IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 0126 OF 2011

In the matter of

Union Zone Management Limited

And in the matter of

The BVI Business Companies Act, 2004 (As Amended)

Applicants:

(1) Wang Zhongyong
(2) Lin Hui
(3) Zhu Yaqing
(4) Gong Yuda
(5) Gao Yuntai
(6) Lu Yimin
(7) Zhu Mingxing
(8) Qiu Jiajun

Respondents:

(1) Union Zone Management Limited
(2) Jin Ziaoyong
(3) Wen Liming
(4) Ma Guomei

Appearances:

Mr. Richard Arthur for the Applicants, the second to fourth Defendants
Mr. Michal Fay for the Respondents, the Claimants

2013: 13, 21 March

JUDGMENT

(Security for costs – claimants ordinarily resident out of the jurisdiction – CPR 24.2 and 24.3 considered – **Nasser v United Bank of Kuwait**[1] considered)

[1] [2001] EWCA Civ 556

[1] **Bannister J [Ag]:** This judgment deals with an application for security for costs made by the second to fourth Defendants to these proceedings ('the Defendants') during a pre-trial review. I dealt as a preliminary issue with the question whether a consent order for the provision of security which had been made at a relatively early stage of the proceedings precluded the Defendants from making this further application. I decided that it did not. I now deal with the substantive application for the provision of security down to the end of trial.

[2] In these proceedings the Claimants claim that the affairs of the first Defendant Company ('the company') have been conducted in a manner unfairly prejudicial to themselves. In essence, they allege a quasi partnership between themselves and the second Defendant's late father. They say that upon his death, the second Defendant effectively hijacked[2] the company. They want it wound up or, in the alternative, an order that they be allowed to buy the Defendants out.

[3] The Defendants' application for security for costs is made under CPR Part 24. It relies solely upon CPR 24.3(g), which provides:

> 'Conditions to be satisfied 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 –
>
> ...
>
> (g) the claimant is ordinarily resident out of the jurisdiction'.

Under this Rule the Defendants now seek payment into Court of a sum in excess of US$1.7 million by way of security for their costs of these proceedings down to the end of trial.

[4] It is not in dispute that all of the Claimants are ordinarily resident out of the jurisdiction (as, indeed are the Defendants). Mr. Richard Arthur, who appeared for the Defendants on the application, relied in the first instance on now obsolete English authority to the effect that it was the usual practice to order that a foreign plaintiff suing in the English Courts would be ordered to give security. Those authorities are, however, no longer to be relied upon in England. First, because there is an exception for persons ordinarily resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State as defined (I shall refer to such persons, for short, as 'European residents'). In order to obtain an order for security for costs against claimants so resident, a defendant to English proceedings will need to bring his application within one of the other heads of the English security for costs rules.[3] Secondly, because the current state of the law in England and Wales is that it would be discriminatory within the meaning of the European Convention of Human Rights ('the Convention') to treat

[2] I apologise for the slang, but it is the shortest and most accurate way of summarizing the complaint

[3] or show that the claimant is not a person against whom a claim may be enforced under the Brussels or Lugano Conventions

persons ordinarily resident outside England and Wales, but who are not European residents, differently from European residents merely on the ground of their non-European residence: **Nasser v Bank of Kuwait**.[4]

[5] The application of the Convention has been extended to the British Virgin Islands, although I do not know whether any of the Member States which form part of the jurisdiction of the Easter Caribbean Supreme Court have similar legislation in place. If and to the extent that they do not, there may be a tension between the principles to be applied in questions of security for costs in litigation being prosecuted in one of the Territories (as defined) and in litigation being prosecuted in a Member State which does not adopt the Convention. I propose for the purposes of this judgment to ignore that possibility and concentrate upon the position as it is now in the British Virgin Islands, where the Convention is clearly of effect. That must, in my judgment, mean that (for present purposes) the Civil Procedure Rules should be applied, so far as possible, in a manner which does not involve discrimination which would amount to a breach of, or would give rise to a claim under, the Convention.[5]

[6] Mr. Fay, who appears for the Claimants on this application, relies upon **Nasser** for his submission that no order for security should be made in this case other than, perhaps, an order which would compensate the Defendants, if successful, for any expense to which they might be put in enforcing a favourable costs order in the People's Republic of China ('the PRC') over and above any expense which they would have incurred in enforcing in the BVI. He says that **Nasser** establishes that unless a defendant shows that recovery of a costs order in the state in which a claimant is ordinarily resident would be impossible, or next to impossible, or would involve a substantial additional burden of cost and delay, the appropriate costs order will be compensation to reflect the additional cost (if any) which may be involved when a defendant is obliged to enforce overseas.[6] He says that this case falls into the latter category and that any costs order should be limited to the putative additional costs of enforcing in the PRC.

[7] **Nasser** is not a particularly easy case to apply in this jurisdiction. First, its reasoning took its impetus from the distinction drawn in the then relevant English rule between European residents on the one hand and others ordinarily resident outside England and Wales on the other. Our rule has no such distinction, so that to apply the reasoning in **Nasser** one has to start from the position that all security for costs orders against claimants on the grounds only that they are not ordinarily resident within the jurisdiction are potentially discriminatory within the meaning of the Convention. The difference is one of emphasis only, because the effect of the English rule was to treat European residents as if they were residents of England and Wales, but it means that much of the argument in the case is not relevant to the position here.

[8] Article 14 of the Convention is as follows:

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[4] [2001] EWCA 556 at para 58

[5] the approach of Jones J in **Gong v CDH China Management Company Ltd**, Grand Court of the Cayman Islands, 22 February 2011

[6] **Nasser** at para 64

> 'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[9] Article 14 says nothing about residence. The English Court of Appeal in **Nasser** appears to have assumed, without expressly deciding, that it was somehow embraced within the expression 'other status,' but it seems to me to be very artificial to describe ordinary residence as amounting to or conferring any particular *status*. Further, the English Court of Appeal was obliged to embark on some fairly tortuous reasoning in order the harmonise the language of Article 14 of the Convention with Article 6 of the Treaty, which speaks only of 'nationality' – something which indisputably is a matter of status. I therefore wonder, although, as will be seen, it is not necessary for me to decide the point, whether CPR 24.3(g) is incompatible with the Convention at all. The making of costs orders is not *per se* incompatible with the Convention.[7]

[10] The other difficulty that I have with the decision is that I am unable to understand how an order of the sort which was made in **Nasser** (that the claimant give security for the supposed difference between the costs of enforcing a costs order in England and enforcing it in Milwaukee, where the claimant resided) can be brought within the jurisdiction which this Court has to order security for costs. CPR 24.2 provides as follows:

> 'Applications for order for security for costs
> (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-trail 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.

The Rule thus gives the Court the power, in specified circumstances, to order a claimant to provide security for the defendant's costs *of the proceedings*. The Court of Appeal in **Nasser** ordered the claimant to provide security for the costs of some other proceedings, *viz* the costs of prospective proceedings in Milwaukee, limited to the likely difference between the costs of enforcement in England compared with the costs of enforcement in the United States. Although in the case of enforcement proceedings to be brought in Milwaukee it must have been fairly safe to assume that the successful defendant would not be awarded its costs of the enforcement action, there will be many jurisdictions where the costs of enforcement will be dealt with in the enforcement proceedings themselves. In such cases it is pointless to compensate the defendant twice. In my judgment there is

[7] see the discussion between paras 37 and 43 in **Nasser**

no jurisdiction under the CPR to make an order of the sort which was actually made in **Nasser**.

[11] Where I find **Nasser** helpful is in its identifying the rationale for the English rule empowering the Court to order a claimant who is not ordinarily resident within the jurisdiction to provide security for costs. The English Court of Appeal explains that the underlying risk against which an order for security is made in such circumstances is that enforcement in the jurisdiction where the non-resident claimant is to be found (or, perhaps, where his assets are to be found) will be so problematic that the only just course is to protect the defendant by making an order for payment of security for the costs of the proceedings in question.[8] This principle as so stated has nothing to do with and is independent of the position under the Convention and in my judgment provides a sound and self-standing guide for deciding when it will be just to make an order for security against a non-resident claimant on the ground only that he is ordinarily resident outside the jurisdiction..

[12] The other material assistance to be derived from **Nasser** is that the absence of statutory or treaty reciprocal enforcement provisions between the BVI and the Territory or State in which the claimant is ordinarily resident cannot of itself be ground for ordering security.[9] If the principle which I have identified above is correctly identified, that must be right. The costs of common law (or equivalent) enforcement of a judgment for costs are not intrinsically likely to be more, nor is the process likely to be more inconvenient, than the costs and inconvenience of making an application to register a foreign judgment.

[13] I therefore turn to the application of these principles to the present case. There is careful evidence before me from Jin Mao, PRC lawyers. That evidence makes clear that if (as is the case here) there is no treaty arrangement between the state in whose courts the judgment has been obtained and the PRC for the reciprocal enforcement of judgments, a party with a valid judgment may apply to the appropriate PRC Court for the enforcement of the judgment. It further makes clear that a legally effective judgment of a BVI Court competent to hear the dispute in question would be amenable to this procedure, which is described in terms which assimilate it to the familiar common law method of enforcing a foreign judgment where no reciprocal enforcement arrangements are in place. The party seeking enforcement will be obliged to pay the Court fees at the outset, but will recover them if successful in the enforcement proceedings.

[14] This evidence alone is sufficient to persuade me that it would not be just to make an order for security for costs in this case. There are, however, other considerations which I should perhaps mention.

[15] First, this is not a case where the defendant is resident in the BVI and will be obliged to litigate in a foreign Court if awarded his costs. In this case, all parties are resident in the PRC, so they will not be having to face litigation in a foreign country. Secondly, there are assets belonging to the Claimants in this jurisdiction against which the Defendants will be

[8] see paras 46 and 64 of **Nasser** in particular

[9] see ppara 65

able swiftly to enforce if they succeed and are awarded their costs – although admittedly only after the costs are quantified. Those assets are the Claimants' shares in the first defendant company. I have considered whether I should make some order or seek some undertaking from the Claimants not to deal with those shares pending the outcome of these proceedings, but I have come to the conclusion that I should not. Having decided that it would be wrong in principle ('unjust') to make an order for security for costs, it seems to me that it would be illogical and improper to require it to be provided by a sidewind – it not being suggested that I have any jurisdiction other than that conferred by CPR 24.3(g) for making an order.

[16] Finally, the Defendants (or their predecessors in title[10]) set up the first defendant company in this jurisdiction and they and the Defendants enjoyed and enjoy the advantages and benefits which that brings. The appropriate forum – indeed, the only forum - for a dispute of the sort with which these proceedings are concerned is the BVI. For the Defendants to contend that the Claimants cannot litigate that dispute in the only available forum for its resolution without providing security for all the Defendants' costs seems to me, in all the circumstances, nothing more than a cynical manoeuvre. Absent the sort of circumstances which are referred to in paragraph [10] above, persons who seek resolution of disputes involving BVI incorporated companies should be able to bring their cases here without the fear that they will be met with an order that they first pay into Court the entirety of the defendants' costs of the proceedings. Each case turns on its own particular facts, but as a matter of general principle I am not afraid to say that the Courts of the BVI will need to be given compellingly persuasive reasons why in cases of this sort security for costs should be ordered on the grounds only that the claimant is ordinarily resident out of the jurisdiction.

Conclusion

[17] This application therefore fails.

Commercial Court Judge
21 March 2013

[10] there is an issue as to whether they had any predecessors in title at all, but it does not lie in the mouths of the Defendants to deny it