IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2004: 51

BETWEEN:

FIRST ATLANTIC COMMERCE LIMITED

Plaintiff

-and-

THE BANK OF BERMUDA LIMITED

Defendant

RULING

Date of hearing: April 26, 2007
Date of Ruling: May 15, 2007

Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, for the Plaintiff
Mr. Andrew Martin & Ms. Venous Memari, Mello Jones & Martin,
For the Defendant

Introductory

1. By Summons dated March 29, 2007, the Defendant applied for the following relief:

> " *a stay of further proceedings until seven days after the Plaintiff produces an undertaking to the Supreme Court of Bermuda that Edmund Gibbons Limited will (a) pay the taxed costs and disbursements (if any) ordered by this court to be paid by the Plaintiff in respect of the Defendant's defence of the proceedings, (b) pay any Judgment entered in favour of the Defendant on its counterclaim together with the taxed costs and disbursements and interest thereon on the grounds that the Plaintiff is insolvent and is reliant on Edmund Gibbons Limited to pay its ongoing liabilities and expenses, together with evidence satisfactory to the court that Edmund Gibbons Limited has the financial resources to meet its obligations such…undertaking.*"

2. It is common ground that there is no express statutory power to order an insolvent local plaintiff to provide security for costs. This Court is, seemingly for the first time, being asked to order security in the exercise of its inherent jurisdiction.

Factual findings

3. The Defendant's Summons was supported principally by the First Affidavit of Sonja M. Salmon, sworn on March 23, 2007. The Bank's General Counsel, she deposes, based on the Plaintiff's January 31, 2006 audited financial statements, that the Plaintiff is (a) insolvent, and (b) only able to continue operating with the support of its parent company, Edmund Gibbons Limited. As costs of the present action will likely run into hundreds of thousands of dollars and the Plaintiff has refused to give particulars of the nature and extent of its parent's support, it would be an abuse of process for the Plaintiff to be able to pursue the present action without the means to meet any adverse costs order or judgment.

4. The Fifth Andrea Wilson Affidavit was sworn on April 2, 2007 in response. The Chief Executive Officer of the Plaintiff admits that the Plaintiff is only able to meet its obligations as they fall due with the support of its parent. She further deposes that (a) the Defendant is responsible for the Plaintiff's current financial position, (b) it cannot be an abuse of process to prosecute an arguable claim, (c) the application if granted would interfere with the Plaintiff's constitutional right of access to the Court under section 6(8) of the Constitution, and (d) the Defendant is familiar through other transactions with the financial standing of the Plaintiff's parent company. That the costs of the action will run into hundreds of thousands of dollars is not disputed.

5. I am bound to find that the Plaintiff is admittedly insolvent in the sense that, absent financial support, it is unable to pay its debts as they fall due. I am also bound to find that this matter, which is listed for trial for the month of November, is likely to give rise to an order for costs well in excess of $100,000.

6. The real controversy turns on whether the Court, on these substantially uncontroversial facts, (a) has the jurisdiction to require the Plaintiff to furnish the undertakings sought, and (b) if so, should exercise such jurisdiction in the present case.

The Defendant/Applicant's submissions

7. Mr. Martin opened his submissions on the law by contrasting the present statutory position in England and Bermuda. In England section 726 (1) of the Companies Act 1985 empowers the English courts to order a company of doubtful solvency to provide security for costs. In addition, section 51 of the Supreme Court Act 1981 (U.K.) empowered the English courts to make costs orders against third party funders of litigation being prosecuted by impecunious or insolvent parties. No such equivalent existed, in either case, in Bermuda.

8. Counsel conceded that Order 62 prescribed the powers of this court as regards costs, and that no statutory power to order costs against third party funders existed. The Bermuda Companies Act 1981 contained no equivalent of section 726(1) of the 1985 U.K. Act. On the first return date of the present Summons, it had readily been conceded that the power to order security for costs under Order 23 only applied to foreign plaintiffs.

9. Mr. Martin then made his principal submission. At common law, the maintenance of an action by a third party may, depending on the circumstances, be held to be an abuse of the process of the Court. The court had the inherent jurisdiction to restrain abuses of its process, which in this context was wholly distinct from the power to strike out a claim which was not made in good faith or which had no prospect of success. It was abusive for the plaintiff to pursue the present claim, dependent entirely on the support of its parent, without giving assurances that the parent would in fact meet obligations arising out of the present litigation.

10. The Bank's case was cogently argued in the following portions of Counsel's written submissions:

"*4.2 In **MacFarlane –v- EE Caledonia Ltd** [1995] 1 Lloyds Rep 535, 540 Longmore J held that the absence of an undertaking by the funder of an action to pay the other side's costs was a factor that (quite independently of any other factors) rendered illegal the maintenance contract:*

"The fact that Quantum have not accepted and do not accept such liability seems to me to affect their contract with Mr. MacFarlane with illegality, quite apart from the additional illegality which arises from the champertous nature of the agreement……". See p 540 col2.

*4.3 This case was cited with approval by Kennedy LJ in **Condliffe –v- Hislop** [1996] 1 All ER 431, at 439-40:*

*"**It may well be that it is not necessary to every case of lawful maintenance that the maintainer should accept a liability for a successful party's costs**; for example, a member of a family or a religious fraternity may well have a sufficient interest in maintaining an action to save such maintenance from contractual illegality, even without acceptance of liability for such costs. **But** in what one may call a business context (e.g. insurance, trade union activity, or commercial litigation for remuneration) **the acceptance of such a liability will always, in my view, be a highly relevant consideration.**"*

And

*"I am satisfied that there is at present no power to require a party who is maintained but who does not satisfy the requirements of Order 23 r 1 to give security for costs….**Nevertheless the court is entitled to protect its own procedures**, and as Sir Thomas Bingham MR said in Roache –v- News Group Newspapers Ltd (1991) Times 23 Nov the principle that in the ordinary way costs follow the event "is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose". **If that principle is threatened, as for example if an insurer or trade union were known to be giving financial support to a party without accepting liability for the costs of the other side if the supported party were to lose, then, as it seems to me, the court might, at least in some cases,***

> ***be prepared to order that the action be stayed****…..Normally the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under s 51 Supreme Court Act 1981…* ***but if the circumstances suggest*** *that the litigating party or the maintainer may not be bona fide,* ***or if that party were to lose, an order for costs would be difficult to enforce against the maintainer then, as it seems to me, a stay could be imposed****."*
> *(emphases added)*

> *4.*[4] *In the English cases, the courts have been able to resolve the potential for abuse by reliance on the power of the court to order costs against a non-party pursuant to s 51 Supreme Court Act 1981 as in* ***Condliffe*** *and* ***Abraham –v- Thompson*** *[1997] 4 All ER 362 CA. In Bermuda there is no such power, and therefore it is submitted that the correct approach is to regard the maintenance of an action by a third party as being unlawful and abusive unless and until adequate protections are established to render the funder liable to pay the other side's costs in the event an order is made against the funded party.*

> *4.*[5] *Although in some circumstances the maintenance of an action by a parent on behalf of a subsidiary may be lawful assistance, this support becomes unlawful and abusive where the parent thereby enables its subsidiary to engage in highly expensive litigation without accepting all the consequences of losing.*
> *Cp* ***The Kommunar*** *[1997] 1 Lloyds Rep 22*"

11. Mr. Martin conceded that this jurisdiction must be exercised within bounds, but submitted that on the facts of the present case, no question of stifling a genuine claim arose. The European Court of Human Rights had held article 6 of the European Convention was not infringed by requiring an appellant to furnish security as a condition of appealing: *Tolstoy Miloslavsky-v- United Kingdom* (1995) 20 EHRR 442. Counsel also referred as a guide to the approach taken by the English courts in exercising the statutory jurisdiction to order security of costs to be provided by insolvent companies:

> "*The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company. This will particularly be the case when the failure to meet that claim might itself have been a material cause of the claimant's impecuniosity. On the other hand, the court 'will also be concerned not to be so reluctant to order security that it 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."[1]

12. Finally, Mr. Martin submitted that the order sought was consistent with the Overriding Objective's goal of putting the parties on an equal footing. The Plaintiff's characterisation of the Bank as the giant in a "*David and Goliath*" confrontation was misleading, because the Plaintiff itself was owned by the parent of Capital G Bank.

The Plaintiff/Respondent's submissions

13. Mr. Woloniecki submitted that, even if both parties were regarded as banks, the Defendant was on any view a far larger financial institution. The order sought was wholly inappropriate in a case where the Plaintiff's claim was not liable to be struck-out.

14. The Plaintiff's Counsel distinguished the present case from the appeal scenario under consideration in *Tolstoy Miloslavsky-v- United Kingdom* (1995) 20 EHRR 442. The right of access to the Court would always be given more weight at the first instance level. This was indeed supported by another authority helpfully provided by Mr. Martin, the Privy Council decision in *Ford-v-Labrador* [2003] 1 WLR 2082. In this case Lord Hope distinguished the *Tolstoy Miloslavsky* decision, holding[2]:

> "*18.In the* Tolstoy Miloslavsky *case the applicant had been required by the Court of Appeal to pay £124,900 as security for the respondent's costs in the appeal as a condition of his appeal being heard by that court. The European Court observed, in paragraph 59, that it followed from established case law that article 6(1) did not guarantee a right of appeal. In paragraph 61 it also noted it was not disputed that the security for costs order pursued the legitimate aim of protecting the respondent from being faced with an irrecoverable bill for legal costs if the applicant was unsuccessful in his appeal. In these circumstances it was held that the order did not impair the very essence of the applicant's right of access to the court, bearing in mind that the applicant had already enjoyed full access to the court in the proceedings at first instance: see paragraphs 62 and 63.* **This reasoning indicates that a more lenient approach requires to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side's costs, as a condition of proceeding at first instance. That is the situation in the present case, as the merits of the petitioner's claim have not yet been determined by any court.**
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> *19. These principles were discussed again in Kreuz v Poland Reports of Judgments and Decisions 2001-VI, 129, 146, para 52, where the court said:*
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> > *'The court reiterates that, as it has held on many occasions, article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in paragraph (1) of article 6. The fair public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated. And in civil matters one can*

[1] '*Gore-Browne On Companies*', paragraph 18-[29], citing *Keary Developments-v- Tarmac* [1995] BCLC 395 at 401.
[2] At page 2088.

scarcely conceive of the rule of law without there being a possibility of having access to the courts …'

The court *recalled, in paragraph 54, that it had ruled in some cases, particularly where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on the individual's access to a court or tribunal and that it had accepted that there may be cases where the prospective litigant must obtain a prior authorisation before being allowed to proceed with his claim. But it* **observed that in all those cases it had satisfied itself that the limitations applied did not restrict or reduce the access afforded to the applicant in such a way or to such an extent that the very essence of that right was impaired**." [emphasis added]

15. The application should be refused, the Plaintiff contended, on two main bases. Firstly, the Defendant could only complain of an abuse of process which amounted to the tort of abuse of process, and involved the "*improper use of court proceedings to effect an ulterior purpose*": *International Risk Management Group Limited –v- Elwood Insurance et al* [1993] Bda LR 48, Ground J. (as he then was)[3]. Mr. Woloniecki also relied on another case which Mr. Martin very properly placed before the Court, which suggested that mere difficulty in enforcing a costs order could not be considered to be an abuse of process in and of itself: *Abraham-v-Thomson* [1997] 4 All ER 362 at 376.

16. And, secondly, the application would impair "*the very essence*" of the Plaintiff's right of access to court.

Legal findings: inherent jurisdiction of Court to stay proceedings unless third party funder undertakes to pay a maintained party's costs on the grounds of abuse of process

17. It is clear that in England the inherent jurisdiction to treat the failure of a third party funder to undertake to the costs of the maintained party as an abuse of process has been significantly reduced (if not eliminated) by the statutory power to order such third parties to pay costs. According to *Chitty on Contracts* 29th edition, paragraph 16-053:

> "*It would still appear to be the position that the court will not stay proceedings which are being maintained provided the proceedings do not constitute an abuse of the process of the court, that is, an action commenced in bad faith with no genuine belief in its merits but commenced for an ulterior purpose.*"[4]

18. I accept Mr. Martin's key contention that, in the absence of an express statutory power to order the Plaintiff's parent company to pay costs at the end of the action, the Bermuda law position must be assessed by reference to the pre-UK Supreme Court Act 1951 common law position. Nevertheless, modern notions of public policy largely linked with the right of access to the Court must also come into play, even in the Bermudian statutory environment. If maintenance is still a tort in Bermuda[5], public policy will rarely be offended by any funding arrangement which is recognised in the wider commercial world.

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[3] Civil Jurisdiction 1993: Nos. 103 and 205, Judgment dated September 29, 2003, page 7.

[4] The footnote explains that the correct remedy is not a stay but a costs order against the third party maintainer under section 51 of the Supreme Court Act. The *McFarlane* case on which Mr. Martin relied is said no longer to be good law.

[5] I am aware of no repeal of the tort here, as occurred in England in 1968. This may be because maintenance was a common law crime never incorporated in our Criminal Code. The crime and tort were both abolished by the Criminal Law Act 1967 in the UK, although the common law public policy objection to maintenance agreements was preserved.

19. But the English courts did not previously view the support of litigation by a third party funder without costs undertakings as abusive because of public policy objections to maintenance itself. Rather, the prejudice suffered by the difficulties the non-maintained party would face in recovering their costs was the main concern. The contrary views in *Abraham-v- Thomson* [1997] 4 All ER 362 carry little persuasive weight, because they are expressed in an entirely different statutory context.

20. Even in the post-1981 UK context, there is persuasive support for the proposition that it is potentially abusive for litigation to be pursued by a plaintiff unrestrained by the usual discipline of having to meet an order for costs if his claim fails. The following passage from the judgment of Kennedy LJ in the Court of Appeal decision of *Condliffe-v- Hislop* [1996] 1 All ER 431 at 440, on which the Defendant relies, is highly persuasive in this regard:

> "*Nevertheless, the court is entitled to protect its own procedures, and as Sir Thomas Bingham MR said in Roache v News Group Newspapers Ltd, Times, 23 November 1992, [1992] CA Transcript 1120 the principle that in the ordinary way costs follow the event 'is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they are likely to lose'. If that principle is threatened, as for example if an insurer or a trade union were known to be giving financial support to a party without accepting liability for the costs of the other side if the supported party were to lose, then, as it seems to me, the court might, at least in some cases, be prepared to order that the action be stayed (cf Wild v Simpson [1919] 2 KB 544, [1918-19] All ER Rep 682, Broxton v McClelland and Grovewood Holdings plc v James Capel & Co Ltd [1994] 4 All ER 417, [1995] Ch 80, a case concerned with champerty not maintenance). Normally the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under s 51 of the Supreme Court Act 1981 (as in McFarlane's case) but if the circumstances suggest that the litigating party or the maintainer may not be bona fide, or that if that party were to lose, an order for costs would be difficult to enforce against the maintainer then, as it seems to me, a stay could be imposed. Precisely how that would operate if the maintained party were the defendant I leave for consideration on another occasion…*"

21. The leading judgment in this unanimous decision concluded: "*the practice of seeking and giving undertakings is not in any way to be discouraged.*" This practice of seeking and giving undertakings clearly evolved in a statutory context which still appertains in Bermuda, namely a context within which third parties who cannot be ordered to pay the costs are the real parties in the litigation. When the maintenance of proceedings without any undertaking to meet any adverse costs orders which may be made will constitute an abuse of the process of the Court will obviously depend on the circumstances of the case. But abuse in this context merely means a misuse of the Court's machinery which, having regard to the Overriding Objective and the fundamental goal of the costs regime, would include gaining an unfair strategic advantage in litigation where only one party could reasonably expect to be able to enforce a costs order in a straightforward manner.

22. Other Commonwealth jurisdictions where the statutory framework appears to be similar to Bermuda have interpreted the cases on which Mr. Martin relied in a similar manner. In *Capital Webworks Pty Ltd.-v-Adultshop.Com Ltd*, 2005 FCA 438, Nicholson J (of the Federal Court of Australia's Western Australian District Registry) held:

> "*85. As noted by Potter LJ in Abraham v Thompson [1997] 4 All ER 362 at 375, Kennedy LJ's reference to the entitlement of the court to protect its own procedures was a reference to the inherent power of the court to prevent abuse of its process. In*

> *the same case, Millett LJ found, at 378, that the presence of unlawful maintenance was not of itself an abuse, but that the real mischief was that the proceedings might be financed by a person who was immune from liability for costs. He noted that this was the mischief that concerned Lord Denning MR in Hill v Archbold [1968] 1 QB 686 and that it had also now been remedied by the UK Supreme Court Act 1981 allowing a costs order to be made against a maintainer.*
>
> *86. In the Canadian case 155569 Canada Limited v 248524 Alberta Limited (1999) 176 DLR (4th) 479, Veit J, sitting in the Court of Queen's Bench of Alberta, stated (at para [50]):*
>
> > *'In recent years, however, the courts have not been so concerned about maintenance either as a crime or as a tort: Shah. However, courts are still concerned about maintenance as an abuse of the court's process:* **it is an abuse because a person who should be taking the risk of the lawsuit is not explicitly recognising that it is liable for the successful party's costs, and, to the extent that it seeks to avoid that result, it seeks to avoid bringing itself within the framework of the discipline of costs.***' (emphasis added)"*

23. Accordingly, I find that this Court possesses the inherent jurisdiction to stay proceedings maintained by a third party unless that third party gives a satisfactory undertaking as to costs. I am not satisfied that any similar jurisdiction exists to compel a third party to pay any damages that the maintained party may be liable to pay, however.

Legal findings: relevance of the Plaintiff's right of access to the Court

24. I accept Mr. Woloniecki's submission that the Plaintiff's constitutional right of access to the Court under section 6(8) of the Constitution would be infringed by any order with respect to costs which impaired the "*very essence*" of the right of access: *Ford-v-Labrador*[2003] 1 WLR 2082 (PC) at 2088. I also accept that the Court must be more lenient at the first instance level than in the context of appeals.

25. However, it is also necessary to remember the two-faceted nature of fair trial rights, particularly in the context of civil litigation. The Court will not give effect to one party's fair trial rights in a way which infringes the corresponding rights of the opposing party: *Dyer-v-Watson* [2004] 1 A.C.379 at 402-403 (Lord Bingham).

26. In the human rights context where an ordinary citizen is suing the state, achieving an "*equality of arms*" (the fundamental right to a fair hearing principle now incorporated in the level playing field provisions of the Overriding Objective) may require emphasis to be given to the applicant's right to their day in court: *Re Burrows* [2004] Bda LR 77. But where an applicant's delay makes a fair trial for the respondent impossible, even in the human rights context, this Court in the latter case held that the applicant's right of access to the court is trumped by the respondent's right to a fair trial.

27. In the context of commercial litigation, save where a real and substantial disparity of financial resources has practical relevance to an interlocutory application, a plaintiff's right of access to the court will rarely be given priority to the defendant's right to a fair process for defending its case on the way to trial. Nor will the fact that a plaintiff alleges that its insolvency was caused by the matters of which it complains in the relevant litigation normally be decisive, in the commercial context.

28. The generally applicable discipline of the costs regime, it seems to me, cannot simply be opted out of as of right by an impecunious plaintiff in circumstances

Findings: is the Plaintiff's parent's maintenance of the present proceedings without giving an undertaking to meet any adverse costs orders against the Plaintiff an abuse of the process of the Court?

29. In this case the Plaintiff is admittedly insolvent-but for its parent company's ongoing support-and bringing the present action with the financial support of such parent. There is no suggestion that the parent is incapable of giving the requested undertaking to pay the Plaintiff's costs. This undertaking has not been offered, nor seemingly sought by the Plaintiff, on the purely technical basis that this Court has no jurisdiction to grant the relief the Defendant seeks in this regard. The Plaintiff has also refused to confirm the nature of its parent's financial support commitment, or to give any comfort to the Defendant that it will be able to enforce any orders as to costs which it obtains.

30. The Defendant's concerns are not artificial. If it wins the present action, the present financial status of the Plaintiff means that it is unlikely itself to be able to pay any costs it is required to pay. The Defendant's remedies, absent the requested undertaking from the Plaintiff's well-heeled parent, would be limited to winding-up the Plaintiff and most likely getting a reduced recovery on a *pari passu* basis with the Plaintiff's other unsecured creditors, many years hence.

31. The Plaintiff, on the other hand, can reasonably expect to be promptly paid after the proceedings come to an end, if it succeeds. This means that, if the Plaintiff's parent is able to fund the present litigation without any enforceable liability to the Defendant in costs, it gains an important logistical advantage in terms of any settlement negotiations and the overall commercial risks of litigation. The issue of costs in the present case is highly significant, involving a month-long trial, overseas expert witnesses, and hundreds of thousands of dollars in costs alone at stake.

32. Mr. Woloniecki sought to argue that requiring a parent to undertake to pay its subsidiary's costs involved a radical re-writing of the elementary principle of separate legal personality, between a company and its shareholder. But the jurisdiction to stay proceedings as abusive where a third party funder refuses to give an undertaking as to costs is not limited to the corporate context, and applies to natural persons and unincorporated bodies as well. In the corporate context, perhaps, it requires the Court to pierce the corporate veil, and to look at the realities of who is really bringing the litigation, with a view to preventing the Court's machinery from being misused. But this is only necessary because the Plaintiff is carrying on business with the financial support of its parent. In this exceptional context, the traditional boundaries between company and shareholder are blurred.

33. The Plaintiff cannot, in fairness, be criticised for taking the technical position that this Court has, after full argument, rejected. The Defendant's point is an entirely new one, in local terms. Indeed, when the present application was first heard for directions, my first inclination was to accede to Mr. Woloniecki's robust submission that it should be summarily dismissed. In the event, Mr. Martin's impressive submissions have, as regards this his main point, prevailed.

Conclusion

34. The Defendant is entitled to an order that the present action be stayed unless the Plaintiff obtains an undertaking from Edmund Gibbons Limited to meet any orders as to costs, either made or which may be made, against the Plaintiff in the present action. The application for an undertaking with respect to the Defendant's Counterclaim is dismissed.

35. Unless either party applies to be heard as to costs within 21 days, I would award the costs of the present application to the Defendant in any event, to be taxed, if not agreed, on the standard basis.

Dated this 15th day of May, 2007

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KAWALEY J.