IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA No 33 of 2013

BEFORE

The Rt Hon Sir John Chadwick, President
The Rt Hon Sir Anthony Campbell, Justice of Appeal
The Hon John Martin QC, Justice of Appeal

FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION
Justice Sir Peter Cresswell (FSD No 8 of 2012 – PCJ)

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION) (AS AMENDED)
AND
IN THE MATTER OF DYXNET HOLDINGS LIMITED

BETWEEN

DYXNET HOLDINGS LIMITED
Respondent to Petition/Appellant

-and-

CURRENT VENTURES II LIMITED
CURRENT VENTURES IIA LIMITED
Petitioners/Respondents to Appeal

Mr Neil Timms QC with **Ms Charlotte Hoffman** of Turners for the Appellant, Dyxnet Holdings Limited
Mr Nigel Meeson QC with **Mr Michael Mulligan** of Conyers Dill & Pearman (Cayman) Limited for the Respondents to the Appeal, Current Ventures II Limited and Current Ventures IIA Limited

Hearing: 14 April 2014
Judgment; 14 April 2014
Reasons for Judgment: 20 February 2015

REASONS FOR JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from the order made on 26 September 2013 by Justice Sir Peter Cresswell in proceedings to wind up the appellant company, Dyxnet Holdings Ltd ("the Company"), on the petition of the respondents, Current Ventures II Limited and Current Ventures IIA Limited (together "the Petitioners"). The order was made on the Company's application, by summons dated 13 March 2013 (as subsequently

amended), seeking security for costs. The judge dismissed the application. He gave leave to appeal to this Court. At the conclusion of the oral hearing of the appeal in April 2014, this Court allowed the appeal, for reasons to be put in writing and handed down at a later date.

2. It is accepted on behalf of the appellant – and it was common ground in the court below - (i) that the court's power to order security for costs under Order 23 of the Grand Court Rules, 1995 was not exercisable in winding-up proceedings and (ii) that there was no comparable power in the Companies Winding Up Rules. In those circumstances the order for security for costs was sought on the basis – advanced by amendment to its summons made (with the leave of the judge) on 26 September 2013 - 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 is reason to believe that its assets will be insufficient to pay the costs of the defendant".

3. The judge, following the decision of Justice Foster in *In re Freerider Ltd* 2010 (1) CILR 286, held that the inherent jurisdiction relied upon would be inconsistent with the provisions of the Companies Winding Up Rules; so could not be invoked. The underlying issue on this appeal is whether Justice Foster, in *Freerider*, was correct to reach the conclusion that he did.

The Company's application for security for costs

4. The Company was incorporated in the Cayman Islands on 30 October 2000 as an exempt company. It is the holding company of a group the business of which is the provision of internet protocol virtual private network services and contact centre outsourcing services to customers in the People's Republic of China, Hong Kong and Taiwan. The Petitioners are companies incorporated in the British Virgin Islands. They are the holders of shares in the Company. The first-named petitioner, Current Ventures II Limited, has been in voluntary liquidation since August 2011.

5. The petition was presented in January 2012. As presented, the petition sought an order that the Company be wound up on just and equitable grounds; or, in the alternative, an order pursuant to section 95(3) of the Companies Law (2011 Revision) that the Petitioners' shares be purchased by the other members or by the Company. The

petition was subsequently amended (on 27 April 2012) to remove the prayer for a winding up order; so that, thereafter, the only relief sought has been a buy-out order. The petition was opposed by the Company. The principal issues in dispute between the parties were whether the conduct of the management and majority shareholders in relation to the Company was oppressive and unfairly prejudicial towards the Petitioners, as minority shareholders; the validity of a rights issue in 2011; and valuation.

6. As I have said, the Company applied, by summons issued on 13 March 2013, for security for its costs of defending the petition. Following the amendment made on 26 September 2013, the amount in which security was sought was US$1,921,096, or such other sum that the Court might think fit. The summons was listed for hearing on 25 April 2013; but that hearing was adjourned by Justice Cresswell and the summons was re-listed for 26 September 2013.

7. At the hearing of the summons on 26 September 2013 the parties addressed the judge on both (i) the question whether the court had jurisdiction to order security for costs against a non-resident limited liability company in proceedings under the Companies Winding Up Rules; and (ii) the questions whether, if jurisdiction were established, security should be ordered in this case and, if so, what the amount of such security should be. The judge found against the Company on the first of those questions: holding that he ought not to differ from the decision by a judge of co-ordinate jurisdiction unless convinced that that decision was wrong; and that, because he was not convinced that the decision of Justice Foster in *Freerider* was wrong, he would follow that decision. He stated that he would give leave to appeal so that the question of jurisdiction could be considered by this Court. In those circumstances he did not find it necessary to decide the remaining questions – whether, if jurisdiction were established, security should be ordered in this case and, if so, what the amount of such security should be.

8. By its notice of appeal, served on 28 October 2013, the Company sought an order reversing the judge's decision on the question of jurisdiction; and an order remitting the remaining questions to a judge of the Financial Services Division for further hearing.

Section 74 of the Companies Law

9. Section 74 of the Companies Law (2011 Revision) – the text of which substantially follows that first enacted in section 24 of the Joint Stock Companies Act 1857 in the legislation of the United Kingdom – provides for the exercise by the court of a power to order an impecunious company to provide security for the costs of litigation. The section is in these terms:

> "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."

In that context "company" means a company formed and registered under the Companies Law or an "existing company". Neither of the Petitioners is a company formed and registered under Companies Law; and neither is an "existing company" for the purposes of the Law (that is to say, 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 Islands). Each is an "overseas company" (that is to say, a company existing under the laws of a jurisdiction outside the Islands).

The relevant provisions of the Grand Court Rules, 1995

10. Section 24(1) of the Judicature Law (2007 Revision) provides that, subject to the provisions of that or any other Law and to rules of court, the costs of and incidental to all civil proceedings in the Grand Court shall be in the discretion of that court. In that context "proceedings" includes insolvency proceedings: section 24(7). Section 24(2) of the Judicature Law is in these terms:

> "24 (2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers."

11. Section 18 of the Grand Court Law (2008 Revision) was in these terms:

> "(1) Subject to this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.

(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

Section 19 of the Law provided for the constitution of a Rules Committee, with power – subject to that and any other law – to make rules for the purposes set out under section 19(3). Those purposes included the regulation of practice and procedure in respect of the conduct of civil business before the Grand Court in relation to all matters within its jurisdiction; and, generally, for such other matters "as may be reasonably necessary for or incidental to the administration of this Law".

12. GCR Order 62 is headed "Costs". Rule 1(2) provides that:

> "1(2) The powers and discretions of the Court under Section 24 of the Judicature Law (2002) Revision (which relates to the costs of proceedings in the Court) shall be exercised subject to and in accordance with this Order."

Order 62 contains seven Parts: "Preliminary" (Part I), "Entitlement to Costs" (Part II), "Wasted Costs Orders" (Part III), "Taxation of Costs" (Part IV), "Powers of Taxing Officers" (Part V), "Procedure on Taxation" (Part VI) and "Review of Taxation and Appeal on Points of Construction" (Part VII). None of those Parts contains any power enabling the court to order that security be provided by one party for his potential liability for the costs of another party.

13. That power is conferred by GCR Order 23, rule 1(1) which provides (so far as material) that:

> "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) . . . , 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 avoiding 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 the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

Order 23, rule 1(4) provides that the references in (*inter alia*) rule 1(1) to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceedings in question.

14. GCR Order 1, rule 2(1), which provides (generally) that the Grand Court Rules should apply to all proceedings in the Grand Court, has to be read in conjunction with the sub-rules that followed. Prior to amendment of the Grand Court Rules by the Grand Court (Amendment No 2) Rules – which were brought into force on 1 March 2009 (the date upon which the Companies Winding Up Rules were introduced) - those included Order 1, rule 2(5) which was in these terms:

> "2(5) Except for Order 62 (Costs) and Order 102 (Applications Pursuant to the Companies Law (2003 Revision) these Rules shall not apply to any proceedings under Part V of The Companies Law (2003 Revision)."

GCR Order 102, rule 17 ("Winding-Up Rules) made provision for the rules which were to apply in proceedings under Part V of the Companies Law:

> "17 Unless and until any rules are made under Section 174 of the Law, all applications to the Court made pursuant to Sections 49, 79 and Part V of the Law and all proceedings concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with The Insolvency Rules 1986 (SI 1986/1925), insofar as such rules are not inconsistent with the Law or such other rules as may be applied to the proceeding in question."

Following amendment in 2009, pursuant to the Grand Court (Amendment No 2) Rules 2008, GCR Order 1, rule 2(5) was replaced by Order 1, rule 2(4) which was in these terms:

> "2(4) Except for Orders 3 (Time), 4 (Assignment, Transfer and Consolidation of Proceedings), 5 (Mode of Beginning Proceedings), 38 Part II (Writs of Subpoena), 39 (Evidence by Deposition), 62 (Costs), 67 (Change of Attorney), 45-51 (Enforcement) and 52 (Committal) these Rules shall not apply to any proceedings which are –
>
> . . .
>
> (c) governed by the Companies Winding Up Rules 2008; or
>
> . . ."

and GCR Order 102, rule 17 (as it had stood prior to amendment) was revoked.

15. The effect of GCR Order 1, rule 2(4) of the Grand Court Rules 1995 (following amendment in March 2009) was that the Company was unable to rely upon the provisions in GCR Order 23 rule 1(1): in particular, it was unable to rely on rule

1(1)(a). But that would have been the position – by reason of GCR Order 1, rule 2(5) – under the Grand Court Rules 1995 as they stood prior to amendment in March 2009. The significant change was not made in the amendment to GCR Order 1, rule 2: it was made by the revocation of GCR Order 102, rule 17 and the introduction of the Companies Winding Up Rules 2008, Order 1, rule 2(2) of which provided that:

> "2(2) The English Insolvency Rules 1986 (SI 1986/1925) shall cease to have any application with effect from the commencement date."

In that context "the commencement date" is the date (1 March 2009) appointed for bringing the Companies (Amendment) Law 2007 into effect: CWR Order 1 rule 3(1).

16. The significance of the revocation of GCR 102, rule 17 and the introduction of CWR Order 1, rule 2(2) was that those changes closed the route by which courts in these Islands had overcome the obstacle to the making of orders for security for costs against non-resident companies in winding up proceedings formerly presented by Order 1, rule 2(5) of the Grand Court Rules: that is to say, the non-applicability of GCR Order 23, rule 1(1)(a) in such proceedings. As I have said, GCR Order 102, rule 17 had provided that, in the absence of rules made under the Companies Law (and, prior to 1 March 2009, there were none), all proceedings concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with the Insolvency Rules 1986. That enabled the courts in these Islands to take the view that, in the absence of any applicable rule as to the making of orders for security for costs against non-resident petitioners in winding up proceedings in the Grand Court Rules and in the absence of any specific provisions in either the United Kingdom Insolvency Act 1986 or the Insolvency Rules 1986 directed to the making of such orders, reliance could be placed on Rule 7.51A(2) of the Insolvency Rules 1986 and on Order 23 rule 1(1) (a) of the Rules of the Supreme Court (which was in the same terms as GCR Order 23, rule 1) or, latterly, Order 25.13(1) and (2)(c) of the Civil Procedure Rules (which gave power to order security for costs against a claimant who was "a company or other body (whether incorporated inside or outside Great Britain" and where "there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so"). Following the revocation of GCR Order 102, rule 17 and the introduction of CWR Order 1, rule 2(2) in March 2009, there was no route into CPR Order 25.13.

Judicial recognition of an inherent power to order security for costs

17. In support of its contention that the court has an inherent power to order security for costs, the Company relies on observations in the judgments of the Judicial Committee of the Privy Council in an appeal from this Court: *GFN SA, Artag Meridian Ltd, Caribbean Energy Company v The Liquidators of Bancredit Cayman Limited (in Official Liquidation)* [2009] UKPC 39; 2009 CILR 578.

18. The underlying facts in the *Bancredit* case are set out in the judgment of Lord Scott of Foscote; and may be stated shortly. The company, Bancredit Cayman Limited, was in liquidation pursuant to an order of the Grand Court made in May 2004. The appellants, GFN SA and Artag Meridean Ltd (as alternative creditors) and Caribbean Energy Company Limited had submitted proofs of debt in the liquidation which had been rejected by the joint official liquidators. Two other creditors, Banco Leon SA and the Central Bank of the Dominican Republic, had submitted proofs of debt which had been admitted. The appellants applied to the Grand Court (i) pursuant to rule 4.83 of the Insolvency Rules 1986 (which, as I have explained, were then applicable in this jurisdiction) for an order reversing the liquidators' rejection of their respective proofs of debt and (ii) pursuant to rule 4.85 for an order expunging the liquidators' admission of the proofs of debt of Banco Leon and the Central Bank.

19. The liquidators' response, by summonses dated December 2006, was to apply to the Grand Court for orders requiring the appellants to provide security for their costs of those applications. The applications for security for costs were made on the grounds that each of the appellants was ordinarily resident out of the jurisdiction and had no substantial property within the jurisdiction. In March 2007 the Grand Court dismissed the liquidators' security for costs applications on the ground that the court had no jurisdiction to grant them. In January 2008 this Court reversed the Grand Court's decision on the jurisdiction issue and remitted the matter for the Grand Court to consider the security for costs applications on their merits. The appellants appealed to the Privy Council on the jurisdiction issue.

20. At the time when the applications were made to the Grand Court challenging the liquidators' decisions to reject the appellants' proofs of debt and to admit the proofs of the other creditors the Companies Winding Up Rules 2008 were not in force. The factors which, in the present case, prevent the Company from relying on CPR Order 25 rule 13 – that is to say, the revocation of the former GCR Order 102, rule 17 and the

exclusion, by CWR Order 1 rule 2(2) of the application of the Insolvency Rules 1986 in proceedings governed by the Companies Winding Up Rules – had not arisen. Further, although the definition of "company" in the Companies Law (2004 Revision) was in the same terms as in the 2011 Revision – that is to say, in terms which confined the reference to "a company" in section 74 of the Law to companies formed and registered under the Companies Law or "existing" companies – it is plain that (if, on the facts, the point that the appellants were overseas companies and so not companies for the purposes of that section could have been taken) that point was not taken before the Judicial Committee. The issue before the Judicial Committee in *Bancredit* (2009 CILR 578, 585, [15]) was whether an application to reverse the liquidators' rejection of the appellants' proofs of debt and to expunge the admitted proofs of the other two creditors was an "action, suit or other legal proceeding" within the meaning of section 74 of the Law or an "action or other proceedings" within GCR Order 23 rule 1(1). The Judicial Committee held that it was.

21. That issue does not arise on the appeal which is before this Court. The importance of *Bancredit* in the present context lies in the observations of Lord Scott (with which the other members of the Board agreed) as to the inherent jurisdiction of the court to make security for costs orders. He said this (2009 CILR 578, 582-583, [9]):

> "[9] It seems to their Lordships clear from the case law dealing with security for costs issues that the court has an inherent jurisdiction to make security for costs orders but that the exercise of that jurisdiction is subject to what has become the settled practice of the court. For example, the rule that an order for security for costs will not be made against a defendant was part of that settled practice. The rule that such an order will not be made against an impecunious plaintiff was also part of that settled practice but was varied by statute in the case of impecunious corporate plaintiffs by section 24 of the 1857 Act, the statutory predecessor of section 74 of the Companies Act (*sic*). Order 23 Rule 1, like its predecessors, specifies particular circumstances in which the court may entertain an application for security for costs. The Rules of Court did not create or confer the power to do so but, rather, harnessed the power so as to control its exercise."

The reference in that paragraph to section 74 of the Companies Act must, I think, be read as a reference to the Companies Law: the successor to section 24 of the English Act of 1857 was, in the English legislation in force at the time of the decision in *Bancredit*, section 726 of the Companies Act 1985.

22. After referring to the decision of the Court of Appeal of England and Wales in *C.T. Bowring & Co (Ins) Ltd v Corsi & Partners Ltd* [1994] 2 Lloyd's Rep 567, [1995] 1

BCLC 148; [1994] BCC 713, Lord Scott went on (*ibid*, 584-585, [13], [14]) to say this:

> "13 Other authorities, too, indicate that the origin of the power of the courts to order security for costs to be given is not statutory but, rather, the inherent jurisdiction of the court to control its proceedings. *In re Semenza, Ex p. Paget* [1894] 1 QB 15 was a case concerning bankruptcy proceedings. A foreign creditor (not the petitioning creditor) resident abroad appealed to the bankruptcy court against the rejection by the trustee in bankruptcy of his proof of debt. An application for security for costs was made by the trustee. The registrar refused to make the order and the trustee appealed. Section 65 of the Bankruptcy Act 1869 gave the bankruptcy court all the powers and jurisdiction of any judge of the Superior Courts of Common Law or of any judge of the High Court of Chancery. However the Bankruptcy Act 1883 and rules made thereunder had dealt with orders for security for costs in bankruptcy proceedings by authorising such orders to be made against a foreign petitioning creditor or against a creditor appealing to the Court of Appeal. These rules did not authorise security for costs orders in respect of appeals by creditors to the bankruptcy court against the rejection by the trustee of proofs of debt. Lord Esher M.R, at 19/20 commented on this.
>
> > 'I think that the legislature, in dealing in the rules made under the Act of 1883 with the question of security for costs, advisedly left out this intermediate proceeding in the bankruptcy, and refrained from making a rule that security for costs should be given. I do not think that by omitting to make such a rule the legislature has taken away the jurisdiction of the Court to order security to be given; but the rules which have been made – that security may be ordered to be given in the two cases of a petitioning creditor who is a foreigner resident abroad, and of an appeal to the Court of Appeal – are strong to show that the jurisdiction with regard to this intermediate step in the bankruptcy procedure, ought only to be exercised in extreme cases.'
>
> Both Lopes LJ and Kay LJ were in agreement with the Master of the Rolls that the question whether an order for security for costs of an appeal against a rejection of a proof of debt should be made was one not of jurisdiction but of discretion.
>
> 14 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 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. . . ."

23. Lord Neuberger of Abbotsbury, in a judgment with which the three other members of the Board concurred, said this (*ibid*, [30], [31]and [33]):

> "[30] As Lord Scott so clearly demonstrates, the court has an inherent jurisdiction to order security for costs, and, while that jurisdiction is

> essentially discretionary, the discretion must be exercised not merely in a generally judicial manner, but in a manner which accords with the settled practice of the court, as circumscribed or extended by primary or secondary legislation.
>
> [31] I am prepared to assume for the purpose of this appeal that, in order to justify an order for security for costs, it is necessary for the respondent liquidators to establish that the applications are within the ambit of section 74 or of Order 23 Rule 1, although there is considerable force in the contention that those provisions extend, rather than limit, the court's inherent power to order security, as Lord Scott explains in paras 10 to 14. . . . .
>
> . . .
>
> [33] . . . *In re Pretoria Pietersburg Railway Company (No 2)* [1904] 2 Ch 359, . . . [Buckley J] suggested, at 361, that the court's power to order security '*prima facie* . . . applies in winding up proceedings', and, (*ibid*, at 362), that 'the ordinary rule as to security for costs applies' where 'a person resident abroad comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court'. Given the importance of settled practice, this is of particular significance. . . ."

I do not understand Lord Neuberger to be suggesting – in his observation (at paragraph [31]) that he was prepared to assume that, "in order to justify an order for security for costs, it is necessary for the respondent liquidators to establish that the applications are within the ambit of section 74 or of Order 23 Rule 1" - that the inherent jurisdiction is only exercisable in cases which do fall within those provisions. That construction would, I think, be difficult to reconcile with his agreement with the analysis in paragraphs [10] to [14] of Lord Scott's judgment.

Justice Foster's decision in Freerider

24. As I have said, in *In Re Freerider Limited* 2010 (1) CILR 286 Justice Foster refused to order the petitioner (a non-resident individual who was one of two voting shareholders) to provide security for the costs of the other voting shareholder (also a non-resident individual) who was the effective respondent to a petition to wind up the company on the just and equitable ground. He reached that conclusion on the ground that the court did not have the power to make such an order in proceedings governed by the Companies Winding Up Rules 2008. The petition had been presented on 6 March 2009: that is to say, very shortly after the Companies Winding Up Rules had been brought into force on the "commencement day" (1 March 2009). The application for security for costs was made by summons dated 10 February 2010.

25. In the judgment which he delivered on 9 March 2010 Justice Foster referred to GCR Order 23 rule 1 – under which the application for security for costs had initially been made – and stated that, in the circumstances that the petition was presented after the commencement date, that rule was not applicable. For the reasons which I have explained, earlier in this judgment, the true position (as it seems to me) is that GCR Order 23, rule 1, would not have been available even if the petition had been presented before the commencement date; but, in those circumstances, the company could have relied on CPR 25.13. The judge went on to say, correctly, that the proceedings were governed by the Companies Winding Up Rules, not by the Grand Court Rules, and that the Companies Winding Up Rules contained no provision relating to security for costs. He turned, then, to address an argument, advanced on behalf of the applicant, that, nonetheless, the court had an inherent jurisdiction to make an order for security for costs in such proceedings in appropriate circumstances.

26. At paragraphs 10 and 11 of his judgment (*ibid*, pages 289, 290) Justice Foster said this:

> "10 Reference was made by both counsel to the recent judgment of the Court of Appeal in *HSH Cayman I GP Ltd.* v. *ABN AMRO Bank N.V.* [2010] (1) CILR 114 in which the circumstances in which the court has and may invoke an inherent jurisdiction was extensively discussed in the context of the court below having exercised a purported inherent power to dispense with strict compliance with certain provisions of the Companies Winding Up Rules. Chadwick, P., in giving the judgment of the court, referred to the decision of the Court of Appeal in England in *Raja* v. *Van Hoogstraten (No. 9)* [2008] EWCA Civ 1444; [2009] 1 WLR 1143. He also referred to the recent decision of the Privy Council in *Texan Management Ltd.* v. *Pacific Elec. Wire & Cable Co. Ltd.* when it was said with reference to the *Raja* case ([2009] UKPC 46 at para. 57):
>
> > '. . . [T]he modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: *Raja* v. *Van Hoogstraten (No. 9)* [2008] EWCA Civ 1444, [2009] 1 W.L.R. 1143. That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae.* It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction.'

11 The Court of Appeal concluded, *inter alia* (2010 (1) CILR 114, at para. 27), that—

> '(3) In the absence of a power to relieve from the consequences of failure to comply with the Winding Up Rules either in the Rules themselves; or incorporated in the Rules by reference to the Grand Court Rules; or made applicable to winding up by the Grand Court Rules; or exercisable pursuant to s.18(2) of the Grand Court Law, the judge was entitled to invoke the inherent jurisdiction of the court to control its own process. But, in exercising that power, he was not entitled to vary the scheme for the winding up of companies in this jurisdiction laid down by the Winding Up Rules.'"

27. At paragraph 12 of his judgment, Justice Foster went on to say this (*ibid*, page 290):

> "12 The upshot of this guidance, as I understand it, is that the court's inherent power may be exercised to supplement the Companies Winding Up Rules but only in a way that is not inconsistent with their overall scheme. If my understanding is correct, the question in this case is therefore whether an inherent power to order the petitioner to give security for costs would or would not be inconsistent with the overall scheme of the Companies Winding Up Rules."

In answer to that question, he concluded:

> "14. In my opinion, 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. Both the Grand Court Rules and the Companies Winding Up Rules incorporate specific orders of the former into the latter, including O.62 relating to costs. The Companies Winding Up Rules also contain other provisions relating to costs, particularly the provisions of O.24, yet they make no reference to security for costs. In the circumstances, it does not seem to me that I can or should assume that the absence of a provision in the Companies Winding Up Rules relating to security for costs was an omission by the Insolvency Rules Committee, established pursuant to s.155 of the Companies (Amendment) Law 2007. It may equally well have been intentional. In fact, on balance it seems to me that the probability is that it was. Clearly, the Rules Committee had costs in mind in determining that O.62 of the Grand Court Rules should be applicable and also in including the provisions of O.24 of the Companies Winding Up Rules. In those circumstances it would be surprising if the absence of any provision relating to security for costs was simply an accidental omission. I do not consider that it can or should necessarily be inferred that there is a lacuna in the Companies Winding Up Rules in this respect. It is more likely in my opinion that the absence of any provision for security of costs in the Companies Winding Up Rules reflects a deliberate decision by the Rule Committee having regard to the nature of proceedings governed by the Rules. I do not think it is appropriate for me to speculate in this regard but I do not consider that it can be said that security for costs is or should necessarily be inferred to be part of the overall scheme of the Companies Winding Up Rules."

28. In reaching that conclusion Justice Foster referred to, and distinguished, the decision of Justice Andrew Jones QC, on a subsequent application *in HSH Cayman I GP Ltd v ABN AMRO Bank NV* (sub nom. *In re HSH Cayman I GP Ltd* 2010 (1) CILR 148), giving the petitioners leave to amend their petitions: notwithstanding (i) that the Companies Winding Up Rules did not contain any express power to allow a winding-up petition to be amended and (ii) that GCR Order 20, rules 5 and 7 – which do contain a power to allow the amendment of a petition – had not been made applicable to proceedings governed by the Companies Winding Up Rules by either GCR Order 1, rule 2(4) or CWR Order 1 rule 4. He said this (2010 (1) CILR 286, 291):

> "13. In giving leave to amend, the judge [Jones J] considered that the court has an inherent power to allow amendment of a winding-up petition on the ground that such a power is clearly not inconsistent with the overall scheme of the Companies Winding Up Rules. He considered that the existence of a power to amend is a useful supplement to the Companies Winding Up Rules and is anyway necessary to give effect to the Rules because it would otherwise be impossible to make an order substituting a party to the proceedings. Counsel for [the applicant] argued that by analogy the power to make an order for security for costs was also not inconsistent with the overall scheme of the Companies Winding Up Rules and was a desirable and useful supplement to them. He contended that there is an obvious lacuna in the Companies Winding Up Rules in this respect and that it should be filled by the exercise of the court's inherent jurisdiction.
>
> . . .
>
> 15 I respectfully agree with Jones, J. that an inherent power to allow amendment of a winding-up petition is clearly supplemental to the Companies Winding Up Rules and not inconsistent with the overall scheme; on the contrary, it is necessary and appropriate. A power to allow an amendment of the petition is, in my opinion, fundamentally different from a power to order security for costs and I do not accept the analogy which was suggested. As I have said, in my view it cannot be said that power to order security for costs is necessarily consistent with the overall scheme of the Companies Winding Up Rules. It follows that it is accordingly not a power which can appropriately be exercised inherently in those circumstances. The matter of security for costs is governed by the Companies Winding Up Rules which provide no power for the court to make such an order in proceedings governed by them."

29. It is pertinent to keep in mind that 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 it costs. That question did not arise in *Freerider*: in that case the petitioner was a non-resident individual, not a non-resident company.

The decision of Justice Sir Peter Cresswell in the present case

30. As I have said, Justice Sir Peter Cresswell held that, as a matter of judicial comity, he should follow the decision of Justice Foster in *Freerider* unless convinced that that decision was wrong. In a section of his judgment headed "Am I convinced that the decision in Freerider was wrong?" - the judge addressed that question. He said this:

> "I am concerned with a decision of another judge of co-ordinate jurisdiction sitting in the Financial Services Division.
>
> I have carefully consider (*sic*) Mr. Timms' submissions set out above.
>
> I am not convinced that the decision of Foster J was wrong. Accordingly I follow and apply that decision. 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."

He referred, briefly, to the appeal which had been before the Privy Council in *Bancredit;* saying only that the Judicial Committee had been concerned with:

> "(a) O 23, rule l of the Grand Court Rules 1995 (as revised in 2003);
>
> (b) Applications under the Insolvency Rules 1986 which were –
>
> (c) 'Essentially free-standing' originating applications."

And he referred, also briefly, to two decisions of Chief Justice Smellie QC, saying this:

> "The decision of the Chief Justice in *In the matter of Cybervest Fund* [2006 CILR 80] was well before the introduction of the CWR.
>
> The decision of the Chief Justice in *In the matter of the Sphinx Group of Companies* [2010 (2) CILR 1] was concerned with a representation order, not security for costs."

31. The judge then addressed "The formulation of the jurisdiction asserted in the amended summons". He noted that the relief sought was "an Order under the Court's inherent jurisdiction to be exercised in accordance with the principles relating to a non-resident limited liability company when there is reason to believe its assets will be insufficient to pay the costs of the defendant". He observed that:

> "The application does not rely in terms on 0.23, r.l, whether 0.23, r.1 is to be regarded as an extension or limitation of the Court's inherent jurisdiction (see Lord Neuberger in *Bancredit* at paras 30 and 31).

Section 74 of the Companies Law has never been part of the inherent jurisdiction of the Grand Court. Whether it is to be regarded as an extension or limitation of the inherent jurisdiction (see Lord Neuberger in *Bancredit* at paras 30 and 31), it only applies to companies formed and registered under the Companies Law (Section 2(1)).”

32. In the next section of his judgment, headed “The Civil Procedure Rules and the Insolvency Rules in England and Wales”, the judge stated that the Civil Procedure Rules had no application in this jurisdiction. He went on to set out the provisions of CPR 25.13 and Rule 7.51A of the Insolvency Rules 1986; observing that “Thus the approach adopted in England and Wales differs from that adopted in GCR O.1, r.2(4)”.

33. In the concluding sections of his judgment, headed respectively “The role of Rules Committees” and “Freerider”, the judge said this:

> “**The role of Rules Committees**
>
> Rules Committees have a central part to play in formulating rules, in particular for present purposes in relation to security for costs.
>
> In C *T Bowring & Co. (Ins.) Ltd. v. Corsi & Partners Ltd.* ([1994] 2 Lloyd's Rep. 570), Dillon, L.J., said at page 571:
>
> > ‘to add a new category, not covered by any enactment, to those listed in r. l (1) in which a plaintiff can be ordered to give security would now be a matter for the Rules Committee, and not for the discretion, as a matter of inherent jurisdiction, of the individual Judge in the individual case.’
>
> The practice as to security for costs as reflected in Court Rules changes from time to time. The conditions to be satisfied in paragraph (2) of CPR 25.13 are more extensive than those in GCR O.23. The Rules Committees in this jurisdiction when making rules from time to time will no doubt consider such matters as whether the public policy of the Cayman Islands as stated by Jones J in *Gong* at paragraphs 13 and 14 should or should not be taken into account, whether article 7 of the Bill of Rights (the right to a fair trial and public hearing) is or is not engaged, and other considerations.
>
> **Freerider**
>
> Foster J said in *Freerider*
>
> > ‘. . . it does not seem to me that I can or should assume that the absence of a provision in the Companies Winding Up Rules relating to security for costs was an omission by the Insolvency Rules Committee. . . . It may equally well have been intentional. In fact, on balance it seems to me that the probability is that it was.’
>
> Foster J was no doubt familiar with the general approach of the Insolvency Rules Committee, including the extent of its practice to review the working of

the CWR from time to time.

The decision in *Freerider* was in March 2010. No relevant change to the GCR or CWR has been made since then.

In all the circumstances set out above I do not consider that I should depart from the decision in Freerider given by a judge of co-ordinate jurisdiction."

34. The judge's reference to "the public policy of the Cayman Islands as stated by Jones J in *Gong*" in the passage which I have just cited, is to the observations of Justice Andrew Jones QC in *Gong v CDH China Management Company Limited* 2011 (1) CILR 57. In explaining why the order for security for costs that he was minded to make in that case should be limited to an amount sufficient to cover the additional costs of enforcing any order for costs which might be made against the plaintiff (who was ordinarily resident in the Peoples Republic of China), Justice Jones had said this (*ibid*, 64, 65) :

> "13. . . . 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. Secondly, I think that the principles set out in the [European Convention for the Protection of Human Rights and Fundamental Freedoms] 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 arts. 6 and 14 of the Convention do no more that re-state what was hitherto regarded as the public policy of this country.
>
> 14 Thirdly, I therefore accept the proposition that, on its true construction, GCR, O.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 GCR are intended to provide all comers with a 'level playing field' in which to resolve their disputes. Fourthly, it follows that the purpose of r.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. Fifthly, 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."

It is clear, if I may say so, that those observations were not made in the context of determining whether or not the court had jurisdiction (either under GCR Order 23, rule 1(1) or otherwise) to order security for costs against a non-resident party: the observations were made in the context of deciding how the court's jurisdiction should be exercised.

The Companies Winding Up Rules 2008

35. As I have said, at paragraph 12 of his judgment in *Freerider* (2010 (1) CILR 286, 290), Justice Foster asked himself "whether an inherent power to order the petitioner to give security for costs would or would not be inconsistent with the overall scheme of the Companies Winding Up Rules"; and concluded, for the reasons which he set out at paragraph 14 of that judgment, 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". It is necessary, therefore, that this Court should seek to identify with what (if anything) in "the overall scheme of the Companies Winding Up Rules" an inherent power to order a petitioner – and, in particular, a petitioner who is a non-resident limited liability company - to give security for costs can properly be said to be inconsistent.

36. It is, I think, pertinent to have in mind that the Companies Winding Up Rules were introduced at the same time (1 March 2009, the "commencement date") as the changes to the substantive law made by the Companies (Amendment) Law 2007. The principal purpose of the 2007 Amendment Law (as stated in the short title) was to repeal and replace Part V of the Companies Law (2007 Revision): further stated purposes were "to reform the Law relating to the winding up of companies" and, more generally, "for incidental and connected purposes". Part V of the Companies Law (in the form substituted by the 2007 Amendment Law) is headed "Winding Up of Companies and Associations". It includes, at section 154, a provision establishing an Insolvency Rules Committee. The powers of the Insolvency Rules Committee are set out in the substituted Part V at section 155: those powers include (so far as material) power to make rules for the purpose of giving effect to Part V of the Companies Law. They do not include, in terms, power to make rules relating to the security for costs (whether in the context of winding up petitions or otherwise); and there is nothing in section 155 of the substituted Part V which suggests that it was intended that the role

of the Insolvency Rules Committee should include the making of rules for that purpose.

37. In those circumstances it is, perhaps, unsurprising that the Companies Winding Up Rules do not contain rules relating to the provision for security for costs. CWR Order 1 rule 4 provides for the application, in proceedings to which the Companies Winding Up Rules apply, of certain of the Grand Court Rules. It is in these terms:

> "4. (1) Every petition, summons, order or other document required to be served by these Rules shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules.
>
> (2) Every affidavit or other document filed in the Court office shall comply with the requirements of GCR Orders 41 and 66.
>
> (3) Every order or direction made in a winding up proceeding shall comply with the requirements of GCR Order 42.
>
> (4) All funds required to be paid into or out of Court in connection with any winding up proceedings shall be lodged, paid, invested and dealt with in accordance with GCR Order 92."

There is nothing in that rule which has the effect of incorporating the provisions in GCR Order 23 rule 1(1) in the Companies Winding Up Rules. But, neither is there anything in that rule which is inconsistent with the exercise of an inherent power to order security for costs against a non-resident limited liability company who is petitioner in proceedings under the Companies Winding Up Rules (if such a power is found to exist independently of that rule).

38. Order 24 of the Companies Winding Up Rules contains provisions relating to "Applications to Court under Part V of the Law". Part II of that Order, comprising rules 7 to 11, is headed "Costs in Liquidation Proceedings". It contains, at Rule 8, "General Rules as to Costs" and, at Rule 11, provisions relating to the Taxation of Costs. CWR Order 24 rules 8 and 11 are in these terms (so far as material):

> "8 (1) The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule.3 should have his costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.
>
> (2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that –
>
> (a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or

(b) if the Court has directed that the winding up petition be treated as an *inter partes* proceeding between one or more members of (*sic)* the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.

. . .

(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.

. . .

11 (1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.

(2) The Guidelines issued by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3) shall apply to every taxation under this Order.

(3) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision in accordance with the provisions of GCR Order 62, Part VII."

As I have said, earlier in this judgment, GCR Order 1, rule 2(4) has the effect that GCR Order 62 continues to apply in proceedings which are governed by the Companies Winding Up Rules.

39. There is nothing in CWR Order 24, rules 8 or 11 (or elsewhere in CWR Order 24 Part II) that empowers the court to order security for costs; whether against a non-resident limited liability company or at all. And, again, there is nothing in those rules (or elsewhere in CWR Order 24 Part II) which is inconsistent with the exercise of an inherent power to order security for costs against a non-resident limited liability company in proceedings under the Companies Winding Up Rules (if such a power is found to exist independently of those rules). Indeed, it may be said that, in a case falling within Order 24, rule 8(2)(b), the absence of any power to order security for costs against a petitioner (who, if unsuccessful, will, *prima facie*, be liable for the costs of the successful respondents) would be surprising.

The submissions in this Court

40. The appellant submitted that there are two questions for determination by this Court: (i) whether the Companies Winding Up Rules had the effect of extinguishing the inherent jurisdiction to grant security for costs that, prior to the introduction of those

Rules, the court had in winding up proceedings; and (ii) that, if those Rules did not have that effect, how should that jurisdiction be exercised in respect of an overseas limited liability company?

41. In support of its contention that the answer to the first of those questions is that, notwithstanding the introduction of the Companies Winding Up Rules, the court retains an inherent jurisdiction to grant full and adequate security in an appropriate case – and that the Rules did not "abrogate by omission a longstanding and sensible rule of fairness" the appellant submitted that the decision of Justice Foster in *Freerider* was wrong; that Justice Sir Peter Cresswell ought not to have followed that decision; and that he should have preferred and adopted the reasoning of the Chief Justice in *In re SphinX Group of Companies* 2010 (2) CILR 1.

42. The application before the Chief Justice was made by the liquidators of companies in the SphinX Group. The issue for determination on that application (so far as material in the present context) was whether the court had an inherent jurisdiction to appoint representative parties to appear for those having a common interest in the context of a forthcoming hearing to consider whether to approve a scheme of compromise. The Chief Justice explained (*ibid*, page 10, paragraph 23) that:

> "23 . . . there are distinct groups or classes of investors or creditors who may properly be regarded as sharing the same interests on one side or the other of the issues. Thus, there are parties who together can be identified as having a common interest in seeking relief by way of the determination of the issues which may be beneficial to all. This circumstance makes the appointment of representative parties, on the basis of the case authority to be discussed below, entirely appropriate. The reason is that it would be a waste of costs for there to be appointed more than one representative to argue on each side of the issues so identified.

In holding that the court did have an inherent jurisdiction to appoint representative parties, the Chief Justice said this (*ibid*, pages 10, 11)

> "24 There is, however, a question of the jurisdiction of the court to make representation orders in these proceedings to be resolved first. While there is clear provision in the Grand Court Rules, O.14, r.12 (*sic*) for the making of representation orders (and such orders have been made before, especially in the context of family discretionary trusts disputes), O.1, r.2(5) operates to disapply O.15, r.12 to winding-up proceedings such as the present. The Companies Winding Up Rules 2008, promulgated under the Companies Law, are themselves silent on the subject.
>
> 25 As the following discussion explains, I am nonetheless satisfied that representation orders can be made in proceedings such as these by exercising

the inherent jurisdiction of the court. The starting point is s. 18(2) of the Grand Court Law, which applies where there is an apparent gap in local practice and procedure and reads as follows:

> "In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

26 Resort to s. 18(2) of the Grand Court Law is not the same thing as resort to the inherent jurisdiction of the court, but s. 18(2) operates in its terms, as a form of statutory recognition that the inherent jurisdiction exists. This is so if for no other reason than the fact that the practice and procedure in the High Court in England is derived from the inherent jurisdiction of that court. Superior courts of record have always had such jurisdiction defined as (*The Supreme Court Practice 1999*, para. 20A–183, at 1612, citing various English and Canadian cases) –

> ' . . . the reserve or fund of powers, a residual source of powers which the court may call upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them . . .'

27 See also *In re Basis Yield Alpha Fund (Master)* (2008 CILR 50, at para. 52) where, in invoking the inherent jurisdiction, this court held that the objective of securing that court-appointed liquidators are properly enabled to fulfil the duties of their office is an objective that justifies the use of the inherent residual source of powers 'which the court may call upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law.'

28 The particular jurisdiction being invoked here—that by which the court makes representative orders (so that the parties who are required to be present and represented as being respectively interested in the issues, will be bound by the outcome in order that there is a final end to all controversy)—'is an old Chancery rule which the Rules of the Supreme Court later made statutory' (*John* v. *Rees* ([1970] Ch. at 369, *per* Megarry, J.)). Having accepted that the jurisdiction exists, I am also satisfied, on the basis of the tests laid down recently by the Court of Appeal in *HSH Cayman I GP Ltd.* v. *ABN AMRO Bank N.V.,* that it may be applied in the circumstances presented here where there are no prescribed rules of court already governing the situation."

It was said on behalf of the appellant that the Chief Justice was correct to take the view that the omission of GCR Order 15, rule 12 from the lists of those Grand Court Rules which were expressly made applicable to proceedings governed by the Companies Winding Up Rules (whether by exclusion from disapplication under GCR Order 1 rule 2(5) – now Order 1, rule 2(4) - or by inclusion under CWR Order 1, rule 4) did not lead to the conclusion that the inherent jurisdiction of the court to regulate

its own practice – which, it is said, underlies that rule – was inconsistent with the Companies Winding Up Rules or had been abrogated or excluded by the introduction of those rules; and that his reasoning applies with equal force to the omission of GCR Order 23 rule 1 from those lists.

43. Further, it was said, that Justice Foster was wrong to take the view that the list of those Grand Court Rules which, by CWR Order 1, rule 4, were made applicable to proceedings governed by the Companies Winding Up Rules was intended to be exclusive. It was pointed out that, elsewhere in the Companies Winding Up Rules, there are references to other Grand Court Rules (not included in CWR Order 1, rule 4) which are made applicable: examples given are CWR Order 3, rule 1 (which requires a petition to be presented in accordance with GCR Order 9) and CWR Order 3, rule 12(2) (which provides for the fixing of trials in accordance with GCR Order 34). And, it was pointed out, the decisions of Justice Andrew Jones QC in *In re HSH Cayman I GP Ltd* 2010 (1) CILR 148 and of the Chief Justice in *In the matter of the Sphinx Group of Companies* 2010 (2) CILR 1 provide further examples of lacunae in the Companies Winding Up Rules which the court has been willing to fill by resort to the inherent jurisdiction.

44. It was submitted on behalf of the respondent that Justice Foster was correct to hold, in *Freerider*, that the scheme of the Companies Winding Up Rules was inconsistent with the exercise of an inherent jurisdiction to grant security for costs in proceedings governed by those rules - and that, accordingly, the court had no such power – and that Justice Sir Peter Cresswell was right in following the decision of Justice Foster. It was accepted that the decisions of Justice Andrew Jones QC in *In re HSH Cayman I GP Ltd* and of the Chief Justice in *In the matter of the Sphinx Group of Companies* were "self-evidently correct"; but it was said that those decisions "both concern procedural issues which simply affect the efficient conduct of the proceedings" and are to be contrasted with the power to make an order for security for costs "which is a much more significant matter".

45. The respondent relied heavily on what were said to be deliberate decisions of the Insolvency Rules Committee and the Rules Committee, respectively, not to make any relevant alterations to the Companies Winding Up Rules or the Grand Court Rules on the occasions, subsequent to the decision in *Freerider*, on which those Committees

had the opportunity to do so. In the skeleton argument (dated 19 March 2014) on which the respondent relied in this Court, the point was put in these terms:

> "17. The Insolvency Rules Committee carried out a comprehensive review of the CWR in 2012 and in January 2013 published the 2013 Amendment Rules . . . These Rules made changes to Orders 3, 8, 9, 11, 15 19 and 25 of the CWR.
>
> 18. This review was conducted and the changes made following the decision in *Re Freerider*, and with the full knowledge of the Insolvency Rules Committee that it had been held that the Court had no power to order security for costs in proceedings governed by the CWR. Very significantly the Insolvency Rules Committee did not make GCR Order 23 applicable to the CWR, nor did it make any other provision for a power to award security for costs.
>
> 19 The GCR has been amended on seven occasions since the decision in *Re Freerider*. These amendments were made with the full knowledge of the Rules Committee that it had been held that the Court had no power to order security for costs in proceedings governed by the CWR. However, no amendment has been made to Order1 rule 2(4) to make Order 23 applicable to proceedings governed by the CWR.
>
> 20 It must therefore be presumed that both the Rules Committee (chaired by the Chief Justice) and the Insolvency Rules Committee (chaired by Jones J) are content with the outcome of the decision in *Re Freerider*."

And, in the section of that skeleton argument headed "Conclusion", it was submitted:

> "27 Both the Rules Committee and the Insolvency Rules Committee have deliberately chosen not to incorporate a security for costs provision into the CWR notwithstanding the decision of Foster J in *Re Freerider* which made it clear that absent such action there would be no power in the Court of order security for costs in proceedings governed by the CWR. It is not the role of the Court of Appeal to reverse a policy decision of the Rules Committee and the Insolvency Rules Committee."

46. In support of its contention that the answer to the second of the two questions which it invited this Court to address – how, on the premise that notwithstanding the introduction of the Companies Winding Up Rules the court retains an inherent jurisdiction to grant full and adequate security in an appropriate case, should that jurisdiction be exercised in respect of an overseas limited liability company – is that "the jurisdiction must be exercised in a non-discriminatory way by adopting the approach taken in respect of local limited liability companies to which s. 74 of the Companies Law (2013 Revision) apply", the appellant submitted that it was settled law that the discretion to grant security for costs should be exercised in a non-discriminatory way; and that, consistently with that principle, "as a matter of vital public policy, foreign companies should not be afforded an advantage over local

companies". It is said, in the written outline submission of the appellant filed in this Court on 27 February 2014, that:

> "45 . . . The rationale for applying s. 74 to domestic companies applies with equal force to foreign companies and, as a matter of public policy, respondents and liquidators should be afforded the same protection in respect of each. Further, also as a matter of public policy, there should be no discrimination in the grant of security between foreign and domestic companies.
>
> 46 Equality of treatment does not frustrate the wish to encourage foreign litigants here. Indeed there is a competing public policy at least as important as, if not more important to the local economy, than that identified by Jones J that persons doing business here should be encouraged to incorporate here. That is frustrated if they compete on unequal terms with foreign companies. This would be discriminatory and . . . unlawful"

47. In response to the appellant's reliance on the need to avoid discrimination, the respondent pointed out that the "alleged discrimination" arises from section 74 of the Companies Law "which applies only to Cayman Island Companies". It was submitted that, if the appellant's discrimination argument were correct, then that would be a reason for a Cayman Islands company to complain that its constitutional rights were being or had been violated by being unfairly discriminated against by reason of the terms of section 74 of the Companies Law "and/or for the Legislative Assembly to amend section 74"; but, it was said, the argument provides "no legal basis for the Court to create a jurisdiction in winding up proceedings which both the Rules Committee and the Insolvency Rules Committee have decided not to have". It was said that:

> "26 The only way in which the discrimination argument could work would be in the context of an application pursuant to section 74 against a Cayman Islands company for security for costs in respect of proceedings governed by the CWR. If the discrimination argument is correct, then that would be a reason for the Court to hold that because the CWR makes no provision for security for costs against a foreign company, it should not exercise its jurisdiction under section 74 to make an order against a Cayman Islands company in proceedings governed by the CWR."

Determination of the issues raised on this appeal

48. As I have said, at the conclusion of the oral hearing of the appeal in April 2014 this Court allowed the appeal. In allowing the appeal the Court held that Justice Foster had been wrong to conclude, in *Freerider*, that - following the introduction of the Companies Winding Up Rules - the courts of these Islands retained no inherent

jurisdiction to order security for costs in proceedings governed by those rules; that Justice Sir Peter Cresswell was wrong to follow that decision; and that he was wrong to take the view that the decision in *Freerider* required him to hold that he had no power to order a non-resident limited liability company to provide security for costs in proceedings governed by the Companies Winding Up Rules. The reasons which, in my view, lead to that conclusion are these:

(1) Section 74 of the Companies 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 his defence the assets of the company will be insufficient to pay his costs". It has not been suggested that that statutory power does not enable the court to make an order for security for costs against a Cayman Islands company in a case where that company is petitioner in a winding up proceedings.

(2) As Lord Scott explained in *Bancredit* (2009 CILR 578, 583,584) - after citing a passage from the judgment of Lord Justice Millett in *C T Bowring & Co (Ins) Ltd v Corsi & Partners Ltd* [1994] 2 Lloyds Rep 567, 576; [1995] 1 BCLC 148 - the statutory power enacted as section 74 of the Companies Law is properly to be seen not as extending the court's inherent power to make security for costs orders; but as curtailing the rule of practice that a court would not make such orders against a plaintiff who might thereby be precluded from bringing his claim. Lord Scott said this:

> "11 . . . Millett, L.J., if their Lordships may respectfully say so, chose his words in the cited passage with care. Section 24 of the 1857 Act did not extend the court's inherent jurisdiction to make security for costs orders. On the contrary, what it did was to make inroads into the rule of practice, to which Dillon, L.J. had referred, that had previously prevented the court from ordering security for costs to be given by an impecunious corporate plaintiff. The section thereby extended the circumstances in which the court could properly order security for costs to be given. . . ."

(3) Section 16 in Part I ("Bill of Rights Freedoms and Responsibilities") of the Cayman Islands Constitution requires that 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 section 7, the right to a 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. That principle was recognised in the context of security for costs in the decision of Justice Andrew Jones to which I have referred earlier in this judgment - *Gong v CDH China Management Company Limited* 2011 (1) CILR 57 – and in the earlier decision of Justice Sanderson in *Elliott v Cayman Islands Health Service Authority* 2007 CILR 163.

(4) To exercise the power to make an order for security for costs against the petitioner in proceedings governed by the Companies Winding Up Rules on the grounds that the court is satisfied that there is reason to believe that, if the respondent is successful in its defence, the assets of the petitioner will be insufficient to pay its costs in a case where the petitioner is a Cayman Islands company, but to refuse to do so where the petitioner is an overseas company, would be discriminatory: it would infringe the principle that, in the exercise of its own powers, the court is required to give effect to the provisions in Part I of the Constitution (the Bill of Rights) by avoiding discriminatory treatment between different classes of litigant.

(5) Prior to the introduction of the Companies Winding Up Rules on 1 March 2009 (the commencement date) – and, in particular, the introduction of CWR 2(2) which provided that the Insolvency Rules 1986 should cease to have any application with effect from the commencement date – the limited scope of section 74 of the Companies Law (which, by reason of the terms in which "company" is defined in that Law, applied only to Cayman Islands companies) did not lead to discriminatory treatment. Orders for security for costs could be made against petitioners in winding up proceedings who were overseas companies either (i), if (contrary to my own view but as the Judicial Committee appears to have assumed in *Bancredit*) the Grand Court Rules (1995 Revision) applied to winding up proceedings under the then Part V of the Companies Law, by reliance on GCR Order 23 rule 1 (which gave power to order security for costs against a plaintiff ordinarily resident out of the jurisdiction); or (ii), if (as I think) the Grand Court Rules had no application to winding up proceedings, by reliance on Rule 7.51A(2) of the Insolvency Rules 1986 and RSC Order 23, rule 1(1) (a) or,

latterly, CPR 25.13(1) and (2)(c). As Lord Justice Phillips explained in *Chequepoint S.A.R.L v McLelland and another* [1997] 1 QB 51, 64G-H:

> "When the provisions of the Companies Act are read with those of [RSC] Ord 23, r.1, it is apparent that it has not been the intention of the legislature to protect overseas companies ordinarily resident outside the jurisdiction from being required to provide security for costs. . . ."

(6) That position changed on the commencement date (1 March 2009). Thereafter it was no longer possible for courts in this jurisdiction to rely on RSC Order 23 rule 1(1)(a) or, latterly, CPR 25.13(1) and (2)(c): the effect of the revocation of GCR 102, rule 17 and the introduction of CWR Order 1, rule 2(2) was to close the route to those rules which had formerly been available through Rule 7.51A(2) of the Insolvency Rules 1986. Thereafter, the only means by which the courts in this jurisdiction can avoid discriminatory treatment between different classes of litigant (Cayman Islands companies on the one hand and overseas companies on the other hand) in the context of making orders for security for costs against a petitioner in proceedings governed by the Companies Winding Up Rules on the grounds that the court is satisfied that there is reason believe that if the respondent is successful in its defence the assets of the petitioner will be insufficient to pay its costs has been either (i) by refusing to exercise the statutory power provided by section 74 of the Companies Law in the case of Cayman Islands companies or (ii) by reliance on the inherent power (freed from curtailment by the historic rule of practice) in the case of overseas companies.

(7) It would be wrong in principle for the court to refuse to exercise the statutory power provided by section 74 of the Companies Law unless there were no other means of avoiding discriminatory treatment between different classes of litigants. If and so far as possible the court should give effect to the legislative intent that the statutory power is to be used in appropriate cases. 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. And, in my view, the court can properly take the view that the historic rule of practice – which, as Lord Scott observed, was curtailed in relation to Cayman Island companies by section 74 of the Companies Law – must also be similarly curtailed, in relation to non-resident companies, by section 16 of the Bill of Rights; that is to say, in order to give effect to the principle that, in the exercise of its own powers,

the court is required to avoid discriminatory treatment between different classes of litigant.

(8) The court is not precluded by existing Rules of Court - and, in particular, is not precluded by the Companies Winding Up Rules - from relying on the inherent power. As I have explained, there are no provisions in the Companies Winding Up Rules which purport to govern the circumstances in which security for costs can be ordered against a petitioner: and so there are no provisions in those rules with which the inherent power to order security for costs could be said to be insistent.

49. I am not persuaded by the submissions, made on behalf of the respondent, that, by failing to include provisions governing the circumstances in which security for costs can be ordered against a petitioner in the Companies Winding Up Rules at the time when those rules were first made (in 2008), the Insolvency Rules Committee must be taken to have intended to provide for discriminatory treatment as between Cayman Islands companies and overseas companies. I do not think it appropriate to speculate whether the Insolvency Rules Committee appreciated that the dis-application of the Insolvency Rules 1986 would, or might, have the effect of disabling the courts from making orders for security for costs against overseas companies who were petitioners in winding up proceedings; so making it impossible (having regard to the need to avoid discriminatory treatment as between Cayman Islands companies and overseas companies) to make such orders against Cayman Islands companies pursuant to section 74 of the Companies Law. I would observe, however, that I would be reluctant to conclude, on the basis of speculation and in the absence of evidence, that the Insolvency Rules Committee or the Rules Committee did intend that consequence.

50. Nor am I persuaded by the submissions that, by failing to include such provisions in 2013 Amendment Rules, the Insolvency Rules Committee intended to endorse the proposition that, following the introduction of the Companies Winding Up Rules, the courts of these Islands retained no inherent jurisdiction to order security for costs in proceedings governed by those rules. It is important to appreciate that, as I have said earlier in this judgment, that Justice Foster did not have to consider in *Freerider* 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 it costs: that question did not arise in the circumstances that, in that case, the petitioner was a non-resident individual, not a non-resident company. The decision in *Freerider* – that security for costs should not be ordered against the petitioner in those circumstances is supportable, in my view, on the basis that section 74 of the Companies Law was irrelevant, GCR Order 23, rule 1(1)(a) had no application, the Companies Winding Up Rules contained no power to order security for costs in proceedings subject to those rules and there was nothing to curtail the limitation on the inherent jurisdiction imposed by historic practice. I do not think it appropriate to speculate whether the Insolvency Rules Committee appreciated that the wider grounds on which Justice Foster reached his decision in *Freerider* would, or might, have the effect of disabling the courts from making orders for security for costs against overseas companies who were petitioners in winding up proceedings; with the discriminatory consequences to which I have already referred.

51. Nor am I persuaded that the Rules Committee had either of the intentions to which I have referred - and which, on the basis of speculation, the respondents seek to attribute to them - either when that Committee chose to make no reference to GCR Order 23, rule 1(1) in the new GCR Order 1, rule 2(4) when the Grand Court Rules (1995 Revision) were amended in 2009 or subsequently. The position under the Grand Court Rules remained the same after the 2009 amendments as it had been before those amendments: GCR Order 23, rule 1(1) had no application in winding up proceedings. I do not think it appropriate to speculate whether the Rules Committee appreciated that there might be a need to alter the Grand Court Rules so as to change that position in order to avoid the discriminatory consequences to which I have referred. As I have said, the significant change, in March 2009, was the dis-application - by CWR Order 1 rule 2(2) - of the Insolvency Rules 1986.

52. For those reasons, I concurred in the decision of this Court at the conclusion of the oral hearing of the appeal that the Appellant was correct in its submission 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 is reason to believe that its assets will be insufficient to pay the costs of the defendant"; and that, accordingly, the appeal from the decision of Justice Sir Peter Cresswell, holding that there was no such jurisdiction, should be allowed.

53. I should add that this Court was not asked to consider the remaining questions whether, on the facts in this case, security for costs should be ordered in this case and, if so, what the amount of such security should be; and it has not done so. In allowing the appeal, we remitted those questions to a judge of the Grand Court.

Sir Anthony Campbell, Justice of Appeal:

54. I agree.

John Martin QC, Justice of Appeal:

55. I also agree.