IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Civil Appeal No. CACV 14 OF 2017
Cause No. FSD 200 of 2015 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
AND IN THE MATTER OF STERLING MACRO FUND

BETWEEN

WORTHING PROPERTIES LIMITED

Appellant

AND

STERLING MACRO FUND

Respondent

IN CHAMBERS

Appearances:	**Mr. T Lowe QC instructed by Mr. J Harris of Higgs & Johnson on behalf of the Respondent** **Mr. R Millett QC instructed by Mr. B Gowrie, Mr. P. Mc Convey and P Kendall of Walkers on behalf the Appellant**
Before:	**The Hon. Justice Ingrid Mangatal (Sitting as a Single Judge of the Court of Appeal)**
Heard:	**14 March 2018**
Ruling Delivered:	**14 March 2018**
Reasons for Ruling Delivered:	**4 April 2018**

HEADNOTE

Civil Practice and Procedure - Application for Security for Costs pending appeal - Company incorporated abroad - Section 19(2) of the Court of Appeal Law (2011 Revision) - Order 23 Rule 1 (1) (a) of the Grand Court Rules, (1995 Revision).

REASONS FOR RULING

1. On the 14 March 2018 I heard an application by the Respondent, Sterling Macro Fund ("**Sterling**") against the Appellant Worthing Properties Limited ("**Worthing**"), for security for its projected costs of an appeal filed by Worthing in respect of the Judgment delivered by me on the 6 April 2017. The application seeks security in the estimated costs of the appeal in the amount of US$250,000.00 from Worthing or from Niaga Holdings Limited ("**Niaga**").

2. The Notice of Appeal was filed on 2 June 2017, and the appeal has been set down for 3 days commencing 1 May 2018.

3. Section 19(2) of the *Court of Appeal Law (2011 Revision)* ("***the Law***") accords the discretion to a single Judge of the Court of Appeal to order security for the costs of an appeal.

4. I should make clear that in respect of this application, I am exercising jurisdiction under section 33 of ***the Law*** whereby all powers conferred upon a single Judge of the Court of Appeal may be exercised by a Judge of the Grand Court.

5. Section 19(2) does not provide any specific guidance as to the circumstances in which the Court should exercise its discretion when considering an application for security for costs. This particular application is made pursuant to Order 23 Rule (1) (1) (a) of the *Grand Court Rules (1995 Revision)* ("***the GCR***").

6. As I understood the application, there was no issue taken by Worthing with the quantum of security estimated by Sterling in respect of the projected costs of appeal. Further, Sterling also did not take issue with the enforcement costs estimate provided by Worthing in respect of enforcement in the British Virgin Islands, ("**BVI**"), estimated in the sum of US$30,000.00. The real issue was whether security should be limited to the costs of enforcement abroad, or whether security should be awarded for full costs.

7. Having listened carefully to the arguments on both sides, I was satisfied that it was appropriate in all of the circumstances to exercise my discretion and grant the relief claimed. Accordingly, I ordered as follows:

(1) The Appellant or Niaga do provide security for the Respondent's costs of the appeal in the sum of US$250,000.00 in the form of either:

a) A bank deposit in an escrow account under the control of the Grand Court; or

b) A Guarantee from a Class A Bank carrying on business and regulated in the Cayman Islands.

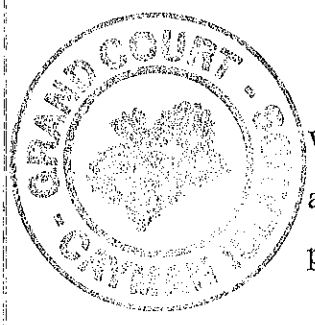
(2) In default of the Appellant or Niaga providing security pursuant to paragraph 1 above by no later than 4pm on 3 April 2018 the Respondent do have liberty to apply to enforce this Order.

(3) The Appellant and Niaga do pay the Respondent's costs of and occasioned by the Summons to be taxed if not agreed.

8. At the time of handing down my decision, I promised to provide my reasons for the decision in due course. This is a fulfillment of that promise. I should say that in fact these reasons were ready in draft from 19 March 2018, but regrettably to date, an affidavit which was to have been filed by Worthing/Niaga, has not been filed and this has caused a delay in the finalising of these reasons.

Sterling- Late filing of affidavit

9. The Summons for security for costs and supporting affidavit, being the first affidavit of Phillip Boni, a partner and head of the Litigation Department in Higgs & Johnson, were filed 7 February 2018. Unfortunately, Higgs & Johnson filed a second affidavit of Mr. Boni on 9 March 2018, just a few days before the hearing. Walkers, on behalf of



Worthing and Niaga, objected to two US judgments exhibited to that affidavit being used, and Mr. Lowe QC, leading Counsel for Sterling indicated that no reliance would be placed on those exhibits.

10. Mr. Millett QC, who now appears for Worthing and Niaga, sought permission to tell the Court his instructions from his client orally, in relation to other exhibits to Mr. Boni's affidavit, which permission I granted, requiring that the information provided to the Court be put in an affidavit to be filed and served by 19 March 2018. This aspect of the evidence had to do with whether Niaga is registered in BVI as claimed in correspondence from Walkers, or whether it is registered in Hong Kong and generally as to the manner and characteristics of Niaga and how it is organised.

11. There was no application by Worthing or Niaga for an adjournment of the application.

Sterling's arguments

12. It is Sterling's case that the Grand Court made orders for full security for Sterling's costs up to and including the conclusion of the trial, notwithstanding Niaga's undertaking to meet any adverse costs in the Court below. The order took the form of fortification of the undertaking by Niaga as to costs as well as in relation to the cross-undertaking in damages in respect of the appointment of provisional liquidators - see unreported judgment, released for publication 6 April 2017.

13. Worthing has no disclosed assets other than its shareholding in Sterling. It was plain to me when dealing with the applications in the Court below that such a shareholding, given the dispute as to beneficial interest of the shares in Worthing, discussed in the judgment below, could not be relied upon or made available to meet an order for costs in favour of Sterling in the circumstances of this case or in relation to an undertaking as to damages.

14. This is the scenario in which Niaga had come into the picture, and wherein Niaga's refusal to provide information as to its finances in my view became relevant.

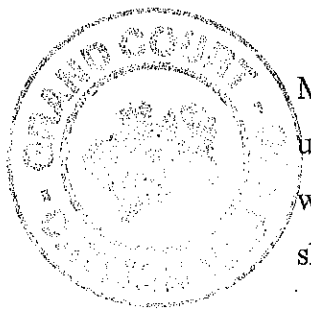
15. Mr. Lowe QC submitted that the test is now well established in the Cayman Islands that security should not be awarded against a foreign party (purely by that fact alone), in an amount greater than the costs of enforcement, because to do so may be discriminatory and in breach of section 16 of the ***Bill of Rights, Freedoms and Responsibilities, the Cayman Islands Constitution Order, 2009***. Reference was made to the unreported decision of Smellie CJ, delivered on 19 October 2017, in ***AHAB v Al Sanea***, paragraphs 19-21. There is also the earlier unreported decision of Clifford J to which Worthing has made reference, in ***Sigma v Trustcorp***, delivered 19 August 2015.

16. Reference was made by Mr. Lowe to the fairly recent decision of the Court of Appeal of England and Wales in ***Bestfort Developments LLP v Ras Al Khaimah Investment Authority and others*** [2016] EWCA Civ 1099, referred to and relied upon in ***AHAB,*** particularly paragraphs 69 -77 of ***Bestfort.***

17. Sterling relies upon paragraphs 22 and 23 of ***AHAB*** and paragraphs 69 and 77 of ***Bestfort.***

18. Sterling has indicated that it also relies on Niaga's failure to disclose its financial position, in the context of being Worthing's funder and not itself a party to the Suit, but yet putting up and offering undertakings on behalf of Worthing in the Court below. It also relies upon Niaga's involvement in an attempt by Mr. Keilman to bypass Mr. Keilman's Dutch bankruptcy trustee.

19. Reference was made to the letter dated 22 September 2017 from Walkers to Higgs & Johnson, exhibited to the affidavit of Sarah Jane Curtis, an executive legal secretary at Walkers. In that letter it was stated that Niaga was incorporated in the BVI. However, in the exhibits to the second affidavit of Mr. Boni there is a Directors' Resolution of Worthing, dated 18 January 2016, where it is stated that Niaga Holdings Limited is a Hong Kong limited liability company with registration number in Hong Kong and with registered office in Hong Kong. The point was made that in Worthing's Register of

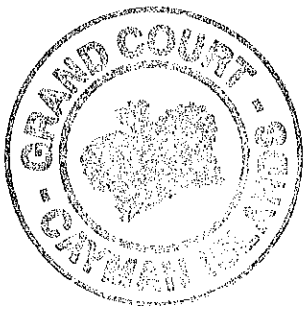


Members there is nothing suggesting a registered office in BVI. It was argued that this unexplained feature of Niaga is an additional reason that shows a real risk of a problem with enforcement, indeed Mr. Lowe argued that it, in combination with the other factors, shows a prima facie case of risk of problems in relation to enforcement is made out.

20. Orally, Mr. Millett QC stated that Worthing is owned by a BVI Company, Niaga Holdings Limited. Niaga Holdings Limited has a Hong Kong address because it is so registered for tax purposes. Learned Queen's Counsel claimed that it is the BVI Company that holds the shares in Worthing and also the share capital of Niaga Hong Kong Limited. Niaga Hong Kong is the director of Worthing. Regrettably, although (a) the Court made an order that an affidavit be sworn by Niaga confirming the exact and true position, to be filed by Monday 19 March 2018 (a date asked for and agreed to by the attorneys for Worthing and Niaga); and (b) several promises to file the affidavit by further dates, to date, 4 April 2018, no affidavit has been filed. That is regrettable, because it was important for Worthing and Niaga to play their part in setting out exactly what the position is, and eliminating any confusion. Separate and apart from the disobedience of the Court's order, it is a further arrow in Sterling's bow that supports the correctness of an order being made requiring security for costs.

21. At paragraphs 69 and 77, Gloster LJ in ***Bestfort***, provided guidance as follows:

> *"69. But the existence of an objectively rational justification for the system obviously does not permit the court which comes to exercise the discretion to do so in what is, in fact, a discriminatory manner. The court' for example, is not entitled without more to assume, that just because a litigant is a company incorporated in a Caribbean island, but resident in Ruritania, that justifies the imposition of an order for security; that would be prima facie discriminatory on grounds of "other status".* ***It has to exercise the discretion on objectively rational grounds by reference to the difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic. But, in my judgment, that***



exercise is not subject to the "severe scrutiny" justification. All that is required is some objectively justifiable rationale for the exercise of the jurisdiction. And that leads onto the next and-principal- issue which has to be addressed in this case, namely, what is the threshold test which the evidence has to satisfy, in order to prevent the exercise of the court's discretion falling afoul of article 14? It is to this issue which I now turn.

.....

77. In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that "on objectively justified grounds relating to obstacles to or to the burden of enforcement", there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be "a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden" but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. *In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test is one of "likelihood", which involved demonstrating that it was "more likely than not" (i.e. an over 50% likelihood), or "likely on the balance of probabilities", that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents. Accordingly, I reject Mr. Millet's submission in this respect."* (My emphasis)

22. Sterling submitted that it has identified real risks by reference to attributes of Worthing and Niaga that objectively render enforcement problematic. These include Worthing's own status and the fact that its only disclosed assets is the shareholding in Sterling and the extant dispute about the beneficial ownership of those shares, Niaga's refusal to

provide financial information, the way that Niaga has organised itself, and the concerns about whether Niaga incorporated in BVI but maintains all its assets in Hong Kong.

23. A point was also made about Niaga's lateness in fulfilling payment under one of the orders made previously, however, the point was not advanced forcefully by learned Counsel and I do not intend to attach much weight to that aspect of the case.

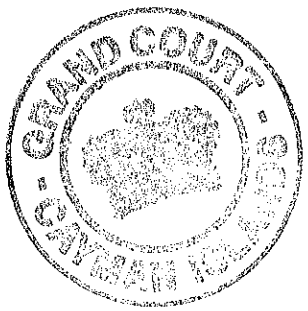
Worthing and Niaga's arguments

24. Mr. Millett QC, who has recently come into the matter on behalf of Worthing and Niaga, argues that that there is sufficient objective certainty as to enforcement to show that the ***Bestfort*** case is not met. He submits that the BVI (like the Cayman Islands) is a common law jurisdiction with a mature and well established legal system. The enforcement process is substantively similar to that in the Cayman Islands and the evidence shows that an uncontested enforcement application is not only possible, but is a relatively inexpensive procedure in the context of costs orders made in other jurisdictions.

25. It was also argued that Sterling has been wrong to rely upon Niaga not proving financial information at the request of Sterling's attorneys. It was submitted that it is trite law that the burden of showing that a paying party will be unable to meet a successful applicant's costs is on the applicant - the usual course being for the applicant making such assertions to file an affidavit which credibly and reasonably shows that the company has inability to pay the costs if the applicant were to be successful. It was stated that no such evidence had been provided by Sterling.

26. It was further argued that the position taken by Sterling is contrary to the position established in the Cayman Islands. Reference was made to the decision of the Cayman Islands Court of Appeal in ***BTU Power Management Company v Hayat*** [2011] 1 CILR 315, as authority for the proposition that the mere fact that a plaintiff refused to provide evidence of its asset position was not of itself sufficient to be satisfied that the defendants' costs would not be paid if the defence were successful.

27. Reference was made by Mr. Millett QC to section 74 of the *Cayman Islands Companies Law (2016 Revision)* which provides as follows:



> *"74. Where a company is plaintiff in any action, suit or other legal proceeding, 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."*

28. It was submitted that section 74 only applies to Cayman companies and therefore ***GCR*** Order 23 applies to "*non-resident*" companies. Reference was made to the decision of Clifford J in ***Sigma v Trustcorp***, delivered 19 August 2015.

29. In its written submissions at page 8, Worthing submits as follows in relation to non-resident companies:

> *"(ii) This gives rise to three distinct scenarios:*
>
> *a. First, there will be cases when the practical difficulties of enforcement mean that it is fair to grant security in respect of the actual costs of the litigation. In such cases, ordering full security is consistent with the purpose of GCR Order 23 because it protects the defendant against the risk that he will not recover any costs in the foreign jurisdiction:* ***Bestford Developments LLP v Ras Al Khaimah Investment Authority [2016] EWCA 1099.***
>
> *b. Secondly, in other cases enforcement is possible without the practical difficulties referred to in (a.) above, however, the non-resident company is* ***impecunious and not in a position to meet the burden of a potential costs order made against it*** *(emphasis added). In such cases, ordering full security is consistent with the purpose of GCR Order 23 (and also ensures there is not*

discrimination between the position under Section 74 relating to a Cayman company and that of a "non-resident: company which does not fall under Section 74 of the Law) because it protects the defendant against the risk of being unable to recover any costs in the foreign jurisdiction.

c. *Thirdly, in other cases enforcement is possible without the practical difficulties referred to in (a.), above, and the "non-resident" company* ***is able to meet the burden of any potential costs order made against it*** *(emphasis added). In such cases, it is not necessary to order more than the additional costs of enforcement in order to achieve the purpose of GCR Order 23: Sigma v Trustcorp."*

30. However, in oral submissions, learned Counsel submitted that "*attribute*" as used in the passages previously quoted in ***Bestfort*** and referenced in ***AHAB,*** does not mean financial position or impecuniosity because to apply this meaning or allow for such an interpretation would be to allow through the back-door that which section 74 of the ***Companies Law*** does not permit, which is to apply to Companies incorporated elsewhere the test of impecuniosity. That submission seems to some extent in my view to run counter to the written submissions advanced on behalf of Worthing and Niaga as set out at paragraph 29 above. It was alternatively submitted that in the event learned Counsel was wrong on that, the burden is in any event upon the applicant Sterling.

Analysis

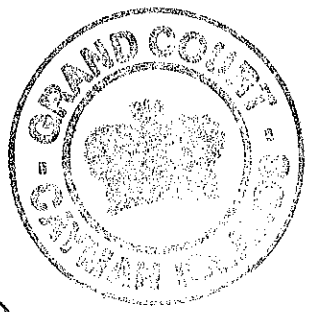
31. It is plain to me that it is for Sterling to identify a real risk that it will not be in a position to enforce an order for costs against Worthing, and that it may do so by reference to either difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic. I accept Sterling's submission that real risk, is as opposed to a fanciful risk. Sterling does not have to show likelihood, it does not have to show more than a real risk that enforcement might fail or be much more problematic.

32. In my judgment, it is plain that other "*attribute*" can relate to and encompass impecuniosity. Order 23 Rule 1(1) (a) requires the Court to have regard to all of the circumstances in considering whether it is just to order security. To accept Mr. Millett's submission would it seem to me mean that one would then be discriminating against Cayman Companies, which of course is obviously another discrimination that should not be permitted. It seems plain to me that the words of Order 23 are wide enough to take into account questions of impecuniosity of a foreign company. As a matter of plain logic and common sense I cannot see why the Court should have power to consider the impecuniosity of a company within its jurisdiction, i.e. a Cayman Company when examining the issue of whether to grant security for costs, and yet be devoid of such power when considering a Company not within its jurisdiction i.e. a non-resident company.

33. Here, not only is Worthing a foreign company; there is clearly doubt that it has assets that can satisfy an order for costs in Sterling's favour in the circumstances of this case. It is Worthing that is the party, not Niaga. There is plainly a real risk on an objective basis that there will be obstacles to enforcing orders for costs against Worthing. Therefore, it is important and relevant that Niaga, which company has been prepared to provide undertakings on Worthing's behalf, is not prepared to provide financial information, since it is not a party to the Suit; it is Niaga that offered undertakings on behalf of Worthing in the Court below to satisfy adverse costs orders. This makes the case distinguishable from the ***BTU*** case.

34. However, there is also the evidence of Niaga's role in by-passing the Dutch trustee of Mr. Keilman. Additionally, there is this cloud of uncertainty and nebulous overlap surrounding the BVI/ Hong Kong information regarding Niaga, such as to reinforce Sterling's uncertainty as to who or what entity it is dealing with, whether dealing with Niaga as a shareholder or as a director, and where exactly it would have to set about its enforcement process for costs. All of which Niaga has (surprisingly) neglected to go on affidavit to clarify.

35. It is when all of the circumstances are viewed together as a whole that I formed the view that on the evidence, submissions and information provided to the Court, there are attributes of Worthing and of Niaga that objectively render enforcement problematic and have satisfied me that it was appropriate to make the order which I have outlined at paragraph 7 above.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT