EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2014/0007

BETWEEN:

[1] JORG "STANLEY" DORNIEDEN
[2] STA**NLEY'S FOOD AND BEVERAGES LTD**

Appellants

and

[1] MILLHAWKE HOLDINGS (BEQUIA) LTD
[2] STOWE CONSTRUCTION (BEQUIA) LTD
[3] HARRY MARRIOT
[4] HON. DINAH LILIAN MARRIOT

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On written submissions:

Mr. Stanley John, QC of Elizabeth Law Chambers for the Appellants
Williams and Williams for the Respondents

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2016: April 21.

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Civil appeal – Interlocutory appeal – Whether learned master erred in granting security for costs – Whether learned master erred in the exercise of her discretion

By way of fixed date claim filed on 22nd September 2010, the respondents brought an action against several parties, including the appellants, for the breach by the appellants of a Joint Venture Agreement ("JVA") between the respondents and the appellants, and for fraud, conversion, and breach of fiduciary duty. On 15th June 2011, the appellants filed a counterclaim against the respondents for the wrongful repudiation of the JVA. Subsequently, the respondents filed a notice of application for security for costs of the appellants' ancillary claim against the respondents. The application contended, as against the first named appellant, that he had changed his address subsequent to the commencement of the claim, with a view to evading the consequences of the litigation. Further, that the respondents were informed that the first named appellant had relocated to

Germany and was now ordinarily resident out of the jurisdiction and that any costs ordered to be paid by the first named appellant would accordingly be very difficult to enforce or recover. With respect to the second named appellant, the application alleged that the company was no longer in operation and had failed to appoint a company secretary and to comply with the mandatory filing of annual and financial returns and any costs ordered to be paid by the second named appellant could be very difficult to enforce or recover.

The appellants then filed a notice of application for security for costs against the third and fourth named respondents in relation to the substantive claim. The grounds upon which the application was made were that the third and fourth named respondents reside outside of the jurisdiction (in the United Kingdom) with limited assets within the jurisdiction and that it will be difficult to recover any order for costs made against them.

The learned master found in favour of the respondents on both applications, holding that the first named appellant now resided in Germany, so that it would be difficult and expensive to enforce any costs order against him, because Germany operates under a different legal system to St. Vincent and the Grenadines and there is no agreement between the two countries for reciprocal enforcement of judgments, such as there is between St. Vincent and the Grenadines and the UK or between Germany and the UK. With respect to the second named appellant, the master based her decision on the fact that the company could be struck off the company register for failing to comply with the mandatory requirements of the Act and could therefore be compulsorily dissolved, and that in light of the fact that no steps had been taken to remedy the violations of the Act, any order for costs made in the proceedings would likely be in jeopardy of being incapable of enforcement. Additionally, the master found that the treaty between the UK and either Germany or St. Vincent and the Grenadines is insufficient to facilitate registration in Germany of judgments from St. Vincent and the Grenadines.

The learned master dismissed the appellants' application, holding that it would be discriminatory and contrary to the proper exercise of the discretion given to her under the Civil Procedure Rules 2000 ("CPR") to make an order for security for costs in favour of the appellants on the sole basis that the respondents reside outside of the jurisdiction and that it would therefore be difficult to enforce any order for costs made against them, in circumstances where there was no evidence of impecuniosity of the respondents.

The appellants, being dissatisfied with the learned master's decision, have appealed on various grounds, primarily arguing that the master's decision exceeded the generous ambit within which reasonable disagreement is possible and, further, that the learned master erred in (1) finding that any costs order that may be made against the appellants is likely to be in jeopardy of being incapable of settlement; (2) exercising her discretion when she ordered that the respondents must be provided with security for their costs; and (3) finding that a request for security for costs would not stifle the ancillary claim.

Held: dismissing the appeal and making no order as to costs, that:

1. The prospect of success is a relevant factor in deciding whether or not to exercise judicial discretion in favour of granting security for costs. This task, however, must

be done without venturing into the merits of the case, unless it can be clearly shown that there is a high degree of probability of success or failure. Both the claim and counterclaim seem to be products of the JVA entered into between the parties. An examination of the JVA reveals that the first named appellant is not a party to the agreement. Accordingly, if the first named appellant's counterclaim is solely based on the JVA, he has no prospect of success. The learned master was therefore correct in granting the respondents security for costs as against the first named appellant.

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 applied; Sir Lindsay Parkinson and Co. Ltd. v Triplan Ltd. [1973] 2 WLR 632 applied; Porzelack K.g v Porzelack (UK) Ltd [1987] 1 WLR 420 applied.

2. A defendant should be entitled to security for costs if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order. If the problem is that, by reason of the way in which the claimant orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security for costs. On this footing, the discrimination is therefore not based upon nationality or residence, but on the need to administer justice effectively. In the present case, the first named appellant's address is uncertain, he has cleared his belongings from the jurisdiction, closed his businesses, and is divorced from his Vincentian wife. In these circumstances, the respondents are entitled to an order for security as it can be shown that an order for costs against the first named appellant will be difficult to enforce.

   DeBry v Fitzerald et al [1990] 1 All ER 560 applied.

3. There still exists a discretion to award security for costs even in cases in which the claim and counterclaim arise out of the same subject matter. If, however, the counterclaim is nothing more than a defence to the main claim, then normally the discretion should not be exercised in favour of ordering security for costs. In this case, the counterclaim is not merely a defence. It may, for the most part, have arisen out of the same subject matter as the main claim, that being the JVA, but it raises substantially different issues in the orders sought. In any event, the paramount consideration remains whether it is just to make the order in the circumstances.

   Autoweld Systems Ltd v Kito Enterprises LLC [2010] EWCA Civ 1469 applied; Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir) [1980] 1 Lloyd's Rep 371 applied.

4. The court must carry out a balancing exercise in deciding whether to order security for costs. On the one hand, it must weigh the injustice to the claimant if prevented from bringing a proper claim by the order for security. Against that it must weigh

the injustice to the defendant if no security is ordered and at the trial the claimant's claim fails and the defendant to the claim is unable to recover the costs which have been incurred in defence of the claim from the claimant. The court is concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the claimant's impecuniosity. The court will require strong, clear evidence to make good any assertion that the security for costs order will stifle the claim and, although the court is sometimes justified in drawing inferences, such occasions will be rare. In the present case, the appellants failed to adduce sufficient or any evidence to satisfy the court that such will be the case. In these circumstances, it would be improper for the court to draw inferences in favour of the appellants.

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 applied; Sir Lindsay Parkinson and Co. Ltd. v Triplan Ltd. [1973] 2 WLR 632 applied; Porzelack K.g v Porzelack (UK) Ltd [1987] 1 WLR 420 applied.

5. 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. There ought to be an examination within the context of the particular individual or country concerned. The current residence of the first named appellant is uncertain; he may now reside in Germany. It does not appear that there are any reciprocal arrangements or legislation between St. Vincent and the Grenadines and Germany. Articles 33 and 38 of the EC Council Regulation No 44/2001 speak to recognition of judgments derived from member states, which St. Vincent and the Grenadines is not. Moreover, the enforcement of any order made against the first named appellant in this jurisdiction will require more expenses to be incurred to enforce it and may even require the institution of fresh proceedings at significant costs, all of which militate against not making a security for costs order.

   Richard Rowe et al v Administrative Services Limited et al SKBHCV2003/0222 (delivered 5th March 2004, unreported) approved; Articles 33 and 38 of the EC Council Regulation No 44/2001 applied.

6. Failure to comply with a statutory requirement except when compelled to do so by threat of deregistration, would justify an inference that the second named appellant would also not comply with a court order unless threatened with forfeiture of its security for costs to the respondents. Whilst it is true that section 512 of the Act maintains the liability of a company that has been struck off the register to meet its debts as though it had not been struck off the register, it would be unfair to the respondents that after the delinquency of the company, they should have to incur further expenditure to attempt to secure the enforcement and satisfaction of a costs order made in their favour against a clearly delinquent company. This indeed is a good reason why a security for costs order should be made against the

second named appellant. Accordingly, the learned master did not err in awarding the respondents security for costs as against the second named appellant.

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 applied; Sir Lindsay Parkinson and Co. Ltd. v Triplan Ltd. [1973] 2 WLR 632 applied.

7. The mere fact that a person resides outside of the jurisdiction is not sufficient to induce the making of a security for costs order. The discretion to award costs against such a claimant is to be exercised on objectively justified grounds relating to obstacles to, or to the burden of, enforcement in the context of the particular individual or country concerned. The appellants have not disputed the existence of assets held by the third and fourth respondents in the jurisdiction and their capacity to settle any costs order that may be made against the respondents. Further, the reciprocal enforcement of judgments arrangements that exist between St. Vincent and the Grenadines and the UK, where the third and fourth named respondents reside, will act as a sufficient safeguard for the appellants. Therefore, the learned master was correct in finding that the respondents' residence outside the jurisdiction does not provide a sufficient basis on which to make a security for costs order in favour of the appellants.

   Richard Rowe et al v Administrative Services Limited et al SKBHCV2003/0222 (delivered 5th March 2004, unreported) approved.

8. An appellate court will only interfere with the exercise of a judges' discretion if it can be shown that the judge erred in principle either by failing to take into account, or giving too little or too much weight, to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and as a result of the error or the degree of the error in principle, the judge's decision exceeded the generous ambit within which reasonable disagreement Is possible and may therefore, be said to be plainly wrong. The learned master applied the correct principles in coming to her conclusion; thus her decision does not exceed the general ambit within which disagreement is possible.

   Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

JUDGMENT

[1] MICHEL JA: This is an interlocutory appeal against the judgment of a master, delivered on 19th November 2013, granting the respondents (who were the claimants/ancillary defendants in the court below) security for costs of the ancillary claim brought by the appellants (who were the defendants/ancillary claimants in the court below) in the sum of $80,000.00 and dismissing the appellants'

application for security for costs of the claim brought by the respondents, with costs to the respondents in respect of both claims.

Background

[2] The first named appellant, Jorg "Stanley" Dornieden, was the first named defendant in the court below and is the sole shareholder and director of the second named appellant, Stanley's Food and Beverages Ltd, a company incorporated under the Companies Act, 1994[1] ("the Act") of St. Vincent and the Grenadines and which was the sixth named defendant in the court below.

[3] The first and second named respondents are companies incorporated under the Act and are both special purpose vehicles.

[4] The third and fourth named respondents are husband and wife and 100% shareholders in the first and second named respondents. The third named respondent is a director of both the first and second named respondents and the fourth named respondent is a director of the first named respondent.

[5] By fixed date claim filed on 22nd September 2010, the respondents brought an action against several parties, including the appellants, for the breach by the appellants of a Joint Venture Agreement ("JVA") between the respondents and the appellants, and for fraud, conversion, and breach of fiduciary duty. On 15th June 2011, the appellants filed a counterclaim against the respondents for the wrongful repudiation of the JVA.

[6] On 29th August 2012, the respondents filed a notice of application for security for costs of the appellants' ancillary claim against the respondents. The application was brought pursuant to rule 24.3(g) and/or rule 24.3(b)(iii) and rule 24.4 of the Civil Procedure Rules 2000 ("CPR") as against the first named appellant. As

[1] Cap. 143, Revised Laws of St. Vincent and the Grenadines 2009.

against the second named appellant, the respondent sought orders pursuant to section 548 of the Act and/or CPR 24.3(a) and 24.4.

[7] CPR 24.3 sets out the conditions that must be satisfied in order for the court, in the appropriate circumstances, to make an order for security for costs. The relevant parts of rule 24.3 on which the respondents relied are as follows:

> "24.3 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 –
> …
> (iii) has changed his or her address since the claim was commenced;
> with a view to evading the consequences of the litigation;
> …
> (g) the claimant is ordinarily resident out of the jurisdiction."

[8] CPR 24.4 allows for security for costs to be ordered for counterclaims and reads as follows:

> "24.4 Rules 24.2 and 24.3 apply where a defendant makes a counterclaim as if references in those rules –
> (a) to a claimant – were references to a defendant making a counterclaim;
> (b) to a defendant – were references to a claimant defending a counterclaim."

[9] The claimant also relied on section 548 of the Act, which provides that -

> "Where a company is plaintiff in any action or legal proceeding any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

[10] The grounds of the respondents' application for security for costs were as follows:

(1) With respect to the first named appellant, he had changed his address subsequent to the commencement of the claim, with a view to evading the consequences of the litigation. Further, the respondents were informed that the first named appellant had relocated to Germany and was now ordinarily resident out of the jurisdiction and that any costs ordered to be paid by the appellants would accordingly be very difficult to enforce or recover.

(2) With respect to the second named appellant, the company no longer operates as a going concern and it has failed to appoint a company secretary and to comply with the mandatory filing of annual and financial returns, which invited the conclusion that this is indicative of the company's illiquidity and that it will, therefore, be unable to pay any order for costs made against it.

[11] On 21st September 2012, the appellants filed a notice of application for security for costs against the third and fourth named respondents in relation to the substantive claim. This application was made pursuant to CPR 24.3(g),[2] which provides that an order for security for costs may be made where 'the claimant is ordinarily resident out of the jurisdiction'. The grounds upon which the application was made were that the third and fourth named respondents reside outside of the jurisdiction (in the United Kingdom) with limited assets within the jurisdiction and that it will be difficult to recover any order for costs made against them.

[12] The master ruled in favour of the respondents on both applications. With respect to the first named appellant, the master based her decision on the fact that he now resided in Germany, so that it would be difficult and expensive to enforce any costs order against him, because Germany operates under a different legal

[2] In the appellants' skeleton submissions, the appellants stated that their application was made pursuant to rule 24.3(c) which states that the order for cost may be made where 'the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;', however, in their notice of application for security of costs, the order was sought pursuant to CPR 24.3(g).

system to St. Vincent and the Grenadines and there is no agreement between the two countries for reciprocal enforcement of judgments, such as there is between St. Vincent and the Grenadines and the UK or between Germany and the UK. With respect to the second named appellant, the master based her decision on the fact that the company could be struck off the company register for failing to comply with the mandatory requirements of the Act and could therefore be compulsorily dissolved, and that in light of the fact that no steps had been taken to remedy the violations of the Act, any order for costs made in the proceedings would likely be in jeopardy of being incapable of enforcement. Additionally, the master found that the treaty between the UK and either Germany or St. Vincent and the Grenadines is insufficient to facilitate registration in Germany of judgments from St. Vincent and the Grenadines.

[13] In terms of the ancillary claim, the master took the view that it would be discriminatory and contrary to the proper exercise of the discretion given to her under the CPR to make an order for security for costs in favour of the appellants on the sole basis that the respondents reside outside of the jurisdiction and that it would therefore be difficult to enforce any order for costs made against them, in circumstances where there was no evidence of impecuniosity of the respondents.

[14] On 15th May 2014, the appellants obtained leave to appeal the decision of the master and filed a notice of appeal on 27th May 2014. Written submissions in support of the appeal were filed by the appellants on 30th June 2014, with the respondents filing their written submissions in reply on 19th March 2015.

Grounds of Appeal

[15] The appellants rely on the following grounds of appeal:

(1) The learned master in deciding at paragraph 25 that any order for costs that may be made in these proceedings against the appellants is likely to be in jeopardy of being incapable of settlement, applied wrong principles.

(2) Further or in the alternative, the learned master wrongly exercised her authority, power or discretion when she ordered (at paragraph 29 of her judgment) that the respondents must be provided with security for their costs.

(3) Further or alternatively, the decision of the master at paragraph 28(b) that a request for security for costs would not stifle the ancillary claim is unreasonable and cannot be supported by the uncontroverted evidence of the respondents.

(4) In the further alternative, the finding of the learned master at paragraph 37 that the appellants' submission is fanciful and based on supposition is unreasonable and unsupported by both the submissions on fact and applicable law in all relevant respects as appears from the copy of the written submissions forming part of the record of appeal.

(5) Further or alternatively, the decision of the learned master to grant security for costs on the counterclaim whilst refusing to do so in relation to the substantive claim exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong in that she failed in all the circumstances of the case to act justly.

[16] With respect to the first ground of appeal, the appellants state that the master ruled that there is sufficient credible evidence that the second named appellant would be unable to pay costs. They submit that although the master found that the second named appellant was not a nominal ancillary claimant and that none of the parties were impecunious, she nonetheless ruled (at paragraph 25 of her judgment) that a natural consequence of the second named appellant's failure to comply with any one of the mandatory requirements of the Act was that the company could be struck off the company register and could consequently be compulsorily dissolved and, therefore, any order for costs that may be made in the proceedings is in jeopardy of being incapable of enforcement.

17] The appellants further submit that the master applied wrong principles in that she failed to take into consideration certain factors. These factors included: (1) that a company is not automatically struck from the register for non-compliance and that the process for doing so is upon notice, which would give the second named appellant the opportunity to become compliant; (2) that even if the second named appellant was struck from the company register, the company, its directors and shareholders have a continuing liability under sections 483, 484 and 512 of the Act, and any order may be enforced as if the company had not been struck off the register, and (3) that if the second named appellant could be dissolved upon being struck from the register, it does not necessarily follow that it would be unable to pay a costs order. The appellants therefore contend that the master was influenced by irrelevant factors and failed to take into account considerations which were relevant.

[18] Still with respect to the first ground of appeal, the appellants state that the master ruled that there was a risk of being unable to enforce a cost order against the first named appellant and/or difficulty or expense in so doing. At paragraphs 28(c) and 33 of her judgment, the master held that being resident in a non-treaty state is not without more a reason to provide security for costs, and that the absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments does not without more justify an inference that enforcement would not be possible. The appellants therefore submit that the master wrongfully held that an order for costs, if made against the appellants, would involve significant expense to recover, well above what would be expended were they resident in the jurisdiction or in a Commonwealth jurisdiction. They submit that the Master's determination that the proposition that the treaty between the UK and Germany which facilitates the registration of UK judgments in Germany may be capable of facilitating the registration of St. Vincent and the Grenadines judgments which are capable of registration and enforcement in the UK is speculation only, and that Germany being a civil law jurisdiction which operates under an unfamiliar legal system, would require fresh proceedings having to be commenced in order to

recover costs, at similar if not significant costs. The appellants further submit that the master came to a conclusion regarding the issue of reciprocal enforcement without addressing the applicable law on the issue and thus failed to take sufficient account of this relevant matter.

[19] The appellants rely on the Administration of Justice Act 1920 (UK), as reproduced in **Blackstone's Civil Practice** 2004,[3] to state that an Eastern Caribbean Supreme Court ("ECSC") (High Court) judgment may be registered in the High Court of Justice in England within 12 months of the delivery of the judgment in order for it to be enforced. The appellants further rely on the EC Council Regulation No. 44/2001, as reproduced in **Blackstone's Civil Practice** 2004,[4] as the authority for allowing a decree, order, decision or writ of execution issued by the High Court of England to be enforceable in Germany without the need to bring fresh proceedings.

[20] In response to the appellants' first ground of appeal, the respondents submit that there was more than sufficient evidence to ground the exercise of the master's discretion against the first named appellant, including the fact that the first named appellant resided out of the jurisdiction and that after the issuance of the claim and counterclaim the first named appellant vacated Bequia with his possessions. The respondents adopted the definition of "ordinarily resident" from **Blackstone's Civil** Practice paragraph 65.5 and, applying the test in Blackstone, they submit that the first named appellant clearly ordinarily resided outside of the jurisdiction. The respondents suggest that the first named appellant had been coy about his residency by using expressions such as that he is "presently located" in Germany, "spending time there with his "mother who is elderly and … experiencing ill health", has "ceased" his café operations in Bequia, and is "currently employed on a part time basis". Also, that he had tried to suggest local residence by saying "this court has already held that…I have a house on Bequia and that I am a business man".

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[3] 5th edn. Oxford University Press at para 77.6, p. 940.
[4] 5th edn. Oxford University Press at para 77.7.

[21] The respondents further submit that the truth is evident in what the first named appellant did not say. He did not say that he did not leave the jurisdiction with his belongings; that he did not inform persons in Bequia that he was moving back to Germany and did not know when he was returning; that he no longer resided in the jurisdiction; that he had left no residential accommodation or possessions to return to; that he currently had a house or home in Bequia; or when he would be returning to the jurisdiction; or whether he had any business or familial connections there. Further, he did not exhibit medical evidence to support his assertion of his mother's illness. The respondents submit that the first named appellant's failure to address these facts and his failure to clearly state his residency, was an indicator of the validity of the respondents' assertion and that the first named appellant is ordinarily resident outside the jurisdiction.

[22] The respondents submit that the first named appellant being ordinarily resident outside the jurisdiction is sufficient reason to grant the respondents security for costs, because the location of the first named appellant presents real difficulty in enforcing any order. The respondents rely on the dictum of Lord Donaldson in DeBry v Fitzerald et al:[5]

> "…a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order… If … the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security. On this footing the discrimination is not based upon nationality or residence, but on the need to administer justice effectively."[6]

[23] In light of all the surrounding circumstances, being that the first named appellant left the jurisdiction and failed to disclose his address, the respondents submit that they are entitled to security for costs. Further, given that the first named appellant

[5] [1990] 1 All ER 560.
[6] At pp. 558-559.

did not address particulars that he alone would know, the court is entitled to draw adverse inferences against him and to find that he does not have any or any substantial assets in the jurisdiction of the court, is impecunious, and is unable to transfer any assets into the jurisdiction.

[24] Further, the respondents submit that the first named appellant's proposition that St Vincent and the Grenadines' judgments are enforceable in Germany by first obtaining a writ of execution in the UK and subsequently enforcing that writ in Germany, is mere speculation. They submit that it could not have been the intention of Parliament that judgments of St Vincent and the Grenadines would be enforceable in Germany. Additionally, registration is not automatic but at the discretion of the court,[7] the proposed method would be an abuse of process and would never be sanctioned by the court. One would have to prove that the judgment debtor is resident in the UK, of which there is no such evidence, and the European States could never have envisaged that Germany would fall under the provisions and protections that the UK has permitted to its Commonwealth members.

[25] In relation to the second named appellant, the respondents submit that they have adduced more than credible testimony that there is reason to believe that the second named appellant will be unable to pay their costs if the respondents are successful in their defence to the counterclaim. They submit that the second named appellant has failed to comply with statutory provisions in that it has not filed its annual returns at the Commerce and Intellectual Property Office ("CIPO"), no financial statements or certificates of solvency have been filed from 1999 to 2010, and this delinquency has not been remedied for at least four years.

[26] They submit also that the second named appellant was not trading as at 24th May 2007 and that it has no net assets apart from its initial stake in the JVA, which was

[7] Section 3(1) of the United Kingdom's Administration of Justice Act 1920, which is similar to Saint Vincent and the Grenadines' Commonwealth Countries Judgments Act.

paid in by the third and fourth named respondents, and that it is totally dependent on the outcome of its counterclaim to demonstrate that it is entitled to any assets at all.

[27] The respondents submit too that the second named appellant is currently a one-man company and that the first named appellant, who is its sole director and shareholder, left the jurisdiction subsequent to the filing of the claim and counterclaim and abandoned the company in its delinquent and impecunious state. Except for the information received by diverse residents of Bequia, where the first named appellant had resided, that he now resides in Germany, the respondents do not know the whereabouts of the first named appellant.

[28] The respondents submit that there is no evidence that, were the second named appellant to fail in its defence to the claims brought against it and in establishing its counterclaim, it could satisfy an order to pay any of the respondents' costs on the counterclaim. They contend that the second named appellant effectively admitted its impecuniosity when it was stated, at paragraph 27 of the submissions made on its behalf, that "on the assumption that the claimants' allegations that the sixth defendant is impecunious are true…" An inference can be drawn from the fact that the assumption has not been denied. Further, the second named appellant conceded in a less straightforward manner at paragraph 25 of the submissions, that its "assets are minimal".

[29] It was further submitted by the respondents that the second named appellant, since 31st May 2007, has existed to shelter the first named appellant against the consequences of his action as its agent under the JVA with the third and fourth named respondents.

[30] The respondents submit that it has been established that the second named appellant's application falls squarely within the conditions set out in CPR 24.3 and in section 548 of the Act. Therefore, it must now be considered whether the court

should exercise its discretion in their favour. The respondents submit that the relevant principles to consider are established in Sir Lindsay Parkinson and Co. Ltd. v Triplan Ltd.,[8] which were applied in Keary Developments Ltd v Tarmac Construction Ltd.[9] These principles are:

(i) The court has a complete discretion and acts in the light of all the circumstances.

(ii) The possibility or probability that the claimant will be deterred from pursuing its claim by an order is not, without more, a sufficient reason for not ordering security.

(iii) The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the claimant if prevented from bringing a proper claim by the order for security. Against that it must weigh the injustice to the defendant if no security is ordered and at the trial the claimant's claim fails and the defendant to the claim is unable to recover the costs which have been incurred in defence of the claim from the claimant. The court is concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the claimant's impecuniosity. But the court will also be concerned not to be so reluctant to order security that it becomes a weapon where the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.

(iv) Regard must be had to the claimant's prospects of success, but the court should not go into the merits in detail unless it can be shown

[8] [1973] 2 WLR 632.
[9] [1995] 3 All ER 534.

clearly that there is a high degree of probability of success or failure. In this context, it will also have regard to the conduct of the litigation so far and whether the defendant to the counterclaim has made any admissions in its pleadings or elsewhere, and whether there has been any payment into court.

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

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

(vii) Regard must be had to the timeliness or otherwise of the application for security.

[31] The respondents then refer to paragraph 28 of the master's judgement where she stated, in relation to the second named appellant, that the guidelines of Parkinson and Keary continue to be applicable in the consideration of an application under the Act. She further stated that she had considered the evidence filed and the relevance of each of the Keary factors in relation to the second named appellant and had overall regard to the overriding objective of the CPR.

[32] The respondents further submit that evidence had been led to show that the second named appellant would be incapable of settling a cost order and the onus therefore shifted to the second named appellant to lead evidence showing the existence of special circumstances to satisfy the master that the order should be refused.[10] The respondents contend that the second named appellant failed to discharge this burden. They maintain that there was ample evidence to find that

[10] See Jack O'Toole Limited v MacEoin Kelly & Associates [1986] IR 277.

the second named appellant would be unable to pay an order for costs, that it is a nominal defendant with no assets, that it does not trade, and that it is in breach of the provisions of the Act.

[33] With respect to the second ground of appeal, the appellants contend that the respondents' claim is for rescission, an account for fraudulent misrepresentation, damages for breach of contract, breach of fiduciary duties, deceit, conversion, delivery of goods and an account for breach of fiduciary duties, all of which relates to the JVA and its performance. On the other hand, the appellants' counterclaim is for declarations in respect of their entitlements pursuant to the provisions of the JVA, damages for breach of the JVA and for conversion of goods. Therefore, at paragraph 28(a), the master found that the ancillary claim brought by the appellants was directly related to the claim brought by the respondents. The appellants thus submit that the master failed to give consideration or sufficient consideration to the following - (1) whether as a matter of substance the appellants' position as a counterclaimant can be fairly equated with that of a claimant or whether in truth it did not go beyond that of a defendant; and (2) that the appellants have successfully pleaded a set off and as such the counterclaim is unable to be decided differently to the set off and would not incur extra costs above those incurred in arguing the set off point. In which case, since the set off is to be regarded as a defence, it is inappropriate to require security for costs from the appellants. In support of these points, the appellants rely on Pimlott & Ors v Meregrove Holdings.[11]

[34] In reliance on **Blackstone's Civil Practice 2004**,[12] the appellants further submit that it is a well settled principle that unless the costs of pursuing the counterclaim will add to the cost of defending the claim, then an order for security for costs of a counterclaim would not be fair or just. The appellants also rely on the case of Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir),[13] in

[11] [2003] EWHC 1766.
[12] 5th edn. Oxford University Press at para 65.3.
[13] [1980] 1 Lloyd's Rep 371.

which there was also a counterclaim and both parties bringing their individual claims wanted security for costs. At first instance it was held that, since the same basic issues arose out of the claim and the counterclaim, an order would be made in favour of the defendants in relation to the main claim but no such order was made in favour of the claimants in relation to the counterclaim. Upon appeal, Lawton LJ held that, in the circumstances, if one party got security for costs, the other should also get. He further stated that there is a discretion to order security for costs even in cases which arose out of the same subject matter, but if the counterclaim is a defence and nothing more, the discretion should not normally be exercised in favour of ordering security for costs.

[35] The appellants contend that, further or in the alternative, the master failed to give any consideration to the fact that the appellants would in all likelihood succeed in their counterclaim.

[36] The appellants submit that the respondents had made certain admissions which establish clearly that the ancillary claim is genuine and that there is a high probability that it will succeed. They submit that the respondents admitted that the first named appellant ought to receive commission on building works; that the JVA sets out the duties which the first named appellant was performing through the second named appellant and the remuneration which he was to receive via the second named appellant; and that they must account to the second named appellant for any loss which is found to have been suffered upon the taking of account, subject to its responsibility for the acts of dishonesty or breach of fiduciary duties which the court may find in relation to its director, the first named appellant. Therefore, the appellants contend that the court must consider the important issue as to whether the amounts which the first named appellant is likely to recover by virtue of the agreement between the parties would potentially set off any damages which the respondents would potentially recover, even if the latter's claim succeeds and the ancillary claim for damages fail.

[37] In response to the appellants' second ground of appeal, the respondents state that, in his affidavit, the first named appellant deposed 'that the applicant's counterclaim aforementioned arises out of the same circumstances as the claimants' claim'. The respondents submit that the applicable principles are to be found in Autoweld Systems Ltd v Kito Enterprises LLC.[14] These are that - (1) there is a discretion to award security even in cases which arise from the same subject matter; (2) the fact that a claim and a counterclaim raise the same issues is an important but not a decisive factor so as to exclude the exercise of the discretion; (3) there is no general principle that where there is a claim and a counterclaim both sides are to be treated equally; (4) an important factor is to determine what would happen if security was ordered but not given; (5) the paramount consideration remains whether it is just to make the order in the circumstances. In any event, the respondents maintain that the claim and counterclaim raise substantially different issues and that a claim for conversion and oppression can never be considered as an action for set off, nor can such a claim be considered as a defence to the respondents' action.

[38] The respondents further submit that the appellants' submission in their counterclaim has no merit. The appellants sought a declaration that they are shareholders with 20% equity in the first and/or second named respondent or, alternatively, that they have a 20% beneficial interest in the property constituting the project. They (the respondents) contend that a claim grounded on the JVA cannot possibly be sustained against all the respondents, including the first and second named respondents, because the first and second named respondents were not parties to the JVA. This is evident from specific clauses of the JVA and from communication between the parties.

[39] The respondents thus contend that the simple object of the JVA was to fund the joint development or building project. They submit that the JVA expressly excluded joint ownership with the developer, with the developer's corporate

[14] [2010] EWCA Civ 1469, paras. 39-59.

vehicle or in the realty. Neither of the appellants was a shareholder in the first or second named respondents. However, even if they were, it is trite law that, as a general rule, shareholders do not have equitable interests in the company's assets and are not part owners of the undertaking. Shareholders do not share property in common and 'at most only share certain voting rights in respect of dividend, return of capital on a winding up, voting and the like'.[15] Shareholders never have a proprietary interest in the company's property,[16] and the respondents submit that there is nothing in this case which could lead a court to depart from the general rule.

[40] The respondents further submit that the second named appellant was not a party to the two agreements for sale in which the third and fourth named respondents were purchasers and which were annexed to and incorporated into the JVA. Therefore, they were not parties to the respective deeds of conveyance.

[41] The respondents also submit that the first named appellant cannot succeed with his claim for a declaration that there has been oppression in relation to him, because section 241(2) of the Act gives relief to a restricted class of complainants, which would not include the first named appellant.

[42] The respondents maintain, as a central part of the third and fourth named respondents' claim, that the JVA is void ab initio, because of the dishonest misrepresentations of the first and second named appellants. They submit, however, that if the court finds that the JVA is valid and subsisting, the respondents are not disputing the applicability of the provisions concerning management fees and profit allocation, subject always to account and the impact of any offset or extinction by the respondents' own claims. The respondents state that they have also implemented measures, including an undertaking to ensure that if perchance the JVA was not void ab initio and the outcome is for any sum to

[15] Gower and Davies, Principles of Modern Company Law, (9th edn., Sweet & Maxwell 2012) at para. 23-1.
[16] Gower and Davies, Principles of Modern Company Law, (9th edn., Sweet & Maxwell 2012) at para. 23-2.

be accounted for to the second named appellant, the second named appellant receives its entitlement as and when it falls due under and in accordance with the strict terms of the JVA. Whilst the quantum is simply an accounting exercise, the respondents submit that there is therefore no dispute on the issue of the joint venturers' rights under the JVA were it found to be valid. They submit that none of these accrue to the first named appellant.

[43] The respondents further submit that if the second named appellant is unable to put up security and the counterclaim is stayed, it does not lose any benefit or entitlement whatsoever since in the event that the JVA is not deemed void ab initio as claimed in the claimant's claim, then the second named appellant's entitlement will be accounted for pursuant to the terms of the JVA. They submit, however, that since the first named appellant has no entitlement under the JVA, he should make proper security before being allowed to proceed with this head of his counterclaim.

[44] The respondents posit that not only does the first named appellant reside outside the jurisdiction, but so does the second named appellant. The principle, they submit, is that most companies reside where they are incorporated, but strictly they reside where their central control and management are. It is a question of fact, but consideration will be given to the place of incorporation, the place where the real trade is carried on, the place where the company's books are kept, the place where its administrative work is done, the place where the directors meet and live, the place where its chief office is located, and the place where its secretary lives.[17] Applying this test, and considering that the second named appellant has no place of residence in St. Vincent and the Grenadines, does no business or trade or any administrative work there, it is clear that this impecunious second named appellant ordinarily resides in Germany, where its current sole director, officer and shareholder lives. These considerations tilt the balance even further in the respondents' favour.

[17] Blackstone's Civil Practice 2004, 5th edn. Oxford University Press at para 65.6

[45] The respondents maintain that the first named appellant has no prospect of succeeding on the counterclaim, since he was the agent of the second named appellant and not a party to the JVA and, therefore, has no contractual or other entitlement to any remuneration from any of the respondents. The respondents submit that the facts placed before the court by the first named appellant do not sustain his counterclaim. The facts show that any loss alleged by the first named appellant is, as a matter of law and fact, the loss, if any, of the second named appellant. Even so, the respondents contend, the prospects of success of the second named appellant on its counterclaim are low to nil. In particular, the prospects of success are nil in respect of those aspects of the appellants' respective counterclaims not required to defend the claim in this action and addressed in one of the affidavits. The respondents submit that the underlying principle is that the court will have regard to the comparative strength of the counterclaim vis-a-vis the defence, if apparent without prolonged examination. However, the standard is one of very high probability.

[46] In support of their submission on this point, the respondents rely on the dictum of Sir Nicolas Browne-Wilkinson V-C in Porzelack K.g v Porzelack (UK) Ltd,[18] where he said:

> "…if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure."

The respondents thus conclude that, whilst the first named appellant's counterclaim will clearly fail, there is a high probability that the second named appellant's counterclaim will also fail.

[18] [1987] 1 WLR 420 at p. 423.

[47] The respondents rely on the rule in Foss v Harbottle[19] to substantiate their position that the first named appellant's counterclaim will fail. The line of reasoning is that there is no evidence that the first named appellant's claims, whether as officer, shareholder or agent of the second named appellant, are not that of the second named appellant. This proposition, the respondents submit, is also evidenced by the first and second named appellants' statement of case, which shows that their counterclaims for financial relief are conjoined and or mutually interchangeable and aimed at all the respondents.

[48] Alternatively, the respondents maintain that it is a central part of their claim that the JVA is void ab initio because of dishonesty of the first named appellant on his own behalf and on behalf of the second named appellant. However, if the court is to find the JVA to be valid and subsisting, given that at this stage of the proceedings a determination of the prospects of success is critical, a construction of the JVA is necessary to evaluate the strength or weakness of the second named appellant's counterclaims. In light of this, the respondents contend, the only parties to the JVA are the third and fourth named respondents (the developers) and the second named appellant (the project manager). Notwithstanding the integral involvement of the first named appellant in the discussions leading up to the attestation of the JVA, and the fact that the first named appellant, being the principal shareholder and sole director of the second named appellant, may ultimately benefit from any returns realized under the JVA, the first named appellant is not a party to the JVA and cannot therefore sue on it. The chances of the first named appellant's success on this counterclaim are therefore slim. In support of this point, the respondents cite Catherine Lee v Lee**'s** Air Farming Limited (New Zealand).[20]

[49] The respondents further submit that the second named appellant is not entitled to a 20% shareholding in the first or second named respondents; that there is no

[19] (1843) 67 ER 189.
[20] [1960] 3 All ER 420 at 426.

provision in the JVA that the second named appellant should be a shareholder in any of the corporate vehicles; and that the only shareholders of the first and second named respondents are the third and fourth named respondents.

[50] With respect to the third ground of appeal, the appellants submit that although it is generally for a claimant to satisfy the court that it would be prevented from continuing the litigation if the security for costs order is made, the court may infer such difficulty. The appellants further submit that the master did find evidence to infer that the appellants would be unable to pursue their claim if an order for security for costs is made. This evidence is to be found at paragraphs 12 and 25 of the master's judgment. The evidence which the appellants refer to is that adduced by the respondents, which was uncontroverted, that the second named appellant had failed to comply with mandatory statutory requirements despite notices to do so.

[51] In response to the appellants' third ground of appeal, the respondents posit that the appellants cleverly failed to explain why the request for security for costs would stifle the ancillary claim. They submit that if the appellants were to explain their position then they would have to admit that they are not in a position to pay the cost of the appeal. This, the respondents contend, would be diametrically opposed to the appellants' submissions on their first ground of appeal, in which they argued that they are in a position to make good on a cost order made against them. In the respondents' view, a litigant facing a security for costs application should not leave it up to the court to infer that his or its claim would be stifled. Strong, clear evidence is needed, because although it is possible that the court will make such an inference, such instances will be rare. In support of this view, the respondents quoted the dictum of Gibson LJ in Keary Developments v Tarmac Construction:[21]

> "The other question which is relevant …is whether the plaintiff company will be prevented from pursuing its litigation if an order for security is made against it. On this, evidence from the plaintiff may be needed…

[21] At p. 542.

> However…the Trident case establishes that in certain circumstances it will be proper to draw inferences, even without direct evidence, that a company would probably be prevented from pursuing its claim by an order for security. But, in my judgment, such a case is likely to be a far rarer one than those cases in which the court will require evidence from the plaintiff to make good any assertion that the claim would probably be stifled by an order for security for costs."

[52] The respondents assert that the second named appellant adduced no evidence whatsoever in support of its claim of 'effective deprivation' and how it actually impacts its ability to fund the counterclaim. It was, the respondents contend, the duty of the second named appellant to provide the court with sufficient particulars to ground its insinuation of stifling, as this information is peculiarly within the second named appellant's knowledge. The second named appellant provided no accounts, no evidence of means or lack of means, whether of the company itself, or of its sole director and shareholder, or of the first named appellant, or other backers. It is in flagrant breach of its statutory filings and it says nothing about how it is financing this very expensive litigation. The respondents therefore contend that, in these circumstances, it is not open to the court to find that an order for security for costs in favour of the respondents would stifle the second named appellant's counterclaim.

[53] The appellants did not elaborate their fourth ground of appeal and the respondents responded to it only by submitting that it had no merit.

[54] With respect to the fifth ground of appeal, the appellants base this ground on the ruling of the master at paragraphs 28(c) and 36 of her judgment. At paragraph 28(c), she ruled that she agrees that the first named appellant's current residence in Germany would cause significant difficulty in recovering any order for costs made against the first named appellant well above what would be expended were he resident in the jurisdiction or in a Commonwealth jurisdiction. At paragraph 36, she ruled that it would be, in her view, discriminatory and contrary to the proper exercise of her discretion under the CPR were she to award security for costs against the respondents on the basis of their residence outside the jurisdiction and

on the basis of nationality and that, unless the appellants could show that a costs order is likely to be unenforceable or will result in significant expenditure, there was no basis to award security. The appellants assert that they acknowledge the reciprocal enforcement treaty which facilitates the registration of judgments of the High Court of St. Vincent and the Grenadines in the UK.

[55] In response to the appellants' fifth ground of appeal, the respondents contend that this ground too is without merit and that it was dealt with in its responses to the appellants' other grounds of appeal. The respondents further submit that the appellants' contention that a costs order can be executed in Germany by registering the judgment in England and that, by extension, an order of the High Court of England is enforceable in Germany is fanciful and meritless and invites the court to speculate.

[56] Having addressed each ground of appeal in its submissions, the appellants then crystallize their grounds of appeal into two general categories: (1) that the master, in exercising her judicial discretion, erred in principle by failing to take into account or giving too little or too much weight to relevant factors and considerations and by taking into account or being influenced by irrelevant factors and considerations; and (2) that as a result of the error or the degree of the error in principle, the master's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. The appellants therefore prayed that the order of the master be set aside with costs to the appellants and that security for costs be granted to the appellants.

Analysis

[57] The law as it relates to allowing an appeal based on the exercise of judicial discretion is now well settled, and the case of Dufour and Others v Helenair Corporation Ltd and Others[22] has been referred to so many times in judgments

[22] (1996) 52 WIR 188.

of this Court as not to merit repetition here. The clearly established position is that an appellate court will only interfere with the exercise of a judges' discretion if it can be shown that:-

1. the judge erred in principle either by failing to take into account, or giving too little or too much weight, to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and

2. as a result of the error or the degree of the error in principle, the judge's decision exceeded the generous ambit within which reasonable disagreement Is possible and may therefore, be said to be plainly wrong.

In the present case, these principles would apply to the exercise of the master's discretion.

The Counterclaim

[58] The appellants have characterised their counterclaim as a set off, so that it is to be regarded as merely a defence to the respondents' claim. If such is the case, then the Court is guided by the principle laid down in Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir) that although there is a discretion to award security for costs even in cases which arise out of the same subject matter, if the counterclaim is nothing more than a defence to the main claim, then normally the discretion should not be exercised in favour of ordering security. I do not however find that the counterclaim is merely a defence. It may, for the most part, have arisen out of the same subject matter as the main claim, that being the JVA, but it raises substantially different issues in the orders sought. In any event, the paramount consideration remains whether it is just to make the order in the circumstances.[23]

[23] Autoweld Systems Ltd v Kito Enterprises LLC [2010] EWCA Civ 1469.

[59] As was submitted by the appellants, the prospect of success is a relevant factor in deciding whether or not to exercise judicial discretion in favour of granting security for costs. This task, however, must be done without venturing into the merits of the case unless it can be clearly shown that there is a high degree of probability of success or failure. The case law is quite explicit on that, which can be seen in the extracts from the cases of Keary Developments Ltd v Tarmac Construction Ltd and Porzelack K.g v Porzelack (UK) Ltd contained in paragraphs 30 and 46 respectively of this judgment. As I have already stated, the claim and counterclaim both seem to be products of the JVA entered between the parties. The respondents have adamantly and repeatedly stated that the first named appellant has no prospect of success, primarily because he is not a party to the JVA. They assert that his role in the agreement was that of an agent on behalf of the second named appellant and therefore he has no contractual or other entitlement to any remuneration from any of the respondents. This they use as a basis to say that the first named appellant has no prospect of success in bringing his counterclaim. The appellants, on the other hand, referred to certain "admissions" made by the respondents in their statement of case which would suggest that the first named appellant is in fact a party to the JVA.

[60] Upon viewing the JVA, it is obvious, as it was explicitly stated in it, that the JVA has two parties - Mr. Henry John Marriot and The Hon. Dinah Lilian Marriott on the one hand and the second named appellant (Stanley's Food and Beverages Ltd) on the other hand. I am guided by the basic contractual principle of privity of contract in saying that the first named appellant cannot sue on the JVA since he is not a party to it. The contract refers to the third and fourth named respondents as 'the Developer' and the second named appellant as 'the Project Manager'. Even if the first named appellant was to receive some sort of benefit under the JVA, this would not entitle him to sue on it. Therefore, if the first named appellant's counterclaim is solely based on the JVA, he has no prospect of success.

[61] As for the second named appellant, the respondents have acknowledged that its counterclaim has a prospect of success, though they regard it as low to nil. What is undoubtable is that there is not a very high prospect of success or failure that would justify me going into the merits of the case and as such that is a matter for the trial judge. There is a prospect of success for the second named appellant's counterclaim and as such it has to be considered among the factors in deciding whether or not to grant the respondents security for costs.

[62] The appellants further stated that a security for costs order would stifle their counterclaim. They have failed to adduce sufficient or any evidence to satisfy the Court that such will be the case. Instead, they assert that the master had made findings that would infer that their claim would be stifled. The evidence refers to the failure of the second named appellant to comply with certain mandatory requirements in the Act. This evidence does not work in favour of the appellants' submission and, if anything, it is detrimental to it. Further, the appellants did submit before the master that this evidence does not mean that they will be unable to support a costs order were one to be made, so I fail to understand how it is that they are putting forward that evidence in support of their submission that a security for costs order will stifle their counterclaim.

[63] I am guided by the principles laid down in the Keary case submitted by the respondents and reproduced in paragraph 30 of this judgment. As was stated in the Keary case, strong, clear evidence is needed by the appellants to show that the security for costs order will stifle their claim and, although the court is sometimes justified in drawing inferences, such occasions will be rare. I do not find the present case to be one in which it is proper for the court to draw inferences in favour of the appellants.

[64] The respondents repeatedly submitted that the appellants are impecunious and that the second named appellant is a nominal claimant. These submissions were rejected by the master based on the evidence before her and no further evidence

has been adduced to satisfy this Court otherwise. Further, if the appellant was impecunious, it would assist their case more than that of the respondents. Though impecuniosity is not a decisive factor, it is a cogent factor in deciding whether to grant a security for costs order against the impecunious party and it would have been sufficient evidence to prove that the impecunious party's claim would be stifled by a security for costs order.[24]

The First Named Appellant

[65] The evidence against the first named appellant is that he has left the jurisdiction with his belongings and possibly now resides in Germany. It appears that his current address is uncertain and the conclusion that he is in Germany is inferred from the information that the respondents received from residents of Bequia and from the fact that he asserts that he is caring for his ill mother who resides in Germany. The fact that the first named appellant is appealing the master's decision on the reciprocal enforcement of judgment treaty is also an indication that he resides or intends to reside in Germany. In any event, what seems to be clear is that he no longer resides in St Vincent and the Grenadines, he has cleared his belongings from the jurisdiction, closed his businesses, and is divorced from his Vincentian wife.

[66] The first named appellant left the jurisdiction subsequent to the filing of the claim and counterclaim, which caused the respondents to contend that this was done to avoid the consequences of the litigation. But this is a serious allegation, and it cannot be that the first named appellant's departure from St. Vincent and the Grenadines subsequent to the filing of the claim and counterclaim will, without more, suffice to show that he is trying to avoid the consequences of the litigation.

[24] Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534.

[67] The mere fact that a person resides outside of the jurisdiction is not, however, sufficient justification for the making of a security for costs order. As was stated by Baptiste J in Richard Rowe et al v Administrative Services Limited et al:[25]

> "The discretion to award costs against a claimant ordinarily resident out of the jurisdiction is to be 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."[26]

[68] There is also the issue of reciprocal enforcement of judgment legislation, which is non-existent between St. Vincent and the Grenadines and Germany, but exists between St. Vincent and the Grenadines and the UK, as well as between the UK and Germany. The appellants contend that the agreement between the UK and Germany can extend to facilitate the enforcement of judgments from this jurisdiction that are enforceable in the UK, to be also enforceable in Germany. But, although they criticised the master for not addressing the applicable law on this issue, they did not themselves furnish the Court with or even refer to any applicable law and I am not aware of any judicial or other authorities which could assist the appellant in this regard. I do not believe that learned Queen's Counsel for the appellant is suggesting that the master, or this Court, should search for evidence or legal authorities to assist the appellant's case. What the appellant did provide and what this Court is aware of is the applicable law as it relates to the UK and St Vincent and the Grenadines and the UK and Germany.

[69] The EC Council Regulation No 44/2001 ("the Regulation") governs the recognition and enforcement of judgments between member states. The UK and Germany are EU member states. Proper construction of Chapter III of the Regulation, which deals specifically with recognition and enforcement, and, in particular, articles 33 and 38, provide for the recognition and enforceability of a judgment in one EU

[25] SKBHCV2003/0222 (delivered 5th March 2004, unreported).
[26] At para. 12.

member state, which judgment emanates from another member state. The articles are reproduced below:

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

A judgment given in St Vincent and the Grenadines and capable of being enforced in the UK would not, however, satisfy the requirements of articles 33 and 38 because it would not have been "given in a Member State" and I have found no other authority that could sustain the appellants' submission on this issue.

[70] The case of Richard Rowe et al v Administrative Services Limited et al is an authority for the proposition, however, that that the absence of any reciprocal arrangement or legislation does not by itself justify an inference that enforcement would not be possible. This has to be examined within the context of the particular individual or country concerned. As has been noted, the current residence of the first named appellant is not certain and the enforcement of any order made against him in this jurisdiction will require more expenses to be incurred to enforce it and may even require the institution of fresh proceedings at significant costs, all of which militate against not making a security for costs order. In any event, the granting of security for costs to the respondents would assure them that regardless of where the first named appellant decides to become ordinarily resident, the respondents will be able to recover their costs against him if an award of costs is made against the appellants.

The Second Named Appellant

[71] The main evidence against the second named appellant is that it had failed to comply with mandatory requirements of the Act, such as the filing of annual returns and financial statements from 1999 to 2010 and appointment of a company secretary. The appellants submit that this does not lead to the conclusion that the second named appellant will not be able to settle a costs order. Further, the appellants state that being struck off the companies' register is not an automatic consequence, since it involves a procedure which requires the defaulting party to be notified of such impending action. This notice, they contend, will give the second named appellant the opportunity to comply with the Act. But failure to comply with a statutory requirement except when compelled to do so by threat of deregistration, would justify an inference that the second named appellant would also not comply with a court order unless threatened with forfeiture of its security for costs to the respondents. Whilst it is true that section 512 of the Act maintains the liability of a company that has been struck off the register to meet its debts as though it had not been struck off the register, it would be unfair to the respondents that after the delinquency of the company, they should have to incur further expenditure to attempt to secure the enforcement and satisfaction of a costs order made in their favour against a clearly delinquent company. This indeed is a good reason why a security for costs order should be made against the second named appellant.

The Respondents

[72] It would appear that the only basis on which the appellants can ground a claim for security for costs against the respondents is that the respondents reside outside the jurisdiction. The appellants claim that if they are impecunious as the respondents claim that they are, then it will be difficult for them to enforce any costs order that may be made against the respondents. But the appellants have not disputed the existence of assets held by the third and fourth named respondents in the jurisdiction and their capacity to settle any costs order that may be made against the respondents. Further, the reciprocal enforcement of

judgments arrangements that exist between St. Vincent and the Grenadines and the UK, where the third and fourth named respondents reside, will act as a sufficient safeguard for the appellants. Therefore, I must agree with the master, who was also guided by Richard Rowe et al v Administrative Services Limited et al, that the respondents' residence outside the jurisdiction does not provide a sufficient basis on which to make a security for costs order in favour of the appellants.

Conclusion

[73] In rendering her judgment in the court below, the master did not exercise her discretion in a manner that exceeded the generous ambit within which reasonable disagreement is possible or in a manner in which she can be said to be clearly or blatantly wrong. Neither did she fail to take into account relevant considerations and accord to them their proper weight, nor did she take into account irrelevant considerations. I find no basis therefore to disturb the ruling of the learned master that security for costs be ordered against the appellants in favour of the respondents and that the appellants' application for security for costs against the respondents be dismissed.

[74] I make no order as to costs on this appeal.

Mario Michel
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]