22-02-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon Mr Justice Andrew J. Jones QC
10th January 2011, in Chambers

Cause No. FSD 140 of 2010

BETWEEN :

STEVEN GONG Plaintiff

And

CDH CHINA MANAGEMENT COMPANY LTD Defendant

APPEARANCES :
Mr Graham Halkerston and Ms Joanne Collett of Appleby for the Plaintiff
Mr Stephen Alexander of Maples and Calder for the Defendant

RULING

1. This is an application by CDH China Management Company Ltd ("the Defendant"), the only defendant remaining in this action, for an order pursuant to GCR Order 23 that Mr Steven Gong ("the Plaintiff") give security for the Defendant's costs. The application is made under Rule 1(1)(a) on the basis that the Plaintiff is "ordinarily resident out of the jurisdiction". The Plaintiff's place of residence is not stated in his writ, but the Court was informed by his counsel that he is in fact ordinarily resident in Beijing in the Peoples' Republic of China and it was conceded that the Court has jurisdiction to make an order requiring him to give security for such of the Defendant's costs of the action as it thinks just. The Defendant is a company incorporated in this jurisdiction and carries on an investment management business, either directly or indirectly through various subsidiaries, in Hong Kong and Beijing. It is not necessary for the purposes of this application to analyse the Plaintiff's cause of action or describe the issues between the parties in any detail whatsoever. Suffice it to say that the Plaintiff claims that he is entitled, pursuant to one or more contracts of employment, to be paid a proportion of the "carry" (a term of art which equates to "profit share") earned by the Defendant

from the investment funds for which it and/or its subsidiaries are acting as investment manager. As the pleadings presently stand, the amount of the Plaintiff's claim is not particularized, but it is my understanding that he expects to be able to claim millions of dollars.

2. Counsel for the Plaintiff raised just one point in response to this application, but it is a point of some general importance. He says that this Court's established approach towards the exercise of its discretion to order security under GCR Order 23, rule 1 has changed, or must now be changed, because it is contrary to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms made in Rome on 4th November 1950 (which is commonly referred to as the "the European Convention on Human Rights"). The Cayman Islands is party to the Convention, but the Legislative Assembly has not enacted any statute by which the rights contained in the Convention are specifically incorporated into our domestic law, with the result that this Court has no power to directly enforce Convention rights as such. However, since 23rd February 2006, persons alleging to be victims of breaches of the Convention, whether by the Legislative Assembly, the executive, the judiciary or any other public authority of the Cayman Islands, have had the right to complain by presenting an individual petition to the European Court of Human Rights. For this reason the Plaintiff's counsel argues that when this Court is exercising a discretionary power, it should not do so in a way which would be inconsistent with the Convention which must be taken to reflect the public policy of the Cayman Islands. He points to the fact that this was the approach adopted by the English Court of Appeal. By way of example, he referred me to *Derbyshire County Council –v- Times Newspapers Ltd* [1992] 1 Q.B 770, a case concerning the right to freedom of expression contained in Article 10 of the Convention. Balcome L.J. explained (at page 812B-E) the basis upon which the English courts should have regard to the Convention, notwithstanding that it had not then been incorporated into the domestic law of the United Kingdom. He said, inter alia, that the court should have regard to Convention rights "when considering the principles upon which the court should act in exercising a discretion". Mr Halkerston says that the rules relating to security for costs contained in GCR Order 23, rule 1(1)(a) fall within the ambit of Article 6 of the Convention which deals with access to justice. Therefore, it is said that the Court should exercise its discretion in accordance with criteria and in a manner consistent with Article 14 which prohibits various forms of discrimination, including discrimination based upon nationality.

3. The Grand Court Rules were enacted in 1995. Order 23 was based upon the equivalent rule of the Rules of the Supreme Court which have since been repealed. In so far as it is relevant to this application, Rule 1 states as follows –

"(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) .....
(c) .....
(d) .....
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."

In determining how to exercise its discretion, this Court consistently followed the guidance of the English Court of Appeal in *Sir Lindsay Parkinson & Co Ltd –v- Triplan Ltd* [1973] QB 609, at least until 2007 when *Elliott –v- Cayman Islands Health Service Authority* [2007] CILR 163 was decided. The Court's established practice was to start from the premise that a defendant ought not to have to pursue a foreign-resident plaintiff abroad for his costs. The mere fact of his non-residence was sufficient to make it just to order security unless (i) the plaintiff had assets within the jurisdiction or (ii) the plaintiff appeared to have a high probability of success or (iii) the plaintiff's financial circumstances were such that an order for security would be likely to stifle a claim that was at least arguable. In this case the Plaintiff has not sought to persuade the Court to exercise its discretion against the Defendant on any of these three grounds. Hence, it is not necessary for the Court to review the merits of the action and take any view about the Plaintiff's likelihood of success. The established practice of the Court, having decided to exercise its discretion in favour of granting security, was then to consider the quantum of security and the method by which it is to be given. Rule 1(1) expressly empowers the Court to order a non-resident plaintiff to secure "the defendant's costs of the action". At least until the decision of Sanderson J. in *Elliott,* it was the established practice of the Court to fix the quantum of security by reference to the amount which a successful defendant could reasonably expect to recover on taxation pursuant to an order that the plaintiff pay his costs of the action. It follows that an applicant's attorney was expected to prepare a pro forma bill of costs setting out the amount(s) likely to be allowed on taxation, either for the action as a whole or for the completion of certain steps such as close of pleadings or completion of discovery, if the plaintiff was being asked to put up security in stages. The Defendant's application is supported by a pro forma bill of costs, prepared in what was the usual way. Part I contains details of the

amount which the Defendant's attorneys say that it could reasonably expect to recover on taxation for the work actually done up to the 31st December 2010 and Part II contains a detailed projection of the additional amount which would be recoverable up to the stage of completing discovery. The total amount is US$60,855.25. No projection has been prepared for the total taxable costs up to the conclusion of the trial.

4. Apart from taking the point that the estimate in Part II of the pro forma bill of costs is apparently higher than a previous estimate put forward in correspondence, Counsel for the Plaintiff did not seek to persuade me that US$60,855.25 is excessive. Mr Halkerston's argument is that if the Court exercises its discretion in accordance with criteria which are consistent with Article 14 of the Convention, this evidence becomes irrelevant. He says that the maximum amount of security which the Plaintiff can be required to post is not "capped" by reference to the amount which would be payable on taxation in the event that an adverse costs order is made against him. Instead, he says that it is "capped" by reference to the additional amount which it would cost to enforce the order against the Plaintiff in China compared with what it would cost to enforce it against him in the Cayman Islands, on the hypothetical assumption that he has assets in this jurisdiction. In support of this proposition, he relies principally upon the decision of the English Court of Appeal in *Nasser –v- United Bank of Kuwait* [2001] EWCA Civ 556. He also relies upon the decision of Sanderson J. in *Elliott* (supra) and a decision of the Jersey Court of Appeal in *Leeds United Association Football Club Limited –v- Phone-In Trading Post Limited* [2009] JLR 186, which was brought to my attention after close of the oral arguments.

5. The claimant in *Nasser* was resident in the United States. She commenced an action against the defendant bank in England. Her action was struck out and she was given leave to appeal against that decision, whereupon the bank made an application for security for costs under the English Civil Procedure Rules. The application was made under Rule 25.15, which incorporates Rule 25.13 by reference. These particular rules have the same legislative history as GCR Order 23 and Rules 25.13(1) and (2)(a) are substantially the same as GCR Order 23, rule 1(1)(a). A single judge of the Court of Appeal ordered that Ms Nasser pay £17,500 into court as security for the defendant's costs of the appeal. On appeal against the single judge's order, the argument made to the full court was essentially the same as the argument made to me on behalf of the Plaintiff. I am conscious of the fact that the Convention has not been incorporated into the domestic law of the Cayman Islands, whereas it has been incorporated into the domestic law of England by the Human Rights Act 1998. However, if I adopt the reasoning of the English Court of Appeal in *Derbyshire,* as I think that I should, the mere

fact that the Convention has not been incorporated as part of our domestic law is not determinative of this application.

6. In *Nasser* the appeal was allowed on the basis, inter alia, that the discretion under CPR 25.13 and 25.15 to award security for costs against a non-resident individual could only be exercised on objectively justified grounds relating to obstacles to, or the burden of, enforcement in the context of the individual or country concerned. It was held that it would be both discriminatory and unjustifiable if the mere fact of residence outside a contracting state of the enforcement conventions to which the United Kingdom is a party could justify the exercise of protecting defendants against risks to which they would equally be subject, and in relation to which they would have no protection, if the claim had been brought by a resident of a contracting state. In other words, it would be discriminatory under Article 14 of the Convention for this Court to require the Plaintiff to post security merely because he is resident outside the Cayman Islands. The rationale for the English rule is to protect defendants from the potential difficulties or burdens of enforcement in non convention countries. Assuming that the rationale for the Cayman Islands rule is the same, it follows that this Court's discretion should not be used to discriminate against non residents on grounds unrelated to enforcement. I think that the rationale for GCR Order 23, rule 1(1)(a) must be the same. It is difficult to see how the purpose of this rule could be anything other than protecting defendants against the difficulty and extra cost of enforcing a costs order out of the jurisdiction.

7. *Elliott* was a claim brought by the former CEO of the Health Services Authority for damages of approximately $712,000 for wrongful dismissal. Mr Elliott was a United States citizen. Having been dismissed from his employment, he returned to live in Florida and had no assets in the Cayman Islands at the time of commencing his action. The defendant applied for security under Rule 1(1)(a) based upon the total amount of costs which would be recoverable on taxation. Mr Elliot defended the application on various grounds including the proposition that the amount of security, if any, should be limited to the costs of enforcement in Florida and two other states in which he had assets. *Nasser* was cited to Sanderson J., although it is not entirely clear from his judgment exactly how the argument was put on behalf of the plaintiff. In any event, Sanderson J. rejected the proposition that the amount of security should be geared to the amount which would be recoverable on taxation and he ordered the plaintiff to pay $15,000 into court on the basis that "The amount is primarily determined by my best estimate of what it might cost to have the judgments registered in the United States should it be necessary to do so."

8. The argument presented to the Jersey Court of Appeal in the *Leeds United* case was essentially the same as the argument presented to me by Mr Halkerston. Jersey is party to the Convention and, unlike the Cayman Islands, it has been incorporated into the domestic law of Jersey by the Human Rights (Jersey) Law 2000. Rule 4/1(4) of the Royal Court Rules 2004 is materially different from the Grand Court Rules in that it provides that *any* plaintiff may be ordered to give security for costs. On a plain reading, one would think that the rule itself could not be discriminatory on any ground set out in Article 14 of the Convention. However, it was held that in practice the Jersey Court's discretion was invariably exercised in exactly the same way as this Court has exercised its discretion, at least prior to the decision in *Elliott*. The plaintiff was a company resident in England which carried on business as a football club. The Deputy Bailiff ordered that it post security of £88,500. The Court of Appeal set aside his order because "The indiscriminate practice of requiring security for costs from plaintiffs resident outside Jersey constituted discrimination on the ground of status under art.14 of [the Convention] in that it impeded their right of access to the courts under art.6".

9. In the present case the Plaintiff does not dispute that it would constitute a proper exercise of the Court's discretion to make an order for security. Therefore, I will make an order, but I think that the amount must depend upon (i) whether or not an order for costs made by this Court is capable of being enforced against the Plaintiff's assets in China and, if so, (ii) whether the difficulty and expense of conducting enforcement proceedings in China would be materially greater than the cost of doing so in this jurisdiction. I have come to this conclusion for the following reasons. First, I cannot properly exercise any of this Court's discretionary powers for a purpose which would be contrary to the public policy of the Cayman Islands. Second, I think that the principles set out in the Convention must reflect the public policy of the Cayman Islands. If they did not, the Cayman Islands would not be party to the Convention or it would have become a party subject to a reservation in respect of whatever aspect of the Convention is thought to be inconsistent with our public policy. I am in no doubt that the general principles contained in Articles 6 and 14 of the Convention do no more that re-state what was hitherto regarded as the public policy of this country. Third, I therefore accept the proposition that, on its true construction, GCR Order 23 could not have been intended to discriminate against foreigners. To the contrary, the Financial Services Division of this Court was established for the purpose of *encouraging* foreigners to conduct their litigation in this jurisdiction. The Grand Court Rules are intended to provide all comers with a "level playing field" in which to resolve their disputes. Fourth, it follows that the purpose of Rule 1(1)(a) is to protect defendants against the additional difficulty and expense, if any, of enforcing a costs order in the particular country in

which the plaintiff's assets are located and the Court's discretion should be exercised in a manner intended to achieve this objective. Fifth, it is accepted that the Plaintiff is ordinarily resident in China. In the absence of any evidence about his financial circumstances and the location of his assets, I think that I must infer that his only assets against which an order for costs can be enforced are located in China. It follows that I must examine whether an order for costs made against this Plaintiff in the particular circumstances of this case would be capable of enforcement in China and, if so, whether that would be a materially more difficult and expensive exercise than enforcing in this jurisdiction.

10. The only evidence before the Court about the applicable PRC law is an Attorney Opinion Letter written by Guangsheng & Partners, a firm of PRC lawyers practicing in Beijing. This Opinion Letter simply states, in general terms, the basis upon which a foreign judgment can be recognized and enforced under Articles 265 and 266 of the Chinese Civil Procedure Code. It says that a person seeking enforcement must apply to the people's court which will examine the judgment in question by reference to any applicable international treaties or principles of reciprocity. If the people's court arrives at the conclusion that the judgment does not contradict basic principles of PRC law or violate sovereignty, security and social and public interest of China, it could be recognized and enforced. The person seeking enforcement would have to pay a court fee. Assuming that the order for costs does not exceed US$100,000, the fee would not exceed US$5,000. This Attorney Opinion Letter does not address whether or not an order for costs made against this Plaintiff in the particular circumstances of this case would be likely to meet the criteria for enforcement. It follows that there is no evidence upon which I could justify exercising the Court's discretion in the manner sought by the Defendant. I would only order the Plaintiff to post security of US$60,855+, if I was satisfied that an order for costs against him would, most likely, be unenforceable in China, with the result that he is likely to be judgment proof.

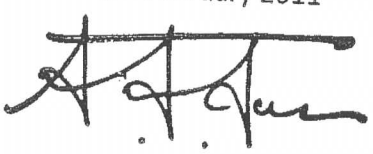
11. However, I think that the Court should proceed on the premise that it will normally be more difficult and expensive to litigate in one country and enforce in another. It seems to me that it must always be easier and less expense to conduct one's litigation and enforcement proceedings in the same country. Whether this simple premise justifies an order for security will depend upon the degree of added difficulty and expense, relative to the potential amount of the order for costs. The Attorney Opinion Letter does not seek to enlighten the Court about the difficulty which might or might not be involved in this particular case, but it does suggest that the court fee of around US$5,000 (or possibly more if the taxed costs exceed $100,000) will be payable upon commencing the

enforcement proceeding. No equivalent fee would be payable upon commencing enforcement proceedings in this jurisdiction. In principle, it would also be necessary for to instruct PRC lawyers and engage interpreters to translate the documents, but I think that I can properly infer that the extra legal fees and disbursements likely to be incurred by this particular Defendant would be relatively low, bearing in mind that its principal places of business are in Beijing and Hong Kong. Its local lawyers may already have some role in this litigation.

12. In conclusion, I think that the proper approach towards the exercise of the Court's discretion under GCR Order 23, rule 1(1) is that reflected in the decision of the English Court of Appeal in *Nasser*. There is no evidence from which I can properly infer that an order for costs made against this particular Plaintiff is likely to be unenforceable in China, being the place in which he is ordinarily resident and in which his assets are most probably situated. It follows that there is no evidence upon which I can properly require him to post security for the whole or any part of the Defendant's potentially recoverable costs of the action up to the point of completing discovery or up to conclusion of the trial. Since it is conceded that I can properly make an order for security based upon the added cost of enforcement in China (no point having been taken about the merits of the claim and no evidence having been given about the Plaintiff's financial circumstances), I will make such an order. The Plaintiff offers US$5,000, but this figure assumes that the Defendant will not incur any extra legal fees and disbursements by having to commence enforcement proceedings in China rather than in the Cayman Islands. In my judgment this is an unrealistic assumption, even taking into account that the Defendant is carrying on business in Beijing and Hong Kong. In all the circumstances of the case I think that it would be just to require that the Plaintiff pay the sum of US$10,000 into court as security for the Defendant's costs.

13. I further order that the costs of this application be costs in the cause.

Dated the 22nd February 2011



The Hon Mr Justice Andrew J. Jones QC