COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2020/PUB/jrv/FP/00005

IN THE MATTER OF an application for for Judicial Review

BETWEEN

THE QUEEN

AND

The Hon ROMAULD FERREIRA MP
Minister of the Environment and Housing
1st Respondent

ROCHELLE NEWBOLD
Director of Environmental Protection and Planning
2nd Respondent

THE ATTORNEY GENERAL
(In a representative capacity for the Governor General)
3rd Respondent

THE TOWN PLANNING COMMITTEE
4th Respondent

BAHAMAS PETROLEUM LTD. PLC
5th Respondent

BAHAMAS OFFSHORE PETROLEUM LIMITED
6th Respondent

Ex Parte

WATERKEEPERS BAHAMAS LTD

COALITION TO PROTECT CLIFTON BAY

Applicants

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Frederick Smith, QC along with Ms. Ruth Jordan, and Mr. Garth Phillippe for the Applicants
Mr. Franklyn Williams along with Mr. David Higgins, Mrs. Kayla Green-Smith and Ms. Kenria Demeritte for the First through Fourth Respondents
Ms. Clare Montgomery, QC along with Mr. Leif Farquharson and Mr. Adrian Hunt for the Fifth and Sixth Respondents

HEARING DATE: February 17, 2021

RULING

This is an application for an Oder for security for costs by the Fifth and Sixth Respondents

Introduction:

1. The brief facts are that on January 5, 2021 the Applicants were granted leave to commence judicial review proceedings as against the named Respondents in this action. Additionally, the Court granted the Applicants leave to join the Town Planning Committee as a Respondent and leave to amend their pleadings to reflect the same. However, the Applicants' application for a stay of the effect of the decisions challenged by them in these proceedings was refused by the Court. On January 22, 2021, Bahamas Petroleum Ltd. Plc and Bahamas Offshore Petroleum Limited (collectively referred to as "BPC") was added as the Fifth and Sixth Respondents to the action.
2. By Summons dated January 25, 2021 BPC makes an application pursuant to Section 285 of the Companies Act, 1992 (as amended) ("the Act") and Order 31A,

Rule 18(s) of the Rules of the Supreme Court ("RSC") and/or the inherent jurisdiction of the Court for orders that the Applicants within 14 days from the date of the Order give security for the costs of BPC to the satisfaction of the Court; all further proceedings herein be stayed pending the Applicants giving the security for the costs of BPC and costs of the application paid by the Applicants to BPC. In support of its application BPC relies on its Skeleton Arguments filed February 15, 2021 and the Affidavit of John Minns filed January 25, 2021.

3. The Applicants oppose BPC's application and rely on their Submissions dated February 16, 2021 and the Third Affidavit of Joseph Darville filed February 10, 2021.

Statement of Facts

4. Mr. Minns states in part that the First Applicant sent a letter dated November 17, 2020 to BPC whereby it advised the Fifth Respondent that it would pursue judicial review proceedings in respect of the decisions taken by the Minister of the Environment to approve the Environmental Impact Assessment submitted by BPC and grant approval for an Environmental Authorization to BPC in respect of exploratory oil drilling in Bahamian waters. That GrahamThompson, his firm sent a letter in response dated December 3, 2020 raising concerns and made a request for information from the First Applicant addressing its ability to satisfy any costs award made in favour of BPC following judicial review proceedings. That the letter from his firm expressly stated that the requests were made for the purpose of informing a decision by BPC as to pursuing security for costs incurred by BPC with respect to contemplated judicial review proceedings. He also states that on January 5, 2021 the Applicants were granted leave to pursue judicial review proceedings against the decisions relating to the project; the Notice of Motion of the same was filed on January 15, 2021 and served on his firm on the same date and on January 22, 2021 BPC was granted leave to intervene and be joined as a Respondent in this action. However, the Applicants have not responded or acknowledged the request made in the said letter.

5. Mr. Minns further states that the First Applicant was incorporated on or about October 11, 2018 but his firm has been unable to find any indication that the First Applicant carries on any commercial business operations within The Bahamas or owns any assets within The Bahamas. That in these circumstances it is his belief that the First Applicant does not have any assets or sufficient assets to satisfy an order to pay BPC's costs, if so ordered. He also states that the Second Applicant is a company incorporated in The Bahamas and that his firm has been unable to find any indication that the Second Applicant carries on any commercial business operations within The Bahamas or owns any assets within The Bahamas. That based on the same it is his belief that the Second Applicant does not have any assets, or sufficient assets to satisfy an order to pay BPC's costs if so ordered. That a draft Bill of Costs setting out BPC's estimated professional fees that will be incurred in this matter in the sum of $300,091.69 is exhibited to his Affidavit and he urges the Court to order the Applicants to provide the sum of $200,000.00 as security for the costs of BPC and that all further proceedings herein be stayed pending such security being provided.

6. Mr. Joseph Darville states in part that he is a director and Executive Chairman of the Second Applicant which is an established NGO. He states that the Second Applicant has a track-record since its incorporation in January, 2013 in that it has successfully challenged an unregulated development through the courts in various judicial review proceedings and been awarded its costs; successfully challenged the Bahamas Government in court and local press for allowing environmental pollution and unregulated development; advocated for an Environmental Protection and Freedom of Information Act; presents environmental education programs to over 800 students in schools across The Bahamas; runs youth programs for junior high school students on Grand Bahama including (with the First Applicant) the Waterkeepers Cadet program and the Young Environmental Ambassador Program; conducts monthly boat patrols over around Grand Bahama, Bimini and New Providence islands to monitor for pollution and environmental degradation of the coastline; conducts beach profiling involving collecting over 600

water samples on 20 Bahamian beaches on Grand Bahama, Bimini and New Providence islands to test for water quality.

7. He also states that the Second Applicant shares leased offices with the First Applicant at Suite 7, Jasmine Corporate Center, Freeport, Grand Bahama. That exhibited to his Affidavit is a Table of Costs awarded to the Second Applicant in judicial review proceedings where costs remain outstanding where some bills have been taxed and paid, some remain untaxed and others have been taxed and are subject to negotiations for payment or enforcement proceedings. That exhibited to his Affidavit are copies of an Originating Summons filed December 14, 2020 whereby the Second Applicant seeks to execute payment of various costs orders made against Mr. Peter Nygard; an appraisal of the property known as Nygard Cay valued at $14,000,000.00; Certificates of Taxation of Costs in favour of the Second Applicant against Mr. Keod Smith and Certificates of Costs dated September 17, 2020 in favour of the Second Applicant against the Government of The Bahamas. That all of the outstanding balances of the costs rulings and Costs Certificates are assets of the Second Applicant which would be more than sufficient to pay the anticipated costs of BPC if the Applicants were unsuccessful in this action and the Court orders that the Applicants pay BPC's costs. That he was informed by Callenders that the Second Applicant has already paid its attorneys so there is no evidence or argument available to BPC that there are corresponding liabilities to Callenders for costs in relation to each of these costs certificates. That there is no evidence upon which BPC could have based its allegation that the Second Applicant may not have assets sufficient to satisfy any costs order made against the Applicants herein.

8. Mr. Darville also states that he is the Secretary and a Director of the First Applicant which is an established NGO. That the First Applicant is a licensed regional organization under Waterkeeper Alliance which is the world's largest non-profit organization devoted solely to the issue of clean water. That it is a global clean water advocacy group with member and affiliate organizations in 44 countries around the world and that all organizations including the First Applicant develops

campaigns, programs and advocacy efforts to promote clean drinkable and fishable water in their communities. That many organizations have active legal matters where they are building cases against corporations and/or government agencies that are polluting waterways. That the Applicants manage a water quality program on Bimini, Grand Bahama and the Western bays of New Providence and currently 16 beach sites are monitored regularly on these islands. That the Applicants have succeeded in fundraising to begin this action and are actively seeking further funding to allow them to continue the action to trial. That notwithstanding that the Second Applicant has substantial assets in the form of the costs certificates detailed above, the Applicants do not currently have sufficient liquid assets (nor are they likely to be able to raise the same before the upcoming trial) to set $200,000.00 aside by way of security for costs. That he can confirm that if the Order for security for costs is made this action will certainly have to be stayed because the Applicants will be unable to raise sufficient sums by that date to both fund its continuation of the action and provide such a significant sum.

Submissions

9. Ms. Clare Montgomery, QC, Counsel for BPC submits in part that there is reason to believe that if BPC is successful in resisting the application for judicial review the assets of the Applicants may be insufficient to pay its costs and that in the circumstances of the case it is just to make such an order pursuant to Section 285 of the Act. She further submits that an order for security for costs is not an order requiring the Applicants to pay any costs to BPC but a protective measure to ensure that justice is done if the Applicants are ordered to pay BPC's costs following the trial. She submits that the application for security for costs was brought promptly and at the first possible opportunity as notice of the same was given on December 3, 2020 at the pre-action stage.

10. Ms. Montgomery, QC submits, in part, that the question of ability to pay must be judged by reference to the Applicants' ability to pay BPC's costs if and when ordered to do so and refers the Court to the case of **Re Unisoft Group Ltd (No 2) [1993]** BCLC 532, 534 in support. It is also her submission that the evidence

on behalf of the Applicants (as found in the Third Affidavit of Joseph Darville) shows that they currently have insufficient liquid assets to pay even a fraction of BPC's costs by way of security; that the assets relied on by the Applicants are costs orders dating from October 17, 2014; that the Second Applicant has failed to disclose any evidence of its liabilities and even if it received payment in relation to its old costs orders by the time judgment is handed down, the Court is unable to determine whether such sums would be available to pay BPC's costs; that the suggestion that the old costs orders will soon generate funds with which to pay BPC's costs is contradicted by the manner in which the Applicants have had to fund this litigation found in the Third Affidavit of Mr. Darville at paragraphs 29 and 31 whereby he states that the Applicants are actively seeking further funding to allow them to continue the action to trial and they will be unable to raise sufficient funds by the trial date to both fund its continuation of the action and provide such a significant sum in security. She submits that in these circumstances there is reason to believe that if BPC is successful in resisting the application for judicial review, the assets of the Applicants may be insufficient to pay its costs.

11. Ms. Montgomery, QC submits that the Applicants would need to prove on a balance of probability that an order for security for costs would prevent them from pursuing the claim and refers the Court to the cases of **Keary Developments Ltd v Tarmac Construction Ltd [1995]** 3 All ER 534 (Court of Appeal of England and Wales) as applied in **Bimini Blue Coalition Limited v The Prime Minister** (SCCiv App No 35 of 2014) para 18, per Allen P.; **Responsible Development for Abaco (RDA) Ltd v The Prime Minister** (SCCivApp No. 248 of 2017) para 40, per Sir Michael Barnett JA. She further submits that the requirement applies even if the Court is satisfied that the application for judicial review raised points of law of public importance and refers the Court to para 13 of **Bimini Blue (supra)** per Adderley JA and para 44 in **RDA (supra)**. It is her submission that the Applicants bear the burden of putting proper and sufficient evidence before the Court of their ability to pay and in doing so they must make full and frank disclosure. She refers the Court to **MV Yorke Motors (A Firm) v Edwards**

[1982] 1 WLR 444, House of Lords in support of this submission. She further submits that to show that an order for security for costs would prevent the Applicants from pursuing their claim they would need to prove that it would not be possible for them to raise the amount needed from their backers or other interested persons and refers the Court to **Keary Developments Ltd Tarmac Construction Ltd (supra)**; **R (We Love Hackney Ltd) v London Borough of Hackney [2019]** Costs LR 463 (High Court of England and Wales), as cited in **RDA (supra)** at para 42 in support. She further submits that the Applicants would need to disclose details of all the financial contributions and pledges received and the identity of their supporters and financial resources available to those supporters. Ms. Montgomery, QC submits that the Applicants have failed to satisfy any of those requirements and failed to respond to BPC's pre-action letter requesting information relating to the Applicants proposed application for leave for judicial review. It is her submission that the Applicants have not given full and frank disclosure of their information and failed to disclose any information about their financial backers or resources available to those backers and therefore the Court cannot conclude that an order for security for costs would stifle the claim.

12. Ms. Montgomery, QC submits that in considering whether it is just to make the order the Court must weigh in the balance the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security and 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. She refers the Court to **Keary Developments Ltd Tarmac Construction Ltd (supra)** in support. It is her submission that where the Court concludes that there is a risk that the Plaintiff will be unable to pay the Respondents costs and the risk of the claim being stifled has not been made out, then it will usually order security for costs in judicial review proceedings and relies on the cases of **Bimini Blue (supra)**, **RDA(supra)**, **We Love Hackney (supra)** and **Save Guana Cay Reef Association Limited v The Queen** (SSCiv App No. 70 of 2006).

13. Ms. Ruth Jordan, Counsel for the Applicants submits in part that there is no reasonable basis for determining that the Applicants *would be unable to pay* BPC's costs if required to do so and as such the threshold test in Section 285 of the Act is not satisfied. It is her submission that BPC is required to show by way of 'credible testimony' that there is 'reason to believe' that the Applicants will be unable to pay any costs order however that they have failed to do so and as such has not satisfied the threshold test of inability to pay. She further submits that the evidence on behalf of BPC (Affidavit of Jon Minns) is mere assertion that has been contradicted and discredited by the Applicants' evidence and as such fails to satisfy the 'credible testimony that there is reason to believe' test in Section 285 of the Act. Ms. Jordan submits that the Costs Certificates exhibited to Mr. Darville's Third Affidavit are assets that are *likely to be available* to satisfy a costs order against the Applicants and that there is no corresponding liability in legal fees due to Callenders in relation to these costs awards. She also submits that the Applicants are relying on the outstanding taxed costs and not the costs order and as such some of these taxed costs have already been paid and some outstanding but this shows that the Second Applicant has been paid a proportion of outstanding costs already. It is her submission that the evidence adduced by the Applicants is more than sufficient to prevent BPC from establishing that the Applicants are unlikely to have sufficient assets to pay any costs order against them. In response to BPC's submission that the Applicants evidence fails to give full and frank disclosure of the Applicants financial position, she submits that no authority has been provided to support this pursuant to Section 285 of the Act and that **MV Yorke Motors (A Firm) v Edwards (supra)** relied on by BPC dealt with circumstances where a defendant sought to avoid payment of security for costs as a precondition to being granted leave to defend an action. Additionally she submits that BPC's reliance on **Re Unisoft (supra)** is misleading as the test in **Re Unisoft (supra)** was pursuant to Section 726 of the Companies Act 1965 (England) whereas the test pursuant to Section 285 of The Act is different as the former provides that "the Company will be unable to pay the defendant's costs if successful in his defence" and the latter

provides that "the assets of the Company may be insufficient to pay his costs." Ms. Jordan submits that BPC has failed to adduce any credible evidence as required by Section 285 of the Act that there is reason to believe that if it is successful at trial, the Second Applicant's substantial outstanding taxed costs may be insufficient to pay BPC's costs.

14. In response to BPC's submissions, Ms. Jordan submits that BPC has not provided any evidence (which must be credible) as required by Section 285 of the Act; a judgment creditor can realize an unsatisfied judgment debt by way of garnishee proceedings; the burden remains on BPC to adduce credible evidence that the outstanding taxed costs are subject to liabilities to such an extent as to render the substantial outstanding taxed costs insufficient to pay BPC's costs.

15. Ms. Jordan submits that the relevant considerations the Court should take into account when exercising its discretion is set out by Lord Denning in **Sir Lindsay Parkinson & Co v Triplan Ltd [1973]** Q.B. 609, CA and states that the Court ought to consider whether the claimant's claim is bona fide and not a sham; whether the claimant has a reasonable good prospect of success; and whether the application for security was being used oppressively so as to stifle a genuine claim. She further submits that the purpose of security for costs is to prevent injustice to the party applying for security but there is also a need to avoid injustice to a plaintiff who has a meritorious claim who would be prevented from pursuing if it required to provide security for costs. Additionally, she submits while it is important to avoid a situation in which the merits have to be considered, the overall result requires that the Order should be just and refers the Court to **Fernhill Mining Ltd v Kier Construction Ltd** [2000] C.P. Rep. 69. She refers the Court to **Keary Developments Ltd v Tarmac Construction Ltd (supra)** at paragraph 540 whereby Peter Gibson, LJ considered the balancing exercise the Court must do. She also refers the Court to Black LJ at paragraph 59 of **Autoweld Systems Ltd v Kito Enterprises LLC [2010]** EWCA Civ 1469.

16. It is Ms. Jordan's submission that the Applicants' claim is bona fide as this has been established on the successful leave application and is a genuine one with

good prospects of success. Further, she submits that the Applicants' position on the threshold test is that they are likely to have sufficient assets to pay any future costs order made against them. Additionally, she submits in the event that this argument fails it will be because the Court has concluded that the Applicants' present illiquidity is likely to continue and prevent them from being able to pay costs and if that is the case, then by definition the Applicants are unable to raise $200,000 to make a security payment and the claim will be stifled. Moreover, Ms. Jordan submits that this application is being used oppressively as BPC has not been forced into this litigation or subjected to unfair pressure but inserted itself into these proceedings for the purpose of making such an application.

17. In relation to the merits of the judicial review proceedings, Ms. Jordan submits that many of the grounds are unanswerable and unanswered in the evidence and submissions filed to date. Ms. Jordan also submits that Mr. Darville's evidence in his Third Affidavit remains uncontradicted by BPC as he states that the Applicants do not have assets sufficient to pay security of $200,000, they are actively seeking further funding to allow them to continue the action to trial and they are unlikely to raise funds on time to pay the security sought and refers the Court to **Nygard v Fredrick Smith, QC et. Al** SCCivApp No. 184 of 2019.

18. Ms. Jordan submits that the instant case raises a number of points of law of public importance that justify relief from a security for costs order and states that this was recognized by the Court of Appeal in **Bimini Blue (supra)**. She further submits that Adderley, JA in **Bimini Blue (supra)** considered the case of **Midland Bank Limited v David Crossley-Cooke [1969]** IR 56 and he noted in that Judgment that to be considered for relief from security for costs the issue raised must be a point of law of public importance the effect of which would be to prevent the point of law in question being decided. The points of law of public importance to which she submits justify relief from a security for costs order are:- the question of the application of the Planning and Subdivision Act; seeking to enforce the Environmental Planning and Protection Act and the Environmental Impact Assessment Regulations; seeking to challenge the Petroleum Act and the

Petroleum (Offshore Environmental Protection and Pollution Control) Regulations 2016 as it relates to offshore oil drilling; and the issue as to the location of the outer limits of the archipelagic baselines. She also submits that the Applicants are not required to disclose the financial resources of those persons and organizations that have contributed to the fundraising efforts and distinguishes **We Love Hackney (supra)** (relied upon by BPC) as in that case the financial backers of the impecunious plaintiff company were found to have a commercial interest in the outcome of the case. Therefore, in those circumstances it was relevant for the Court to know that they were individuals of means as it allowed the Court to conclude that it was unrealistic to suggest that they would not pursue the action if the costs capping order was made.

19. Ms. Jordan submits that BPC's interest is to prevent the case from being heard and not in protecting itself from an adverse costs order. She further submits that if security is ordered it would have the sole purpose of preventing the claim from proceeding and thus the order will not serve the intended purpose therefore the discretion to make the order ought not to be exercised. It is also her submission that BPC has not adduced any evidence in support of this application to demonstrate in what way their participation will be different other than a duplication of costs alongside the Government Respondents. She refers the Court to the case of **Bolton MBC v Secretary of State for the Environment [1995]** 1 WLR 1176 whereby it was held that the appellant could not be made to pay two sets of costs where the interests of the Developers and the Government Respondents were identical. Therefore, she submits that interested parties are generally not entitled to their costs unless they can show that there was a separate issue on which they were entitled to be heard and have separate representation; where interested parties choose to apply to be joined as Respondents in these proceedings, the success of such an application does not displace the **Bolton** principle; since interested parties generally do not recover their costs, it would be wrong in principle to grant security for costs.

20. Ms. Jordan submits that there is no risk of BPC suffering irrecoverable loss as the Costs Certificates relied on by the Applicants are an existing debt to which BPC could recover by way of garnishee proceedings and refers the Court to Order 45, Rule 1 of the Rules of the Supreme Court ("RSC") and Order 49 of the RSC. Mr. Smith, QC also submitted that while the Applicants have made the suggestion that BPC could recover their costs by way of garnishee proceedings (Order 49 of the RSC) relative to the Second Applicant's costs orders, he clarified to the Court that garnishee proceedings are not available against the Crown (the judgment debtor to those costs orders) and submits that the process of enforcement, i.e. attachment of judgment debt would be under Section 21 of the Crown Proceedings Act. Further, Ms. Jordan distinguishes the instant action and **Re Unisoft (supra)** as in the latter case it was the risk of suffering irrecoverable loss that led to the Court making such an order for security.

21. In response to the Applicants' submissions, Ms. Montgomery, QC states that the language of Section 285 of the Act provides that "the assets may be insufficient to pay his costs" and the use of 'to pay' implies to actually pay. She submits that the provision looks at the ability to pay at the time the Order for costs is made and not theoretical costs of assets that are not capable of being realized in a way that would pay. Moreover, she states that if the assets are not liquid then they do not qualify as being sufficient to pay. Additionally, it is her submission that the evidence of Mr. Darville makes it clear that the Applicants do not have any assets available to pay not only their own costs but to provide security for BPC's costs before the end of March.

22. Ms. Montgomery, QC submits that when considering the balancing act the Court must employ, the Applicants assertion that they will suffer injustice as they have a strong case, there are public issues of great importance and the case would be stifled by an Order for security is false as the issue about injustice turns on the question as to whether or not the Court is satisfied the case would be stifled. She refers the Court to the decision in **Bimini Blue (supra)** and submits that case law from England and The Bahamas show that before claiming a case would be

stifled the Applicants need to establish by way of detailed evidence that they will not be able to bring the claim if they are required to provide such security and submits that they have failed to do so.

23. Additionally, Ms. Montgomery, QC submits that the Applicants' claims made at the leave stage are now academic as the drilling has ceased and the only live issue to be considered by the Court on behalf of the Respondents is the issue of the licenses. Moreover, it is her submission that BPC is not before the Court as volunteer as alleged by the Applicants and its need to be before the Court is because its main corporate assets are under challenge. Therefore, she submits that BPC has been forced to come to Court late after a great period of delay by impecunious Applicants and claim that BPC can seek recourse for the costs by going after the Government or Mr. Nygard in the event the Applicants lose. She submits that that is not what the Act is designed to do, it is designed, she further submits, to secure the position of BPC in relation to the costs that they claim. Moreover, she submits this is not a case where BPC would be duplicating as they do not have only the same interest as the Government Respondents.

Issues

24. The issues to be determined by the Court are (1) whether the condition for the application of Section 285 of the Act is satisfied; (2) whether an order for costs will stifle the Applicants' claim; and (3) if not, in what sum should security for costs be ordered.

Analysis and Conclusions

The Law

25. Section 285 of the Act states:-

> **"Where a limited liability company is plaintiff in any action, suit or other legal proceedings, a judge having jurisdiction in the matter may, if it appears by any credible testimony**

that there is reason to believe that if the defendant is successful in his defence the assets of the company may be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

26. I accept that the evidence before the Court is that the First and Second Applicants are entities that are incorporated in The Bahamas and thus Section 285 of the Act applies. In considering the above provision, as I understand it, the Court is to look at whether any credible testimony has been provided which would give rise to a reasonable belief that if the Respondents are successful in their defence the assets of the Applicants may be insufficient to pay their costs. Further, the use of the word 'may' places a discretionary power in the judge to make or not to make an order for security or to stay or not to stay the proceedings until such security is given.

27. The evidence of Mr. Minns as stated above is that a search by his firm was done in relation to the assets held by the Applicants as a result of which none were found. The evidence of Mr. Darville as stated above is that the Second Applicant has outstanding costs orders against various entities and as such they qualify as assets that may be sufficient to pay BPC's costs. This in a nutshell is the evidence of the parties in this application.

28. While the Applicants submit that the outstanding costs orders and awards are assets which are sufficient to pay the costs of BPC, I am not so satisfied. The Applicants have not satisfied me as to if and when these costs orders and awards would be realized and made liquid. I am also not so satisfied that these qualify as assets. Additionally, the uncontroverted evidence before the Court by Mr. Darville is that the Applicants have succeeded in fundraising to begin the action and actively seek further funding to continue the action and they ***currently*** (***emphasis mine***) do not have sufficient liquid assets to set aside for an Order for security of costs. To my mind, this evidence reinforces that the Applicants may

not be in position to pay BPC's costs should BPC be successful in its defence. I am not satisfied that the Applicants have any known assets, that is, any real property or substantial cash other than the cash what was raised through fundraising. Additionally, after reviewing the relevant authorities in regard to the 'threshold test' propounded by Counsel for the parties, it is of import to note that the English cases submitted rely on Section 726 of the Companies Act, 1985 and as such the English provision places an obligation on the Court to consider that the company **will** be unable to pay as opposed to the Bahamian provision that places an obligation on the Court to consider that the company **may** be unable to pay. To my mind, as identified in **Re Unisoft (supra)** where Sir Donald Nicholls VC so held, the phrase "will be unable to pay" is clear and unequivocal. The same cannot be said when considering the Bahamian provision, "may be insufficient to pay", and while there is a threshold to be met, albeit a lower threshold, I find that in all of the circumstances before the Court BPC has adduced credible testimony which gives rise to a reasonable belief that if BPC is successful in its defence the assets of the Applicants may be insufficient to pay its costs. However, the Court before making an order for security for costs must consider other matters.

29. In **Sir Lindsey Parkinson & Co. Ltd. v Triplan Ltd. (supra),** Lord Denning sets out the principles which the Court should consider when determining whether to exercise its discretion and award a party security for costs as follows:
    a. Whether the company's claim is bona fide and not a sham;
    b. Whether the company has a reasonably good prospect of success;
    c. Whether there is an admission by the defendant;
    d. Whether there was a payment into court of a substantial sum;
    e. Whether the application was used to oppressively stifle a genuine claim;
    f. Whether the plaintiff's want of means had been brought about by the conduct of the defendant;
    g. The stage of the proceedings during which the application is being made.
30. There have been no admissions by BPC, nor any substantial payment into Court. Nor can it be argued that the Applicants want of means has been brought about

by the conduct of BPC. The application was brought promptly by BPC. Ms. Jordan submitted and I accept that the Court has to take into account the prospect of success of the case. However, in considering the evidence before me, in particular the evidence of the Applicants and the evidence of the Government Respondents, the evidence of BPC and weighing the evidence in the balance I am unable to say at this early stage of the proceedings that any of the parties to these proceedings have clearly demonstrated that they have a high degree of probability of success or that the other has a high degree of probability of failure.

31. Therefore, the Court must then consider whether the application is being used to oppressively stifle a genuine claim. In **Bimini Blue (supra)** Justice Allen at paragraph 18 stated "**As stated in the Keary Developments case, it is for the appellant to demonstrate that it is more probable than not, that its claim will be stifled if the amount awarded remains. It is also for the appellant to establish that it is unable to raise the funds needed either from its members or from any interested parties. The only evidence placed before the judge was an Affidavit indicating that the Plaintiff was a nonprofit organization and as such unable to raise the funds within the stipulated time frame. This claim, as Kearny shows, without more is not enough; the appellant has to demonstrate either directly or indirectly that it cannot raise the funds from either its members or from any interested parties.**"

32. In **Keary Developments Ltd Tarmac Construction Ltd (supra)** Peter Gibson LJ stated:-

> "**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.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation..."

He went on to quote Lord Diplock in **MV Yorke Motors (a firm)(supra)** in which Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal thus:

"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

33. The Applicants have submitted that the inclusion of BPC to the instant action was done as a means to stifle their claim and Ms. Jordan submits that Mr. Darville's evidence shows that the Applicants do not have assets sufficient to pay the $200,000.00 requested and are actively seeking further funding to allow them to continue the action to trial and are unlikely to raise the funds sought. Having considered the Judgment of President Allen in **Bimini Blue (supra)** and LJ Peter Gibson in **Keary Developments Ltd Tarmac Construction Ltd (supra)** I am

of the view that the mere statement by the Applicants that they are unlikely to raise sufficient funds by their continuing fundraising efforts fails to demonstrate that they would not be able to meet an order for security for costs. The evidence of Mr. Darville is that they succeeded in fundraising and actively seek further funding.

34. It has been submitted by Ms. Jordan that the claim is one of public importance and raises a number of points of law and an order for security for costs would prevent these points of law being determined. She also submitted that the Court of Appeal recognized in **Bimini Blue (supra)** that there is a public interest exemption from the requirement to pay security if it can be shown that the order for security would prevent a point of law of public importance from being decided. She further submitted that **Midland Bank (supra)** should be applied as that was also considered by the Court of Appeal in **Bimini Blue (supra)**. **Midland Bank (supra)** was considered by Adderley, JA in **Bimini Blue (supra)** at paragraph 13 where he stated:-

> **"And so, on that authority, to be considered for relief from granting security for costs the issue raised must be a point of law of public importance, and the effect of making the order would be to prevent the point of law in question being decided. Neither of these apply in this case. While this case, like most environmental matters raised by judicial review, may be of public importance and has an element of public interest, it does not raise any points of law of general public importance."**

35. Considering the submissions at paragraphs 52 to 55 of the Applicants Written Submissions whereby they set out what they deem as points of law of public importance, I adopt the view of President Barnett in **RDA (supra)** at paragraph 44 where he states "**Like many applications for judicial review it has a public interest element in it, but that in itself is insufficient to immunize the applicant from being required to provide security and effectively pursue this claim without any meaningful risk as to costs if it is**

unsuccessful in its claim. This is particularly so in circumstances where the applicant is itself not prepared to forego a claim to costs in the event it is successful." Therefore, I am of the opinion that the Applicants are not immunized from an application for security for costs simply because their action raises points of law of public importance.

36. Additionally, Ms. Jordan's submission that BPC's involvement was not necessary and their participation will be a duplication of costs as a method to stifle the claim is not supported by any evidence before this Court. Moreover, while Ms. Jordan relies upon **Bolton (supra)** in support of this submission, I find that in determining that BPC was a 'person' who would be adversely affected by any order relating to the quashing of the licenses, their request to intervene could not possibly be interpreted as a means to stifle the claim. Further, I am satisfied that the Government Respondents and BPC have different interests in this claim.

37. I turn now to the case of **Keary Development Ltd. V Tarmack Construction Ltd (supra)** which both parties rely on where Peter Gibson L.J. stated:

> **"..3. The court must carry out a balancing exercise. On the one hand it must weigh the injustices 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 if the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff costs which have been incurred by him and his defence of the claim. The court will properly be concerned that 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 the claim might in itself have been a material case of the plaintiff's impecuniosity. (see Farrer v Lacy, Hartland & Co. (1885) Ch D 482 per Brown L.J.). 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 and Naydlar[1977] 3 All ER 531 at 532)..."

38. I accept Counsels submissions that the Court must carry out a balancing exercise whereby, the Court must weigh the Applicants possibly being prevented from pursuing a proper claim by an order for security and the injustice to BPC if no security is ordered and at the trial the Applicants' claim fails and BPC finds itself unable to recover from the Applicants the costs which have been incurred by them in their defence of the claim.

39. Therefore, having weighed all of the relevant considerations, considered the evidence before the Court, the submissions of Counsel for the parties, the applicability of Section 285 of the Act and the relevant principles laid down by the case law reviewed I am satisfied that this is a proper and just case for granting BPC security for costs.

Quantum

40. BPC has submitted a draft Bill of Cost totaling $300,091.69 for professional fees. Ms. Montgomery, QC further submits that the sum sought for security should be set at a level which the Court is confident it would recover in the event it is awarded its costs and refers the Court to the draft bill exhibited to the Affidavit of John Minns. She states that the sum of $300,000.00 is reasonable and proportionate in circumstances where the claim raises a large number of points and the Applicants seek to quash BPC's license. It is her submission that it is most unlikely that its bill would be reduced on assessment by more than a third and that $200,000.00 represents an appropriately cautious sum to be paid as security. She refers the Court to the order for security in the sum of $315,000.00 (including $215,000.00 in respect of the developer's costs) in **Bimini Blue (supra)** and $250,000.00 (including $150,000.00 in respect of the developer's costs) in **RDA (supra).** Lastly, she submits that taking into consideration **Bimini Blue (supra)** and **RDA (supra)** whereby the Developers were deemed to have a separate interest by the

Court and thus were entitled to a greater sum of costs than that which was claimed by the Government, BPC has reduced the amount to reflect a sensible and fair analysis of what the Order for Costs might be and submits that the Applicants should be ordered to pay the sum into Court before BPC is put to the substantial costs of preparing for trial.

41. Ms. Jordan has submitted that the draft Bill of Costs does not provide a realistic estimate of BPC's costs and the figure of $200,000.00 greatly exceeds what BPC will obtain on taxation. As it relates to the issue of quantum should the Court make an order for security for costs, Ms. Jordan submits that the Court should consider what is an appropriate amount. She further submits that it is unlikely that BPC will recover the amounts claimed because it is unlikely to be awarded all of its costs if successful and that costs should be allowed on a party to party basis and not on a full indemnity basis. She refers the Court to **Re Unisoft (supra)** whereby it was held that it would not be fair to SHL to direct security in the full amount of anticipated costs, so that the respondents are wholly protected and the whole financial burden of providing costs would fall on SHL even though ultimately it may be that the burden should not have rested with that company at all. She further submits that if BPC is awarded all of its costs, if taxed are unlikely to exceed $150,000.00 and when applying the **Re Unisoft (supra)** approach the sum of $50,000.00 would be appropriate. She takes issue with several items listed in particular $72,487.01 (excluding VAT) estimated for miscellaneous costs and costs of taxation; $25,000.00 for telefax charges, photocopies, long distance calls, courier charges, miscellaneous expenses, online research, etc. as excessive for an era of dropbox and zoom conferences; legal fees quoted for Ms. Montgomery, QC at $2,037.00 per hour and two other counsel charged at $700.00 and $500.00 differ greatly in the Bahamas as legal fees for Queens Counsel in The Bahamas are allowed between $750.00 to $900.00 per hour and only one junior whose rate depending on year of call would be between $350.00 to $450.00 per hour.

42. As stated by then President of the Court of Appeal Anita Allen in **Bimini Blue (supra) "Estimating the quantum to be awarded for security for costs is**

not an exact science." The case of **Bimini Blue (supra)** is instructive not only on the question of quantum in security for costs applications but also in respect of the general principles to be applied in these applications. Adderley, JA in **Bimini Blue (supra)** states "**Having regard to all the circumstances and the authorities, and working on the current practice of taking 2/3rds of the estimated party and party costs as an estimate of what is required to indemnify respondents against their party and party costs...**", I am not minded at this juncture to carry out a taxation of BPC's draft Bill of Costs as Mr. Smith, QC would have me do. Taking into consideration the legal counsel engaged in this litigation, that is, the Applicants are represented by Mr. Fred Smith, QC of Callenders & Co., Mr. Garth Phillipe, and Ms. Ruth Jordan, Associates of Callenders & Co., BPC is represented by Ms. Clare Montgomery, QC, Counsel from the United Kingdom, Mr. Leif Farquharson, Partner at GrahamThompson and Mr. Adrian Hunt, Partner at GrahamThompson, having considered the general principles laid out in **Keary Developments Ltd. v Tarmack Construction Ltd (supra)** and **Bimini Blue (supra)**, the submissions before the Court, the draft Bill of Costs, the nature of the Applicants' case and the conduct of the Applicants thus far and based on the current practice of taking 2/3rds of the estimated party and party costs as an estimate of what is required to indemnify Respondents against their party and party costs, I order that the Applicants pay security for costs in the sum of $200,000.00 for BPC. Such security to be provided by cash, bond or letter of credit from a commercially licensed bank within the Bahamas or by any other means mutually agreed to by the parties within 30 days and the action is to be stayed pending payment of the said sum.

43. The costs of and occasioned by this application are costs in the cause.

44. The parties are granted leave to appeal this decision.

Dated this 1st day of March A. D. 2021

Petra M. Hanna-Adderley

Petra M. Hanna-Adderley
Justice