

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2009/COM/gen/00019

**IN THE MATTER OF the Companies Act 1992, the Companies (Winding Up)
Amendment Act 2011 and the Companies Liquidation Rules 2012**

AND IN THE MATTER OF CLICO (BAHAMAS) LIMITED (IN LIQUIDATION)

BETWEEN

CLICO LIFE INSURANCE COMPANY SURINAME S. V.

Plaintiff

AND

CLICO (BAHAMAS) LIMITED

(IN LIQUIDATION)

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Alfred Sears QC with v. Marino Hamilton for the Plaintiff

Brian Simms QC and Marco Turnquest for the Official Liquidator

16 October 2018

RULING

WINDER, J.

This is my brief decision on the defendant's (the OL's) application seeking for the plaintiff (Clico Suriname) to provide security for costs.

1. The application was made by Summons dated 27 October 2016. The OL says:
 - a) Clico Suriname is ordinarily resident outside the jurisdiction;
 - b) Clico Suriname has no assets in the jurisdiction. The fact that it is claiming that the Official Liquidator is holding some assets in the Clico Bahamas liquidation on trust for it is not the same as actually having assets in the jurisdiction.
 - c) There is credible evidence that Clico Suriname is in financial difficulty with no means to meet any adverse costs orders made against it. Further, Clico Suriname has produced no evidence to demonstrate that it has assets to pay any adverse costs orders made against it in this matter.
 - d) The ordinary rule is that Clico Bahamas should not be put to the expense and time of having to enforce any adverse costs outside the jurisdiction since enforcement is not automatic.

2. This action and the appeal of Clico Suriname arise out of the decision of the Liquidator to reject the entirety of Clico Suriname's claim in the Clico Bahamas liquidation. Clico Suriname says that the rejection was in respect of the following five (5) transactions:
 - a) Transaction # 1 or a Flexible Saving Annuity Insurance Policy Plan or Insurance Policy Number 2000000031 purchased from British Fidelity Assurance Limited ("BACO" now Clico Bahamas) on November 28, 2004 for Twenty-Seven Thousand One Hundred and Seventy-One Dollars and Twenty Cents (US\$27,171.20) with a maturity date of January 25th
 - b) Transaction # 2 or a Flexible Saving Annuity Insurance Policy Plan or Insurance Policy Number 2000000034 purchased on April 22, 2005 for Three Million Dollars (US\$3,000,000.00) with a maturity date of April 2010
 - c) Transaction # 3 or a Flexible Saving Annuity Insurance Policy Plan or Insurance Policy Number 2000000039 purchased on September 23, 2005 for the sum of One Million Dollars (US\$1,000,000.00) with a maturity date of September 23, 2007) and no roll over provision
 - d) Transaction # 4 or an attempt by Clico Suriname to purchase a fourth Flexible Savings Annuity Plan from Clico Bahamas by transferring One

Million Five Hundred Thousand Dollars to Clico Bahamas on or about September 25, 2008.

- e) Transaction # 5 or a loan made by Clico Suriname to Clico Bahamas of Seven Hundred and Fifty Thousand Dollars (US\$750,000.00).

Clico Suriname contends that:

- a) Transactions 1 and 2 are at a minimum secured creditor claims;
- b) Transactions 3 and 4 are trust beneficiary claims; and
- c) Transaction 4 is an unsecured creditor claim.

3. Order 23(1) of the RSC provides:

(1) Where, on the application of a defendant to an action or other proceedings in the Supreme 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.


4. It is common ground that the Clico Suriname resides out of the jurisdiction and therefore Order 23(1)(a) permits an application for security for costs. The basis for the requirement for security does not arise out of the any fact that the plaintiff is foreign but from the intrinsic difficulty which will attend upon a defendant seeking to recover its costs from the non-resident. The evidence is also to the effect that there are no assets in the jurisdiction other than Clico Suriname's claim to the funds, the subject of this action/appeal. The Eastern Caribbean Court of Appeal in recent case of *Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.* SLUHCVAP2017/0051 on appeal from St Lucia, provides a very useful discussion

on this issue. The respondent in that case, Royal Caribbean Cruises Limited ("RCC"), brought a claim against the appellants. The appellants applied for security for costs of the proceedings on the grounds that RCC is an external company that is ordinarily resident outside the jurisdiction and does not have assets in the jurisdiction. The master dismissed the application and ordered the appellants to pay the costs of the application. The master found, inter alia, that it was a notorious fact that RCC had ships that visited Saint Lucia regularly and that there would be no difficulty enforcing a costs order against RCC's ships. Further, there was no evidence by the appellants that RCC would be unable to honour a costs order, or would fail or refuse to satisfy such an order. The appellants appealed against the master's decision. The Eastern Caribbean Court of Appeal allowed the appeal and set aside the order below ordering the respondent to pay security for the appellants' costs and the costs of the application in the court below and of the appeal. It was found, per **Webster JA**, that the court will not order security for costs solely because the claimant is ordinarily resident outside the jurisdiction. However, a non-resident claimant with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs. In light of the circumstances, where RCC has no assets in the jurisdiction and there are potential difficulties and expenses associated with enforcing a costs order against RCC, it would be just to order that RCC provide security for the costs of the appellants.

5. The case of ***Sir Lindsay Parkinson and Co. Ltd v Triplan Ltd, 1973 QB 609*** outlines the factors to be taken into account in determining whether an order for security ought to be made. These factors are (1) whether the plaintiff has a reasonably good prospects of success, (2) whether any admissions were made by the defendant, (3) any substantial payment into court, (4) whether application was used to oppressively stifle a genuine claim, (5) whether the plaintiff's impecuniosity has been brought about by the conduct of the Defendant and (6) the stage of the proceedings during which the application is being made.

6. Having considered these factors and weighing the injustice to the plaintiff if it has to put up security against the injustice towards the defendant if it were to pursue a successful costs order against the plaintiff in its home jurisdiction, I lean towards the grant of security. I am cognizant of the need to ensure that the Order for security is not used as an instrument of oppression to stifle a genuine claim by an indigent company, however Clico Suriname avers that it is a company of considerable means and backing and could easily satisfy an order for costs. In this very same vein I am satisfied therefore the Clico Suriname is not being oppressed or prejudiced by an Order for security.
7. I did not find that any of the other factors militated against the grant of security, in particular the allegation of an admission made by the OL and his attorneys. I am satisfied therefore that security for costs ought to be given for the defendant's costs as Clico Suriname is outside of the jurisdiction of the court, in the event an order for costs is made against it.
8. Having considered the draft bill and the submissions of the parties I order security in the amount of \$100,000. The security may be procured by: payment into the Court; payment into a joint account of counsel; a bond issued by a local financial institution; or by some other appropriate means. The security is to be put up within the next 30 days.
9. The OL shall have their costs of the application.

Dated this 7th day February 2019


Ian Winder

Justice