APPLEBY

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The Cayman Islands Court of Appeal Confirms Orders for Security for Costs in Winding Up Proceedings

INTRODUCTION

In a significant judgment, the Cayman Islands Court of Appeal (**CICA**) recently held that the Court has an inherent jurisdiction to grant security for costs against a petitioning foreign company in winding up proceedings. In *Dyxnet Holdings Limited v Current Ventures II Limited and Current Ventures IIA Limited* (Cause CICA 33/2013), the CICA overturned two Grand Court judgments dating back to 2010 which had prevented security for costs from being ordered in winding up proceedings against either a petitioning foreign individual or a petitioning foreign company.

BACKGROUND

Before 1 March 2009, when the Companies Winding Up Rules (**CWR**) were introduced (and the Grand Court Rules (**GCR**) were amended), orders for security for costs could be made against petitioners in winding up proceedings which were foreign companies either by application of the GCR to winding up proceedings, or by reliance on the English Insolvency Rules 1986 and Civil Procedure Rules (**CPR**) rule 25.13. However, following an amendment to the GCR and the introduction of the CWR (which provided that the Insolvency Rules 1986 should cease to have any application), the routes by which security could be ordered were no longer available. The CWR themselves makes no express provision for security for costs.

Section 74 of the Companies Law (2013 Revision) (the Law) provides a statutory power to make an order for security for costs against a Cayman Islands company in a case where that company is plaintiff and the Court is satisfied *"that there is reason to believe that if the defendant is successful in its defence the assets of the company will be insufficient to pay his costs"*. Company is defined in the Law as a company formed and registered under the Law or an existing company (a company which, prior to the 1st December, 1961, has been incorporated and its memorandum of association recorded in the Islands pursuant to the laws relating to companies then in force in the Island). Neither of these definitions applies to a foreign company.

Order 23 of the GCR gives the Court power to order a plaintiff who is ordinarily resident out of the jurisdiction to give security for a defendant's costs if it thinks it is just to do so. However, this rule does not apply to winding up proceedings, which are governed by the CWR.

It is against this background that the Court of Appeal had to consider whether, following the introduction of the CWR, the courts in the Cayman Islands have an inherent jurisdiction to order a foreign company to provide security for costs in proceedings governed by those rules.

FREERIDER

In *Re Freerider Ltd* [2010] 1 CILR 286, Justice Foster had to consider whether an inherent power to order the petitioner to give security for costs would be inconsistent with the overall scheme of the Companies Winding Up Rules. He concluded that *"it cannot be said that an inherent power to order security for costs would not be inconsistent with the overall scheme of the Companies Winding Up Rules"*. He therefore held that, following the introduction of the CWR, the Courts of the Cayman Islands retained no inherent jurisdiction to order security for costs in proceedings governed by those rules.

As the CICA pointed out in *Dyxnet*, *"Justice Foster did not have to consider whether or not the extent of the inherent power of the court to order security for costs against a petitioner in winding up proceedings was enlarged or otherwise affected by the provisions of section 74 of the Companies Law in a case where the petitioner was a non-resident company and there was reason to believe that, if the respondent company was successful in resisting the petition, the assets of the petitioning company would be insufficient to pay its costs."* That question did not arise in *Freerider* because the petitioner was a foreign individual, not a foreign company.

DYXNET (FIRST INSTANCE)

In *Dyxnet* at first instance, Justice Sir Peter Creswell held that, as a matter of judicial comity, he should follow the decision of Justice Foster in *Freerider* unless he was convinced that the decision was wrong. Justice Cresswell was not convinced the decision was wrong and, therefore, followed and applied it. He did say, however, that *"because of the importance of the point I will grant leave to appeal so that the point can be considered by the Court of Appeal."*

DYXNET (COURT OF APPEAL)

The CICA said that Justice Cresswell was wrong to follow the decision in *Freerider* and was wrong to take the view that the decision required him to hold that he had no power to order a foreign limited liability company to provide security for costs in proceedings governed by the CWR.

The CICA thought that it should seek to identify with what (if anything) in the overall scheme of the CWR an inherent power to order a petitioner – and, in particular, a petitioner who is a foreign limited liability company – to give security for costs can properly be said to be inconsistent.

The CICA could not find any inconsistency. There was nothing in the CWR that had the effect of incorporating the provisions of GCR Order 23 rule 1(1) (the order relating to security for costs) in the CWR. But, neither was there anything in the CWR which is inconsistent with the exercise of an inherent power to order security for costs against a foreign limited liability company which is a petitioner in proceedings under the CWR.

The CICA also relied on the explanation of the Privy Council in *GFN SA v. Bancredit Cayman Ltd (in liquidation)* [2009] CILR 578 that *"the power of the courts to order security for costs is not statutory, but rather the inherent jurisdiction of the Court to control its proceedings…the effect, therefore, of statutory provisions such as section 74, or of Rules of Court such as Order 23 Rule 1, is not to confer a jurisdiction that the courts did not previously have, but in the case of section 74 to exclude impecunious plaintiffs from the established settled practice that security for costs orders could not be based on mere impecuniosity, and in the case of Order 23 Rule 1, to specify particular circumstances in which the jurisdiction could properly be exercised…rules of court can regulate practice but cannot confer jurisdiction."*

The CICA concluded that for the Court to order security for costs where the petitioner is a Cayman Islands company (under section 74 of the Law), but to refuse to do so where the petitioner is a foreign company, would be an infringement of the prohibition against discrimination in the Islands' Bill of Rights.

The CICA determined that *"reliance on the inherent power, freed from curtailment by the historic rule of practice, provides a means of avoiding discriminatory treatment between different classes of litigants".*

The CICA, therefore, held that the court had an inherent jurisdiction to grant security for costs to be exercised in accordance with the principles relating to a non-resident limited liability company when there was reason to believe that its assets would be insufficient to pay the costs of the defendant.

COMMENT

It was said as long ago as 1904 by Buckley J in *Re Pretoria Pietersburg Railway Co (No. 2)* [1904] Ch 359 that *"it would be a strange result if security for costs could be ordered in the case of an action and not in the case of a summary method of procedure by summons in the winding up."*

This statement holds true today. Disputed petitions can, in the same way as ordinary civil proceedings, be very hard fought and expensive. A respondent company may therefore have legitimate concerns at the outset that the petitioner may be unable to pay the company's costs if the petition is dismissed.

Despite the obvious expedience of the Court having jurisdiction to make such orders in petitions, since the 2009 procedural amendments (including the introduction of the CWR) and the decisions in *Freerider* and *Dyxnet* (at first instance), the position in the Cayman Islands has been that the respondent company could seek

security against neither *petitioning foreign individuals* nor *petitioning foreign companies*. Furthermore, although the Grand Court had the power under section 74 of the Law to make orders for security against *petitioning Cayman companies*, exercising that power where there was no equivalent power in respect of foreign companies (which there was not, per *Dyxnet* at first instance) would have been discriminatory and a breach of the constitutional protections in the Cayman Islands' Bill of Rights.

The CICA decision in *Dyxnet* is therefore significant as it confirms for the first time that security may be ordered by the Grand Court in all three of those situations, where appropriate.

The CWR are considerably less detailed than the English Insolvency Rules. Absent any proposal either to radically overhaul the CWR or to include a provision incorporating the GCR by reference along the lines of rule 7.51A in the English Insolvency Rules, the Court's inherent jurisdiction will continue to play an important part in supplementing the Cayman rules, as and when appropriate.

Where the exercise of a particular discretionary power is considered necessary in the interests of properly administering justice in the petition and is not contrary to or inconsistent with an existing rule (*cf. Tombstone Ltd v. Raja* [2008] EWCA Civ 1444), the Court is likely to rely on its inherent jurisdiction as the basis to make an order.

Since the introduction of the CWR in 2009, there have been five other reported decisions in which the inherent jurisdiction has been used by the Courts to make just provision for the management of winding up proceedings. In those cases, the Courts have variously confirmed inherent powers to dispense with strict compliance with the rules (*HSH* [2010] 1 CILR 114 (CICA), Chadwick P), to allow petitions to be amended (*HSH* [2010] 1 CILR 148, Jones J), to make representation orders (*Sphinx* [2010 2 CILR 1, Smellie CJ), to permit substituted service (*Saad* [2010] 2 CILR 422, Smellie CJ) and to order the removal of petitions from the Register of Writs (*In re X* [2012] 1 CILR 407, Cresswell J). All of these cases, together now with the CICA judgment in *Dyxnet*, provide useful guidance to practitioners as to the question of the Court's jurisdiction, in circumstances where the rules themselves are silent.

Allowing procedure to develop by way of the Court's inherent jurisdiction has not been without criticism. However, as Lord Dyson makes clear in *Al-Rawi v. Security Service* [2011] UKSC 34 (at [21]), some of the common law's most radical and draconian procedures - *Mareva* orders and *Anton Piller* orders – were first introduced by way of the Court's inherent jurisdiction. In light of that, the incremental development of insolvency procedures in the Cayman Islands, as outlined above, is appropriate and should be welcomed.

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