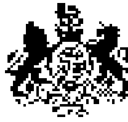

IN THE SUPREME COURT BERMUDA
CIVIL JURISDICTION
(Commercial List)
2008: 142

IN THE MATTER OF THE JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1958
AND IN THE MATTER OF JUDGMENTS AGAINST CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL AND CONSOLIDATED CONTRACTORS (OIL AND GAS) COMPANY SAL OBTAINED IN THE HIGH COURT OF ENGLAND AND WALES DATED 15 JUNE 2007, 5 OCTOBER 2007, 11 FEBRUARY 2008 AND 9 APRIL 2008

BETWEEN:

MUNIB MASRI
Applicant/Judgment Creditor

-v-

CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL
Respondent/Judgment Debtor

-and-

TEYSEER CONTRACTING COMPANY WLL
Intervenor

REASONS FOR RULING

Date of Ruling: January 22, 2009
Date of Reasons: January 28, 2009

Mr. Jan Woloniecki and Mr. Peter Dunlop, Attride-Stirling & Woloniecki, for the Intervenor ("Teyseer")
Mr. Ben Adamson, Conyers Dill & Pearman, for the Judgment Creditor

Introductory

1. On January 21, 2009 I refused the Intervenor's application for (a) fortification of the undertaking given by the Judgment Creditor when it obtained this Court's Order dated June 13, 2008 appointing a Receiver ("the Receivership Order"), and (b) payment of security for the undertaking in respect of Teyseer's legal costs in relation to the present proceedings. These are the Reasons for that decision.

2. Both counsel tendered written submissions in advance of last week's hearing, with Mr. Woloniecki contending at the hearing that no real legal controversies fell for determination in the face of Mr. Adamson's contention that the relief sought was objectionable on jurisdictional as well as factual grounds. Teyseer sought orders that:

    1. the Respondent/Judgment Debtor do pay Teyseer's costs pursuant to the costs undertaking given to this Court and appearing at paragraph 22 of the Interim Receivership Order dated 1 June 2008;
    2. the Respondent /Judgment Debtor provide security for his undertaking in costs to Teyseer I the sum of $500,000;
    3. the Respondent/Judgment Creditor shall pay the costs of and occasioned by this application in any event.

3. Teyseer was granted leave to intervene in the Judgment Creditor's reciprocal enforcement of judgment action on August 28, 2008. It contends that the joint venture receivables the Judgment Creditor contends are due to Consolidated Contractors International SAL ("CCIC"), and therefore liable to attachment by the Receiver, are in fact payable solely to Teyseer itself. Accordingly, it will seek a determination that the judgment may not be enforced against its contract revenues, should this be necessary if CCIC's subsequent application to set aside the said judgment fails.

4. Teyseer's application for security was issued, after several weeks sparring in correspondence, on December 24, 2008, the same date CCIC served voluminous evidence in support of its application to set aside registration. The application was heard less than a week before CCIC's application to set aside was due to be heard.

Jurisdiction

5. Teyseer submitted that if this Court had jurisdiction to order costs against a non-party (*Phoenix Global Fund Ltd. and Phoenix Capital Reserve Fund Limited-v-Citigroup Fund Services (Bermuda Limited) et al* [2007] Bda LR 61; *Aiden Shipping Co. Ltd.-v-Interbulk* [1986] A.C. 965), jurisdiction clearly existed to award costs in favour of a non-party. This broad proposition was clearly sound.

6. Secondly, it was contended more controversially that Teyseer was entitled to seek security for costs under Order 23 rule 1(1)(a), which provides as follows:

"23/1 Security for costs of action, etc.
1 ***(1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court—***

> **(a) that the plaintiff is ordinarily resident out of the jurisdiction***, or*
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so*, or*
>
> *(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
>
> *(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just." [emphasis added]

7. Mr. Adamson for the Judgment Creditor pointed out that Teyseer was not a "defendant" for the purposes of Order 23 rule 1 and was maintaining the position that it had not even submitted to the jurisdiction of the Court. Order 23 constituted a "*complete and exhaustive code*" relating to the circumstances in which security for costs could be ordered: *C.T. Bowring & Co. (Insurance) Ltd.-v- Corsi Partners Ltd.* [1994] 2 Lloyd's LR 567 at 580 (per Millett, LJ). In the same case, Dillon LJ (at page 572) approved the following dictum of Croom-Johnson LJ[1]:

> "*The right to ask for security for costs under O. 23, where the plaintiff is not resident within the jurisdiction is purely devoted to people who are plaintiff and defendant in the proceeding as a whole.*"

8. There was no need to decide who constitutes a defendant for Order 23 rule 1 purposes, because Teyseer's written submissions made it clear that it was in substance relying on the undertaking in damages given by the Judgment Creditor when he obtained the Receivership Order. It is certainly arguable that in the post-overriding objective era, who qualifies as a defendant for the purposes of Order 23 rule 1 is subject to more fluidity than once was the case. However, the dominant rule of Order 23 as presently drafted is clearly to require foreign plaintiffs who have issued contentious proceedings against defendants to provide

[1] *Taly NDC v. Terra Nova Ltd.* [1986] 1 Lloyd's R LR 29 at 31; [1985] 1 WLR 1359 at 1363 C-D.

security to such defendants for their costs. The obvious rationale for this rule is that where a foreign plaintiff who has no assets in the jurisdiction compels a party to defend proceedings, the defendant should not be put to undue inconvenience enforcing any costs orders he may eventually obtain.

9. Mr. Woloniecki, however, relied upon the following undertaking set out in paragraph 22 of the Receivership Order: "*The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order…*" He contended that this undertaking entitled Teyseer to either (a) immediate payment of its costs to date, or (b) insist that the Judgment Creditor fortify his undertaking in respect of the costs of non-parties, applying by analogy the principles applicable under Order 23. Mr. Adamson countered these arguments by contending that Teyseer's application (a) misunderstood the nature of the undertaking given in the Order, (b) conflicted with the Judgment creditor's fair hearing rights, and (c) was premature.

10. These arguments appeared to me to go to the exercise of the Court's discretion rather than to the Court's jurisdiction to grant the relief sought based on the relevant undertaking, and Teyseer's application was accordingly dealt with on discretionary rather than jurisdictional grounds.

The Court's Discretion

11. Teyseer's application for the immediate payment of legal costs was clearly premature as it was impossible to determine at this stage whether the costs were reasonably incurred and any legal costs (as opposed to expenses of complying with the Receivership Order) would be subject to taxation in any event. I accepted Mr. Adamson's submission that in light of this court's statutory jurisdiction to order costs in favour of non-parties, "*the undertaking in favour of non-parties adds nothing*…": Gee, '*Commercial Injunctions*', 5th edition[2], paragraph 11.035.

12. Where legal costs of applying to court are incurred, the undertaking only really bites in respect of expenses which would not otherwise be recoverable upon taxation. *Gee* (at paragraph 11.010) describes the rationale underlying the development of undertakings such as that relied upon on the present application as follows:

> "*The court avoids putting innocent non-parties to the trouble, expense and hazards of applying to the court, when fairness requires that their position be protected, at least to the extent of the court putting in place a mechanism conferring jurisdiction to achieve a just result.*"

13. Since Teyseer is actively before the Court, and seeking to equate its status with that of a party for Order 23 purposes, it was clear that the immediate payment

[2] (Sweet & Maxwell: London, 2004).

request was not, or not predominantly, based on the undertaking at all. The submission that the same principles applicable to parties under Order 23 should be applied by analogy to a non-party enforcing an undertaking was misconceived. Teyseer is not in the position of an innocent third party whose out of court expenses in complying with the order have fully crystallized so that they can be finally determined. This Court may still have to determine, in an application to which the Receiver but not the Judgment Creditor will be party, whether or not Teyseer's fundamental position that the alleged receivables due to CCIC are in fact solely due to Teyseer is factually and legally justified.

14. For these reasons, the application for immediate payment was refused.

15. As far as the application for fortification is concerned, the same objections to this head of relief sought come into play. The bulk of the sum claimed is potentially due by way of legal costs, not by way of out of court expenses. So although the Court possesses the discretionary jurisdiction to require the Judgment Creditor to fortify its undertaking, it would be an improper exercise of such discretion to require fortification when in substance such fortification is sought by way of security for costs.

16. Assuming that the Court may order the Judgment Creditor to furnish security for Teyseer's costs because Teyseer's position is analogous to that of a defendant, I was still not minded to grant the fortification sought because I would not have ordered security for costs in similar circumstances in any event. The best informal indicator of when a defendant has substantial fears that any costs order it may obtain will be difficult to enforce is how early in the litigation the application is made. The present application was filed on December 24, 2008, almost exactly four months after Teyseer filed its intervention Summons, on August 25, 2008. This was not a period of sleepy inactivity, with the security for costs being sought before significant costs were incurred. During this period, costs running into six figures were incurred, making it clear that, as Mr. Adamson noted in his written submissions, Teyseer is "*in full litigation mode*."

17. I placed no great reliance on the fact that the Judgment Creditor was not, for commercial confidentiality reasons, able to fully assess the merits of Teyseer's intervention in the present proceeding. The merits of Teyseer's intervention did not appear to me at this point to be pivotal to the merits of its costs/fortification application, which stood to be refused on the other more pertinent grounds advanced by the Judgment Creditor's counsel.

Dated this 28th day of January, 2009 ____________________

KAWALEY J