Dyxnet Decision: Cayman Islands' Court of Appeal Clarifies the Availability of Security for Costs in Winding Up Proceedings

In a recent decision of importance in the context of winding up petitions and proof of debt appeals, the Court of Appeal has clarified that the Cayman court may order that an impecunious corporate petitioner or appellant provide security for the respondent's defence costs, irrespective of whether the petitioner/appellant is a foreign or a Cayman company.

Although *Dyxnet Holdings Limited v Current Ventures[1]* was specifically concerned with the narrower question of the Cayman court's jurisdiction to order security for costs against a *foreign* company which had presented a winding up petition against a Cayman Islands company, it appears from the judgment that the broader state of the law on this issue is now as follows:

- When *any* company (i) petitions the Cayman court for an order winding up another company[2], or (ii) appeals against the rejection of its proof of debt by liquidators appointed by the Cayman court, if the court is satisfied that the assets of the petitioning/appellant company would be insufficient to pay any costs awarded in the proceedings to the respondent company/liquidators, the court has jurisdiction to order the provision of sufficient security to meet those costs.[3] The court has an express power to do so under section 74 of the Companies Law (2013 Revision) where the petitioning/appellant company is a Cayman Islands company[4], and an inherent jurisdiction to do so where it is a foreign company.

- No such jurisdiction exists in winding up proceedings where the petitioner/appellant is an individual, irrespective of his or her country of residence or impecuniosity.

Background

The background was this: until 2009, it was clear that the Cayman court had jurisdiction in winding up proceedings to grant security for costs against an impecunious foreign company, just as it could against an impecunious Cayman company. However, the position became muddled (and highly technical) after the introduction of the Companies Winding Up Rules in 2009, because those rules meant that the Insolvency Rules 1986 (which had granted an express power to award security against either a Cayman or a foreign company) no longer applied to winding up proceedings.[5] That, in turn, meant that the only remaining express power governing the award of security against a company was section 74 of the Companies Law – but, on its face, section 74 applied only to Cayman companies. Hence, the Cayman court considered itself to be constrained against awarding security against foreign litigants in winding up proceedings; such relief was refused in *In re Freerider Limited[6]* and in the first instance decision in *Dyxnet[7].*

The first instance Judge in *Freerider* felt that any award of security in winding up proceedings would be inconsistent with the scheme of the Companies Winding Up Rules; if the legislature or the Rules Committee had intended the court to have had any such power, they would have stated that expressly in the rules. He was not referred by counsel to section 74 of the Companies Law because the applicant for security in that case was an individual rather than a company, but the logical extension of his analysis was that the court no longer had jurisdiction in winding up proceedings to order security against foreign companies. The first instance Judge in *Dyxnet* followed *Freerider* as a matter of judicial comity because he was not convinced that the decision was wrong, and he therefore held that the court had no jurisdiction in winding up proceedings to order security against a foreign company.

Analysis

However, in a carefully-reasoned analysis, the Court of Appeal held that the court *does* have an inherent jurisdiction in winding up proceedings to grant an order for security against a foreign company on the basis that it is satisfied the company will not be able to meet any adverse costs award. That jurisdiction is not inconsistent with the Companies Winding Up Rules, because the rules simply do not address the issue at all.

One important factor in the court's decision was that, by virtue of the Cayman Islands Constitution, the government and, by extension, the court must not discriminate between different classes of litigants. If the court only had jurisdiction in winding up proceedings to order security against Cayman companies, that would provide preferable treatment to foreign companies and be discriminatory against Cayman companies. The only two ways for the court to avoid such discrimination would be: (1) to cease awarding security against *Cayman* companies, despite the express power under section 74 to do so, or (2) to exercise its inherent jurisdiction to make equivalent security orders against foreign companies. It would be wrong in principle for the court to refuse to exercise the statutory power provided by section 74 against Cayman companies unless there was no other means of avoiding discriminatory treatment between different classes of litigant. Exercising its inherent jurisdiction against foreign companies provides that alternative means, and there is nothing in the Companies Winding Up Rules which precludes the court from doing so. Cayman and foreign litigants are therefore now to be treated on an equal footing in this respect, as in all others.

Comment

The decision represents a welcome clarification of the law, is fair, and offers costs protection and/or a useful litigation tactic for (i) companies presented with winding up petitions in Cayman by impecunious corporate petitioners, and (ii) Cayman liquidators who wish to protect their estate's assets when resisting proof of debt appeals by impecunious corporate appellants.

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[1] Dyxnet Holdings Limited v Current Ventures II Limited & another, CICA No. 33 of 2013 (unreported, 20 February 2015).
[2] Or, for that matter, an exempted limited partnership.
[3] The usual form of security is a cash deposit in an escrow account under the control of the court, and the security must be within the jurisdiction in any event: see Caribbean Islands Development Ltd. (in official

liquidation) v First Caribbean International Bank (Cayman) Limited, FSD No. 52 of 2013, judgment of Chief Justice Smellie, (unreported, 16 September 2014 at [46]).
[4] In GFN SA, Artag Meridian Ltd., Caribbean Energy Company v The Liquidators of Bancredit Cayman Limited (in official liquidation) [2009] UKPC 39, the Judicial Committee of the Privy Council held that a proof of debt appeal constituted "proceedings" within the meaning of section 74 of the Companies Law.
[5] In ordinary litigation the jurisdiction to order security for costs against foreign plaintiffs derives from Order 23 of the Grand Court Rules, but Order 23 does not apply in winding up proceedings.
[6] In Re Freerider Ltd 2010 (1) CILR 286.
[7] Current Ventures II Limited & another v Dyxnet Holdings Limited, FSD No. 8 of 2012, judgment of Sir Peter Cresswell (unreported, 26 September 2013).

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