IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE

SUIT NO. GDAHCV2009/0471

BETWEEN:

W&W SPICES GRENADA LIMITED

Claimant

AND

GRENADA NUTMEG PRODUCTS LLC

Defendant

Appearances:

Cajeton A K Hood of Counsel for the Defendant/Applicant

Anyika Johnson of Counsel for the Claimant/Respondent

2011: November 1st

2013: April 22nd, June 7th

Application to strike out statement of case; CPR 26.3 (1) (b) and (c); Abuse of Process; Limitation of Action; Proceedings statute barred by the operation of the Limitation of Actions Act Cap 173 of Grenada; Security for costs.

DECISION

[1] TAYLOR-ALEXANDER, M: The defendant applies to strike out the claim form and statement of claim filed in these proceedings as not disclosing any

reasonable ground for bringing the claim and as an abuse of process, likely to obstruct the just disposal of the proceedings, alternatively;

For an order that the claim is stayed until the claimant fully satisfies the judgment of the court in claim GDAHCV2006/0221 to pay to the defendant US$ 1,750,000.00 plus interest on the sum at the rate of 6% per annum from the 30th June 2006, and costs of $5,000.00, alternatively;

The claimant is to give security for costs, failing which the proceedings are to be struck out.

[2] The grounds in support provide the basis for the application and are that:—

(a) The claimant has not established any or any sufficient contractual obligation on the part of the defendant capable of sustaining a claim for damages as pleaded in the statement of claim.

(b) The issues raised in the claim could have been disposed of in claim GDAHCV2006/0221 and it is an abuse to seek to re-litigate or otherwise try these issues.

(c) The judgment in claim GDAHCV2006/0221 remains largely unsatisfied. Only costs of $5,000 have been paid and there is good reason to believe that the claimant would be unable to pay the defendant's costs in these proceedings as the company has ceased to conduct business in the jurisdiction; has no or no sufficient assets in the jurisdiction and has no resident officer in the jurisdiction; as such, the claimant should be required to give security for costs.

[3] The application is supported by the affidavit of Ewart Lane which largely provides justification for the grounds adduced in the application.

Factual background

[4] The litigants shared a business relationship defined by a Sales and Distribution Agreement, the purpose of which was to market and sell the infamous nutmeg oil of Grenada to markets extending beyond the shores of Grenada. Their business relationship was short-lived and these and earlier proceedings between them arose from difficulties in their contractual relationship. An historical perspective is necessary to understand the proceedings and the application.

[5] W&W Spices Grenada Limited is in the main, a producer of nutmeg oil and other like products for sale. On the 1st of November 2002 it entered into a Sales and Distribution Agreement (SDA) with North Star LLC giving North Star the exclusive right and licence to sell its nutmeg oil to the entire world. The agreement was for a term of two years with an automatic extension for five years unless terminated.

[6] On the 12th of May 2003, North Star LLC assigned all of its rights and obligations under the agreement to Grenada Nutmeg Products LLC and on the same day, the new parties amended the SDA to effect certain changes to the original terms including changing section 3 on the grant of distributorship, by reiterating the grant of the exclusive licence to Grenada Nutmeg Products LLC, but with a new inclusion that allowed for the resale of the nutmeg oil by Grenada Nutmeg Products LLC to a US subsidiary of W&W Spices Grenada Limited, Atlantic Nutrition International LLC, who would sell the product to consumers in the United States and Canada. It was further agreed that upon a request by W&W Spices Grenada Limited the parties could enter into other substantially similar agreements.

[7] On that same date, the 12th May 2003, the parties executed a deed of assignment in which the Bank of Nova Scotia as the holder of various fixed and floating charges over the assets of W&W Spices Grenada Limited intervened and agreed with the assignment to Grenada Nutmeg

Products LLC of a further fixed and floating charge over certain assets of W&W Spices Grenada Limited to secure a loan granted by Grenada Nutmeg Products LLC in favour of W&W Spices Grenada Limited of US$1,750,000.00.

[9] It was an express term of the deed of assignment that so long as no default existed under the loan, the sole source of repayment of the sums due by W&W Spices Grenada Limited would be payments to Grenada Nutmeg Products LLC at the rate of US$3.50 for each 10ml bottle of product sold by W&W Spices Grenada Limited from time to time.

Claim No. GDAHCV2006/0221

[10] Grenada Nutmeg Products LLC the claimant under the earlier proceedings, sued the defendant W&W Spices Grenada Limited a mere three years after the execution of the SDA, in May 2006 for a sum of US$1,750,000.00/ XCD$4,725,000.00 being monies loaned under the deed of assignment. The claimant alleged that the defendant failed to satisfy the demand made, when in violation of the deed of assignment, the defendant, during the month of May 2003 and continuing for an extended period, sold an undisclosed quantity of product for which it failed and or refused to pay amounts due to the claimant. The claimant alleges that after demand was made, the defendant acknowledged the debt and expressed a desire to have the debt settled and payment terms agreed to. Despite this, no payments were made, whereon the sum of US$1,750,000.00/ XCD$4,725,000.00 together with interest and costs became due and owing.

[11] By acknowledgement of service filed on the 1st June 2006, the defendant admitted the whole debt and stated that it did not intend to defend the proceedings. Judgment on admission was granted to the claimant, finally determining the issues that arose under that claim.

[12] In these current proceedings filed on the 30th November 2009, the claimant W&W Spices Grenada Limited being the defendant in the earlier proceedings, brought a claim against the defendant Grenada Nutmeg Products LLC, being the claimant in the earlier proceedings on the basis that the defendant as assignee under the SDA as amended, breached its obligation to sell 4 million units of products annually. The claimant avers that the defendant failed to take delivery of 100,000 (10) ml bottles, which products subsequently expired while awaiting collection by the defendant. The costs of the stock was XCD$934,500.00. The claimant also claimed for the costs of 200,000 (10) ml bottles at XCD$1,869,000.00 produced by the claimant but not shipped due to the defendant's refusal to purchase them. The claim was for a total XCD$3,063,676.55 in other losses and for US$65,174,000.00 for loss of profit over the duration of the agreement.

CONSIDERATION OF THE ASSERTIONS

No reasonable ground to sustain a claim

[13] The first challenge by the claimant is brought pursuant to Rule 26.3(1) (b) of the Civil Procedure Rules (CPR 2000) on the basis that the claim does not disclose any reasonable ground in contract law capable of sustaining a claim for damages.

[14] Rule 26.3 (1) (b) provides:—

"In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that —

(a) .....

(b) the statement of case or the part to be struck out does not

disclose any reasonable ground for bringing or defending a claim;"

[15] The defendant relies on the principles set out in Ian Peters v Robert George Spence HCVAP2009/016, in support of his submission which he says ought to guide the court in the application of CPR part 26.3 (1) (b) It provides:—

(i) Whenever the court is required to apply rule 26.3 (1) (b) of the CPR it must approach the matter on the assumption that the primary facts pleaded in the statement of claim are true.

(ii) The court may strike out a statement of case if the facts disclosed reveal no legally recognizable claim even though the court has proceeded on the assumption that the facts are true.

[16] Ian Peters v Robert George Spence is a restatement of the principles identified in Swain v Hillman [2001] 1 All ER with continues as the seminal authority on the application of that rule. The dictum of Lord Woolf at paragraphs 94 and 95 is useful to the present application. It provides:—

"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[17] The defendant submits that the following are material facts to be assumed from the pleadings of the claimant:-

(i) The claimant and the defendant entered into a contractual relationship by virtue of an Amended Agreement dated the 12th May 2003;

(ii) The defendant failed or refused to accept a shipment of 100,000 (10) ml bottles of products from the claimant;

(iii) In the year 2003 the claimant produced 200,000 (10) ml bottles of nutmeg products but this quantity was never shipped to the defendant.

(iv) The defendant failed to make other purchases of nutmeg products from the claimant between 2003 and 2009.

(v) By virtue of the Deed of Assignment the claimant borrowed the sum of US 1.75 million dollars from the applicant which sum was in the absence of default to be paid out of monies derived from sale of products supplied by the Respondent.

(vi) The claimant defaulted on its obligations to repay the loan from the defendant and the defendant instituted court action obtaining judgment against the claimant.

[18] Assuming these material facts the defendant challenges the ability of the claimant to continue the proceedings on the following grounds:—

(a) The claim is statute barred being filed outside the four year statutory limitation period of the law of Pennsylvania, or otherwise the six year limitation of action pursuant to the Limitation of Action Act Cap 173 of the Laws of Grenada

(b) The claimant has not established that the loss of $934,500.00 arose from the products supplied in accordance with the amended agreement.

(c) The claimant has not established that the loss of $1,869,000.00 arose within the limitation period of the applicable law.

(d) The loss of $53,400.00 has not been established as arising from the breach of contract and that it arose within the limitation period.

(e) It is not established that the loss of $206,776.55 flowed from a breach or breaches of contract by the defendant.

(f) In relation to the claim of $36,000,000.00, there was no contractual obligation owed for the period 2007-2009, that relationship having been terminated prior to December 31st 2003.

The Limitation Defence:—

[19] The defendant contends that the applicable law of the contract is the law of Pennsylvania USA, under which the statutory limitation period is 4 years from the date of the breach, The defendant contends that even if the applicable law is the law of Grenada the action was commenced outside the six year limitation.

[20] Clause 22 of the SDA provides that *"in the construction of the SDA the laws of the United States of America and the Commonwealth of Pennsylvania shall govern and the manufacturer unconditionally submits to the jurisdiction of the courts of Pennsylvania in all matters relating to or arising out of the agreement."*

[21] Counsel for the claimant submits that Clause 22 provides for submission to the law of Pennsylvania only for issues of construction of the contract. For reasons explained hereunder I do not intend to explore that submission.

[22] The Pennsylvania Statute of Limitations Section 5525 (42 Pa. C.S. 5525(a)) provides for a four year limitation on an action upon a contract, obligation or liability founded upon a writing not specified in paragraph (7) of the act, under seal or otherwise, except an action subject to another limitation specified within another part of the provision. The burden to prove the application of the statute is the defendant's as applicant. There are a number of factors according to my understanding of the statute that may operate to stay the accrual of the cause of action, such that to prove the application of the limitation period the defendant would be required in the very least to allege that this is not a case where the exceptions apply. A proper consideration of such an application at this stage would be based largely on my speculation, as no evidence was provided to discount factors that may be relevant to the application of the limitation period. I am constrained therefore to consider this ground as being a ground of any relevance.

[23] The claimant theorises that in any event if the claim fell to be governed under the laws of Grenada it would be similarly challenged as it was filed outside the six year statutory limitation. The claim pleads that the SDA was entered into on the 1st November 2002. It pleads various breaches of the terms of the agreement all of which occurred during "the last quarter of 2003 ". The claim was served on the 7th December 2009.

[24] The relevant statutory regime is the Limitation of Actions Act Cap 173, of Grenada of which section 36 provides as follows:—

> *"No action of debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, of debt upon any recognisance, or debt upon any award where the submission is not by specialty, for an escape, or for money levied under any writ of execution, and no action for a penalty, for damages, or for a sum of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced but within the periods hereinafter expressed, that is to say: the said actions of*

debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, and of debt upon any recognisance, within twenty years after the cause of such actions; the said actions by the parties grieved, within two years after the cause of such actions:

Provided that nothing herein contained shall extend to any action given by any statute where the time for bringing the action is by any statute not hereinafter mentioned specially limited."

[25] The cause of action alleged is for breach of a written contract executed between the parties and for loss and damage purportedly arising from the failure of the defendant to honour its obligations pursuant to the contract to purchase its annual agreed quota of the nutmeg oil. The action is governed by section 36 of the Act and a six year statutory limitation applies.

[26] In Reeves v Butcher [1891] 2 QB 509, it was held that a cause of action accrued from the earliest time at which the claimant could have brought her action, and though an action may well arise on various events, it has always been held that the statute runs from the earliest time at which an action could be brought. I find that according to the pleadings the cause of action would have accrued at some unspecified time in the last quarter of 2003. The claim form and statement of claim was served on the 7th December 2009. It seems to me odd, that an issue of such critical importance as the date when the cause of action accrued was left deliberately vague. No documentation was provided, no clarification by evidence offered, or explanation was given as to why the date of the accrual of the action, despite its importance was unspecified. Neither of the parties pleaded the specific dates of the breach and I, without more, will not engage in conjecture.

.

[27] A cause of action becomes statute barred by operation of law. The onus nevertheless remains on the party asserting limitation as a defence, to prove

its application. The cause of action accrued towards the end of 2003, and based on a six year period of limitation the cause of action would be expected to expire before the end of the six year period in the year 2009. The claimant's cause of action was filed on the 30th October 2009 and was served on the 7th day of December 2009. Without a specific date, I find the defendant has not proven that the cause of action is statute barred.

[28] It is also contended that the claimant has not established that the sums of monies allegedly lost namely:— $934,500.00, $53,400.00, $206,776.55 flowed from a breach or from breaches of the contract by the defendant and; there was no contractual obligation owed for the period 2007-2009, such that the loss of $36,000,000.00 claimed for that period cannot be sustained.

[29] The function of any pleadings is to state with sufficient clarity the case that the defendant must meet. As such, the material facts constituting the cause of action must be pleaded and facts which show the nature and extent of the injury in respect of which damages are sought are to be defined, such that the parties and the court are aware of the issues intended to be proved at the trial.

[30] I find the defendant to be challenged in its submission. The statement of claim is concise, all relevant fact on which the claimant relies are set out and the remedies flowing therefrom defined, so as to allow effective and efficient disposal of the pleadings. All in all I am satisfied that the claimant pleaded that the loss of the sum of $3,063,676.55 flowed from the defendant's breach of the agreement by it failing to take delivery of items earmarked for sale to it and for the costs associated with the preparation of the oil for sale.

[31] Although I agree with the defendant that in so far as the claim for loss of $36,000,000.00 refers to losses for the period 2007-2009, occurring after the default, I would hesitate to conclude that such a claim is unsustainable without a proper consideration of effect of terms of the agreement.

Abuse of Process

[32] Mr Cajeton Hood for the defendant alleges that the current proceeding was filed for a collateral purpose; is a spurious claim; and arises from an improper use of the courts machinery. He submits that the issues raised in the second claim are issues which could have been fully determined by the earlier proceedings in GDAHCV2006/0221 and that the claimant by this action is attempting to remove the defendant from the seat of justice. He begs the court to dismiss the proceeding as res judicata and an abuse of process.

[33] The defendant further contends that despite the accrual of the cause of action in 2003, the claimant sat on its rights choosing not to pursue any purported losses it claimed to have suffered, not even after the defendant commenced related proceedings in an earlier action in which the claimant judiciously allowed judgment to be entered on admission.

[34] When it was subsequently discovered to be false, the asset base the claimant alleged it owned, the defendant wrote to the managing director of the claimant demanding that he take personal responsibility for the debt failing which criminal charges were to be instituted. It was only then, alleges the defendant that the claimant was galvanised into action as it were and raised for the first time the allegations contained in the present claim.

[35] The defendant not surprisingly challenges these submissions asserting its right to commence these fresh proceedings on the ground that it relates to a wholly separate issue and cause of action. The affidavit of Sharon Samuel the affiant in response, denies that the present claim raises issues which have already been litigated or adjudicated upon in claim GDAHCV2006/0221. She states that the present claim relates directly to the SDA and the amended SDA by which terms the defendant company assumed all of the rights and obligation of the company North Star LLC and the exclusive right and licence to sell and distribute the units in the entire world. Under the SDA,

North Star LLC purchased 286,000 units in the first year of the agreement and subsequently made an assignment of its rights and obligations to the defendant who in large part failed to meet any of its obligations under the contract.

[36] The claimant contends that the present issues were never adjudicated upon and states that the only way these issues could have been raised in the earlier proceedings was by a counterclaim. This the claimant states is an indication that although the issues are related, the earlier proceedings were not directly relevant to the issues to be determined presently. The claimant further contends that by not raising these present issues in the first claim, it facilitated the speedy completion of the first claim on issues that were not in contention. The present proceedings require a determination of more complex issues and are better tried separately. In any event the claimant submits that the mere fact that these present proceedings could have been tried at the time of the earlier proceedings, is not of itself indicative of abuse of process and it is on assessment of the broad objective and that the court should make a determination of abuse. Furthermore the overriding objective of CPR 2000 is to encourage a hearing on the issues raised in the present proceedings.

Analysis of the facts and applicable law

[37] The earlier and instant proceedings share some similarities. The litigants are the same, and both actions are founded on the business relationship the parties shared arising out of the SDA. Beyond that I find no natural nexus between the two proceedings. Perhaps the nexus if any arose from the alleged failure of the defendant to honour the terms of the agreement in relation to annual purchases of the bottles of nutmeg oil, which may have contributed to the claimant's default of the deed of assignment. That however

is largely a matter of speculation as it is neither pleaded nor offered in evidence.

[38] The parties accept that the issues in the present claim could have been raised in the earlier claim albeit by counterclaim. The question for this court is whether the failure to raise these present issues in the earlier proceedings amounts to an abuse of process of the court, or is likely to obstruct the just disposal of the proceedings.

[39] Unless a claim is frivolous, vexatious or an abuse of process a claimant has a right to have his claim litigated. This is eminently stated by Lord Diplock in Hunter v. Chief Constable of the West Midlands Police [1982] AC 529 at 536. He said thus:—

"inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people...."

[40] This power to strike is a powerful tool in the courts armoury and a decision to utilise it is usually upon a scrupulous examination of the circumstances of the case.

[41] Both parties agree that the leading authority is the case of Johnson v Gore Wood & Co (No 1) [2001] 1 All ER 481 and the dicta of Lord Bingham at page 89 which powerfully summarises the applicable principles coming out of all of earlier authorities and which offers guidance as to what the court ought properly to look for when such a challenge is raised:—

"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the

party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[42] The earlier claim concerned the obligations of the parties under a deed of assignment dated the 12th May 2003 under which the defendant loaned the claimant the sum of XCD$4,725,000.00 under a fixed and floating charge.

[43] Although the causes of action in these proceedings are different there is much in common with the issues arising in the two claims. The facts bear out that the parties entered an SDA which created an obligation on the part of the defendant to purchase a certain quantity of nutmeg oil. The facts also bear out that the defendant had loaned the claimant a certain sum of money to float its obligations under the SDA, payment for which would come from the sale of bottles of nutmeg oil, which loan the claimant defaulted on. There are other collateral issues all of which feed into these two main obligations. To my mind the most appropriate question to ask is whether there would be a duplication of issues and effort in trying the two proceedings separately?. The short answer is yes.

[41] Certainly it would have been prudent for all of the following reasons for the actions to have been tried together, namely; the necessity to ensure efficiency and economy; avoiding the likelihood of the court reaching inconsistent decisions on the same issue; and the facts giving rise to the causes of action that arise from the same or materially the same circumstances. As such I question the claimant's motives in not proceeding with its claim in the earlier action.

[42] The guidelines in Johnson v Gore require that despite a finding of potential abuse the court must discount special justification for the claimant proceeding as it has. The claimant indicates that in their view it was more expedient to proceed by separate action leaving the more complex issues to be decided separately. I disagree. In my view, a thorough appreciation of all of the facts arising from both proceedings justifies proceeding in a single action.

[43] Although the claimant failed in its obligation to give effect to the overriding objective, to my mind the justice of the case would demand that it be heard. What to my mind is material and on which my decision rests is that the judgment in the earlier proceeding was entered by administrative act and such there was no judicial determination on the facts surrounding the causes of action. The potential of the court to be compromised by differing decisions is eliminated, and although the public interest element in ensuring the efficiency in litigation remains, it is important to appreciate that the earlier action was concluded shortly after filing and at minimal costs to the parties and the court.

[44] Considering all I have said before, and despite the fact that the later action could have been raised in the earlier proceedings, it is my view that the interest of the administration of justice is better served by allowing the proceedings to continue.

Grounds for a stay

[45] The court has the power to stay the whole or part of any proceedings generally or until a specified date or event by virtue of its inherent jurisdiction and by CPR part 26.1(2) (q)

[46] It is urged upon me by the defendant that such power should be exercised to stay the current proceedings until the judgment in the earlier proceedings between the parties is settled.

[47] The rules do not offer guidance on the circumstances on which the court should exercise its power to order a stay. Under its inherent jurisdiction the power to grant a stay varies and depends largely on the circumstances of

each case. In Grobbelaar v News Group Newspapers Ltd. [2002] 1 WLR 3024, at page 3037B) Lord Bingham defined the inherent jurisdiction of the court as being

> *"the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

[48] I am also guided by the decision in the English authority of Aktas v Adepta [2011] QB 894, in which Rix LJ offered guidance on the court's exercise of its case management powers. He said thus:—

> *"Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in Biguzzi v Rank Leisure plc."*

[49] I had earlier concluded that the claimant's conduct and approach to the earlier litigation was less than satisfactory, in terms of ensuring efficiency and economy of the determination of the two proceedings. Despite this stance I nevertheless found that the subsequent proceedings were not an abuse of the court's process and should be allowed to continue. In view of that it would contrary to the proper exercise of the inherent powers of the court to grant a stay of process, nor would such a sanction be justified, the court having found that the second proceedings did not amount to an abuse.

Security for costs

[50] The final pillar of the defendant's application is one for security for costs. The company submits that there is good reason to believe that the claimant would be unable to pay the defendant's costs since the claimant has ceased to conduct business in the jurisdiction; has or has no sufficient assets in the jurisdiction; and has no resident officer in the jurisdiction.

[51] The defendant alleges that it was misled by the claimant to that fact that it owned no assets in the jurisdiction capable of being used to satisfy a judgment of the court should one eventually be given in its favour. The facts of the case as advanced by both parties bear out that indeed the claimant owns no assets within the jurisdiction.

[52] The affidavit evidence of Ewart Lane is unchallenged in so far as it states that the claimant is no longer in the jurisdiction and no longer has a resident officer in the jurisdiction.

[53] The court may make an order for security for costs against a claimant under rule 24.3(g) of the CPR 2000 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.

[54] An applicant is required to established that he comes within the relevant criteria and that the court ought to exercise its discretion in favour of the grant of security, and if so in what amounts .

[55] Blackstones Civil Practice 2013 interpreting 65.5 of the UK CPR at paragraphs 65.16 a provision identical to Part 24.3 of CPR 2000 offers guidance on the exercise of a discretion under the rules. It provides:—

" 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."

[56] In keeping with the learning in Nasser v United Bank of Kuwait [2001] 1WLR 1868, I am satisfied that while the fact of the claimant residence overseas is a factor that is relevant in the court's exercise of its discretion to order security for costs, that discretion should not be exercised in a manner which is discriminatory against those who reside outside the jurisdiction.

[57] The evidence of Ewart Layne affiant, on the 22nd March 2010, provides the basis for the application summarized as follows:—

(a) The statement of claim at paragraph 20 reveals that the claimant has no assets, or no sufficient assets in the jurisdiction on which the loan of $1,750,000.00 could have been secured.

(b) The assets if any owned by the claimant in the jurisdiction has a negative equity of ($2,786,819) such that the claimant is bankrupt.

(c) The directors of the claimant who is a local company both reside out of the jurisdiction.

I find all of the factors identified by the defendant to be very relevant considerations.

[58] Sharon Samuel who offers evidence for the claimant in opposition to the application explains that there are assets in the jurisdiction valued in excess of XCD$25,500,000.00. Those assets are owned by W&W

Electronics Limited, a Grenada registered company of whose director and Majority shareholder is Joel Webb. Joel Webb is also the majority shareholder and director of the claimant. Nothing is offered as to the relevance of this testimony to the issue at hand and I find it of no consequence to the ability of the claimant to satisfy an order made in costs.

[59] Ms. Samuel also deposes to Mr. Joel Webb and his wife owning assets in the jurisdiction in excess of $1,000,000.00 and to the fact that they repeatedly travelled to the jurisdiction and have been attentive to the current proceedings. She alleges that Joel Webb, the managing director of the claimant has strong ties to the jurisdiction. She admits that the claimant is experiencing financial difficulties, and states that the security for costs application will cause undue hardship.

[60] I have tremendous difficulty with the evidence of the claimant most of which bears no direct relevance to the grounds advanced. Despite the allegation of strong ties to the jurisdiction, the evidence of ownership of assets by a company unrelated to the claimant is of no consequence and does little to improve the position of the claimant if an award of costs was to be made against it. If anything this evidence suggests to me that the financial difficulty allegedly being suffered by the claimant may be alleviated by the financial security of its managing director and majority shareholder, who owns assets of some value in the jurisdiction. I therefore order that within 28 days after this order is served on the claimant, the claimant shall pay into court the sum of XCD$ 170,594.16 being 50% of the prescribed costs, as security for the costs of this proceeding. I further order that until the security required by this order has been given, the claimant may not take any step in these proceeding, except an appeal from this decision.

Conclusion

I find on the issues raised for adjudication that:-

(a) The issue of the claim being statutorily prescribed pursuant to the laws of Pennsylvania was not raised for present determination;

(b) This court is unable based on the pleadings, affidavits and the law, to conclude that the claim brought is statute barred pursuant to the laws Grenada;

(c) This court further holds that the proceedings are not an abuse of process and disclose a reasonable cause of action.

(d) There is no basis on which the court should order a stay of the second proceedings until payment is made under the first claim;

(f) The court finds the application for security for costs is meritorious and orders security for costs in the sum of XCD$ 170,594.16 to be paid within 28 days hereof.

(g) I further order that until the security required by this order has been given, the claimant may not take any step in the proceeding, except an appeal from this decision.

(h) I further award costs on these proceedings in the sum $2500.00 in the proportion of 80% to the claimant and 20% to the defendant.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER