SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2010/0301

BETWEEN:

[1] MILHAWKE HOLDINGS (BEQUIA) LTD

[2] STOWE CONSTRUCTION (BEQUIA) LTD

[3] HENRY JOHN MARRIOT AKA HARRY MARRIOTT

[4] HON.DINAH LILLIAN MARRIOT

CLAIMANTS

AND

[1] JORG "STANLEY"DORNIEDEN

[2] TIMOTHY GABRIEL

[3] CARIB CONSTRUCTION

[4] CARIB INTERNATIONAL

[5] LEOMORE MAC DONALD

[6] STANLEY'S FOOD AND BEVERAGES LTD

DEFENDANTS

Appearances:

Joseph Delves of Counsel for the Claimants/Applicants

Stanley John of Counsel for the First and Sixth Named Defendants/Respondents

Akin John of Counsel for the Second Named Defendant/Respondent

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2013: February 28th, , March 1st 15th

October 14th

JUDGMENT

[1] TAYLOR-ALEXANDER. M: Before me are three applications, two of which are for security for costs; the first moved by the Third and Fourth Claimants/ Ancillary Defendants of the one part for security for their costs in the sum of EC$92,968.68 and by the First and Sixth Defendants of the other part, for security for their costs in the sum of EC$271,000.00 and for the manner in which such costs are to be given. There is also an application for budgeted costs, termed management of costs brought by the Claimants. One further application has been brought by the Claimants to determine the value of the claim. I have not chosen to deal with this application with the other outstanding applications as no evidence was led nor submissions advance in support or opposition of the application. It may well be prejudicial to all the parties to have this application prematurely adjudicated upon. On the 28th of February 2013, I heard the application for security for costs and the application for budgeted costs was heard on the 5th of March 2013 and 21st of March 2013. Evidence given in support of the applications was by affidavits.

BACKGROUND

[2] There have been other interim applications so far heard in these proceedings in which the factual history is well documented. The facts stated in these proceedings serve only to garnish what has been earlier stated.

[3] As pleaded in the statements of case, the Third and Fourth Named Claimants entered into a joint venture agreement (JVA) dated the 24th May 2007 with the First Named Defendant via the instrumentality of the Sixth Named Defendant a locally registered company. The agreement reflects the terms pursuant to which the parties intended to complete and fund the development of a high end tourism product, a Caribbean hideaway offering luxurious cottages, spectacular views over a bay and direct access to Bequia's renowned and secluded beaches, the concept being attractive to persons wishing to avoid high density and artificial environments. The property that is the subject of these proceedings is

located at Mount Pleasant and Hope Bay located in the Grenadines on the island of Bequia.

[4] The Third and Fourth Named Claimants live at Tangley House, Tangley, Hampshire, England and are resident in the United Kingdom. They are directors of the First and Second Named Claimants. It is relevant to these proceedings that Mrs Marriot is also a holder of a United Kingdom hereditary title.

[5] The Sixth Named Defendant is a Vincentian incorporated company, and the First Named Defendant is a director of the Sixth Named Defendant. He is of German citizenship and decent and is also a citizen of St. Vincent. At the time of the commencement of the proceedings he was resident in the St. Vincent. He is a director of the Sixth Named Defendant. His current residency status is disputed.

[6] The First Defendant under the JVA was the project manager for the Mount Pleasant and Hope Bay Development (The project). The project was commissioned by the Third and Fourth Named Claimants.

[7] Work on the project commenced on the 12th May 2008 and continued until the 24th of August 2010 when the First and/or Sixth Defendant or both were terminated for fraud, depravation, conversion and breach of fiduciary duty.

[8] A claim was filed by the First and Second Named Claimants who are both special purpose vehicles incorporated in St. Vincent and the Grenadines and by the Third and Fourth Named Claimants against the First and Sixth Named Defendants and four other Defendants who it is alleged may have been facilitators of the First and Sixth Defendants', in the allegations of fraud, conversion and breach of fiduciary duty.

The Application of the Ancillary Defendants

[9] The Third and Fourth Named Claimants are also Ancillary Defendants whose application for security for costs is brought pursuant to CPR 2000 Part 24.3 (b) (iii) and/or Part 24.3 (g) against the First and Named Defendant/Ancillary Claimant, and as against the Sixth Named Defendant, pursuant to the Companies Act 1994 Section 548 (the Act) and pursuant to CPR 2000 Part 24.3 (a) and 24.3 (d).

[10] Their application was filed on the 29th August 2012, and is supported by two affidavits of Henry Marriot and the affidavit of Kemilia Anderson. The Applicants aver that the First and Sixth Named Defendant Jorg Stanley Dornieden and the company he incorporated are without the means or assets to satisfy a judgment debt, and that Dornedien has now "skipped" the jurisdiction in an attempt to avoid the consequences of the action including the counterclaim and any order as to costs that may be made.

[11] Specifically the Claimants assert that the First Defendant who was resident at Lower Bay Bequia terminated his occupancy in the jurisdiction after proceedings had begun and after he himself filed a counterclaim against the Third and Fourth Named Claimants. The Applicants aver that he packed up his belongings and had them shipped away from the island. They rely on affidavit evidence filed on the 21st of October 2012, in support of a freezing order application earlier heard in the proceedings that the First Defendant is now divorced from his wife and to being told that he currently resides in Germany, or at least out of the jurisdiction. In any event they state, he has changed his address since initiating the counterclaim, all of that with a view to avoiding the consequences of this litigation. In response to the submissions of the Defendants implying that the First Defendant maintains ties with the jurisdiction and that in other proceedings the court recognised the ownership by the First Named Defendant of a property on Bequia, the Claimants state that such evidence was not tested and was admitted to when that issue was not live. They state that he now resides out of jurisdiction and in a state where recovery of any sums ordered in costs would be difficult and the costs of recovery prohibitive.

[12] As against the Sixth Named Defendant, the Claimants state that it is a limited liability company registered in St. Vincent and the First Defendant is its sole director and sole shareholder. The searches conducted by the Claimants at the Commerce and Intellectual Property Office reveal delinquency of the Sixth Defendant despite notices to rectify; to appoint a company secretary; to filing annual and financial returns from 1999; and to disclose any assets it owns in the jurisdiction. The state of its corporate affairs suggests that this Defendant is unlikely to settle an order for costs were one to be made.

Evidence by the First and Sixth Named Defendants

[13] The application of the First and Sixth Named Defendants is for security for costs in the sum of $181,200.00 or such other sum as the court thinks just by way of cash payment into the registry of the High Court or by way of bank guarantee for an equivalent amount from a bank doing business in St. Vincent and the Grenadines, on the basis that both the Third and Fourth Named Claimants are by their own admission resident in the United Kingdom. The fact of their residence overseas the Defendants' state increases the difficulties in recovering any award of costs likely to be made.

[14] On the applications for security for costs three questions arise for determination:—

(a) Whether there are grounds for ordering security for costs;

(b) If so, whether the court's discretion should be exercised in favour of making the order, and ;

(c) If so, the amount of security that should be ordered.[1]

A Grant of Security for Costs

[15] The regime of security for costs is long familiar in English law, and provides for a Claimant under certain conditions, to provide security for costs to a Defendant on the basis that it might be unfair if a successful Defendant should be unable, or find it difficult, to recover its

[1] See Blackstones Civil Practice 2013 para 65.1

costs against a Claimant who had unsuccessfully invoked the jurisdiction of the court. The application of that regime and the conditions to be satisfied is now largely provided for under CPR 2000 Part 24 and additionally for an order against a Claimant company under the Companies Act 1994, Section 548.

[16] Ultimately, the making of an order for security is a question of jurisdiction, ensuring that the qualifying conditions are met and of discretion satisfying the court that having regard to all the circumstances of the case, it is just to make such an order.

[17] The conditions to be satisfied are provided for at Part 24.3. It states:—

"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 all the circumstances of the case, that it is just to make such an order, and that —

(a) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;

(b) the claimant —

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced; with a view to evading the consequences of the litigation;

(c) the claimant has taken steps with a view to placing the claimant's assets beyond jurisdiction of the court;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) the claimant is an external company; or

(g) the claimant is ordinarily resident out of the jurisdiction."

[18] Where a Defendant is a company, the Companies Act 1994, Section 548, empowers any court having jurisdiction and if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendants if successful in their defence, require sufficient security to be given for those costs and may stay all proceedings until security is given.

Analysis of the evidence of the Claimants / Ancillary Defendants in relation to the First Defendant

[19] Counsel for the First Named Defendant submits that the onus of proving the ordinary residence of the First Defendant is the Claimants'. He submits that the evidence so far in the proceedings is that the First Defendant is a citizen of, resident and married in St. Vincent with a family. His absence from the state is temporary and it is unlikely that he would leave St. Vincent and the Grenadines abandoning the project in which he has so much invested.

[20] Stanley "Jorg" Dornieden, the First Named Defendant is German born and for some time and certainly during the currency of the contract between the parties, was domiciled in St. Vincent and the Grenadines, residing in Bequia. It is not disputed that he is German, and evidence that he has submitted that he is a citizen of St. Vincent and the Grenadines is so far not also challenged. By his own evidence and prior to becoming the project manager of the project, he operated Lina's Bread and Delicatessen; a bakery and coffee shop, Bequia Real Estate and Cantrememberthename Ltd, a restaurant that was being built up at the time. He also incorporated the Sixth Named Defendant sometime in or before 1999 of which he is the managing director. He avers that he has lived in St. Vincent for the past 19 years. His former wife is a Vincentian native and so are his two daughters. He states that the fact that he has links with Germany is not sufficient to justify an assumption that he will move his assets or will conduct himself unlawfully. He states that his departure from the jurisdiction is temporary to care for his ailing mother. In evidence given in earlier proceedings he admits that he has stopped the operation of the bakery on the island and that he is now divorced.

[21] The determination of residency is a question of fact requiring a holistic assessment of the evidence provided. There is no question that the First Defendant was ordinarily resident in St. Vincent and the Grenadines prior to November 2011. There have been some material changes in his life from that period, including his relationship with the Project. To my mind the question for determination ultimately is whether he continued his residency in the island after November 2011. In Bess et al v Ho Young et al SVGHVC1989/0008 now deceased Singh J (as he then was) surmised that *"residence has no actual definite technical meaning. It has to be construed in every case in accordance with the object and intent of the act in which it occurs."* In his text "The Conflict of Laws" Fourth Edition, deceased J.H C Morris defined "ordinary residence" as connoting *"residence in a place with some degree of continuity and apart from accidental or temporary absences"….. "If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered"*. I am guided by those references.

[22] I have cautiously considered the submissions and evidence of the parties, mindful that the circumstances of each case require an assessment based on its particular facts. I find no evidence to conclude that the First Defendant has changed his address to the one he currently occupies to avoid the consequences of this litigation.

[23] Although the First Defendant has stated that his absence from the state is temporary, what is relevant is not only what he states but whether the factual circumstances is suggestive of only temporary absence or something more long term or permanent. I am of the view that prior to November 2011, the Defendant had a settled life in Bequia. He ran a bakery and a restaurant; he was also engaged in real estate, was married and had a family. The evidence of that period is suggestive of a man who had chosen to make Bequia his home and had created a lifestyle in keeping with that objective. There is no doubt that the Defendant's life is now differently ordered. He is now divorced. He became involved with the Hope Bay Project and in recent times certainly in the last two years has

closed his businesses, has given up his tenancy and he has had a prolonged uninterrupted absence from St. Vincent and the Grenadines. He is currently in Germany caring for his mother. Although his counsel submits that the First Defendant has no intention of abandoning his interest in the Project, I fail to see the relevance of this to the question of his ordinary residence, as certainly his interest if determined subsists despite his residency. None of the factors in and of themselves are sufficient to satisfy the question of ordinary residency and although I cannot say where the that Defendant conducts his day to day living, his settled life as it were, I am of the view that by the way his life is now ordered, the First Defendant is no longer ordinarily resident in the jurisdiction.

Analysis of evidence on the Sixth Named Defendant

[24] I have no reason to question the evidence provided in relation to the management and corporate status of the Sixth Defendant. In any event, it was not factual challenged. Based on the evidence presented I am being asked to conclude that this Defendant is only a nominal Defendant and that the ordering of its affairs leaves no confidence that it or that the entity for whom it acts is likely to be able to settle an order for costs were one to be made against it.

[25] The evidence of the Claimants' summarised, invites the court to conclude that despite its continued registration, the Sixth Defendant of which the First Defendant is the sole director, no longer operates as a going concern it having failed to appoint a company secretary and to comply with the mandatory filing of annual and financial returns from 1999 to 2010. The evidence of Mr Marriot is that the company is not trading and he invites the conclusion that this is indicative of the company's illiquidity. No challenge was advanced to the evidence of this Defendant's violation of the requirements of the Act, with its counsel submitting instead that this evidence cannot lead to the conclusion that the company will be challenged to settle an order for costs were one to be made. I disagree. Although I find no evidence to support the contention that the Sixth Defendant is a nominal ancillary claimant, I have no hesitation concluding that a natural consequence of its failure to

comply with any one of the mandatory requirements of the Companies Act is that this Defendant could be struck off the company register and could be compulsory dissolved. The fact that the Defendant has not sought to remedy these violations despite the potential consequences is worrying and forces me to conclude that any order for cost that may be made in these proceedings is likely to be in jeopardy of being incapable of settlement.

[26] I am guided by the authors of Blackstone's Civil Practice 2013 interpreting part 65.5 of the UK CPR on security for costs at paragraphs 65.16 who state:—

" Once it can be identified that the case comes within one of the exceptions identified in 65.5, the court has a general discretion whether to grant an order for security. In exercising this discretion the court will have regard to all the circumstances of the case, and consider whether it would be just to make the order. (See CPR,rr 25.13 (1) (a) and 25.14(1) (a)). There is a conflict in the Court of Appeal authorities on whether it is appropriate to consider pre CPR cases on the exercise of the discretion to award security for costs. It is submitted that the better view, which is consistent with the CPR being a new procedural code, is that stated in Nasser v United Bank of Kuwait *[2001] EWCA civ 556, [2002] 1 WLR 1868, which is that the substantial body of pre CPR case law on the subject is consigned to history. Instead the discretion has to be exercised applying the overriding objective, and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in the case in question.'*

[27] Both counsels also directed the court to the authorities of Sir Lindsay Parkinson and Company Ltd v Triplan Ltd [1973] 2 WLR 632 and Keary Developments Ltd v Tarmac Construction Ltd and Another. [1995] 3 All ER 534 which provide the factors to which the court must have regard in the exercise of the court's discretion on an application for security for costs in relation to a limited company registered under the UK Companies Act 1985, a provision that mirrors section 548 of the Saint Vincent Companies Act 1994. They provide for the following paraphrased conditions:—

(i) The court has complete discretion as to whether to order security for costs and will act in light of all circumstances;

(ii) The possibility or probability that a party for whom security for costs is ordered will be deterred from pursuing its claim is not without more a sufficient reason for not ordering security;

(iii) In considering an application the court must carry out a balancing exercise. It must weigh the injustice to the claimant if prevented from bringing its claim by the order for security, against that it must weigh the injustice to the defendant if no security for costs is ordered and at trial the claimant's claim fails and the defendant is unable to recover its costs incurred. It should not use its power as an instrument of oppression, but the court will also be concerned not to be so reluctant to use its power that that becomes a weapon where the impecunious company can use its inability to pay costs as a means of applying unfair pressure on a more prosperous company.

(iv) Regard must be had to the claimant's prospect of success but the court should not go into the merits in detail. Regard must also be had to the conduct so far of the parties to the litigation.

(v) In considering the amount of security the court can order any amount up to the full amount claimed by way of security provided that it is more than a simple nominal amount ; it is not bound to make an order of a substantial amount.

(vi) Before refusing to order security on the ground that it may stifle a claim the court must be satisfied that in all the circumstances it is probable that the claim would be stifled.

(vii) The lateness of the application for security.

[28] It would appear that the guidelines in Parkinson v Triplan and Keary continue nevertheless to be applicable in the consideration of an application made under the Companies Act of St. Vincent and the Grenadines in relation to the Sixth Defendant. I have considered the evidence filed, I have considered the relevance of each of the Keary

factors in relation to the Sixth Defendant and had overall regard to the overriding objective of CPR 2000. Additionally I have considered the following:-

(a) The ancillary claim brought by the First and Sixth Named Defendants is for the wrongful repudiation of the JVA. It is directly related to the claim brought by the Claimants which is a claim for the breach by the Defendants of their obligations under the JVA, fraud, conversion and breach of fiduciary duty. I am satisfied that both claims raise triable issues, which will ultimately require an appreciation of each parties' obligation under contract and an understanding their opponents obligations under the JVA, and the extent to which these were met. It also requires assessment of the beneficial interest of the parties to the action. The understandings of these issues must be fully ventilated at trial and are to be appreciated from the evidence of the witnesses given at trial.

(b) On the question of whether a request for security would stifle the Ancillary Claim, very little evidence in support has been provided by the Defendants, making such a determination challenging. I find no evidence of impecuniosity of any of the parties although there is disparity in the means of the Third and Fourth Claimants and of the First and Sixth Named Defendants.

(c) I agree that the First Defendant's current residence in Germany would impact any order for the recovery for costs should he remain there. Having found that this Defendant has minimised what life he had in St. Vincent, I find it troubling that there is no evidence now, of how his life is ordered, his current address, how he now earns a living, or anything indicative of any stability. It is agreed that Germany is not party to the reciprocal enforcement treaty that facilitates the registration of a scheduled commonwealth jurisdiction in another scheduled commonwealth country. But being resident in a non-treaty state is not of itself a reason to provide security. Upon inquiry the parties canvassed with me the suggestion that the treaty status shared between the United Kingdom and Germany which itself provides for the registration of UK judgments may well allow for St. Vincent Judgments capable of registration in the United Kingdom to be registered and

enforceable in the community. It was understood that this was speculation only and had not been explored by the parties.

[29] I am of the considered view that an order for costs if made against the First Defendant would involve significant expense to recover, well above what would be expended were he resident in the jurisdiction or in a commonwealth jurisdiction. Germany is a civil law jurisdiction and operates under an unfamiliar system of law. Any action for recovery would require the commencement of fresh proceedings in that jurisdiction at similar if not more significant costs. A relevant consideration is the language barrier. I am convinced that this is a case where having satisfied myself that the Claimant is no longer ordinarily resident in St. Vincent and the Grenadines and it is likely that if an order for costs were one to be made against the First Defendant would have to be enforced in Germany where he is currently resident, that an order for security for costs must be made.

[30] Counsel for the Defendants submitted that an application to determination the value of the claim should have preceded this application. This certainly would have assisted in valuing both the claim and the ancillary claim. The order for security is based on the ancillary claim. From the pleadings it appears that the Ancillary Claimants have valued their claim at US$2,600,000.00. Based on my own assessment of the likely impact of the counterclaim I award the Claimants security for their costs on the Ancillary claim in the sum of EC$80,000.00 to be paid into an account under the management of the Registrar of the High Court, or by way of bank guarantee for an equivalent amount from a bank doing business in St. Vincent and the Grenadines.

Analysis of the evidence of the First and Sixth Defendant's Application.

[31] The evidence in the affidavit of Jorg Dornieden is that the Third and Fourth Named Claimants have no known assets, investment, or sources of income in St. Vincent and the Grenadines, other than a purported share entitlement in the Hope Bay Project which according to the Claimants continue to suffer loss. They are not citizens of St. Vincent and

the Grenadines and do they reside there. The Project in any event has targeted an international clientele and funding for the Project has always been treated as short term investment and has emanated from outside of St. Vincent and the Grenadines. The First and Sixth Named Defendants assert that they would be prejudiced in the circumstances should they be awarded judgment as they would be faced with the prospect of recovering nothing unless security for costs is ordered.

[32] During the hearing of the application Counsel Mr Stanley John confirmed that that the Defendants were not asserting the impecuniosity of the Third and Fourth Claimants, and conceded that any prejudice likely to be suffered by the Defendants as a basis for requesting security for costs emanated from the sole ground that the Defendants were resident overseas.

[33] This application can be dealt with expeditiously. The condition advanced for requesting security for costs is contemplated by the CPR and certainly once established is a factor for the grant of security for costs for a Defendant who has been brought to the proceedings by a Claimant. The rule however contemplates something much more, than the mere satisfaction of jurisdiction. In Richard Rowe et al v Administrative Services Limited SKBHCV2003/0222 Justice Davidson Baptiste succinctly and fluently reasoned the approach of the courts when considering the effect of ordinary residence out of the jurisdiction. He stated thus:—

The fact of the claimant being ordinarily resident abroad engages the court's jurisdiction but is not of itself a ground for making the order for security for costs.

Ordinarily resident out of the jurisdiction assumes moment in the context of grounds relating to the difficulties of enforcement. The court has to consider the relevance of the foreign residence in terms of ability of a successful defendant to enforce an award against the foreign claimant.

The discretion to award costs against a claimant ordinarily resident out of the jurisdiction is to exercised on objectively justified grounds relating to obstacles or to the burden of

enforcement in the context of the particular individual or country concerned. The absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments does not by itself justify an inference that enforcement would not be possible.'

[34] The evidence of Henry Marriot provides details of their residence in the United Kingdom and he avers to his wife and him being 100% shareholders of the First and Second Claimants, although it has been acknowledged elsewhere that these were only special purpose vehicles that owned no assets other than the value of their shareholding. Henry Marriot also averred to owning vehicles and furniture on Bequia, although here was no documentary evidence provided in support, neither in terms of their existence or value. Having read paragraphs 16 of the eight affidavit of Henry Marriot and paragraph 18.3 , I am not convinced that the Project commissioned by the Claimants is an asset on which the Third and Fourth Named Claimant can rely on to support their own liquidity and ownership of assets in the jurisdiction.

[35] The First and Sixth Defendant do not challenge the Claimants ownership of assets in the United Kingdom satisfactory to discharging an order for costs, but assert that recovery outside the jurisdiction would be onerous on the Defendants. I am bothered by the First Defendant's submissions. He does not assert that he is impecunious, but seeks to assert through his attorney that if as is asserted by the Claimants', he is impecunious execution outside this jurisdiction even if in the United Kingdom would be more onerous on him just for the fact that it is outside this jurisdiction. I had earlier concluded that I found no evidence of the First Defendant's impecuniosity.

[36] To award security for costs only on the basis of the residence out of the jurisdiction and /or nationality of the claimants is in my view discriminatory and contrary to the proper exercise of the discretion afforded by CPR 2000. Unless the Defendants are able to show that an order for costs is likely to be unenforceable or will result in significant expenditure there really is no basis to award security. The Defendants also acknowledged that Saint Vincent and the Grenadines and the United Kingdom share a reciprocal enforcement treaty which

facilitates the registration in the United Kingdom of a judgment of the court of St. Vincent and the Grenadines.

[37] I am unconvinced by the Defendants' submissions which I have found to be fanciful and based on supposition. I find there to be no basis on which I ought to order the payment of security for costs and the application of the First and Sixth Named Defendant is dismissed.

The Budgeted Costs Application

[38] The Claimants request the setting of a costs budget. This they suggest is necessary given the level of damages to which the parties may be entitled if successful in the proceedings. They discount quantification based on the prescribed costs regime, which they submit, may be wholly inadequate for their costs so far estimated at US$208,222.14 or EC$558,035.14. Unless a budgeted costs order is made, the Claimants' fear they will only be able to recover in the event of their success a very small portion of the costs expended on the claim, and in defending the counterclaim of the First and Sixth Named Defendants.

Submissions of the Claimants

[39] Mr Delves for the Claimants punctiliously advanced the justification for the application. This is a claim, he submits, which begs for parameters. It is complex and voluminous. Affidavits and statements so far prepared, have had to be executed both within and outside St. Vincent and the Grenadines at significant costs and which costs are continuing; Both the Third and Fourth Named Claimants reside in England, their travel, accommodation and daily living expenses during the run of these proceedings when necessary are tremendous; There is a need for experts to assist in the recovery of documents cleaned from computers seized from the premises of the First Defendant. The fact that the matter has taken some time to reach case management conference is indicative of its complexity and its telling as to the attention it requires. It has been necessary to have had various applications dealing with interim issues,

including the obtaining of a search order, an injunction and a freezing order[2]. This is a case counsel submits where most of the relief claimed has no monetary value and even where there is a stated monetary value, as in the claim for damages for deceit and or for special damages of EC$1, 500,000.00 the likely prescribed costs on these causes of action of $108,750.00 is likely to be substantially inadequate. It is telling counsel states that the First and Sixth Defendants have themselves admitted in an earlier application that their own costs are likely to exceed $300,000.00.

[40] Accompanying the application is the affidavit evidence of Loreth Bartholomew a legal clerk in the offices of Mr. Delves whose evidence supports the submissions of Counsel. She avers that this is a claim often quoted in United States dollars. The Project at the heart of the substantive claim concerns a development which initially had a value of US$9,000,000.00. It is now valued on the open market at US$6,000,000.00. The costs so far expended on the development have been approximately US$10,000,000.00. She avers that the witnesses likely to be involved in the proceedings reside largely out of the jurisdiction, one of whom resides in the United States. The cost of swearing his affidavit alone has been US$25,000.00. There has been additional and senior counsel retained in the United Kingdom who has been and continues to be involved in the preparation and presentation of the litigation. The claim she states involves very large amounts of documents prepared in support of the claim which have had to be been drawn up both in St. Vincent and the Grenadines and in the United Kingdom. She further avers that the First and Sixth Defendants have in their counterclaim asked for injunctions restraining the Claimants from disposing or diminishing the value of their assets beyond the sum of US$2,600,000.00. It is expected that the trial is likely to involve 10 days of testimony. All of this Ms Bartholomew advances to support the calculation of a costs regime other than by prescribed costs.

[41] Her evidence is supported by exhibit **"LB 3"**, a cost budget statement, exhibited in compliance with rule 65.8, providing a breakdown of costs incurred to date, anticipated fees

[2] These orders were obtained without notice, and on the inter partes hearing the freezing order was discharged and the injunction order modified.

payable to the expert, disbursements, legal practitioner fees and other charges. I was also directed to the 3rd, 4th and 5th affidavit of Henry Marriot in support of the summary statement of costs. Counsel Mr Delves admitted that there was some contamination in the calculation of the costs budget contained in the affidavit of the 23rd of October 2012. The disbursements ought properly to have reflected the sum of $62,815.00.

Submissions of Defendants

[42] The Defendants launched an incisive attack on the application to justify their position that the application and the costs budget statement are unreasonable. Although the Defendants offered no affidavit evidence, their counsels assisted the court with filed submissions. They opposed the application entirely including as to quantum. They submit that the Claimants application for budgeted costs was bought on the misguided basis that there was a limit to the amount recoverable in prescribed costs. This they submit, prompted this application for budgeted costs which is entirely without basis.[3] They submit that there are no grounds under the requirements of CPR 2000 on which such an application can be granted.

[43] Counsel Mr Akin John commenced the challenge for the Second Named Defendant and Mr Stanley John followed for the First and Sixth Defendants, relying on the additional oral submissions of Mr Akin John. He also helpfully supplied the court with speaking notes. Both Counsels opposed the application on behalf of their clients on the basis that it is premature and for which an application ought initially to have been made to set a value for the claim usefully allowing for parameters to be set. The entire application is they submit is misconceived owing to the Claimants misunderstanding of the operation of CPR 2000, as amended. They challenge the evidence of values and costs provided by the Claimants in support of their application as being unreasonable, and the need for a costs budget for the following reasons:—

[3] The scale of prescribed costs contained in the CPR 2000 was by amendment of the 30th September 2013 revised and now provides for prescribed costs to be calculated at the rate of 0.5% on a claim exceeding EC$2,500,000.00.

(a) The Claimants' submissions on the voluminous documentation involved in the proceedings is without merit as earlier proceedings for an Anton Pillar Order resulted in the disclosure forcibly or otherwise by the Defendants requiring no further disclosure on their part.

(b) There is an obligation on each of the parties to manage their costs. An unnecessary burden ought not to be placed on the Second Defendant Counsel Mr A John submits who has so far managed his costs, avoiding the circumstances of incurring unreasonable and tremendous costs, and it is unfair that he should be made to participate in an exercise to establish unwarranted parameters.

(c) The court must consider the modest resources of the Second Defendant, and is obliged to consider whether there is athe need to further burden the parties with a request to set a budget. Mr A John asks that the court give serious consideration to the means of the Second Defendant as oppose to that of the Fourth and Fifth Named Claimants and to appropriately consider the overriding objective and deny the Claimants' what he says is their hidden agenda which is to blow the Defendants out of the water, constraining any strategy to defend the proceedings.

Consideration

[44] The courts power to award costs is contained at part 64 of CPR 2000 which provides for the entitlement to recovery of costs from any other party only by agreement of the parties, an order of the court or by a provision of the rules. Order 65.3 directs that costs are to be quantified as fixed costs where order 65.4 applies, or otherwise where order 64.6 is applied, in accordance with the scale of prescribed costs under rule 65.5, budgeted costs under rule 65.8, or where such is not applicable by assessment in accordance with rules 65.11 and 65.12.

[45] Part 65.5 provides for the scale of prescribed costs to apply as the general rule, based on a stated or applied value of the claim. It is a comprehensive award which includes the routine

steps in litigation, legal costs, disbursements and costs and includes costs in instructing experts, considering and disclosing of any experts reports; arranging the expert witnesses' attendance at trial, and attendance and advocacy at the trial including attendance at any case management conference or pre-trial review. This regime allows costs to be easily calculated based on the value of the claim and gives the litigant the advantage of knowing well beforehand his approximate costs liability. The prescribed costs award excludes experts' fees and enforcement costs. It also excludes the costs of applications to the court, unless made at case management conference. It is usual I suppose for the costs of those hearings to be determined at the hearing of the application itself.

[46] The prescribed costs regime however is not expected to be always applied. The circumstances of cases differ widely and a scale based broadly on a percentage of the value of a claim would not always accord justice. In such a case the rules anticipate that the mechanical application of the scale of prescribed costs would not be appropriate. This is supported by the reasoning of Barrow JA in Donald v The Attorney General of Grenada Civil Appeal No. 32 of 2003 with which I am in accord. He said:—

"The rules do not intend that once a claim is to be concluded after trial the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the rules will indicate that opportunities are afforded parties to vary the consequences of a mechanical application of the prescribed costs...."

[47] One such rule to which Barrow JA referred must surely have had in mind being rule 65.8 which allows the parties to set a costs budget. Although the rules do not dictate the circumstances when such an application should be made, nor does it limit such an application to circumstances of unusual expenditure, the learned authors of The Caribbean Civil Law Practice at note 29.6 surmise that the provision is one to be applied where the costs assessed or fixed by reference to the low amount of the value of the claim do not justly reflect the considerable complications of law or fact. It may well be the authors suggest that the converse situation arises with a claim the value of which is very high but the work involved in its conduct

is not appreciable and the value of the costs payable by reference to the value of the claim is disproportionate to the reality of the expense involved, in which case prescribed costs may not be appropriate. The Defendants relying on learning in Caribbean Civil Law Practice to support their objection submit that the case brought by the Claimants contains neither complications of law or fact, nor is the value of the claim very high.

[48] Counsel Mr Delves has urged me to consider that the objective of the exercise is to merely achieve what under the United Kingdom CPR rule 3.12 is referred to as costs management conference, to control the future conduct of the litigation. The practice now in effect under recent amendments to the United Kingdom CPR with effect from April 2013, is to encourage costs budgets to be made in all cases except where there is good reason not to so do. Although the interpretation accorded to a cost budget in the UK is distinct from our CPR, the objective is in keeping with the mood of the entire CPR and the overriding objective of ensuring that litigation is conducted at proportionate costs, and that litigants are is not driven from the seat of justice because of disproportionate means.

[50] I am satisfied that the learned authors of the Caribbean Civil Law Practice have merely provided an example of when a costs budget may be useful without limiting the circumstances when the provision will apply. Part 65 provides for no such restriction other than that provided by rule 65 which simply accommodates applications made to have costs determined on a basis other than fixed, assessed or the scale of costs. The considerations directing the court's discretion is in my view at large and while it is useful in cases where expenditure is unusual, it is equally applicable in situations such as this case where the application of prescribed costs due to the size and or complexity of the case may not accommodate the moderate means of a party. In such a case a budgeted costs application allows the court to assist the parties in setting a budget realistic to the nature of the proceedings and the means of the parties. The provision states:—

"(1) A party may apply to the court to set a costs budget for the proceedings.

(2) An application for a costs budget must be made at or before the first case management conference.

(3) The application may be made by either or both parties but an order setting a costs budget may not be made by consent unless all relevant parties are bodies corporate.

(4) An application for a costs budget must be accompanied by —

(a) a statement of the amount that the party seeking the order wishes to be set as the costs budget;

(b) a statement showing how the budget has been calculated and setting out in particular —

(i) a breakdown of the costs incurred to date;

(ii) the anticipated amount of any expert witness fees and whether or not such fees are included in the budget;

(iii) the disbursements other than expert fees that are included in the budget;

(iv) the fees that are anticipated to be paid to any legal practitioner other than the legal practitioner on record for advocacy (including advocacy by a Queen's Counsel, a State Counsel or more than one counsel), advising or settling any document;

(v) the hourly rate charged by the legal practitioner (or other basis of charging);

(vi) a statement of the number of hours of preparation time (including attendances upon the party, any witness and any other party to the proceedings) that the legal practitioner for

the party making the application has already spent and anticipates will be required to bring the Proceedings to trial; and

(vii) what procedural steps or applications are or are not included in the budget; and

(c)the written consent from the client in accordance with rule 65.9.

(5) ……"

[52] The pleading summarised reveal a claim for fraudulent misrepresentation by the First Defendant to the Third and Fourth Claimants; wrongful conversion of materials and machinery belonging to the First Claimant; concealment and breach of fiduciary duty. It is a claim proof of which may be

tedious requiring an audit of the obligations of the parties under the JVA together with the justification of supporting documents and evidence

[53] It is not unreasonable to assume that the First Defendant as project manager would have been in charge of documentation and records including financial records of the project. In so far as he interacted with third parties and sub-contractors information relating to those transactions if not recorded by him would have to be obtained from the parties themselves. The First Defendant himself expressed his own limitations of project management in his affidavit filed in support of the application for security for costs. It would be no easy task I imagine the level of investigation to which the Claimants would be put to prove the facts in issue. It is therefore not unreasonable the actions of the Claimants in the manner they have sought to recover the evidence necessary to prove their case, although reminiscent of a fishing expedition.

[54] I have found the submissions of all sides to be relevant. The overriding objective demands that in the exercise of any discretion the court deal with cases justly by ensuring so far as it is possible that the parties are on an equal footing; that expense is saved; that the cases are dealt with proportionate to the amount of money involved; the importance of the case; the complexity of the issues; the financial position of each party; expeditious management and the proper allocation of the court's resources. The manner in which evidence has to be collected, the disparity in the means of the parties, the location of witnesses out of the jurisdiction; the amounts so far claimed, all convince me that this is an appropriate case for the fixing of a costs budget. Nevertheless and despite this I am constrained to make an order as I am not satisfied that all of the 10 parties to the proceedings understand the implications of the mandatory requirements of Part 65.9.

[55] I agree with the Defendants that it is prudent to have some an idea of the total value of these proceedings, so as to be satisfied what the ordinary prescribed costs would be. But beyond that there is need to determine what are the fair and reasonable costs that ought to attend these proceedings. The cost budget statement is preliminary and I feel there is little appreciation of the value of the exercise. While insufficient preparation was made to assist the court, this is not the type of application where in penalty, the court should set a costs budget without satisfying itself that

the parties made a valuable contribution and understood the implications of such a decision. I therefore decline to make an order at this stage and instead direct the parties each in the face of an application for budgeted costs to file within 21 days hereof of, affidavit evidence assisting the court in setting a total value for the proceedings, and the fair and reasonable costs that ought to attend the proceedings. Each party is to assist the process by attempting to agree beforehand those costs where agreement can be achieved. The matter is to come on for the determination of the value of the claim and a cost budget following the expiry of the time for filing the affidavits of the parties.

Costs on the Applications

[56] I award the Third and Fourth Claimants their costs on the application for security for costs in the sum of $3500.00 and award them a further sum of $1500.00 on the First and Sixth Named Defendants' application for security for costs to be paid in 21 days hereof. Beyond that I make no further order in costs.

[57] Summary of award

(a) The Claimants are awarded security for costs of the Ancillary Claim in the sum of $80,000.00 to be paid by First and Sixth Named Defendants within 28 days hereof, into an account under the management of the Registrar of the High Court, or by way of bank guarantee for an equivalent amount from a bank doing business in St. Vincent and the Grenadines.

(b) Costs to the Claimants on their application in the sum of $3000.00 payable within 21 days hereof.

(c) The First and Sixth Defendants' application for security for costs is dismissed with costs in the sum of $1500.00 to the claimants payable within 21 days hereof;

(d) No costs are awarded on the application for budgeted costs which continues.

(de With the exception of the obligation to pay costs the Ancillary Claim is stayed pending the payment by the Defendants of the said security.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER