IN THE CAYMAN ISLANDS COURT OF APPEAL

ON APPEAL FROM THE GRAND COURT OF THE CAYMANS ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 26 of 2021
(FSD CAUSE NO. 52 of 2016 (RMJ))

IN THE MATTER OF CHINA BRANDING GROUP LIMITED (IN OFFICIAL LIQUIDATION)

BETWEEN:

TONY BOBULINSKI

APPLICANT

AND

CHINA BRANDING GROUP LIMITED
(IN OFFICIAL LIQUIDATION)

RESPONDENT

BEFORE:

The Rt. Hon. Sir John Goldring, President
The Hon. Sir Michael Birt, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Appearances:	**Mr Ben Tonner QC and Ms Sally Bowler of McGrath Tonner for the Applicant** **Mr Matthew Goucke, Mr Peter Kendall and Mr Chaowei Fan of Walkers for the Liquidators**
Heard:	**19 May 2022**
Draft judgment circulated:	**21 June 2022**
Judgment delivered:	**1 July 2022**

JUDGMENT

The Rt. Hon Sir Jack Beatson, JA

1. On 19 May 2022 the court heard the application by Mr Tony Bobulinski made on 4 October 2021 for leave to appeal out of time against the Order of McMillan J dated 4 February 2019. The judge dismissed his appeal against the partial rejection of his revised proof of debt in the

winding up of China Branding Group Limited ("CBG") by the Joint Official Liquidators, Messrs Hugh Dickson and David Bennett of Grant Thornton ("the liquidators"). The judge rejected his claim to be a secured creditor under a Senior Secured Promissory Note and Pledge Agreement concerning a loan by him to CBG and to be entitled to a 2.5 times cash multiplier of the sum loaned and to US$140,000 in respect of his legal fees in proving the claim. The judge also made three costs orders on 5 April 2018, and on 26 September 2018 and 5 February 2019, totalling over US$600,000 and on 6 May 2019 issued a Default Costs Certificate for US$562,170 which has not been paid.

2. The application came before the Full Court pursuant to the Order of the President on 11 October 2021. That Order provided that should time be extended and leave granted, the appeal be heard at the same hearing. Since then, the liquidators have stated that they wish to adduce further evidence and, if there is to be an appeal, to cross examine Mr Adam Roseman, a former director and Chief Executive of CBG. At their request, and with the agreement of those representing Mr Bobulinski, it was ordered that the hearing would solely consider whether leave should be granted.

3. Mr Bobulinski's application, supported by his 5th Affidavit sworn on 4 October 2021, is based on evidence disclosed in 2021 in proceedings he brought in California against Mr Roseman and the well-known principles in *Ladd v Marshall* [1954] 1 WLR 1489. He also seeks to rely on Mr Roseman's 4th Affirmation sworn on 20 April 2022, and an expert report on Californian law dated 30 April 2022 provided by Ms Melainie Mansfield a partner in Willkie Farr & Gallagher LLP. As the President stated at the beginning of the hearing, the very extensive documentation before the court was not in good order. For example, there was no reading list to indicate which of the documents should be read before the hearing and there was either no reference or a wrong reference to the location of a number of the documents referred to in the skeleton argument filed on behalf of Mr Bobulinski.

4. At the end of the hearing, and after considering submissions by Mr Matthew Goucke on behalf of the liquidators and by Mr Ben Tonner QC on behalf of Mr Bobulinski, the court indicated that it would grant leave. The President stated that it would do so subject to Mr Bobulinski's payment of sums outstanding on costs orders made by the judge. Mr Tonner referred to a bond in the full amount of the outstanding costs orders Mr Bobulinski had been required to provide as a condition of him pursuing an appeal against summary judgment in proceedings in California to enforce the Cayman costs orders which Mr Bobulinski was appealing. He submitted that Mr Bobulinski should not have to pay twice. The President suggested that the

parties seek to find a practical way forward, whether by Mr Bobulinski abandoning his appeal in California or by him securing the release of the bond but stated that this court would not countenance non-compliance with the orders of the Cayman courts. He also stated that the court was minded to require Mr Bobulinski to provide security for the costs of the appeal. The parties were given 7 days to make short written submissions on these matters and on the scope of the appeal.

5. In the remainder of this judgment, I summarise the grounds on which the application was made, the underlying background, and the submissions of the parties. I then give my reasons for joining in the decision to grant leave and my conclusions on the matters on which the court has now received submissions from Mr Tonner and Ms Bowler on behalf of Mr Bobulinski and from Walkers on behalf of the liquidators.

6. As to the grounds, the written submissions on behalf of Mr Bobulinski are based on the evidence disclosed in the California proceedings which was in the possession of the liquidators. It is submitted on his behalf that this evidence shows that the hearing before the judge proceeded on a false basis. It is said that this is because before the judge that basis was that at the material time CBG held no assets which qualified as collateral under a Senior Secured Promissory Note and Pledge Agreement securing a loan by him to CBG. But the evidence disclosed in the Californian proceedings shows that CBG did hold such assets.

7. For present purposes, the factual background can be summarised as follows. CBG was the parent company of a group operating in the USA and China the primary business of which was the provision of media content to the Chinese market. In 2015 it was in financial difficulties and decided to sell the business.

8. On 15 April 2015 and in February and March 2016, Mr Bobulinski and others made loans to CBG. Their loans are governed by materially identical Senior Secured Convertible Promissory Notes and Pledge Agreements with a maturity date of one year, that is 15 April 2016. The total sum CBG borrowed from Mr Bobulinski was US$650,000. By then a purchaser had been identified. On 28 February 2016, Remark Media Inc. ("Remark Media") entered into a LOI to buy CBG for $8.5m cash and $15m in securities. The transaction did not proceed because CBG's series B preferred Shareholder, SIG China Investments Master Fund III, LLLP (SIG), exercised a right of veto.

9. Under the Pledge Agreements, the Noteholders, including Mr Bobulinski, were granted security interests over *"all assets (including intangible assets) of the Pledgor in the United States, including without limitation its content library, licence agreements, and physical assets such as production equipment"*. By clause 3.1 of the Promissory Notes:

> "*Upon the consummation of a Liquidity Event on or before the Maturity Date, the Principal Loan Amount shall automatically convert into a new class of preferred equity securities …*"

By clause 3.3:

> "*if neither (a) a Liquidity Event nor (b) a bona fide equity financing of the Borrower has been consummated on or before the Maturity Date, the Principal Loan Amount shall convert into equity securities of the Borrower on terms and conditions to be negotiated in good faith by the Borrower and the Noteholder*".

10. On 24 April 2016 CBG informed the Noteholders and its other creditors that it was unable to meet its obligations. On 28 April 2016 its largest creditor, Hickory Grove LLC, presented a creditor's winding up petition in the Grand court against CBG, and on 19 May 2016 CBG applied for the appointment of Joint Provisional Liquidators. The application was unopposed, and Messrs Dickson and Bennett were appointed JPLs on 2 June 2016. On 7 July 2016, they applied to the court for authority to acquire 100% of the equity securities of RAAD Productions LLC ("RAAD") and to sell all of CBG's assets, including its shares in its subsidiaries China SNS and FansTang, and the securities it was to acquire in RAAD, to Remark Media. On 18 August 2016 the court gave the JPLs authority to enter into these transactions, put CBG into official liquidation and appointed the JPLs as Joint Official Liquidators.

11. It was a condition precedent to the completion of the proposed Asset and Securities Purchase Agreement (the "APA") between CBG and Remark Media that the Noteholders agreed to subordinate their claims against CBG to CBG's unsecured creditors. All the Noteholders except Mr Bobulinski did so. The judge found at [19] - [21] that Remark Media waived the requirement for him to do so and the sale was completed on 20 September 2016. The judge also stated at [22] that the shares in RAAD, which was previously outside the CBG group, were transferred to CBG for US$10 on 19 September 2016 and then immediately sold by CBG to Remark Media.

12. Mr Bobulinski submitted three proofs of debt, the initial one on 6 October 2016. His revised proof, dated 19 April 2017, was for a total of US$1,765,000. This largely consisted of a 2.5 times cash multiplier of the sum loaned which Mr Bobulinski claimed had been agreed on 3 August 2015 would be paid to him in the event of a sale of CBG or other liquidity event. His case was that he had brought Remark Media to the table because of his close relationship with Shing Tao, its CEO. The liquidators admitted Mr Bobulinski's proof of debt claim in the amount of the US$650,000 he lent but rejected his claim to be a secured creditor or to apply a 2.5 times cash multiplier to the sum lent.

13. An application for disclosure of information about CBG's assets which fell within the pledge did not succeed. The liquidators maintained that CBG held no such assets on 24 April 2016, the date of default and that licenses held by RAAD, in which at that date CBG itself had no interest, did not qualify. At the trial, the list of issues agreed by the parties consisted of 19 issues grouped under 3 headings; waiver of the maturity date under clause 3 of the Promissory Note; promissory estoppel in relation to the claim for a cash amount of 2.5 times the principal loan amount, and "*security*", including whether there is evidence of assets falling within the collateral reasonably identified by the Pledge.

14. The Draft Notice and Grounds of Appeal at the beginning of Bundle A invites the court to set aside the judge's Order and either determine the issue of security for itself or remit the matter to the Grand Court for redetermination. The skeleton argument of Mr Tonner and Ms Bowler in support of the application stated at §45 that the appeal focussed on Mr Bobulinski's security interest and the costs order at the trial before the judge and that "the newly discovered materials clearly impact issues 1, 2, 3 and 6 of the agreed list of issues at trial set out by the judge at [32]. The application for leave thus primarily concerns the "*security*" heading.

15. The following evidence was disclosed in the Californian proceedings:

    (a) An email chain dated 17 August 2016, the day before the Court authorised the transactions between CBG and Remark Media and CBG and RAAD, culminating in an email from Mr Roseman to Mike Saville of Grant Thornton UK. Mr Bobulinski argues that this shows that CBG owned licenses which added approximately US$800,000 to its annual profit and which appeared to fall within the definition of collateral in the Pledge Agreement.

    (b) An "*Assignment and Assumption Agreement"* stated to be "*entered into as of September 20 2016*" between CBG in liquidation as "*assignor*" and RAAD as

"*assignee*" and signed by Mr Dickson for and on behalf of CBG's liquidators. Under the agreement CBG assigned all of its rights, and any obligations and liabilities arising on or after 28 April 2016 (which is given as the date of the commencement of the liquidation) under 5 agreements executed in May and June 2014 to "*its wholly owned subsidiary, RAAD*".

(c) Copies of the 5 license agreements referred to in the Assignment and Assumption Agreement.

In his 5th Affidavit Mr Bobulinski stated at §71 that he does not believe that the Assignment and Assumption Agreement was mentioned once through the entirety of the Cayman proceedings.

16. In his recent 4th Affidavit Mr Roseman stated that the vast majority of the assets sold to Remark Media were owned directly by CBG, including the licenses disclosed in the Californian proceedings. He also stated that he drew the attention of the liquidators to these licenses on 17 August 2016 and that they had significant value. This appears to be contrary to earlier statements by him that CBG had no secured creditors and that its assets were not otherwise subject to outstanding security interests which are relied on by the liquidators in their response to this application and to which I refer below.

17. Ms Mansfield's report addresses the application of California law to Mr Bobulinski's rights over the licenses and the proceeds of sale of the licenses. It also addresses what Mr Tonner and Ms Bowler's skeleton argument characterises as "*novel*" legal arguments as to why the licenses were not collateral and why Mr Bobulinski could not assert security interests over proceeds derived from them which Walkers had advanced on behalf of the Liquidators in a letter dated 28 September 2021.

18. On behalf of Mr Bobulinski, it is submitted that the liquidators knew that the licenses were owned by CBG, and they also knew how valuable they were. Transferring them to RAAD on 20 September 2016 was a breach of Mr Bobulinski's security. There is no evidence that the liquidators obtained the permission of the court to transfer the undisclosed licenses to RAAD or disclosed them and Mr Bobulinski's security rights to the court. This failure to disclose the existence and ownership of the licenses meant that the proceedings as to the partial rejection of Mr Bobulinski's proof proceeded on a mistaken understanding by the court and him.

19. It is also submitted that the liquidators have not complied with their positive duty as liquidators to assist the court and Mr Bobulinski in relation to the discovery of documents relevant to the rejection of his proof. He argued that the licenses now relied on are central to the status of Mr Bobulinski's security interest and the issues which were before the Judge.

20. On behalf of the liquidators, it is submitted that this application has no realistic prospect of success so that the test in these islands for granting leave out of time is not satisfied: see *Re Rhone Holdings LP* [2016] 1 CILR 273 (*per* Rix JA) and *Streeter v K Coast Developments and Immigration Board* [1999] CILR 264 (*per* Smellie CJ).

21. The liquidators filed an unsworn Affidavit of Mr Dickson dated 17 May 2022, subsequently sworn on 27 May 2022, and the affirmation of Mr Roseman dated 17 May 2016 in support of the appointment of Messrs Dickson and Bennett as JPLs. Their written submissions maintain that the argument that the licenses on which Mr Bobulinski relies fall within the definition of security under the Promissory Note and are collateral under the Pledge is fanciful. They also describe the argument that, had the licenses been disclosed, Mr Bobulinski would have been able to establish his secured position and trace into the proceeds of the sale of CBG's assets as fanciful.

22. Before the judge and in response to this application, the liquidators argued that, although the parties intended to create a valid security over CBG's assets under the pledge, as a matter of law they were not successful in doing so. Leaving aside their argument before the judge that there was no evidence of assets falling within the pledged collateral, they maintain this is so for a number of reasons.

23. The first two are that the pledge did not reasonably identify the collateral and that it did not attach to the proceeds of sale under the APA. In their written submissions in response to this application the liquidators also argue that the Note could not be relied on once it had matured and that the maturity date on which the Note lapsed was 15 April 2016. This was before CBG informed its creditors it was unable to pay its debts and before their appointment and the sale of CBG's assets to Remark Media. They also maintain that it can be inferred that the reason why waiver and promissory estoppel were the primary arguments before the judge was that Mr Bobulinski or his then lawyers accepted that he could not rely on the Note once it had matured.

24. The liquidators' written submissions in response to this application also argue that the new evidence does not assist Mr Bobulinski. They maintain that the tests in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 and *Ladd v Marshall* [1954] 1 WLR 1489 were not satisfied because Mr Bobulinski could not show that the evidence could not have been obtained with reasonable diligence for use at the trial. They submitted that, on Mr Roseman's new evidence, Mr Bobulinski knew prior to executing the note that Mr Roseman's intent and understanding was that Mr Bobulinski's loan was to be secured against CBG's media licenses. Mr Roseman now says that he personally negotiated the Note and the Pledge with Mr Bobulinski and stated his intent and understanding that the loan was secured against CBG's media licenses with Mr Bobulinski prior to their execution. Accordingly, contrary to §33 of his 5th affidavit, Mr Bobulinski had knowledge prior to executing the Note which enabled him to contradict the liquidators' case in the appeal as to the issue of security. The liquidators submitted that Mr Bobulinski should have but did not raise the alleged representations made by Mr Roseman at the hearing before the judge.

25. I turn to the complaint of breach of duty by the liquidators. Referring to Mr Dickson's recent affidavit, Mr Goucke submitted that at the time the liquidators were appointed the APA was substantially "*a done deal*" the terms of which had been negotiated by Mr Roseman advised by Sheppard Mullin, CBG's United States' attorneys. The Assignment and Assumption Agreement was one of a number of ancillary documents required to be signed as a condition of the completion of the APA. Mr Dickson's recent affidavit stated at §§ 14 and 16 that the liquidators were heavily reliant and proceeded on the basis of statements and information by Mr Roseman and advice by Sheppard Mullin. He also stated at § 23 that prior to being presented with copies of the documents in July 2021 as part of a deposition by him in Mr Bobulinski's proceedings against Mr Roseman in California he had no recollection of signing the Assignment and Assumption Agreement.

26. Mr Dickson's recent affidavit also stated that the liquidators relied on statements made by Mr Roseman that CBG had no encumbered assets and was not subject to any applicable security. Mr Roseman had made such statements both in his sworn statement of CBG's affairs provided to the liquidators on 7 July 2016, in his 3rd Affirmation dated 8 September 2017, and in his capacity as "*seller management*" and a party to the Amended and Restated Asset Purchase Agreement which was substantially the same as the APA which CBG, for whom he acted, made with Remark Media. Mr Goucke invited the court to be sceptical about Mr Roseman's new evidence.

27. I have concluded that, in the light of the affidavits and the exhibited agreement transferring licenses from CBG to RAAD on the same day as the transfer of CBG's assets to Remark Media, in principle and subject to the payment of the sum outstanding on the costs' orders, leave should be given. There are *prima facie* grounds for considering that the judge was misled as to the position of licenses owned by CBG prior to the assignment to RAAD.

28. In reaching this conclusion I have taken into account in particular that the agreement transferring the licenses was signed by Mr Dickson, one of the liquidators and the repeated statements in response to the application for disclosure that there was no evidence that CBG had any assets falling within the definition of Collateral or that it held any "*license agreements*" in the United States of any value. The judge, although he did not decide this point, appeared at [221] – [226] and [230] of his judgment, to accept it.

29. The position and the force of the points the liquidators have made in responding to this application should be explored in the context of a full appeal with the evidence and the issues of law that have been raised, tested appropriately. I have in mind, in particular, the liquidators' submissions based on what they maintain is a fundamental change in the position and evidence of Mr Roseman and the alleged representations made by him and what they submit Mr Bobulinski knew at the time of the trial and they say he should have raised at the hearing before the judge. I also have in mind their submissions that as a matter of California law the security was never perfected.

30. As to the scope of the appeal, the list of agreed issues identified by the judge at [32] under the heading "*Security*" are:

> *"*
>
> *1 Whether as a matter of Californian law the Pledge reasonably identifies the Collateral and if so to what extent.*
>
> *2 Whether there is evidence of assets falling within the Collateral reasonably identified by the Pledge.*
>
> *3 Whether any security created by the Pledge attaches to any part of the consideration under the Remark APA, whether the cash proceeds, or the warrants, or a combination thereof (and, if so, to which part of such consideration).*
>
> …
>
> 6 *Whether the Appellant is a secured creditor and, if so, in respect of what sum; and whether in respect of his legal fees."*

31. The parties disagreed about whether it was necessary for the Order expressly to provide that the issues in the appeal included whether they should be remitted to the Grand Court for determination; whether it should consider the costs orders made by the judge, and whether "*for the avoidance of doubt*" it should state that the issues listed do not "*limit or restrict an application in the Grand Court by the Appellant for orders sanctioning the [liquidators] in respect any payment for costs, expenses and remuneration in FSD Cause No. 52 of 2016 (RMJ) whether as expenses in the liquidation of the Company or otherwise and the enforcement of any costs orders"*.

32. It is not necessary for the Order expressly to state that the issues include the question of remission to the Grand Court. It is inherent in the power of any Court of Appeal that it can either decide issues itself or remit for decision by the lower court. Moreover, section 5 of the Court of Appeal Act (2011 Revision) gives this court the power "*to hear and determine appeals from any judgment of the Grand Court given or made in civil proceedings, or to order a new trial if the Court thinks fit*". It will be for the court hearing the appeal to decide whether to determine the issues or to remit all or any of them to the Grand Court. See also the Court of Appeal Rules (2014 Revision), rules 17 and 18 which provide that this Court has all the powers of the Grand Court and may set aside a finding or judgment of the court below or order a new trial (i.e. remit) on any question without interfering with the finding or decision upon any other question.

33. It is also not necessary that the Order should state that "*for the avoidance of doubt*" the issues listed do not "*limit or restrict an application in the Grand Court by the Appellant for orders sanctioning the [liquidators] in respect any payment for costs, expenses and remuneration in FSD Cause No. 52 of 2016 (RMJ) whether as expenses in the liquidation of the Company or otherwise and the enforcement of any costs orders"*. The list of issues does not limit or restrict an application in respect of the alleged misconduct or breach of duty by the liquidators under the principle in e*x parte James* (1873-74) LR 9 Ch App 609. The Draft Notice and Grounds of Appeal invited this Court to determine the issue of security for itself or to remit it to the Grand Court for determination. Mr Tonner and Ms Bowler's submissions accepted (at § 37) that the issue of remedial steps applying the *ex parte James* principle is a separate and parallel jurisdiction to the appeal.

34. Since we have given conditional leave out of time because of the information that was in the hands of the liquidators but not disclosed, in my judgment it follows that the conduct of the liquidators, whether it was unfair or a breach of duty and whether any of remedial steps

contemplated by the *ex p James* principle are needed may be an issue. But that issue must be formulated with appropriate precision in an application rather than floated in the general way that it has been in §47 of the original skeleton in support of the application and §37 of the Applicant's 'conditional leave' submissions. This matter can be dealt with in the directions hearing that we have ordered at the next sitting of this Court.

35. The parties also disagreed about whether the Order should provide for liberty to apply to a single judge of the Court of Appeal in respect of any matter arising from it that must be determined before the directions hearing ordered by the Court at its next sitting. We have decided that it should. We have also decided that the costs of the application for Leave be costs in the appeal. Notwithstanding the undoubted force of the points made about the liquidators' conduct in §§ 44 and 45 of the conditional leave submissions in support of the application, the President's Order of 11 October 2021 in response to the *ex parte* application, provided for a *"rolled up*" hearing whereby should time be extended and leave granted, the appeal was to be heard at the same hearing. Accordingly, the presence and participation of the liquidators was necessary at the leave stage.

36. The liquidators also maintain that Mr Bobulinski should be barred from pursuing this application because he is in contempt of court because of his failure to comply with the costs' orders. In §46 of the skeleton argument in support of the application for leave, it is stated that Mr Bobulinski has "*provided a bond in respect of the costs orders*" but no further information is given. At the hearing Mr Tonner stated that the liquidators had obtained summary judgment in proceedings in California to enforce the Cayman costs orders which Mr Bobulinski was appealing, and the California court had required him to provide a bond in the full amount of the outstanding costs orders as a condition of him pursuing his appeal but was unable to provide any further information about the terms of the bond. He came close to suggesting that the bond given by Mr Bobulinski in the Californian proceedings sufficed to protect the liquidators. In my judgment, any such suggestion is totally without merit. The only reason the liquidator sought to enforce the costs orders in California was because Mr Bobulinski has not complied with the orders of the Cayman Grand Court. The only reason that the California court has required him to post a bond is that he is seeking to appeal against the summary judgment allowing enforcement in that jurisdiction of the Cayman costs orders.

37. The parties were invited to consider a practical way forward to avoid Mr Bobulinski paying the costs while also remaining subject to the bond but have been unable to agree. The issue is dealt with in submissions dated 26 May 2022 by both parties. Mr Tonner and Ms Bowler state that

if the liquidators and Mr Bobulinski, the parties to the Californian proceedings, request the California court to so order it will do so and the bond agent "*will release the money*" to Mr Bobulinski or his Californian lawyers. They state that this will take at least 28 days from the request and involves steps being taken by third parties outside Mr Bobulinski's control and that accordingly any order should allow 42 days for payment. There is also some uncertainty as to whether the bond is in the form of cash, as suggested by the use by Mr Tonner and Ms Bowler of the phrase "*release the money*" or is in the form of an insurance instrument, as opposed to cash, which is stated to be the understanding of the liquidators.

38. In the light of the submissions and these factors, the court concluded that Mr Bobulinski should be given until 4:00 pm on 11 July 2022 to pay the outstanding costs orders but with liberty to apply if there are problems outside his control that prevent the release of the bond in that period subject to the conditions in the order. Because technical issues resulted in a delay of a week in the court issuing this order, the time was extended until 18 July 2022. Pending the outcome of the appeal, the funds are to be paid to the liquidators subject to undertakings that, pending outcome of the appeal, they will be retained in a bank account controlled by them without deduction.

39. As to security for the costs of an appeal, prior to the hearing on 19 May, the liquidators did not seek such an order. At the hearing, Mr. Goucke stated that this was because it was believed that such an order was precluded in the context of proof of debt appeals by Order 24, rule 10(5) of the Companies Winding Up Rules, 2018. But this is an application for leave to appeal pursuant to rules 11(6) and 21A(1) of the Court of Appeal Rules (2014 revision) and it is now common ground that this court has jurisdiction to make an order for security for costs. The principles governing security for costs are stated a number of authorities in this jurisdiction which the parties put before the court. They include: *GFN SA and others v The Liquidators of Bancredit Cayman Limited (in Official Liquidation)* [2009] UKPC 39; (2009) CILR 578 at [9], [13] – [14], [30] – [31] and [33] ; *Cesar Hotelco (Cayman) Limited v Ryan* [2012] 2 CILR 164 [45] – [46] *Dyxnet Holdings Limited v Current Ventures II Limited an another* [2015] (1) CILR 174 at [52]; *AHAB v Saad Investments Co Limited (in official liquidation)* [2017 (2) CILR 602] at [9], [15] – [24]; *Walkers (A Firm) v Arnage Holdings & Ors* CICA (Civil) Appeal No. 5 of 2020 (2 August 2021) at [48] and [52] – [53].

40. Mr Bobulinski is not resident in these islands and the liquidators state that, to the best of their knowledge, he does not own any assets in the jurisdiction. He has not applied for a stay of execution of the costs' orders made by the judge in 2019 in respect of which the judge made a

default certificate on 6 May 2019. There is no submission on his behalf that he lacks the means to pay them, and he has given no satisfactory explanation for his refusal to pay them. This history of non-compliance with the costs orders of the Grand Court in these proceedings has resulted in the liquidators having to take enforcement action in California, with the additional difficulty and expense that involves. Mr Bobulinski unsuccessfully resisted the enforcement proceedings in California and is currently pursuing an appeal against the Californian court's summary judgment in favour of the liquidators.

41. Mr Bobulinski cannot legitimately rely, as he seeks to do, on the liquidators' alleged misconduct as justifying his refusal to obey the orders of the Grand Court and pay the orders. This is because the costs orders and the default certificate were made in the first five months of 2019 but, on Mr Bobulinski's own case, he only learned about the transfer in the Assignment and Assumption Agreement after Mr Roseman's disclosure in the Californian proceedings in 2021: see §21 of the skeleton argument dated 13 May 2022 and §10 of the conditional leave submissions dated 26 May 2022.

42. I have concluded that in the light of the guidance in the decisions to which I have referred, there is a real risk that, if the liquidators succeed in the appeal, their costs will not be paid. I have also concluded that the factors relevant to the exercise of the court's discretion, such as whether making such an order is oppressive or would stifle an appeal do not suggest that such an order should not be made in this case. Indeed, I consider that given the history of these proceedings there are strong reasons favouring the making such an order. As to the amount of the security, the court has considered the evidence on behalf of the liquidators in Mr Dickson's second Affidavit, and the submissions on behalf of the Appellant on security for costs in paragraphs 19 – 28 of his conditional leave submissions dated 26 May 2022 and those on quantum dated 14 June 2022. In the light of that evidence and those submissions, I have concluded that in the circumstances of this case security for costs in the sum of US$250,000 should be provided.

43. Accordingly, the court decided that leave be granted on the basis described in this judgment and set out in the order. Leave is subject to the conditions that Mr Bobulinski pays the liquidators the sum due but not paid under the costs' orders by 18 July on the basis set out in [38] above and provides security for the costs of the appeal in the sum of US$250,000.

The. Hon Sir Michael Birt, JA

44. I agree.

The Rt. Hon Sir John Goldring, President

45. I also agree.