

Security for Costs in Cayman Islands Proceedings – the Impecuniosity Factor

The Cayman Islands Court of Appeal ("CICA") in *Traded Life Policies Fund (In Official Liquidation) ("TLPF") & Anor v Jeremy Leach et al*¹ confirmed that where the plaintiff's want of means (impecuniosity) was brought about by the defendant's own conduct (the "Impecuniosity Factor"), this factor alone can, in certain circumstances, be capable of forming a standalone defence to an application for security for costs. Whether this standalone defence is available is highly fact sensitive, but importantly, the CICA has provided useful guidance which can be applied to future cases. This brings greater certainty to an area of the law where previously there was at least a perception of conflicting guidance from the courts.

Background

An award for security for costs may be made against an impecunious plaintiff. The rationale is to avoid injustice being caused to a party defending litigation proceedings with no prospect of recovering its costs, even if the defendant party is ultimately successful at trial.

However, once the court's jurisdiction is enlivened, i.e. it is satisfied there is reason to believe that the plaintiff will have insufficient assets to satisfy any adverse costs order at the conclusion of trial, it then has discretion as to whether or not to award security for costs. In exercising that discretion, the court should take

into account a number of factors, including the Impecuniosity Factor.

TLPF, a Cayman Islands company in official liquidation (acting through its joint official liquidators) brought claims against, among others, a former director of TLPF alleging that he had breached his fiduciary duties, having caused and / or permitted TLPF to dissipate its assets through a combination of: (i) mismarking of asset values; (ii) improper related party transactions; and (iii) overpayment of fees charged by related party service providers which the former director controlled and / or had a personal financial interest. These claims arose in circumstances where the former director had also been a director of the precursor entity to TLPF, Traded Policies Fund ("TPF"), the assets and liabilities of which were transferred to TLPF ("Purported Restructuring") at a time when (among other things) TPF faced adverse shareholder and creditor activity as a result of a suspension of redemptions in TPF. One aspect of TLPF's case is that it was insolvent on and from the Purported Restructuring.

At first instance, the judge exercised her discretion in favour of awarding the defendants security for costs. In doing so, the judge did not take into account the Impecuniosity Factor because she placed emphasis on the fact that the cause of TLPF's insolvency (as distinct from TLPF's impecuniosity in the context of any

¹ Unreported, CICA (Civil) Appeal No 18 of 2021, 21 December 2021

adverse costs order) was an issue in dispute in the proceedings. TLPF appealed.

CICA's Decision

The CICA set aside the order for security for costs. It held that, on the evidence (that was not seriously disputed), TLPF's want of means to meet any adverse potential costs liability was caused by the former director (and other defendants, being corporate entities within the former director's control and / or in which he had an economic interest) and, in the circumstances, this discretionary consideration weighed so heavily so as to militate against the court exercising its discretion in favour of awarding security for costs.

In reaching its decision, the CICA helpfully reconciled Cayman Islands case law which had been seen as arguably reaching competing conclusions as to when and how the Impecuniosity Factor applies to applications for security for costs. In doing so, the CICA concluded that the Impecuniosity Factor is one to be weighed by the court in the overall balance in deciding whether or not to order security for costs. While, this factor may not assist the plaintiff greatly where the facts surrounding the impecuniosity are tied up with the merits of the case, where the impecuniosity is not inextricably bound together with the merits of the case (as was the case in respect of TLPF), the Impecuniosity Factor should hold greater sway.

Takeaway

The CICA's guidance will be useful in future cases. This is likely to particularly be the case

where companies in official liquidation are considering whether or not to bring claims against former officers and / or related parties connected with the cause of the company's insolvency, and are weighing up the potential of security for costs being ordered. While whether the claim is inextricably bound together with the cause of the impecuniosity (and so the Impecuniosity Factor is likely to be of little assistance) will always be highly fact sensitive, the fact that the court has clarified that, in certain circumstances, the Impecuniosity Factor can operate as effectively a standalone defence to an application for security for costs is to be welcomed.

Maples and Calder (Cayman) LLP act for the successful appellant, TLPF, acting by its joint official liquidators, Michael Penner and Stuart Sybersma of Deloitte & Touche LLP.

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