In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2016 No: 345

IN THE MATTER OF AN APPLICATION FOR SECURITY FOR COSTS

AND IN THE MATTER OF THE RULES OF THE COURT OF APPEAL

AND IN THE MATTER OF THE REGISTRAR'S SUMMONS UNDER RULE 2/7

BETWEEN:

CAPITAL PARTNERS SECURITIES CO. LTD

Appellant/Petitioner

And

STURGEON CENTRAL ASIA BALANCED FUND LTD

Respondent/Respondent

CHAMBERS RULING

Application for Security for Costs (Rules of the Court of Appeal 2/10)

Date of Hearing: 19 December 2017
Date of Ruling: 16 January 2018

Appellant/Petitioner: Katie Tornari, Marshall Diel & Meyers Ltd (MDM)
Respondent/Respondent: Steven White, Cox Hallett Wilkinson Ltd (CHW)

RULING of Registrar S. Subair Williams

Introductory

1. On 28 July 2017, the Appellant filed a Notice of Appeal (No. 14 of 2017) against the final judgment of the learned Hon. Chief Justice, Ian Kawaley, which was made on 14 July 2017 in company winding-up proceedings.

2. By summons dated 2 October 2017 and issued by me (in my capacity as Registrar of the Supreme Court) pursuant to Rule 2/7 of the Rules of the Court of Appeal ("the Rules"), the parties first appeared before me on Tuesday 5 December 2017 when I issued standard directions in respect of Court fees and the filing of submissions. I adjourned the matter to hear Counsel on the disputed issue of security for costs.

3. On Tuesday 19 December 2017 I heard full arguments from both sides as to security. The Appellant is not opposed to the Respondent's request for the making of a security for costs order. The dispute goes to the appropriate sum in security and the correct principles of law in determining quantum for cases on appeal from the Supreme Court. At the end of the hearing, I reserved my decision to be delivered after the public Christmas and New Year holidays and my annual leave period. This is the written ruling which I advised Counsel that I would provide.

4. The appeal hearing in this matter is fixed to proceed during the upcoming Court of Appeal session on 7 and 8 March 2018.

Background

5. The Respondent, ("the Fund"), was incorporated as a Bermuda exempted company on 20 March 2007. The Fund primarily invested in natural resources in Kazakhstan.

6. The share capital of the Fund, which is said to be worth a sum in excess of $40,000,000.00, comprised of management shares (where voting rights were mostly vested without any right to collect dividends or other distributions[1]) and participating shares (where there was an entitlement to declared dividends and surplus assets). Participating shareholders did not have automated rights of redemption under the operation of the Fund and the sale or purchase of participating shares required the consent of the Board of the Fund, who were effectively the Management Shareholders.

7. The Appellant ("CPS") in this case is a securities company whose registered office is in Tokyo, Japan. CPS invested in the Fund and aimed to attract their clientele of Japanese

[1] Under Bye-Law 3.1.3 holders of Management Shares were entitled to receive the amount of capital paid up on their Management Shares after payment of the capital for the Participating Shares in the event of a winding up, dissolution of the Company, or any other occurrence resulting in the distribution of capital.

investors to invest in the Fund. Collectively, CPS and its investor clients became the registered holders of 7,561,000 of the Fund's total of 7,600,000 issued participating shares.

8. By 2015 the share value depreciated significantly from its offering price and CPS became keen to redeem its shares. The Bye-laws (pre-2014) provided for the proposal of a Special Resolution at the 2014 Annual General Meeting ("AGM") for the winding up of the Fund effective 31 December 2015 subject to an extended period specified not to go beyond 31 December 2017. However, in 2014 a resolution was approved by the management shareholders to amend the company bye-laws as they related to the redemption of the participating shares. The amended bye-laws inserted a new provision stating that a participating shareholder could only redeem 5% of its shares every two years effective 1 March 2015. This provision replaced the previous afore-mentioned parts of the bye-laws where the Special Resolution for the dissolution of the Fund was not to extend beyond 31 December 2017.

9. CPS, through a series of Court proceedings which followed, complained that the 2014 amendment wrongfully removed the end-date for the winding-up of the Fund as stated in the original version of the byelaws. The case advanced by CPS was that the 31 December 2017 operated as a maximum fixed term for the investment in the Fund. CPS further complained that the 2014 amendment wrongfully deprived it (CPS and its clients as Participating Shareholders) of their voting rights on the dissolution of the Fund.

The First set of the Court Proceedings

10. Aggrieved by the amendment to the bye-laws, on 17 August 2015 CPS filed a petition to wind-up the Fund on just and equitable grounds seeking relief under section 111 of the Companies Act 1981 (alternative remedy to winding up in a case of oppressive or prejudicial conduct).

11. The Fund successfully argued that CPS lacked standing to windup the Fund on the grounds that it was not a registered shareholder. To meet the standing objection, legal title to the 7,561,000 participating shares was transferred back CPS. The instruments of transfer were two stock transfer forms (one for 319,000 shares and the other for 7,242,000) dated 30 December 2015. The clients of CPS were the underlying beneficial owners of the 7,242,000 participating shares and CPS held the remaining 319,000 shares in its own right.

12. The share transfers did not end the matter. The Fund's Board of Directors refused to register the shares. CPS initially attempted, by way of summons under the Petition proceedings, to secure a Court order requiring the transfer of the 7,561,000 participating shares to be recorded on the Fund's share register by 12 February 2016. However, it thereafter withdrew the Petition on 10 March 2016 and proceeded by way of an Originating Summons which was filed on 21 March 2016.

The Second set of the Court Proceedings

13. The Originating Summons claimed for declaratory relief validating the transfer of the 7,561,000 participating shares from the Fund to CPS and, *inter alia*, an order (pursuant to section 67 of the Companies Act 1981) to compel the directors of the Fund to procure the rectification of the share register(s).

14. By Consent Order dated 7 April 2016 directions for the further filing of evidence were agreed between the parties and the hearing of the Originating Summons was fixed for 6 June 2016 which resulted in Judgment in favour of CPS on 27 June 2016.

The Third set of the Court Proceedings

15. On 12 September 2016 CPS presented its petition to wind up the Fund and the Court's judgment was handed down on 14 July 2017 by the learned Hon. Chief Justice, Ian Kawaley. These are the proceedings against which an appeal is now pursued and an application for security for costs arises.

16. As recited at paragraph 3 of the Judgment CPS' Petition to wind up the Fund was presented on the following grounds:

    - *the Fund's Core Documents were reasonably understood by the Participating Shareholders (including the Petitioner) to mean that the Fund would be wound up on December 31, 2015 or, at the latest December 31, 2017;*

    - *on May 8, 2014 the Board of Directors recommended adoption of the 2014 Amended Bye-Laws which were adopted at the Annual General Meeting ("AGM") by the Management Shareholder with Participating Shareholders excluded from the right to vote;*

    - *the Amended 2014 Bye-Laws removed the Participating Shareholders' right to vote for a winding up altogether and granted a right to redeem 5% of their shares every two years which represented replacing the right to exit the Fund by December 31, 2017 at the latest with a 40 year term investment;*

    - *these changes "amounted to a breach of the fundamental terms and/or underlying basis and/or understanding on which the Participating Shareholders invested in the Fund" (paragraph 54);*

    - *"the shareholders with the ultimate economic interest in the Fund wish the Fund to be wound up…" (paragraph 66).*

17. CPS pleaded these grounds as a basis for winding up the Fund on 'just and equitable' grounds, alleging that the Fund's management acted in bad faith by unlawfully amending the bye-laws so to deprive the Participating Shareholder of its voting rights in respect of when

the Fund should be wound up. Counsel, Mark Diel, for the Fund, relied on the Privy Council case of *Loch v John Blackwood Ltd [1924] A.C 783* where Shaw J stated: "*It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs*."

18. Kawaley CJ surmised the Fund's case at paragraph 4 of his Judgment as follows: "*The Fund's case in a nutshell was that (1) it was established from the outset as an unlimited term investment with the Management Shareholder (Sturgeon Holdings Limited- initially Compass Asset Management Ltd) alone being entitled to exercise voting rights, and that (2) CPS as an insider could not claim ignorance of these facts and seek to impose a contrary interpretation on the Core Documents*."

19. The Judgment is set out in thorough analysis and covers some 33 pages in length. The merits of the Petition were expressly stated to largely depend on the interpretation of Bye-law 78, in its original formulation, recited in the judgment as follows:

"*78.1 The Shareholders may resolve by Special Resolution proposed at the Annual General Meeting held in the year 2014 to wind up an dissolve the Company with effect from 31 December 2015 subject to the right to extend the effective date of the winding up for a further two consecutive years but in no event shall such a period extend beyond 31 December 2017.*

78.2 If no Special Resolution is approved at the Annual General Meeting pursuant to Bye-Law 78.1, the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and liquidation of the Company shall occur.

78.3 If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Shareholders and any other sanction required by the Act, divide among the Shareholders in cash or kind the whole or any part of the of the (sic) assets of the Company (whether shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Shareholders or different classes of Shareholders. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no Shareholder shall be compelled to accept any shares or other assets upon which there is any liability."

20. The 2014 amendments deleted 78.1 and 78.2, effectively clarifying that the lifespan of the Fund would be for an indefinite period. At the heart of this litigation is the question as to whether the amendment, which was done by Special Resolution at the 2014 AGM, was capable of being done by a vote between the Management Shareholders to the exclusion of the Participating Shareholders.

21. The Court in its interpretive analyses of these issues, on the basis of various doctrines and principles on the art of interpretation, had regard to relevance and admissibility of the core

documents, namely the Subscription Agreement; the Placing Memorandum; and the Prospectus. Kawaley CJ further outlined the drafting history of the core documents between 2007 and 2014.

The commercially sensible construction

22. CPS argued commercial prejudice on the basis that the Japanese investors whom they were charged to attract would not have been motivated to invest in a fund which they could not wind up by their majority vote. Mr. Atherton QC, representing the Fund, argued that the commercial perspective based on the "*hedge fund professional view*", was that the structure of the Fund was not uncommon and that the Bermuda Courts should be careful not to allow regretful investors to renege on investments because to do so would have wider industry ramifications in Bermuda.

23. The Court was clear in its findings that CPS knew and understood from a commercial perspective that the Participating Shareholders would have limited management and voting power. Kawaley CJ stated at paragraph 38 of the Judgment, "…*I find that the commercial context in which Bye-Law 78 was originally adopted was one in which it was mutually understood by the Investment Manager and CPS that Participating Shareholders were to have as little control over the Fund as possible, both in general management terms but as regards the right to seek a winding up as well*."

24. With the appearance of ease, the Court found at paragraph 55: "*One interpretive argument advanced by CPS can be disposed of shortly. The drafting history in my judgment makes it impossible to credibly argue that the interpretation contended for by the Fund of Byelaw 78 (in its original form) "flouts business common sense". CPS's role in relation to the Fund was to market the Participating Shares to Japanese investors, and when the draft Byelaw 78 was amended April 2007 to "make it clearer" that the investors had no right to vote on winding-up, neither CPS nor the Japanese lawyer upon whom CPS relied raised a word of dissent. While this silence is not dispositive, it is powerful evidence that persons who one would expect to be sensitive to how an investment product would be received by Japanese investors were not motivated to exclaim instinctively that for investors to be given no voting rights in relation to winding up would be wholly unacceptable."*

25. At paragraph 61 the learned Chief Justice further rejected the commercial context argument as a determining factor in interpreting whether Bye-Law 78 includes Participating Shareholders in those who were entitled to vote on a Special Resolution to wind up and dissolve the Fund.

Whether the approach to interpreting bye-laws is the same as for ordinary written contracts

26. It is clear from the 14 July judgment that the legal principles governing the construction of bye-laws were novel to the extent that the Court looked to non-Bermudian authorities for guidance. As a starting point, it appears that the Court had regard to *Arnold v Britton [2016] 1 ALL ER* where Lord Neuberger re-stated the proper approach for interpreting written contracts and the importance of determining the parties' respective intentions in the making

of such contract by reference to '*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'*. On these principles, extrinsic evidence relevant to background knowledge is admissible. However, the real question was whether these principles applied to the construction of bye-laws.

27. It was Mr. Atherton QC for the Fund who referred the Court to the English Court of Appeal decision in *Bratton Seymour Service Co. Ltd v Oxborough [1992] BCLC 693*. At paragraph 43 of his judgment the learned Chief Justice surmised the English authority as follows, "*This decision supports a general prohibition on using extrinsic evidence about what those involved in the establishment of (the) company knew about, inter alia, the drafting history of the bye-laws in a subsequent interpretation of the registered bye-laws in a subsequent interpretation of the registered bye-laws*."

28. In the end the Court held that the interpretation of a bye-law could not properly be based on CPS' knowledge during the negotiating process. Extrinsic evidence on the parties' negotiating history is relevant and admissible for ordinary written contracts but not for company bye-laws. The supporting authorities cited were *HSBC Bank Middle East and others-v-Paul Clarke (as liquidator of the Oracle Fund Limited) and others [2006] UKPC 31* and *McKillen v Misland Cyprus Investments Ltd [2011] EWHC 3466*.

29. Supplemental submissions for the Fund to clarify its own position on the admissibility of such extrinsic evidence were invited and received by the Court. Having received the necessary clarification, it became apparent that the Fund's position was that such evidence was relevant only to rebut CPS' contention that it had an expectation during the negotiation process that the Participating Shareholders would have voting rights (as opposed to a tool for the interpretation of the bye-laws).

Other rules of construction for the interpretation of company bye-laws

30. CPS advanced other rules of construction before the Court. At paragraph 50 of the Court's judgment, the learned Chief Justice referred to judgment of Kay LJ in *Aircare Ltd v Wyatt Sellyeh [2015] Bda LR 32* wherein Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191*, 201 was cited as follows: "*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business common sense*."

31. In the event of any finding of ambiguity, CPS further relied on the *contra proferentem*[2] rule of interpretation on the basis that it was not legally qualified or represented and that the Fund on the other hand were represented by Appleby as legal experts. At paragraph 52, the Court observed that CPS' right to rely on this rule was not disputed. Accordingly, the Court examined whether any such ambiguity existed by reference to the bye-laws.

[2] Where there is a finding that the term or provision to be interpreted is ambiguous, the doctrine of *contra proferentem* provides that the interpretation of the ambiguous term should be construed against the interests of the party who provided the wording.

Summary of the Court's Findings

CPS successful on Construction of Bye-Law 78 to include Participating Shareholders

32. Commencing at from paragraph 67 of the judgment, as a matter of construction, the Court found in favour of CPS' argument that the pre-amendment bye-law provisions in 78 did in fact apply to both the Participating Shareholders and the Management Shareholders, so to confer voting rights on both classes of shareholding. The Court adjudged this interpretative finding to be free and clear from ambiguity.

CPS unsuccessful on Commercial Context Arguments

33. The Court rejected CPS' contention that it was commercially unreasonable and offensive to business common sense to conclude that CPS ever agreed for the Participating Shareholders not to have voting rights on the winding up of the Fund.

CPS unsuccessful on Fixed Term Investment Argument

34. The Court readily rejected CPS ground of petition that the Participating Shareholders were reasonably entitled to assume, on the construction of the pre-amended bye-laws and/or the core documents, that the Fund would be wound up no later than 31 December 2017. It was held that the bye-law clauses never made it mandatory for the Fund to be wound up by 31 December 2017. The learned Chief Justice found the meaning of 78.2 for the finding of an alternative wind-up date to be '*so clear that any inconsistent wording in other documents*' was '*immaterial for the purposes of the relevant construction analysis*.'

CPS unsuccessful in its attempt to prove 'Just and Equitable' Grounds

35. CPS was unsuccessful in proving on the evidence that the management acted in bad faith when they passed a Special Resolution, having excluded the Participating Shareholders from the vote, to amend the bye-laws. Kawaley CJ stated at paragraph 79; *"…In my judgment the preponderance of the evidence relating to how the 2014 Bye-Law amendments took place is inconsistent with any bad faith finding, a finding upon which the success of the Petition crucially depends….The wrong that has occurred is more technical and formal than substantive in its effects*."

36. At the conclusion of the judgment, it reads: "*I find that the Petitioner has failed to make out a case for a just and equitable winding-up because I reject its central thesis that the Fund, acting in bad faith, appropriated the rights of the Participating Shareholders to vote in 2014 under Bye-Law 78 on whether the Fund should be wound up at year end 2015 or, at the latest, year-end 2017. Voting rights were conferred on Participating Shareholders, but their wishes could be blocked by the Management Shareholder whose support was required in any event for any resolution in favour of winding up to be passed. The Fund acted reasonably in introducing the 2014 Amended Bye-Laws and by acting in accordance with credible legal advice*."

The Scope of the Appeal:

CPS Grounds of Appeal:

37. On 28 July 2017 CPS filed a Notice of Appeal against the 14 July 2017 judgment. An Amended Notice of Appeal followed on 25 August 2017.

38. CPS are appealing against the whole of the learned Chief Justice's decision save for his decision on the construction of Bye-Law 78 wherein he found that voting rights were in fact conferred on the Participating Shareholders and that they had been unlawfully excluded from the Special Resolution which resulted in the 2014 bye-law amendment.

39. In ground 2(1) CPS criticized the Court's factual finding that Participating Shareholders' wishes could be blocked by the Management Shareholder whose voting support was required in order for the winding up resolution to be passed. CPS pointed to paragraph 68 of the judgment where the learned Chief Justice referred to this as "*practical ramifications which were not…explicitly addressed in argument*." At paragraph 6 of the written submissions filed by CPS, it is stated; "*This is now the subject of an appeal as it is CPS's position that no such alleged right to veto existed in the Bye Laws or at all. No such argument was ever raised at any time by the Fund during the proceedings in evidence, submissions or during the hearing. It was a novel point which was advanced by the Honourable Chief Justice and the basis upon which CPS's petition to wind up the Fund failed*."

40. Ground 2(2) complains that the Court ought to have found that the Participating Shareholders were unlawfully deprived of their contractual right to exit the Fund by 31 December 2017. At 2(6) of the Amended Notice of Appeal, CPS reassert that the investment term was mandatorily fixed to expire no later than 31 December 2017 and complain that learned Chief Justice erred in construing otherwise. This ground of complaint also criticizes the Court for not factoring into consideration (sufficiently or at all) the extrinsic evidence and in particular the Placing Memorandum.

41. The nutshell of grounds 2(3) - 2(5) amount to a complaint that the learned Chief Justice's finding that the Participating Shareholders were wrongly excluded from the December 2014 vote on whether to wind up and from the vote on the amendment to Bye-Law 78 should have been sufficient to consequently find the Fund's management had acted in bad faith and for the Court to find in favour of CPS' case for a just and equitable winding up. Ground 2(4) also claims, somewhat alternatively, that the learned Chief Justice erred in finding that the absence of a finding of bad faith would be fatal to CPS petition for a just and equitable wind up.

The Fund's contention for Judgment to be affirmed on Alternative Grounds:

42. On 16 August 2017 the Fund filed a '*Notice of Intention to Contend that Judgement should be affirmed on grounds other than those relied on by the Supreme Court*' (the "Fund's Notice").

43. In the Fund's Notice, it is alleged that the learned Chief Justice found that the Management Shareholders had an obligation to convene all of the shareholders to consider and determine whether or not to wind up the Fund and to accordingly determine the date for the winding up. The Fund further contends that the learned Chief Justice erred in its construction of Bye-Law 78 in finding that the Participating Shareholders were entitled to vote on such resolutions.

44. The Fund argues that the Court should have found that there was no obligation on management to convene a meeting to determine whether and/or when to wind up and that in any event the Participating Shareholders had no entitlement to vote on either issue.

The Law on Security for Costs on Appeal:

Security for Costs under the Rules of the Court of Appeal

45. Order 2 Rule 10 of the Rules of the Court of Appeal provides:

"The appellant shall within such time as the Registrar of the Supreme Court directs deposit such sum as shall be determined by such Registrar or give security therefor by bond with one or more sureties to his satisfaction as such Registrar may direct for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant:

Provided that no deposit or security shall be required where the deposit would be payable by the Crown or Government department."

46. Rule 2/11 further provides:

The Court may, where necessary, require security for costs or for performance of the orders to be made on appeal, in addition to the sum determined under Rule 10 of this Order.

Security for Costs under the Rules of the Supreme Court

47. Mr. White correctly observed that the legal framework governing security for costs on appeal differs from Order 23 of the Rules of the Supreme Court ("RSC") which is applicable to an order for security in its original jurisdiction.

48. RSC Order 23/1 reads:

"*23/1*

1 (1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

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

Comparing the approach to an order for security between first instance and appeal cases

49. In *First Atlantic Commerce Ltd*, Kawaley CJ cited the Privy Council decision in *Ford v Labrador [2003] 1 WLR 2082* where the favoured approach was stated to be one of leniency towards a Plaintiff in proceedings at first instance so to preserve the infallible right to access to justice. The question arose as to whether such an approach was to be mirrored in appeal proceedings. The Judicial Board distinguished *Tolstoy Miloslavsky v United Kingdom 91995) 20 EHRR 442* as follows:

"*In the Tolstoy Miloslavsky case the applicant had been required by the Court of Appeal to pay £124,900 as security for the respondent's costs in the appeal as a condition of his appeal being heard by that court. The European Court observed, in paragraph 59, that if followed from established case law that article 6(1) did not guarantee a right of appeal. In paragraph 61 it also noted it was not disputed that the security for costs order pursued the legitimate aim of protecting the respondent from being faced with an irrecoverable bill for legal costs if the applicant was unsuccessful in his appeal. In these circumstances, it was held that the order did not impair the very essence of the applicant's right of access to the court, bearing in mind that the applicant had already enjoyed full access to the court in the proceedings at first instance…* ***This reasoning indicates that a more lenient approach requires to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side's costs, as a condition of proceeding at first instance.*** *That is the situation in the present case, as the merits of the petitioner's claim have not yet been determined by any court...*"

50. The '*more lenient approach*' towards first instance cases must include both the question on whether or not to make an order for security in addition to the quantum to be decided.

51. While neither Counsel referred to the Supreme Court's appellate jurisdiction in their comparative analyses on the varying approaches to security orders depending on the jurisdiction of Court, I note with interest that RSC Order 55/7 (6) provides, "*The Court may,* ***in special circumstances****, order that such security shall be given for the costs of the appeal as may be just*." It would appear that the requirement for *special circumstances* is arguably tantamount or similar to the '*more lenient approach*' standard. If I am correct, there is more parity between the Bermuda Supreme Court's original jurisdiction and its appellant one in relation to the leniency approach to be used.

52. So, what is the correct approach in deciding quantum for matters on appeal to the Court of Appeal?

53. Counsel before the Court of Appeal in *Allied Trust & Allied Development Partners Ltd v Attorney General and Minister of Affairs [2016] Bda LR 31* p.3 argued that the $12,000

maximum sum in security which may be ordered in respect of appeals to the Privy Council pursuant to section 4 of the Appeals Act 1911 should not be far removed from the sums ordered for security on appeal to the Court of Appeal. While Counsel in *Allied Trust* argued that the appeal was of a constitutional nature and should be exempt from an order of security for costs, Sir Scott Baker P stated at paragraph 15 of his judgment; "*Important as this issue may be, it does not seem to me to affect anyone other than the parties in the present case. As Sir Maurice Kay put in argument: who else would have standing to join in the proceedings? The fact that the constitutional issue has no direct input on anyone other than the parties to the present litigation to my mind means that it adds nothing to applying the ordinary principles for deciding whether to order security*…"

54. At its conclusion, the judgment in in *Allied Trust* reads; "*The constitutional issue arising in this case is not such as to take the case outside the ordinary principles of deciding whether to order security for costs and if so in what amount.* ***The Court has to balance the interest of not depriving a litigant of access to the Court on the one hand with that of leaving a winning litigant with an irrecoverable bill of costs on the other****. I do not regard the reference to $12,000 in section 4 of the Appeals Act 1911 as either helpful or relevant to this issue in the present case. The appellants have failed to discharge the burden of impecuniosity as described by Mance LJ as he then was in Nasser. I cannot fault the conclusion of the Acting Registrar Miller to order security of $150,000 and nothing in the fresh material put before the Court causes me to take a different view now*…"

55. Counsel for the Fund, Mr. Steven White, relied on *Procon (GB) Ltd v Provincial Building Co Ltd and others [1984] 2 All ER 368*[3] where the English Court of Appeal, sitting on an interlocutory appeal against a judge's order for the Defendants to pay £6m in security for the Plaintiffs' costs to defend a counterclaim, considered the correct approach for the making of an order for security of costs under RSC Order 23.

56. In *Procon* the Plaintiffs were builders seeking to recover the balance of moneys due to them under a building contract for an oil refinery in Canada. The Defendants, by counterclaim, pursued a set-off for work not properly done which they say resulted in losses and caused or contributed to the liquidation of the oil refinery. Massive claims in liquidation proceedings followed and the action proceeded for years.

57. Much dispute was made by Counsel before the appellate Court in *Procon* as to whether those proceedings qualified for inclusion on the 'commercial list'. Counsel highlighted the then UK RSC Order 72 r 1(2) which defined commercial actions (less extensively then the RSC Order 72/1(2) in Bermuda). Counsel also distinguished cases on the commercial list as follows "…*Interlocutory business is usually undertaken by the masters or on appeal to the judge in chambers of the day. There is not usually any single judicial figure in control of the whole case from the beginning (as occurs in commercial cases)*."

[3] The hardcopy extract provided to the Court did not display page numbers. Consequently, page number references have not been included in this Ruling.

58. At first instance, the High Court judge stated:

> "*I recognise that there is a difference in practice between various branches of this court. In the Commercial Court it is generally accepted that, if we are presented with applications for security for costs without an attempt to particularise, two-thirds is ordered, but, if there is a particularisation with facts and figures, then particularly in respect of past costs, and making an allowance for what might be taxed off, we give an indemnity. I am bound to say that I believe this is the correct principle and I do not see why, if the costs have been incurred, there should not be security for all of them and not two-thirds. I think that this is a case where the Commercial Court practice should be adopted. It is a major piece of litigation which is at least quasi-commercial and accordingly I will not take the practice of two-thirds but grant an indemnity of whatever I consider to be the proper sum*."[4]

59. The learned judge was said to have correctly departed from the approach favoured in the commentary passage for RSC Order 23 in *The Supreme Court Practice 1982* Vol I, ("the White Book") para 23/1-3/22.:

> '*Amount of Security- The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered; but there is no hard and fast rule. It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Geoffrey Lane J. in T. Sloyan & Sons (Builders) Ltd. v. Brothers of Christian Instruction ([1974] 3 ALL ER 715 at 720))*"

60. In both the leading judgment of Cumming-Bruce LJ and the judgement of Griffiths LJ, the Court of Appeal strongly criticized the above White Book commentary. Cumming-Bruce LJ, in material part, stated:

> "*I take the view that the note under the heading 'Amount of Security' which has been published in The Supreme Court Practice to the notes to Order 23 since 1964 is expressed in too dogmatic and inflexible terms and has probably given rise to a misunderstanding by masters and judges of the principles to be followed having regard to the words of the rule. In my view, I would respectfully suggest to the editors of The Supreme Court Practice that they reconsider the words of their note. As I have stated, where there is a prospect of settlement, that is a factor to be taken into account by the court in deciding the quantum of security to be ordered. But in a case such as the present, where millions of pounds of costs assessed on*

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In considering the above passage, Cumming-Bruce LJ remarked; "*It is important for a proper understanding of that passage in the judgment to bear in mind as is clear from the preceding passage in the judgment, that when the judge used the phrase 'grant an indemnity' he meant an indemnity to protect the party seeking security in respect of party and party costs only, and nothing in his judgment is to be understood as meaning that he was intending to grant an indemnity for anything else, eg. solicitor and client costs, solicitor and own client costs and so on*."

a party and party basis have become the subject of fee notes and have in most cases, already been paid, there is no reason that I can see in justice or common sense for any conventional discount of the kind described in the note. There will, of course, be a discount as the judge made, having regard to his expectation that the fees which were particularised before him would be reduced by the taxing master (that is a quite different matter), but when that discount has been made, if the judge is satisfied that the solicitors have honestly attempted to make, and have made, an actual calculated estimated of their costs and disbursements, then, when the judge has arrived at what he thinks is the actual figure, he should order that figure to be the figure incorporated into his order for security…"

61. On the penultimate page, Griffiths LJ expressed his agreement with Cumming-Bruce LJ in the following portion of his judgment:

"*Having heard of the researches of counsel for the plaintiffs in the masters' corridor, I am not myself persuaded that a two-thirds fixed practice in fact exists, but if it does I am satisfied that it is time it stopped. I can see no sensible reason why the court should not order security in the sum in which it considers the applicant would be likely to recover on taxation on a party and party basis if the court considers it just to do so. This, as I understand it is the practice of the judges in the Commercial Court and it is a practice that ought also to be followed in the rest of the Queen's Bench Division. It is, of course, for the party seeking an order for security to put before the court material that will enable the court to make an estimate of the costs of the litigation. In the normal course of things, it is to be expected that the court will, to some extent, discount the figure it is asked to award. Allowance will have to be made for the unquenchable fire of human optimism and the likelihood that the figure of taxed costs put forward would not emerge unscathed after taxation*…"

62. Mr. White also referred me to *Artha Master Fund LLC v Dufry South America [2011] Bda L.R.16* where Originating Summons proceedings were commenced by the Plaintiff hedge fund which was domiciled outside of Bermuda. The Plaintiff's application was made under section 106(6) of the Companies act 1981 for the Court's assessment of the fair value of the Defendant company shares for the purposes of a merger and amalgamation agreement.

63. The learned Hon. Chief Justice, Ian Kawaley, issued pre-trial directions for the filing of expert valuation evidence and other pre-trial issues which included an order for security for costs under RSC Order 23. The security for costs order was adjourned on the issue of quantum with reasons to follow. Prior to delivering those reasons, the Court indicated; "…*in the absence of cogent evidence of the Plaintiff's impecuniosity*[5]*, such costs should be limited to the additional costs attributable to enforcing any costs order abroad*."

64. The application was explicitly based on the fact that the Plaintiff was resident abroad. However, a concession was made that the historical practice of making orders for security

[5] See paragraphs 23-25 of the reasons provided by the learned Chief Justice wherein he later characterized his use of the word "impecuniosity" as unfortunate and favoured the use of the word "insolvent" in its place. The likely reason for the corrected terminology is related to the fact that there are no express provisions in Bermuda for an order of security to be made against an insolvent company.

based solely on an overseas domicile had been modified in 1998 since the passing of human rights legislation in England so to avoid discriminatory interpretations of Order 23 based on place of origin.

65. The derivative of the non-discrimination principle was said to have come from Mance LJ in *Nasser v United Bank of Kuwait [2002] 1 WLR 1868* to which I also referred in my previous ruling on security for costs in *Ayo Kimathi et al v the Attorney General et al [2017] SC (Bda) 87 Civ (24 October 2017)*.In *Nasser* the Court of Appeal restricted the assessment of costs for security in cases pleaded on the sole basis of foreign domicile to orders which would mitigate only against any additional difficulty in enforcement. The scale of costs payable on security would therefore vary (without the need for formal evidence) according to the difficulty of enforcement and according to jurisdictions where reciprocal enforcement legislation existed: see *Texuana International Ltd v Cairns Energy Plc [2004] EWHC 1102 (Com)* which was cited with approval by the Kawaley CJ in *Artha Master Fund*.

66. Kawaley CJ unraveled the Bermuda position by analysis of section 12 of the Constitution of Bermuda which stands to safeguard against discriminatory constructions of law. The learned Chief Justice held that RSC Order 23 must be applied in a manner consistent with section 12 but also observed the various express exceptions in section 12 to the right not to be subjected to discriminatory treatment. Specifically the Court referred to section 12(4)(d) (as read with section 12(5)) which provides that it is not discriminatory for the purposes of section 12(1) or 12(2) if a law makes provision: "*whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons of any other such description, is reasonably justifiable in a democratic society*."

67. At paragraphs 19-21 of his judgement it reads:

"*Thus the English position appears to be that security for costs may only be ordered if there are grounds over and above residence abroad for requiring security. The Bermudian position is that one must consider whether foreign litigants may be subjected to the disability of being required to furnish security on the grounds that such disability is, having regard to the "nature" of the restriction or "special circumstances" pertaining to foreign litigants (or particular categories of such), "reasonably justifiable in a democratic society". The fact that additional costs may be incurred through enforcing a costs award overseas, would clearly constitute a special circumstance applicable to all foreign plaintiffs who are nationals of (or who have assets located in) countries in relation to which no reciprocal enforcement of judgment regime exists.*

I was willing to assume for present purposes, based on the English case law, that ordering such foreign litigants to post security to cover such additional costs meets the constitutional reasonable justifiability test. For similar reasons, I would endorse the views of Gross J in Texuna International Ltd v Cairns Energy Plc [2004] EWHC 1102 (Com) (transcript, paragraph 23(xi)) to the effect that where enforcement abroad would be near impossible, the

quantum of costs would potentially not be limited to the additional costs of enforcement overseas.

For these reasons I was satisfied that this Court clearly had the discretion to require the Plaintiff to provide security…"

68. The learned Chief Justice expressly allowed room for argument, in cases to follow, that the English approach was "*overly narrow and that the very "nature" of the security requirement imposed on foreign litigants is "reasonably justifiable in a democratic society*" ".

The Law on a Respondent's Notice to Affirm on Alternative Grounds

69. The Respondent's Notice was filed pursuant to Order 2/13 of the Rules of the Court of Appeal which in relevant part reads:

"*It shall not be necessary for the respondent to give notice of motion by way of cross-appeal; but if a respondent intends upon the hearing of the appeal to contend that the decision of the Supreme Court should be varied, or that it should be affirmed on grounds other than those relied on by that Court(,) he shall within one month after service upon him of the notice of appeal cause written notice of such intention…to be given to every party who may be affected by such contention, whether or not such party has filed an address for service. In such notice the respondent shall clearly state the grounds on which he intends to rely and within the same period he shall file with the Registrar six copies of such notice of which one shall be included in the record, and the other five copies provided for the use of the Judges*…"

70. Mr. White relied on *Hart Investments v Larchpark Ltd and another [2007] EWHC 291 (TCC)* wherein Judge Peter Coulson QC sitting in the Queen's Bench Division outlined what he phrased 'Principles relating to security for costs' in the context of section 726 of the (UK) Companies Act 1985 (as it was originally enacted) which provided as follows:

"726(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

71. In *Hart Investments* the application for security was made against a counterclaim. Most helpfully he recited the below passage and authorities at paragraph 11 of his judgment:

"*Because this application is for security on a counterclaim, it is also right to note two authorities relied on by Mr. Quiney on behalf of Larchpark which deal with the relevance of the relationship between claim and counterclaim. They are:*

(a) Neck v Taylor [1893] 1 QB 560, in which Lord Esher MR said (at 562):
'Where, however, the counter-claim is not in respect of a wholly distinct matter, but arisies in respect of the same matter or transaction upon which the claim is founded, the

Court will not, merely because the party counter-claiming is resident out of the jurisdiction, order security for costs…'

(b) Hutchinson Telephone (UK) Ltd v Ultimate Response Ltd [1993] BCLC 307, in which Bingham LJ said (at 317):
'At that point, one moves on to the largely discretionary area. The trend of authority makes it plain that, even though a counterclaiming defendant may technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own? It appears to me that Field J put his finger on the appropriate question when he pithily observed in Mapleson v Masini (1879) 5 QBD 144 at 147: the substantial position of the parties must always be looked at"."

72. Order 59/6 of the UK Supreme Court Rules, as reported in the 1999 edition of the Supreme Court Practice ("the White Book"), provided:

"*59/6 (1) A respondent who, having been served with a notice of appeal, desires-*
(a) to contend on the appeal that the decisions of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or
(b) to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or
(c) to contend by way of cross-appeal that the decision of the court below was wrong in whole or in part
must give notice to that effect, specifying the grounds of his contention and, in a case to which paragraph (a) or (c) relates, the precise form of the order which he proposes to ask the Court to make.
…"

73. Ms. Tornari highlighted the following White Book commentary:

"*A respondent who has given a respondent's notice under this rule is generally in the same position as to costs as though he had presented a cross-appeal (Harrison v Cornwall Minerals Ry. Co. (1881) 18 Ch. D. 334 at 346, CA). Appeal and cross-appeal are generally to be treated as separate proceedings for the purpose of taxation if they raise distinct issues, and the costs of appeal and cross-appeal should be separately taxed, and the amounts allowed set off against each other, and the balance paid (Jones v Stott [1910] 1 K.B. 893, CA)…*"

The Correct Approach to Deciding Quantum for Security for Costs

74. I am grateful to Counsel for the clarity of their submissions and the thorough research presented which now affords me the welcomed opportunity to further outline the principles and to clarify the correct approach applicable to orders for security on appeals to the Court of Appeal.

75. While RSC Order 23 restricts the circumstances (beyond that imposed by Order 2/10) as to when an order for security may properly be made, the principles for determining the appropriate quantum will not always differ.

76. The correct application of Order 2/10 is reliant on the proper exercise of the Registrar's discretion in determining quantum. On my assessment of the line of authorities placed before me, it is clear that the following factors must be considered in the exercise of that discretion:

    (i) The extent to which an order for security may deprive an appellant of access to justice;

    (ii) The financial ability or disability of the appellant and the impact of an order on the paying appellant;

    (iii) The level of risk to a successful respondent whose legal costs have been left unpaid;

    (iv) The extent of difficulty which a successful respondent is likely to encounter in enforcing payment of a costs award;

    (i) The integrity of the grounds of appeal on its face and whether or not such grounds are obviously unmeritorious or even abusive (in which case the quantum would be less conservative and potentially contemplate a costs order by the full Court on an indemnity basis);

    (ii) The scope of the disputed issues for determination on appeal (this will include an assessment of the volume and complexity of the relevant issues and any set off warranted by a cross-appeal);

    (iii) Particulars of any estimate of legal costs which will likely be incurred and/or a bill of costs for services rendered in preparation for the appeal together with likely deductions after taxation (using a broad-brush approach);

    (iv) Any known taxed or agreed fees in respect of the legal costs for the proceedings below; and

    (v) The complement and practice experience of Counsel assigned to the case and whether the same Counsel were employed in the proceedings subject to appeal.

Analysis:

77. The Respondent provided the Court with a Bill of Costs comprising of both costs incurred (sub-totaling $50.00 + $14,420.00 + $5,561.47 = $20,031.47) and estimated future costs (sub-totaling $153,315.55). The grand total is reported to be $173,347.02. Mr. White submitted that this figure should be subject only to a discount for '*notional taxation*' at 12.5% which results in a rounded down figure of $150,000.00. On Mr. White's argument, the proposed fees represent "*a drop in the ocean*", of the net worth of the Fund and much less than the Fund's Supreme Court fees were in the neighborhood of $450,000.00-$500,000.00.

78. To justify the high sums in legal fees, Mr. White submitted that this is a complex and difficult case and that the Bar Council, in approving the request to retain Queen's Counsel, would have necessarily found that this case satisfies the "complexity and uniqueness" test. He also directed my attention to paragraph 4 of his written submissions where it is stated that CPS's legal fees for the Supreme Court proceedings exceeded $900,000.000 ($235,000.00 of which was said to be attributable to the share rectification proceedings under the 2016 Originating Summons).

79. The largest portion of the estimated fees is stated to be in the sum of $128,315.55 in respect of fees for Mr. Stephen Atherton QC. These estimated fees are stated in the Bill of Costs at Part IV to entail "*drafting of Skeleton Argument, preparatory work, brief fee, refresher and travel*". CHW's fees were estimated to total $25,000.00. (Mr. White confirmed, without dispute from Ms Tornari, that a certificate for two Counsel had been issued for the Supreme Court proceedings.)

80. Ms. Tornari challenged the reasonableness of the Respondent's $150,000.00 estimate and submitted that the actual costs for responding to the appeal grounds pleaded by CPS should not exceed $50,000. Mr. White, on the other hand described the $50,000.00 proposal as an entirely arbitrary figure with no basis other than the fact that the $50,000.00 sum mirrors the sum which was ordered in security at first instance during the first set of aborted petition proceedings in the Supreme Court in 2015.

81. The Appellant argued that any costs exceeding $50,000.00 would be attributable only to the new issues raised in the Respondent's Notice, which stands more as a cross-appeal than a defence or response to CPS' appeal. Ms Tornari further submitted that CPS and its clients, as the majority of the Participating Shareholders of the Fund, are the sole owners of the assets of the Fund. She argued that, ultimately, the Fund's legal costs will be at the expense of CPS and so the Fund has nothing to gain or lose by an order for security. For the avoidance of ambiguity, Ms. Tornari clarified that she was not opposed to the making of a security for costs order but instead considers this point to be a relevant consideration in my assessment of the quantum.

82. Applying the broad-brush approach, I have reviewed the Respondent's Bill of Costs. I have also assessed the volume and level of complexity which is engaged by the appeal grounds. While, this is indeed a case which qualifies as '*complex commercial litigation'* I am more

than dubious that even the sum of $150,000 would be upheld after a taxation of costs. I reject the proposed approach for a nominal reduction of 12.5%. Each case must be considered on its own facts in determining the likely reduction after taxation. Some bills of costs or estimates will be more fair or justifiable than others. In this case, I would sooner assess the costs at this stage of proceedings to be in the neighborhood of $100,000.00, particularly having factored into consideration the likelihood of any costs order being made on a standard basis. I have also factored into my consideration that the same seasoned and experienced Counsel who appeared in the Supreme Court will be re-arguing these points in the Court of Appeal.

83. There is no evidence or suggestion made before me that CPS would be deprived of access to justice by way of appeal if a full order for security for costs were to be made. This is not a case where there is financial disability or impecuniosity on the part of the Appellant. Equally, it seems that I need not be overly concerned by the risk of the Respondent being left with an unpaid bill of costs. This is effectively a sophisticated litigious dispute between different classes of shareholders of a Fund worth approximately $41,000,000.00. For these reasons, I do not see it fit or appropriate to consider any additional costs for enforcement.

84. As for the appeal grounds, I find that there is no reason for me to doubt the integrity of the Appellant's case. There is nothing abusive about the Appellant's decision to challenge the Court's finding that the Management Shareholders' voting support on a Special Resolution to wind up the Fund was required in any event to give effect to the Participating Shareholders' wishes. Equally, no criticism can be made of the Appellant for challenging the Court's finding that there was no contractual right to exit the Fund by 31 December 2017. I am mindful that the scope of the appeal will likely include arguments on the admissibility of extrinsic evidence and analytical arguments on whether the Court's finding that the Participating Shareholders were unlawfully excluded from the December 2014 vote, *inter alia*, should have also led it to a finding of bad faith on the part of the Fund's management. Ultimately, the question for the Court will be whether there were in fact sufficient grounds for the success of the Petition to wind up the Fund. I am in no position to describe any of these grounds as obviously unmeritorious or abusive.

85. I have, with equal care, examined the Respondent's Notice and challenge to the Court's finding that the Participating Shareholders were entitled to vote on the Special Resolution on whether or not to wind up the Fund. However, Ground 2(1) of the Appellant's Notice of Appeal criticized the Court's factual finding that the Participating Shareholders' wishes to wind up could be blocked by the Management Shareholder. On this particular ground pleaded by CPS, the Court of Appeal will be required to examine the Management Shareholders voting power and possible veto rights. This will unavoidably lead the Court into an analysis of the voting rights of both the Participating Shareholders and the Management Shareholders.

86. The Fund also intends to argue that the learned Chief Justice should have found that there was no obligation on management to convene a meeting in the first place to determine whether and/or when to wind up. This point is engaged by CPS' complaint that the investment term was mandatorily fixed to expire no later than 31 December 2017 and that

learned Chief Justice erred in construing otherwise. On my assessment, the Court of Appeal could not or would not determine whether the investment term was fixed to expire by a definitive date without also resolving whether or not management were under a duty to convene a meeting to determine whether and/or when to wind up.

87. Accordingly, I find that the Respondent's application for the Court of Appeal to affirm the judgment of the learned Chief Justice on alternative grounds does not add any real significance in volume or scope of issues for adjudication. I, therefore, decline to set off any portion of the Respondent's security for costs on this basis.

88. For all these reasons, I see no reason to deprive the Respondent of a full reasonable sum in security for costs for its fees and disbursements for two Counsel, subject only to my broad-brush assessment of the likely reduction after taxation of those costs.

89. (It should be noted that the broad-brush assessment of costs, at this early stage, is neither an indication nor a bar to the Taxing Master on how to determine the reasonable costs in taxation proceedings when a more informed bill on fees and disbursements would be before the Court.)

Conclusion:

90. Security for Costs is ordered to be paid by the Appellant in the sum of $100,000 on or prior to Friday 9 February 2018.

91. Upon written request within 14 days by either side to the Officer of the Court of Appeal, I will hear the parties as to:

    (i) costs of this application;
    (ii) the perfection of an order arising out of this ruling;
    (iii) any dispute arising out of the deposit location for the security for costs ordered;
    (iv) the 9 February 2018 deadline set in the preceding paragraph; and/or
    (v) any other pre-appeal directions for my determination.

92. A copy of this Ruling shall be included in the Record of Appeal.

Tuesday 16 January 2018

_____

SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT