

BVI Court Clarifies the Position on Security for Costs

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In *Wang Zhongyong & Others v Union Zone Management Limited & Others* BVIHC (COM) 0126 of 2011 ("*Union Zone*") the BVI Commercial Court gave guidance on the circumstances in which an order for costs will be made against a non-resident individual claimant to BVI proceedings.

In the proceedings, the Claimants sought an order for the liquidation of a BVI company on the unfair prejudice basis, alternatively on the just and equitable ground. All of the Claimants and all the Defendants, save the BVI company that is the subject of the proceedings, were individual shareholders resident in the PRC.

The Defendants brought an application under CPR 24.3(g) - it provides that the Court can award security for costs against a claimant who is ordinarily resident out of the jurisdiction if, in all the circumstances of the case, it would be just to do so.

Bannister J. referred to the English Court of Appeal case of *Nasser v Bank of Kuwait* [2001] EWCA 556 ("*Nasser*"). He noted that following *Nasser*, security for costs should be awarded if enforcement would be so problematic that the only just course would be to make the order. This is a relatively high hurdle, and it was not reached in *Union Zone*.

The Court did not determine whether the burden of proof to establish whether a costs order can be enforced in another jurisdiction rests with the Applicant or the Respondent. However, the Court considered that it was not decisive that there was no reciprocal enforcement treaty in place between the BVI and the PRC if there was an avenue available for enforcement that was similar to the common law method of enforcement known to BVI law. Indeed, the Judge held that the ability to enforce a costs order in another jurisdiction, coupled with the ability to recover the costs of enforcement, was sufficient of itself for him to dismiss an application for security for costs.

The Judge also noted that:

1. all of the parties were PRC residents and would therefore not have to face litigation in a foreign country if it was necessary to enforce a costs order in the PRC;
2. there were assets against which enforcement could be sought in the BVI in the form of the Claimants' shares in the BVI company. He was prepared to accept, without any formal valuation evidence, that those shares were more valuable than the \$1.7 million security sought by the Defendants;
3. the English Court in *Nasser* had made an order for security for costs in the amount of the likely costs that the Bank of Kuwait would incur if it was required to enforce any order for costs against Mrs. Nasser in the USA. Bannister J. held that the costs of enforcing an order for costs in another jurisdiction could not be costs of the BVI proceedings, and that consequently he had no jurisdiction to make an order in respect of such costs pursuant to CPR 24 (it being limited to the costs of the BVI proceedings).

Having determined that it was not appropriate to make an order for security for costs, Bannister J. refused to accede to the Defendants suggestion that he should seek an undertaking from the Claimants that they would not to transfer the shares prior to the trial, and he was not prepared to grant an injunction. He held that to do so would simply be a way of ordering security for costs by a "*sidewind*".

The concluding paragraph of the judgment illustrates that the Court's starting point will be against awarding security for costs against an individual non-resident claimant. Bannister J. emphasised that all parties had benefited as a consequence of the incorporation of the company in the BVI and noted that the BVI was also the only forum in which the dispute could be litigated. It would therefore be unfortunate (the Judge described the Defendants' attempt as a "*cynical manoeuvre*") to prevent claimants from bringing claims in the BVI unless they were prepared to pay large sums of money into court by way of security for costs. Bannister J. therefore concluded that he would need "*compellingly persuasive reasons*" before he would order security for costs solely on the basis that a claimant was resident outside jurisdiction.

It must, however, be noted that in *Union Zone*, the Court only considered the application for security for costs under CPR 24.3(g) (on the ground that the Claimants were resident outside the jurisdiction). The Court did not consider other bases for the award of security for costs. It is to be assumed therefore that it would still be open to a defendant to argue, for example, that security for costs should be available because a corporate claimant is impecunious.

Finally, and as a side-note, Justice Bannister also made some obiter comments about the application of the European Convention of Human Rights (the "*Convention*") in the BVI. He noted correctly that the Convention has been extended to the British Virgin Islands. He held that the CPR should therefore be applied, in so far as possible, in a manner which would not be

discriminatory and would not amount to a breach of the Convention. This may be putting the position too high. The Convention allows citizens to complain to the European Court of Human Rights if they believe that the State is infringing their human rights. It does not mandate that all domestic legislation should be interpreted, as far as possible, in accordance with the Convention. This is the position in England as a consequence of the Human Rights Act 1998 - however, there is no equivalent legislation in the British Virgin Islands.

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