IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2024/CLE/gen/00208

IN THE MATTER OF PART 8.15 OF THE SUPREME COURT CIVIL PROCEDURE RULES, 2022

Between

(1) BRIGHTMILL INTER CORP.
(2) KSV LTD.

Claimants

AND

(1) 17 ARM AFRICA AND CIS OPPORTUNITY FUND LTD.
(2) 17 ARM UAE (FZ) LLC

Defendants

Before:	The Honourable Madam Justice Simone I. Fitzcharles
Appearances:	Mrs. Tara Cooper-Burnside, KC, with Mr. Miguel Darling appearing for the Claimants
	Mr. Marco Turnquest with Ms. Chizelle Cargill appearing for the Defendants
Hearing Date:	10 June 2024

RULING

On Security for Costs

FITZCHARLES J.

Introduction

1. This is a ruling on a security for costs application brought by 17 Arm Africa and Cis Opportunity Fund Ltd. ("the First Defendant") and 17 Arm UAE (FZ) LLC ("the Second Defendant") (collectively, "the Defendants") in relation to a claim commenced by way of an Originating Application filed on 8 March 2024 against them by BrightMill Inter Corp. ("the First Claimant") and KSV Ltd. ("the Second Claimant") (collectively, "the Claimants").

2. The Defendants moved the Court by way of a Notice of Application filed on 3 June 2024 seeking the following reliefs, that –

i. the Claimants, within 14 days of the date of the Order, give security for the First and Second Defendants' costs, in the sum of Three Hundred Thousand Dollars ($300,000.00);

ii. all further proceedings in this Action, as against the First and Second Defendants, be stayed until security is given;

iii. such further or other relief as the Court deems fit; and

iv. costs to be taxed if not agreed.

3. The grounds of the Defendants' application for security for costs are that pursuant to **Rule 24.3(f)** and **(g)** of the **Supreme Court Civil Procedure Rules, 2022** ('CPR') and/or the inherent jurisdiction of the Court, the First Claimant is an external company and the Second Claimant is ordinarily resident outside of the jurisdiction, as it is managed and controlled by individuals or entities that are not resident in the jurisdiction, and both only have nominal assets within the jurisdiction.

4. The application is supported by the Affidavit of McFalloughn Bowleg filed on 3 June 2024 which exhibited an unnotarized Affidavit of Patrick James Meade Earl of Clanwilliam. The Defendants' Counsel undertook to file the notarized Affidavit of Patrick James Meade Earl of Clanwilliam in the Supreme Court Registry as soon as reasonably practicable upon receipt, and did so on 24 June 2024.

5. The Claimants produced evidence to resist the present application by way of the Affidavit of Kimberleigh Turnquest filed on 6 June 2024.

Factual Background

6. The present application arises out of a claim that involves chiefly a dispute between the parties over the interpretation of the constitutive documents of the First Defendant and other corporate documents, and the validity of certain actions performed by or for the Defendants.

7. The First Claimant is a body corporate duly incorporated under the laws of the Republic of Seychelles. The First Claimant's business focus is the provision of loan facilities to third parties.

8. The Second Claimant is a body corporate duly incorporated under the laws of the Commonwealth of The Bahamas and existing as a Bahamian International Business Company. The Second Claimant is in the business of litigation financing, providing capital for investment in contentious claims.

9. The First Defendant is a body corporate duly incorporated under the laws of the Commonwealth of The Bahamas and existing as a Bahamian International Business Company. The First Defendant is licensed with the Securities Commission of The Bahamas to operate as a Specific Mandate Alternative Regulatory Test (SMART) Fund Model SFM002 pursuant to the **Investment Funds Act, 2003**, **Investment Funds Regulations, 2003**, and **Investment Funds (Smart Funds) Rules, 2003**.

10. The Second Defendant is a body corporate duly incorporated under the laws of the United Arab Emirates and acts as the investment manager of the First Defendant providing the First Defendant with investment advisory, investment management, investment management evaluation, and monitoring services. The Second Defendant holds all of the management shares issued by the First Defendant.

11. The Claimants are the sole investors and shareholders of the First Defendant. The First Claimant holds fifty-eight percent (58%) of the First Defendant's investor shares and the Second Claimant holds the remaining forty-two percent (42%) of the First Defendant's investor shares.

12. On 8 March 2024, the Claimants by way of an Originating Application commenced a claim against the Defendants pursuant to Rule 8.15 of the CPR seeking, *inter alia,* declaratory relief as to the proper interpretation of the First Defendant's articles of association and memorandum of association, the validity and effect of purported resolutions passed by the First Defendant's board of directors, and the validity of the purported appointment of Patrick James Meade Earl of Clanwilliam ('Earl Clanwilliam') as a director of the board of the First Defendant. The Originating Application is supported by the First Affidavit of Monika Budryte also filed on 8 March 2024.

13. On 8 March 2024, the Claimants filed a Notice of Application seeking certain interim injunctive reliefs against the Defendants. The Notice of Application is supported by the Supplemental Affidavit of Monika Budryte also filed on 8 March 2024.

14. As recorded in an Order dated 17 May 2024, the First Defendant, by its purported director, Earl Clanwilliam, undertook henceforward and until the determination of the claim to do the following –

    i. save for the steps taken in the ordinary course of business, the First Defendant shall howsoever be restrained from taking any action whatsoever in the name of the First Defendant without providing to the Claimants 28 days' notice thereof;

    ii. without prejudice to paragraph 1(a) above, the First Defendant shall be at liberty to advance its position in the strike-out application in certain proceedings pending in the Supreme Court of the Republic of Cyprus, Provincial Court of Limassol, namely, Claim No. 1394/2022 between the First Defendant and Akrostar Enterprises Ltd. and Eleni Sokratous ("the Cypriot Proceedings") which is presently listed for substantive hearing on 23 May 2024 or any adjournment thereof and take steps necessary to preserve any appeal thereof or to comply with any Order of the Supreme Court of the Republic of Cyprus…".

15. By the Order dated 17 May 2024, the Court gave an order in relation to *inter alia* the entry of appearances in the action and directions pertaining to the filing and hearing of this application. Following this, on 16 May 2024, the First Defendant entered an appearance to the claim, and on 21 May 2024, the Second Defendant also entered an appearance.

16. On 10 June 2024, I heard argument from Counsel for the parties on the present application and reserved my decision with a promise to deliver the same at a later time. I do so now.

Evidence of the Defendants (Applicants)

17. The Affidavit of Patrick James Meade, Earl of Clanwilliam, is the principal affidavit the Defendants rely on to support the present application ("the Meade Affidavit"). In the Meade Affidavit, Earl Clanwilliam stated as set out below.

    (i) Earl Clanwilliam is sole director of the Defendants.

    (ii) The First Claimant is an external company for the purpose of **Rule 24(3)(f)** of the CPR and the Second Claimant, while a Bahamian International Business Company, is ordinarily resident out of the jurisdiction for the purpose of **Rule 24(3)(g)** of the CPR.

    (iii) Aside from the Claimants' shares in the First Defendant which is only of a nominal value, the Claimants have no assets in the jurisdiction against which any order for costs may be enforced should they fail in their claim against the Defendants. On 27 May 2024, Messrs. Lennox Paton wrote to Messrs. Higgs & Johnson, Counsel for the Claimants, requesting the Claimants to provide the Defendants with security for their costs in this claim in the sum of $300,000.00 by 30 May 2024. On 30 May 2024, Messrs. Higgs & Johnson communicated the Claimants' refusal to provide the security requested.

    (iv) The assertion that the Claimants purportedly have "significant assets" in the form of cash and publicly traded securities in a bank account at "CBH Bank which has presence in The Bahamas" does not convey the correct position regarding CBH Bank. CBH Bank, which is based in Switzerland, is a completely separate bank with a separate ownership structure from the CBH Bank which operates in The Bahamas. Further, Messrs. Higgs & Johnson produced no evidence to confirm the Claimants' bank account at CBH Bank Bahamas or that they have any assets at CBH Bank Bahamas or any other Bahamian Bank.

    (v) The investor shares of the First Defendant claimed to be owned by the Claimants only have nominal value. The First Defendant was created primarily for the purpose of providing litigation funding to Russian businessman Alexander Tugushev ("Akrostar"). The Tugushev claim was settled out of Court and as a part of the litigation funding arrangement, the First Defendant was entitled to receive the sum of $18,979,111.04 ("the 17 Arm Payment"), based on the overall settlement sum. This sum constitutes the bulk of the First Defendant's assets. The 17 Arm Payment was received by Akrostar and was to be held on trust for the First Defendant. However, Akrostar's director purportedly paid over the whole of these funds to the Claimants. The Claimants admitted this fact in the Winding Up Petition they filed against the First Defendant on 30 March 2023 at paragraph 30 of their Petition.

(vi) The First Defendant's directors did not authorize Akrostar to release the funds on trust for it to the Claimants. On 7 December 2022, the First Defendant commenced a Norwich Pharmacal action against Akrostar and its director Mr. Eleni Sokratous in Cyprus, seeking to find out where the 17 Arm Payment was disbursed so it could trace and recover the same. The Cyprus Action is ongoing. It is unlikely that the First Defendant will continue to carry on business, thus further decreasing the value of its shares.

(vii) Considering the issues involved and the standing of the Defendants' Counsel at the Bar, it is estimated that the Defendants will likely incur legal costs in the amount of $300,000.00 or more in defending the Claimants' claim. Accordingly, the Claimants ought to be ordered to provide the Defendants with security for their costs in the sum of $300,000.00 or such sum as the Court thinks just, and that the Claimants' claim be stayed pending the provision of such security.

Evidence of the Claimants (Respondents)

18. The Claimants relied on the Affidavit of Kimberleigh Turnquest in opposition to the present application ("the Turnquest Affidavit"). By that Affidavit, Ms Turnquest stated the facts set out below.

(i) The Claimants own assets within the jurisdiction against which any adverse costs order made against them can be enforced. They hold the shares of the First Defendant, which may properly be classified as substantial shares and significant assets in the jurisdiction of the Court. The shares are capable of being sold by the Claimants to satisfy any potential adverse costs order made against them in the claim. The shares are not of a nominal value as asserted by the Defendants.

(ii) The pending proceedings (as referred to by Earl Clanwilliam) in the Supreme Court of the Republic of Cyprus, Provincial Court of Limassol, namely, Claim No 1394/2022 between the First Defendant and Akrostar Enterprises Ltd. and Eleni Sokratus ("the Cypriot Proceedings"), and the Winding Up Petition filed by the Claimants in respect of the First Defendant on 30 March 2023 ("the Winding Up Petition") was never served on the First Defendant nor prosecuted by the Claimants.

(iii) In the Cypriot Proceedings the First Defendant states it has a real cause of action. The First Defendant seeks to trace and recover the sum of $18,979,111.03 it alleges is owed to it ("the 17 Arm Payment"). It is paradoxical for the Defendants to state that the 17 Arm Payment rightfully belongs to the First Defendant and constitutes the bulk of 17 Arm's assets (thus contributing to its overall value) while simultaneously asserting, without any credible evidence, that the shares only have nominal value.

(iv) With reference to the Winding Up Petition, the Claimants sought to wind the First Defendant up on the ground that it was just and equitable to do so and not on the ground that the First Defendant was unable to pay its debts and

therefore insolvent. Alternative to the Claimants' prayer that the First Defendant be wound up, the First Defendant sought orders pursuant to section 191(3) of the Companies Act to direct (i) the purchase of the Claimants' shares by the First Defendant at a fair valuation and (ii) a reduction in the First Defendant's capital accordingly. If the shares were only of nominal value, no such order would have been sought by the Claimants. Furthermore, by Part 47 of the CPR, upon application, the Court may impose a charge upon the shares to secure the payment of any amount that may be found to be due to the Defendants should any adverse costs order be made against the Claimants in the instant action.

(v) In addition to the shares, the Second Claimant maintains a substantial investment portfolio at CBH Compagnie Bancaire Helvetique SA ("CBH Bank"), which holds Bahamas Sovereign Bonds valued at US$1,170,720.00 as of 31 May 2024 ("the Bonds"). The Bonds are easily capable of being liquidated, as a part of their investment portfolio with CBH Bank. The Bonds are to be properly classified as assets owned by the Second Claimant within the jurisdiction. The Bonds are highly stable and regarded as low-risk government-backed security. They are easily transferable and may be sold with relative ease on the international bond market. The proceeds therefrom could be used by the Claimants to satisfy any adverse costs order that may be made against them. Likewise, pursuant to Part 47 of the CPR, a charging order can be made against the Bonds.

(vi) Based upon the pleadings and the uncontroverted documentary evidence filed by the Claimants, the Claimants have a reasonably good prospect of success in the instant claim. To date, the Defendants have not filed a defence and do not have a *prima facie* defence to the Claimants' claim. On 27 May 2024, Messrs. Lennox Paton wrote to Messrs. Higgs & Johnson requesting the Claimants to provide security for costs in the instant claim. By letter dated 30 May 2023, Messrs. Higgs & Johnson advised Messrs. Lennox Paton that the requested amount was wholly excessive considering the nature of the instant claim, the relief sought by the Claimants therein, and relevant principles associated with the Court's approach to the quantification of security. Further, Messrs. Higgs & Johnson sought a breakdown of the requested security amount. To date, Messrs. Lennox Paton have failed and/or declined to provide the details requested. Rather than furnishing a response, the Defendants prematurely issued the Security for Costs Application.

(vii) There are no technical or complex issues to be resolved in the instant claim nor does it involve any novel points of law. Any request for security for costs in proceedings before the Court, as with any other step taken by a litigant, ought to further the overriding objective of the CPR and, to this extent, be proportionate to the amount of money involved, the importance of the case, and the complexity of the issues to be decided.

(viii) The costs outlined in the draft Bill of Costs, which is exhibited to the Affidavit of Patrick James Meade, Earl of Clanwilliam ("the Meade Affidavit") demonstrate costs of a wholly excessive, disproportionate, and exorbitant amount in all the circumstances of the case. The Security for Costs Application

is oppressive and is an attempt by the Defendants to stifle and delay the hearing of the meritorious claim brought by the Claimants. It will not be difficult for the Defendants to recover any order for costs made in their favour and the Security for Costs Application should be dismissed. Alternatively, if the Court is minded to make an order for security for costs, the security to be provided should be in a reasonable and proportionate amount having regard to all the circumstances of the case.

Submissions

19. The Court wishes to thank Counsel on both sides for their helpful and comprehensive submissions. While those submissions will not be reproduced in detail, they have been fully considered.

Submissions for the Defendants (Applicants)

20. Mr. Marco Turnquest, Learned Counsel for the Defendants, submitted that the Court has an inherent jurisdiction to make an order for security for costs against the Claimants in this case. Counsel drew the Court's attention to the Privy Council decision of **GFN SA and Others v Liquidators of Bancredit Cayman Ltd. (in Official Liquidation) [2009] UKPC 39**.

21. Mr. Turnquest referred to **Part 24** of the CPR, which sets out the law on security for costs. Counsel stated that the law on security for costs is not in dispute. The Court has a broad discretion to determine whether to make an order requiring a claimant to provide security for a defendant's costs in a claim. However, the Court, in making its decision will have regard to a range of factors. Counsel drew support from the factors enumerated by Lord Denning in **Sir Lindsey Parkinson & Co. Limited v Triplan Ltd. [1973] QB 609**.

22. The Defendants submitted that the First Claimant, as a company incorporated in the Republic of Seychelles, is an external company for the purpose of Rule 24(3)(f) of the CPR. Additionally, Counsel advanced a somewhat novel argument in relation to the Second Claimant, to wit, while the Second Claimant is a Bahamian International Business Company, it is ordinarily resident out of the jurisdiction for the purpose of Rule 24(3)(g) of the CPR, because its directors and shareholders are foreign nationals. Counsel relied on **Re Little Olympian Each Ways Ltd. [1994] 4 All ER 561** and **Copeman Financial Corporation v C. Brian Barnes Ltd. Barbados Civil Appeal No. 6 of 1999**.

23. The Defendants submitted that it is the usual, ordinary, or general practice of the Court to require a foreign claimant to give security for costs provided it is just to do so, unless special circumstances can be established. To support this position, Counsel relied on the decision of **Aeronave SPA and Another v Westland Charters Limited and Another [1971] 3 All ER 532**.

24. Counsel argued that the Claimants only have nominal assets within the jurisdiction, particularly, the Claimants' investor shares in the First Defendant. The shares would

unlikely be sufficient to satisfy any costs judgment should the Claimants be unsuccessful in their claim. It was further submitted that there is no suggestion that the Second Claimant has any assets in the jurisdiction. This is contrary to the Claimants' statement that they have "significant assets in the form of cash and publicly traded securities at CBH Bank which has a presence in The Bahamas." The cash and securities are in a portfolio at CBH Compagnie Bancaire Helvetique SA ("CBH Bank") in Switzerland. There, the Claimants state, the portfolio holds Bahamian Sovereign Bonds valued at US$1,170,720.00 as of 31 May 2024, which are capable of being liquidated as a part of their investment with CBH Bank.

25. Mr. Turnquest subsequently submitted that the fact that the Second Claimant purportedly has assets in a Swiss Bank account is irrelevant as there is no suggestion that these funds and securities are in The Bahamas. As for the purported Bahamian Government Bonds, neither the Second Claimant nor CBH Bank have provided an undertaking that they will not sell these bonds at their first opportunity to frustrate any costs order that may be made against the Second Claimant. Further, the suggestion that the Bahamian Court could simply issue a charging order over the Second Claimant's Government Bonds is a gross over-simplification of the process. CBH Bank is a Swiss Bank, not a Bahamian Bank, and is not a party to these proceedings. Consequently, CBH Bank is free to dispose of these Government Bonds without any fear of being liable to account to the Bahamian Court Order concerning the Second Claimant's Government Bonds. In any event, the Claimants have failed to clearly indicate who holds these bonds.

26. The Defendants argued that even if one were to accept that, in enforcing a costs order, they could obtain a charging order over the Second Defendant's Government Bonds, this would not be the end of the matter. The charging order process would be expensive and time-consuming as the Claimant would have to wait a minimum of six months from the date of the order to show cause before any charging order is made absolute, and capable of being enforced. The Defendants would then have to commence a second set of proceedings to enforce the charging order to sell the Government Bonds. The Defendants contended that they should not be forced to go through this expensive and time-consuming process.

27. Counsel submitted that the Claimants have produced no evidence of its position to pay any costs order. The onus is on the party opposing a security for costs application to confirm its position to pay any costs order. The Defendants argue that it cannot be fair for the Claimants, as purportedly well-resourced companies, if they are successful, to take the benefit of the Bahamian legal system through the proceeds of any victory, without sharing the burden of the legal system. The necessary burden is to be subject to a security for costs order to satisfy any potentially adverse costs order, if they are unsuccessful. Moreover, it cannot be fair that the Defendants should put themselves in the position of having to incur substantial legal costs and be at risk of liability for the Claimants' legal costs, but yet have no real chance of recovering costs if the Claimants fail in this action. Counsel relied on the decisions of **Strukturmas (Selangor) Sdn v Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344** and **Curzon Press Ltd. v Interbook Ltd. [1982] Lexis Citation 1453**.

28. The Defendants stated they are of the firm view that they have a strong case against the Claimants' claim, although it is accepted that a security for costs application is not

the venue for a detailed consideration of the strengths and weaknesses of each party's case. To support this position, Counsel relied on the decision of **Porzelack KG v Porzelack (UK) Ltd. [1987] 1 All ER 1074.**

29. Counsel advanced that there can be no suggestion that the Defendants' application for security for costs is being made oppressively to stifle a genuine claim that has a reasonable prospect of success. By seeking security for costs at this stage, the Defendants are simply trying to protect their interests. Further, the Defendants raised the issue of security for costs with the Claimants promptly and there can be no suggestion that the Claimants' position had been brought about by the Defendants' conduct. The amount of security requested by the Defendants is a reasonable estimation of the Defendants' recoverable costs on any taxation as this matter is complex. Consequently, for all the submissions set out, the Court should make an order for security for costs against the Claimants in the terms sought by the Defendants.

Submissions for the Claimants (Respondents)

30. Mr. Miguel Darling, Learned Counsel for the Claimants, presented their response to the Defendants' application. Counsel drew the Court's attention to Part 24 of the CPR. Relying on the dicta expressed by Nugee LJ **in Infinity Distribution Ltd. The Khan Partnership LLP [2021] EWCA Civ 565,** Mr. Darling submitted that the Court, in exercising its discretion, must be satisfied that one or more of the conditions set out in Rule 24.3 of the CPR have been met. Thereafter, the Court must, in the exercise of its discretion, have regard to all the circumstances of the case and consider whether it would be just to make an order for security for costs. This encompasses all of the aspects of the order it is asked to make, including the amount of security, and the manner in which the security is to be provided. The Court is also obliged to have regard to the overriding objective of the CPR.

31. Counsel conceded that the First Claimant, being duly incorporated under the laws of the Republic of Seychelles, is an external company as defined by the CPR. However, he refuted the advancement made by the Defendants that the Second Claimant is ordinarily resident out of the jurisdiction. It was argued that the Second Claimant is an International Business Company duly incorporated and existing under the laws of The Bahamas. Unlike the term "external company", the term "ordinarily resident" is not defined and may be construed according to its natural and ordinary meaning. Counsel relied on the definition of the term "ordinarily resident" espoused by Lord Scarman in **Shah v Barnet London Borough Council and Other Appeals [1983] 1 All ER 226.**

32. The Claimants submitted that in the event the Court were to find that both the external company and jurisdiction have been satisfied, there is no rigid rule that a foreign claimant should always be required to provide security for costs because he is foreign. The basis for security for costs arises out of the fact that a defendant may encounter difficulty in seeking his costs from a foreign plaintiff. A material consideration for the Court is whether the Claimant has assets within the jurisdiction. Counsel relied on the Eastern Caribbean Court decision of **Dr. Martin Didier et al. v Royal Caribbean Cruises Ltd. SLUHCVAP2017/0051** which was cited with approval in the Bahamian Supreme Court decision of **Clico Life Insurance Company Suriname S.V. v Clico (Bahamas) Limited [2019] 1 BHS J. No. 120.**

33. The Claimants stated they have substantial and significant assets within the jurisdiction capable of being used to satisfy any adverse costs order made against them in the claim. Therefore, no order for security for costs should be made against the Claimants. Counsel referenced the investor shares of the First Defendant that are owned by the Claimants and the bonds valued at US$ 1,170,720.00 as of 31 May 2024 that are owned by the Second Claimant as a part of its substantial investment portfolio at CBH Compagnie Bancaire Helvetique SA. They asserted that a charging order could be made against the shares and bonds pursuant to Part 47 of the CPR and upon application by the Defendants. Counsel relied on the decision of **Powell Brothers, Inc. v Water and Sewerage Corp. [1988] BHS J. No. 24.**

34. Counsel drew the Court's attention to the decision of **Texuna International Ltd. v Cairn Energy plc [2004] EWHC 1102 (Comm),** submitting that the onus is on the Defendants to show some evidential basis for its conclusion that there would be difficulty in enforcing a costs order in another jurisdiction. Mr Darling submitted that without prejudice to the Claimants' submission that the bonds are assets within the jurisdiction, the Defendants have not proffered or attempted to proffer any evidential basis for concluding that there would be difficulty enforcing a costs order against the Second Claimant.

35. In the Claimants' view, it would not be just for the Court to make an order for security for costs against the Claimants. Reliance was placed on the decision of **Parkinson (Sir Lindsay) & Co. Ltd. v Triplan Ltd. [1973] QB 609** in which Lord Denning provided a non-exhaustive list of circumstances for the Court to consider when exercising its discretion as to whether to order security for costs. Those circumstances include whether the claimant's claim is *bona fide* and not a sham and whether the claimant has a reasonably good prospect of success. The Claimants' contend their claim is *bona fide* as it is *prima facie* regular on its face and discloses a cause of action. Further they say *prima facie*, they have good prospects of success in the claim as the pleadings and evidence filed stand as uncontroverted evidence in support of the claim.

36. The Claimants contended that the costs detailed in the draft Bill of Costs provided by the Defendants are wholly excessive and unjust in all the circumstances of the instant claim. In addition, there are numerous cases of a far more complex nature where costs were not ordered in the amount of the requested amount as itemized in the draft Bill of Costs. Counsel relied **on Lyford Holdings N.V. v Vernes Holding Ltd. BS [2018] CA 172** and **Powell Brothers, Inc. V Water and Sewerage Corp. [1988] BHS J. No. 24.** Counsel submitted that the amount of security ordered by the Court should be neither illusionary nor oppressive. Costs generally must be reasonable having regard to the amount of money involved, and the novelty, weight, and complexity of the case. The Claimants' claim is neither complex nor does it raise any technical or novel questions of law. It is a straightforward dispute in which the Claimants seek declaratory reliefs.

37. In the Claimants' view the present application should be dismissed. Alternatively, if the Court is minded to order that security be provided by the Claimants, the amount should be one the Court deems reasonable and proportionate having regard to all the circumstances of the case.

Issue

38. The key questions are whether the Court, in the exercise of its discretion, ought to make an order for security for costs against the Claimants and if so, whether $300,000 is a reasonable amount.

Law and Discussion

Section A: General Provisions

39. The learned authors Gilbert Kodilyne and Vanessa Kodilyne in their textbook entitled ***Commonwealth Caribbean Civil Procedure (3rd Edition)*** at page 154 defined the term "security for costs" as follows –

> "... a fund paid ... out of which an unsuccessful claimant would be able to satisfy, wholly or partly, any eventual award of costs made against him. **Its purpose is to protect the defendant against the risk of being unable to enforce any costs order he may later obtain**."
>
> **[Emphasis added]**

40. Sykes J (as he then was) in the Jamaican Supreme Court decision of **Matcam Marine Ltd. v Michael Matalon Claim No. A 0002/2011** at paragraph 33 provided the following commentary on security for costs –

> "[33] Security for costs is not intended to be a litigation-suppressing device whereby a defendant can stifle a claim by asking for security for costs. It is intended to strike a reasonable balance between a defendant, who, by virtue of the claim brought by a claimant who is resident out of the jurisdiction or in parlous financial condition, is forced to expend resources to defend the claim, on the one hand, and a claimant's right of access to the courts on the other hand."

41. An order for security for costs may be procured using various mechanisms, namely, (i) payment into court; (ii) payment into a joint account of Counsel; (iii) a bond issued by a local financial institution, or (iv) by some other appropriate means: **see Clico Life Insurance Company Insurance S. V. v Clico (Bahamas) Limited [2019] 1 BHS J. No. 120.**

42. As rightly submitted by Mr. Turnquest, the Court is bestowed with the inherent jurisdiction to make an order for security for costs. In the Board decision of **GFN SA, Artag Meridian Ltd. and Another v The Liquidators of Bancredit Cayman Limited (in Official Liquidation) [2009] UKPC 39**, Lord Scott in writing for the Board affirmed that the rules of the Court did not create or confer the power on the Court to make an order for security for costs but, rather, harnessed the power to control its exercise. The Court has always been vested with the inherent jurisdiction to make an order for security for costs.

43. For all intent purposes, the rules of the Court that are most relevant and definitive in the present application are those of the CPR. The commentary in the **CPR Practice**

Guide 2024 at page 11 includes the following observation on the Court's inherent jurisdiction and the CPR –

> "**The CPR [is] supplemented by the Court's inherent jurisdiction as a superior court of law, which is a residual source of power which the Court may draw upon as necessary. The inherent jurisdiction cannot be exercised in such a way as to lay down a procedure that is inconsistent with the CPR (Texan Management v Pacific Electric Wire and Cable Co. Ltd. [2009] UKPC 46) or to circumvent the CPR (Belgravia International Bank & Trust Company Limited v Sigma SCCivApp No. 79 of 2021).**"
>
> **[Emphasis added]**

44. The CPR empowers a defendant to make an application for security for costs. **Rule 24.2** is the starting point, which provides –

> "**24.2 Application for order for security for costs.**
>
> **(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 application should be made at or before a case management conference.**
>
> **(3) An application for security for costs must be supported by evidence on affidavit.**
>
> (4) **The amount and nature of the security shall be such as the Court thinks fit.**"
>
> **[Emphasis added]**

45. The CPR further outlines certain conditions, at least one of which must be satisfied, before the Court may make an order for security for costs. **Rule 24.3** provides –

> "**24.3 Conditions to be satisfied.**
>
> **The Court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to the circumstances of the case, that it is just to make such an order, and that –**
>
> ...
>
> (f) **the claimant is an external company; or**
> (g) **the claimant is ordinarily resident out of the jurisdiction.**"
>
> **[Emphasis added]**

46. The CPR therefore precludes the Court from making an order for security for costs until it is first satisfied that it is just to make such an order, having regard to the circumstances of the case, and second, at least one of the conditions in **Rule 24.3** have been satisfied.

47. **Rule 24.5** provides the means by which the Court secures compliance with an order for security for costs. It provides –

> **"24.5 Enforcing order for security for costs.**
>
> **On making an order for security for costs the court must also order that –**
>
> a. **the claim, or counterclaim, be stayed until such time as security for costs is provided in accordance with the terms of the order;**
>
> b. **if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out."**
>
> **[Emphasis added]**

Section B: Security for Costs Conditions

48. The claim before the Court does not involve natural persons but corporate entities. Moreover, the claim involves two claimants – the First Claimant, conceded by the parties to be an external company falling within the ambit of **Rule 24.3 (f)**, and the Second Claimant, a Bahamian International Business Company, which the Defendants argue, is ordinarily resident out of the jurisdiction and falling within the ambit of Rule **24.3(g)**. This is a somewhat novel argument in this jurisdiction.

49. It is noteworthy that, as pointed out by Klein J in **Gabriele Volpi v Delanson Services Ltd and others 2020/APP/sts/00013** and **Delanson Services Limited v Matteo Volpi and others 2020/CLE/gen/00632** at paragraph 111, in The Bahamas there are provisions in the **Companies Act, Chapter 308**, governing security for costs against domestic companies (**s. 285**), and a general power under the **Rules of the Supreme Court (Order 31 A, Rule 18**) to require a party, pursuant to the Court's case management powers, to give security. The RSC referred to in that decision has been replaced by the CPR. Apart from **Part 24**, the general case management power of the Court to order security for costs has been retained in **Part 26.1(4)(b)** as a condition of an order or direction of the Court.

50. While, unlike **s. 285** of the **Companies Act**, the **International Business Companies Act, Ch 309** ("IBC Act") contains no provision as to the payment of security for costs, there is no express exemption or protection in the IBC Act afforded an international business company from either obeying an order to pay costs or giving security for costs in litigation.

51. Further, as regards foreign and domestic plaintiffs in the same action, in the Jamaican Supreme Court decision of **Jamaica Money Market Brokers Limited and JMMB**

International Limited v Pradeep Vaswani and Santoshi Limited [2012] JMCC Comm. 5(1), Mangatal J at paragraph 26 made the following pronouncement –

> "[26] There is no inflexible rule that whenever a company is incorporated abroad, an order for security for costs will be made. Nor is there a binding rule that an order for security will not be made against a foreign plaintiff if there is a co-plaintiff resident within the jurisdiction. **The court retains a wide discretion to order security for costs if it considers it is just to do so and must have regard to all the circumstances of the case**."

[Emphasis added mine]

52. In order fully to determine the present application, and apart from the Court's obligation to consider whether it is just to make an order for security for costs having regard to the circumstances of the case, the Court must determine whether the Second Claimant is indeed ordinarily resident out of the jurisdiction as purported by the Defendants. It is accepted that the First Claimant is an external company.

53. "Ordinarily resident out of the jurisdiction" is not a term of art. It is a term that is applied differently to corporate entities than natural persons. Concerning corporate entities, "ordinarily resident out of the jurisdiction" goes beyond the corporate entity's place of incorporation and registered office. It extends to the place of the corporate entity's control and management. To put it another way, "ordinarily resident out of the jurisdiction" refers to the place where the corporate entity's business is carried on: **see Re Little Olympian Each Ways Ltd. [1994] 4 All ER 561** and **Texuna International Ltd. v Cairn Energy plc [2004] EWHC 1102 (Comm)**. For the purposes of deciding whether the court should make an order for security for costs, the court in **Re Little Olympian** determined that this stated test, which is usually applied in tax cases for assessing a company's place of residence, should be adopted.

54. In the Eastern Caribbean Supreme Court decision of **Surfside Trading Ltd. v Landsome Group Inc. et al [2006] ECSC J0120-1**, George-Creque J stated at paragraph 3 –

> "[3.] For completeness, however, and given the lack of jurisprudence in this jurisdiction in respect of the aspect of the matter, I think it appropriate, therefore, to deal with the question as to whether the Claimant may be said to be ordinarily resident out of the jurisdiction. The matter may very well arise again and in circumstances of a wholly solvent company. Both sides agree that the test to be applied for the purpose of making this determination of fact is the central control and management test as enunciated in the case of *DeBeers Consolidated Mines Ltd. v Howe [1906] AC 448* and further propounded in the case of *Re Little Olympian Each Ways Limited [1995] 1 WLR 560*. Lindsay J in *Re Little Olympian* at pages 568-569 considered the following factors relevant in determining whether a company was ordinarily resident –
>
> (a) the objects clause;

(b) the place of incorporation;

(c) where the company's real trade or business is carried on;

(d) where the company's books are kept;

(e) where its administrative work is done;

(f) where its directors meet or reside;

(g) where it "keeps house";

(h) where its chief office is situate; and

(i) where its secretary resides."

55. The Claimants seek to rely on the Second Claimant's domicile conferred by statute, by virtue of its incorporation in The Bahamas, as its ordinary residence for the purpose of deciding whether it should be ordered to pay security for costs. However, a company's place of incorporation does not determine its ordinary residence.

56. In **Tulip Trading Ltd (a Seychelles company) v Bitcoin Association for BSV (a Swiss verein) and others** [2022] EWHC 2 (Ch), Master Clark rehearsed the settled law on the issue of determining domicile and ordinary residence as follows:

"33. Rule 173 of *Dicey, Morris & Collins* (15th edn) provides:

(1) The domicile of a corporation is in the country under whose law it is incorporated.

(2) A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries, then the corporation is resident in each of these countries.'

"34. The 'central management and control' test derived from the speech of Lord Loreburn LC in De Beers Consolidated Mines Ltd v Howe [1906] AC 455 at 458:

> "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. ...The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson,* now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.
>
> ...

"This is a pure question of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading."

57. The Court was invited to consider the Barbadian Court of Appeal decision of **Copeman Financial Corporation v C. Brian Barnes Ltd. BS 2000 CA 19**. Here, the Barbadian Court of Appeal held that a Barbadian High Court judge (Greenidge, J) was correct when he ordered an international business company incorporated under the laws of Barbados to pay security for costs. This is because the company was found to be ordinarily resident out of the jurisdiction. Such finding was made despite the fact that (according to **s. 3(2)** of the Barbadian **International Business Companies Act, Ch 77**) international business companies incorporated or registered under the laws of Barbados are statutorily deemed to be resident within the jurisdiction of Barbados for the purposes of that legislation. The Court of Appeal approved the High Court's adherence to the test of the situs of the control and management of the company. It was found that the company possessed no assets in Barbados and its control and management were not in Barbados. Williams CJ pronounced the following –

"The residence of an international business company is placed in Barbados because the policy of the legislation is to encourage the development of Barbados as a financial centre and in order to do so incentives by way of tax reduction, exemptions and benefits must be provided. Those administering the relevant law are enabled to deal with international business companies as residents of Barbados and prescribed incentives accordingly…

The essential question is whether for this purpose the court should pay regard to the statutory residence conferred on the plaintiff for the special purposes of the International Business Companies Act.

A company incorporated in Barbados must have a registered office: see Form 4 in the Third Schedule of the Companies Regulations, 1984. But the existence of a registered office is not significant for the purpose of determining where a company is resident. In Barbados section 75(1) of the Companies Act, Cap. 308…enacts that, unless the articles or by-laws of a company otherwise provide, the directors of a company may meet at any place and upon such notice as the by-laws require. Section 79 enables participation in meetings by the board of directors by means of such telephone or other communication facilities as permit all persons participating in the meeting to hear each other; section 80 enables the directors of a company to appoint a managing director and delegate to him any of the powers of the directors; section 82 provides that when a resolution in writing is signed by all the directors entitled to vote on the resolution at a meeting of directors, the resolution is valid as if it had been passed at a meeting of directors.

In this case the plaintiff company has three directors. Two of them are international business companies controlled by non-residents of Barbados

and the third is a resident of Canada. Its central control and management can be anywhere but nothing is disclosed about how the directors manage the company's affairs. Instead it seeks to say that the residence conferred on it by statute is its ordinary residence for the purpose of deciding whether it should be made to pay security for costs.

The learned judge in his discretion thought it just that the plaintiff should give security for costs to the defendant. We see no reason for interfering. The appeal is dismissed with costs."

[Emphasis added mine]

58. In The Bahamas, the **IBC Act** is devoid of any provision which deems an international business company to be resident or ordinarily resident in this jurisdiction. As such, there is no hurdle to overcome in that respect which would affect the exercise of determining whether an international business company is ordinarily resident in The Bahamas.

59. In the present application, the Second Claimant is an international business company incorporated under the **International Business Companies Act, Ch. 309** (as amended). **Section 37(1) of the International Business Companies Act**, Ch 309 (as amended) provides that a company incorporated under this Act "shall at all times have a registered office in The Bahamas". **Section 38(1)** provides that a company incorporated under this Act "shall at all times have a registered agent in The Bahamas". **Section 43** provides that "the number of directors shall be fixed by the Articles and subject to any limitations prescribed in the Memorandum or Articles, the Articles may be amended to change the number of directors". **Section 48(1)** provides that "subject to any limitations in the Memorandum or Articles or a unanimous shareholder agreement, directors may meet at such times and in such manner and places within or outside The Bahamas as the directors may determine to be necessarily desirable. **Section 48(2)** enables participation in meetings by the board of directors by means of such telephone or other communication facilities as permit all persons participating in the meeting to hear each other. Subject to any limitations in the Memorandum or Articles or in any unanimous shareholder agreement, **Section 51** empowers inter alia a director, without the need for notice, to take any action by consent in writing, by telex, telefax or other written electronic communication that such director would take at a meeting by resolution. **Section 52** permits a director to appoint an alternate who need not be a director to exercise the vote or consent of such director.

60. Based on the evidence, the Second Claimant is incorporated, and necessarily has an administrative presence (by its registered office) in The Bahamas. However, the Defendants, by way of the Meade Affidavit, advanced that the Second Claimant's sole director who exercises its management and control, Theocharis Savva, is resident in Limassol, Cyprus. Moreover, its shareholders and ultimate beneficial owners are ordinarily resident out of the jurisdiction. The Second Claimant, has proffered no evidence to show how its affairs are managed. Its central control and management may be anywhere.

61. I am persuaded that like the Barbadian courts in **Copeman**, this Court ought to look beyond the place of incorporation of the Second Claimant to determine its ordinary residence for the purpose of this application. Domestic Bahamian companies are most often incorporated to conduct business in The Bahamas or to hold in-country assets. If such companies are susceptible to scrutiny for the purpose of security for costs, why would not an international business company which, (with no assets in the jurisdiction and shares of nominal value), brings an action against others causing them to risk costs to defend themselves? Having regard to the submissions of Counsel, applying the principles set out above, and taking into account the lack of evidence to the contrary, I am satisfied that the Second Claimant is ordinarily resident out of the jurisdiction for the purposes of giving security for costs, and falls within the ambit of **Rule 24.3(g)** of the CPR.

Section C: Assets within the jurisdiction

62. As the First Claimant is an external company falling within the ambit of **Rule 24.3(f)** of the CPR and I have found that the Second Claimant is ordinarily resident out of the jurisdiction for the purpose of **Rule 24.3(g)** of the CPR, the question which now arises is whether the Claimants have assets within the jurisdiction capable of satisfying an order for costs that may be made against them in the event the Defendants are successful in the claim.

63. After all, the foreignness of a claimant, while an important consideration, is not the sole basis on which a court may make an order for security for costs. Webster JA in **Dr. Martin Didier et al. v Royal Caribbean Cruises Ltd. SLUHCVAP2017/0051** found that the Court will not order security for costs solely because a claimant is foreign and/or ordinarily resident out of the jurisdiction. However, a claimant who is foreign and/or ordinarily out of the jurisdiction and possessing no assets in the jurisdiction may, in all likelihood, be required to put up security for the defendant's likely costs.

64. The assets within the jurisdiction must also be unimpeded from any encumbrance and/or pending litigation: **see Clico Life Insurance Company Suriname S. V. v Clico (Bahamas) Limited [2019] 1 BHS J. No. 120.** As Winder CJ found in that case, the instrinsic difficulty a defendant would have to recover his costs from a non-resident claimant forms the true basis of the requirement for security.

65. The Claimants, through the Turnquest Affidavit, seek to rely on their investor shares in the First Defendant to triumph against any argument that an order for security for costs should be made. The Claimants advanced that the investor shares are substantial assets within the jurisdiction capable of satisfying any adverse costs order that may be made against them. On the other hand, the Defendants, through the Meade Affidavit, stated that the Claimants' investor shares are of a nominal value. The First Defendant is a party to two pending proceedings, namely, the Cypriot Proceedings and the Winding Up Petition.

66. Based on the evidence presented, I am satisfied that the investor shares, while they may be assets within the jurisdiction, are no doubt encumbered and/or impeded by the two pending litigation proceedings. The outcome of these proceedings will no doubt

have implications on the First Defendant's financial position, inclusive of its share value. To bank, at this stage, upon assets the value of which is questionable is simply a risk too far. It is furthermore irrelevant that the Winding Up Petition proceedings have not been served on the First Defendant and/or prosecuted by the Claimants. There is no evidence before me that the Claimants have discontinued such proceedings.

67. The Claimants, through the Turnquest Affidavit, seek further to rely on the Second Claimant's Bahamas Government Sovereign Bonds valued at US$1,170,720.00 as of 31 May 2024 which are held in its investment portfolio at CBH Compagnie Helvetique SA ("CBH Bank") to resist an order for security for costs. The Claimants advanced that the bonds are to be properly classified as an asset owned by the Second Claimant within the jurisdiction. The Claimants exhibited a heavily redacted extract of the Second Claimant's portfolio statement as of 31 May 2024 to the Turnquest Affidavit, which evidenced the Second Claimant's ownership and value of the bonds. The Claimants further advanced that the bonds are highly stable and regarded as low-risk, government-backed bonds, which are easily transferrable and may be sold with relative ease on the international market. The Claimants ultimately argued that Part 47 of -the CPR allows the Defendants to apply for a charging order to be made against the bonds to satisfy any adverse costs order that may be made against the Claimants in the claim.

68. On the other hand, the Defendants, through the Meade Affidavit, contended that CBH Bank, which is based in Switzerland, and to which the Defendants assume the Claimants are referring, is a completely separate bank with a separate ownership structure from CBH Bank that operates in The Bahamas. The Claimants have produced no evidence to confirm that the Claimants' bank accounts are at CBH Bank Bahamas or that they have assets at CBH Bank Bahamas or any other Bahamian Bank.

69. In any event, the Defendants, through submissions, asserted that even if one were to accept (which they do not) that the Claimants obtain a charging order over the Second Claimant's bonds that is not the end of the matter. The charging order process would be both expensive and time-consuming. The Claimants would have to wait at least six months from the date of the order to show cause before any charging order is made absolute and capable of being enforced. Moreover, the Claimants would have to commence separate proceedings to enforce the charging order and sell the government bonds. The Claimants have not provided any undertaking that they would not oppose such proceedings. The Claimants should not be forced to go through such an expensive and time-consuming process to enforce a costs order.

70. In light of the evidence presented, submissions of Counsel, and relevant law, the Court is satisfied that The Bahamas Government Sovereign Bonds evidenced to be owned by the Second Claimant are not assets in the jurisdiction capable of satisfying any adverse costs order that may be granted against the Second Claimant in the event the Second Claimant is not successful in the claim. Although the Court is told that the bonds are not encumbered or impeded by any pending litigation, I observe that they are held in a portfolio by a bank in Switzerland, which would necessitate the eventual enforcement in Switzerland of any costs order the Defendants may obtain in The Bahamas. Additionally, the Court accepts that the bonds are highly stable, low-risk,

government-backed, easily transferrable, and may be sold with relative ease on the international market to satisfy any adverse costs order granted against the Second Claimant in the claim. However, the ease with which the assets may be disposed of is of concern. They could disappear before any costs order is satisfied, which would defeat payment of the same.

71. The charge order process is the usual process that would be utilized by a party, in whose favour a costs order was granted, in order to recover the costs from the assets owned by the adverse party. But the Court accepts that the two-stage process would not be necessary if there were adequate assets held here in The Bahamas. Therefore, the argument that enforcement against these bonds will involve increased expense and time is not without merit.

Section D: Relevant Factors

72. In determining whether the Court ought to make an order for security for costs against either or both of the Claimants, I look to the relevant factors outlined by George-Creque J in **Surfside Trading Ltd v Landsome Group Inc. et al [2006] ECSC J0120-1**, which are somewhat similar to the factors outlined by Lord Denning in the celebrated decision of **Sir Lindsey Parkinson & Co. Limited v Triplan Ltd. [1973] QB 609**. George-Creque J at paragraph 7 stated the following –

> "[7] This is by far the most troubling aspect of the matter. Counsel on both sides have presented compelling arguments. I am required to carry out a balancing exercise, taking into account many factors such as –
>
> (a) the risk of not being able to enforce a costs order and/or the difficulty or expense in so doing;
>
> (b) the merits of the claim where this can be investigated without holding a mini-trial; This has an impact on the risk of needing to enforce a costs order against the Claimant;
>
> (c) whether the Defendant may be able to recover costs against someone other than the Claimant;
>
> (d) the impact on the Claimant having to give security. Will an order for security effectively deprive the Claimant of the ability to take the claim to trial? Where the Claimant is sheltering in a tax haven the court is unlikely to be very sympathetic, but where the Claimant's inability to pay has been caused by the Defendants' conduct complained of in the claim, a substantial order may unjustly stifle the claim;
>
> (e) delay in making the application. Generally, the application should be made shortly after the proceedings are commenced and delay may be reflected either in refusing the application or reducing the amount of security ordered."

73. Mr. Darling submitted, *inter* alia, that the Claimants' claim is *bona fide* and not a sham, the Claimants have a reasonably good prospect of success and the Claimants would be prejudiced in their prosecution of the claim and the claim could be stifled if the Court orders the Claimants to provide security for costs, particularly, in the requested amount. On the other hand, Mr. Turnquest submitted, *inter alia,* that the Defendants have a strong case (although it is accepted that a security for costs application is not the venue for a detailed consideration of the strengths and weaknesses of each party's case). Further, that the Defendants are simply trying to protect their interests, not stifle the claim.

74. I am satisfied that the Claimants present a *bona fide* claim. The Court makes no commentary on the prospects of success of the claim or which party's actions brought about the claim. Such commentary is best reserved for the trial of the claim when there would be an opportunity for fuller consideration of each party's case. The Court is further satisfied that the present application cannot in any way be perceived as the Defendants seeking to stifle the Claimants' claim. The Defendants moved the Court relative to the present application for security for costs at a somewhat early stage of the claim. There has not yet been a case management conference nor has there been a pre-trial review. Moreover, the Defendants appropriately attempted at the onset of the claim, and without intervention by the Court, to have the Claimants provide security for their costs. The attempt was unsuccessful, which led to the Defendants making the present application. The latter assessment may be gleaned from the letter communications exhibited to the Turnquest Affidavit and Meade Affidavit.

75. Having weighed all of the circumstances in respect of the present application, the Court is of the firm view that security for costs ought to be ordered against the Claimants. Of course, multiple claimants may be held jointly or severally responsible for any order as to costs that may be made in favour of a successful defendant. I expressed to Counsel on both sides that I was minded to make the order for security for costs on the day this application was heard. However, since Mr Turnquest introduced a somewhat novel point, and Mrs Cooper-Burnside KC expressed some reservations about it and both parties undertook to attempt to locate certain authorities to assist the Court, I did not rule at that time. I note that Mrs Cooper-Burnside KC stated that her clients would proffer an undertaking to the Defendants if the Court was of the view that security for costs should be given by the Claimants. The Court takes this offer into account, as well, and will afford that opportunity to the parties.

Section E: Security Amount

76. It is true that it is good practice for the party making the application for security for costs to provide the Court with some idea of the costs likely to be incurred in defending the claim. The Defendants have done this by exhibiting a draft bill of costs to the affidavit evidence supporting the application. Generally, the Court is not bound by the costs amount provided, and retains the ultimate discretion to determine the amount and nature of security to be provided as it thinks fit and just.

77. The Defendants, through the Meade Affidavit, exhibited a draft bill of costs estimating some $300,000.00 in legal costs. The Defendants submitted that

considering the complex issues involved, and the standing of the Defendants' Counsel at the Bar, the estimated amount is reasonable.

78. On the other hand, the Claimants, through the Turnquest Affidavit, advanced that the estimated amount demonstrates costs of a wholly excessive, disproportionate, and exorbitant amount in all the circumstances of the case. They contend there are no technical or complex issues to be resolved in the instant claim nor does it involve any novel points of law. Any request for security for costs in proceedings before the Court, as with any other step taken by a litigant, ought to further the overriding objective of the CPR and, to this extent, be proportionate to the amount of money involved, the importance of the case, and the complexity of the issues to be decided.

79. The Court is mindful that it has not yet seen the Defendants' answer to the claim and while, as currently drafted, the Originating Application prays for declarations concerning points of interpretation of the constitutive documents of the First Defendant, it also involves a prayer that certain acts of the Board of Directors of the First Defendant be undone. The Defendants contend that the claim is complex while the Claimants argue the opposite. It remains to be seen as the pleadings are not closed nor the evidence and argument on both sides tendered. It may well be that if there turns out to be a substantial dispute of fact, the proceedings may have to be converted as if begun by Standard Claim Form with full pleadings. While the Court is of the view that, based on its appreciation of that part of the pleadings which can now be perused, costs of $300,000 may be excessive, a review of the draft bill of costs for the Defendants in the Meade Affidavit provides a guide in relation to the tasks which must be done by Counsel and the time which may be involved. I am not certain at this point whether it will merely require a one-day trial as is contended. However, given the background of the issues amongst these parties as a whole, there is scope for complexity in this case.

80. Having regard to all the circumstances of the claim, the overriding objective under the CPR, and the standing of the Defendants' Counsel at the Bar, and making the best estimate possible at this early stage, in my judgment the just and reasonable amount of security for costs to be ordered against the First Claimant is two-thirds the amount claimed, that is, BSD$200,000.00.

Conclusion

81. In light of the foregoing reasons set out above in this ruling, the Court hereby makes the following Orders –

    (1) The Claimants are to provide the Defendants with security for costs in the amount of BSD$200,000.00 to be procured within twenty-one (21) days from the date of this ruling, that is, on or before 14 November 2024 ('the specified date') by any of the following means, that is:

        (i) payment into Court,

        (ii) payment into a joint account of Counsel,

(iii) a bond issued by a local financial institution, or

(iv) some other appropriate means agreed amongst the parties.

(2) The proceedings are stayed until payment of the security for costs is made;

(3) This Order shall automatically be discharged if the Claimants, by the Specified Date, proffer an undertaking ('the Undertaking') to the Defendants in relation to this Order, and the Defendants accept the Undertaking; and

(4) Costs are awarded to the Defendants to be assessed, if not agreed.

Dated 24 October 2024

Simone I. Fitzcharles
Justice