accordingly, the defendant says it is not responsible for any resultant congestion in call traffic as claimed by the Claimant."

[74] In its defence, the defendant states that it puts the claimant to strict proof that faults were not resolved in accordance with the fault management system under the ICA.

[75] Lastly, I will highlight that the defendant has indicated that clause 27.2 of the Legal Framework of the ICA excludes liability for indirect, purely economic, special or consequential loss or damage, foreseeable or not, arising from either party's performance or non-performance of its obligations under the agreement.

[76] In its defence, the defendant has, among other things:

(a) denied the allegations and put the claimant to strict proof;

(b) alleged that low ASR could be as a result of a number of factors; and

(c) pointed a finger at another telecommunications company.

[77] In my judgment, there is no demonstrably high degree of probability that the claimant will emerge successful at trial but I cannot rule out the possibility, at this preliminary stage, that the claimant may prove its case to the satisfaction of the court.[14]

[78] This brings me to the consideration of whether an order for security would have the effect of stifling a genuine claim or be of oppressive effect. Whether there is an admission by the defendant on the pleadings or elsewhere that money is due

[79] The claimant has disputed the amounts said to be outstanding in respect of the invoices. Where the judgment debt in ***Traille*** is concerned, it has asserted that

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[14] The exclusion of liability clause would be the subject of interpretation. See for example ***Polypearl Ltd v E. ON Energy Solutions Ltd*** [2014] All ER (D) 31 (Oct)

there has been no demand for payment. This assertion is at variance with the documentary evidence. In a letter dated 9 May 2018 Mr. Andrew Lee of Cable & Wireless Jamaica Limited addressed to Mr. Sylvester Hemmings, attorney-at-law it is stated in part, as follows:

> *"**Non-Payment of Damages***
>
> *Reference is made to the judgment handed down May 22, 2017 in the matter of Traille Caribbean Limited v cable & Wireless Jamaica Limited. As outlined in the judgment, Claimant is required to pay the Defendant damages in the sum of $22,600,680.19 plus statutory interest at the rate of 6 percent per annum from May 22, 2017.*
>
> *To date, we have not received such payment.*
>
> *In all the circumstances of this matter, we are unwilling to provide any additional service to Traille."*

[80] That letter also addressed the issue of outstanding invoices and the ruling from the OUR which at the time was outstanding.

Whether the application for security was being used oppressively so as to stifle a genuine claim

[81] In ***Keary Developments Ltd v Tarmac Construction Ltd*** (supra) this was one of the factors which Peter Gibson LJ highlighted for the court's consideration. He stated:

> *"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. **The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim***

> ***by an indigent company against a more prosperous company,*** *particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see* ***Farrer v Lacy, Hartland & Co*** *(1885) 28 Ch D 482 at 485 per Bowen LJ).* ***But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company*** *(see* ***Pearson v Naydler*** *[1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906)."*[15]
>
> [My emphasis]

[82] The claimant has submitted that an order for security for costs will have the effect of stifling its claim which it regards as a strong one. However, there is only a bald statement to that effect in paragraph 11 of Mr Robinson's affidavit sworn to on 30 July 2019. In ***New Tasty Bakery v MA Enterprise*** (supra), Judge Hacon stated:

> *"In any event the claimant's difficulty in relation to its allegation of stifling is that no effort has been made by the claimant to produce evidence establishing that it could not have obtained the sum sought in security from another source. With regard to the obligation on a claimant, who alleges that an order for security will stifle the claim, to adduce satisfactory evidence that he not only does not have the means to provide security but also cannot obtain the necessary financial assistance from a third party who might reasonably be expected to provide such assistance if it could, I refer to* ***Al-Koronky v Time Life Entertainment Group Limited*** *[2005] EWHC 1688."* [16]

[83] In ***Al-Koronky v Time Life Entertainment Group Limited*** (supra), Eady J stated:

> "31. *An important consideration, especially having regard to the need for equality of arms under the CPR and the Claimants' rights of access to justice under Article 6 of the European Convention, is whether the order sought or indeed any order for security for costs will have the effect of stifling their claim. That is a major factor in the present case. I need to remember, however, that* ***it is necessary for the Claimants to demonstrate the probability that***

[15] Page 540

[16] Paragraph 9

> ***their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not.***
>
> *32. There are interesting recent observations in this context in the case of* ***Brimko Holdings Limited v Eastman Kodak Company*** *[2004] EWHC 1343 (Ch), to which Miss Page drew my attention. Park J, having referred to the burden of proof, continued:*
>
> > *'Secondly, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether the security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs'."*
>
> [My emphasis]

[84] In the absence of any evidence from the claimant to supports its assertion, there is no basis on which the court could find that the claim is likely to be stifled if the order is made.

[85] In ***Monica Harrison v Atkinson and others*** (supra), Hibbert J noted that the court in its consideration of whether to make an order for security for costs was required to *"…weigh [the] contending difficulties in order to satisfy itself having regard to all the circumstances of the case whether or not it is just to make the order."*

[86] Having weighed the relevant factors, I am of the view that my discretion should be exercised in favour of the defendant/applicant. The order should be granted.

[87] I will therefore now consider what is an appropriate amount to order as security. The projected costs have been estimated at thirteen million four hundred and seventeen thousand three hundred and five dollars ($13,417,305.00). This is supported by schedule A of the affidavit of Sola Hines which is quite detailed. However, as can be gleaned from the decision in both ***Cablemax*** and ***C & H Property Development Company Limited v Capital and Credit Merchant Bank Limited*** (supra), the court is not bound to order the full amount claimed by way of security. The court should also not order an amount that can be described as nominal. I am also mindful of the fact that the amount ordered should not have the effect of stifling the claim. It is indeed a balancing exercise.

[88] The defendant/applicant has asked for this claim to be stayed pending the payment of the judgment debt and costs in ***Traille***. I am not of the view that that is necessary as there has been no stay of execution in that matter. The defendant/applicant is therefore free to execute the judgment if it so desires.

[89] In the circumstances, it is ordered as follows:

(1) The claimant is to provide security for costs in the sum of six million dollars ($6,000,000.00).

(2) The security for costs ordered pursuant to paragraph 1 hereof be provided by the claimant within twenty-one (21) days of the date of this order.

(3) The security for costs ordered pursuant to paragraph 1 hereof shall be paid into an interest bearing account at First Global Bank in the joint names of the attorneys-at-law for the claimant and the defendant.

(4) The claim is stayed until the sum ordered as security for costs is paid.

(5) Costs of this application to be defendant/applicant to be taxed if not agreed.

(6) Leave to appeal is refused.