

CT/418

Reported
CJL 2004-5
Note 18

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

19-03-04

CAUSE NO: 46 of 2001

File

BETWEEN:

GRAND CAY DEVELOPMENT LTD.
(IN LIQUIDATION)

Plaintiff

AND:

PEER GRIESEL

First Defendant

AND:

CHARLOTTE GRIESEL

Second Defendant

AND:

PAUL GRIESEL

Third Defendant

AND:

GRAND CAY INVESTMENTS LTD.

Fourth Defendant

Before: Hon. Madame Justice Priya Levers

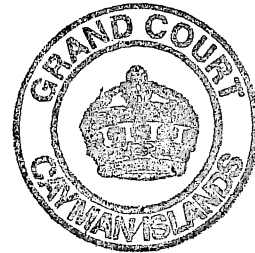
Appearances:

Counsels for the Plaintiff: Mr. Thomas Lowe instructed by Mrs. Linda DaCosta of Myers & Alberga

Counsel for the Second, Third & Fourth Defendants: Mr. Ross McDonough of Campbells

Date of hearing: 12th May, 2004

JUDGMENT



Levers J.

This is an application by the Second, Third, and Fourth Defendants for an Order that the Plaintiff provide security for the Defendants' costs.

The Defendants' application is made pursuant to Section 74 of the Companies Law (2003 Revision).

The Plaintiff was a limited company incorporated under the laws of the Cayman Islands. It was placed into compulsory liquidation on the 16th December, 1999. The Second, Third and Fourth Defendants were directors and shareholders of the company. The Plaintiff was incorporated by the First Defendant in order to, inter alia facilitate the development of land owned by the Fourth Defendant. Having been placed into compulsory liquidation, the Plaintiff commenced these proceedings by a generally endorsed Writ of Summons issued on the 30th January, 2001 and accompanied by a Statement of Claim filed on the 24th May, 2001. The Plaintiff claims the following:

- (a) In respect of the variations the cost thereof from Grand Cay Investment Ltd ("GCI") or, alternatively, from each of the Defendants damages or compensation in the same amount for breach of contract and/or breach of fiduciary duty in failing to ensure that GCI was liable to Grand Cay Development ("GCD") in respect of the variations.
- (b) In respect of the BCQS re-measurement under the Supplemental Agreement, the consequentially increased costs from GCI or, alternatively, from each of the Defendants damages or compensation in the same amount for breach of contract and/or breach of duty in failing to ensure that GCI was liable to GCD in respect of such increased costs.
- (c) Payment of US\$1,949,756.41 by Paul and Charlotte Griesel or, alternatively, from Peer Griesel in respect of Peer Griesel's misappropriations.
- (d) An inquiry into the sums due from Peer Griesel by way of cost overruns and an order for payment of such sum as may be found to be due to GCD.

- (e) Damages or compensation from Paul and Charlotte Griesel for breach of contract and/or duty in failing to supervise Peer Griesel and failing to take steps to enforce his obligations in respect of cost overruns.
- (f) Payment of US\$815,500.98 outstanding from GCI on its loan account.
- (g) A declaration that the purported repayment of Peer Griesel's loan account and GCI's loan accounts in about December 1998 was fraudulent or void as an improper preference in favour of Paul Charlotte Griesel.
- (h) A declaration that the sums advanced by Paul and Charlotte Griesel are to be treated as GCD's long term loan capital which is not to be repaid to them prior to payment by GCD of sums owed to its other creditors.
- (i) Interest as pleaded.
- (j) All necessary further accounts and inquiries.

Pleading closed on the 17th December, 2001. The Second, Third and Fourth Defendants believe that the Plaintiff has no resources of its own and that proceedings have been funded by the only substantial creditors of the Plaintiff, K-Coast which the Defendants submit has sufficient funds to provide the security for costs. Mr. McDonough on behalf of the Defendants submits that although the company is in liquidation, the Plaintiff has not asserted that it could not provide security, if ordered. He submits that this is not a case in which this Court can be certain one way or the other as to whether the Plaintiff or the Defendants will succeed and in those circumstances the Defendants stand to lose substantial sums of money if they cannot recover the cost in the event of success. He urges the Court to exercise its wide discretion and award costs as it is being shown that the Plaintiff company will be unable to pay the Defendants' cost if the Defendants were successful and the Court should exercise its discretion having regard to all the

circumstances of this case. He relies on the case of Pearson v Naydler [1977] 3 All ER at page 531 and 537:

“It seems plain enough that the inability of the Plaintiff company to pay the Defendants’ costs is a matter which not only opens the jurisdiction but also provides a substantial factor in the decision as to whether to exercise it. It is inherent in the whole concept of the section that the Court is to have power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for the costs which ex hypothesi it is unlikely to be able to pay. At the same time, the Court must not allow the section to be used as instrument of oppression...As against that, the Court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the Defendant will be seriously out of pocket, even if the action fails, is not to be encouraged. While I fully accept that there is no burden of proof one way or another, I think that the Court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section.”

Finally, he submits that this is an ideal case for ordering security for costs.

Mr. Lowe instructed by Mrs. DaCosta on behalf of the Plaintiff argues that the Court has a wide discretion which it must exercise carefully and that the relevant factors to be considered by the Court are well established and they are:

1. Both parties have a reasonable prospect of success. He submits that on reading of the affidavits it is clear that Mrs. Griesel, one of the defendants, has admitted her son Peer Griesel, the first defendant was negligent in the management of GCD. He further

submits that the facts as sworn in the affidavits support a breach of fiduciary duty on the part of the directors and that it is no defence for a director to absent himself or herself and then to plead ignorance.

2. That this company went into liquidation as a result of the Defendants' conduct and negligence.
3. That the official liquidators are performing their duty in bringing these proceedings; and
4. That the Defendants are responsible for the financial predicament of the Defendant company.

He submits that it is well established that when the allegations made by the insolvent corporate plaintiff should, if proved, show that the insolvency was due to the actions of the Defendant, it is a denial of justice to order security.

The Law

As with foreign plaintiffs, the rationale behind ordering security against an impecunious company is to safe guard the defendant against the prospect of encountering real difficulty in enforcing an order for costs of the action. One factor to be considered when the Court exercises its discretion as mentioned by Lord Denning Mr., in **Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.** [1973] Q.B. 609, in addition to those mentioned above is whether the company's want of means has been brought about by any conduct by the defendant, such as, in an action for breach of contract delaying payment or the defendant's delay in performing its part of the contract.

In this case, Mr. Lowe submits that the company's position in liquidation and financial distress is due entirely to the Defendants' conduct.

In considering whether to order security for costs to be given once the basic ground is made out, the Court has a wide discretion and must take into account all the circumstances of the case. *Aquila Design (GRP products) Ltd. v Cornhill Insurance plc* [1988] BCLC 134, CA is instructive. The plaintiff company's premises were burnt down in a fire. It made a claim on its fire insurance policy. The insurer repudiated liability on two grounds. First it alleged arson on the part of the plaintiff's managing director in that either he deliberately started the fire or else, after discovering a fire started by someone else, he turned a blind eye and left. Secondly, it alleged breach of warranty by the plaintiff in keeping flammable material on the premises with inadequate protection. On the defendant's insurance application for security for costs, it was established that the plaintiff company had gone into insolvent liquidation. The plaintiff's managing director swore an affidavit denying arson and establishing a letter from the police to the effect that they did not believe that the fire had been started by any willful act. The affidavit also give details as to why the state of security of the materials on the premises did not amount to a breach of the warranty. The judge found that the plaintiff had a boni fide claim with a 50/50 chance of success. He took into account that it would be burdensome on the defendant to refuse the order, but decided that that was outweighed by the following factors:

- (a) that it might be oppressive to the plaintiff if security was ordered as the plaintiff was unable to raise the money;
- (b) that the plaintiff had insured against fire, and had gone out of business as a result of a fire; and
- (c) that the plaintiff's case did have at least a reasonable prospect of success.

I therefore ask myself does this Plaintiff's claim have a reasonable prospect of success. I am of the view that the Plaintiff's claim does have a reasonable prospect of success. It therefore, now leaves this Court to exercise its discretion in all the circumstances of this case and make an order either ordering security for costs or refusing security for costs.

In circumstances where the liquidators are bringing these proceedings albeit in the name of the company in performance of their statutory duty, I must address the question whether it be equitable to order security for costs in all the circumstances of the facts of this case and indeed, would it be oppressive if these costs were ordered. I bear in mind that Mr. McDonough makes the point that third parties who have interest in the proceedings will be able to fund the security for costs. However, in the circumstances of this case where the allegation is that the directors left the company with no assets, in my view the liquidators are not acting unreasonably in attempting to collect these funds from the directors. Although, the Court is unhappy about the delay in making this application for the security of costs, I have not held that against the Defendants as both parties appear to have been delinquent in the prosecution and/or defence of this action.

I therefore hold that in view of the fact that the action has been commenced by liquidators performing their statutory duty and the fact that the Defendants conduct on the facts appears to have contributed to the impecuniosity of the company and its financial distress that an order for security for costs would be oppressive in all the circumstances of this case. I therefore refuse the application for costs.

Dated this 19th day of May, 2004



Judge of the Grand Court