IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 104 OF 2016 (RMJ)

BETWEEN:	**NICOLA LOCKE**	**PLAINTIFFS**
	AND	
	THOSE OTHERS LISTED IN SCHEDULE A	
AND:		
	(1) CWM LIMITED	**DEFENDANTS**
	(2) DMS BANK & TRUST LTD	

IN CHAMBERS

Appearances:	**Mr. Samuel Dawson and Mr. Tim Baildam of Carey Olsen for the Plaintiffs** **Mr. Mark Goodman and Mr. Jeremy Durston of Campbells for the Second Defendant** **The First Defendant was not represented**
Before:	**The Hon. Mr. Justice Robin McMillan**
Heard:	**29th March 2017**
Draft Judgment Circulated:	**6th April 2017**
Judgment Delivered:	**7th April 2017**

GRAND COURT · CAYMAN ISLANDS

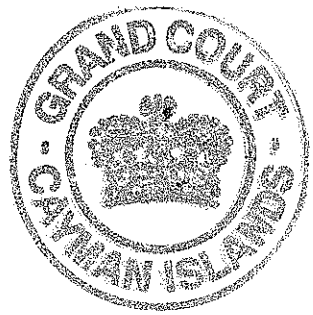
HEADNOTE

The construction of GCR 0.23 r. 1 (1) - No intention to discriminate against foreigners - A security for costs must be a real security – A successful defendant must have a fund available within the jurisdiction of the Court against which a judgment for costs can be enforced.

REASONS FOR JUDGMENT

Introduction

1. On 29th March 2017 the Court granted an application by DMS Bank and Trust Ltd ("the Second Defendant") for security for costs against Nicola Locke and Those Others Listed in Schedule A ("the Plaintiffs") in the sum of U.S$75,000 in the form of either a payment into Court or alternatively of payment into an agreed escrow account. In reaching this decision the Court reminded itself that the Court must not order security in an amount which would stifle a claim or be unaffordable. The Court acts because it is just to do so.



The Background

2. There are 318 individual Plaintiffs, 300 (approximately 95%) of those being ordinarily resident in England. The other 18 individuals are resident in one of the following 13 jurisdictions: Gibraltar, Italy, Switzerland, Belize, Malta, Dubai, Ireland, Seychelles, New Zealand, Brunei, Northern Ireland, France or Spain. Indeed, further issue has also been taken by the Second Defendant as to whether all of the Plaintiffs are actually covered by a relevant policy of insurance.

3. The Second Defendant is a company incorporated in the Cayman Islands and it carries on the business of banking and trust services. It acted as banker to the First Defendant.

4. The Plaintiffs each invested funds with CWM Limited ("the First Defendant"), a company incorporated in the British Virgin Islands which is currently struck off the Register of Companies. A number of the Plaintiffs transferred funds directly to the Second Defendant for the account of the First Defendant as part of the investment process. The First Defendant's operations are said to be dishonest, fraudulent, and involved the operation of a "Ponzi" scheme, and the Plaintiffs seek damages from the First Defendant for breach of trust and breach of the client agreements. In March 2015, the London police raided the First Defendant's offices and arrested a number of persons, including the First Defendant's Chief Executive Officer, on suspicion of fraud related offences.

5. The First Defendant has failed to file an Acknowledgement of Service or Defence in the Proceedings.

6. The Plaintiffs allege that the Second Defendant dishonestly assisted the First Defendant in its breaches of trust by operating the accounts and permitting the transfer of the Plaintiffs' invested funds in and out of those accounts, and that the Second Defendant became a constructive trustee and was negligent in avoiding payments being made other than for the purpose for which the Plaintiffs invested their funds. Alternatively,

the Plaintiffs seek restitution of the funds paid to the Second Defendant as funds paid by mistake.

7. If the Court is to order the Plaintiffs to provide security for costs, it must be satisfied on objectively justified grounds that the Second Defendant will encounter obstacles or burdens in enforcing a costs order against the Plaintiffs outside the Cayman Islands. In the case of 318 overseas Plaintiffs such considerations are practically unavoidable.

The Applicable Law in the Cayman Islands

8. GCR O.23 r.1 (1) upon which the Second Defendant relies states as follows:

> *"1. (1) Where, on the application of a defendant to an action or other proceedings 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 (3), 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 that plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."*

9. The interpretation of these provisions has given rise to considerable judicial commentary and guidance.

10. However, it is now settled law in the Cayman Islands that the Court must approach the matter with certain clear principles in mind.

11. The Cayman Islands Court of Appeal has held in *Dyxnet Holdings Limited v Current Ventures II Limited* [2015] 1 CILR 174 that the Court must avoid discriminatory treatment between different classes of litigant under section 16 of the Bill of Rights, Freedoms and Responsibilities (the "**Bill of Rights**"). The Bill of Rights came into effect on 6 November 2012. Chadwick P states at paragraph 48(c):

"Section 16 in Part I ("Bill of Rights, Freedoms and Responsibilities") of the Cayman Islands Constitution requires that the government shall not treat any person in a discriminatory manner in respect of the rights under that Part. In that context, discriminatory means affording different and unjustifiable treatment to different persons on any ground such as, inter alia, national origin or other status. The rights under Part I include, at s.7, the right to fair and public hearing in the determination of his or her legal rights and obligations. In exercising its own powers, the court is required to give effect to those provisions by avoiding discriminatory treatment between different classes of litigant. The principle was recognized in the context of security for costs in the decisions of Jones, J., to which I have referred earlier in this judgment (Gong

v. CDH China Mgmt. Co. Ltd.) and in the earlier decision of Sanderson, Ag. J. Elliott v. Cayman Islands Health Servs. Auth".

12. A practical example of these principles as they operate may be found in *Kernohan v. H.E. The Governor et al* [2011] 2 CILR 7.

13. In the *Kernohan* case Sir Alan Moses states at paragraph 117:

"The costs that should be ordered should be those which might reasonably be foreseen to be incurred over and above those which would anyway be incurred for enforcing costs within the Cayman Islands. Costs have already been incurred in tracing the Plaintiff and in finding out whether he has assets in California. There is a risk that there will be costs incurred in enforcing either in Scotland or in California, as well as in England and Wales."

14. The learned Judge further states at paragraph 120:

"The Plaintiff has only himself to blame, although in circumstances with which I sympathize, for the concern the Defendants have as to the necessity of enforcing in a number of jurisdictions. In those circumstances, I shall order security for costs, which I have diminished to some extent, because they represent only a risk, in the sum, namely, of 49,200 USD."

15. None of the Plaintiffs are resident within this jurisdiction and there is no evidence before the Court that they have any assets in the Cayman Islands by reference to which a successful costs order could be pursued. According to the Second Defendant significant expenses and procedural challenges in respect of enforcement are inevitable. This is a proposition which the Court accepts as correct.

16. However, based upon the current state of the Cayman islands legal authorities, the Court accepts that any amount of security to be ordered should be limited to the additional costs of enforcement that the Second Defendant is likely to incur in enforcing a costs order outside of the Cayman Islands, having regard to all the circumstances of the case as GCR 0.23 r. 1 (1) in fact prescribes.

17. In summary, GCR 0.23 r. 1 (1) is not intended to discriminate against foreigners (see Jones J. in *Gong v. CDH China Management Company Limited* [2001] 1 CILR 57 at paragraph 14).

The Nature of Appropriate Security

18. The Court now turns to consideration of the appropriate manner in which the nature of a security or a proposed security should be addressed.

19. In this regard excellent and comprehensive guidance is found in *Caribbean Islands Development Ltd v. First Caribbean International Bank Cayman Limited* [2014] 2 CILR 220.

20. The learned Chief Justice points out at paragraph 37 that the essential question in deciding on what form of security is acceptable is whether what is proposed does indeed provide real security.

21. Smellie CJ further accepts at paragraph 42 that such a question raises *"important concerns"*.

22. The learned Chief Justice adds at paragraphs 44-47:

"44. I think it must be regarded as settled principle that the purpose of an order for security for costs is "to ensure that a successful defendant will have a fund available within the jurisdiction of [the] court against which it can enforce the judgment for costs" – see In re Cybervest Fund (2) (2006 CILR 80, at para. 22), applying Porzelack KG v. Porzelack (UK) Ltd. (5).

45. This principle must be a fortiori applicable to security for costs ordered pursuant to s. 74 of the Companies Law to be provided by a company which is in liquidation.

46. A cash deposit in an escrow account under the control of the court is the usual form of security for costs and, in any event, the security should, for enforceability reasons,

be within the jurisdiction: Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd. (1) (at paras. 32-60).

47. The JOLs' proposal for the QBE bond does not satisfy these principles."

23. It is noteworthy that the form of security which was declined in that case took the form of an indemnity bond purchased from QBE Insurance (Europe) Ltd.

24. In relation to this specific aspect, Smellie CJ states at paragraphs 40-41:

"The defendant's concern that neither QBE itself nor the QBE bond is amenable to the jurisdiction of this court is a matter of real significance.

41. For instance, whether or not the QBE bond would be enforceable by the defendant according to its terms as a matter of the English law which governs it is a matter about which the defendant's local lawyers have not, and may not, advise the defendant. The defendant would therefore be required to go to the expense of obtaining English legal advice before it could be satisfied about that issue. Already there is a significant area of uncertainty as to whether the QBE bond would cover costs orders in any event already made in the defendant's favour and which already would consume half of the security to be provided by the security order Moreover, the defendant would be required to seek enforcement of the QBE bond in England if a dispute arose, notwithstanding that it is entitled to the enforcement of the security by the court before which it has been sued. All of these considerations arise against the background

of recalcitrance and lack of relevant disclosure on the part of the party proffering the bond."

25. The relevant questions therefore are whether the security is a real security, whether there is a fund available within this jurisdiction, and whether in the case of a bond or other instrument of security any issue arises as to potential difficulties of enforcement.

26. While the Court recognizes that the third factor set out in paragraph 25 is essentially reflective of the first factor nonetheless in the circumstances of the instant case it is helpful and indeed desirable that this factor should be explicitly identified.

The Adequacy of the Security Proposed

27. The Plaintiffs submit that they have the benefit of an After-The-Event insurance policy ("ATE insurance policy") from AmTrust Europe Limited which provides for cover revised upwards to £1,300,000 (approximately US$1,606,425) on 14 March 2017.

28. The Plaintiffs claim in paragraph 23 of their Skeleton Argument that the ATE insurance policy covers all Plaintiffs insured in the event that they are ordered to pay the Defendants' costs in the proceedings, up to the limit identified above.

29. However, the Second Defendant inter alia makes the following observations at paragraph 22 of its Skeleton Argument:

"22. As the Insurance Policy is governed by English law and the Insurer is based in England, it is submitted that:

(a) the insurance Policy is not amenable to the jurisdiction of this Honourable Court, which as the Chief Justice opined, is a "matter of real significance";

(b) DMS would be required to obtain advice as to the enforceability of the Insurance Policy or any other considerations arising with respect to it by instructing specialist English solicitors and /or Counsel, at its own cost, which it should not be required to do; and,

(c) even if the Insurance Policy is enforceable, is not vitiated by the insurer, and a claim accepted, then DMS would be required to seek to enforce any judgment for costs against the insurer in England notwithstanding its entitlement to a fund being made available within the jurisdiction."

30. The Second Defendant adds at paragraph 26:

"The Insurance Policy makes various references to the English Civil Procedure Rules (the "CPR Provisions") which are not applicable or enforceable in the context of Cayman Islands litigation, nor replicated in any way in the Grand Court Rules. As such, DMS has no way of knowing in what way the insurer may attempt to rely upon the CPR Provisions to vitiate cover in ways such as those considered in the case law referred to

above, without seeking the costly advice of English solicitors/Counsel. Furthermore, it is entirely unclear to DMS how the insurer will equate compliance with Grand Court Rules to compliance with the CPR Provisions, which necessarily compounds the uncertainty as to how the insurer may seek to avoid accepting a claim for non-compliance with the CPR Provisions."

31. A copy of the ATE insurance policy is found at pages 45-66 of Exhibit IA3 attached to the Third Affidavit of Ian Dafydd Austin, dated 3 February 2017. Mr. Austin is a Solicitor of England and Wales and a Partner at Fieldfisher LLP, an English firm of Solicitors.

Conclusion

32. Having reviewing this document, and bearing in mind the comments of Smellie CJ as to how such a document should be considered, the Court agrees with and accepts the concerns and reservations expressed on behalf of the Second Defendant.

33. The policy clearly has been drafted in the context of proceedings in England and Wales. It refers to Solicitors, as distinct from the Attorneys-at-Law, and it makes reference to the Civil Procedure Rules, again as distinct from the Grand Court Rules. It does refer to "*Court*" as meaning a court or tribunal in the Cayman Islands, but as the

document is subject to English law as the governing law issues of construction could well arise in any event.

34. In all the circumstances the lack of clarity and precision highlights the central difficulty which the learned Chief Justice amply describes in the *Caribbean Islands Development Limited* case itself.

35. Accordingly the Court finds that the policy which has been put forward does not satisfy the relevant principles of law nor the necessary safeguards required. It does not provide a real security, it does not cause a fund to be made available within the Cayman Islands and it may well result in practical problems of both construction and enforcement.

36. It is for these Reasons that the Court declines to accept this policy as an adequate security for the purposes of GCR 0.23, r. 1 (1).

Robin McMillan

The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court