COMMONWEALTH OF THE BAHAMAS CLE/GEN/FP/00218/2008

IN THE SUPREME COURT

Civil Side

BETWEEN

FLORIDA MARINE AND CAREY MARINE INTERNATIONAL

T/A CAREY MARINE

Plaintiff

AND

NEW HOPE HOLDING CO. LTD.

Defendant

Appearances:	Mr. Osman Johnson on behalf of the Plaintiff
	Mr. Dwayne Fernander on behalf of the Defendant
Hearing date:	26th April 2022

Decision

Introduction

1. The parties have each filed their respective Summonses in these proceedings.
    a. By a Summons filed on the 23rd April, 2019 pursuant to Order 31 A, Rule 21 and 22 of the Rules of the Supreme Court ("the RSC") the plaintiff seeks an Unless Order as a result of the defendant's failure to comply with the Directions Order made on December 11, 2018. That Summons is supported by the Affidavit of Trinity Russell filed on the 17th May, 2021;

    b. By a Summons filed on the 24th April, 2019 the defendant seeks an Order pursuant to Order 2, Rule 2 of the RSC to set aside the plaintiff's Summons for an Unless Order on the ground that it does not comply with the requirements of Order 31A, Rule 21(2) of the RSC, an Order pursuant to Order 23, Rule 1 of the RSC that the plaintiff give security for the 1st and 2nd defendants costs on the ground the plaintiff is ordinarily resident out of the jurisdiction and the plaintiff's address is not stated in the Writ of Summons and Statement of Claim required by the RSC, an Order that all further proceedings pending the payment of security be stayed and costs;

    c. By a Summons filed on the 25th May, 2021 pursuant to Order 18, Rule 19(1)(b),(c) and (d) of the RSC the plaintiff seeks an Order to set aside the defendant's application for security for costs and costs.

Background

2. The plaintiff filed a Writ of Summons on the 26th September 2008 whereby the plaintiff alleges that the 1st defendant breached a written contract dated the 10th January, 2007 made between the plaintiff and the 1st defendant and the 2nd defendant was acting as servant and/or agent of the 1st defendant. No appearance was entered on either defendant's behalf and the plaintiff subsequently obtained a Judgement in Default of Appearance against the 1st defendant on the 14th October, 2008. On or about the 29th May, 2009, the Court ordered that the 1st

defendant pay to the plaintiff the sum of one million two hundred seventy thousand dollars ($1,270,000.00), the sum claimed as damages in the writ of summons following an assessment of damages hearing 2nd December, 2008. The plaintiff then sought to enforce the Judgement. The defendant subsequently made an application to set aside the Judgment in Default and by an Order dated the 2nd June 2011 the Judgement in Default of Appearance was set aside.

3. Sometime in or around the 7th June, 2011, the plaintiff filed a Summons seeking leave to amend the Writ of Summons and by a Consent Order filed on the 8th June, 2011, the parties consented to the plaintiff's application for leave to amend which removed the 2nd defendant as a party to the proceedings. The parties also agreed that the costs incurred by the application to amend were to be paid by the plaintiff to the defendants to be taxed if not agreed. The plaintiff filed its Amended Writ of Summons and Statement of Claim on the 8th June, 2011. The defendant filed its Defence and Counterclaim on the 28th June, 2011 and the plaintiff filed its Reply and Defence to Counterclaim on the 8th August, 2011.

4. A review of the file shows that the defendant filed its Bill of Costs, Statement of Parties and Notice of Taxation on or around the 11th November, 2011. An Affidavit of Aisha Stuart-Smith, on behalf of the defendant was filed in or around the 26th January, 2012 asking the Court to extend the time for filing of documents pursuant to Order 59, Rule 14 of the RSC in relation to the costs order made. She deposes that the defendant sought to settle the costs by letter dated the 7th July, 2011 with a 7 day response from the plaintiff.

   Further, she states that due to miscommunication and inadvertence in their clerical department the taxation documents were not filed in the requisite time frame as Counsel who had carriage of the matter had taken holiday and did not return until after the expiration. It is noted that nothing further in relation to the taxation of the Bill of Costs or whether

an order was made by the Court allowing an extension of the time period.

5. Sometime in or around the 11th December, 2018 the parties appeared before the Court for case management and a Directions Order was filed on the 18th January, 2019.

6. The parties appeared before this Court in reference to their respective applications on the 24th February 2022. During the hearing the defendant contended that the plaintiff had been struck off the Company Register and was not legally before the Court. The plaintiff was granted leave to apply to have the Company reinstated and upon the payment of outstanding company fees and filing of current returns the plaintiff was reinstated.

7. As there are several Summonses before the Court, the Court will first deal with the application for strike out.

Application to Strike out the Security for Costs Application

8. The plaintiff in its skeleton arguments contends that the defendant's application(s) has no merit and amounts to an abuse of process pursuant to Order 18, Rule 19(1)(d) of the RSC and relies on Order 31, Rule 18(2)(i) and (s) in support of its contention. Counsel for the plaintiff submits that the Court may treat the defendant's willful and unnecessary delay between the filing of the application for security and the eventual hearing on the 24th February, 2022 following the plaintiff's request that the matter move forward as such an abuse. He further contends that the facts show that the defendant filed the application(s) in a deliberate attempt to delay the rightful progress of the action to trial resulting in further and unnecessary costs incurred by the plaintiff and an inappropriate waste of the Court's time. Additionally he asserts that the defendant's application is a clear abuse of the Court's process as the application is not supported by valid grounds and seeks to legally embarrass the plaintiff.

9. It is also his contention that the Court may strike out the defendant's Summons on the basis that it has not been prosecuted within a reasonable time period and is otherwise scandalous, frivolous and vexatious and an abuse of the court's process.

   Further, he asserts that the Court should consider the aggravating factors on behalf of the defendant such as its failure to advance the present application; failing to comply with the Directions Order; failing to provide in detail the sums sought for security; failing to provide the estimated legal costs for such security and failing to communicate with plaintiff counsel to fix the matter for case management. **See Burns v Ship-Link Ltd [1995] Lexis Citation 1354; Mobile Doctors v Johan T/AS Your Lawyers [2014] EWCA Civ 1452; Rev. Oswald Joseph Reichel v Rev. John Richard Magrath [1889 H. L. E] 22; Outram v Academy Plastics Limited [2001] 367 CA; B(Deportation: Application to Strike Out) [2014] UKSIAC SC 6 29; David Eric Laing v Taylor Walton (a Firm) EWHC 196 (QB); Odgers On Civil Court Action, Practice and Precedents, pg 210; Order 31, Rule 18 (2)(s) of the RSC**.

10. Counsel for the plaintiff also submits that the relief sought by the defendant's Summons is relief, which the defendant is not entitled to and as such on the face of the application it is not a bona fide application. It is his submission that any party seeking to advance a prayer for relief to which it is not lawfully entitled is considered scandalous, frivolous and vexatious. **See Norman v Matthews [1916] 85 L.J.K.B. 857, 859; Arrow Nominees Inc v Blackledge [2000] 2 B.C.L.C 167 CA; The Civil Procedure White Book, 2010 at page 71.**

11. Lastly, he submits that the defendant's lack of sufficient detail as to the amount sought for security and lack of evidence in support of its prayer for relief in its affidavit in support amounts to such summons being embarrassing and tending to delay the fair trial of the action. Further, he asserts that there has been an elapse of 34 months since the filing of

the defendants summons and there is no evidence that suggests the defendant took a single step to have the application fixed for hearing.

12. Counsel for the defendant in response submits that the provisions of Order 18, Rule 19 of the RSC is intended to apply to "pleadings" i.e. documents in which a party to proceedings in a court of first instance is required by law to formulate in writing his case. He contends that a Summons may be heard and either acceded to or dismissed but not struck out and that Order 18, Rule 19 does not apply and neither is there an inherent jurisdiction for such strike out to occur. **See Montague Investments Limited v Westminster College Ltd. and another [2020] 1 BHS J. No. 11; Halsbury Laws of England 36(1), para 3, Fourth Edition Reissue; Halsbury Laws of England, Fourth Edition reissue, 36(1), paras 47-62.**

The Law

13. The plaintiff makes this application pursuant to Order 18, Rule 19(1)(b),(c) and (d) of the RSC.

14. Order 18 Rule 19 of the RSC provides:-

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

15. The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at

the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in **Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc SCCiv App No. 312 of 2013**).

16. Auld, LJ in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589 at 613 stated that** "*It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence…the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case.*"

Analysis and Discussion

17. As I understand the crux of the plaintiff's contention it is that the defendant's application for security is an attempt to delay the trial of a bona fide claim and the defendant's failure to identify the amount of security and the relief sought constitutes as frivolous, vexatious and embarrassing and amounts to an abuse of the Court process.

18. The Court's power on an application to strike pursuant to Order 18, Rule 19 of the RSC should only be used in plain and obvious cases.

Further, as stated by Allen, J above, it should only be used in cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.

The application the plaintiff seeks to strike is an application for security for costs, plainly an application asking the court to have the plaintiff who may or may not be ordinarily resident within the jurisdiction to provide some security in the event the defendant is successful in the action and the plaintiff may be unable to cover the costs of the action. The nature of the defendant's application for security is interlocutory, an application

which is usually made by Summons. The editors of Atkins Court Forms Second Edition, Volume 1, 1978 Issue under the heading "Pleadings" on page 70 at paragraph 52 state:- *"Pleadings generally". If judgment is not obtained summarily, the action must proceed to trial before judgment can be obtained and, in order to define the issues to be determined at the trial, the opposing parties must serve on each other successive pleadings containing statements of the facts on which each party relies. There is, however, procedure for passing from appearance to trial without intervening pleadings in certain instances. The pleadings commonly in use are the statement of claim, the defence and, if appropriate, counterclaim; and the reply and, where necessary, defence to counterclaim…A writ of summons is not a pleading, but a statement of claim indorsed on a writ is, and so are further and better particulars."* Therefore, considering excerpt from the learned editors of Atkins and accepting the submissions of Counsel for the defendant and his assertion that in the circumstances, the plaintiff can object to the defendant's application as opposed to making an application to strike accepting them in full, the Court forms the view that the defendant's summons for security for costs is not a pleading to which the Court can strike under the provisions of Order 18, Rule 19 of the RSC.

19. The Court dismisses the plaintiff's application to strike out the defendant's application for security for costs. As the plaintiff's application is hereby dismissed, the Court awards the defendant the costs of the application to be paid by the plaintiff to be taxed if not agreed.

Application for Security for Costs

20. The defendant relies on the Affidavit of Zia Lewis-Adams filed on the 26th April, 2019 in support of its application and provided the Court with its Skeleton Submissions and Supplemental Submissions filed on the 1st February and dated the 5th May, 2022 respectively. In response, the plaintiff relies on the Affidavit of Bryanna Knowles filed on the 24th February, 2022 and it's Skeleton Arguments which are undated.

Issues

22. The Court on this application must determine:-

a. whether the plaintiff is ordinarily resident outside the jurisdiction;
b. whether the plaintiff owns any assets within the jurisdiction sufficient in value to satisfy an order for costs and available to do so; and
c. whether the Court should exercise its discretion and make an order for security for costs.

The Law

23. Order 23, Rule 1 of the RSC states:-

"1. (1) Where on the application of a defendant to an action or other proceedings in the Supreme Court, it appears to the Court —

(a) that the plaintiff is ordinarily resident out of the jurisdiction; or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

Whether Ordinarily Resident Outside of the Jurisdiction

Submissions

24. The defendant contends that the plaintiff is ordinarily resident out of jurisdiction and as such, the Court exercising its discretion ought to grant security for cost to the defendant so that it does not have to seek to enforce its judgment or cost award in a foreign jurisdiction. Counsel cited the case of **Areonave SPA v. Westland Charters Ltd (1971)** 3AER 531 at page 533(b) in support of this contention.

Further, he submits that the fact that a plaintiff is not ordinarily resident within the jurisdiction is not determinative of whether the Court ought to

exercise its discretion and order the plaintiff to give security for costs. Counsel cited the cases of **Lloyd v Roycan International Banking Ltd BHS J. No 114; Ebrard v Grassier (1884) 28 Ch. D. 232** in support. The defendant also submits that the plaintiff has expressed that it does not have any assets in the jurisdiction and Counsel referred to paragraph 9 of the Affidavit of Mrs. Zia A. Lewis Adams whereby she states:

> *"9. In this regard, I am advised by counsel for the defendant and verily believe that sometime in early December 2018, it was confirmed by counsel for the plaintiff, orally that the plaintiff was not ordinarily resident in the Bahamas and that the plaintiff does not own or possess any assets in the jurisdiction against which an order for cost may be enforced if the Defendant successfully opposes the Plaintiff's action."*

25. Counsel for the plaintiff argues that it is ordinarily resident in the jurisdiction citing the decision of **Shah v Barnet London Borough Council and other appeals (1983) 1 AER 2261**. He submits that Lord Scarman defined the term "ordinarily resident" and summarized the portions of Lord Scarman's speech outlining the legal concept of "ordinarily resident". He also contends that the plaintiff company is registered pursuant to the International Business Company Act Chapter 309 of the Statute Laws of the Commonwealth of the Bahamas. He refers the Court to the plaintiff's Affidavit in support whereby a "Certificate of Good Standing" on behalf of the plaintiff company was exhibited and submits that that constitutes evidence that the plaintiff cannot be considered resident outside of the jurisdiction. Moreover, he contends that the decision in **Aeronave S.P.A. v Westland Charters Ltd (above)** provides that it is no longer an inflexible rule that if a foreigner sues within the jurisdiction he/she must give security for costs. He further contends that the plaintiff company has multiple assets within the jurisdiction.

In its Affidavit in support at paragraph 7 Bryanna Knowles avers:

> *"7. That, I am advised by the Attorneys and verily believe that the Plaintiff is also the owner of the following assets and or chattels in this jurisdiction which include 1 floating barge #BT218 valued at $150,000.00. 1 Tug boat,*

known and referred to as "Spanky", valued at $60,000.00, 1 Intrepid Model speed Boat, valued at $75,000.00 and 1D-Mag Hammer, valued at $76,000.00. The Attorneys advised, and I verily believe that the cumulative value of these assets could more than satisfy any potential cost order which may arise in this matter and as such there is no basis for an Order granting Security for Costs against the Plaintiff."

Analysis

26. Counsel for the plaintiff has helpfully submitted that the Court's power granting an order for security for costs is discretionary. The Supreme Court Practice, Volume 1, 1999 at page 429, 23/3/3 states, "*The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs to be given. Rule 1 (1) provides that the Court may order for costs "if, having regard to all of the circumstances of the case, the Court thinks it just to do so." These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs…*"

27. The circumstances which this Court has regard to on this application is that in paragraph 1 of the Statement of Claim, the plaintiff states that it is an International Business Company duly incorporated under the laws of the Commonwealth of the Bahamas; that the plaintiff was incorporated pursuant to the International Business Companies Act in or around 2007 (Certificate of Incorporation).

Further, the evidence of the defendant in its Affidavit in support exhibited a copy of the plaintiff company's website. The plaintiff's company under the history tab states that the plaintiff company is a privately held corporation with global headquarters in West Palm Beach, Florida.

It further states that the company has rapidly expanded into the international marine construction business shipping materials to

different ports in the United States, the Bahamas, Haiti, South and Central America.

28. In consideration of these circumstances as stated above, the Court accepts that the plaintiff company is ordinarily resident outside of the jurisdiction. However, as submitted by Counsel for the plaintiff it is no longer a rigid rule that a plaintiff ordinarily resident abroad should provide security for costs and as such the Court looks to see if the plaintiff company has any assets within the jurisdiction that can satisfy any potential costs order.

Assets Within the Jurisdiction

29. The Court moves on to consider whether the plaintiff has assets within the jurisdiction of a fixed and permanent nature sufficient in value to satisfy any potential costs order.

30. The defendant in its affidavit in support relies on a conversation held between an associate of the firm acting on behalf of the defendant and plaintiff counsel whereby it is alleged that plaintiff counsel advised that the plaintiff company is not ordinarily resident in the jurisdiction and does not have any assets within the jurisdiction (see paragraph 24 above).

    The plaintiff in its Affidavit in support lists numerous assets which it states would satisfy any potential cost order but the plaintiff has not adduced any evidence in support of the assertions made (see paragraph 25 above).

31. Considering the evidence of both parties on this issue, the Court is of the view that both have failed to adequately satisfy the Court as to whether the plaintiff company has assets within the jurisdiction.

Exercise of Discretion

32. The Court nonetheless, at this juncture must consider the principles outlined in **Sir Lindsay Parkinson & Co Ltd. v Triplan Ltd [1973] Q.B. 609**, an authority relied on by both parties. The Court also considers the Court of Appeal's decision in Alexandra Henderson v. Yamaha Motor Manufacturing Corporation of America & Yamaha Motor Co. Ltd SCCivApp. No. 153 of 2021 whereby the Justices at paragraph 11 outlined the general factors (as founded in Triplan) a court is to consider on an application for security for cost :

> "11. Counsel for the Appellant as well as Counsel for the Respondents made reference to the case of Sir Lindsay Parkinson & Co. Ltd. V Triplan Ltd. [1973] Q.B. 609 where the Court listed the general factors which the Court ought to consider in applications for security for costs as follows:
>
> *a. Whether the Plaintiff's case is bona fide and not a sham?*
>
> *b. Whether the plaintiff has a reasonably good prospect of success on his part of the claim?*
>
> *c. Whether there has been an admission, formal or informal, in the course of the proceedings, of some part of the Plaintiff's claim?*
>
> *d. Whether there has been a payment into court, or its equivalent in arbitration proceedings, of some part of the plaintiff's claim?*
>
> *e. Whether there are any grounds for thinking that the defendants are using the application to prevent the plaintiff's case from coming before the adjudicating tribunal?*
>
> *f. Whether an order for security might enable a defendant to, defeat a claim on the ground of the plaintiff's impecuniosity which the defendant himself has caused?*
>
> *g. Whether the defendant's application for security has been guilty of delay in making the application?"*

33. The Justices however, in their decision stated that they were not confined to the principles that govern an application for security for costs

in the Supreme Court as Order 24, Rule 5 of the Court of Appeal Rules confers a wider discretion on the Court.

34. The Court reminds itself that on an application for security of costs, its role is not to determine the merits of the case, but to consider whether the plaintiff has a reasonably good prospect of success, whether the application is being used to stifle a genuine claim, any admissions made by the defendant, any substantial payment into court, the possible impecuniosity of the plaintiff as a result of the defendant's conduct and the stage in which the application is brought.

35. The Court has had an opportunity to review the pleadings and it is of the opinion that the plaintiff's claim is a bona fide claim. However, with respect to the chances of the plaintiff's case succeeding and the submissions of Counsel for the plaintiff I have weighed this evidence in the balance and I am unable to say at this stage of the proceedings that any of the parties to these proceedings have clearly demonstrated that they have a high degree of probability of success or that the other has a high degree of probability of failure.

36. Counsel for the plaintiff has also submitted that the defendant's lateness of the application has been an attempt to further delay the action. Counsel for the defendant submitted that there were numerous events that intervened between the date of filing and the date when the matter was heard such as the former judge who had previously had conduct of the matter on the civil side was sitting on the criminal side and only able to hear civil matters based on her availability. Hurricane Dorian's devastation of the island in September 2019, the COVID 19 Pandemic in March 2020, the former judge who had conduct of the matter ceased to take on new matters/applications in November 2020, as she was beginning her pre-retirement leave in February 2021. It was also submitted that an application for security for cost can be made at any stage during the course of the proceedings and that it cannot be denied that both parties failed to take any procedural step during the course of the period complained of by the plaintiff.

37. Sir Michael Barnett President, in the case of **Responsible Development for Abaco (RDA) Ltd v The Queen et al SCCiv App No. 248 0f 2017** at paragraph 57 of the Judgment discussed the issue of lateness of such an application and said as follows:

"57. Although lateness of an application is a factor to take into account, an application for further security has been successfully made as late as the commencement of the trial. See Craft Leisure v Gravestock & Owen [1993] BCLE 1273 where the Court said:

> "**it is often a difficult decision when to make a substantive application before trial. If one makes it too early one is reproached because one cannot forecast accurately how long the trial will take and how much it will cost. If one makes it too late, one is said to have led the plaintiffs up the garden path.**"

38. The defendant's application for security for costs was filed a day after the plaintiff filed its application for an Unless Order for what it alleged was non-compliance with the directions order. All of this transpired in or around the ending of 2018 and the beginning of 2019. It is rather unfortunate that the application was not heard until 2022 but it cannot be disputed that there were numerous intervening events that transpired which led to a serious delay.

39. In **Keary Development Ltd. v Tarmack Construction Ltd & anor** (1995) 3 All E. R. p. 534 Peter Gibson L. J. stated:

"...3. The court must carry out a balancing exercise. On the one hand it must weigh the injustices to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial if the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff costs which have been incurred by him and his defence of the claim.

The court will properly be concerned that to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company particularly when the failure to meet the claim might in itself have been a material case of the plaintiff's impecuniosity. (see Farrer v Lacy, Hartland & Co. (1885)Ch D 482 per Brown L. J.). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the

impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company." (see Pearson and Naydlar [1977] 3 All ER 531 at 532)..."

40. As previously noted above, the parties consented to an amendment of the plaintiff's Writ of Summons and Statement of Claim and agreed that the costs of such amendments would be the defendant's to be taxed if not agreed. The taxation documents were filed (albeit out of time) and by an affidavit on behalf of the defendant, the defendant sought from the Court an order extending the time period for the filing of the same. There is no evidence before the Court as to whether such order was granted and the evidence of Mrs. Lewis-Adams in her affidavit is that the defendant attempted to agree the costs with the plaintiff.

    The Court takes note that the consent order was made on the 8th June, 2011 and the taxation documents were filed in October 2011. However, it appears that the defendant has not made any steps to tax a bill of costs that had been awarded some 9/10 years ago.

41. Therefore, in consideration of the pleadings, submissions, evidence and applicable law and the circumstances of this case, the Court finds that this is not a proper and just case for the granting the defendant security for costs.

Order 2, Rule 2 of the RSC

42. The defendant also sought an order to set aside the plaintiff's first summons filed on the 23rd April, 2019 on the ground that it did not comply with the requirements of Order 31A, Rule 21(2) of the RSC. Order 31A, Rule 21(2) of the RSC states:-

> "21. (1) Where a party has failed to comply with any of these Rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an unless order as defined in paragraph (7).
> (2) An application under paragraph (1) may be made without notice but must be accompanied by —

(a) evidence on affidavit which —

(i) identifies the rule or order which has not been complied with;
(ii) states the nature of the breach; and
(iii) certifies that the other party is in default; and

(b) a draft order."

43. The Court accepts that at the time of the filing of the plaintiff's first summons, there was no affidavit in support of the plaintiff's application. However, the plaintiff subsequently filed the affidavit of Trinity Russell on the 17th May, 2021 in support of the first summons.

44. In light of the filing of the Affidavit and that the plaintiff's application has only been heard now, the Court is not minded to set aside the plaintiff's Summons filed the 23rd April, 2019.

45. Therefore, the Court dismisses the defendant's application with costs.

Summons for Unless Order

46. The plaintiff also made an application pursuant to Order 31A, Rule 21 and 22 of the RSC seeking an Unless Order as a result of the defendant's failure to comply with the Directions Order.

47. Order 31A, Rule 21 and 22 of the RSC states:-

" 21. (1) Where a party has failed to comply with any of these Rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an unless order as defined in paragraph (7).

(2) An application under paragraph (1) may be made without notice but must be accompanied by —

(a) evidence on affidavit which —

(i) identifies the rule or order which has not been complied with;
(ii) states the nature of the breach; and
(iii) certifies that the other party is in default; and (b) a draft order.

(3) The judge or Registrar may —

(a) grant the application;
(b) seek the views of the other party; or
(c) direct that a date be fixed to consider the application.

(4) Where a date is fixed under paragraph (3)(c), the applicant must give not less than 7 days' notice of the date, time and place of such date to all parties.

(5) The party in default should be ordered to pay the costs of such an application.

(6) Where the defaulting party fails to comply with the terms of any Unless Order made by the Court that party's pleading shall be struck out.

(7) In this rule and in this Order, an Unless Order is an order which identifies the breach and requires the party in default to remedy the default by a specified date.

(8) Rule 26 shall not apply to this rule.

"22. (1) This rule applies where the Court makes an order which includes a term that the pleading of a party be struck out if the party does not comply with the Unless Order.

(2) Where a striking out order was made, any other party may ask for judgment to be entered and for costs."

48. The Court accepts that since the filing of the parties' respective applications, there has been a period of delay as a result of numerous intervening events.

The Court also notes that prior to the filing of the parties respective applications, both parties failed to advance this matter. Given that the Court is now seized of this matter, and the previous dates as set by the directions order has now passed, the Court intends to set down a case management hearing and provide the parties with a respective timeline to progress this matter to trial.

49. Therefore, the plaintiff's summons is hereby dismissed, however the Court will award costs in the cause.

Dated the 1st of June, 2022

Andrew Forbes
Justice