Neutral Citation Number: [2025] CIGC (Civ) 7

IN THE GRAND COURT OF THE CAYMAN ISLANDS **Cause No: G2023-0076**

CIVIL DIVISION

BETWEEN:

R&A HEAVY EQUIPMENT SERVICES LLC

Plaintiff

-and-

SCOTTS EQUIPMENT LTD

Defendant

Appearances:	**Mr Clayton Phuran of CP Attorneys for the Plaintiff**
	Mr Nick Dunne of Walkers (Cayman) LLP for the Defendant
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**12 December 2024**
Judgment delivered:	**17 February 2025**

Civil procedure—security for costs from non-resident company—principles to be applied

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JUDGMENT

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A. Introduction and background

1. By a summons filed on 6 November 2024, the Defendant seeks an order that the Plaintiff give security for the Defendant's incurred and anticipated costs of this action in the total sum of US $268,000 or such other sum as the Court considers appropriate. The Defendant was represented by Mr Nick Dunne of Walkers (Cayman) LLP and the Plaintiff by Mr Clayton Phuran of CP Attorneys. This is my judgment on the Defendant's summons.

2. The essential background is as follows. The Plaintiff is a limited liability company incorporated and carrying on business in Florida, USA. The Defendant is an ordinary resident company registered and carrying on business in the Cayman Islands. The Plaintiff and the Defendant concluded a contract in January 2022.

3. The Plaintiff commenced work under the contract in March 2022. The Defendant rapidly became concerned that the Plaintiff was not meeting the contractual requirements, and that the Plaintiff's invoices did not reflect the Defendant's records of the work done. In November 2022, the contract was terminated.

4. The Plaintiff commenced these proceedings by writ filed on 25 April 2023 claiming in excess of US $2.73 million. The Defendant filed a Defence and Counterclaim on 30 May 2023 denying liability and counterclaiming over US $1.6 million. In its Reply and Defence to Counterclaim filed on 12 June 2023, the Plaintiff admits that just less than US $717,000 should be set off against its claim (and says that it did so in its Statement of Claim) but disputes the balance of the Defendant's counterclaim. There are therefore substantial sums at stake.

5. Following service of the Plaintiff's Reply and Defence to Counterclaim, the parties agreed a consent order for directions on 8 August 2023 intended to lead to a trial to be listed after 15 November 2023. The parties served their Lists of Documents by 24 August 2023. However, they do not appear to have

taken any further procedural steps to comply with the consent order for directions. No further steps were taken to prepare the matter for trial or to list it. Instead, the Plaintiff filed a fresh summons for directions on 11 September 2024.

6. The end result is that, as a result of the failure to progress the matter, the action is still at an early procedural stage, which is relevant to the exercise of my discretion to order security for costs.

B. Security for costs – the law and principles

7. Under GCR O.23 r.1 the Court can order security for costs against, amongst other persons, a plaintiff who is *"ordinarily resident out of the jurisdiction"*. GCR O.23 r.1 is not limited to natural persons, and so it applies to a company that is ordinarily resident out of the jurisdiction, i.e. a company that is registered somewhere other than the Cayman Islands.

8. Mr Dunne submitted that the Court can also order security against a foreign company under the inherent jurisdiction, which he said should be exercised in accordance with the principles relating to a non-resident limited liability company when there is reason to believe that its assets will be insufficient to pay the costs of the defendant. He based this submission on the Court of Appeal's decision in *Dyxnet Holdings Ltd v Current Ventures II Ltd* [2015] 1 CILR 174, and in particular on the statement to that effect of Chadwick P at [52]. However, *Dyxnet Holdings Ltd* case concerned the question whether security for costs could be ordered in winding up proceedings. GCR O.23, r.1 does not apply in winding up proceedings and the Companies Winding-up Rules do not include an equivalent to GCR O.23, r.1. This was why the Court of Appeal had recourse to the inherent jurisdiction. There is no such difficult in this case, which is an ordinary writ action, to which GCR O.23, r.1 applies. There is therefore no need in this case to have recourse to the inherent jurisdiction.

9. It is well established in both English law and Cayman law that as a result of the implementation in national law of Articles 6 and 14 of the European Convention on Human Rights (which applies in the Cayman Islands) and the Bill of Rights of the Cayman Islands, the court must not apply GCR O.23, r.1 (or its equivalent in the English CPR) in a way that discriminates against foreign natural persons: see *Nasser v United Bank of Kuwait* [2001] EWCA Civ 1454; *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099; *Gong v CDH China Management Company* [2011] 1 CILR 57, *Walkers v Arnage Holdings & Ors* [2021] 2 CILR 277 and *Cowan v Equis Special*

LP (unreported, Parker J, 22/05/24). Consistently with the fact that security for costs cannot be ordered against a natural person resident within the jurisdiction, it has therefore become established law and practice that an order for security against a foreign natural person should be limited to the extra costs of enforcement necessary because the plaintiff is not locally resident.

10. However, this limitation on the scope of security for costs does not apply in respect of corporate litigants. Such litigants are not entitled to the protection of the European Convention or the Bill of Rights, since they are not natural persons.

11. Security for costs can be ordered against a locally resident corporation under s.74 of the Companies Act rather than under GCR O.23, r.1. The purpose of s.74 is plainly to protect a defendant against the risk of impecuniosity of the corporate plaintiff (which has the protection of limited liability):

> *"Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if that person is satisfied that there is reason to believe that if the defendant is successful in that person's defence the assets of the company will be insufficient to pay that person's costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

12. Making an order for security for costs against a non-resident corporation under GCR O.23, r.1, and framing the scope of that order to be consistent with what could be ordered against a resident company under s.74 of the Companies Act, i.e. with the aim of protecting the defendant against the risk of impecuniosity of the corporate plaintiff, is accordingly not discriminatory since it simply reflects what could be ordered against a resident corporation. Indeed, it is in fact applying a level playing field.

13. Thus, in my judgment the power under GCR O.23, r.1 to order security from a non-resident corporate plaintiff should be exercised consistently with s.74 of the Companies Act, as would be the case if the corporate plaintiff were resident within the Cayman Islands. In particular, security for costs in this situation should not be limited to the additional costs of enforcement resulting from the fact that the plaintiff company is non-resident; to the contrary, the discretion should be exercised so as to provide the defendant with reasonable protection against the risk that the plaintiff corporation is found to be impecunious when it comes to enforcing any costs order in the defendant's favour. I note that, following the conclusion of the oral argument, Mr Dunne provided the Court with the unreported judgment of Clifford J in *Kabushiki Kaisha Sigma v Trustcorp Ltd* (19/08/15), which reaches the same conclusion.

14. Turning to the principles regarding the exercise of the discretion, the first point is that the court has a real discretion whether or not to order security; it is not obliged to do so even if the threshold for making an order is established.

15. The court applies a two-stage test: see *Cesar Hotelco (Cayman) Limited v Ryan* [2012] 2 CILR 164 at [45]-[46]:

> *"45. Consideration of an application under s.74 for security for costs in an action brought by a limited company involves a two-stage approach. First, it is necessary for the court to consider whether it is satisfied that there is reason to believe that if the defendant is successful in the defence, the assets of the company will be insufficient to pay the defendant's costs.*
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> *46. Secondly, if the judge is so satisfied, the court has a discretion under s.74 whether to order security for costs having regard to all the circumstances of the case …"*

16. In considering whether there is reason to believe that the assets of the company will be insufficient to pay the defendant's costs in a timely fashion, the court applies a low threshold, described as more than a mere doubt about ability to pay but less than balance of probabilities: see *BTU Power Management Co. v Hyatt* [2011] 1 CILR 315 at [3], *Eagle Ltd v Falcon Ltd* [2012] EWHC 2261 at [22] and *Holyoake v Candy* [2016] EWHC 3065 (Ch) at [63]. There must be a *"real risk that the defendant's costs will not be paid if the defence is successful"* – *BTU Power Management Co.* If the risk of non-payment is established, then it is generally just to order that security be provided: see Nugee J in *Holyoake v Candy* [2016] EWHC 3065 (Ch) at [67]. As to the requirement that the plaintiff should be able to make payment in timely fashion, a plaintiff with illiquid assets or who is unable to pay with *"any high degree of promptness"* may be required to give security: *Holyoake v Candy* at [63].

17. Once the "real risk" has been established, the evidential burden shifts to the plaintiff to provide some material to explain why it would not be just to make an order for security. If the Plaintiff fails to provide information regarding its assets, the court may infer that there is no answer to the application: *BTU Power* at [17]:

> *"17. Put simply, if an applicant establishes by evidence, however weak, that there is a case to answer, then the court may infer, from the failure or refusal to answer that case, that there is no answer to it. It may infer that, if there were an answer, it would have been brought forward, and the fact that it has not been is a sufficient indication that there is indeed no answer. …"*

18. A similar sentiment, but going slightly further and addressing the situation where the plaintiff company may not be required to publish its accounts, was expressed in *Sarpd Oil International Ltd v Addax Energy* [2016] EWCA Civ 120. The English Court of Appeal said:

> *"17. ... If a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so there is, in our view, every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so. ...*
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> *19. ... a court can and should take account of deliberate reticence as part of the overall picture. Any evaluation has to be made on the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it. If, therefore, there were to be a practice of the Commercial Court ... that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, our view is that the practice is a sound one ..."*

19. Finally of relevance, where a plaintiff provides only partial information about its financial position, the court may still draw inferences against the plaintiff: *Pisante v Logothetis* [2020] EWHC 3332 (Comm), Henshaw J:

> *"81. ...there can be reason to believe that a company will lack the means to pay, even in circumstances where some information about assets has been provided, particularly if the information provided about the claimant's financial affairs is unsatisfactory ... Moreover, I do not consider that the defendant is required in this context to demonstrate a lack of probity, or solid evidence of a risk of asset dissipation such as might justify a freezing order. ... "*

20. When considering the second stage of the exercise, the court must consider all the circumstances. However, certain factors are generally identified, and are summarised in the *Supreme Court Practice* 1999, as being relevant to the exercise of the discretion, namely:

20.1 whether the plaintiff's claim is *bona fide* and not a sham;

20.2 whether the plaintiff has a reasonably good prospect of success (without going into the merits in detail);

20.3 whether there is an admission by the defendant on the pleadings or elsewhere that money is due;

20.4 whether there is a substantial payment into court or an "open offer" of a substantial amount;

20.5 whether the application for security is being used oppressively, e.g. so as to stifle a genuine claim;

20.6 whether the plaintiff's claim would in fact be stifled by considering whether the plaintiff can raise funds outside its own resources to conduct the litigation, the onus being upon the plaintiff to satisfy the court that no such resources are available;

20.7 whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work;

20.8 whether the plaintiff is using its impecuniosity to put pressure on the defendant;

20.9 whether the application for security is made at a late procedural stage of the proceedings.

I endorse and adopt these as being equally relevant in the Cayman Islands to the exercise of the judicial discretion.

C. Security for costs – application in this case

21. The Defendant first raised the question of security for the Defendant's costs and asked for details of the Plaintiff's assets in November 2023, with no substantive response.

22. The Defendant raised the question of security again, in response to the summons for directions filed by the Plaintiff in August 2024. I am told, without demur by Mr Phuran, that this was ignored by the Plaintiff. The Plaintiff has not provided the court with any evidence or information in response to the Defendant's summons regarding its asset position and its ability to pay an adverse costs order.

23. Accordingly, the Plaintiff has had three opportunities to provide information as to its assets and, I infer, has positively chosen not to do so. Applying the principles set out earlier in this judgment, I therefore conclude that a real risk has been established that the Plaintiff will not be able to pay the Defendant's costs in a timely manner, if the Defendant succeeds at trial.

24. I now turn to the second part of the exercise in order to determine whether or not to exercise my discretion in the Defendant's favour and, if so, what order to make. Taking each of the factors identified above in turn:

24.1 There is no suggestion that the Plaintiff's claim is not *bona fide*, and certainly it is not suggested that it is a sham.

24.2 I am unable to form a view on the likely prospects of the Plaintiff's success on its claim and the Defendant's prospects of success on its counterclaim. I consider that the latter is relevant because the extent to which the Defendant fails on its counterclaim may affect both the incidence and amount of the costs order made at the conclusion of the trial. I therefore approach the matter on the basis that I should accept that the Plaintiff has a reasonably good prospect of success.

24.3 There is no admission or open offer by the Defendant in respect of the Plaintiff's claim. However, the Plaintiff has accepted that it is liable to the Defendant for approximately US $717,000 on the Defendant's counterclaim, i.e. just less than 50% of the value of the counterclaim. This is again relevant to the likely incidence and amount of the costs order to be made at the conclusion of the trial.

24.4 The Plaintiff does not suggest that the Defendant's application is being made oppressively.

24.5 Because the Plaintiff has not submitted any evidence in response to the Defendant's summons, there is no material before me to suggest that the Plaintiff's claim would be likely to be stifled if I order security, and there is no evidence as to whether or not the plaintiff could raise funds outside its own resources to conduct the litigation, if needed.

24.6 In the circumstance that the Plaintiff has not provided any evidence of its asset position, the question whether any want of means has been brought about by any conduct by the Defendant does not arise.

24.7 There is no evidence that the Plaintiff is using the risk of impecuniosity to put pressure on the Defendant.

24.8 Finally, as noted earlier, the application for security is made at a relatively early procedural stage of the proceedings, despite the unsatisfactory delay in progressing the case since discovery was completed in August 2023.

25. Weighing all of the above factors, in my judgment it is just to make an order that the Plaintiff should provide security for the Defendant's costs of defending the claim against it.

26. I must now consider the amount to order by way of security. The affidavit of Ms Amanda Jervis, filed on behalf of the Defendant, sets out details of the costs incurred so far and the Defendant's approach

to assessing the future costs likely to be incurred. It is this exercise that has resulted in the Defendant's quantification of its request for security in the sum of US $268,000.

27. However, for the reasons that I now set out, I consider that this figure is significantly too high.

27.1 Ms Jervis states that attorney's fees have been calculated using a blended rate of US $625 per hour. This is the average of the hourly rates of the partner and associate charged at US $850 and US $400 respectively. However, this approach fails to reflect the more usual allocation of work on a file, with the associate doing the majority of the day-to-day work and the partner providing oversight and general strategic input. It also fails to reflect that work will often be delegated by the associate to a junior associate or paralegal. I consider that a weighted average should be used, reflecting that sort of division of labour. I therefore adopt a composite hourly rate of US $500, which is based on a 25% / 75% allocation of work between partner and associate, with an additional reduction to reflect further delegation of work to fee earners of lesser seniority, charged at lower hourly rates.

27.2 Ms Jervis discounts the figures proposed by the Defendant by 15% to reflect the likely effect of taxation on the standard basis. However, a discount of only 15% is not a fair reflection of the likely result of a taxation on the standard basis. The usual rule of thumb is that a litigant can reasonably expect to receive about 65% of their incurred costs on that basis, i.e. a reduction of about 35%. In addition, Ms Jervis has not applied any reduction to the estimated disbursements, which I consider to be wrong.

27.3 Ms Jervis describes the schedule of estimated costs as being in respect of "the proceedings". The schedule provides only very minimal information about the work covered within the various phases of the case identified by the Defendant's attorneys. In particular, it is not clear to me from the material in evidence that the Defendant's attorneys have separated out the costs of defending the Plaintiff's claim, for which security can be ordered, from the costs of prosecuting the counterclaim, for which security cannot and should not be ordered. Doing the best that I can, my assessment is that it is likely that about 35% of the Defendant's costs of the proceedings are likely to be attributable to the counterclaim and 65% to defending the claim.

27.4 Finally, I note that the schedule includes 50 hours for giving and reviewing disclosure, which appears to ignore that Lists of Documents were filed in August 2023. I therefore reduce this particular figure by 50% to reflect that document collection and preparation of Lists has already been carried out.

28. In those circumstances, and rounding down for convenience, my assessment is that a fair figure to order by way of security for the Defendant's costs of defending the Plaintiff's claim is US $100,000. Given the absence of any evidence from the Plaintiff as to its financial position and ability to pay, I order that the Plaintiff shall provide security for costs in the sum of US $100,000 within 28 days of this judgment being handed down. In default, the claim shall be stayed.

29. Counsel are requested to indicate within 7 days of handing down of this judgment: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions. They should also submit a draft order in respect of the Plaintiff's summons for directions. I record here that, in any event, they should have re-started progressing the case towards a conclusion – the Defendant's summons was no reason not to move the case forward in the meantime.

Dated 17 February 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT