1-04-07

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

C.I.C.A. (Civil) # 11 of 2007

(GC Cause No. 171 of 2004)

IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)
AND IN THE MATTER OF Bancredit Cayman Limited (in Official Liquidation)

BETWEEN:

THE LIQUIDATORS OF BANCREDIT CAYMAN LIMITED (In Official Liquidation)

Appellants

- and -

GFN S.A. et al

Respondents

BEFORE: **The Rt. Hon. Mr. Justice E. Zacca, President**
The Hon. Mr. Justice M. Taylor, J.A.
The Hon. Mr. Justice E. Mottley, J.A.

In the presence of Michael Crystal Q.C. instructed by Ben Mays of Maples for the Appellant, and Thomas Lowe instructed by Cherry Bridges of Ritch & Conolly for the Respondents.

Heard: 29th & 30th November, 2007 Judgment delivered: 6th December, 2007
Reasons released: Tuesday 1st April, 2007

President:

Reasons for Judgment

1. Bancredit Cayman Limited (Bancredit) is in official liquidation. It is insolvent and is said to have a large deficiencies of assets to discharge the claims of its creditors.

2. GFN S.A. (GFN) and Artag Meridian Ltd. (Artag) filed an application under rule 4.83 of the Insolvency rules against the refusal by the liquidators to admit their proof of debt dated 24 May 2005 for US $168,700,000.

3. Caribbean Energy Company Ltd, GFN and Artag filed an application under rule 4.85 of the Insolvency rules to expunge two proofs of debts, which have been admitted by the liquidator, of Banco Leon S.A. (Banco Leon) and the Central Bank of the Dominican Republic (the Central Bank) in the liquidation of Bancredit.

4. These applications were in effect an appeal from the decisions of the Liquidators.

Two applications for Security for Costs were heard by Levers J in the Grand Court. The first was an application by the Liquidators of Bancredit and the second by Banco Leon. Levers J. held that the Grand Court had no jurisdiction to order Security for Costs because the applications were not actions commenced by Originating Process.

5. An order for Security for Costs is governed by Order 23 rule 1 of the Grand Court rules and section 74 of the Companies Law (2004 revision) Grand Court Rules. Order 23 rule 1:

(i) "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 would be unable to pay the costs of the defendant if ordered to do so; or

(c) subject to paragraph 3, that the plaintiff's address is not stated in the suit or other originating process or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of proceedings with a view to evading the consequences of the litigation then if having regard to all the circumstances of the case, the court think it just to do so, it may order the plaintiff to give such security for the defendants costs of the action or other proceedings as it thinks just."

4. The references in the foregoing paragraphs 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, including a proceeding on a counterclaim."

6. Section 74 of the Companies Law (2004 revision) provides;

> "where a company is plaintiff in an action, suit or other legal proceeding, a 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 for Costs, and may stay all proceedings until such security is given"

7. Levers J held that "other legal proceedings" refers to a matter in which the jurisdiction of the court is invoked by an originating process, other than writ. The word 'plaintiff' indicates not a person who would be normally described as a plaintiff but covers a person who has 'invoked the jurisdiction of the court by whatever originating process he has selected and that the applications were interlocutory proceedings in an ongoing supervised administration, and do not therefore come within order 23 rule 1.

8. Mr. Crystal for the liquidators submitted that the alleged creditors are clearly in the position of "plaintiff" for the purposes on order 23 rule 1 and that in the context of this rule "proceeding" is the invocation of the jurisdiction of the court by process other than writ. He argues that the appeal of a rejection of a proof of debt is clearly a "proceeding" for the purposes of GCR Order 23 Rule 1(a) and section 74 of the Companies Law.

9. Reference was made by Mr. Crystal to the English rules prior to 1962 which provided that in any cause or matter where security for costs was required, "the security shall be of such amount, and be given at such time or times and in such manner or form as the court or a judge shall direct."

10. Mr. Crystal further submitted that in 1962 the English rules were revised and included rules similar to the Grand Court rules Order 23 rules 1(1) and 1(4) The commentary to the Annual Practice following the introduction of the new rules stated:

> "This order embodies the previous case law dealing with the power of the court to order Security for Costs"

11. He relied on the case of Re Pretoria Petersburg Railway Co. [1904] 2 Ch 359, which he said, confirms that the practice extended to a claimant residing outside the jurisdiction who sought to establish a claim in a liquidation whether it be a voluntary liquidation, a court supervised liquidation or a liquidation by the court.

12. Levers J in her judgment referred to the Pretoria case and said;

> "The nineteenth century authorities where the court claims inherent jurisdiction to award Security for Costs such as in this case are no longer relevant"

Levers J. therefore rejected this case as being the law today.

13. It was also submitted on behalf of the appellant that Re Pretoria Petersburg Railway Company continued to be good law after 1962 under the English equivalent of G.C.R. O 23 rule 1 and continues to be cited in the English Supreme Court Practice and by academic commentators.

14. In the case of Re Pretoria Petersburg Railway Company (no.2) [1904] 2 Ch. 359, the head note reads:

> "where a creditor resident out of the jurisdiction applies in a voluntary winding up for a declaration that he is entitled to prove in the winding up, the court has jurisdiction to require him to give Security for Costs…and semble, that wherever a person out of the jurisdiction comes forward in an action in a winding up whether voluntary, or under supervision, or by the court, the ordinary practice of the court as to ordering Security for Costs applies".

Buckley L.J. at page 31 stated:

> "In this case a person out of the jurisdiction took out an originating summons asking that it might be determined that he was entitled to prove in the winding up as a creditor for £120. The liquidators applied for an order on him to give Security for Costs. The registrar refused to make the order, and this application is in substance an appeal from that refusal. Having regard to the fact that S138 of the Companies Act 1862 as amended by S. 25 of the Companies Act, 1900, gives a creditor of a company in voluntary winding up the right to apply to the court "to determine any question arising in the matter of such winding up" instead of bringing an action for his debt, it would be a strange result if Security for Costs could be ordered in the case of an action and not in the case of the summary method of procedure by summons in the winding up."

At page 362:

> "In my judgment the ordinary practice of the court applies in the case, and wherever a person resident abroad comes forward in an action in a winding up, whether voluntary, or under supervision or by the court, the ordinary rules as to Security for Costs apply. I therefore discharge the order of the registrar, and order the claimant give security in the sum of £25."

15. In the case of Tanning Research Laboratories Inc. V O'Brien [1990] 169 CLR 332, the court stated:

> "If the liquidator, in performing his function of considering the admissibility of proofs of debt, decides to reject a proof of debt, the ordinary remedy of the person claiming to be admitted as a creditor is to apply to the court to reverse or modify the decision. The proceedings thus instituted, though often referred to as an "appeal" from the liquidators decision to reject, are originating proceedings which the court hears de novo"

16. In an extract from Bailey, Groves and Smith – Corporate Insolvency Law-(2001) the authors at paragraph 12-12 states:

> "If a creditor is dissatisfied with the liquidators decision with respect to his proof, including any decision on the question of preference, he may apply to the court for the decision to be reversed or varied--- an application may also be made by the contributor or any other creditor if dissatisfied with the liquidators decision admitting or rejecting the whole or any part of a proof...The court may make an order that the applicant give security for the liquidators costs, as for example where the applicant is ordinarily resident out of the jurisdiction"

The note to this extract refers to the case of Re Pretoria Pietersburg Railway Company (no. 2) [1904] 2 ch. 359.

17. Again in an extract from McPherson's Law of Company Liquidation [2001], under the heading "Interlocutory Proceedings (a) Security for Costs at paragraph 3.122 the author makes reference to the Re Pretoria case.

18. In the case of C T Browning Insurance V. Corsi Partners [1994] 2 Lloyds Law Reports, Millett L J. at page 577 in reference to Order 23, Rule 1(1) – "an action or other proceeding in the High Court" stated:

> "The Order is taken from the 1962 revision of the Rules of the Supreme Court and replaces (with changes not material to be considered) the former O 65 rule 6 which was introduced in 1883 and embodied the previous case law on the subject. The language of O 23 and that of S. 726 and its predecessors are closely similar and if possible ought to be similarly construed. That is not because either was taken from or is coloured by the other, but because they have a common source. The order represents a codification of the case law dealing with the power of the court to order security for costs which had formed the model for the statutory power conferred by the various Companies Acts."

19. Mr. Lowe for the Creditors submitted that the phrase "other legal proceedings" has consistently been interpreted as referring only to originating or original process and not to any form of interlocutory proceeding. So that a person does not become a "plaintiff" in any proceeding for the purpose of G.C.R. Order 23 or S. 74 of the Companies Act by making an application in the course of existing legal proceedings.

20. It is further submitted on behalf of the creditors that the liquidation is an original proceeding by a petition, and proof of debt is not a new proceeding but an application in pending proceeding, Mr. Lowe submits that the Pretoria case is in relation to a voluntary liquidation and is not relevant to the case before the court. He also submits that the observation by the court in Tanning case is obiter. The court may order Security for Costs in a voluntary liquidation, but in a compulsory liquidation the court never has the power to order Security for Costs.

21. Mr. Lowe relies on the cases of Re Unisoft Group Ltd. (no. 1) [1993] BCLC 528 and Electrotec Services V. Issa Nicholas (Grenada) Ltd [1998] 1 W.L.R. 2002

22. Re Unisoft Group Ltd concerned proceedings began by a Petition. Morritts J at page 530 said:

> "In the end, the point boils down to two short questions of construction. The first is what is meant by "In other legal proceeding". Counsel for the petitioner accepted that "other legal proceeding"

would include an originating summons or an originating notice of motion. He submitted that it would not include a petition. One reason he gave for that, but not the exclusive reason, was that a petitioner is not a plaintiff. But I think I must consider first the meaning of "other legal proceeding" divorced from the context of plaintiff. It seems to be manifest that "other legal proceeding" refers to any matter in which the jurisdiction of the court is invoked by an originating process other than a writ. Other forms of originating process create other legal proceedings by invoking the courts jurisdiction. I can see no reason why in relation to the phrase "other legal proceeding" where only an action precedes it so that there can be no application of the ejusdem generis rule, that that phrase should be restricted so as to exclude either petitions as a whole or petition under S. 459 of the 1985 Act."

23. The trial judge was in error in holding that the Pretoria case was not relevant. This case has not been overruled and is as relevant today as it was then.

24. We are satisfied that the court had jurisdiction to make an award for Security for Costs. The creditors are not resident in the Cayman Islands and there is no evidence that they are in a position to pay costs if the defendant is successful. They are to be regarded as plaintiff and their applications are amenable to an award for Security for Costs.

25. We see no distinction between Security for Costs being awarded on a voluntary winding up and a compulsory winding up.

For these reasons the appeal was allowed and the matter remitted to the Grand Court to consider whether Security for Costs shall be granted. Costs to the appellant to be taxed if not agreed.

E. Zacca, P.

M.R. Taylor, J.A.

E Mottley, J.A.