ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2003

IN THE MATTER of Globe-X Canadiana Limited (In Liquidation) and Globe-X Management Limited (In Liquidation)

AND IN THE MATTER of Winding-up Orders of the Supreme Court of the Commonwealth of The Bahamas dated 5th September 2002 appointing Clifford A. Johnson and Wayne J. Aranha as joint Liquidators of Globe-X Canadiana Limited and Globe-X Management Limited

AND IN THE MATTER of a Request from the Supreme Court of the Commonwealth of The Bahamas dated 4 April 2003 for the recognition of Winding-up Orders made on 5th September 2002

AND IN THE MATTER of a request from the Supreme Court of The Commonwealth of The Bahamas dated 4 April 2003 for assistance to be granted to Clifford A. Johnson and Wayne J. Aranha, the Official Liquidators of Globe-X Canadiana Limited and Globe-X Management Limited

BETWEEN:

[1] GLOBE-X CANADIANA LIMITED
[2] GLOBE-X MANAGEMENT LIMITED
[3] SILICON ISLE LIMITED

Appellants

and

[1] CLIFFORD JOHNSON
[2] WAYNE ARANHA

Respondents

Before:

The Hon Mr. Michael Gordon, Q.C. Justice of Appeal

Appearances:

Mr. Kenneth Porter with Miss Merlene Barratt for 1st and 2nd Appellants
Mrs M. E. Birnie Stephenson Brooks for 3rd Appellant
Mr. James Hilsdon for the Respondents

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2004: July 8;
September 20.

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JUDGMENT

[1] GORDON J.A.: This is an application by Globe-X Canadiana Limited and Globe-X Management Limited (hereafter "the Companies") for an extension of time under Part 62.16 of the Civil Procedure Rules (CPR) to file the Record of Appeal and the Skeleton Argument in support of the appeal filed by the Applicants. This Application, dated July 6, 2004, was no doubt stimulated by another application filed by the Respondents seeking to strike out the appeal on the grounds of the Appellants failure to comply with Part 62.12 (3) CPR.

[2] I will deal with both applications together for the sake of brevity. The Companies advance as a reason for their non-compliance two distinct causes; firstly, that they had been in serious and potentially fruitful negotiations with the creditor company which had been the petitioner in the proceedings for the winding up of the Companies and that the negotiations had progressed to the point of a draft settlement agreement when the control in the creditor company was sold to a third party. This is neither denied nor admitted by the Respondents. The second reason advanced by Companies for their delay is that in September 2003 the Respondents made an application to this Court for Security for costs; the Court ordered that written submissions be submitted by 9th January 2004 and that they expected a ruling on the application shortly thereafter and were awaiting such ruling.

[3] Dealing with the second reason first, I am completely unable to tie the lack of a ruling on the issue of security for costs with the failure to comply with Part 62.12 of CPR into any logical matrix. I discount this absolutely.

[4] Regarding the first reason, however, I am sympathetic to the view that where genuine and productive negotiations are proceeding with a likelihood of success, then failure to comply with the time lines set down in CPR might be excusable on the grounds of saving costs and Court time. Having said the above, however, I would not like Counsel to regard this as a charter for excusing delay. Each circumstance will be regarded on its particular merits and Courts will extend time only where they are convinced that delay was caused by a reasonable belief of imminent settlement. In any event, the better and safer practice is to apply for an extension of time before the expiry of the time limit being sought to be extended.

[5] In the circumstances I would allow an extension of time up to 30th September 2004 within which to file the Record of Appeal and Skeleton submissions.

[6] By Order of Saunders CJ [Ag] the parties were required to file written submissions pertaining to an application for Security for Costs of the appeal and the application would then be determined on those written submissions. Both parties duly filed their written submissions and the following is the decision on that application.

[7] The Application for Security for Costs was filed on behalf of the Respondents Clifford A Johnson and Wayne J Aranha, as joint Official Liquidators of the Companies. Not only have they applied for security for costs but they have applied that those costs be provided by some sufficient person providing security. The sum for which they seek security is US$95,000.00. The application is also directed at Silicon Isle Limited who has joined the Companies in the appeal.

[8] It seems to me that there are three questions to be answered. Firstly, should security for costs be ordered at all, and if so, then secondly in what amount and then thirdly by whom should it be provided.

[9] The application for security for costs is made pursuant to Part 62.17 of CPR sub clause 3 of which reads:

> "In deciding whether to order a party to give security for the costs of the appeal, the Court must consider-
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> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
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> (b) whether in all the circumstances it is just to make the order."

[10] I interpret the *"and"* between (a) and (b) in a copulative or disjunctive sense. Hence, (a) and (b) are separate criteria that the Court must apply. I am of the view that once a company is in liquidation a presumption is raised that its assets will be insufficient to pay its costs – see Pure Spirits Co v Fowler[1] but this is a rebuttable presumption. In resisting the application for security for costs the Companies have filed an affidavit by Lowell Holden, Managing Director of the Companies. In it he avers that the Companies have assets in the potential sum of $42,000,000.00 being in the nature of a counter-claim filed against Cinar Corporation, the entity that petitioned in the Bahamas for the companies' winding up. This is a mere hope, rather of the *genus spes successionis*, a hope to succeed rather than a title to property. I do not regard the counterclaim as rebutting the presumption of insufficiency of assets.

[10] In the affidavit of Lowell Holden he says, amongst others, two things of relevance in this context. Firstly that the Companies, prior to their redomicile in Anguilla "were well known in the Nassau investment community as honest and able investment professionals" and that in 2002 all of the shares of the Companies were purchased by Silicon Isle Ltd. There is no evidence of Silicon Isle Ltd having any assets within the jurisdiction of Anguilla other than the shares of the Companies. I am of the view that it is not an unreasonable inference that a reasonable sum ordered as security for costs would not drive the Companies and Silicon

[1] (1890) 25 QBD 235

Isle Ltd from the judgment seat. I therefore hold that this is a case where the circumstances make it just to make an order for security for costs.

[11] This gives rise to the second question posed above, namely in what quantum should such security be ordered. The Respondents have submitted a proforma bill as they are required to do. As I understand this proforma an associate's time is being charged out at US$320.00 which is EC$864.00 per hour. I find this, in the context of our jurisdiction, to be excessive and would substitute a figure of US$200.00 as being an appropriate charge out rate for an associate. I would therefore allow US$9,280.00 for the associate's time. As for Counsel's fee, a half day of hearing preceded by one day of preparation would seem to me to be adequately provided for by a fee of US$25,000.00. I would therefore order that security for costs be given in the sum of US$34,000.00.

[12] Finally, the third question must now be answered. The Respondents argue that it would be unfair to the creditors of the Companies if the assets of the Companies were to be used to provide the security for costs as in the event that the Companies lost the appeal then the effect would be that the creditors would in fact be prejudiced by the diminution of assets to satisfy their claims. Authority for this proposition is found in In Re E. K. Wilson and Sons Ltd[2] and a number of other cases. The logic in such a proposition is inescapable and I have no difficulty in holding that the security must be provided from those promoting the appeal and not from the assets of the Companies

[13] My order therefore is as follows:

(i) The application to strike out the appeal is dismissed;

(ii) The Appellants to file the Record of Appeal and Skeleton Arguments on or before 30th September 2004;

[2] [1972] 1 W.L.R. 791

(iii) Security for costs in the appeal is ordered in the sum of US$34,000.00 to be provided within 60 days of this judgment by way of bank guarantee or by way of deposit of funds in Court but in neither case are the assets of the Appellant companies to be compromised or used to provide such security;

(iv) In the event the security for costs is not provided in the amount, in the manner and by the time ordered the appeal shall stand dismissed.

Michael Gordon, Q.C.
Justice of Appeal