LEGISLATION COMMENTS

SOCIETIES IN LITIGATION
THE SOCIETIES (AMENDMENT) ACT 1982

This Act,[1] operative from 10th September 1982, amends the Societies Act, Cap. 262, by substituting the following new section 35A:[2]

> 35A. — (1) Where a registered society or any of its officers purporting to act on its behalf is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the society or the officer will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
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> (2) Where a society is required to give security for costs under sub-section (1) and the amount of the security is not sufficient to pay the costs of the defendant —
>
> (a) the officers of the society who approved the institution of the action or legal proceedings; and
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> (b) any person who, on subsequently becoming an officer of the society, does not take any reasonable measure for the purpose of seeking the discontinuance of the action or legal proceeding,
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> shall be jointly and severally liable for any part of the costs awarded against the society which, after deducting the amount of the security, remains unsatisfied after one month from the date the costs became payable.
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> (3) This section shall apply to any action or legal proceeding whether instituted before or after the commencement of the Societies (Amendment) Act, 1982.

By substituting this section Parliament seeks to restrict the access of a registered society to the courts in providing a procedure by which the court can require security for costs to be given, with a stay of proceedings in the event of default. Before considering the reasons for this Act it will therefore be well to review the extent to which access to the courts is already restricted in this manner. Before doing this it should be pointed out that it is axiomatic that every citizen should have access to the courts to petition for the redress of his grievances; this proposition is conceived as part and parcel of the rule of law. The courts are a *tabula in naufragio;* legal rights of redress are futile unless the citizen has the means of vindicating those rights, and in many countries the right of access to the courts is enshrined in the constitution as a fundamental right, perhaps *the* fundamental right because all the others depend upon it; in Singapore there is no such fundamental right, but clearly the Constitution and the entire legal system assume its existence. Seen in this light access to the courts is clearly a right which must not be removed and which may be restricted only insofaras to prevent serious abuse and to allow the courts, administratively, to dispense justice for all litigants fairly and speedily.

1 Act 18 of 1982.
2 The Act also makes a consequential amendment to s. 35(d) of the main Act.

Security for costs may be ordered under the Rules of the Supreme Court, Order 23, in four cases:

(a) where the plaintiff is ordinarily resident out of the jurisdiction, or

(b) where the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) where the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) where the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.

In the event of failure to provide security as ordered, the proceedings are dismissed.[3] The courts have made it clear that where any of the four conditions is satisfied the judge has a discretion, not an obligation, to order security to be given and that an application for security for costs will not be allowed to be an instrument of oppression.[4] The leading case is *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.*,[5] decided by the English Court of Appeal in 1973. This case was decided under section 447 of the (UK) Companies Act 1948, with which section 351 of the (Singapore) Companies Act, Cap. 185, and the new section 35A(1) of the Societies Act, are *in pari materia.* The principles laid down in that case with regard to orders for security for costs against limited companies are therefore applicable to orders against societies under section 35A(1). Lord Denning M.R., with whom Lawton L.J. agreed, made it clear that the principles to be applied in cases falling under the Companies Act and cases falling under the Rules of the Supreme Court were the same; the court has a genuine discretion, to be exercised considering all the circumstances of the case, which would include:

(a) whether the claim is *bona fide,*

(b) whether the plaintiff has reasonably good prospect of success,

(c) whether there is an admission by the defendant on the pleadings or elsewhere that money is due,

(d) whether there was payment into court of a substantial sum of money,

(e) whether the application for security is being used oppressively (for example to stifle a genuine claim),

(f) whether the plaintiff's want of means has been brought about by any conduct of the defendant (for example delay in payment or performance), and

(g) whether the application was made late in the proceedings.

Lawton L.J., agreeing with Lord Denning M.R., specifically rejected the view of the third judge Cairns L.J. that only in special circumstances will the court refuse to order security, and added:

3 *La Grange* v. *McAndrew* (1879) 4 Q.B.D. 210.
4 *Pearson* v. *Naydler* [1977] 3 All E.R. 531.
5 [1973] 2 All E.R. 273.

> ... the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straight-jacket by considerations of burden of proof.[6]

It is also clear on high authority that mere impecuniosity or insolvency of the plaintiff is *not in itself* a ground for ordering security for costs.[7] This would be expressly relevant to nominal plaintiffs, but might even be relevant in other instances falling under Order 23, for example where a plaintiff resident out of the jurisdiction has property within the jurisdiction.

The meaning of "nominal plaintiff" is clearly limited, and herein lies the problem which is dealt with the new section 35A. A nominal plaintiff does not include a person suing in a representative capacity, for example an executor, nor even a trustee in bankruptcy[8] or a next friend,[9] but seems to be confined to cases where the plaintiff is an assignee of the benefit of the action or a person in a similar position.[10] It would clearly not include the officers of a society suing on behalf of the society, and *a fortiori* would not include a society suing in its own name.

In view of the identity between section 351 of the Companies Act and the new section 35(A) of the Societies Act, it is suggested that the principles laid down in the *Triplan* case should be applied by the courts in Singapore. Any other approach, it is suggested, will interfere with the due process of law.

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From the foregoing it will be apparent that societies are in an anomalous position. An ordinary citizen with a claim to bring before the court is entitled as of right to the issue of his writ and the hearing of his case in accordance with law; the door of the court cannot be closed to him purely on the ground that he may be unable to pay the costs of the defendant if unsuccessful in his claim. The only other restriction on this freedom of access is the provisions of R.S.C. Order 18, rule 19, under which the court can strike out pleadings (including originating process) which are scandalous, frivolous, vexatious or otherwise an abuse of the court's process.[11] If the plaintiff is unsuccessful and is unable or unwilling to pay costs, then judgment can be enforced against him by writ of execution.[12] In the case of a limited company the directors are protected by the doctrine of limited liability and therefore it is necessary, subject to the principles laid down in *Triplan* case or other similar principles, to protect a defendant from abuse of process by a plaintiff company; the same considerations would also apply to a nominal plaintiff. At common law a society is not a legal person, but under section 35(b) of the Societies Act a

6 *Ibid*., p. 276.
7 *Cowell* v. *Taylor* (1885) 31 Ch.D. 34; *Rhodes* v. *Dawson* (1886) 16 Q.B.D. 548; *Cook* v. *Whellock* (1890) 24 Q.B.D. 658; *Le Mesurier* v. *Ferguson* (1903) 20 T.L.R. 32.
8 *Cook* v. *Whellock* (1890) 24 Q.B.D. 658.
9 *Fellows* v. *Barrett* (1836) 1 Keen 119.
10 *Sender* v. *Murphy* [1968] Ch. 123; *Lloyd* v. *Hathern Station Brick Co.* (1901) 8 S.L.T. 158; *Greener* v. *Kahn & Co.* [1906] 2 K.B. 374.
11 A person can also be posted as a vexatious litigant on the Attorney-General's application under s. 74, Supreme Court of Judicature Act, Cap. 9.
12 See R.S.C. 1970, Order 46.

society can sue or be sued in its registered name. Further, under section 35 (d) judgment in a suit against a registered society could not, prior to the Societies (Amendment) Act, be enforced against the person or property of any officer or member of the society but only against the property of the society, which, under section 35(a), if not vested in trustees, is deemed vested in the governing body of the society. The new section 35A(2), which provides for joint and several liability of officers for costs awarded against the society, is an express exception to section 35(d).[13]

The Minister of State for Law and Home Affairs in moving the second reading of the Societies (Amendment) Bill made it clear that the purpose of the provision is to prevent abuse of process by a society which has not the means to pay the costs of an unsuccessful action.[14] It is clear from the parliamentary debate that only one instance has occurred in Singapore of a society suing unsuccessfully and leaving the defendant to "whistle" for his costs; this is the instance of the Workers' Party's unsuccessful action against Mr. Tay Boon Too.[15] The Minister pointed out however that although there had been only one such instance the same society had commenced an action against another defendant (the Second Deputy Prime Minister), and that it was not necessary to "wait for other perpetuators of the same kind of abuse of our court process."[16]

Conclusions

There seems to be no objection in principle to a provision which allows the court to require security for costs in the case of a suit by an impecunious society. In fact, it is suggested, to bring societies into line with nominal plaintiffs and companies in this regard is a logical and laudable step. In each of these instances the "real" plaintiff is protected by a legal veil which, in the absence of statutory provision, cannot be penetrated by an unfortunate defendant who is put to the cost of defending an unmeritorious action and is then unable to recover his costs. The danger is that the provision could be abused in such a way as to stifle a meritorious claim, especially for instance where the impecuniosity of the plaintiff (it turns out) is attributable to the defendant's wrong. This is of course also true of nominal plaintiffs and companies. It is therefore suggested that it is of the utmost importance that the courts adopt the guidelines laid down in the *Triplan* case in order to make sense and justice of the wide discretion entrusted to them by the legislature. It should always be remembered that the real test of a meritorious claim is a trial, and a plaintiff, even an impecunious one (one might say especially an impecunious one) should not be in effect deprived of his right to a trial except in the clearest possible case of abuse of process.

Some other aspects of the amendment deserve comment. The new section 35A(2) is seen by the Minister as an "additional check against irresponsible acts by the officers of society who use the society's name to initiate legal proceedings." One wonders, in view of what has been said, whether such an additional check is necessary. The directors

[13] S. 2, Societies (Amendment) Act 1982.
[14] Parliamentary Debates (Singapore), 27th July 1982, cols. 56-8.
[15] *Ibid*., cols. 57, 65.
[16] *Ibid*., col. 65.

of a limited company are not subject to such liability, and if indeed the officers of a society should be liable for unsecured costs awarded against the society, why should they not be liable for *all* judgment debts of the society? There seems to be no logic in the distinction between a case where the society provides security for costs and sues unsuccessfully and a case where the society is sued successfully or sues unsuccessfully without providing security (it will be noted that the new section 35A(2) does not apply where there is no order for security). In any event the proper exercise of the court's discretion with regard to security for costs is adequate protection for the defendant — either security will be ordered or the action will be stayed. In this regard it should be noted that the court has a discretion with regard to the amount of the security ordered (the sum is usually about two-third of the estimated party and party costs up to the stage in the proceedings for which security is ordered, but the security can be increased where necessary and there is no rule against granting full indemnity). As an alternative, the draftsman might have considered dealing with the problem by simply allowing the courts to award costs against the officers of the society in appropriate cases, thus enabling the officers to decide whether to risk litigation.

It will be noted that only officers who approved the institution of the action, and any person who subsequently became an officer but took no reasonable measure for the purpose of seeking the discontinuance of the action, are liable under section 35A(2). One wonders what is meant by "approved" and "seek discontinuance". Presumably officers acting reluctantly in obedience to a decision of the members of the governing body who had refused to follow their advice would not be held liable, but what kind of measure should a new officer take to seek discontinuance of the action? The only really safe course would appear to be resignation.

By the new section 35A(3) the whole provision applies to actions pending at the commencement of the Act. To this extent the provision is retrospective. In view of the fact that no issue of national defence or security is involved one wonders what can justify this unusual step, especially when a society considering whether to take legal action would no doubt be advised to consider the Act before deciding to proceed. Societies with pending actions are placed in an invidious position by this provision, because to discontinue the action, even if hazardous but potentially successful, will render them liable for costs, a liability which would not have been incurred had the provision not been retrospective.

The conclusion drawn is therefore that this Act is in part sensible but in part goes too far in protecting defendants against abuse of process by a society. To that extent, having regard to the importance of maintaining unfettered access to the courts as well as the importance of preventing frivolous actions, the Act would appear to be a defendants' charter. It is hoped however that, by interpreting the provisions as suggested herein, the courts will ensure that this amendment is not used as an "instrument of oppression."[18]

A.J. HARDING

[17] *Ibid.*, col. 58.
[18] *Pearson* v. *Naydler* [1977] 3 All E.R. 531.