THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/2005/0016

BETWEEN:

SURFSIDE TRADING LTD.

Claimant/Respondent

AND

LANDSOME GROUP INC. ET AL

Defendant

APPEARANCES:

Mr. Mark Brantley for the 13th 14th and 16th Defendants/ Applicants
Mr. Ravi Bahadursingh for the Claimant/Respondent

Date: 13th January, 2006
20th January, 2006

JUDGMENT

[1] GEORGE-CREQUE, J.: This action has, since its commencement in May, 2005, consumed a considerable amount of judicial time in the hearing of various interlocutory applications. The Claimant (which is ultimately owned by Mr. Philip Sinel of Jersey C.I.) is a 60% owner of Landsome Group Inc (the 1st Defendant herein), with the other 40% being owned by Tryon Limited, (a company ultimately owned by Mr Wijsmuller) the 15th Defendant herein. Landsome in turn is the sole owner directly or indirectly, of a group of companies all named as Defendants in this action (the "Landsome Group"). The corporate structure in itself is somewhat complex. Messrs. Brice and Richardson (the 13th and 14th Defendants) were the directors (until recently removed), of most of the Landsome Group.

The interlocutory application, now under consideration, is for security for costs filed on 5th December, 2005, and brought by the 13th 14th and 16th Defendants (together called "the Defendants" for the purposes of this application) prior to the case management conference of the substantive claims made herein. The Defendants seek as against the Claimant, security in the sum of US$500,000 pursuant to CPR 2000 Part 24, on the grounds that the Claimant is ordinarily resident out of the jurisdiction, is a nominal claimant without assets and will be unable to satisfy a costs order made against it in favour of the Defendants and that in all the circumstances of the case, it is just to do so. The power of the court to order security for costs is purely discretionary.

[2] The Claimant is a company registered under the Companies Act[1] having been continued under the said Act on 18th November, 2005 and was formerly, as at the commencement of the action, an International Business Company ("IBC") incorporated under the International Business Companies Act of Anguilla[2]. The Application as filed, was made pursuant to CPR 2000 Part 24 only and no reliance at that time was sought to be placed on section 276 of the Companies Act notwithstanding the asserted impecuniosity of the Claimant. The Claimant has confirmed its impecunious state. Counsel for the Claimant has quite rightly drawn the court's attention to section 276 and the Applicants additionally seek to rely on this section. Section 276 states as follows:

"*Where a company is plaintiff in an action or other legal proceeding, the Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given".*

Under this section, the test of non-residency is not a precondition to the consideration of the giving of security and rests mainly on a Claimant company's impecuniosity. I have found no authority on which an application for security brought pursuant to Part 24 of the Rules, may be treated as one also made under section 276 of the Companies Act. Most of the authorities cited in the course of argument concerned applications brought under mirror provisions to section 276 in other jurisdictions. It is clear however, given the

[1] C65 RSA

Claimant's admitted impecuniosity that it would have been open to the Applicants to apply solely on this ground. I am further of the view, given the clear wording of section 276 that notwithstanding an application being made under CPR 2000 Part 24, that where a Claimant company admittedly is impecunious I am not precluded from a consideration of requiring security of such claimant company under this section even though such company may not fall within any of the categories set out under CPR 2000 Part 24.3 (a) to (g).

Ordinarily resident out of the jurisdiction

[3] For completeness, however, and given the lack of jurisprudence in this jurisdiction in respect of this aspect of the matter, I think it appropriate, therefore, to deal with the question as to whether the Claimant may be said to be ordinarily resident out of the jurisdiction. The matter may very well arise again and in circumstances of a wholly solvent company. Both sides agree that the test to be applied for the purpose of making this determination of fact is the central management and control test as enunciated in the case of DeBeers Consolidated Mines Ltd. - v- Howe[3] and further propounded in the case Re Little Olympian Each Way Limited[4]. Lindsay J. in Little Olympian at page 568-569 considered the following factors relevant in determining whether a company was ordinarily resident:

(a) the objects clause;

(b) the place of incorporation;

(c) where the company's real trade or business is carried on;

(d) where the company's books are kept;

(e) where its administrative work is done;

(f) where its directors meet or reside;

(g) where it 'keeps house';

(h) where its chief office is situate; and

(i) where its secretary resides.

The Companies Act itself is silent on this issue but does define a "non-domestic company" as a company that does not maintain a physical presence, office or staff in

[2] I20 RSA
[3] [1906] A.C. 448
[4] [1995] 1 WLR 560

Anguilla or that does not engage in any revenue generating activities in Anguilla. There is thus a clear recognition that all companies registered and maintaining a registered office in Anguilla are not considered domesticated in Anguilla. I think it useful and accordingly adopt the test as enunciated in Little Olympian for determining residency for the purposes of an application for security for costs in respect of this jurisdiction.

[4] In the case at bar, the Claimant company is incorporated and has a registered office in Anguilla, is said to be a non- trading company and that its largest asset consist of shares indirectly held in Sinel Trust Anguilla Ltd. ("STAL"- the 8th Defendant and one of the main companies in the Landsome Group) which is an Anguillian Trust Company doing business in Anguilla. The Claimant's sole director and ultimate owner (Mr. Sinel) resides in Jersey and thus it is contended that its mind, management and control is outside Anguilla and that any meetings of the company are presumably held outside Anguilla, that its administrative work is done outside Anguilla and that it in essence "keeps house" outside of Anguilla and until recently was an IBC barred from doing business or trading in Anguilla but now continued under the Companies Act so as to comply with directorship requirements in respect of STAL.

[5] The Claimant, on its own admission, would appear to fit the definition of a non-domestic company under the Companies Act, given the fact that it is a non- trading company and does not appear to have or maintain any physical presence, office or staff in Anguilla.
Save for its incorporation coupled with its obligatory requirement of maintaining a registered office in Anguilla, no other meaningful nexus has been established. Given these factors, coupled with the fact that its ultimate owner and sole director resides outside of Anguilla, it is reasonable to infer that its directing mind and control is outside Anguilla. I accordingly hold that the Claimant is a person ordinarily resident out of the jurisdiction.

A nominal Claimant

[6] The Applicants contend that the Claimant is a nominal Claimant being a mere holding entity for Mr. Sinel and is being used by Mr. Sinel to pursue his claims against his "partner" Mr. Wijsmuller. While it is true that the deep differences which have emerged between

Mr. Sinel and Mr. Wijsmuller provide the stimuli giving rise to these proceedings, they both chose to conduct their affairs and business relations through corporate vehicles set up for that purpose. At the heart of this litigation is the question of the manner in which the main entity STAL was operated and the fight for control of STAL. Counsel for the Claimant cited Ennis –v- Thakkar[5] in which Kennedy LJ stated the character of a nominal claimant in relation to an application of this nature as involving "*some element of deliberate duplicity….." someone with a real cause of action who in order to cheat the defendant deliberately divested himself of all right to retain any benefit from the action."*

I do not consider that the Claimant can be categorized in this light as it is a substantive party making claims and seeking relief in its own right given its relationship in respect of the Landsome Group.

Is an order for security just in all the circumstances?

[7] This is by far the most troubling aspect of the matter. Counsel on both sides have presented compelling arguments. I am required to carry out a balancing exercise, taking into account many factors[6] such as:

(a) The risk of not being able to enforce a costs order and /or the difficulty or expense in so doing;

(b) The merits of the claim where this can be investigated without holding a mini trial;[7] This has an impact on the risk of needing to enforce a cost order against the Claimant.

(c) Whether the Defendant may be able to recover costs against someone other than the Claimant;

(d) The impact on the Claimant of having to give security. Will an order for security effectively deprive the Claimant of the ability to take the claim to trial? Where the Claimant is sheltering in a tax haven the court is unlikely to be very sympathetic, but where the Claimant's inability to pay has been caused by the Defendants'

[5] Times Law Reports 2nd May, 1995, 1

[6] See: Blackstone's Civil Practice 2002 para.65.7

[7] See: Porzelack KG –v- Porzelack (UK) Ltd [1987] 1WLR 420
Swain -v- Hillman [2001] 1 All ER 91
Trident International Freight Services Ltd-v- Manchester Ship Canal Co. [1990] BCLC 263

conduct complained of in the claim, a substantial order may unjustly stifle the claim.[8]

(e) Delay in making the application. Generally, the application should be made shortly after the proceedings are commenced and delay may be reflected either in refusing the application or reducing the amount of security ordered.

[8] In the case at bar, the Claimant is admittedly impecunious having little or no assets of value within or without the jurisdiction. Impecuniosity, however, is but one factor and this without more is not sufficient. The clear wording of section 276 of the Companies Act bears this out. Megarry V-C in Pearson –v- Naydler[9] said at p.906 referring to a similar provision in the Companies Act 1985 (UK) said this: *It is inherent in the whole concept of the section that the court is to have power to order the company to do what it is likely to find difficulty in doing, namely to provide security for the costs which ex hypothesi it is likely to be unable to pay. At the same time the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company."*

[9] The Claimant seeks relief ranging from injunctions, orders for inquiries and accounts to damages for breach of fiduciary duties and or conspiracy mainly against Messrs Brice, Richardson and Wijsmuller. The Claimant alleges inter alia, diversion or misappropriation of monies, breaches of fiduciary duties to the Landsome Group and other related entities and certain trusts, namely: the Gemstone A and Gemstone B Trusts ("the Trusts")administered directly or indirectly by them, whereby said Trusts are said to have been transferred to the 16th Defendant, Barwys Trust Anguilla Ltd ("Barwys") incorporated on 23rd March, 2005, of which Messrs. Brice and Wijsmuller are directors. A related action has been brought by the beneficiaries of these Trusts in respect of the said transfer from STAL to Barwys as to the validity of the transfers of the Trusts. Also in dispute is what appears to be a virtual wholesale transfer from STAL to Barwys of approximately 15 companies administered by STAL. The administration of the companies and the Trusts is said to comprise the bulk of STAL's business. The 13th and 14th

[8] See: Sir Lindsay Parkinson and Co Ltd.-v- Triplan Ltd. [1973] 609
[9] [1977] 1 WLR 899

Defendants whilst admitting the transfer of the Trusts and the various companies referred to, deny that they personally owed fiduciary duties to companies of which STAL or other entities was a director and that STAL as director of such entities or as trustee, owed fiduciary duties to such entities and the beneficiaries of those Trusts and if they owed such duties then same were owed to the beneficiaries of the Trusts and are not in breach of their duties to STAL. They also deny that there was any diversion or misappropriation of funds. As to the 16th Defendant, whilst admitting that the Trusts and the companies referred were transferred to it for administration it denies being involved in any wrong doing in respect thereof and owed no fiduciary duties to the Claimant or STAL and by way of counterclaim seeks inter alia, declarations and orders as to the validity or effectiveness of the transfers. The standing of the Claimant to bring the claim, save as it relates to Landsome, is also challenged by the Defendants.

[10] It is accepted that the Claim raises weighty and complex legal issues in respect of company and trust law relating to the fiduciary duties of directors and trustees as well as issues involving alleged tortuous behaviour. The merits of the claim cannot be easily investigated without embarking upon a mini trial of all the issues which are as intertwined as the affected entities themselves.

[11] The Claimant also says that its impecuniosity was brought about by the very conduct of the Defendants in respect of which complaint is made in that its only asset, namely its interest in its subsidiaries such as STAL which it contends has been denuded of assets by Messrs. Brice, Richardson and Wijsmuller. Mr. Sinel deposed to the fact that neither the Surfside Trust which holds the Claimant nor him is in any position to financially assist the Claimant due, he says, to the Defendants' activities and other litigation which has drained his financial resources. As I have stated above, it is difficult at this stage to make a determination of wrong doing. The Defendants contend that no nexus has been established between STAL's business failure or lack of business prospects and the Claimant's impecuniosity. They blame STAL's failure on the actions of Mr. Sinel. Whilst I am not making any determination as to whose conduct is responsible for STAL's business failure I do find it strange that the flight of business,(including the Trusts business

which admittedly provided a lucrative source of income) away from STAL at the time when the 13th and 14th Defendants were its directors happen to have found a ready home in Barwys, a recently established trust company in which Messrs. Wijsmuller and Mr. Brice (though not Mr. Richardson) are the directors.

[12] The Claimant also point to what they consider to be the lateness of the application made, it appears, only after Messrs Brice and Richardson were effectively removed as directors of STAL sometime in November, 2005, notwithstanding that the Claim was filed in May 2005. I am mindful of CPR 2000 Part 24.2(2) which says in effect, that where practicable such an application must be made at case management conference or at pre-trial review. The action is now ripe for a case management conference. This application was filed however, before the Claimant's Defence to the 16th Defendant's counterclaim was filed. It therefore begs the question: if the Defendants considered it necessary to make the application before case management then why wait for over six months to do so. The Claimant contends that the Defendants' application made only at this stage, is calculated to force the Claimant to abandon its claim against them by reason of its inability to provide such security and in essence is being used as an instrument of oppression designed to stifle the genuine claim of the Claimant. In Aquila Design (GRP Products) Ltd. –v- Cornhill Insurance plc[10] Fox LJ a p 136 opined thus: "*it is necessary for the court in looking at the whole matter, to take into account the burden on the plaintiff of having to provide security with the result that it may have to abandon the action in consequences of impecuniosity and an inability to provide the amount ordered by the court . In such cases there is therefore a danger of oppression as a consequence of making an order for security".*

[13] Having weighed all the circumstances in respect of this matter, I am of the firm view that the making of an order for security creates a real danger of oppression leading more likely than not to the Claimant having to abandon its claim against the Defendants. Accordingly, I do not consider that justice would be done in the making of such an order as against the

[10] [1988] BCLC 134, 137

Claimant. The application is therefore refused. The Defendants shall pay the cost of this application to be assessed unless agreed within twenty one (21) days.

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Janice M. George-Creque
High Court Judge