

IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO. 34 OF 2018

CMB MANAGEMENT LIMITED

Appellant

v

STEM LLC

First Respondent

RANDAL PAUL

Second Respondent

FALAH TABAHI

Third Respondent

BEN MASON

Fourth Respondent

PROPRIETORS OF STRATA PLAN 54

Fifth Respondent

PROPRIETORS OF STRATA PLAN 42

Sixth Respondent

Before:

The Hon Mr. Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz Bertram
The Hon Mr. Justice Murrio Ducille

Justice of Appeal
Justice of Appeal
Justice of Appeal

A Marshalleck SC along with E Perera and G Payal for the appellant/respondent
D Vernon for the 1st to 4th respondents/1st to 4th applicants
P Banner for the 5th and 6th respondents/5th to 6th applicants.

31 October 2019 and 22 September 2020

AWICH JA

[1] I have read the draft judgment prepared by the learned Hafiz-Bertram JA. I concur in the way she resolved all the many issues raised in the long submissions made. I concur entirely in the judgment and the court orders that Hafiz-Bertram JA has proposed. All of us on the panel have concurred, so the orders are adopted as the orders of the Court.

AWICH JA

HAFIZ BERTRAM JA

[2] There were two applications for security for costs before the Court which were heard on 31 October 2019 and the decision reserved.

[3] The first application was issued on 14 June 2019 by the Proprietors of Strata Plan 54 and the Proprietors of Strata Plan 42 ('the proprietors'). The second application was issued on 24 June 2019 by Stem LLC ('the first respondent'), Randal Paul ('the second respondent'), Falah Tabahi ('the third respondent'), and Ben Mason ('the fourth respondent').

[4] The first respondent is a management company retained by the proprietors to manage the common areas and units of the proprietors of both Strata 42 and 54. It is an internationally incorporated boutique hotel management company.

[5] The second respondent is a member of the Executive Committee of the sixth respondent.

[6] The third respondent is a businessman and is a proprietor/owner of several condo units in both the fifth and sixth respondents.

[7] The fourth respondent is a businessman and proprietor of the fifth and sixth respondents.

[8] CMB Management Limited (“the appellant”) is a resort management company that manages several resorts in Belize (paragraph 1 of the amended statement of claim).

[9] The appellant was the claimant in the court below and stated that it had been providing property management services to the proprietors for a number of years. It claimed several declarations and orders from the court below including that it and its employees were forcefully removed from the properties it managed. It also claimed that it was entitled to a beneficial interest in developments located within the common properties of Strata Plans 42 and 54.

[10] On 19 October 2018, the Hon. Chief Justice made an order against the appellant (perfected on 22 October 2018) which was decided on preliminary issues agreed to be heard by the consent of the parties. The Chief Justice granted substantive orders in respect to the preliminary issues. One such order is that the appellant was not entitled to the beneficial interest as claimed. The Chief Justice also made consequential orders on 22 October 2018 which was entered on the same day.

[11] On 9 November 2018, the appellant filed a notice of appeal which appealed the whole decision in the two orders and sought for both orders to be set aside.

[12] The proprietors made a demand for security for costs on 14 June 2019. A notice of motion was also issued on the same date for security for costs.

[13] The first to fourth respondents made a demand for security for costs on 19 June 2019. They filed a motion on 24 June 2019, for security for costs.

[14] The two applications for security for costs were heard by the Court and the decisions reserved.

Security for costs by the Proprietors

[15] The proprietors by motion dated 14 June 2019, sought the following orders:

1. “An order pursuant to section 18 of the Court of Appeal Act and Rule 20 of Order II of the Court of Appeal Rules that the appellants give security for the respondents’ (Proprietors) costs in the sum of \$125,000;
2. An Order that the appeal be stayed until such time that the security for costs is provided, being no later than one month (31 days) from the making of the Order for security;
3. An Order that the appeal shall stand dismissed with costs in the event that the security for costs is not provided within one month (31 days) of the date of the Order for security;
4. Further, or other relief deemed just; and
5. An Order that the costs of this application be costs in the cause.”

Grounds of the application for security of costs

[16] The grounds of the application for security for costs are:

1. The appellant has no assets in Belize to satisfy any order of costs in the respondents’ favour if they were to succeed on appeal;
2. The proprietors wrote to the appellant on the 20 May 2019, requesting that the appellant agree to deposit with their counsel appropriate security for costs in the sum of BZ\$125,000.00 no later

than 30 days from the date of the letter which the proprietors indicated was in its belief a reasonable estimate to cover the costs of the appeal (inclusive of senior counsel, junior counsel and general sales tax);

3. The appellant has responded to the request for security for costs by indicating that it is unable to comply with the demand on some four grounds which the respondents view as untenable;
4. The proprietors state that it is in the interests of justice that security for costs in the sum requested be deposited with the appellant's counsel within one month of the making of the order and if there is a failure to do so then the appeal should be dismissed with costs.

Evidence

[17] The application for security for costs is supported by the affidavit of Carla Sebastian sworn on 14 June 2019, a paralegal in the law firm of Courtenay Coye LLP. She deposed that she is familiar with the proceedings which have given rise to the present appeal. Ms. Sebastian deposed about the two orders made by the Chief Justice on the preliminary issues which she exhibited as Tab 1.

[18] She deposed that after the notice of appeal was filed on 9 November 2018, the proprietors received its first case management (CMC) notice on 10 April 2019 and the CMC was held on 15 April 2019. In the CMC checklist, the proprietors gave notice that it intends to file an application for security for costs.

[19] Ms. Sebastian further deposed that on 20 May 2019, the proprietors sent a letter to the appellant seeking to agree to security for cost. She exhibited the letter as Tab 3. By a letter dated 22 May 2019, the appellant responded to that request and this is exhibited as Tab 4. The proprietors then responded to the appellant by letter dated 14 June 2019, which is exhibited as Tab 5.

[20] She further deposed that by a letter dated 14 June 2019 to the appellant, the proprietors requested agreement as to costs for the Supreme Court matter. She exhibited a copy of the Bill of Costs and the letter as Tab 6.

[21] Ms. Sebastian deposed that she was advised by Mr. Tarique Choudhury, Executive Committee member for the proprietors that the appellant has no assets within the jurisdiction of Belize to satisfy any order for costs which may be granted in the proprietors favour on the appeal.

[22] The Operations Manager of the appellant, Mr. Reynaldo Malik, responded to the evidence by Ms. Sebastian and gave four reasons as to why this Court should refuse the application for security for costs.

[23] Mr. Malik deposed that the demand for security for costs was sent to the appellant on 20 May 2019 which is approximately one month after the first CMC and five months after the appeal was filed. The security for costs application was filed on 14 June 2019, which is seven months after the appeal was filed.

[24] He further deposed that the demand for costs did not include any basis for claiming \$125,000.00. On 22 May 2019, the appellant responded to this request. The proprietors thereafter provided a bill of costs which formed the basis for the request. (See Tab 5 for response letter).

[25] At paragraph 14 of his affidavit, he deposed that a letter was sent for the appellant requesting agreement as to costs in the sum of \$134,850.00 for the Supreme Court matter and it included a bill of costs for the said amount. (See Tab 6 for letter).

[26] Mr. Malik deposed that by letter dated 21 June 2019, the appellant responded to the letter requesting agreement as to costs for the Supreme Court matter. (See Tab 2 for the letter). In that letter the appellant indicated that the costs being claimed was unreasonable.

[27] He further deposed that the appellant is a limited liability company which was incorporated for the sole purpose for conducting the resort business on the premises known as Belize Ocean Club. That when the orders were made in the court below, the appellant was stripped of its rights to engage in its resort business on the said premises and also stripped of all its assets used in the course of its business. As such, the special circumstances of the appellant having no assets within this jurisdiction is a direct result of the orders in dispute and it would be unjust for the proprietors to benefit from this order by imposing a demand for costs. He deposed that an order for security for costs would force the appellant to withdraw its appeal.

[28] Mr. Malik deposed that he was advised by the appellant's attorneys that the appellant has a *bona fide* claim with a realistic prospect of success. Further, that even if it is accepted that the proprietors have a right to possess the common property of the resort in the circumstances established before the trial court, the Chief Justice erred in finding that the rights translated to ownership of the appellant's assets and business.

[29] Ms. Sebastian in her second affidavit sworn on 12 July 2019, responded to the affidavit evidence of Mr. Malik and stated that no prejudice had been caused to the appellant in relation to the demand for security for costs and the application for security for costs. Further, she was informed by Ms. Banner that the Bill of Cost was reasonable and no counter proposal was received by counsel for the appellant.

[30] She further deposed that the order for security for costs would not stifle the appeal as the appellant may raise funds from its shareholders to pay for any security or borrow from a banking institution. Also there is no evidence before this Court to show that it is insolvent.

[31] Ms. Sebastian deposed that she had been informed by Ms. Banner that the appellant has no reasonable prospect of success since the appellant's claim

to beneficial ownership is misconceived and without merit as the claim is based on an alleged right to the beneficial interest having been conferred by third party who had no legal right or authority to confer such interest.

[32] Mr. Malik in his second affidavit sworn on 5 July 2019, responded to Ms. Sebastian's second affidavit. He deposed that he was advised that the application should have been made promptly. Further, the demand for security for costs did not include any basis for the amount of costs being requested. He repeated his evidence that an order for security for costs would force the appellant to withdraw its appeal and that the appellant has a *bona fide* claim with a realistic prospect of success.

Application for the first through fourth respondents for security for costs

[33] The first through fourth respondents made an application for security for costs dated 24 June 2019 for the following orders:

1. "An order pursuant to section 18 of the Court of Appeal Act and Rule 20 of Order II of the Court of Appeal Rules that the appellants give security for the respondents' costs in the sum of \$120,000;
2. An Order that the appeal be stayed until such time that the security for costs is provided, being no later than one month (31 days) from the making of the Order for security;
3. An Order that the appeal shall stand dismissed with costs in the event that the security for costs is not provided within one month (31 days) of the date of the Order for security;
4. Further, or other relief deemed just; and
5. An Order that the costs of this application be costs in the cause."

[34] The grounds of the application are as follows:

1. The appellant has no assets in Belize to satisfy any order of costs in the respondents' favour if they were to succeed on appeal;
2. The appellant was recently incorporated in October 2016 and the sole director and shareholder is resident outside the jurisdiction of Belize;
3. The first through fourth respondents wrote to the appellant on the 19 June 2019, requesting that the appellant agree to deposit with their counsel appropriate security for costs in the sum of BZ\$120,000.00;
4. The appellant is already facing requested costs for the matter in the court below and security for costs application by the proprietors for the amount of \$285,060.00;
5. The first through fourth respondents state that it is in the interests of justice that security for costs in the sum requested be deposited with the appellant's counsel or the respondents' counsel within one month of the making of the order and if there is a failure to do so then the appeal should be dismissed with costs.

[35] The application for security for costs by the first through fourth respondents is supported by the affidavit of Stacy Gordon sworn on 24 June 2019. She is a paralegal in the firm of D. Vernon & Co. and is familiar with the proceedings.

[36] She deposed that after the appeal was filed, the office received notice that the first CMC would be held on 15 April 2015. The matter was also called up for mention on 14 June 2019. But, at this time the office was unable to reach three respondents who were out of the jurisdiction in order to get instructions whether to apply for security for costs.

[37] Ms. Gordon deposed that by a letter dated 19 June 2019, having received instructions from the respondents, security for costs was sought in the amount of \$120,000.00 See SG 2 for letter.

[38] She further deposed that she was advised by the respondents that the appellant has no assets within the jurisdiction of Belize to satisfy any order for costs.

[39] Ms. Gordon deposed that she was advised by the third respondent that the appellant is a recently incorporated company which was formed in October 2016.

Submissions for the Proprietors

[40] Ms. Banner submitted that the Court will exercise its discretion under section 18 of the Court of Appeal (“the Act”) when special circumstances exist such as impecuniosity or insolvency of a company. Learned counsel relied on the case of *Una Welch v Shafi Janali* (1972) 19 WIR 66, where the Guyana Court of Appeal affirmed that “*impecuniosity is a special circumstance which would persuade the Court to make an order for security for costs.*”

[41] In relation to the Court’s discretion, counsel referred the Court to the principle in *Sir Lindsay Parkinson & Co. v Triplan Ltd.* [1973] QB 609, where Lord Denning stated that:

“*If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise considering all the circumstances of the particular case.*”

[42] Ms. Banner submitted that the Court is not bound to grant an order for security for costs, but courts in the region have shown willingness to grant security for costs based on impecuniosity. See *Speedways Jamaica Ltd. v Shell Company (W.I.) Ltd v Anor* SCCA No. 66/2001; *Shell Company (W.I.) Ltd. Fun Snax Ltd. & Anor* [2011] JMCA App 6; *Keary Developments Ltd v Tarmac Construction Ltd.* [1995] 3 All ER 534. Counsel submitted that the Court of Appeal of Jamaica in *Shell Company* granted security for costs based on a lack

of assets in Jamaica. The court cited *Speedways* and approved its citation of the headnote of *Keary*.

[43] Ms. Banner contended that the appellant has admitted that it cannot raise the security due to the lack of assets in the jurisdiction. As such, this constitutes a special circumstance warranting an order for security for costs.

[44] She further submitted that if the appellant does not succeed in its appeal, it would also bear the financial burden of the other respondents, both in this Court and the court below. As such, the enforcement of the costs order will be time consuming and likely not be satisfied because of the number of respondents.

[45] In relation to the contention of the appellant that its appeal would be stifled if it has to pay security for costs, since it had been stripped of its assets, counsel referred the court to the case of *Kloekner & Co. AG v Gatoil Overseas Inc.* [1990] 1 Lloyds rep 177 and *Keary*. In these cases the principle established is that the appellant must show that he is unable to raise the money elsewhere if he does not have it himself.

[46] As such, Ms. Banner submitted that the burden rests on the appellant to prove that the company is unable to provide security. Further, since the appellant admitted lack of assets in this jurisdiction and the amount of costs that will be outstanding if it is unsuccessful, the respondents have established special circumstances warranting an order for security for costs of the appeal. Counsel further contended that the respondents will be severely prejudiced if this Court does not grant security for costs of the appeal.

Submissions for the first through fourth respondents

[47] Learned counsel, Ms. Vernon, submitted that the power to award security is discretionary and the fact that a party is resident abroad has been proven in

some instances to be the sole ground for awarding such security. She relied on the cases of *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556 and *Sir Lindsay Parkinson & Co. v Triplan Ltd.* [1973] QB 609.

[48] Ms. Vernon submitted that the objective of ordering a party to furnish security for costs is to ensure a fair process as between the appellant and the respondent(s). Counsel relied on the case of *Thomas Pound & Anor. V George Dueck*, Civil Appeal No. 15 of 2017, where Awich JA stated at para 13 that the Court must carry out a balancing exercise of the probable injustice to the appellant against the probable injustice to the respondent.

[49] Ms. Vernon also relied on the principles in relation to special circumstances set out in the cases relied upon by Mr. Courtenay SC, that is, (1) *Una Welch*; (2) *Speedways Jamaica Ltd*; and (3) *Keary*.

[50] Counsel further submitted that an application for security of costs must be made promptly and before significant expense is incurred. See *Order II Rule 20* of the Court of Appeal Rules, which provides that the application must be made promptly. See also *Ren v Jiang* (No. 4) [2014] NSWCA 315, that it must also be made before significant expenses are incurred.

[51] Counsel further relied on *UK Decorative Coatings Pty Limited v Mirotone Pty Ltd.*, [2004] NSWCA 1074, where it was stated that delay is a relevant consideration in making an application for security for costs. She argued that the appellant has not embarked at this stage on any real extent of its litigation except for filing of its notice of appeal and settling of the record. Further, it is normally at CMC that indications are made as to preliminary applications. As such, in this appeal, the delay is not oppressive or unreasonable.

[52] Ms. Vernon further submitted that the appeal has no reasonable prospect of success. She submitted that the respondents, except for the first respondent, are collectively the strata proprietors under strata No. 42 and 54 and were not

parties to any of the agreements relied upon by the appellant. The said agreements were between Belize Ocean Club Ltd and Kianalei LLC who were not parties to the proceedings. Further, prior to the commencement of the claim, it was “Muy Ono” who was in actual physical possession and occupation of the property conducting management duties and not the appellant.

[53] Counsel further argued that in the court below the appellant could not prove it had paid and/or satisfied the condition for ownership of the assets in question as alleged.

Appellant’s response opposing Proprietors’ request for security for costs

[54] Learned senior counsel, Mr. Marshalleck, submitted that pursuant to section 18 of the Court of Appeal Act, there is no legal entitlement to security for costs. That the existence of special circumstances merely entitles one to ask the Court to make an order in the exercise of its discretion and provides a basis upon which the discretionary power conferred by the Act may be exercised.

[55] Counsel referred to *Una Welch* and submitted that while the Court of Appeal in Guyana recognized that impecuniosity is a special circumstance which would persuade the court to make an order for security for costs, it is not enough to justify an order. He contended that the court in exercising its discretion must seek to (i) guard against stifling the right of the appeal and (2) prevent a respondent from suffering at the hands of an impecunious appellant who launches a frivolous appeal.

[56] Mr. Marshalleck further submitted that the Court should not allow the power to order security for costs to be used as an instrument of oppression, such as, by stifling a genuine claim by an indigent company against a more prosperous respondent. See *Farrer v Lacy, Hartland & Co.* (1885) 28 Ch D 482 at 485 per Bowen LJ.

[57] Senior counsel further relied on the case of *Gill All Weather Bodies Ltd. v All Weather Motor Bodies Ltd.*, which was cited in *Peppard & Company Limited v Bogoff et al* [1962] IR 180, where it was stated by Maugham J that “*there may be cases where a company is insolvent, and yet the court would not order security to be lodged. I will take as an example the case of a defendant company which is alleged to have stolen the plaintiff company’s business. It is quite clear the Court would not ask the plaintiff company to give security.*”

[58] Mr. Marshalleck submitted that in the instant case, the evidence shows that the appellant is without assets and is unable to continue to conduct its hotel, restaurant and dive shop businesses in which it was engaged and which were its only businesses and sources of income. Further, the decision of the court below has deprived the appellant of all of its assets and this has also prevented it from seeking alternative funding from outside sources. Counsel argued if an order for security is made, it will more than likely stifle the appeal.

[59] Senior counsel argued that the appeal is not frivolous and that the appellant has a good prospect of success. He submitted that the issues are complex and that the trial judge failed to appreciate the legal nature and capacity of strata corporations under the provisions of the Strata Titles Registration Act. He argued that the Court is obliged to determine the nature of the legal relationship of the parties in light of a number of complex written contracts and the legal nature and capacity of strata corporations.

[60] Counsel further argued that the Proprietors have not been deprived of the fruits of the judgment because they have taken possession of the assets and have exploited them in the conduct of business for its own benefit and for their members.

[61] Mr. Marshalleck further submitted that the delay in prosecuting the appeal resulted from the late request of the proprietors for security for costs and a very high estimation of costs. He submitted that initially the costs requested was

without any basis and later a bill of costs was designed to justify the initial arbitrary estimation. He submitted that many months elapsed since the notice of appeal was filed and a request for security for costs was made shortly before the hearing of the CMC of the appeal. Counsel further submitted that the late timing and amount of the request clearly signal an intention to stifle the appeal on the part of the respondents.

[62] Senior counsel submitted that the security for costs requested by the proprietors is speculative and excessive. That a better approach is to adopt the measure of security provided for by the provisions of the Caribbean Court of Justice Act (CCJ Act) governing appeals from the Court of Appeal to the CCJ. This amount being BZ\$15,000.00 as provided for by the CCJ Appellate Jurisdiction Rules. Counsel argued that if the Court is minded to order security for costs for the proprietors, it should be in this amount, in light of the unreliability of the estimates of the Proprietors.

Response of the appellant to the first through fourth respondents

[63] The appellant repeated the submissions it made for the proprietors and made two additional points. These points are:

- (i) The first through fourth respondents are not at risks in the instant appeal because no orders were made by the court below in their favour which is under appeal except for the order as to costs;
- (ii) A singular effort is required to represent the shared interests of the first through fourth respondents in supporting the positions of the Proprietors in the appeal.

Proprietors reply submissions on security for costs

[64] Learned counsel, Ms. Banner, in reply submitted that the proprietors have met the test for the grant of an order for security for costs since special

circumstances exist, that is, the appellant has no assets in Belize and by its own admission is impecunious.

[65] Counsel further submitted that the appellant has not provided any evidence to the Court to demonstrate that it is unable to raise security from other sources. Further, the only person who was benefitting financially from the occupation of the common property which was to be managed by the Strata respondents was the appellant and its owner, William Poston. She argued that the evidence in the court below shows that in 2014, the appellant received 4.5 million USD in revenue for the resort.

[66] Ms. Banner referred the Court to the case of *Idoport Pty Limited & Anor v National Australia Bank Limited* [35] [2001] NSWCS 744 dated 13 September 2001, where the court stated that if there is good reason to believe that a company may be unable to pay its costs, this provides a gateway by which an application for security for costs may be made. At paragraphs 55 and 56, the court stated as follows:

“The Court in *Harpur v Ariadne* [1984] 2 Qd. R 523 at 532 described the rationale behind this principle in the following terms:

‘The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play.

The inability of a plaintiff company to pay the costs of the defendant not only opens the jurisdiction for the giving of security, but also

provides a substantial factor in the decision whether to exercise it
...”

[67] The proprietors submitted that the appellant do not have a good prospect of success as it is seeking to obtain repossession of the Strata respondents’ property on the strength of agreements signed with persons who do not own the respondents property and who has no right to grant any proprietary rights or interests over the said property.

[68] In response to the issue of delay, the proprietors submitted that notwithstanding the lapse of time, the parties are at a very preliminary stage of the hearing and the appellant has suffered no prejudice. Counsel also submitted that Rule 20(2) is somewhat ambiguous and should be resolved in favour of the respondents in view of the special circumstances which exist.

Discussion

Security for costs in the Court of Appeal

[69] The power of the Court of Appeal to order security for costs on appeal is found in *section 18 of the Court of Appeal Act (‘the Act’)*, Chapter 91 of the Laws of Belize. Section 18 of the Act provides as follows:

“The Court may make any order as to the whole or any part of the costs of an appeal as may be just and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”

[70] Further, the Court has to consider other factors as shown in *Order II, Rule 20* of the Court of Appeal Rules. It provides:

“20 (1) Before an application for security for costs is made, a written demand shall be made by the respondent and if the demand is refused or if an offer of security be made by the appellant and not accepted by the

respondent, the Court or the Court below shall in dealing with the costs of the application consider which of the parties has made the application necessary.

(2) An application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter.

(3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs.”

Prior written request for security in the instant matter

[71] As shown by Rule 20, a prior written request must be made for security for costs. There was compliance with the rules by the applicants as there was prior written requests by their counsel for security for costs. The evidence of Ms. Sebastian shows that the proprietors sent a letter to the appellant seeking to agree to security for costs. The evidence of Ms. Gordon shows that the first through fourth respondents made a request by letter for security for costs.

Whether this court should order security for costs

[72] In accordance with section 18 of the Act, the Court has a discretion in “special circumstances” to give an order for costs which is just. As such, the Court has to consider all the relevant circumstances of the case in order to avoid an arbitrary costs order.

[73] In the instant matter, the appellant is a company which has no assets in Belize. The approach of a court to an application for security for costs in respect of a company is shown in the case of *Sir Lindsay Parkinson & Co.* where it was held that even where there was credible evidence that a limited company would be unable to pay the costs of a successful defendant, section 447 of the Companies Act 1948 (UK) was not mandatory but gave the court a

discretion whether or not to order security for costs against the company. In doing so, the court would have regard to all the circumstances of the particular case, where there was special circumstances.

[74] Section 447 of the 1948 UK Companies Act is similar to section 254 of the Belize Companies Act, Chapter 250, which provides:

“254. Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it

appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

[75] According to section 254, the trial judge therefore has a discretion whether or not to order security for costs, even where there is credible testimony that the company will be unable to pay the costs of the defendant.

[76] The proceedings before this Court is an appeal and it seems that the appellant will be unable to pay the costs of the respondents, if it is unsuccessful. In the case of *Speedways Jamaica Ltd.*, the Court of Appeal stated that the principles in *Keary*, (where the plaintiff was a company), by which a trial court is guided when considering security for costs applications are equally applicable at the appellate court when considering such applications. I respectfully adopt these principles which are **applicable** in this application. These are:

- (i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances. *Sir Lindsay Parkinson & Co.*

- (ii) The possibility or probability that the plaintiff company will be deterred from pursuing its appeal by an order for security is not a sufficient reason for not ordering security.
- (iii) In considering an application for security for costs, the court must carry out a balancing exercise. On the one hand, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security. On the other hand, it must weigh the possibility of injustice to the respondents if no security is ordered, the appeal fails, and the respondents find themselves unable to recover from the appellant the costs which have been incurred by them in response to the appeal. See *Farrer; Pearson v Naydler* [1977] 3 All ER 531 at 537.
- (iv) In considering all the circumstances, the court will have regard to the appellant's prospect of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure. See *Porzelack*.
- (v) The Court is not bound to make an order for a substantial amount for security for costs. It can order up to the full amount claimed but not a nominal amount. See *Roburn Construction Ltd. v William Irwin (South) & Co. Ltd.* [1991] BCC 726.
- (vi) Before the court refuses to order security on the ground

that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled. Here the Court should consider not only whether the appellant company can provide security of its own, but also, whether it can raise funds from its directors, shareholders or other persons. It is for the appellant company to satisfy the court that it would be prevented by an order for security from continuing the litigation. See *Flendeer Werft AG v Aegean Maritimem Ltd.* [1990] 2 Lloyd's Rep 27.

(vii) The lateness of the application.

Balancing exercise

[77] Mr. Malik for the appellant deposed that an order for security for costs would force the appellant to withdraw its appeal. The reason being is that the appellant was incorporated for the sole purpose of conducting the resort business and when the orders were made in the court below, the appellant was stripped of its rights to engage in the business and also stripped of all its assets. As such, the appellant has no assets within this jurisdiction and it would be unjust for the proprietors to benefit from the order of the court below by imposing a demand for costs.

[78] Mr. Marshalleck, relying on *Farrer*, contended that the Court should not use its power to order security for costs as an instrument of oppression, such as stifling a genuine claim by an indigent company against a more prosperous respondent.

[79] As shown by the principles in *Keary*, this Court has to carry out a balancing exercise. It must weigh the injustice to both sides, the appellant and the respondent. Therefore, the Court must weigh the possibility of injustice to

the respondents also. That is, if no security is ordered and the appeal fails, the respondents may very well find themselves unable to recover from the appellant the costs which have been incurred by them in response to the appeal. See *Pearson*.

[80] Pursuant to section 18 of the Act, the Court will exercise its discretion when special circumstances exist. Ms. Banner submitted that impecuniosity is a special circumstance. I am not satisfied on the evidence that the appellant is impecunious. However, the financial circumstances of the appellant is a special circumstance which the Court must consider when exercising its discretion. See *Una Welch; Sir Lindsay Parkinson & Co*;

[81] Indeed, as shown by the authorities cited by Ms. Banner, courts are willing to grant security for costs based on impecuniosity. However, this is done after considering all the relevant circumstances of the case. See *Speedways; Shell*; and *Keary*. On the other hand, as shown by *Gill* cited by Mr. Marshalleck, there may be cases where a company is insolvent, but the court will not order security for costs, for example where a defendant company stole the business of the plaintiff/company. In the instant matter, there is no documentary evidence that the company is insolvent and there is no evidence of stealing. The issues in the instant matter concern interpretation of agreements and the evidence shows that the appellant was managing the business for the Proprietors.

[82] As stated above, I am not satisfied on the evidence that the appellant is impecunious. The special circumstances in this matter is the lack of evidence of the financial affairs of the appellant.

[83] I have also considered that there are six respondents in this appeal and if the appellant is unsuccessful, it is my view that there could be delay and a greater burden on the respondents in enforcing a costs order. I have also taken into consideration that the appellant has not paid the costs order in the court below.

Stifling of appeal

[84] This court also has to consider if an order for security for costs is made, whether the appeal will be stifled. It is for the appellant to satisfy the Court that it would be prevented by an order of security for costs from continuing its appeal. It is not sufficient for the appellant to say that it has no assets within this jurisdiction. See *Keary; Kloeckner & Co.* Further, there is no evidence from the appellant that it is unable to raise the security from other sources, including from the sole director and shareholder of the company. As such, I am not satisfied that the appeal will be stifled if an order for security for costs is made.

Reasonable prospect of success

[85] Senior counsel, Mr. Marshalleck, submitted that the appeal is not frivolous and that the trial judge failed to appreciate the legal nature and capacity of strata corporations under the provisions of the Strata Titles Registration Act. Both Ms. Banner and Ms. Vernon submitted that the appellant has no prospect of success. Ms. Banner submitted that the respondents, except for the first respondent, are collectively the strata proprietors and they were not parties to any of the agreements relied upon by the appellant in the court below. Further, the appellant was not in actual physical possession of the property before the commencement of the claim. Even further, in the court below, the appellant could not prove that it had paid for the assets being claimed.

[86] Mr. Malik for the appellant deposed that even if it is conceded that the Proprietors have a right to possess the common property of the resort, the trial judge erred in finding that the rights translated to ownership of the appellant's assets and business.

[87] Based on the pleadings, evidence and submissions made by counsel, I am of the view that it cannot be said that there is a high degree of success or failure in relation to the assets and business. Therefore, I do not find it

necessary to consider the merits of the case. See the case of *Porzelack KG v Porzelack (UK) Ltd.*

Is it just to make an award for security for costs

[88] It has not been proven that the appellants are impecunious and there is no evidence from the Company that it can make an effort to raise the security for costs. Even if it had been proven that the appellant was impecunious, there is no evidence that the respondents were responsible for such impecuniosity, stealing of its business as was stated in the case of *Gill* which cited *Peppard*.

[89] Further, there is no assistance from counsel for the appellant as to the likely costs to be incurred for the appeal. In my view, the Court should be given assistance from both parties as to likely costs and not only from the applicant.

[90] Senior counsel, Mr. Marshalleck, submitted that the costs requested by the respondents are speculative and excessive. He suggested that if this Court is minded to grant security for costs, it should adopt the measure of security provided by the provisions of the CCJ Act, that is, \$15,000.00 as shown by the Rules. In my view, the CCJ legislation is not applicable. This Court has to make an award that is just. It should not be excessive and it should not be nominal.

[91] The Proprietors have requested \$125,000 as costs for the appeal. The first to the fourth respondents have requested \$120,000. I have considered the two Bill of Costs and it is my opinion that the total sum is excessive bearing in mind the grounds of appeal.

Was the application for security for costs made promptly

[92] Firstly, the rule provides that an “*application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter.*” Ms. Banner submitted that “at any time” and “promptly” are ambiguous.

[93] In my view, Rule 20(2) is not ambiguous. There is no doubt that the application must be made promptly after the appeal has been filed. The words 'at any time' cannot be read without considering 'promptly'. Both Ms. Vernon and Mr. Marshalleck SC submitted that an application for security of costs must be made promptly. See also the case of *Ren* which states that it must also be made before significant expenses are incurred.

[94] The question is whether there was a delay in making the application for security for costs. As shown in *UK Decorative Coatings Pty Limited*, delay is a relevant consideration in making an application for security for costs. Mr. Marshalleck submitted that many months elapsed since the notice of appeal was filed and a request for security for costs was made shortly before the hearing of the CMC of the appeal. There is no doubt that many months elapsed after the appeal had been filed. But, as all counsel are aware, these days, no appeal is heard without a CMC and counsel are encouraged to make applications such as this at the CMC stage.

[95] Nevertheless, the question for consideration is whether the appellant had been prejudiced by the application for security for costs. The evidence in this case is that only the record had been settled after the filing of the notice of appeal and as such the appellant had not incurred significant expenses in prosecuting its appeal. I have considered that this matter is not ready for trial and has not gone past the CMC. In such circumstances, the appellant has not been prejudiced by the delay.

Disposition

[96] For reasons discussed, the following is ordered:

Order

- (i) The appellant give security for costs for the appeal in the sum of \$70,000.00 for the proprietors within 30 days;
- (ii) The appellant give security for costs for the appeal in the sum of \$ 50,000.00 for the first through fourth respondents within 30 days;
- (iii) Appeal be stayed pending payment of the security for costs;
- (iv) The total sum of \$120,000.00 to be paid in an escrow account of the appellant's counsel;
- (v) Pursuant to section 23 of the Act, the appeal shall stand dismissed, if the security for costs is not paid within the 30 days period.

(vi) Costs of these applications to be in the appeal.

HAFIZ BERTRAM JA

DUCILLE JA

[97] I have read the draft judgment prepared by the learned Hafiz-Bertram JA. I am in total agreement with the draft judgment and the disposition of the matter.

DUCILLE JA