[2022] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00035

BETWEEN	**KAREN STEWART**	**APPELLANT**
AND	**BOBBY SEEPERSAUD**	**1ST RESPONDENT**
AND	**GARY MATTIS**	**2ND RESPONDENT**
AND	**SEEMAT CONSTRUCTION COMPANY LIMITED**	**3RD RESPONDENT**

Written submissions filed by Frater, Ennis & Gordon for the appellant

Written submissions filed by Zavia Mayne & Co for the respondent

25 November 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to 2.4(3) of the Court of Appeal Rules 2002)

BROOKS P

[1] I have read in draft the judgment of Laing JA (Ag). I agree with his reasoning and conclusion and have nothing further to add.

SIMMONS JA

[2] I too have read the draft judgment of Laing JA (Ag) and agree with his reasoning and conclusion.

LAING JA (AG)

[3] Mr Seepersaud ('the first respondent') and Mr Mattis ('the second respondent') (together referred to herein as 'the respondents') were the original shareholders and directors of the third respondent Seematt Construction Company Limited, a company duly incorporated on 20 September 1997 under the Companies Act of Jamaica ('the company'). The first and second respondents each held one of the two issued shares in the company.

[4] The annual returns of the company filed for the year 2020 showed that the respondents were no longer directors, and that the second respondent held one share in the company. The issued shares in the company had been increased to 1000 and there were six shareholders with Miss Karen Stewart ('the appellant') being the majority shareholder, with a shareholding of 548 shares.

[5] The first and second respondents, having concluded that the adjustment of the shareholding and corporate governance structure of the company had been procured by fraud, filed a claim in the Supreme Court on 1 February 2021 against the appellant, Debbilee Stewart and the Registrar of the Companies Office, seeking numerous declarations in respect of their exclusion from the ownership and management of the company. The company was named as a claimant in the claim.

[6] In the claim they allege that they were removed as shareholders and directors by fraud, as they had not resigned or transferred their shares to anyone. The respondents successfully applied for an injunction in the Supreme Court to restrain the appellant and Debbilee Stewart from any further dealings with the company, and to restrain all three defendants from registering any transfer of shares and/or appointing officers to the company.

[7] At the hearing of the application for the injunction Palmer J ('the learned judge') also heard and considered a notice of application filed by the appellant seeking the following orders:

"1. An order that the 3rd Claimant Seematt Construction Company Limited be removed as a party to the proceedings herein;

2. An order that the 1st and 2nd Claimants Bobby Seepersaud and Gary Mattis pay into court by way of Security for Costs the sum of One Million Five Hundred Thousand dollars ($1,500,000.00) within thirty (30) days of the date of this order.

3. That the 1st and 2nd Claimants shall deposit the said sum of One Million Five Hundred Thousand dollars ($1,500,000.00) as security for costs into an interest-bearing account in the name of Frater, Ennis & Gordon Attorneys-at-law, at a financial institution to be agreed on by the parties.

4. That the proceedings herein be stayed pending the payment of Security for Costs in accordance with the terms of this order.

5. That if the security is not provided in accordance with the terms of this order, the 1st and 2nd Claimants' Claim shall be struck out.

6. Costs of this application to be costs in the Claim.

7. Such further and/or other relief as this Honourable Court deems fit."

[8] The appellant made the application pursuant to rules 19.2(4) and 24.3 of the Civil Procedure Rules ('CPR') on the bases that the respondents are ordinarily resident outside of the jurisdiction, the company is not a proper party to the claim and that the appellant is not aware of any assets within the jurisdiction belonging to respondents.

[9] After hearing the applications by both parties, on 14 March 2022 the learned judge granted the injunction and made the following orders:

"…

(i) Application to have the 3rd Claimant Company removed as a party to these proceedings is refused;

(ii) Separate Counsel to appear to protect the interests of the 3rd Claimant company;

(iii) A Receiver Manager to be appointed to manage the 3rd Claimant company as follows:

(a) The Receiver Manager shall be agreed upon by the parties within 14 days of the order herein;

(b) If not agreed, the Receiver Manager is to be appointed by the Registrar of the Supreme Court from a list of prospects to be agreed by the parties within 28 days of the date hereof;

(c) If no agreed list is supplied as stated above, the Registrar shall select a suitable Receiver Manager after the expiration of the 28-day period in (iii) (b) above;

(d) The Receiver Manager to be paid by the 3rd Claimant company.

(iv) Application for Security for Costs is refused;

(v) Costs of the 1st Defendant's application awarded to the Claimants to be taxed if not agreed.

…"

The appeal

[10] Being dissatisfied with the orders made in relation to her application, the appellant has filed the following grounds of appeal challenging the orders made by the learned judge:

1. "The Learned Trial Judge erred in facts [sic] and/or law in refusing the Appellant's application to have the [company] removed as a party to the proceedings, thereby permitting the 1st and 2nd Respondents to continue a derivative action without adhering to the clear provisions outlined in section 212 of the Companies Act.

2. The Learned Trial Judge failed to properly address how section 212 of the Companies Act applies to the claim filed, and if it does not apply, failed to explain why.

3. The Learned Trial Judge erred in facts [sic] and/or law by permitting the 1st and 2nd Respondents to bring an action in the name of the [company] notwithstanding the fact that neither party purports to act with the authority or sanction of the [company] and/or its Board of Directors.

4. The Learned Trial Judge erred in facts [sic] and/or law by ordering the appointment of a Receiver Manager to manage the [company] notwithstanding the fact that there was no evidence or indication that the [company] was insolvent, bankrupt or a debtor in any proceedings.

5. The Learned Trial Judge erred in facts [sic] and/or law by ordering the appointment of a Receiver Manager to manage the [company] notwithstanding the fact that there was no application made by the 1st and 2nd Respondents, or any other party, for a Receiver Manager to be appointed.

6. The Learned Trial Judge erred in facts [sic] and/or law by refusing the Appellant's Application for Security for Costs notwithstanding the fact that both the 1st and 2nd Respondents gave foreign addresses.

7. The Learned Trial Judge erred in facts [sic] and/or law by refusing the Appellant's Application for Security for Costs notwithstanding the fact neither the 1st nor 2nd Respondents gave sufficient particulars about any property that they owned within the jurisdiction."

Appellant's submissions

[11] After outlining the factual background, the appellant argued that, since the respondents were "former directors" and they included the company as a claimant, the only reasonable conclusion to be drawn is that they were pursuing a derivative claim and section 212 of the Companies Act was therefore applicable.

[12] The appellant relied on Sykes J's (as he then was) judgment in **Fulton v Chas E Ramson** [2016] JMSC COMM 14 where he distinguished a derivative action from an oppression remedy. The appellant submitted that this distinction is important because the derivative action is brought when the company would have a cause of action for wrongs done to it. This is distinct from the oppression remedy, which is filed on behalf of individuals for wrongs done to them and is not filed in the company's name. The appellant also submitted that the respondents would have to show that the wrongs being complained of were wrongs done to the company and sought support in this court's decision in **John Plummer and another v Phenee Plummer et al** [2020] JMCA App 16.

[13] The appellant contended that the requirements of the Companies Act have not been complied with and that the learned trial judge did not properly apply the relevant legislation. In addition, it was submitted that the learned judge has not provided any explanation as to how he arrived at his decision.

<u>Security for costs</u>

[14] The appellant referred to rule 24.3(a) of the CPR and submitted that had the learned judge removed the company as a party to the claim he would have had sufficient reasons to grant the order for security for costs as there would have been no claimant who was ordinarily resident within the jurisdiction.

[15] The appellant submitted that the requirements for an order for security for costs had been satisfied based on the affidavit in support in that, both respondents gave addresses outside the jurisdiction. Furthermore, the only evidence of assets in the jurisdiction belonging to them was made in reply and is property jointly owned by the second respondent and several other persons.

[16] The appellant submitted that, having satisfied the conditions under rule 24.3 of the CPR and the respondents' inadequate response, the learned judge wrongly exercised his discretion in refusing the order for security for costs.

The issue of appointing a receiver manager

[17] The appellant submitted that, based on the requirements of sections 2 and 58 of the Insolvency Act, section 213A of the Companies Act ('the Act') and Part 51 of the CPR, the learned judge erred in making an order to appoint a receiver as neither party made any application for this order and there was no evidence on affidavit to justify the appointment of a receiver manager.

[18] The appellant contended that there was no evidence that the company was insolvent, bankrupt or indebted to any of the parties in the proceedings. In addition, the appellant argued that there was no evidence before the court to support the decision and the learned judge deprived the parties of the opportunity to make submissions on the relevant legislation.

Respondents' submissions

Derivative claims

[19] The respondents submitted that they did not need leave before the claim, which included the company as a claimant, could be filed. They cited section 212 of the Act which deals with derivative claims. The respondents also cited Sykes J's judgment in **Fulton v Chas E Ramson** where, at para. [10], he explained the difference between a derivative action and an oppression remedy, but asserted that they were seeking an oppression remedy. Accordingly, there is no requirement under law or statute for leave to be obtained from the court before an action can be brought for redress against a wrong done to a "complainant" as defined by the legislation.

[20] The respondents contended that the company was a proper party to the claim based on the nature of the allegations against the appellant, and the second respondent as an officer of the company is able to sign the claim on its behalf.

[21] It was argued that, in light of the nature of the allegations and the circumstances of the case, the learned judge was correct to deny the order being sought by the appellant to remove the company as a party to the claim.

Security for costs

[22] The respondents argued that in **BRL Limited v Attorney General of Jamaica and another** [2017] JMCC Comm 05 Batts J cited **Manning Industries Inc and Mannings Mobile Co Ltd v Jamaica Public Service Co Ltd** ('**Manning Industries**') (unreported), Supreme Court, Jamaica, Suit No CL 2002/M058, judgment delivered 30 May 2003 and acknowledged that the court has a wide discretion when considering an application for security for costs.

[23] The respondents relied on the first instance decision of Lawrence Beswick J in the case of **Mount Zion Apostolic Church of Jamaica Limited and another v Joycelyn Cash and another** [2016] JMSC Civ 115 in submitting that where one claimant resides outside of the jurisdiction and another is a local claimant, an order for security for costs cannot be made. They argued that the company is located within the jurisdiction with its own legal identity and is therefore a 'local claimant'. Based on that fact, there can be no order for security for costs.

[24] In addition, it was submitted that the respondents are able to establish that they have adequate ties to Jamaica and that they have placed sufficient evidence before the court to support that assertion. It was also submitted that the second respondent is one of the registered owners of property located in the parish of Portland registered at Volume 1256 Folio 909 of the Register Book of Titles and that he also has an interest in another viable company located within the jurisdiction, Turbo Construction Company Limited.

[25] The respondents further submitted that the court, in exercising its very wide discretion, may also consider the prospect of success when deciding whether to make an order for security for costs. It was highlighted that the appellant's defence contains bare denials and does not dispute the allegations of fraud set out in the claim with a contrasting version of the claim as advanced in the respondent's statement of case. Notably missing was an explanation of the circumstances under which the respondents were lawfully removed as directors and the first respondent as a shareholder of the company.

[26] The respondents submitted that, the learned judge in his assessment of the evidence, accepted that by virtue of the serious nature of the allegations, the insufficiency of the appellant's defence and the fact that the company is located within Jamaica and a proper party to the claim, correctly refused to make an order for security for costs.

Appointment of a receiver manager

[27] The respondents submitted that although they did not make an application for the court to appoint a receiver manager, the learned judge was concerned about the management of the company, especially in light of the allegations of fraud and the injunction which was ordered against the appellant.

[28] They argued that the learned judge was of the opinion that since the company continues to be viable it was important to ensure that it continued to operate on a day-to-day basis in order to meet its contractual obligations. As a result, he ordered that a third-party manager be put in place to manage the affairs of the company until the final determination of the matter.

Analysis

[29] In reviewing the exercise of the learned judge's discretion this court will have to adhere to the oft-cited principles stated in **Hadmor Productions Limited et al v Hamilton et al** [1982] 1 All ER 1042. At Page 1046 Lord Diplock stated that:

> "… the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further

> evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges … may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision … is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

Is the company a proper plaintiff?

[30] A convenient starting point in analysing shareholder remedies is the rule in **Foss v Harbottle**, derived from the case of **Foss v Harbottle** (1843) 2 Hare 461. The essence of the rule is that where there is an action in respect of a wrong alleged to be done to a company then, *prima facie*, the company is the proper plaintiff. Over time, there developed a considerable body of case law that provided a number of exceptions to the rule in **Foss v Harbottle**, pursuant to which a shareholder could bring an action on behalf of the company where there had been, *inter alia*, a fraud on the minority and where the wrongdoers themselves were in control of the company. These claims are generally referred to as common law derivative claims. These common law derivative claims have largely now been placed on statutory footing and in Jamaica the relevant provision is found at section 212 of the Act. Subsection (2) does not affect the current discussion and section (1) which is relevant is in the following terms:

> "212- (1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party."

[31] It is settled law in this jurisdiction that permission is required to bring a derivative claim, however, this issue need not detain the court because the respondents assert that they are not purporting to bring such a claim, but that their intent is to bring a claim for an oppression remedy. Notably, there is no reference in their claim to section 213A of the Companies Act, which deals with the granting of such a remedy.

[32] In **Re G & G Properties Ltd; Re Bankside Hotels; Griffith v Gourgey et al** [2019] EWCA Civ 2046, the England and Wales Court of Appeal emphasized the need for unfair prejudice petitions to be fully and properly pleaded in the sense that the facts supporting the claim are to be clearly set out in the petition. In this case, the relevant facts have been pleaded and the omission of references to section 213A of the Companies Act can be cured by amendment at a later stage of the proceedings, if necessary. To that extent, the omission is not critical.

[33] The Act, provides for remedies for complainants. A complainant is defined in section 212(3) as follows:

> "(3) In this section and section 213 and 213A, 'complainant' means –
>
> (a) a shareholder or former shareholder of a company or an affiliated company;
>
> (b) a debenture holder or former debenture holder of a company or an affiliated company;
>
> (c) a director or officer or former director or officer of a company or an affiliated company."

In the light of that definition of a complainant the respondents are *prima facie*, proper claimants, but, the company is not. However, it may be a proper party in certain circumstances and should be joined as a nominal defendant or respondent, where, for example, the company's shares are the subject matter of an unfair prejudice petition claim between shareholders (see **King v Kings Solutions Group Limited** [2022] EWHC 1099 and **Re Crossmore Electrical and Civil Engineering Ltd** (1989) 5 BCC 37). For

present purposes, without commenting on whether the company may properly be joined as a nominal defendant having regard to the nature of the claim, it is sufficient for us to conclude that the company ought properly to have been removed as a claimant by the learned judge, and accordingly, he erred in this regard.

The appointment of a receiver manager

[34] The respondents are pursuing an oppression remedy. Section 213A of the Act provides for an application to be made to the court for relief as follows:

> "213A – (1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates –
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of."

[35] The Act, therefore, provides relief for conduct that is oppressive or unfairly prejudicial, concepts which may overlap to some extent. Oppressive conduct was described in **Scottish Cooperative Wholesale Society Ltd v Meyer and another** [1959] AC 324 as "burdensome, harsh and wrongful conduct". Unfairly prejudicial conduct is usually of a type that is less offensive and does not rise to the level of oppressive

conduct. It is difficult to identify all the conduct that might be determined to be unfairly prejudicial to shareholders, but common examples include the dilution of a minority shareholder's shareholding or the exclusion of someone who is both a director and shareholder who has a legitimate expectation to be involved in its management as in the case of very small companies or quasi partnerships (see **In re a Company (No 00709 of 1992); O'Neill v Phillips** [1999] UKHL 24; [1999] 2 All ER 961). For purposes of our analysis, no emphasis is being placed on the distinction between oppressive conduct and unfair prejudice, and the term 'the oppression remedy' is used herein to include claims for relief in respect of both categories of conduct.

[36] It must be acknowledged that company law in the modern era is also concerned with whether the powers of directors are being exercised for purposes other than for which they were conferred. The power of the directors to issue shares has historically led to abuses as they could issue shares to themselves and/or to friends and family members, often at prices that did not reflect the true value of the shares.

[37] The law in relation to directors acting for improper purposes was reviewed by the Privy Council in **Howard Smith Ltd v Ampol Petroleum Ltd** [1974] 1 All ER 1126, Lord Wilberforce at page 1131 further explained the position as follows:

> "… when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme."

At page 1134 Lord Wilberforce also made the following observation:

> "…In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

[38] Based on the allegations of the respondents their removal was improper and is wrongful conduct in respect of which they are entitled to relief. In this regard, if they are correct that they did not resign as they assert, or if they were not otherwise removed in accordance with the constitutional documents of the company, then it appears that they may have an arguable claim. The transfer of the share that was previously held by the first respondent, if not effected by an instrument of transfer signed by him or lawfully on his behalf with his authorisation, is a matter capable of being rectified by the court. It could be argued by the first and second respondents, that the purpose of such an unauthorised transfer would be to dilute the existing majority, and thereby, to maintain control or take over control of the company.

[39] The issuing of an additional 998 shares and the consequences of this increase for the respondents are therefore relevant considerations in assessing the claim. The learned judge was therefore tasked with the responsibility of determining what interim remedies were appropriate to ensure that justice would be served at the final conclusion of the proceedings. His appointment of a receiver/manager appears to have been a prudent step geared at achieving that objective and there was no statutory pre-requisite that an order in those terms or an order that the company be wound up must have been before the court.

Power of the court pursuant to section 213A of the Act to appoint a receiver-manager

[40] Section 213A(3) of the Act provides a wide range of reliefs in respect of the conduct of the company's affairs in respect of which the respondents complain. It provides that the Court may, in connection with an application under that section, make any interim or final order it thinks fit, including an order restraining the conduct complained of or appointing a receiver or receiver-manager.

[41] Having regard to the impugned circumstances under which the current directors of the company were appointed and the learned judge's order to restrain the appellant and Debilee Stewart and their servants and/or agents from further dealings with the company until further orders of the court, there was the need for adequate provisions to be made to ensure the proper operations of the company until the issues raised by the claim are resolved. The object of an oppression remedy is to rectify the oppressive conduct complained of but should go no further than is necessary to rectify the wrong being complained of.

[42] Admittedly, the appointment of a receiver manager is a serious step to be taken but in this case it appears that it was a manifestly sensible order to make to protect the company as a going concern and to protect the respondents. It was an option open to the learned judge and we do not find that there was an improper exercise of his discretion in this regard. The fact that neither party applied for that remedy does not prevent the learned judge from making the order, since a judge's discretion as to which of the remedies available under section 213A(3) of the Act he applies, is not limited to those reliefs specifically prayed for. In exercising his judicial mind, he is able to determine which is best suited to meet the needs of the particular circumstances before him. We have accordingly concluded that there is no merit in the challenge to the learned judge's decision on this point.

The order for security for costs

[43] The court may make an order for security for costs under rule 24.3 of the CPR against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that the claimant is ordinarily resident out of the jurisdiction.

[44] In **Mount Zion Apostolic Church of Jamaica v Joycelyn Cash** [2017] JMCA Civ 44, Phillips JA cited with approval the following statement made by Brooks J (as he then was) in **Manning Industries** as to the approach to be adopted when applying the provisions of Part 24:

> "The structure of the rule seems to indicate that the justice of the case is to be first considered and then a determination made as to whether the authority existed in 24. (a) – (f). It would seem however, that logically, a court should approach it the other way round, that is to say, to determine whether any of the conditions stipulated in paragraphs (a) to (f) applied and then, having determined that the authority did exist, to then consider the circumstances of the particular case to determine if an order for security for costs should justly be made."

[45] Phillips JA also examined the case of **Corfu Navigation and Another v Mobil Shipping Co Ltd and Others** (1991) Times, 28 February; [1991] 2 Lloyd's Rep 515. In that case, Lord Donaldson of Lymington, Master of the Rolls, referred to the settled rule of practice that no order would be made against a foreign plaintiff if there was a co-plaintiff resident in England. In doing so, he contrasted and examined the dicta in **Slazengers Ltd v Seaspeed Ferries International Ltd** [1987] 1 WLR 1197. Phillips JA at para. [38] stated that:

> "… as Lord Donaldson eloquently put it in **Corfu Navigation**, although the court's discretion is very wide and account must be taken of all the circumstances of the case, it would be unjust for a foreign plaintiff to be immune from the costs orders which potentially could be made against him (regardless of whether the co-plaintiffs were resident in the

> jurisdiction), and so funds should be made available so that such orders could be executed." (Bold as in the original)

[46] Phillips JA noted that in **Manning Industries** Brooks J accepted the principle as stated in **Corfu Navigation** as being applicable to Jamaica, and expressed her own view at para. [47] as follows:

> "… in my view, as indicated, there is no doubt that an order can be made for security for costs when there are co-claimants and one of them is ordinarily resident or incorporated in Jamaica. However, it is equally clear that a court can only make such an order against a claimant which is ordinarily resident outside Jamaica and/or a company incorporated outside of Jamaica ..."

[47] Our finding that the company should have been removed as a claimant, is therefore not determinative of the issue of whether security for costs should have been granted. It would have been determinative if the learned judge found that he could not have ordered security for costs because the company was a co-claimant, but there is no assertion by counsel for the appellant that he did so specifically on this basis. What counsel for the appellant has submitted is that the learned judge exercised his discretion incorrectly on the evidence before him. Counsel for the respondents, in para. 30 of their written submissions, posits that the learned judge was influenced by the fact that the company was located in Jamaica and a proper party to the claim but we have not been presented with any evidence of such a finding by the judge. Unfortunately, we have not had the benefit of the learned judge's reasons for his decision and we are loathe to assume that this was a factor influencing his decision. Nevertheless, it is necessary for us to determine whether there was ample evidence upon which the learned judge could have properly exercised his discretion in the manner in which he did.

The factors to be considered

[48] Since the respondents are not disputing that they are not ordinarily resident within the jurisdiction the main issue to be determined is whether it is just to make an order for security for costs.

[49] In **Symsure Limited v Kenin Moore** [2016] JMCA Civ 8 Phillips JA identified certain principles that aid in our analysis. She stated at para. [44] of the judgment that:

> "[44] In **Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd**, in reviewing The Supreme Court Practice, 1982, volume 1, page 435, Belgrave J suggested that there are several factors which the court may take into account when considering applications for security for costs, namely:
>
> (1) Whether the plaintiff's claim is bona fide and not a sham.
>
> (2) Whether the plaintiff has a reasonably good prospect of success.
>
> (3) Whether there is an admission by the defendant on the pleadings or elsewhere that money is due.
>
> (4) Whether there is a substantial payment into court on an 'open offer' of a substantial amount.
>
> (5) Whether the application for security was being used oppressively so as to stifle a genuine claim.
>
> (6) Whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work.
>
> (7) Whether the application for security is made at a late stage of the proceedings …"

[50] In applying these principles identified in **Symsure** to our analysis, it is helpful to identify some of the evidence which was before the learned judge. As has been

highlighted by counsel for the appellant, the property in respect of which the second respondent has an interest is jointly owned with six other persons. There is also no evidence of its value. There is also no evidence of the value of the single share he holds in the company nor the value of the shares held in the company named Turbo Construction Co Limited. The first respondent has not produced any evidence of assets held by him in this jurisdiction. It is, therefore, clear that there is a real risk that the appellant will face an injustice if the claim fails since she may find herself unable to recover from the respondents, the costs which she has incurred and will in the future incur, in resisting the claim.

[51] In considering all the circumstances, the court will have regard to the appellant's chances of success. There are a number of significant features of the evidence that was before the learned judge. The first, is that the records at the Companies Office of Jamaica, as reflected in the company search document extracted by the legal representatives for the appellant and exhibited to the affidavit of Shantel Jarrett filed 19 November 2021, indicates that the second respondent still holds one share in the company. To that extent, the pleading in the respondent's particulars of claim at para. 10 that the respondents did not transfer their shares to the first and second defendants or to any other person or entity, is imprecise in failing to distinguish between the respective shareholding positions of the first and second respondents. Nevertheless, putting aside that failure to distinguish between the shareholding of the first and second respondents, it is noted that the appellant in responding to para. 10 of the respondents' particulars of claim, pleads in para. 11 of her defence that "Paragraph 10 is denied to the extent that [the appellant] had been presented with documentation which says otherwise".

[52] In response to the respondents pleading in para. 11 of their particulars of claim that they did not resign as directors of the company, the appellant also pleads in para. 12 of her defence that she had been presented with documentation which says otherwise.

[53] Documentation, if it exists, which evidences the resignation of the respondents as directors, or the disposal by the first respondent of his share, would form part of the

records of the company and would be of critical importance. It is therefore quite odd that the appellant did not produce that evidence to the learned judge or explain its absence.

[54] It is obvious that the change in the corporate governance structure of the company by the resignations of the respondents would have provided the first step in a cascading series of events which led to the appointment of other directors who exercised their power to issue additional shares. These additional shares, if their assertions are proven, would have had the effect of diluting the shareholding of the second respondent and would have also diluted the shareholding of the first respondent of which he asserts he has been fraudulently deprived.

[55] Accordingly, without going into the merits of the case in detail, the learned judge could have properly concluded that, in the absence of any documentary evidence to support the historical change in the shareholding and directorship of the company, which has resulted in the current position, the defence had little chance of success.

[56] There were, therefore, sufficient bases on which the learned judge could have properly exercised his discretion in refusing the application for security for costs after conducting the "balancing exercise of weighing the injustice to the claimant, on the one hand, if prevented from proving a genuine claim, as against the injustice to the defendant, on the other hand, if no security is obtained and the defendant's costs cannot be paid at the end of the trial if the defendant is successful" (see **Symsure Limited v Moore** para. [50]). Consequently, we find no reason to interfere with his decision in respect of refusing the application for security for costs.

Conclusion and disposition

[57] Save for his decision to have allowed the company to remain a claimant, we have found no reason to interfere with the orders made by the learned judge. For the reasons expressed herein we make the following orders:

1. The appeal is allowed in part.

2. The order of Palmer J made on 14 March 2022 refusing the application for the removal of Seemat Construction Company Limited as a claimant is set aside.

3. Seemat Construction is removed as a claimant/party in the matter.

4. The order that "Separate Counsel to appear to protect the interests of the 3rd Claimant company" is set aside.

5. A Receiver Manager shall be agreed upon by the parties within 14 days of the order herein.

6. If not agreed, the Receiver Manager is to be appointed by the Registrar of the Supreme Court from a list of prospects to be agreed by the parties within 28 days of the date hereof.

7. All other orders made by Palmer J are affirmed.

8. Half-costs of the appeal are awarded to the first and second respondents to be taxed if not agreed.

BROOKS P

ORDER

1. The appeal is allowed in part.

2. The order of Palmer J made on 14 March 2022 refusing the application for the removal of Seemat Construction Company Limited as a claimant is set aside.

3. Seemat Construction is removed as a claimant/party in the matter.

4. The order that "Separate Counsel to appear to protect the interests of the 3rd Claimant company" is set aside.

5. A Receiver Manager shall be agreed upon by the parties within 14 days of the order herein.

6. If not agreed, the Receiver Manager is to be appointed by the Registrar of the Supreme Court from a list of prospects to be agreed by the parties within 28 days of the date hereof.

7. All other orders made by Palmer J are affirmed.

8. Half-costs of the appeal are awarded to the first and second respondents to be taxed if not agreed.