THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 63 of 2012

BETWEEN:

CHINA NTG INVESTMENTS LIMITED

**Claimant**

And

(1) GREAT RIVER CORPORATION LTD
(2) CARLYE TSUI
(3) ELEANOR CHAN
(4) EDMOND CHAN
(5) ADRIAN CHAN
(6) POAN GROUP HOLDINGS PTY LIMITED
(7) CHINA NTGGAS GROUP LIMITED
(8) CHINA NTG GAS GROUP LIMITED
(9) CHINA NTG DEVELOPMENT HOLDINGS LIMITED
(10)CHINA NTG DEVELOPMENT HOLDINGS LIMITED
(11)CHINA NTG BEIJING GAS LIMITED
(12)CHINA NTG BEIJING GAS LIMITED
(13)CHINA NTG GANSU GAS LIMITED
(14)CHINA NTG GANSU GAS LIMITED
(15)CHINA NTG SHANXI GAS LIMITED
(16)CHINA NTG SHANXI GAS LIMITED

**Defendants**

(17) LEUNG SIN WAI
(18) WORLDWIDE EXECUTIVE LIMITED
(19) SONG LIAN ZHONG
(20) CNTG GANSU NATURAL GAS LTD

**Defendants to the Counterclaim**

**Appearances:** Mr Jeremy Child for the Applicants
Mr Robert Nader for the Respondent

**JUDGMENT**

2012: 21, 28 November

(Security for costs – CPR 24(c) – whether claimant taking steps to place assets beyond the jurisdiction of the Court – CPR 24.3(d) - whether claimant nominee claimant – CPR 24.3(g) – whether claimant ordinarily resident outside the jurisdiction)

[1] **Bannister J [Ag]:** This is an application for security for their costs of these proceedings made by the first six defendants to them. The claim alleges that the second to fifth defendants have misappropriated money from the claimant, have failed to account for the claimant's money, have acted in conflict with their duties as directors of the claimant and have engaged in a fraudulent conspiracy against the claimant. The first, third and fourth defendants have counterclaimed for the winding up of the claimant or for appropriate orders to be made under section 184I of the Business Companies Act, 2004.

[2] The application is made under CPR 24 and seeks an order for payment into Court of just over US$1 million within 14 days, failing which the applicants ask that the claim be dismissed with costs.

[3] Rules 24. 2 and 24.3 are in the following terms:

> 24. 2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
>
> (2) Where practicable such an application must be made at a case management conference or pre-trial review.
>
> (3) An application for security for costs must be supported by evidence on affidavit.
>
> (4) The amount and nature of the security shall be such as the court thinks fit.
>
> 24. 3 The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that –

(a) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;

(b) the claimant –

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced;

with a view to evading the consequences of the litigation;

(c) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) the claimant is an external company; or

(g) the claimant is ordinarily resident out of the jurisdiction.

[4] The present application is not being made at a case management conference, but was made on 23 August 2012, during the course of a flurry of applications and cross applications which had begun in around mid July 2012. The application is supported by an affidavit of the third defendant, Eleanor Chan. She says that the applicants have incurred costs of some US$300 thousand to date in these proceedings, although she does not say how much of that was incurred in bringing the counterclaim or on applications brought against the claimant by the applicants. She says that it is anticipated that further costs of approximately US$761 thousand will be incurred by the end of the trial (if any). She goes on to say that the claim should never have been brought, is unmeritorious and is vexatious.

[5] The applicants rely, first, on CPR 24.3(c). They say that the claimant is a nominal claimant. I am not sure what is meant by this. It is not suggested that the current board of the claimant had no authority to bring these proceedings or that any recoveries made in the proceedings will not enure for the benefit of the claimant. The suggestion seems to be that the directors of the claimant who have caused it to commence these proceedings have some ulterior motive for doing so. Even if that is so, it would not make the claimant a nominee for them.

[6] Next, Ms Chan says that the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of this Court. This is a reference to the

allegation that Mr Song, one of the two current members of the claimant's board, has caused a 49% holding in a PRC company, formerly held by the claimant through a succession of subsidiaries, to be transferred from its immediate holding company to a company owned or controlled by Mr Song. Ignoring the fact that this holding was never an asset of the claimant, the difficulty with this submission is, first, that that asset has always been beyond the jurisdiction of the Court and in any case its alleged removal took place almost a year before these proceedings were commenced. It is therefore difficult to see how the alleged misappropriation (which has been the subject of proceedings in the Hong Kong Special Administrative region and in the Gansu Province Court of the People's Republic of China), could have been a step taken with a view to placing that asset beyond the jurisdiction of this Court and thus protecting the claimant against any adverse costs order that might be made in these proceedings. The same may be said of the alleged peculation and misfeasance on the part of Mr Song which are mentioned in paragraphs 34 to 43 of Ms Chan's first affidavit in these proceedings.

[7] Then Ms Chan says that the claimant is ordinarily resident outside the jurisdiction within the meaning of CPR 24.3(g) because, although the claimant is incorporated here, the 'overall management' is said to be carried out in Hong Kong and the PRC rather than in the BVI. It is said that the claimant's 'main asset' (the 49% holding referred to above) has been spirited away and that it is 'dubious' whether the claimant will be able to meet an award of costs should it be ordered to do so. Finally, it is said that it is notorious that it is difficult to enforce orders made by foreign Courts in the PRC. Ms Chan says nothing about enforcement in Hong Kong, where the claimant has subsidiaries.

[8] I am told by Ms Chan in her fifth affidavit in support of this application that the claimant is a non-trading holding company which does not enter into obligations, incur debts, have bank accounts, make payments, employ staff, pay utilities, rent office space or do anything else that could be considered operational in nature. There must, I suppose, have been a resolution of its two directors for the bringing of these proceedings, but whether they met for the purpose and, if so, where, I am not told. Ms Chan says that the 'overall management' of the claimant is carried out by the current directors who, she says, are resident in 'Hong Kong and the PRC', but that is a wholly unparticularised statement and does not even tell me where each of the two directors is ordinarily resident, let alone where the claimant itself is ordinarily resident, which is the object of the inquiry in the present case.

[9] Mr Child, for the applicants, referred me to the decision of Lindsay J in **In re Little Olympian Each Ways Ltd**[1] in which he held that in order to see whether a

[1] [1995] 1 WLR 560

(foreign) corporation was ordinarily resident out of the jurisdiction of the English Court for the purposes of the then RSC Ord 23 r1 (the equivalent to CPR 24.3(g)) the test of where central management and control abides, well established in English tax cases, should be 'imported' into the security for costs rule. Applying that test, he held on the facts of that case that the central management and control of the claimant, which was a non trading company incorporated in Jersey CI, was in Jersey, on the grounds that it had been incorporated there and that what few corporate acts were carried out in relation to it were carried out exclusively in Jersey, despite the fact that the real controlling mind and will of the company was ordinarily resident in England. He therefore held that he had jurisdiction to make an order for security for costs against it.

[10] I may say that I am very doubtful whether a search for the location of the 'central management and control' of a company of the type described by Ms Chan is going to be a very fruitful inquiry, if only because, *ex hypothesi*, it will have no managers (or controllers, in the sense in which the word is used in the English tax cases). The companies referred to in the English tax cases upon which Lindsay J relied were clearly trading companies with businesses that needed management and control. The search proposed by Lindsay J, if embarked upon in relation to an inert offshore asset holding company must therefore end in failure. For that reason it seems to me that, while he clearly reached the right answer in the case before him, the test which Lindsay J imported from the tax cases into the security for costs rule is not appropriate when dealing with companies of this type and character.

[11] I have come to the conclusion on the evidence with which I have been presented that it is not possible for me to find that this particular company is *ordinarily* resident elsewhere than here in the BVI. It is here that it was incorporated, no doubt because for sound commercial reasons those who incorporated it wished to be able to tell the world that it was resident here, here where it has its registered office, here where it keeps an agent to represent it, here where it is to be found and here where it may be served. A significant asset which it owns, 99.5% of the shares in China NTG Gas Group Limited, is situated here in the BVI. Its directors are abroad, but it conducts no business overseas and in these days of instant electronic communications I regard the residence of the directors of a non-trading BVI company as of little, if any, significance. Even if I am wrong about that I have, unlike Lindsay J, no evidence to show that the board as a body is ordinarily resident in any one place rather than another. In those circumstances I have no material and can see no reasons to find that the claimant is ordinarily resident elsewhere than in the jurisdiction in which it is to be found.

[12] I have been shown no authority which has decided that a company incorporated here, or in England, was to be treated, for the purposes of a decision whether to order it to give security for costs, as ordinarily resident elsewhere than here or, as the case may be, in England. I was, however, referred to the decision of George-Creque J (as she then was) in **Surfside Trading Ltd v Landsome Group**,[2] where she considered whether a non trading Anguillan registered company was ordinarily resident out of the jurisdiction for the purposes of CPR 24.3(g). She found that it was, on the grounds that its sole director and ultimate owner lived in Jersey CI. These are different facts from those in the present case. Further, the parties had agreed that the test propounded by Lindsay J was to be applied and in any event the decision was made against the background of Anguillan legislation which has no equivalent here. The decision is not, therefore, of assistance in resolving the question which arises in the present case.

[13] In my judgment, therefore, I have no jurisdiction under CPR 24.3 (c), (d) or (g) to make an order for security for costs against the respondent company.

[14] Finally, had I held otherwise, I would not have ordered security in a sum greater than the US$250 thousand mentioned in Mr Leung's affidavit in opposition to the application. The evidence of both past and of future anticipated costs is far too diffuse to enable me to have made any more precise calculation as to past or any future costs and is not arranged in the conventional way by apportioning costs to particular stages of the litigation. In any event, I would not have been inclined to make any order for security in respect of costs to be incurred after disclosure until after that process had been completed. I should add that had I made an order for security for costs, I would not have attached an unless order to it.

[15] For the reasons given, however, this application is dismissed.

**Commercial Court Judge**
28 November 2012

[2] AXAHCV/2005/0016 20 January 2006