

Security for costs and human rights

The Manx Court recently determined a motion for Security of Costs in an application brought by Mr Pattni seeking that the parties Mr Ali and Dinky International SA (Dinky) provide Security of Costs in respect of Mr Ali and Dinky petitions dated 14th September 2001. This is believed to be the first time an application of this nature was before the Manx Courts post the enabling of the Manx Human Rights Act 2007

The background to the proceeding involved an agreement where Mr Ali and Dinky a Liberian company which owned the bulk of World Duty Free Company Ltd (a Manx company) (WDF) shares had agreed to sell shares in WDF.

The agreement was subject to Kenyon Law and in 1998 the parties submitted to the proceeding of a Kenyan High Court. An order was subsequently made by Mr Justice Mbaluto on 25th September 2001 ordering Mr Ali and Dinky transfer all their shares in World Duty to Mr Pattni as per the sales agreement. In two petitions dated 14th September 2001 Mr Ali and Dinky further challenged the sales agreement and sought declarations that they were the beneficial share owners of the issued share capital of World Duty.

Mr Pattni made a petition seeking rectification of the Companies Register that all shareholding in World Duty were to be registered in his name and a declaration that he was the legal and beneficial owner of the shares.

As Mr Ali was resident in Dubai, and Dinky a Panamanian company with a registered agent in that country the applicant sought payment into court as security for past and future costs.

The Advocates for the party's agreed that since the coming into force of the HRA 2001

any Acts and subordinate legislation must be read and given effect in a way which is compatible with convention rights, therefore, when the courts exercise discretion pursuant to Order 48 Rule 2, the court must ensure that its decision is compatible with convention rights. It was recognised by the court that Art 6 of the Human Rights Act applied to the issues in the case, in that the courts requirement in determining who owed the shares in world duty, involved the determination of civil rights and obligations, and the parties were not precluded from Article 6 on the basis of extra territorial features. However, this right was not absolute and it was recognised that limitation including financial ones may be placed on the individual's access to a court in the interests of the fair administration of justice provided there is a legitimate aim and a reasonable relationship of proportionality between the means employed and the legitimate aims sought to be achieved.

Through Affidavit evidence Mr Ali stated that given the financial status neither he nor Dinky would be able to comply with an Order that they or either of them provide Security for Costs and any order to this effect would effectively mean that they could not afford to participate in the action allowing Mr Pattni to obtain judgment by default.

The Court referred to Order 48 Rule 2 of the rules of the High Court of Justice of the Isle

of Man and it was agreed that the Court had discretion as to whether to award security for costs. In exercising their discretion the court considered Mr Ali and Dinky's ability to pay, the courts approach was one of caution given that Mr Ali and Dinky argued that by making such order for Security for Costs it would effectively stifle their claim. It was held that in order to support a claim of this nature Mr Ali and Dinky would need to adduce full, frank, clear and unequivocal evidence. The test is whether it is more likely than not.

In the Court's view, the Affidavits produced by Mr Ali fell far short of this test in that the evidence could not be independently checked and/or challenged. Further more Mr Ali also had the additional Burden of proving not only their inability to provide costs but also that there were no other sources such as third parties who could provide security.

As well as considering the party's ability to pay, the court considered the party's conduct in the proceeding, the strength of the case and whether the motion seeking security for costs was being used oppressively.

The power to order payment of security should be exercised with caution in that the order should not be made unless it has been

shown that the party has regularly flouted court procedure or has otherwise demonstrated a want of good faith. The court did not find that the motion seeking Security for Costs was being used oppressively and there was no evidence that Mr Ali or Dinky had flouted court procedure or otherwise demonstrated a want of good faith.

It was acknowledged that the courts are often faced with 2 competing issues. Firstly, the issue of one party's inability to provide security and secondly, the providing of protection for the party against the risks of incurring irrecoverable costs. It was recognised by the court that to deny the motion would enable the Defendants to litigate without any real risk of costs and to allow the situation to continue would be disproportionate and unfair to Mr Pattni, the balance favoured the granting of the motion.

The court ordered that Mr Ali and Dinky provide Security for Costs in the sum of £56,759.18 which represented the figure ordered to be paid, arising from earlier proceeding before the Privy Council, being an amount which was considered to be just, fair, reasonable and proportionate by the Deemster.

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This document is intended to provide a general overview and should not in any way be construed as legal advice. Always seek specific advice in respect of any particular issue.

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