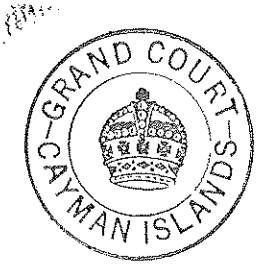


IN THE GRANT COURT OF THE CAYMAN ISLANDS

IN THE FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 52 OF 2013

BETWEEN	**CARIBBEAN ISLANDS DEVELOPMENT LTD. (IN OFFICIAL LIQUIDATION)**	**PLAINTIFF**
AND	**FIRST CARIBBEAN INTERNATIONAL BANK (CAYMAN) LIMITED**	**DEFENDANT**

IN CHAMBERS
THE 16TH SEPTEMBER 2014
BEFORE THE HON. CHIEF JUSTICE

Appearances: Ms. Joanne Verbiesen and Annalisa Wallace of Walkers for the Applicant/Defendant

Mr. Michael Mulligan of Conyers Dill & Pearman for the Joint Official Liquidators (("JOLs") present with him Mr. Peter Anderson and Mr. Omar Grant of Rawlinson Hunter (Cayman) Limited

Mr. John Harris of Higgs Johnson for the Liquidation Committee (watching brief).

Insolvent company ordered to provide security for costs of action taken against Defendant bank – failure to comply with order for security and with subsequent "Unless Order" – whether action should be struck out.

JUDGMENT

1. On 7th March 2014 I made an order for security for costs in the amount of USD100,000 in the Defendant's favour ("the Security Order"). A written ruling explaining the reasons for that order was delivered.

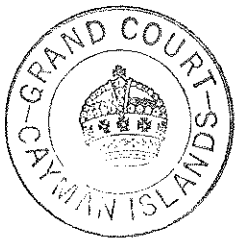
2. By the order, the Plaintiff was allowed 21 days until the 28 March 2014, to comply by means of lodgement into Court.

3. The action was ordered to be stayed if the Plaintiff failed to comply.

4. The draft of the Security Order prepared by the Defendants attorneys was approved as to form and content by the Plaintiff's attorneys and presented to the Court for signature on 11 March 2014, in terms in keeping with the pronouncements made on the 7th March 2014.

5. The Plaintiff failed to comply with the Security Order by 28th March 2014, failed to file a summons for an extension of time to comply and failed to respond to the Defendant's attorneys' enquiries[1] over the course of the ensuing weeks, regarding its non-compliance.

6. In response, the Defendant filed a summons on 4th April 2014 seeking orders striking out the Plaintiff's claim or, in the alternative; an order that unless the Plaintiff complied with the Security Order within seven days, the Plaintiff's claim be struck out and dismissed accordingly (the "Strike Out Summons"). At the hearing of the Strike Out Summons on 21 May 2014, the parties through their attorneys agreed the following order and it was ordered that:



(i) Unless the Plaintiff complies with the requirement to give security as set out at Paragraph 1 of the Security Order within 90 days (that is: by 19th August 2014), the Plaintiff's claim shall stand struck out and the action will be dismissed accordingly within seven days of the expiry of the 90-day period (that is: on 26th August 2014) (the "Unless Order")); and

(ii) The costs of and occasioned by the Strike Out Summons shall be the Defendant's in any event, on the standard basis, to be taxed if not agreed ("the Costs Orders") ("together with the Security Order and the Unless Order, "the Orders").

[1] As explained in the 3rd Affidavit of Patrick Cover, Senior Corporate Manager of the Defendant.

7. No application was made to the Court by the Plaintiff to vary the terms of any of the Orders or to apply for an extension of time to comply with the Unless Order either prior to 19th August 2014 or at any time thereafter, until by summons presented today during the very hearing for enforcement of the Unless Order.

8. By this summons, the Plaintiff seeks an order retrospectively to vary the Security Order so that the Plaintiff may be allowed to provide security for costs by way of an indemnity bond which it claims to have had in place by 21 August 2014. So as retrospectively to remedy its breach of the Unless Order, the Plaintiff also seeks an order allowing it an extension of time from the 19th to 21 August 2014, to provide security for costs.

9. If the relief sought on this summons is granted, the Plaintiff would rely upon a form of indemnity bond purchased from QBE Insurance (Europe) Limited with effect from 21 August 2014, as having provided security in keeping with the Security Order.

10. In seeking to justify their failure to comply with the term limits of the Unless Order, Mr. Mulligan for the JOLs cites the difficult position in which the JOLs found themselves in resorting to an indemnity bond instead of payment into Court as required by the Security Order.

11. The explanation comes from the first affidavit of Peter Anderson, one of the JOLs, as follows:

> *"9. The JOLs initially hoped that security would be posted by way of a bank guarantee from HSBC (Cayman) Limited ("HSBC"). However, following further discussions with HSBC it became apparent that HSBC would not be able to provide a bond at this time. I understand*

that this was solely due to the fact that HSBC is selling all its assets in this jurisdiction and was consequently unable to provide any new products to customers.

10. *The JOLs then explored alternative ways of posting security and entered into discussions with QBE Insurance (Europe) Limited ("QBE"), one of the world's leading international insurers and reinsurers, with a view to providing after-the-event insurance (the "ATE Insurance") and an unconditional and irrevocable bond in the sum of $100,000 (the "Bond") to cover security. The JOLs were fully aware of the consequences of the Ruling and wished to ensure that they complied with the same. The JOLs were of the opinion that the combination of the ATE Insurance and the Bond would comply with the intention of the Ruling in that the Defendant would have absolute certainty that, in the event that it was successful, it would have the sum of $100,000 available to it to satisfy any costs award made in its favour at the conclusion of these proceedings.*

11. *Unfortunately, it became apparent that notwithstanding all efforts being made by the JOLs and QBE it was unlikely that the Bond and the ATE Insurance would be in place by 19 August 2014, the deadline imposed by the Unless Order. For this reason, the JOLs instructed our attorney, Mr. Ben Hobden of Conyers Dill & Pearman, to telephone Ms. Joanne Verbiesen of Walkers (attorneys for the Defendant) to inform her that the JOLs were doing all that they could*

to put security in place but that they may require an additional day or two than the time frame envisaged by the Unless Order. Mr. Hobden did so on 18 August 2014. In any event, it was understood and agreed by both parties (as reflected in the Unless Order) that there was a grace period of 7 days after the expiry of which the proceedings would be struck out and stand as dismissed. This was to allow for any last minute delays in finalising and posting security.

12. *I am informed that having relayed the position of the JOLs on 18 August 2014 by telephone, Mr. Hobden was informed by Ms. Verbiesen that she would have to take instructions on the matter overnight.*

13. *Later that evening, Mr. Hobden received an email from Ms. Verbiesen asking for details of the ATE Insurance and the Bond to be provided within 48 hours. A copy of this email is at page 1. At first glance, this appeared to be a positive, conciliatory step on the part of the Defendant. The JOLs reasonably assumed that as Walkers had asked to review the ATE Insurance policy and the Bond their client considered that they would provide adequate security, subject to their terms.*

14. *The following morning, on 19 August 2014, the JOLs instructed Mr. Hobden to write to Ms. Verbiesen informing her that the ATE Insurance and the Bond were confidential but that the JOLs had asked QBE to consent to their disclosure. Further, we asked Mr. Hobden to*

formally request that the Defendant take no further action pursuant to the Unless Order pending its receipt of the ATE Insurance and the Bond. A copy of that email is at page 2. The JOLs were of the opinion that this would be a formality given that Walkers had requested copies of the ATE Insurance policy and the Bond within 48 hours.

15. *Regrettably, Ms. Verbiesen was unable to provide confirmation that the Defendant would not take steps to enforce the Unless Order and that in the event that security was not posted by 5pm that day, she was instructed to issue a summons for the dismissal of the Plaintiff's claim. A copy of this email can be found at page 3. The content of the email and the Plaintiff's subsequent unreasonable stance came as somewhat of a surprise to the JOLs: the Defendant requested documentation within 48 hours but actually intended to take further action within less than 24 hours.*

16. *Having been placed in a difficult position by the Defendant, the JOLs attempted to do all that they could to give the Defendants comfort that the sum of $100,000 was secured pending the JOLs entering into the ATE Insurance policy and the Deed. This being the case, the JOLs approached HSBC who agreed that it would transfer the sum of $100,000 into a fixed term deposit account for 7 days in the name of the Company, only to be accessible upon the written consent of both Walkers and the JOLs. HSBC confirmed this in writing. A copy of this letter is at 4.*

17. *Conyers sent Walkers a letter at 5.01pm on 19 August 2014, attaching the letter from HSBC. That ('Conyer') letter confirmed that:*

> *"Within the next seven days our clients will procure a further bond in the sum of $100,000, meaning that your client will have security in the sum of $100,000 at all times, in compliance with the Ruling."*

18. *The JOLs considered that this would be the end of the matter. It was difficult to see how the Defendant could not be content with the situation. In the event that the JOLs posted no further security within the 7 day period the Defendant may have had cause for complaint. However, as at close of business on 19 August 2014 the Defendant had security in place. This in effect was holding security....*

19. *The following morning Walkers sent an email timed at 11.35am to this Honourable Court advising that it would be filing the Summons on behalf of the Plaintiff later that day. It had not at this point made any comment in relation to Conyers letter sent the previous day.*

20. *During the course of the morning of 20 August 2014, the JOLs entered into the ATE Insurance policy and the Deed with QBE. Copies of both documents are at pages 5-39. The Deed provides that:*

> *"QBE Insurance (Europe) Limited hereby unconditionally and irrevocably undertakes to pay to First Caribbean International Bank (Cayman) Limited ("the Defendant") within 7 working days of receipt by QBE Insurance (Europe) Limited of the Defendants' written demand of any sum or sums, or within 14 days of the issue of the relevant Court Order of Assessing Officer's Certificate for costs whichever is the later, which Caribbean Island Developments Limited (in official liquidation) ("the Claimant") is liable to pay in respect of the Defendant's costs of Cause Number FSD*

> *52 of 2013 (ASCJ), to be assessed if not agreed pursuant to order, statute, agreement or otherwise, providing always that QBE Insurance (Europe) Limited's total liability hereunder shall not exceed the sum of USD 100,000 plus any sum which may be due solely in respect of simple interest applicable to the original demand at the judgment rate from the date of the presentation of the demand by the Defendants under the indemnity until payment by QBE Insurance (Europe) Limited."*

21. *Under cover of letter sent by email timed at 12.27pm, Conyers sent these documents to Walkers, stating that it considered that the JOLs had now posted security and that the Defendant should withdraw the Summons. A copy of this letter is at pages 40-42. Walkers did not respond to this letter. Rather, it served the filed Summons together with the Fourth Affidavit of Patrick Cover by an email timed at 1.33pm."*

12. Thus, the battle lines were drawn: the Defendant did not consider the Bond an acceptable form of security in keeping with the terms of the Security Order and through Ms. Verbiesen, made its position known in that regard in a letter of 22 August 2014. Apart from her concerns over the terms of the Bond not yet being fully disclosed or explained to and understood by the Defendant, she protested that it was clear form HSBC's letter of 19 August 2014 that the JOLs had sufficient cash deposits to comply with the strict terms of the Security Order but had chosen not to do so. She also noted the apparently conflicted position being taken by the JOLs that while asserting that the Plaintiff had fully complied with the Security Order by providing the HSBC letter, the JOLs nonetheless provided the QBE Bond claiming

under cover of the letter of 21 August 2014 from Mr. Mulligan – that the JOLs had thereby and then complied with the Security Order.

13. Ms. Verbiesen also explained the Defendant's position: that, had the Defendant's agreement to the Bond been sought in advance, it would not have been forthcoming for the further reason that the Bond came from an insurer who had no corporate presence in the Cayman Islands and her client had had no opportunity to review beforehand any of the transactional documentation or evidence (if there was any) of the JOLs' disclosure to QBE in respect of these proceedings.

14. In this regard, she noted in her letter that Mr. Mulligan's letter of 21 August 2014 stated that the Bond "*guarantees payment of [our] client's costs (if any award is made in its favour) up to $100,000*". "*As you should be aware*", she reminded, "*our client already has a costs in any event order against your client, which appears to be, and should be covered by the (Bond). However, the wording in your letter suggests that this material fact has not been considered and has not been disclosed to QBE Insurance. Indeed, we would be very surprised if QBE Insurance would offer an indemnity in respect of a costs order that has already been made against the Insured.*"

15. No answer to these concerns has been provided and the impression is left with me that, whatever coverage the Bond provides, it does not cover the significant costs already incurred by the Defendant in these proceedings and for which it is entitled to security in keeping with the Security Order.

16. The merits of the JOLs' position, as a party in default seeking retrospective relief from the consequences of its breach of an unless order, is further weakened by the

disclosure of the accounts of receipts and payments relating to the liquidation[2]. These accounts show that as at 21 March 2014 – and still within the deadline for compliance with the Security Order – the estate had USD273,712.84 in cash available.

17. This was the balance of receipts into the estate of USD1,214,995.45 after payments of the JOLs' fees and expenses (USD460,582.78); their lawyers' fees (USD259,751.55) and other legal fees and expenses, (of approximately US220,000) up to the accounting date of March 31, 2014.

18. The JOLs had they chosen to do so, could therefore have met the requirements of the Security Order by lodgement into Court of USD100,000.

19. They chose not to do so.

20. At the hearing on 3rd September 2014, I sought an explanation as to why the Plaintiff had not complied with the Orders in circumstances where there was clear evidence from HSBC that the Plaintiff had the means to comply. The Plaintiff then sought and obtained an adjournment on Mr. Mulligan's representation, that the Plaintiff had compelling and "*highly confidential*" reasons which it wished to put before the Court.

21. The sum effect of that explanation, as Mr. Peter Anderson explains in his latest affidavit, is that the JOLs intended and still intend to use the available cash to meet obligations for accrued costs in respect of their lawyer's and the Liquidation Committees' lawyers' fees for the ongoing prosecution of the claim against the Defendant and for the prosecution of another claim in a separate action[3].

[2] Disclosed as an exhibit to the Affidavit of Omar Grant of RHSW (Cayman) Limited, the JOLs' firm.
[3] Against Simba Ltd. (t/a REMAX Cayman, in Cause FSD 53 of 2013 AJJ, relating to that defendant's marketing and sale of the same property over which the Defendant bank here is sued.

22. As at August 19 2014, the latest account statements show that the JOLs have a balance of cash in hand of only USD23,357.75; once certain accrued (but as yet unpaid) fees are taken into account.

23. This remaining cash in hand is net also of the sum of USD20,000.00 spent by the JOLs for the purchase of the QBE Insurance and Bond.

24. The JOLs argue that no prudent liquidator would have behaved differently. They insist that to have lodged into Court the amount of USD100,000 as required by the Security Order, would have meant having to abandon their claims in the two actions which comprise the only remaining assets of the liquidation estate. Their creditors having refused to provide funding for the litigations (here I interject – without satisfactorily establishing that they are unable to provide or raise funding), the JOLs determined that the only prudent thing to do was to purchase the QBE insurance and bond which, at a cost of USD20,000, allowed them to retain approximately USD250,000 to fund the litigation and/or meet their own fees.

25. I am bound to note that it is, to say the least, surprising that the JOLs could have taken this course without first seeking the approval of this Court, as it involved a decision not to pay in the security while having the means to do so and while continuing to act in breach of the Orders. This occurred even while the JOLs - between 31 March 2014 and 31 July 2014 – continued to pay out of the estates over USD150,000 in costs[4], including their lawyers' costs of defending both of the Defendanots' summonses issued to compel compliance with the Security Order.

[4] See balance as at 31 July 2014 ($123,387.76) as compared to balance as at 31 March 2014 ($273,712.84) as these appear from the respective Receipts and Payments Accounts.

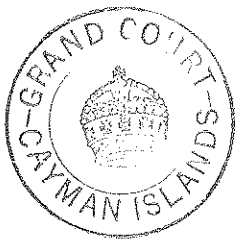
26. In this regard the JOLs state[5] that (emphasis added):

> *"Whilst the JOLs had a balance of cash in hand of $123,387.76 as at 31st July 2014, once again accrued costs meant that the JOLs were unable to post security for costs by way of cash deposit. Even leaving accrued costs aside, to do so would have left only a few thousand dollars with which to run the liquidation. In my view, no prudent liquidator would have done so."*

27. Ms. Verbiesen makes two compelling points in response to this statement:

(i) First, the situation was very different as at 28 March 2014 when security was first due – at that time the Plaintiff would still have had over $170,000 to run the liquidation after satisfying the Security Order – in an estate of this size, a relatively large amount.

(ii) Second, a prudent liquidator should not be expected to fail repeatedly to comply with Court Orders and while in so doing, incur further expenses in the liquidation in the form of costs in any event orders – which is exactly what the JOLs did here. In this regard, it must be noted that the JOLs have failed to make a reserve in respect of the costs in any event orders so far made in favour of the Defendant as an accrued cost in the liquidation, despite such costs being a priority expense and where, in the case of fees or costs accrued to the account of others, such provisioning has been made[6]: The Companies Winding Up Rules (2008 Revision), Order 20 – explains that the Security



[5] At paragraph 11 of Mr. Anderson's 2nd Affidavit.
[6] Including the JOLs' own fees and expenses, its lawyers' and the LC's lawyers' amounting to $141,493.69 in the Receipts and Payments Accounts as at 8th September 2014.

Order ranks ahead of the JOLs' remuneration in the liquidation rights of distribution..

28. Indeed, the hypothetical balance of USD17,746.95 identified by Mr. Grant of the JOLs as being available as at 31 March 2014, serves to confirm the fact that the JOLs consider their own costs to be of higher priority than compliance with the Security Order; as that is the balance shown after the provisioning for their own fees.

29. I am clear that there is to be no such "*competing obligations to the Court and to creditors*" as asserted by Mr. Anderson at paragraph 12 of his second affidavit in seeking to explain the failure to comply with the orders.

30. In the first place, it is well understood that liquidators are not obliged to institute proceedings unless there are enough assets available to cover the costs of that litigation. See, for instance, Bailey & Groves Corporate Insolvency: Law and Practice, 3rd Edition paragraph 15.37 where the obvious advice is given that:

> *"In any event, when the liquidator is undertaking litigation, he would be wise to first obtain an indemnity, in respects of the costs of litigation and he is not obliged to litigate unless there are enough assets available to cover the costs of that litigation."*

31. Moreover, if the creditors wish the liquidators to pursue the litigation where the estate is impecunious, they should be expected to fund the proceedings themselves or provide an indemnity: McPherson's Law of Company Liquidation (3rd Ed.) 9-074 – 9-075[7]. This principle was recently re-affirmed by this Court in *AHAB v Saad and Others* 15 November 2013, FSD 54 of 2009 (unreported), at paras. 68-94.

[7] Citing the observations of Marriott LJ in *Re Exchange Travel (Holdings) Ltd. (No. 3) [1997] 2 BCLC 578* at 595, adverting to the fact that indemnities from creditors for these purposes is a common place.

32. Seeking to defend as prudent their preferred use of the available funds for their litigations rather than for satisfaction of the Orders, Mr. Anderson (at paragraph 25 of his second affidavit) asserts that to have not done so would have caused prejudice to the creditors. But I am obliged to note that the impecunious state of the liquidation estate has not changed since before these proceedings were instituted and in such circumstances, the JOLs were obliged to secure that appropriate funding was in place before commencing proceedings. Otherwise, the risk of having to discontinue before completion would have been apparent and it is well established that where a liquidator discontinues proceedings for lack of funding, the usual rules as to costs apply in the absence of evidence of an unforeseen change of circumstances; precisely because the liquidators should not have chosen to take a course of action that they could not properly pursue: *Walker v Walker* [2005] EWCA 247 (CA); and *RBG Resources Plc. (in liquidation) v Rastogi, Jain and Patel* [2005] EWHC 994 (Ch.).

33. In the former of these cases, Chadwick LJ stated the law (in terms as applicable here as in England and Wales on this point); at para. 36:

> *"The rule recognises that justice will normally lead to the conclusion that a defendant who defends himself at substantial expense against a plaintiff who changes his mind in the middle of the action for no good reason – other than that he has re-evaluated the factors that have remained unchanged – should be compensated for his costs."*
>
> *Here the re-evaluated factor that would have remained unchanged from the outset of these proceedings, would be the likely unavailability of funds to the JOLs to see the proceedings to conclusion."*

34. At paragraph 17 of his second affidavit, Mr. Anderson acknowledged that he understood "*it would be unwise to assume that the Court would automatically accept [the QBE Bond] alone.*" In light of that understanding it is, I repeat, surprising that the JOLs did not consider it prudent first to apply to the Court for its approval of this form of security before entering into and paying for the QBE insurance and bond.

35. Thus, it seems to me the JOLs seek to present the Court and the Defendant with a *fait accompli* – the acceptance of the QBE bond as good security, whatever the proper concerns and reservations in that regard may be.

36. Mr. Mulligan, in support of the JOLs' action, points to recent case law in England and Wales which recognises that "After the Event Insurance" ("ATE Insurance") has become an acceptable form of security for costs. Two recent cases are relied upon as being illustrative: *Versloot Dredging B2 v HDI Gerling Industries Versicherung AG* [2013] EWHC 658 (Comm) and *Michael Phillips Architects Limited v Riklin and Riklin* [2010] EWHC 834 (TCC).

37. In *Versloot,* Justice Christopher Clarke declared ATE Insurance from a reputable provider – in that case none other than the same QBE involved here – to be an acceptable form of security for costs. He stated (at paragraph 10 of the transcript of judgment):

> "*In my view, it is necessary to take a pragmatic view, or as the Master of Rolls expressed in Shlaimon and Anor v Mining Technologies International Inc. [2012] EWCA Civ. 772, a realistic view. There is no magic in the provision of security from a first-class London bank. The essential question for the court in deciding on what form of*

security is acceptable is whether what is proposed does indeed provide real security. This it may do if it amounts to a promise which would in all likelihood be honoured, given an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given a truly creditworthy entity."

38. The learned Judge went on to conclude:

"I am satisfied on the evidence presently before me that QBE is a reputable and creditworthy insurance company, present in London, and that the security constituted by the deed is equal to or better than many first-class London banks. QBE is one of the largest managing agents at Lloyds and has been established in London since 1904, with many regional offices throughout the United Kingdom.

In terms of rating, that is to say, the credit rating of Standard and Poor's; it fairs slightly better than ABN Amro and better than all but one of the underwriters who are defendants in this case....It is apparent from the Standard and Poor's data that QBE Insurance has an A-plus rating in relation to both issues of credit and financial strength....There is also evidence that QBE Insurance has been accepted by litigants as sound security....In the end, whether security from an insurer should be accepted is a matter of judgment. It also seems to me consistent with the overriding objective that I should vary the order in the way sought [(to allow security by way of the QBE Insurance) since it seems to me that that is the best way of ensuring

that this dispute is in fact resolved rather than knocked out and that that can be done without unacceptable prejudice to the interests of the defendants and I propose to order accordingly."

39. That approach of Justice Christopher Clarke's to the issue whether ATE Insurance should be regarded as an acceptable form of security for costs seems eminently sensible to me. Indeed, had I been sitting on this matter in a court in London, I should have felt compelled by his reasoning to follow suit.

40. But the difference in circumstances here is more than merely geographical. The Defendant's concern that neither QBE itself nor the QBE bond is amenable to the jurisdiction of this Court, is a matter of real significance.

41. For instance, whether or not the QBE bond would be enforceable by the Defendant according to its terms as a matter of English Law which governs it, is a matter about which the Defendant's local lawyers have not and may not advise the Defendant. The Defendant would therefore be required to go to the expense of obtaining English legal advice before it could be satisfied about that issue. Already there is a significant area of uncertainty whether the QBE bond would cover costs orders in any event already made in the Defendant's favour and which already would consume one-half of the security to be provided by the Security Order. Moreover, the Defendant would be required to seek enforcement of the QBE bond in England if a dispute arose, notwithstanding that it is entitled to the enforcement of the security by the court before which it has been sued. All of these considerations arise against the background of recalcitrance and lack of relevant disclosure on the part of the party proffering the bond.

42. These are important concerns which must be addressed in answering the "*essential question*" posed by Justice Christopher Clarke in Versloot, "*whether what is proposed does indeed provide real security*" in respect of which "*enforcement can readily be obtained.*"

43. In my judgment that essential question has not been satisfactorily answered by the JOLs proposal for the QBE bond.

44. I think it must be regarded as settled principle that the purpose of an order for security for costs is:

> "*...to ensure that a successful defendant will have a fund available within the jurisdiction of (the) Court against which it can enforce the judgment for costs.*" *See* In re Cybervest Fund *2006 CILR 80 (AT PARA 22), applying* Porzelack K.G. v Porzelack (UK) Ltd. *[1987] 1 All E.R 1074, 1076.*"

45. This principle must be a fortiori applicable to security for costs ordered pursuant to section 74 of the Companies Law to be provided by a company which is in liquidation.

46. A cash deposit in an escrow account under the control of the Court is the usual form of security for costs and, in any event, the security should, for enforceability reasons, be within the jurisdiction: *AHAB v Saad* (above) at paras. 32-60).

47. The JOLs' proposal for the QBE bond does not satisfy these principles.

Unless Orders

48. The power to dismiss an action or to make an "unless order" in circumstances of default by a plaintiff in failing to comply with an order for security, derives from the

inherent jurisdiction of the Court: *Speed Up Holdings Ltd. v Gough & Co. Handly* [1986] FSR 330. In that case the Court recognised that there are three principal bases upon which the jurisdiction to make an unless order might be exercised and with which I agree:

(a) where the court became satisfied that the action was not being pursued with due diligence;

(b) where the court became satisfied that, notwithstanding that the relevant limitation period had not expired, there was nonetheless no reasonable prospect that security was going to be paid;

(c) where the court has prescribed a time limit within which security shall be paid and that time limit has been disregarded by non-payment.

49. It is of course, the third of these bases upon which the Defendant relies, although there may now be a confirmed reason to doubt whether the Plaintiff is any longer in funds to comply[8] and so may come within the second basis as well.

50. The inherent jurisdiction to dismiss when the basis is established, applies equally where security has been granted under section 74 of the Companies Law[9].

51. And while I accept that section 74 itself does not confer power to dismiss an action for failure to provide security, there is no question that the court has the inherent power to do so. See *Multi-Sky Ltd. v Hong Kong Chinese Insurance Co. Ltd.*

[8] As section 74 of the Companies Law explains below, the apparent lack of means of the Plaintiff – an insolvent company – was the reason for ordering security in the first place.

[9] Section 74, which was considered in the ruling herein of 7.3.14 provides: *"Where a company is plaintiff in any action, suit or other legal proceedings, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

[1994]1 HKC 108 to that effect; applying dictum of Deputy Judge Evans-Lombe QC from *Speed Up Holdings v Gough & Co.* (above).

52. An order dismissing an action already stayed for failure to comply with an order for security, will ordinarily be the appropriate order to make. See *Giddings v Giddings* (1847) 10 Beav. 29 – an early case in which the by then settled line of case law on this principle going back to *Camac v Grant* (1827)1 Simons 348; was reviewed.

53. The principles relating generally to the making and enforcement of "unless orders" were set out by Henderson J of this court in *R. Ebanks, Powery, A. Ebanks and Bodden v Brooks* [2004-05] CILR Note 28)[10]. There the learned judge applied the guiding principles expounded by the English Court of Appeal in *Hytec Information Systems Limited v Coventry City Council* [1997] WLR 1666 as follows (at page 9 of the unreported judgment):

> *"(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.*
>
> *(2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.*
>
> *(3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.*

[10] The full unreported judgment was delivered in Causes 817 of 1977 C.I. CA. No. 1 of 2000 and C.I. CA No. 22 of 1999 on 2 March 2005.

(4) *It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flaunts the order then he can expect no mercy.*

(5) *A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.*

(6) *The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice.*

(7) *The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."*

54. To similar effect, in Garren International Inc. v G. Wight and M. Wight, 1984-85 CILR 324, Hull J, in respect of an application for relief from an unless order, held that "*the [English] Court of Appeal made it clear in Samuels v Linzi Dreams Ltd. [1981] QB 115, that although jurisdiction exists to extend time for compliance with "unless" orders ...relief should not be granted otherwise than on the strongest terms*

as to payment of costs and so on. It stressed the need to maintain the principles that orders must be complied with."

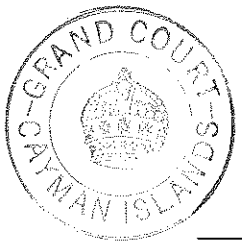
55. That principle lies, it must be emphasized, at the very core of the proper administration of justice and invokes the duty of the court to insist upon due compliance with its orders, whether such orders require the payment in of money to satisfy security for costs or – as in *Garren International* (above) – or the meeting of some other obligation such as where unless orders have been enforced by this Court[11] for failure to comply with orders for discovery.

56. Most egregious of its failings here the Plaintiff – through the deliberate choice of its JOLs – has failed to comply with the Unless Order in circumstances where there is clear evidence that the Plaintiff could have complied had it chosen to do so.

57. It will therefore be immediately apparent that the JOLs' conduct falls afoul of the fifth principle from *R. Ebanks, Powery et al* (above).

58. This came against the background of circumstances where the JOLs, again had they chosen to do so, could have applied to the Court, well in advance of the deadline of 19 August 2014, for an extension of time to comply and for leave of the Court to comply by means of the QBE bond. Instead, the JOLs chose to present the Court and the Defendant with a *fait accompli* - seeking to force the grant of retrospective extensions of time and variation of the Security Order.

59. In the process, the Plaintiff's conduct can fairly be described as "fast and loose".



[11] See also *Brown v Harvat Properties (Cayman Islands) Ltd.* 1992-93 CILR Note 5.

60. First, it claimed that the HSBC letter constituted compliance with the Orders, threatening to seek to recover indemnity costs if the Defendant proceeded to insist upon enforcement of the Unless Order[12].

61. Then later, two days after the deadline for compliance with the Unless Order (and in seeming contradiction of its earlier position that it had already provided valid security) the Plaintiff presented the QBE bond, asserting that it constituted compliance with the Security Orders.

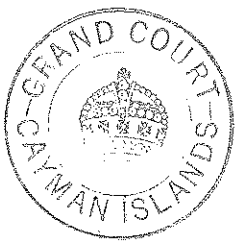
62. Neither of those purported forms of security constituted lodgement of USD100,000 into Court as required by the Security Order.

63. Moreover, as to the QBE bond, presented two days after the deadline for compliance with the Unless Order, I accept the Defendant's concerns:

(i) The indemnity is non-compliant with the Security Order or indeed with the reasons explained in the Ruling of 7 March 2014 for ordering security.

(ii) The Indemnity is not in any sense a "common or generally accepted form of security" despite the Plaintiff's suggestion to the contrary – the usual form of security still is a cash deposit in an escrow account under the control of the Court and, in any event, a form of security amenable to direct enforcement within the jurisdiction of the court: *AHAB v SICL* (above).

(iii) The QBE bond had never been raised with the Defendant as a possible form of security at any time prior to 18 August 2014 (and one day before the deadline for compliance). Had prior indication been given, it would have been open to



[12] Patrick Cover's 5th Affidavit, paragraph 7.

the Defendant to negotiate for a higher indemnified sum, to take into account the uncertainty associated with that form of security and the possible costs associated with enforcement in England – concerns which could be relevant in light of the following further concerns.

(iv) QBE, the insurer providing the indemnity, does not operate and has no juridical presence within this jurisdiction. When the indemnity is to be provided by an entity that is not shown to have any assets within the jurisdiction against which the indemnity can be enforced in the event of non-compliance, it is impossible for the Court to assess what value to ascribe to the indemnity as security. This difficulty is significantly exacerbated in this case by the fact that the QBE bond is to be governed and construed in accordance with English Law and is subject to the exclusive jurisdiction of the English Courts.

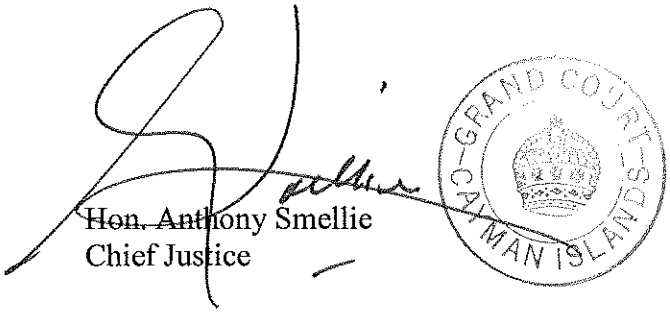
(v) Finally, in noting the Defendant's concerns, I must accept that the Defendant has no knowledge of the terms of the underlying policy between QBE and the Plaintiff or of what disclosure was made by the Plaintiff to QBE for the purposes of obtaining the bond. As already noted, there may well already be an issue over whether the bond covers extant costs orders in any event made in favour of the Defendant. The Plaintiff's lawyers have not responded to Ms. Verbiesen's concerns raised in this regard.

64. I conclude that it would not be reasonable to require the Defendant to accept a form of indemnity that is deliberately not in compliance with the Security Order; that the Defendant was given no opportunity to negotiate or even comment upon beforehand;

that is governed by the laws of another jurisdiction; that forces the Defendant to submit exclusively to the Courts of that jurisdiction; that is therefore wholly unenforceable in this jurisdiction; and that may in any event, be inadequate for having been obtained without complete disclosure of the Plaintiff's liability as to costs.

65. For all those reasons, the Plaintiff has failed to comply and continues to be in breach of the Unless Order. In all the circumstances, I am satisfied that the only proper order to make is one confirming that fact and confirming therefore that the Plaintiff's claim stands dismissed in accordance with the Unless Order, with costs to the Defendant.

66. It is so ordered.



Hon. Anthony Smellie
Chief Justice

October 8, 2014