IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 52 OF 2013 – ASCJ

BETWEEN CARIBBEAN ISLANDS DEVELOPMENT LIMITED (IN OFFICIAL LIQUIDATION PLAINTIFF

AND FIRST CARIBBEAN INTERNATIONAL BANK (CAYMAN) LIMITED DEFENDANT

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 6TH AND 7TH MARCH, 2014

APPEARANCES: Ms. Colette Wilkins and Ms. Joanne Verbiesen of Walkers for the Plaintiff

Mr. Michael Mulligan of Conyers Dill & Pearman for the Defendant

RULING

1. The Defendant Bank brings an application for security for its costs in the sum of USD150,000. The application is brought in circumstances where the Defendant is sued by the Plaintiff for breach of statutory and fiduciary duties owed as chargee exercising its powers of sale over property owned by the Plaintiff.

2. The Plaintiff is a company in official liquidation and the property in question was its only significant asset.

3. The Plaintiff resists the Defendant's application on the basis that its claim, which it says has good prospects of success, would be stifled by an order for security for costs because of its inability to provide security.

4. The Plaintiff invites me to take account of the conduct of the Defendant which it says resulted in the sale of the property in question at a gross undervalue, thus contributing to its impecunious state. This is a consideration that the

case law advises might be taken into account by the Court in the exercise of the discretion whether or not to award security for costs.

5. The Defendant, through its attorney Mrs. Wilkins, strongly denies the allegations of breach of duties and rejects the argument that the Plaintiff has a bona fide claim with good prospects of success and one that would be stifled by an order for security.

6. She explains that the Defendant maintains that it was entitled to sell the property as it did by way of public auction, exercising its rights as statutory chargee and that it relied upon independent professional valuations for fixing the reserve price for the sale. Further, that the sale to the purchaser was an arm's length transaction to the bidder who met the reserve price. The Defendant therefore rejects the Plaintiff's allegations that the sale was in any way a related party transaction.

7. The Plaintiff being a company in liquidation, the starting point for my deliberations is section 74 of the Companies Law which provides:

> *Where a company is Plaintiff in any action, suit or other legal proceedings, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the Defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

8. This section has been recognised as providing a two stage test: first, the court being satisfied as to the test of inability to pay in the event of an adverse costs order against the company; second, whether in the exercise of the Court's discretion, an order for

security should be made[1]. Simply stated, the Court has a discretion which it will exercise considering all the circumstances of the particular case.

9. The policy behind section 74 is clear enough: it is that a company that institutes an action before the Court, should not enjoy an immunity from the costs of suing, and like an ordinary person who institutes suit, will be held accountable for the payment of costs if unsuccessful in its claim. Accordingly, the Court will enquire into the state of its financial affairs, and, if satisfied that the assets of the company will be insufficient to meet its liability for costs, may require it to provide security for costs.

10. It must follow that there must be good reason to refuse an order for security for costs to a defendant who is sued by an insolvent plaintiff company.

11. The two-stage test of section 74 is independent of the factors identified by Grand Court Rules ("GCR") O.23 for consideration by the Court upon an application for security for costs and which will apply generally, whether or not a plaintiff is a company coming within section 74 of the Companies Law.

12. The principles developed in the case law in relation to Order 23 applications will therefore generally be applicable, although it appears that certain factors identified by Order 23 for consideration by the Court in an ordinary application for security for costs – such as whether a plaintiff is ordinarily resident outside the jurisdiction – do not arise in this case where the Plaintiff is a Cayman Islands Company.

13. At page 627 F-H of *Sir Lindsay Parkinson* case[2], Cairns LJ declared that special circumstances to justify refusing an order for security included the fact that the probable inability of the claimants to meet an order for costs was likely to be

[1] See *Sir Lindsay Parkinson & Co. v Tripland Ltd. [1973] 1 Q.B. (C.A.) 609, at 626 D-F.*
[2] And at 627 B-C per Lord Denning, to the same effect.

dependent upon the failure to recover the sums they were suing for and the fact that an order for security might well result in the claimants being unable to proceed at all with their claim which was admittedly a bona fide claim.

14. I accept that such consequencies – here in the case of an insolvent plaintiff company as in the case of any other plaintiff – could be good reason for refusing an application for security. It is another way of recognising the concern that an order for security would not be just as it would stifle a genuine claim. See also *Farrer v Lacy, Hartland & Co.*[3]; *AHAB v SICL*[4].

15. That above cited dictum of Cairns LJ also shows that a related reason for refusing the making of an order could be such as the further assertion here; that the Plaintiff's predicament was occasioned by the Defendant's wrongdoing. This factor is already also recognised in local case law. See *JM Bodden & Sons Int'l v Dettling and Sparke*[5] and *Grand Cay Dev. Ltd. (In Liquidation) v Griesel and others*[6].

16. In advancing this point, it was explained by Mr. Mulligan that what the Plaintiff asserts, is not that the Defendant's breach of duty was a factor that led to the Plaintiff's insolvency and liquidation, but that the breach resulted in the value of its only significant asset being largely diminished. And that that was the direct result of the Defendant failing in its duty to obtain the true market value for the Plaintiff's property. The property was in fact sold for USD2.5 million but the Plaintiff asserts that it was valued between USD3.3 million and USD4 million. That the Defendant's breach of duty therefore resulted in a loss of between USD800,000 to USD1,500,000.

[3] [1885] 28 Ch. 482 (CA).
[4] FSD 54 OF 2009, Unreported, 15 November 2013
[5] 1990-91 CILR 220
[6] 2004-05 XCILR N. 18 at N. 51

17. The converse of this argument as a reason for refusing an order for security, as Ms. Wilkins submitted, is that the risk of prejudice to the Defendant, in not being able to recover its costs if it succeeds, is confirmed by the Plaintiff's admitted insolvency, impecuniosity and inability to meet an order for costs – the very matters relied upon by the Plaintiff as reason for refusing the order.

18. *Keary Developments Ltd. v Tarmac*[7] (as applied by this Court before; for instance in *AHAB v SICL*[8] and other cases) advises that when faced with such competing concerns, the Court is called upon – not surprisingly – to carry out a balancing exercise and decide in its discretion what is the just order to make in all the circumstances.

19. Applying the relevant principles identified above to the circumstances of the case, I find:

(a) Notwithstanding that the Plaintiff considers its claim to be bona fide and taken on advice (and moreover as in this case, brought with the leave of the judge of this Court who supervises the liquidation of the Plaintiff), it is not overwhelmingly clear on the pleadings that its claim is more likely than not to succeed.

It is the Defendant's case that it acted in good faith by reliance on independent valuations, and by setting a reserve price relying on those valuations which was paid by the purchaser in the course of an arm's length transaction. On the material before me the defence seems no less plausible than the Plaintiff's claim.

[7] [1995] 3 All. E. R. 534
[8] Above

(b) The Plaintiff relies on section 75 of the Registered Land Law (RLL) – that which protects its equity of redemption from an unscrupulous chargee. But the RLL also recognises the right of a chargee, acting in good faith, to sell the property, provided that the chargee does its best to realize the true market value.

As already observed, on the present state of the evidence, this is not a clear cut case. The exercise of "reasonable care to obtain the best price reasonably obtainable" or "a proper price" is how the duty owed by the Defendant is described in the case authorities: See *Cuckmere Brick v Mutual Finance Bank*[9] and *Michael v Miller*[10]. On the material before me, it is at least arguable that the Defendant met that duty.

(c) If the Defendant did not cause the Plaintiff's predicament in the sense alleged, it must follow that the Plaintiff's inability to meet an order for security for costs may not be allowed to redound to the detriment of the Defendant in not being able to recover its costs if it succeeds.

20. A further concern is that while the Plaintiff pleads impecuniosity, it invites the Court to infer this only from its status of insolvent liquidation. No evidence has been presented to show what is the actual state of its finances. It is well established that there is a duty of full and frank disclosure in this regard and the onus remains throughout upon the Plaintiff as the party claiming an inability to provide security. This must be so as the state of a party's finances would be something peculiarly within its own knowledge. The recent case of *AHAB v SICL*[11] before this court is

[9] [1991] 1 Ch. 949
[10] [2004] EWCA Civ. 282
[11] Above, at paras. 80-85

directly on point. Following *Kloeckner & Co. v Gatoil Overseas Inc*[12]; *York Motors v Edwards*[13]; *Keary Dev. v Tarmac* (above) and *Cigna Worldwide Ins.*[14], it was declared by this Court to be settled principle that a Plaintiff who alleges that an order for security will stifle its claim must adduce satisfactory evidence that the Plaintiff does not have the means to provide security and further, that the Plaintiff cannot obtain appropriate assistance to do so from any third party who might reasonably be expected to provide such assistance if they could (citing with approval especially on this last point – *Al-Koronky v Time Life Entertainment Group*[15]). I have already noted that no evidence at all has been provided by the Plaintiff here in this regard. Instead, I am simply asked and left to infer that because of its insolvent status, an order for security would stifle the Plaintiff's claim. This is notwithstanding the evidence before me that shows that the Plaintiff did receive $1.25 million from the very transaction that its claim now brings into question.

21. As mentioned earlier, in a case like this where the Plaintiff is an insolvent company, there must be good reason to refuse a defendant an order for security for its costs. This was recognised by Walker LJ in *Metalloy Supplies Ltd (in liq.) v MA (UK) Ltd.*[16]; where he declared on behalf of the English Court of Appeal that:

> *"I would myself prefer the approach that ordinarily in the case where a Plaintiff is an insolvent company, an order for security for costs should be the appropriate remedy."*

[12] Unreported, Court of Appeal E&W (Civ. Division) Official Transcripts, 16 March 1990
[13] *[1982] 1 WLR 449*
[14] 2012 CILR 55
[15] *[2005] All E. R. 457*
[16] *[1997] 1 All E.R. 418, 423*

That approach correctly, in my view, recognises a presumption in favour of making an order for security when the plaintiff is insolvent and the very fact of a plaintiff company's impecuniosity can, in and of itself, be no ground for refusing a defendant an order for security for costs which would otherwise be justified in all the circumstances of the case.

22. Barring circumstances where an insolvent plaintiff company has an overwhelmingly clear case, an order for security should be made.

23. A separate concern raised by the Plaintiff is that the Defendant has been dilatory in bring this application. However, it has not been established that any such delay has operated to the prejudice of the Plaintiff.

Rather, it appears from the evidence that the Defendant brought this application as soon as reasonably practical, after it became clear that the question of security for costs was not to be resolved by agreement.

24. Not being satisfied that the Plaintiff Company has an overwhelmingly clear and compelling case, and one that would be stifled by an order for security for costs, I conclude that the Defendant shall have security. The remaining question is how much?

25. Here, too, the discretion is unfettered and to be exercised on balance and in fairness according to all the circumstances. The amount is entirely at the Court's discretion and may be any amount up to the full value of the amount claimed. See in this regard, *Procon (G.B.) Ltd. V Provincial Bldg Co. Ltd*[17].

26. The Defendant seeks an order for USD150,000 based on its estimate of the likely costs to be recovered on the ordinary taxation basis, if it succeeds. In negotiations it

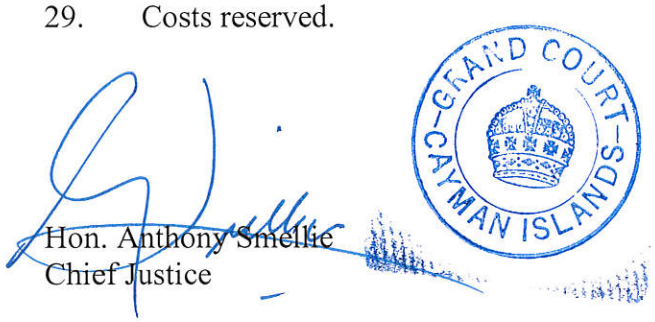
[17] [1984] 1 WLR 557

had sought USD100,000 from the Plaintiff but says the amount has since been projected to increase, among other things, by its having to bring this application.

27. I do not accept, however, that ordinary costs should be regarded as likely to increase by such a large amount and will order for security for costs in the amount of USD100,000 which seems to be otherwise reasonable.

28. The Plaintiff will have 21 days to provide the security either by payment into court, into escrow with the Defendant's attorneys' firm or by guarantee from a local Class A bank. The action to be stayed if the Plaintiff fails to comply.

29. Costs reserved.



Hon. Anthony Smellie
Chief Justice

March 7, 2014