

## BERMUDA

### SUPREME COURT

#### **CAPITAL PARTNERS SECURITIES CO. LTD -v- STURGEON CENTRAL ASIA BALANCED FUND LTD [2018] SC (Bda) 5 Com (16 January 2018)**

#### APPLICATION FOR SECURITY FOR COSTS ON APPEAL – RULES OF THE COURT OF APPEAL – THE REGISTRAR’S SUMMONS UNDER RULE 2/7

##### Background

In July 2017 Capital Partners Securities Co. Ltd. (“CPS”), a Japanese securities company, filed an appeal against the Supreme Court’s [decision in winding-up proceedings](#) relating to Sturgeon Central Asia Balanced Fund Ltd (“the Fund”), a Bermuda exempted company. The Supreme Court refused to wind up the Fund and CPS sought to appeal. In December 2017 the Supreme Court Registrar heard arguments from CPS and the Fund with respect to the disputed issue of security for costs. The dispute centred on the appropriate sum in security and the correct principles of law in determining the quantum of security for cases on appeal from the Supreme Court.

##### Legal framework governing security for costs

Examining the law on security for costs on appeal, the Court noted that the legal framework governing security for costs on appeal differs from Order 23 of the Rules of the Supreme Court (“RSC”). RSC Order 23 states that the court may order the plaintiff to give security for the defendant’s costs only in certain circumstances. Order 2 of the Rules of the Court of Appeal requires the appellant to give security for a sum determined by the Registrar for the prosecution of the appeal and for the payment of any costs which the appellant is ordered to pay. The Court may require security for costs or for performance of the orders to be made on appeal in addition to the quantum decided.

Comparing the approach to an order for security between first instance and appeal cases, the Court found that in order to preserve the right of access to justice “a *more lenient approach requires to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side’s costs, as a condition of proceeding at first instance*”.

In examining the correct approach to deciding quantum for security for costs the Ruling cited the judgment in *Allied Trust & Allied Development Partners Ltd -v- Attorney General and Minister of Affairs [2016] Bda LR 31*:

*“The Court has to balance the interest of not depriving a litigant of access to the Court on the one hand with that of leaving a winning litigant with an irrecoverable bill of costs on the other.”*

##### Principles for determining appropriate quantum

The Registrar found that while the Supreme Court and Court of Appeal rules on security for costs differ, the principles for determining the appropriate quantum will not always differ. She determined that the following factors must be considered in the proper exercise of the Registrar’s discretion in determining quantum:

- The extent to which an order for security may deprive an appellant of access to justice;
- The financial ability or disability of the appellant and the impact of an order on the paying appellant;
- The level of risk to a successful respondent whose legal costs have been left unpaid;
- The extent of difficulty which a successful respondent is likely to encounter in enforcing payment of a costs award;
- The integrity of the grounds of appeal on its face and whether or not such grounds are obviously unmeritorious or even abusive (in which case the quantum would be less conservative and potentially contemplate a costs order by the full Court on an indemnity basis);
- The scope of the disputed issues for determination on appeal (this will include an assessment of the volume and complexity of the relevant issues and any set off warranted by a cross-appeal);
- Particulars of any estimate of legal costs which will likely be incurred and/or a bill of costs for services rendered in preparation for the appeal together with likely deductions after taxation (using a broad-brush approach);
- Any known taxed or agreed fees in respect of the legal costs for the proceedings below; and
- The complement and practice experience of Counsel assigned to the case and whether the same Counsel were employed in the proceedings subject to appeal.

## Ruling

In this case, the respondent estimated that incurred and future costs would total \$174,347, the majority of which represents QC fees, justified on the grounds that this is a complex and difficult case. The appellant argued that reasonable costs should not exceed \$50,000.

The Court determined that an appropriate assessment of costs after taxation would be around \$100,000. It found that CPS would not be deprived of access to justice by way of appeal if a full order for security for costs were to be made, nor would the respondent be put at undue risk if left with an unpaid bill of costs. It also found that there was no reason to doubt the integrity of the appellant's case and that the respondent's application for the Court of Appeal to affirm the judgment of the Chief Justice on alternative grounds did not affect the adjudication.

Determining that there was "*no reason to deprive the respondent of a full reasonable sum in security for costs for its fees and disbursements for two Counsel*", the Court ordered security for costs in the sum of \$100,000 to be paid by the appellant.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.