TAN SRI ABDUL AZIZ ZAIN & ORS v. UNITED OVERSEAS LAND LTD & ORS
HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
CIVIL SUIT NO: 22-265-95
12 OCTOBER 1998
[1998] 4 CLJ 321

***COMPANY LAW**: Suit by Company - Security for costs - Test to be applied - Matters to be considered - Delay - Effect of order on other plaintiffs - Companies Act 1965, s. 351*

***CIVIL PROCEDURE**: Costs - Security for costs - Suit by plaintiff Companies - Whether plaintiffs unable to pay defendants' costs - Test to be applied by judge - Companies Act 1965, s. 351*

The parties entered into a joint venture agreement in respect of some land, pursuant to which, the plaintiffs were to provide the land, and the defendants, the finance and expertise. The venture failed, and in 1990, the plaintiffs commenced an action based on breaches of contract, fiduciary duties and trust, and negligence.

The second and third defendants in turn brought two actions in the High Court to recover the shortfall in the loan provided to the third plaintiff. Protracted proceedings ensued as a result of numerous applications being made by the parties, and an order was made by the Supreme Court that all three actions be transferred to the High Court at Penang and heard together. Several applications had been made since then and, at the date of this judgment, an appeal against the dismissal of the plaintiffs' application to amend the statement of claim was pending in the Court of Appeal.

On 3 January 1998, the first defendant applied for an order that the second and third plaintiffs (both companies) be ordered to furnish security for the first defendant's costs, pursuant to s. 351 of the Companies Act 1965 ('the Act'). On 22 April 1998, the second and third defendants made similar applications in respect of their costs. The applications were heard together.

Held:

[1] There are two approaches adopted by the courts in relation to s. 351 of the Act. One approach is that security for costs is a matter of discretion for the court, to be exercised in all the circumstances of the case. The other approach is the 'consistent approach', with a predisposition in favour of the defendant applicant seeking security for costs against an impecunious plaintiff.

[2] The instant court was inclined to take the former approach, namely, that security for costs is a matter of discretion for the court and not a question of burden of proof one way or the other.

[3] The Supreme Court Practice 1993 lists out some of the matters which the court may take into account, which are,*inter alia*, the *bona fides* of the plaintiff's claim, its prospects of success, whether the application for security is being used to stifle a genuine claim, whether the defendant's conduct was a cause of the plaintiff's lack of means, and whether the application for security was made late in the proceedings.

[4] The instant action was commenced in 1990, and there had been many applications and appeals since then. The plaintiffs had also applied for a trial date to be fixed. Furthermore, the Supreme Court had held that the plaintiffs' claim and their defence to the defendants' two actions were sustainable. Therefore, to now allow the defendants' application for security for costs could stifle the plaintiffs' action.

[5] Furthermore, the first plaintiff, who was the 'alter ego' of the second and third plaintiffs, had not been asked to provide security for costs. Any order for costs could include an order against him individually. As there was no evidence that he would not be able to pay the costs, it could be inferred that he could pay the costs if ordered to later, and that the defendants were therefore not prejudiced.

[Applications for security dismissed.]

Case(s) referred to:

*Adarsh Pandit v. Viking Engineering Sdn Bhd [1998] 2 AMR 100 (**dist**)*

Aiwa (malaysia) Sdn Bhd V. Lim Beng Huan & Anor [1997] 3 BLJ 511

*Buckley v. Bennell Design & Constructions Pty Ltd [1974] 1 ACLR 301 (**not foll**)*

*Donna Bersaudara Sdn Bhd v. Cape Contracts International Ltd v. Anor [1993] 2 CLJ 577 (**foll**)*

*Gula Perak Bhd v. Agri Project (M) Sdn Bhd [1988] 1 LNS 220; [1989] 1 MLJ 422 (**not foll**)*

*J & M O'Brien Enterprises Pty Ltd v. The Shell Company of Australia Ltd [1982- 1983] 7 ACLR 790 (**refd**)*

*Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149; [1986] 2 MLJ 310 (**dist**)*

*Loreva Pty Ltd v. Cefa Associated Agencies Pty Ltd [1982-1983] 7 ACLR 164 (**refd**)*

*Peng Ann Realty Pte Ltd v. Lik Cho Chit & Ors [1993] 1 SLR 630 (**refd**)*

*Sembawang Engineering Pte Ltd [1992] 2 SLR 806 (**foll**)*

*Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 (**foll**)*

Quality Tractors (m) Sdn. Bhd. V. United Asian Bank Bhd. [1979] 1 LNS 84

Legislation referred to:

Companies Act 1965, s. 351(1)

Rules of the High Court 1980, O. 23 r. 1

Companies Act 1985 [UK], s. 726(1)

Other source(s) referred to:

Supreme Court Practice, 1993, vol 1, part 1, p 426

Counsel:

For the plaintiffs - P Gananathan; M/s Logan Sabapathy

For the 1st defendant - Sivakumaran; M/s Skrine & Co

For the 2nd & 3rd defendants - WM Lee; M/s Shook Lin & BokReported by Anne Khoo

JUDGMENT

Abdul Hamid Mohamad J:

This action began in the High Court Malaya at Kuala Lumpur in 1990 as D1- 22-881-90. The causes of action were (and are) predicated upon breach of contract, negligence, breach of fiduciary duties and breach of trust.

The second and third defendants commenced foreclosure proceedings in respect of the lands in question which culminated in the sale of the lands. The second and third defendants also commenced two proceedings in the High Court at Penang (22-48-91 and 22-165-91) claiming the short-fall of the loan given to the third plaintiff. It should be noted that when this action was still in the Kuala Lumpur High Court, the second and third defendants had applied to strike out the statement of claim but failed. Their appeal to the Supreme Court was dismissed. The second and third defendants had also applied for summary judgments in 22-48-91 and 22-165-91. Their applications were also dismissed by the High Court and their appeals to the Supreme Court were dismissed on 22 February 1995. The Supreme Court also ordered that this action (then known as D1-22-881-90 (Kuala Lumpur)) be transferred to High Court, Penang to be heard together with 22-48-91 and 22-165-91. The action was duly transferred to High Court, Penang on 13 October 1995 and given the present number.

Since then there had been a number of applications made in this as well as in the other two

actions. In this action, even as at today, there is still an appeal pending in the Court of Appeal against the order of this court dismissing the plaintiff's application to amend the statement of claim.

On 3 January 1998 the first defendant filed a summons-in-chambers (encl. 13) for an order that the second and third plaintiffs be ordered to furnish security for the costs of the first defendant and in the meantime all proceedings other than proceeding relating to the giving of such security be stayed. The first defendant also prayed that in default of such security being given, if ordered, this action do stand dismissed without further order, with costs.

By a summons-in-chambers dated 22 April 1998 the second and third defendants also made a similar application - encl. 37.

Both applications were heard together. I dismissed them with costs. The defendants appealed.

It should also be noted that on 16 April 1998 the plaintiffs had filed a summons-in-chambers praying for an early trial be fixed for the disposal of the action. That application has not been heard.

We now come back to the present applications, ie, applications for security for costs.

These applications were made under s. 351 of the Companies Act 1965 which reads:

> 351(1) Where a company is plaintiff in any 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 costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

It appears that in this country, no court higher than the High Court has decided on this section. Of the three known judgments, one took one view while the other one took a different view. It is not clear to me which view the third case takes. In the circumstances I will consider both local and foreign authorities on the section.

I shall refer to the local authorities first. This section was considered by Vohrah J, in *Quality Tractors (m) Sdn. Bhd. V. United Asian Bank Bhd. [1979] 1 LNS 84*. In dismissing the application the learned judge held that the question of security for costs is a matter of discretion for the court to be exercised in all the circumstances of the case. In his brief but solid judgment the learned judge said:

> It was urged by counsel for the defendants that I should make an order for security for costs unless the plaintiffs have made out special circumstances justifying the exercise of the discretion in their favour. I consider, however, that it is clear from the majority view in the Court of Appeal in *Parkinson's* case that there is no such restriction on the exercise of the discretion: it is simply a discretion to be exercised in all the circumstances of the case.
> From the *Tradestock* case it seems that this view has been adopted in Australia with regard to section 363(1) of the Companies Act (Vic) which is identical to our section 351 and is in *pari materia* with the English section 447. In that case Smithers J at page 56 said:-

It is clear, however, that the real problem is to determine whether, in the circumstances of that case, the court ought to take the view that the protection should not be afforded to the defendant.

> No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief.

The other case is *Gula Perak Bhd v. Agri Project (M) Sdn Bhd [1988] 1 LNS 220;*[1989] 1 MLJ 422. In the case VC George J (as he then was) also considered the provisions of s. 351(1) of the Companies Act 1965. The learned judge referred to a number of leading authorities on the point both English and Australian and found himself not inclined to follow the view taken by Vohrah J. Instead he preferred to follow the "consistent approach" of a predisposition in favour of the defendant applicant seeking security for costs against an impecunious plaintiff.

In his judgment the learned judge said:

> Now the provisions of sec. 351 provide the exception to the general rule that a plaintiff should not be precluded from pursuing with the claim even though it is obvious that he is so impecunious that he will not be able to meet the costs of the defendant if he fails in the action and is ordered to pay costs.

In England at one time it was thought that the defendant seeking such security for costs pursuant to a section 351 type of situation was entitled to it as of right. Later cases suggest that whether security for costs should be ordered was in the discretion of the court.

> One school of judicial thought was that such a discretion was to be exercised with a bias in favour of the defendant applicant while another school took the view that the discretion was not to be fettered by any such bias.

In *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* (CA) [1973] 2 WLR 632 Lord Denning M.R. at p. 645 of the report discusses the issue of discretion and the attitude the English Courts have taken in respect of it and arrives at his own view that the judge has a discretion whether to order security or not and that there should be no burden or bias one way or the other in that it is a discretion to be exercised in all the circumstances of the case. In that same case Cairns LJ took the view that he was inclined towards a predisposition in

> favour of the defendant applicant.
> The 3rd member of the quorum, Lawton LJ noting the difference of emphasis between the judgment of Denning M.R. and Cairns LJ went on to say that he shared the view taken by Lord Denning that the discretion ought not to be hampered by any special rules or regulations nor ought it to be put into a straight jacket by considerations of burden of proof.
> The attitude taken in Australia is discussed in *Westralian Gold Mines Ltd. v. Westralian Minerals & Drilling Pty. Ltd.* [1986] 4 ACLC 167 (SC (WA)) at p. 173. Some courts took the view taken by the majority in *Sir Lindsay Parkinson* but in

> *Buckley v. Bennel Design & Construction Pty. Ltd.* [1974] 1 ACLR 301 the Court of Appeal of N.S. Wales took the view that although the court's discretion is unlimited the consistent approach by the courts to the section indicated some predisposition in favour of the defendant applicant.
> In *Quality Tractors (m) Sdn. Bhd. V. United Asian Bank Bhd. [1979] 1 LNS 84*Vohrah J preferred to follow the Denning view expressed in *Lindsay Parkinson & Co. Ltd.* With respect I am inclined to follow the "consistent approach" that was noted in *Buckley v. Bennel Design & Constructions Pty. Ltd.* of a predisposition in favour of the defendant applicant seeking security for costs against an impecunious plaintiff which was the approach preferred by Cairns L.J. expressed as the minority opinion in the *Lindsay Parkinson & Co. Ltd.* The rule provided by sec. 351 as has been seen, it seems to me that the burden is on the plaintiff, once it is established that it will be unable to pay the costs, to satisfy the court why security for costs should not be ordered.

In the instant case it is admitted that the petitioner is insolvent.

> Accordingly it is for it to satisfy the court why security for costs should not be ordered.

Two other local decisions were also referred to me, namely *Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149;*[1986] 2 MLJ 310 and *Adarsh Pandit v. Viking Engineering Sdn. Bhd.* [1998] 2 AMR 100. I do not think that these two cases are relevant in the present discussion because the plaintiffs in both cases who were being asked to provide security for costs were not limited companies (one a firm of partnership and the other an individual) and the applications were made under O. 23 r. 1 of the Rules of the High Court 1980 (RHC 1980)as s. 351 of the Companies Act 1956 was not applicable.

A more recent case is *Aiwa (malaysia) Sdn Bhd V. Lim Beng Huan & Anor [1997] 3 BLJ 511*. It is a decision of Jeffrey Tan J. The learned judge surveyed the authorities, both local, English and Australian. Unfortunately it is not clear to me which of the two approaches he adopted.

We now go to Singapore cases. First, the case of *Sembawang Engineering Pte. Ltd.* [1992] 2 SLR 806. After referring to the case of *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* the learned Judicial Commissioner said:

> Section 388(the Singapore equivalent of the Malaysian section 351) of the Companies Actgives to the court a discretion in the matter where the condition as regards inability to pay costs is satisfied. The discretion has to be exercised upon a consideration of all the relevant circumstances. Admittedly, one of these circumstances is the inability itself.
> The language of section 388 does not lend itself to a construction that in any way fetters the discretion of the court. I respectfully agree with the majority view in *Lindsay Parkinson v. Triplan Ltd.* There is no burden of proof one way or another.

The other Singapore case is *Peng Ann Realty Pte. Ltd. v. Lik Cho Chit & Ors.* [1993] 1 SLR 630. Goh Joon Seng J, held:

> (1) The court has discretion to order security for costs.

> Under s. 388 of the Act,the court will have regard to, *inter alia*;
> (a) whether the plaintiff's claim was *bona fide*;
> (b) whether the plaintiff has a reasonably good prospect of success;
> (c) whether the application for security was being used oppressively;
> (d) whether the plaintiff's want of means was brought about by any conduct by the defendants.

The learned judge concluded, at p. 633:

> I am satisfied that the plaintiff's claim is *bona fide* and not a sham. I am also satisfied that the application for security for costs is being used oppressively to stifle a *bona fide* claim which is not without reasonable prospects of success. If security is ordered, the plaintiffs will be unable to pursue, the action.
> The plaintiff's financial position is also allegedly due to the conduct of the defendants complained of.

There is also a decision of the High Court of Brunei on a similar provision. The case is *Donna Bersaudara Sdn. Bhd. v. Cape Contracts International Ltd. v. Anor [1993] 2 CLJ 577*. In that case Dato' Sir Dennys Roberts CJ said:

> The principles which a court should follow, when deciding if security for costs should be ordered under s. 726 of the U.K. Companies Act 1985, (which is in similar terms to s. 320 of the Brunei Companies Act) are set out in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] 2 All ER 273.

These are summarized in the 1991 Edition of the White Book at p. 418. Having emphasized that a court has a discretion whether or not to order security, having regard to all the circumstances of the case, it lists the following matters as among those which a court might take into account -

> (1) whether the plaintiff's claim is *bona fide* and not a sham;
> (2) whether the plaintiff has a reasonably good prospect of success;
> (3) whether there is any admission by the defendants on the pleadings or elsewhere that money is due;
> (4) whether there is a substantial payment into court or an open offer of a substantial amount;
> (5) whether the application for security was being used oppressively - eg. so as to stifle a genuine claim;
> (6) whether the plaintiff's want of means has been brought about by any conduct of the defendants, such as delay in payment or in doing their part of the work;
> (7) whether the application for security is made at a late stage in the proceedings.
> This is not an exhaustive list, and includes only examples of matters which a court may take into account before it exercises its discretion.
> As was made clear in *Pearson v. Naylor* [1977] 3 All ER 531, the court must not allow this provision for security to be used as an instrument of oppression, so as to shut out a small company from making a genuine claim against a large company.
> His conclusion deserved quoting:
> (a) the fact that a company seems insolvent does not mean that security must follow, since it is still a matter for the discretion of the court;
> (b) if there is reason to believe that a company cannot pay the costs, security may be

> ordered, "not must be" ordered; it remains a matter of discretion."

We now go to England. The provision of s. 726(1) of the Companies Act (England) is similar to the Malaysian s. 351(1). I think all I need do is just to refer to the summary in the *Supreme Court Practice*, 1993, Vol. 1, Part 1 at 426. However, I will not reproduce the parts, reproduced in *Donna Bersaudara Sdn. Bhd's (supra)* case even though the learned chief justice from Brunei quoted it from an earlier edition: it is the same. I will only reproduce some parts which I consider important for this case, but not earlier reproduced:

> The court has a discretion under section 726(1) of the Companies Act 1985, just as under r. 1, whether to order security for costs having regard to all the circumstances of the case (*Sir Lindsay Parkinson & Co. Ltd.* [1973] QB 609, [1973] 2 All ER 273 (CA).

That passage is followed by the circumstances which the court might take into account reproduced earlier. The learned authors then went on to say:

> ... and while the court must not allow s. 726(1) to be used as an instrument of oppression it must equally not allow an impecunious company to put unfair pressure on a prosperous company (*Pearson v. Naydler & Others* [1977] 1 WLR 999; [1977] 3 All ER 531.) Where an order for security for costs against a plaintiff company might result in oppression in that the plaintiff company would be forced to abandon a claim which has a reasonable prospect of success, the court is entitled to refuse to make that order, notwithstanding that the plaintiff company if unsuccessful, will be unable to pay the defendant's costs (*Aquila Design (GRB) Products Ltd. v. Cornhill Insurance plc* [1988] BCLC 134, CA), in this respect it is sufficient for the plaintiff to show that there is a probability that it will be unable to pursue the action if the order is granted; it need not show with certainty that it will be unable to do so (*Trident International Freight Services Ltd. v. Manchester Ship Canal Co.* [1990] BCLC 263, CA).

A number of Australian cases were also referred to me. I shall refer to some of them. In *Buckley v. Bennell Design and Constructions Pty. Ltd.* [1974] 1 ACLR 301 the Court of Appeal of New South Wales held:

> (1) In applications for security for costs a court must achieve a balance between ensuring that adequate and fair protection is provided to the applicant as well as avoiding injustice to the impecunious company by unnecessarily prejudicing it in the conduct of litigation.
> (2) Although the court's discretion under section 363 is unlimited, the consistent approach by courts to the section indicates some predisposition in favour of granting a defendant who issued by an impecunious company the protection of an order for security.

VC George J (as he then was) had followed this case in *Gula Perak Bhd (supra).*

In *Loreva Pty. Ltd. v. Cefa Associated Agencies Pty. Ltd.* [1982-1983] 7 ACLR 164, the Supreme Court of New South Wales, Needham J said: "It is clear from the authorities that a court should not generally exercise its discretion in favour of an applicant for security if by his or its delay the other party has been forced to incur expense in the litigation."

In *J & M O'Brien Enterprises Pty. Ltd. v. The Shell Company of Australia Ltd.* [1982-1983] 7 ACLR 790 Bowen CJ talked about the factors to be considered which include the relationship between the parties and whether there had been delays in applying for security.

Having considered the provision of s. 351(1) of the Companies Act 1965 and the authorities, I am inclined to the view that the question is a matter of discretion for the court to exercise considering all the circumstances of the case. It is not a question of burden of proof one way or the other. The factors to be considered include those enumerated in the *Supreme Court Practice* and reproduced earlier.

Just as I was finalising this judgment, I received a copy of the judgment of the Court of Appeal in *Skrine & Co. v. MBf Capital Berhad & Anor [1998] 3 CLJ 432* in which the provision of s. 351 was considered. Had this judgment reached me only a few days earlier, a lot of my time would have been saved. I would not have to analyse the authorities referred to above but just to follow it as it is binding on this court. However, I am happy to note the Court of Appeal had taken the same view that it is a matter of discretion for the court whether or not to order security for costs.

Coming back to the present case, the plaintiffs and the defendants had entered into a joint venture agreement. The plaintiff provided the land valued at about RM14 millions and the defendants were to provide finance and expertise. Unfortunately the venture failed. As a result the plaintiff commenced this action way back in 1990. This was followed by foreclosure action by the defendants and two other suits for the short fall of the loan. The land had been auctioned. Appeals had gone up to the highest court of this country, one is still pending in the Court of Appeal. The plaintiffs have applied for a date of trial to be fixed. Only now the defendants have applied for security for costs.

It is true that the second and third plaintiffs had suffered heavy losses. But it was due to the failure of the project which the plaintiffs alleged was due to the faults on the part of the defendants, which is to be decided at the trial. The Supreme Court had held that the plaintiffs' claim (and also defence in the other two actions) were sustainable. To allow this application may stifle the plaintiffs' action after nine years when it is nearing a trial.

Furthermore, besides the second and third plaintiffs, there is the first plaintiff, the "alter-ego" (if I may use the term) of the second and third plaintiffs. Any order for costs may include an order against him individually. There is no evidence that he will not be able to pay the costs. In fact there is no application for him to provide security for costs. It may be inferred that he is able to pay the costs if ordered later. So, the defendants are not prejudiced.

Considering all these factors I am of the view that this is not a case in which this court should exercise its discretion to order security for costs. On these grounds I dismissed the applications with costs.