# The Grand Court of the Cayman Islands grants security for costs in Abraaj related proceedings

Insights - 15/12/2021

**Introduction**

Earlier this year, the Honourable Justice Segal (**Segal J**) delivered a judgment (*Abdulhameed Jafar v Abraaj Holdings and Others*, unreported, 10 August 2021) (**Judgment**) on two security for costs applications. These applications were both made in the Cayman Islands Grand Court Financial Services Division (FSD 203 of 2020) (**Proceedings**). The Proceedings arise out of circumstances relating to the collapse of the Abraaj group (at one time the largest private equity group in the Middle East, said to have had over US$13 billion of reported assets under management). The claims in the Proceedings have been brought by the Plaintiff, Mr Abdulhameed Jafar in respect of three loans of approximately US$350 million which he is alleged to have made to certain entities in the Abraaj group in late 2017. [1]

**The Applications**

The applications for security were made by three of the defendants to the Proceedings, who are general partners [2] of investment funds formerly known as Abraaj Growth Markets Health Fund LP and Abraaj Private Equity Fund IV LP (Cayman Islands exempted limited partnerships), but which have since been restructured and renamed. [3]

In the same way as in many other common law jurisdictions, the Cayman Islands Grand Court Rules (**GCR**), allow parties defending claims to seek an order for security for costs to offset the injustice that might arise where a party faces defending proceedings with no real prospect of recovering its costs even if it is successful.

The applications for security in this case were made on the basis that the Plaintiff is ordinarily resident outside of the jurisdiction (being domiciled in the United Arab Emirates). It was common ground that the jurisdictional threshold set out in the Grand Court Rules O.23, r.1(1)(a)

was satisfied. [4] O.23, r.1(1)(a) provides that if a jurisdictional threshold is met, 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".

**Applicable law**

As regards the Court's exercise of its discretion in relation to an application for security against a party ordinarily domiciled outside of the jurisdiction, Segal J considered that the summary of English law set out by Lord Justice Hamblen (as he then was) (**Hamblen LJ**) in the English Court of Appeal decision of *Chernukhin v Danilina* [5] also reflects the position under the law of the Cayman Islands [6] in respect of the equivalent provisions of the English Civil Procedure Rules and the GCR as to security from a non-resident plaintiff. In summary, Hamblen LJ made it clear that for the Court to be satisfied that its discretion was being exercised in a non-discriminatory manner it would require "objectively justified grounds relating to the burden of enforcement in the context of the particular foreign claimant or country concerned", and such grounds would exist where there is "a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay", [7] relying on the earlier English Court of Appeal decision of *Bestfort Developments LLP v Ras Al Khaimah Investment Authority.* [8]

Segal J followed [9] the decision of Chief Justice in *AHAB v SICL* [2017] (2) CILR 602 where he held that: "the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the discriminatory basis of the plaintiff's foreign status but because real risks of unenforceability are shown "on objectively justified grounds" to exist", and the Chief Justice accepted that the test articulated by Lady Justice Gloster in *Bestfort* was the correct statement of applicable principles in the Cayman Islands.

Segal J also relied [10] on a previous decision of the Cayman Islands Grand Court, *Worthing Properties Limited v Sterling Macro Fund*, [11] where Mangatal J accepted the submission of the applicant in that case that the test was "real risk... as opposed to fanciful risk" and the applicant did not "have to show more than a real risk that enforcement might fail or be much more problematic".

**Questions in Dispute**

Therefore, the Judge addressed the following main questions:

1. whether there were objectively justified grounds for concluding there are obstacles to or burdens on the enforcement of a costs order against the Plaintiff, such that there is a real and serious risk of non-enforcement; [12]
2. whether if there are such real risks, it was "just" in the circumstances to order that Mr Jafar provided security; [13] and

3. if the Court thought it appropriate to order security, then what was the appropriate quantum of such security.

**Outcome**

As to the first question (ie the "real risk" question), the evidence relied on by the applicants needed to establish that there was a real risk of non-enforcement in the UAE, if the Applicants are successful in defending the Proceedings, and then sought to enforce a costs order against the Plaintiff. There was a recent change in the UAE law [14] as relevant to the enforcement of foreign judgments and orders in the UAE Courts, which was the subject of expert evidence submitted by the parties. This evidence will be jurisdiction specific, and the Judge in this case concluded on the basis of the expert evidence before him that there were realistic and substantial risks of non-enforcement of the judgment at the Plaintiff`s place of residency (notwithstanding recent changes to the relevant regime in the UAE). Segal J however made it clear that his conclusions as to the content and effect of UAE law involve no criticism of the UAE courts and the new regime, and the outcome of applications such as these may well change when the UAE courts have the opportunity to give judgments interpreting the new UAE rules. [15]

As to the second question – whether an order for security was just in the circumstances of the case – the Judge gave weight in particular to the following additional matters (amongst other points):

i. the prejudice to the Defendants resulting from the failure to award security for costs would be substantially greater than that suffered by the Plaintiff in being required to provide it, meaning that the balance of prejudice was firmly in favour of the applicants;

ii. the Plaintiff had declined to provide details of the location of his assets and to show that he has valuable assets in jurisdictions against which a costs order could clearly be enforced;

iii. the Plaintiff is well able to afford the cost of giving security and such cost will not stifle or inhibit his conduct of these proceedings; and

iv. although the Plaintiff had offered to provide a contractual undertaking to assist with enforcement, Segal J considered that this would not provide the applicants with adequate protection against the risks.

As to the third point (quantum), security for costs was awarded in the sum of 70% of (a) the actual incurred costs to date; and (b) the estimated future costs up to the conclusion of the discovery process, with the applicants being given liberty to apply thereafter for further security to cover the period up to and after the trial.

The Plaintiff was ordered to provide security in the form of cash paid into Court or by way of a bank guarantee from a first-class reputable bank (based or with a branch in the Cayman

Islands).

**Addendum**

As an addendum, between the hearing of the security applications in the Proceedings and the handing down of the Judgment, the Cayman Islands Court of Appeal also handed down a decision on security for costs. [16] The Judgment of Segal J was consistent with the CICA judgment in that CICA [17] also adopted the *Bestfort / Danilina* approach that had been taken by the Chief Justice in AHAB, and awarded the defendant in that case security against an individual plaintiff outside the jurisdiction, with CICA concluding: "there is a real risk that enforcement of a Cayman Islands costs award would be not only delayed, but substantially obstructed or ultimately frustrated...". This was because the relevant Plaintiff has since 2010 been formally bankrupt in her home jurisdiction of Brazil, and there was no evidence as to how she was funding the Cayman Islands litigation despite the ongoing bankruptcy.

Ogier acts for the Fourth Defendant in these Proceedings, one of the successful applicants for security. For further information on this topic please contact Jennifer Fox or Rebecca Findlay, at Ogier's Grand Cayman office. The authors of this article also thank intern Alexandra Young for her assistance on this briefing note.

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[1] At paragraph 3 of the Judgment

[2] As well as a related holding company

[3] At paragraph 4 of the Judgment

[4] Ibid, paragraph 10

[5] [2018] EWCA Civ 1802

[6] At paragraph 11(d) of the Judgment

[7] *Danilina*, at paragraph 51

[8] [2016] EWCA Civ 1099

[9] Paragraph 11(d)(i) of the Judgment

[10] Ibid, at paragraph 11(d)(ii), and 61(d)

[11] Unreported, 4 April 2018

[12] Paragraph 60 of the Judgment

[13] Ibid, also at paragraph 60

[14] The relevant rules are the UAE Federal Law No. 11 of 1992 (as amended) and the Executive Regulations issued pursuant to the Cabinet Decision No.57/2018 (as amended) by Cabinet Decision No. 33 of 2020.

[15] Judgment, at paragraph 69

[16] *Arnage v Walkers*, CICA, unreported, 2 August 2021, at paragraph 52

[17] See paragraphs 40 to 53.

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