REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2016-04365**

BETWEEN

THE SPORTS COMPANY OF TRINIDAD AND TOBAGO LIMITED

Claimant

And

SEBASTIAN PADDINGTON

First Defendant

CHELA LAMSEE-EBANKS

Second Defendant

REYNOLD BALA

Third Defendant

NORRIS BLANC

Fourth Defendant

NISA DASS

Fifth Defendant

ANYL GOPEESINGH

Sixth Defendant

SABRENAH KHAYYAM

Seventh Defendant

CHEEMATTEE MARTIN

Eighth Defendant

MATTHEW QUAMINA

Ninth Defendant

ANNAN RAMNANANSINGH

Tenth Defendant

KENT SAMLAL

Eleventh Defendant

HARNARINE SEERAM SINGH

Twelfth Defendant

MILTON SIBOO

Thirteenth Defendant

JOHN MOLLENTHIEL

Fourteenth Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. C. Kangaloo instructed by Ms. S. Moe for the Claimant

Mr. S. Sharma for the First, Second, Fifth and Ninth Defendants

Mr. R. Mungalsingh for the Third, Seventh, Tenth, Twelfth and Thirteenth Defendants

Mr. A. Viera and Mr. A. Maraj instructed by Ms. N. de Verteuil-Milne for the Fourth Defendant

Ms. S. Gopeesingh instructed by Ms. K. Persaud-Maraj for the Sixth Defendant

Mr. N. Bisnath for the Eighth Defendant

Mr. R. Jagai for the Eleventh Defendant

Mr. R. Dass and Mr. Punwasee for the Fourteenth Defendant

DECISION ON APPLICATION FOR SECURITY FOR COSTS

1. By Notice of Application filed on the 14th December, 2017, the fourth defendant (hereinafter referred to as "the defendant") applied for security for costs pursuant to section 522 of the Companies Act Ch 81:01. The costs budget set for this defendant is the sum of $1,375,075.00. The test under section 522 for the grant of the order is that the judge has to be satisfied based on 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.

2. The defendant alleges that the claimant company (a limited liability company incorporated under the said Act) is impecunious. That the money at its disposal is allocated on an individual basis by the government for specific purposes as the need arises and that these purposes do not include the payment of costs of litigation.

3. The defendant further alleges that the claimant is not authorized to use such funds in any manner it chooses and in this case for the payment of costs. That it is the implementation arm of the Ministry of Sport and Youth Affairs ("the Ministry"), which controls all allocations to the claimant. Consequently, the defendant alleges that the claimant lacks the necessary funds and resources to make such payments.

4. The defendant has written to the claimant demanding security for costs but the claimant has refused to so do and has responded by letter of the 8th December 2017 setting out its position.

5. The defendant has sworn to an affidavit in support of his application and the Corporate Secretary of the claimant has sworn to an affidavit in opposition of the 29th December 2017. The claimant also relies on an affidavit sworn to on its behalf by Stephanie Moe on the 4th January 2018. This affidavit simply corrects the allocation figure for 2018 set out in the principal affidavit in opposition.

The arguments in support of the application

6. In brief the matters set out in the evidence filed in support of the application are as follows. Firstly, the allocations to the claimant are made annually by way of the passage of the annual finance acts commonly referred to as the national budget. Secondly, financial statements of the claimant for the years 2014 and 2015 show that the claimant has no assets. Thirdly, the claimant holds no real property in its name. Fourthly, there is a judgment registered against the claimant in the sum of 3,519,500.76. It is to be noted that this judgement was set aside on the 22nd February 2018 (the court was so notified at the hearing of this application).

7. Fifth, there have been media reports that suggest that the claimant is to be shut down and replaced by a Sports Commission and a steering committee has been implemented to facilitate the transition. The defendant therefore fears that by the time the claim is determined the claimant may no longer be operational. The defendant also relies on an internal memo which it has annexed to its evidence. The memo purports to inform employees that the claimant is not in a healthy financial position and cannot guarantee the renewal of employee contracts pending a review.

The arguments in opposition to the application

8. The claimant's evidence filed in opposition to the application amounts to the following. It is accepted that the claimant receives its funding from the ministry through the national budget allocation. When received however, the allocation is to be used at its sole discretion. The claimant's budget itemizes specific activities and objectives which includes provision for the estimated legal fees and costs associated with litigation.

9. Further, even though that allocated to it is less than that sought by it, the claimant has the option of applying to the ministry for additional funding. That includes an urgent

request for funds. The allocation received by the claimant for fiscal 2018 is $80,200,000.00. The figures for 2017 and 2016 were slightly higher.

10. The claimant deposes that it in fact has assets and that these assets are reflected on its financial statements. They include current and non-current assets such as equipment, furniture, fixtures, machinery, computers, motor vehicles, intangible assets, trade receivables and investments. The claimant has annexed its financial statement for the year ended 2016 as proof. That statement values the assets at $743,020,425.00. It is equally clear to the court on the evidence of the claimant that the claimant holds no real property.

11. In relation to the steering committee, the claimant testifies that the committee was appointed to look into the idea of a Commission but has not yet reported or recommended whether such a commission should be established at all. To so find would be to speculate in its view.

12. In relation to the letter to staff, the claimant says that it is not insolvent and that the letter was part of the process of streamlining operations.

13. Further, the evidence on the part of the claimant is that the claim is a bona fide one for the loss of thirty-four million dollars by reason of the defendant's role in approving the embeam contract and approving payments. That therefore the application is being used to stifle a genuine claim.

The law

14. In ***Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.***[1] (a case relied upon by the claimant) an application for security for costs pursuant to section 447 of the Companies Act 1948 was made against a plaintiff company, which was believed to be unable to

[1] [1973] Q.B. 609

pay the defendant's costs if unsuccessful. The contents of section 447 of the Companies Act 1948 is the same as section 522 of the Companies Act Ch 81:01. Lord Denning M.R. at 626–627 had the following to say;

"If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively — so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work .... I am quite clear that a payment into court, or an open offer, is a matter which the court can take into account. It goes to show that there is substance in the claim: and that it would not be right to deprive the company of it by insisting on security for costs…"

15. In ***Keary Developments Ltd. v Tarmac Construction Ltd.***[2] (a case relied upon by the defendant) Peter Gibson LJ set out the relevant principles which are applicable in determining whether an order for security for costs should be made;

"1. As was established by this court in Sir Lindsay Parkinson & Co Ltd v Triplan Ltd… the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

[2] [1995] 3 All ER 534 at 539

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v Naydler [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. 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).

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in

acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal."

The issues

16. The issues for determination in this case are as follows;
    i. Whether it appears by credible testimony that there is reason to believe that the claimant company will be unable to pay the costs of the defendant if successful in his defence; and
    ii. Whether the effect of an order for security for costs may be that of stifling a genuine claim.

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.

17. In relation to the assets and financial statements of the claimant, it is accepted that the claimant holds no real property. However, the court finds that it does in fact own assets which are intangible and realizable. The court accepts the evidence that these assets are valued at $743,020,425.00 as set out in the evidence in relation to the last available financial year namely 2016. The court does not accept that the statements relied on by the defendant demonstrate that the claimant is insolvent and will be unable to pay an order for costs either by itself or when considered with other evidence. Firstly, the statements relied on by the claimant are of some vintage. The court therefore prefers to act upon the last available statement before it. Further, the fact that liabilities may be reflected as exceeding assets on audited statement does not necessarily give rise to an inference of insolvency in the circumstance where the claimant in this case is government funded in the manner set out in the evidence of the claimant. It is clear that the claimant has access to funds from the Ministry for the purpose of paying its debts or for any other lawful purpose it may determine.

18. In relation to the letter to staff. It is clear that the letter sets out the following. Firstly, that there is no truth to the rumour that the company is to be shut down as management has received no such official notification. However, the company's future remains uncertain because of serious financial difficulty. It means therefore that the company must review how it does business with a view to streamlining operations to reduce expenses and create a more efficient cost-effective organization. As a consequence of the review being conducted no contracts will be renewed for extended period pending the completion of the review. Month to month contracts will be offered pending the review process. Further, employees are advised to actively explore alternative employment.

19. In the court's view, the contents of this letter do not spell doom and gloom and the closure of the company. This letter it can be reasonably inferred, is no different to any

which may distributed to staff by any company in Trinidad and Tobago after the slump in oil prices which occurred prior to the date of the letter and of which the court can and does take judicial notice. It is what is to be expected when a company acknowledges that it has been operating in manner which has not been conducive to the changing economic environment and so must also effect changes to remain viable.

20. It is a reasonable inference that in some cases the natural and ordinary consequence of stream lining operations for efficiency is bound to be that of the non-renewal of the contracts of some workers particularly in a worker heavy environment. Otherwise what is the purpose of the review. It does not mean that the company is to be closed down and the court therefore does not draw that inference.

21. In relation to the steering committee that has been appointed, unless the circumstances change subsequently in which case the defendant is entitled to make another application for security for costs based on the new circumstances, the evidence before the court is that no decision has yet been taken on the claimant and it continues to operate and receive its annual allocations. To find that it is likely that the claimant will be non-operational by the time this matter is determined in as set out in the public statements relied on by the defendant in light of the explanation provided by the evidence of the claimant would be for this court to speculate. This the court will not do. The court is therefore not satisfied on the evidence before it that the claimant is likely to be non-operational by the time this claim is determined.

Stifling a genuine claim

22. The claimant submits that the effect of an order for security for costs may be that of stifling a genuine claim. The court does not accept that this argument has force when applied to the fourth defendant alone. But the court has to consider not only the fourth defendant in examining the argument but it is duty bound to consider the potential effect on all of the parties to the claim pursuant to the overriding objectives of the CPR to ensure that cases are dealt with justly and that parties are placed in so far as it is possible on equal footing.

23. In that regard it is reasonable to infer that an order for security in favour of the fourth defendant would entitle all of the defendants to apply for security for costs on the same basis. Should such orders be granted, (the court having at this stage no reason to make a distinction between the arguments here and potential arguments of the other defendants, but applying a common sense approach), this would mean that security for costs in the region of approximately ten million (having regard to the order for budgeted costs) or about 8% of the annual allocation of the claimant may have to be set aside as security. Certainly this would more likely than not have the effect of stifling what the court finds to be a genuine claim brought by the claimant.

24. Not only is it a genuine claim, but there is a high public interest component in these proceedings having regard to the fact that the claim concerns the spending of public funds. So that the public coffers would be made to allocate substantial sums as security in the context of a claim brought for the public good in relation to the alleged mis spending of some thirty-four million dollars in taxpayers' money. The court therefore has to be circumspect in making the order sought.

25. The court is therefore not satisfied on all of the evidence that an order for security for costs ought to be made in all of the circumstances. The application is dismissed and the fourth defendant shall pay to the claimant the costs of the application to be assessed in default of agreement.

Dated the 13th of June 2018

Ricky Rahim

Judge