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GFN SA and Ors v The Liquidators of Bancredit Cayman Limited (in Official Liquidation) [2009] UKPC 39: Security for Costs in Insolvency and Interlocutory Proceedings

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A recent Privy Council decision,[1] *GFN SA and Ors v The Liquidators of Bancredit Cayman Limited (in Official Liquidation)* has reconsidered the question as to whether or not security for costs can be granted in relation to interlocutory applications.

Background

In May 2004, the Grand Court of the Cayman Islands ordered the winding-up of Bancredit Cayman Limited ('Bancredit'). Thereafter, the liquidators adjudicated upon various proofs of debt. They rejected proofs of debt submitted by GFN SA, Artag Meridian Ltd and Caribbean Energy Company (the 'Appellants') and admitted others. The Appellants then applied to the Grand Court for an order reversing the liquidators' rejection of their proofs of debt and for orders to expunge the admission of certain admitted proofs.[2] The liquidators applied for security for costs of the Appellants' applications.

The jurisdiction of the Grand Court to make orders for security for costs in this context was set out in Grand Court Rule O.23, r.1[3] and section 74 of the Companies Law (2004 Revision). The former required that there be 'an action or other proceedings' to which the defendant was a party and the latter required that there be an 'action, suit, or other legal proceeding'.

At first instance, the liquidators' applications for security for costs were dismissed on the ground that the court had no jurisdiction to make an order for security for costs. The Grand Court construed the relevant provisions as being limited to matters in which the court's jurisdiction was invoked by writ or some other originating process. As the Appellants' appeals against the rejection of their proofs were ordinary applications filed in Bancredit's pre-existing liquidation, which was a proceeding in its own right, each appeal against the rejection of proofs was not considered to be an 'action or other proceedings' or 'an action, suit, or other legal proceeding' so as to trigger the court's jurisdiction to award security for costs.

The liquidators appealed the first instance decision. The Court of Appeal of the Cayman Islands upheld the appeal on the jurisdiction issue and remitted the matter to the Grand Court to reconsider the security for costs application on its merits. The Appellants appealed to the Privy Council after being granted special leave to appeal.

Privy Council decision

The Privy Council dismissed the appeal on the ground that the Grand Court had jurisdiction to award security for costs in the circumstances.

Lord Scott, delivering the leading judgment on behalf of the Board, noted that the court retained an inherent jurisdiction to award security for costs but that the exercise of that jurisdiction is subject to the settled practice of the court as set out in the rules of court. His Lordship noted:

> 'The effect, therefore, of statutory provisions ... or of Rules of Court ... is not to confer a jurisdiction that the courts did not previously have, but, in the case of section 74 and its statutory predecessors, to exclude impecunious corporate 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. It has, indeed, been long since

Notes

1 Delivered on 4 November 2009.

2 References in this article to the Appellants' appeal against the rejection of their proofs should be taken to include their application to expunge the admission of other proofs, unless specified otherwise.

3 This is in substantially the same terms as the old RSC O.23, r.1 previously applicable in England.

established that rules of court can regulate practice but cannot confer jurisdiction ...'[4]

Their Lordships, therefore, considered that the critical issue was not whether the court had jurisdiction to make an order for security for costs but whether, in light of the relevant statutory provision and rules of court, it would be proper to entertain the applications. Lord Scott reviewed a number of authorities in which 'proceedings' had been construed to exclude interlocutory proceedings.

In particular, their Lordships referred to the English Court of Appeal decision in *CT Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567. In that case, the plaintiff commenced proceedings against the defendant for balances alleged to be due under insurance and reinsurance contracts. The plaintiff obtained a mareva injunction against the defendant on the undertaking to pay any damages later ordered by the court. Subsequently, the mareva injunction was discharged by consent and the defendant applied for an inquiry into the damages it claimed to have sustained as a result of the injunction granted to the plaintiff. The plaintiff then applied for security for costs against the defendant in relation to that application. The application for security for costs was dismissed and the plaintiff appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. Millett LJ held that the word 'proceeding' in the context of RSC O.23, r.1(1) included 'an original proceeding commenced by a form of originating process and not an interlocutory application in other proceedings.' [5]

After considering *CT Bowring*, Lord Scott found that Millett LJ's reference to 'a form of originating process' should be taken as referring to the substance rather than the form of the application. It was reasoned that because Millett LJ expressed no disagreement with Dillon LJ's proposition that a counterclaim could sustain an application for security for costs, and given that, in Lord Scott's view, a counterclaim is not strictly an originating process, it followed that Millett LJ's reference to 'a form of originating process' should be taken as referring to the substance of the application in question.

Lord Scott considered various applications which could be made by way of an interlocutory application in an existing action or by the commencement of a new action and held that the form of the application chosen should not be determinative of whether or not security for costs could be awarded. Quoting from the judgment in *Gilbert v Endean*[6] Lord Scott drew upon a distinction between two types of interlocutory applications which, on the one hand:

'do not decide the rights of parties, but are made for the purpose of keeping things in *statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties',

and, on the other hand, those that 'are to decide the rights of the parties'.

His Lordship considered that this distinction provided a means of determining those interlocutory applications which were capable and those that were not capable of sustaining an application for security for costs. He stated as follows.

'An interlocutory application designed to regulate or assist in some way the conduct of the substantive action between the parties would not in their Lordships' opinion, constitute "proceedings" for the purposes either of section 74 or Order 23. On the other hand, an application which, although interlocutory in form, raised issues as to the rights of the parties which were in substance independent of the issues in dispute in the parent action would, in their Lordships' opinion, normally constitute in substance "proceedings" for those purposes.'[7]

On this footing, His Lordship held that the applications for security for costs by Bancredit's liquidators were, in form, interlocutory but, in substance, originating applications because they were 'applications to determine the substantive, as opposed to merely procedural, rights of would-be creditors'.[8] In the particular context of an application for security for costs by a liquidator against a putative creditor, Lord Scott drew support from *Re Pretoria Pietersburg Railway Company (No. 2)* [1904] 2 Ch 359 in which Buckley J had held that 'wherever a person resident abroad comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court, the ordinary rule as to security for costs applies'.[9]

Lord Scott specifically questioned (without deciding the point) whether the result in *CT Bowring* was correct and cited examples of interlocutory proceedings in which it might be appropriate for security for costs to

Notes

4 At para. 14.
5 At p. 579.
6 [1878] 9 Ch D 259 at p. 269.
7 At para. 26.
8 At para. 27.
9 At p. 362.

be awarded.[10] Lord Neuberger delivered a short separate judgment in which he concurred with Lord Scott's decision, save that he preferred to leave entirely open the question of in what specific interlocutory contexts security for costs might be ordered, and whether *CT Bowring* was correctly decided.

Conclusions

The Privy Council's decision is notable for a number of reasons. First, it confirms that a putative creditor who has appealed against a rejection of its proof of debt may be liable for security for costs even though the application is brought within existing winding-up proceedings.

Secondly, their Lordships confirmed that the origin of the court's jurisdiction to order security for costs is the inherent jurisdiction of the court to control its own proceedings and not the relevant primary or secondary legislation. Specifically relevant in the context of Cayman Islands liquidations, the decision confirms that the Grand Court retains an inherent jurisdiction to award security for costs which is not fettered by the absence of a specific security for costs procedure in the recently introduced Companies Winding Up Rules 2008.[11]

Thirdly, the decision opens the door for security for costs applications to be brought in any interlocutory proceedings where substantive rights are to be determined. In this respect, it openly questions the correctness of the *CT Bowring* decision and rejects any inflexible rule which requires proceedings to be 'originating' before any application for security for costs is jurisdictionally permissible.

Notes

10 In addition to accepting that security could be granted in a counterclaim context (where the counterclaim was more than a mere formulation of the defence), the examples were: in favour of an alleged contemnor for security for costs of a committal application; and where an application is made to set aside a compromise of an action on the ground of misrepresentation or concealment of material facts.

11 The case was decided by reference to the insolvency regime that existed in the Cayman Islands prior to 1 March 2009.

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