

BRITISH VIRGIN ISLANDS HIGH COURT (COMMERCIAL DIVISION)

Hualon Corporation (M) Sdh Bhd (In Receivership) Acting By Its Receiver and Manager Dr Duar Tuan Kiat -v- Marty Limited Claim No. Bvihc (Com) 2014/0090

SECURITY FOR COSTS CIVIL PROCEDURE RULES ("CPR") 24.2 - APPLICABLE PRINCIPLES - CLAIMANT ORDINARILY RESIDENT OUTSIDE JURISDICTION - CLAIM FUNDED BY THIRD PARTY - WHETHER APPLICATION PREMATURE CPR 24.2(2) WHETHER JUST TO ORDER SECURITY AND IF SO, IN WHAT SUM CPR 24.3

The Defendant applied for security for costs of proceedings commenced by the Claimant, a company incorporated in Malaysia and currently under receivership. In support of its application the Defendant relied on the fact that the Claimant was resident outside the jurisdiction and was being funded by third parties. The Defendant also relied on the impecuniosity of the Claimant and its past conduct in not satisfying an (albeit unrelated) cost award. The Claimant opposed the application on the ground that the application was premature having been applied for before a case management conference and in any event should await the outcome of an application to stay the proceedings in favour of arbitration and an appeal of the court's decision to discharge an injunction. The Claimant said it had assets, that the merits of the Claim were arguable, and that enforcement in Malaysia (which is where its assets were based) would not be tedious since Malaysia was a commonwealth country.

In ordering security for cost the Court found that while Rule 24.2 (the "Rule") contemplated that an application would be made at a case management conference or pretrial review that the Rule did not preclude such an application being made earlier. The Court found that there were circumstances (e.g. where substantial costs had already been incurred) where it would not be practical or in the interest of justice for a defendant to await a Case Management Conference or Pre-Trial Review before making an application.

In exercising its discretion and awarding security for costs to the Defendant the Judge referred to the relevant principles which a court ought to take into account in the exercise of its discretion under CPR 24.3, as summarised by Peter Gibson LJ at pages 539 to 542 in *Keary Developments Ltd -v- Tarmac Construction Ltd* namely in carrying out the balancing exercise the Court must weigh the injustice to the claimant if prevented from pursuing a proper claim by an order for security against the injustice to the Defendant if no security is ordered and he is unable to recover costs incurred in defence of a failed claim. The Court also stressed that some regard may be had to the merits of the Claim but this should not invite a detailed investigation of such, unless it can clearly be demonstrated that the Claim has a high probability of success. The Court found that on balance the interest of justice was in favour of ordering security for costs. The Court did not consider that an application for a stay was itself a good reason not to grant an order, but in ordering security for costs, provided that payment would be made in two increments with the second and most substantial only be due and payable upon an order by the Court that the proceedings would not be stayed.

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