[2009] UKPC 39
Privy Council Appeal No 0014 of 2009

JUDGMENT

(1) GFN SA, (2) Artag Meridian Ltd, (3) Caribbean Energy Company *v* The Liquidators of Bancredit Cayman Limited (in Official Liquidation)

From the Court of Appeal of the Cayman Islands

before

Lord Scott
Lord Rodger
Lady Hale
Lord Neuberger
Sir Jonathan Parker

JUDGMENT DELIVERED BY

ON

4 November 2009

Heard on 6 May 2009

Appellant	*Respondent*
Thomas Lowe QC Cherry Bridges	Michael Crystal QC Matthew Crawford
(Instructed by Glovers LLP)	(Instructed by Lawrence Graham LLP)

LORD SCOTT :

1. On 31 May 2004 a winding-up order was made against Bancredit Cayman Ltd by the Grand Court of the Cayman Islands. Mr James Cleaver and Mr Richard Fogerty of Ernst & Young were appointed joint official liquidators. They are the respondents to this appeal.

2. The liquidators received and adjudicated upon a number of proofs of debt. These included

(i) proofs of debt dated 24 May 2005 and 7 August 2006 from GFN S.A.("GFN") and Artag Meridian Ltd ("Artag") as alternative claimants for US$168,700,000;

(ii) a proof of debt dated 30 October 2006 from GFN and Artag as alternative claimants for US$43,831,576 or, alternatively, US$30,984,486;

(iii) a proof of debt dated 18 April 2006 from Banco Leon S.A. for US$76,341,609;

(iv) a proof of debt dated 20 August 2004 from the Central Bank of the Dominican Republic for US$30,972,809; and

(v) a proof of debt dated 3 August 2004 from Caribbean Energy Co.Ltd ("CAREC") for US$41,613,810 odd.

3. GFN, Artag and CAREC are the appellants in this appeal. The proofs that had been submitted by them were rejected by the liquidators. The proofs that had been submitted by Banco Leon and by the Central Bank of the Dominican Republic were admitted by the liquidators.

4. Pursuant to Insolvency Rule 4.83 each of the appellants applied to the Grand Court by summons for an order reversing the rejection by the liquidators of their respective proofs of debt and, pursuant to Insolvency Rule 4.85, they each applied to the Grand Court by summons for orders expunging the liquidators' admission of the proofs of debt of Banco Leon and the Central Bank.

5. The liquidators, by summonses dated 1 December 2006 and 28 December 2006, applied for orders requiring the appellants to provide security for their (the liquidators') costs of these applications. The security for costs applications were made on the grounds that each of the appellants was ordinarily resident out of the jurisdiction and had no substantial property within the jurisdiction.

6. On 13 March 2007 the Grand Court dismissed the liquidators' security for costs applications on the ground that the court had no jurisdiction to grant them. However on 23 January 2008 the Court of Appeal of the Cayman Islands reversed the Grand Court's decision on the jurisdiction issue and remitted the matter for the Grand Court to consider the security for costs applications on their merits. This appeal to the Privy Council is an appeal on the jurisdiction issue.

7. The power for the Cayman Islands courts to make orders for security for costs is dealt with in section 74 of the Companies Law (2004 Revision), the text of which substantially follows section 24 of the Joint Stock Companies Act 1857, and in Order 23 Rule 1 of the Grand Court Rules of Court 1995 (2003 rev). Section 74 provides that

> "Where a company is plaintiff *in any action, suit, or other legal proceeding*, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs and may stay all proceedings until such security is given" (emphasis added).

Section 74 in the 2004 Revision, the applicable Revision when these proceedings were commenced, has been re-enacted, with an identical text, as section 74 of the Companies Law (2007 Revision). Order 23 Rule 1 provides that

> "(1) Where, on an application of a defendant to an action or other proceedings it appears to the Court –
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction
>
> (b) ……
>
> (c) ……
>
> (d) …….
>
> 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.
>
> ……
>
> (4) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceedings in question, including a proceeding on a counterclaim" (emphasis added).

8. The appellants, in paragraph 2 of their printed Case, have described the issue in the appeal as being

> ".. whether an application to the Court by a creditor in a compulsory winding up by the Court, challenging a decision of a liquidator (colloquially known as a 'proof of debt appeal') or an application to expunge an admitted proof, is a 'proceeding' in respect of which there is jurisdiction to order the creditor to pay security for the costs of those applications".

They submit that such applications cannot be "proceedings" within the meaning of section 74 or Order 23 Rule 1.

9. It seems to their Lordships clear from the case law dealing with security for costs issues that the court has an inherent jurisdiction to make security for costs orders but that the exercise of that jurisdiction is subject to what has become the settled practice of the court. For example, the rule that an order for security for costs will not be made against a defendant was part of that settled practice. The rule that such an order will not be made against an impecunious plaintiff was also part of that settled practice but was varied by statute in the case of impecunious corporate plaintiffs by section 24 of the 1857 Act, the statutory predecessor of section 74 of the Companies Act. Order 23 Rule 1, like its predecessors, specifies particular circumstances in which the court may entertain an application for security for costs. The Rules of Court did not create or confer the power to do so but, rather, harnessed the power so as to control its exercise.

10. In *C.T.Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567 Dillon LJ, when considering the courts' power to make security for costs orders at the time when section 24 of the 1857 Act was enacted, referred at 570 to

> "… the *general rule of practice* that a party who desires to litigate a claim shall not be prevented by the Court from doing so, at any rate at first instance, on the grounds of his poverty …" (emphasis added)

This was a recognition of an inherent jurisdiction in the court to make security for costs orders and to rules of practice, established by case law, as to circumstances in which that jurisdiction could properly be exercised. This reading is re-enforced by Dillon LJ's remark at 571, when considering the effect of the then Order 23(1) of the Rules of the Supreme Court (in the same terms essentially as the Cayman Islands, Order 23 Rule 1), that

> "To add a new category, not covered by any enactment, to those listed in r.1(1) in which a plaintiff can be ordered to give security would now be a matter for the Rules Committee, and not for the discretion, as a matter of inherent jurisdiction, of the individual Judge in the individual case."

11. Millett LJ, to the same effect at 576 said that

> "…. by enacting s.24 of the [1857] Act Parliament was extending the existing power of the Court under its inherent jurisdiction to order security for costs by adding an additional circumstance in which it could be exercised. It was well settled long before 1857 that the Court would not order security for costs against a plaintiff who was resident within the jurisdiction merely because he was impecunious and unlikely to be able to meet an order for costs made against him. Henceforth that would be a ground for ordering security for costs against a plaintiff which was a company incorporated in the United Kingdom with limited liability."

Millett LJ, if their Lordships may respectfully say so, chose his words in the cited passage with care. Section 24 of the 1857 Act did not extend the courts' inherent jurisdiction to make security for costs orders. On the contrary, what it did was to make inroads into the rule of practice, to which Dillon LJ had referred, that had previously prevented the court from ordering security for costs to be given by an impecunious corporate plaintiff. The section thereby extended the circumstances in which the Court could properly order security for costs to be given. At 579 Millett LJ referred to the rule that a defendant would not be ordered to give security for costs as "a settled practice of the Court for over 200 years … made explicit by the terms of s.726 [of the Companies Act 1985] and [Order] 23". In adding that the practice "must now be regarded as going to ... jurisdiction" the learned Lord Justice should not be taken to be referring to jurisdiction in its strict sense but rather to the limits on the exercise of jurisdiction that had become established by the "settled practice" of the court.

12. The third member of the Court of Appeal in the Bowring case was Sir Michael Kerr. He agreed with his learned colleagues that the application for security for costs against the defendant who, pursuant to an undertaking in damages that had been given to the court on the grant of a Mareva injunction, was seeking an inquiry as to the damage caused to it by the injunction, was not franked by section 726 or by Order 23. But he went on to consider the power of the court nonetheless to make an order for security for costs and did so in terms that made clear his opinion that the court possessed an inherent jurisdiction, independent of section 726 or Order 23, to make a security for costs order in suitable circumstances. He said at 582 :

> "… bearing in mind that the Court may release such undertakings [i.e. undertakings in damages] altogether, it must be entitled to impose terms on parties seeking to enforce them, in whatever way appears to be just in the circumstances; and some form of security for costs may be an appropriate requirement in some cases"
>
> and

> "… I prefer not to seek to define the limits of the Court's discretion in this or other cases, save that – as already mentioned – its scope is in my view wider than the inherent jurisdiction to deal with abuses of the Court's process."

Their Lordships agree.

13. Other authorities, too, indicate that the origin of the power of the courts to order security for costs to be given is not statutory but, rather, the inherent jurisdiction of the court to control its proceedings. In *re Semenza, Ex p Paget* [1894] 1 QB 15 was a case concerning bankruptcy proceedings. A foreign creditor (not the petitioning creditor) resident abroad appealed to the bankruptcy court against the rejection by the trustee in bankruptcy of his proof of debt. An application for security for costs was made by the trustee. The registrar refused to make the order and the trustee appealed. Section 65 of the Bankruptcy Act 1869 gave the bankruptcy court all the powers and jurisdiction of any judge of the Superior Courts of Common Law or of any judge of the High Court of Chancery. However the Bankruptcy Act 1883 and rules made there under had dealt with orders for security for costs in bankruptcy proceedings by authorising such orders to be made against a foreign petitioning creditor or against a creditor appealing to the Court of Appeal. These rules did not authorise security for costs orders in respect of appeals by creditors to the bankruptcy court against the rejection by the trustee of proofs of debt. Lord Esher M.R, at 19/20 commented on this.

> "I think that the legislature, in dealing in the rules made under the Act of 1883 with the question of security for costs, advisedly left out this intermediate proceeding in the bankruptcy, and refrained from making a rule that security for costs should be given. I do not think that by omitting to make such a rule the legislature has taken away the jurisdiction of the Court to order security to be given; but the rules which have been made – that security may be ordered to be given in the two cases of a petitioning creditor who is a foreigner resident abroad, and of an appeal to the Court of Appeal – are strong to show that the jurisdiction with regard to this intermediate step in the bankruptcy procedure, ought only to be exercised in extreme cases."

Both Lopes LJ and Kay LJ were in agreement with the Master of the Rolls that the question whether an order for security for costs of an appeal against a rejection of a proof of debt should be made was one not of jurisdiction but of discretion.

14. The effect, therefore, of statutory provisions such as section 74, or of Rules of Court such as Order 23 Rule 1, is not to confer a jurisdiction that the courts did not previously have, but, in the case of section 74 and its statutory predecessors, to exclude impecunious corporate plaintiffs from the established settled practice that security for costs orders could not be based on mere impecuniosity, and, in the case of Order 23 Rule 1, to specify particular circumstances in which the jurisdiction could properly be exercised. It has, indeed, been long since established that rules of court can regulate practice but cannot confer jurisdiction (see

British South Africa Company v Companhia de Moçambique [1893] AC 602 and, generally, Halsbury's Laws (4th Ed Reissue Vol 37 para.7).

15. The critical issue in this case, therefore, is not whether the court has jurisdiction to make the security for costs order sought by the liquidators but whether, in view of the reference in section 74 to "action, suit or other legal proceeding" and in Order 23 Rule 1 to "an action or other proceedings" it would be proper for the court, having regard to the nature of the appellants' applications, to entertain the liquidators' security for costs application.

16. There is a good deal of judicial guidance on the nature of the "proceedings" contemplated by the references in section 74 and Order 23 Rule 1. In *In re Pretoria Pietersburg Railway Company (No 2)* [1904] 2 Ch. 359 Buckley J, an acknowledged master of company law practice, held at 361 that "prima facie the ordinary rule of the High Court as to ordering security for costs applies in winding-up proceedings" and, more particularly at 362, that

> "… wherever a person resident abroad comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court, the ordinary rule as to security for costs applies."

Mr Thomas Lowe QC, counsel for the appellants both in the Court of Appeal of the Cayman Islands and before the Board, has pointed out that the creditor against whom a security for costs order was sought in *In re Pretoria Pietersburg Railway Co*. was an individual, so the court was not concerned with section 69 of the Companies Act 1862 (which had replaced section 24 of the 1857 Act). He pointed out that the then Rule of Court dealing with security for costs applications, Order 65 Rule 6 of the 1883 revision of the Rules of the Supreme Court, referred not to "proceedings" but to "cause or matter". Mr Lowe is correct, but the points he makes do not appear to their Lordships to detract from the pertinence of Buckley J's remarks to the question whether a creditor's application in a winding-up, challenging a decision by a liquidator to reject his proof of debt, was an application in respect of which an order for security for costs could be made. Buckley J clearly thought that it was.

17. In *Taly N.D.C. International NV v Terra Nova Insurance Co. Ltd* [1985] 1WLR 1359 the plaintiff brought an action claiming sums of money alleged to be due from the defendant, who, claiming an indemnity from a third party, joined the third party. The plaintiff then obtained orders for specific discovery and interrogatories against the third party. Thereupon, the third party made an application against the plaintiff under Order 23 Rule 1 for security for costs. The application was dismissed by Steyn J and the third party's appeal was dismissed by the Court of Appeal. The main judgment in the Court of Appeal was given by Parker LJ who, at 1361-1362, discussed the nature of the proceedings to which Order 23 Rule 1 applied :

> "In my judgment the proceedings referred to in the rule, if they are not an action, are at least proceedings of the nature of an action and refer to the whole matter and not to an interlocutory application in some other proceedings. Were it otherwise, it appears to me that chaos would reign, for every time an interlocutory application was taken out by a defendant the plaintiff would be able to say, 'The plaintiff is in the position of the defendant in this application and the defendant is in the position of the plaintiff. They are proceedings. Therefore I ought to have security for the costs of this application'. One has only to examine that to see that it cannot have any foundation whatever …."

Parker LJ went on to say that if and when the third party were given leave to defend the action, either alone or jointly with the defendant, it would then be open to the third party to apply for security for costs from the plaintiff. Croom-Johnson LJ agreed with Parker LJ and added, at 1363, that he had no doubt that

> "… upon the proper construction of RSC Ord.23, r.1 … the purpose of that order is that the proceeding … is the proceeding as a whole, whether it is an action or something equivalent to an action."

18. In *Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd* [1998] 1 WLR 202, 206 Lord Hoffmann said that the words "or other legal proceedings" in section 548 of the (Grenadian) Companies Act (No 35 of 1994), the equivalent of the Cayman Islands section 74,

> "… meant, in the original English legislation, proceedings at first instance other than actions, i.e. commenced by originating process other than a writ. … It did not include appeals."

19. Finally, their Lordships must refer once more to the *C.T.Bowring* case [1994] 2 Lloyd's Rep 567, in which a number of dicta relating to the nature of the "proceedings" that can sustain an application for security for costs are to be found. The case concerned, it will be recalled, an application by a plaintiff for security for costs of a defendant's application for an inquiry as to damages suffered by the defendant as a result of the grant to the plaintiff of an interlocutory injunction. The injunction had been granted upon the plaintiff giving the usual cross-undertaking in damages to the court. The Court of Appeal accepted that the words "or other legal proceedings" in section 726 of the Companies Act 1985 included "proceedings by whatever form of originating process they may be commenced" (per Millett LJ at 576). Millett LJ went on to make clear his opinion that the words could not be construed so as to include an interlocutory application in existing proceedings. He said that

> "ordinary principles of construction, including the *eiusdem* generis rule, confine those words to other legal proceedings

> comparable to an action or suit in that they are commenced by a form of originating process".

Dillon LJ expressed himself to much the same effect on the scope of section 726 but said also, at 570, that it was

> "… clear that an impecunious company which makes a counterclaim which is more than a mere formulation of its defence can be ordered to give security for the plaintiff's costs of the counterclaim."

Millett LJ expressed no disagreement with the proposition that a counterclaim could sustain a security for costs application under section 726, and in their Lordships' opinion that proposition is plainly correct.

20. It follows that Millett LJ's reference to "a form of originating process" in the passage from his judgment at 576 cited above should be taken to be referring to the substance of the application in question rather than to its strict form. In any event, that is how their Lordships would read the reference. A counterclaim is not, strictly, an originating process. It is always a claim made in an existing action between existing parties, but that is no sufficient reason why a security for costs application should not be entertained.

21. As to Order 23 Rule 1, Millett LJ said that the word "proceeding" meant "an original proceeding commenced by a form of originating process and not an interlocutory application in existing proceedings". He went on, at 579

> "while the demarcation between 'action' and 'other proceedings' in O.23 r.1(1) is not precisely the same as that in s.726, I have no doubt that the scope of the combined expression 'action or other proceedings' is the same".

22. Their Lordships agree that there is no distinction that can be drawn between the type of proceedings that can sustain a security for costs application under section 726 and the type of proceedings that can do so under Order 23 Rule 1. But, in relation to both, it is the substance of the "proceedings" rather than their form that is important. It is accepted that a counterclaim will qualify albeit that it is made in an existing action. If a defendant in proceedings commenced by originating summons were to make, by ordinary summons, a claim for relief that constituted, in effect, a counterclaim, and that was not, to borrow Dillon LJ's words in the *C.T.Bowring* case, a mere formulation of its defence, their Lordships would regard as mere pedantry the proposition that a security for costs application could not be entertained because the ordinary summons was not a form of originating process.

23. Consider also the nature of committal applications made by a party to an action on account of an alleged breach of an undertaking to the court or of an interlocutory injunction. Such a committal application could be made by interlocutory application and the hearing of the application would normally be regarded as an interlocutory proceeding (see *Savings &*

Investment Bank Ltd v Gasco Investments (Netherlands) BV (No 2) [1988] Ch.422 per Nicholls LJ at 444). It makes no sense for the ability of an alleged contemnor to obtain security for costs of the committal application to depend upon whether the application were made by interlocutory application in an existing action or by the commencement of a new action. In either case the nature of the application would be in substance the same. In the former case the applicant for the committal order, whether plaintiff or defendant in the existing action, would be in the position of plaintiff in the committal application and, therefore, a potential object of a security for costs application whether under section 74 or under Order 23.

24. Another possible example of the necessity of having regard to substance rather than form might arise in the case of an application to set aside a compromise of an action on the ground of misrepresentation or concealment of material facts. Such an application would usually be made in a new action and there could be no question but that the new action would constitute "proceedings" for the purposes both of section 74 and of Order 23. But, if the original action were technically still on foot, the application to set aside the compromise could be made by interlocutory motion in the still existing action (see *Gilbert v Endean* [1878] 9 Ch D 259 and the remark of Jessel MR, at 266, that the object of the motion was to decide "a substantial question between the parties"). In such a case the applicant would be in the position of a plaintiff and the respondent in the position of a defendant whatever their respective roles in the existing action. The ability of the court to entertain an application by the respondent for security for costs of the applicant's application to set aside the compromise could surely not be denied on the ground that the application was not in form an originating process and so did not constitute "proceedings" for section 74 or Order 23 purposes.

25. In *Gilbert v Endean*, which had nothing whatever to do with security for costs applications, Cotton LJ at 268/269 drew a distinction between two types of interlocutory applications, namely, on the one hand,

> "[those] which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties"

and, on the other hand,

> "[those that] are to decide the rights of the parties",

26. Cotton LJ drew this distinction for the purpose of deciding whether on an interlocutory application of the latter variety evidence on information or belief was admissible. In their Lordships' opinion, the same distinction can usefully be drawn between those proceedings, interlocutory in form, that would and those that would not, sustain an application for security for costs. An interlocutory application designed to regulate or assist

in some way the conduct of the substantive action between the parties would not in their Lordships' opinion, constitute "proceedings" for the purposes either of section 74 or Order 23. On the other hand, an application which, although interlocutory in form, raised issues as to the rights of the parties which were in substance independent of the issues in dispute in the parent action would, in their Lordships' opinion, normally constitute in substance "proceedings" for those purposes. And, although it is not necessary for their Lordships to decide the point, their Lordships must not be taken as necessarily agreeing with the conclusion of the Court of Appeal in the *C.T.Bowring* case that the nature of the defendant's application for an inquiry as to damages prevented the court from entertaining the plaintiff's security for costs application.

27. Turning then to the respondents' applications in the present case, the applications have been made, in accordance with the relevant rules of court, by ordinary summonses. The applications are unquestionably in form interlocutory and not originating. But they are, equally unquestionably, as Mr Lowe very candidly accepted, in substance originating applications. The applications to reverse the liquidators' rejection of the appellants' proofs of debt require the Court to determine whether, and if so to what extent, Bancredit Cayman Ltd was indebted to the appellants at the commencement of the winding-up. The applications to expunge the liquidators' admission of the proofs of debt of Banco Leon and of the Central Bank of the Dominican Republic require the Court to determine whether, and if so to what extent, Bancredit Cayman Ltd was indebted to those parties at the commencement of the winding-up. These are applications to determine the substantive, as opposed to merely procedural, rights of the would-be creditors in the winding-up. The cause or matter (to use a neutral term) in which these applications are made is the winding-up. But the only issue raised for decision by the winding-up application was whether Bancredit should be placed in liquidation. The winding-up order did not and could not resolve any issue as to the state of indebtedness between individual creditors and the company. Each creditor's submission of a proof of debt and the liquidators' response to that proof provided a new factual platform on the basis of which new substantive issues between individual creditors and the liquidators might arise. The commencement of litigation to resolve these issues would, in their Lordships' opinion, constitute the commencement of "proceedings" for the purposes both of section 74 and of Order 23.

28. Their Lordships will, accordingly, humbly advise Her Majesty that this appeal ought to be dismissed with costs. The order as to costs is to be treated as an order *nisi* and will become absolute unless an application is made within 14 days for some other order as to costs to be made.

LORD NEUBERGER (with whom Lord Rodger, Lady Hale and Sir Jonathan Parker concur)

29. I agree with Lord Scott that this appeal should be dismissed on the ground that each of the applications made by the appellants under Insolvency Rules 4.83 and 4.85 was an "action, suit, or other legal proceeding" within the meaning of section 74 of the Companies Law

(2004 Revision), and, indeed, an "action or other proceedings" within Order 23 Rule 1 of the Grand Rules of Court.

30. As Lord Scott so clearly demonstrates, the court has an inherent jurisdiction to order security for costs, and, while that jurisdiction is essentially discretionary, the discretion must be exercised not merely in a generally judicial manner, but in a manner which accords with the settled practice of the court, as circumscribed or extended by primary or secondary legislation.

31. I am prepared to assume for the purpose of this appeal that, in order to justify an order for security for costs, it is necessary for the respondent liquidators to establish that the applications are within the ambit of section 74 or of Order 23 Rule 1, although there is considerable force in the contention that those provisions extend, rather than limit, the court's inherent power to order security, as Lord Scott explains in paras 10 to 14. I also accept that it is the settled practice of the court not to order security for costs against a defendant in relation to any steps which are reasonably necessary to enable him to resist a claim brought against him. Additionally, I agree that, at least in general, a discreet order for security will not be made in relation to what is in substance an interlocutory application. It further seems to me that it must be right, at least as a general rule, that, when deciding whether a particular application is an "action, suit, or other proceeding" or an "action or other proceedings", the court must look at the substance of the application as opposed to its strict form.

32. In my judgment, viewed in the light of these principles, the applications in the present case were originating applications falling within the expressions I have just quoted. They brought before the court issues which were not previously before the court, and which would not otherwise have been before the court; and, although brought in the context of a winding up ordered by, and under the ultimate supervision of, the court, these applications were essentially free-standing. The applications arose because of Bancredit Cayman Ltd's insolvency and because of a dispute as to whether that company was genuinely indebted to the appellants (as they claimed and the liquidators denied) or to other claimants (as the liquidators claimed and the appellants denied). The winding up proceedings merely provided the forensic framework in which the applications were made, or the procedural launch pad from which the applications were issued. Indeed, in his engaging submissions, Mr Lowe QC realistically accepted that the applications were in substance originating proceedings. This concession must be right given that these applications would admittedly be originating proceedings if this was a voluntary or creditors' winding up and all the facts were otherwise identical.

33. It appears to me that this conclusion is consistent with the observations of Buckley J in *In re Pretoria Pietersburg Railway Company (No 2)* [1904] 2 Ch 359, where he suggested, at 361, that the court's power to order security "prima facie" "in winding up proceedings", and, at 362, that "the ordinary rule as to security for costs applies" where "a person resident abroad comes forward as an actor in a winding-up, whether voluntary, or

under supervision, or by the Court". Given the importance of settled practice, this is of particular significance. (The fact that the order in that case was sought in relation to a foreign resident individual does not detract from the force of the point, as one is here concerned with the principles governing the court's power to order security.)

34. For my part, I would prefer to leave entirely open questions such as whether and if so when it is possible or appropriate to order security for costs against a defendant who brings a counterclaim or defends by way of set-off, whether and if so when security can be ordered in the context of a committal application, or in connection with an application to set aside a compromise of an action, and whether the decision of the Court of Appeal in *C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567 was correct. We did not hear much, if any, argument on any of those issues and it is unnecessary to resolve them for the purpose of determining this appeal. That is not meant to imply that I positively disagree with anything Lord Scott says on those issues in his admirable opinion: it is merely that I prefer to leave them for determination when they have been subject to fuller argument.