

Judgment 8/2006

**Ashdene Consultants Ltd v Bachmann Group Ltd –
Royal Court (Civil Action File 332) – 17 February
2006**

Security for costs – defendant’s application for further sum to be ordered – principles to be applied – non-residence of the 'controlling mind' of the plaintiff – whether the plaintiff was not an entity of substance – whether there was any evidence that the plaintiff would be able to pay the defendant’s costs if ordered to do so

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 332

The 17th day of February 2006 before Robin Alan Winston Hancox, Esquire
E.G.H., C.B.E, Lieutenant Bailiff, sitting alone

ASHDENE CONSULTANTS LIMITED

Plaintiff

AND

BACHMANN GROUP LIMITED

Defendant

Whereas on 30th January 2006 and 13th February 2006 the Lt Bailiff considered an application for security for costs and heard thereon Advocates P. Richardson and G.S.K. Dawes counsel for the Plaintiff and Defendant respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED;

1. That the Plaintiff furnish £14,000 by way of further security for costs by 10th March 2006 with liberty to the Plaintiff to apply for an extension to be made no later than the Interlocutory Court on 24th February 2006.
2. The Costs of this Application are reserved.

S M D ROSS
H.M. Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

ASHDENE CONSULTANTS LIMITED.....Plaintiff/
Respondent

And

BACHMANN GROUP LIMITED.....Defendant/
Applicant

Judgment

1. This case was commenced as long ago as November, 1997. It concerns an agreement for consultancy services to be provided by the Plaintiff Company to the Defendant, made on 22nd October, 1996, and expressed to be for three years from the preceding day. It could also be terminated by either party giving to the other twelve months' written notice to expire on the third anniversary of the date of its commencement, that is to say the 21st October, 1999, or any date thereafter.

2. The kind of services to be provided by Ashdene are not specifically stated, and the Agreement itself is not included in the Bundles placed before me for the purposes of the instant Application, but it is clear that they were of a financial nature in view of the normal business conducted by the Defendant Group and that the moving spirit (see the Porzelack case (*infra*)) of Ashdene is and at all material times was Mr. Zygmund Marcinski, who, the Court was informed, was formerly a partner of Coopers & Lybrand in Montreal, and is a qualified Chartered Accountant. According to his Affidavit of 25th December, 2003, he now operates a tax consultancy practice in Montreal, Canada, having left Guernsey early in 1998.

3. Paragraphs 3 to 7 of the Cause, which was amended pursuant to a consent Order on 24th October, 2003, recite the various obligations which Mr. Marcinski fulfilled during the first year of the Agreement, including entering into an Equity Incentive Scheme with the Defendant ('Bachmann') and Bachmann Holdings Ltd, and taking a loan of £120,000 from the Bank Julius Baer, which the former had agreed to guarantee and to service the interest thereon. It is then alleged that on 13th November, 1997, Bachmann summarily and unlawfully terminated the Agreement, giving rise to the present action for damages for breach of contract and other relief.

4. The Defences were filed in January, 1998, and subsequently amended and re-amended, but the Replique was not lodged until February 13th of this year—on the second day of the hearing of this Application. As a result, Mr. Dawes, representing Bachmann, says that due to repeated delays on the part of the Plaintiff and its advisers, the action has now passed the eighth anniversary of its inception. On 14th November, 2003, after some negotiation, there was a consent Order that the Plaintiff should provide £50,000 as Security for Costs. By paragraphs 1 and 2 of Bachmann's Application of 14th December, 2005, it seeks *inter alia*, an additional £50,000 for this purpose for the reasons stated in Mr. Dawes' second and supporting Affidavit, amplified in his third Affidavit of the 10th February, 2006, and expanded in his submissions to the Court.

5. Mr. Dawes took the Court through the standard authorities on this issue, which have been followed in Guernsey, in particular Naghsineh's case (*infra*), which cited extensively the leading case of Nasser v. United Bank of Kuwait [2002] 1 AER 401, and

the corresponding provisions in the 1999 White Book, namely Order 23 Rule 1 and the Commentary thereto. He also referred to the 2005 provision in the C.P.R's, appearing as Order 25.12, which incorporated several refinements, including condition (c) which relates to companies and which was formerly included in the Companies Act, 1985, a factor upon which he relied as especially relevant to his Application in the instant case.

6. In essence Advocate Richardson, opposing any further security, submitted on Ashdene's behalf that this is not a heavyweight case, nor nearly as complicated as Mr. Dawes had made out. It is a straightforward action for wrongful dismissal, the only complicating aspect being as to the *quantum* of damages, the claim for which is based on the Tables forming Schedules A to J annexed to the Cause at 28a to j of the Consolidated Pleadings tabled on 18th March, 2004, included as TAB 4 in the Defendant's green Bundle. The only substantial issue to be resolved on liability is whether Bachmann was justified in terminating the contract, the resolution of which to an extent will depend on oral testimony as to what was said at the material time.

7. Mr. Richardson did not dispute the proposition that the Court has wide discretionary powers as to whether to make an Order of the nature sought. But he argued that, despite Mr. Dawes' criticism that Ashdene had not produced any response to paragraph 25 of his Second Affidavit, the Court must not lose sight of the principle that the onus of showing that additional security would be just in all the circumstances rests squarely on Bachmann (*Ei incumbit probatio qui dicit, non qui negat*) for instance, to prove alleged impecuniosity on the part of Ashdene or of Mr. Marcinski, or, for other reasons, to cite the words of Mance L.J. in Nasser v. United Bank of Kuwait at paragraph [62], that:

“.....there are likely to be substantial obstacles to or a substantial extra burden (e.g of costs or delay) in enforcing' [a Guernsey] 'judgment, significantly greater than there would be as regards a party resident in' [Guernsey] or 'in a Brussels or Lugano state' [referring to the Brussels Convention].

of which, Mr. Richardson said, there had not been a shred of evidence of any burden, let alone a substantial extra burden, of enforcement, if Bachmann succeed at the trial.

8. Had there been such evidence, Mr. Richardson continued, the £50,000 already furnished would be more than sufficient, because, as Mance L.J. said on the same page at [64]:

“If for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.”

Moreover the Court would recall that when the 2003 Order was made the period from the Application down to actual payment occurred within a short time frame which, far from showing that Ashdene would be unable to meet any bill for costs, provided, evidence to the contrary and of good faith—not bad going, Mr. Richardson commented, for an \$2 company as Mr. Dawes had scathingly described it!

9. Mr. Dawes had made much of the fact that the results of the Company searches he had caused to be carried out as shown in pages 57 to 59 of Exhibit GSKD2 were that Ashdene could at best be described as insubstantial. While the Plaintiff was nominally resident in Guernsey the reality is that it operated through its controlling mind, namely Mr. Marcinski, who, although he is no longer a director, is unquestionably resident abroad. Ashdene, Mr. Dawes said, is a typical offshore vehicle with nominee

shareholders, nominee directors and possessing only a nominal share capital. For practical purposes, Mr. Dawes said, Mr. Marcinski was and is the *Alter Ego* of Ashdene and *vice-versa* and he could not hide behind it.

10. Consequently Mr. Dawes strongly urged that the Court should not follow the principles stated in two of the leading cases on this topic—Nasser’s case (*supra*) and Leyvand v. Amnon Barasch and Others (*infra*)—as regards a non-resident, this formerly being one of the threshold or ‘gateway’ conditions for an order requiring the provision of security for the defendant’s costs. He asked the Court, take a robust attitude and not permit Mr. Marcinski to hide behind the façade of Ashdene by adopting the principles expressed at paragraphs [14] to 14.7 of the judgment in Naghsineh & Others v. Chaffe & Others [2003] EWHC 2107 (Ch) (which closely followed Nasser v. United Bank of Kuwait), as regards a non-resident plaintiff. In other words, for the reasons put forward by Mr. Dawes, non-residence remains a criterion for the purposes of the instant case.

11. Although the Royal Court has hitherto accepted, insofar as it looks to the English Courts for guidance, that the Rules of the Supreme Court, as they stood in 1999, are applicable here, Mr. Dawes submitted that Guernsey practice should move with the times and recognise that the categories of pre-conditions for the granting of this type of order are not closed. In particular the former Order 23 Rule 1 (1)(b), which deals with a nominal plaintiff, whom there exists reason to believe will not be able to satisfy an order for costs made against him, has been re-cast as Rule 25.13 (2)(f) of the C.P.R, and should now be applied. Secondly, Section 726(1) of the Companies Act 1985, which made similar provision in respect of a plaintiff limited company, is now incorporated in the same C.P.R as 25.13 (2)(c). Both these provisions, he said, are relevant to this case.

12. It followed, continued Mr. Dawes, that I should not hesitate here to jettison the discrimination doctrine, formulated as it has been to conform with Article 14 of the European Convention on Human Rights, which is as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, ace, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The foregoing is clearly that which led Mance L.J. to say in Nasser at paragraph [58]:

“The exercise of the discretion conferred by r.25.13(1), (2)(a)(i) and (b)(i)’ raises in my judgment, different considerations. That discretion must be exercised by the court in a manner which is not discriminatory.”

Further down he said:

“Potential difficulties or burdens of enforcement in states not party to the Brussels or Lugano Conventions’ [here I interpolate of my own volition ‘not being a country to which the Judgments (Reciprocal Enforcement) Law, 1957, applies’] ‘are the rationale for the existence of any discretion.’ My emphasis.

13. It is, however, as I have indicated at paragraph 7 above, Mr. Richardson’s case that these authorities should be applied here. Given that it might well not be as easy a matter to pursue the real plaintiff (if—which Mr. Richardson did not necessarily accept—Mr. Marcinski can be so regarded) in Canada as in Guernsey, there existed no evidence whatsoever of the key concepts of any extra or additional burden of

enforcement there of the nature which appears in the Commentary to this portion of the Rules in the 2005 White Book.

14. That the foregoing is a requirement of the modern case law is shown by this passage from the Judgment of Jonathan Crow Q.C in Naghsineh at paragraph 14.6.1 (I quote from this paragraph rather than 14.6.2 because here we are considering an application for *substantial*, rather than *any* security):

“The court should only exercise its discretion to require a non-Convention resident’ [here I adopt the rider I stated in the second quotation in paragraph [12]] ‘to provide substantial security where there are sufficient grounds (*whether in the form of evidence, or matters of which judicial notice can be taken*) for believing that there would be a substantial obstacle to enforcing an order for costs in his country of residence, or where his assets are located.”

Still less, said Mr. Richardson, is there any material before this Court that ‘steps’ have been taken by the real plaintiff, in relation to his assets, which would render it more difficult to enforce an order for costs against him—an entirely new condition created in C.P. Rule 25.13. (2)(g).

15. On the contrary, Mr. Richardson said, the promptness of his compliance with the October, 2003, Order showed that the Court could have confidence in the probity of his client, which had been unjustifiably called into question—for instance in Paragraph 25 of Mr. Dawes’ current Affidavit he says, *inter alia*:

“.....Mr. Marcinski plainly makes it his practice to protect his assets through complex offshore structures. My understanding is that Ashdene itself was just such a structure created to avoid prospective claims against his former accountancy firm.”

16. Equally plainly, Mr. Richardson contended, this was a prejudicial assertion, wholly unjustified by any material before the Court in this Application. This being so, the Court should confine itself to answering the sole question now relevant in applications for security for costs, namely, in the language of the present English Rule whether ‘it is satisfied, having regard to all the circumstances of the case, that it is just to make the order’, and one or more of the conditions in sub-paragraph (2) applies.

17. Of those conditions (d) and (e) are not in issue, and I agree with Mr. Richardson that there is no material on the record to support a finding under (g). As I have said condition (a)(i) & (ii) has to be read in the light of the recent authorities to which I have referred above. Dealing with those authorities, for the moment, it seems to me that each is distinguishable from the instant case.

18. First, Nasser v. United Bank of Kuwait (where there had been an earlier order by the Master that the plaintiff should furnish security for the defendant’s costs at first instance, which had been reversed on appeal therefrom to a Judge) the relevant costs, for the purposes of this case, for which security was sought in Nasser, were those of the respondent on an appeal, not of the defendant at first instance. The Court, as is shown by this observation by Mance L.J at paragraph [76], was only

“.....concerned with the amount of security appropriate in respect of the costs of appeal against Ian Kennedy J’s order striking out the claim’ [for want of prosecution under C.P.R 3.4]. ‘We have not been concerned on this application with what might be the position in any respect with regard to the trial that would take place if that appeal succeeds.”

A single Judge of the Court of Appeal having set the security at £17,500, the two-Judge Court, consisting of Simon Brown and Mance L.J.J, then reduced it to £5,000.

19. It is to be noted that the new C.P Rules in England have a separate provision in the form of Rule 25.15, in relation to appeals, which is similar but not identical to the security for costs provisions in respect of the High Court. For one thing the jurisdiction to order security for costs under Rule 25.12 and 25.13 is only in respect of a *defendant's* costs, whereas on an appeal *either* party may seek security. Indeed the Commentary to the 1999 R.S.C. at page 437 makes it clear that security could not be ordered against a defendant who is repelling an attack. In Guernsey Rule 12(5) of the Court of Appeal (Civil Division) Rules 1964 likewise makes a similar provision as appears in Rule 48 (b) of the Royal Court Civil Rules 1989 (under which this Application is brought) with the important addition of the words 'in special circumstances'.

20. Secondly, the Naghsineh case, which was also an appeal, this time from a Deputy Master who had ordered limited security, there were a multiplicity of claimants and defendants, and no evidence of lack of probity as regards the movement of their assets by the applicant claimants. Another relevant factor was that the United Kingdom had a reciprocal enforcement treaty with Canada (paragraph [13]), which is not the case here, since Canada is not included in the Schedule to the Ordinance (No. 32 of 1991) as a country to which the 1957 Law has been extended.

21. In my judgment the decision of Lightman J. in Leyvand v. Amnon Barasch and Others [2000] High Court 15th February, [2000] TLR 223 (cited by Mr. Dawes at page 431 of his book but not in this case) which Mr. Crowe Q.C described (paragraph [14]) as one of the three key decisions on this subject (which was admittedly not a decision at first instance, but an appeal from the Master dismissing the application) is of great assistance. The case concerned a partnership between the claimant and the first defendant in the field of property development, the claim being for a declaration as to which developments were partnership ventures and for a partnership share therein, or alternatively on a *quantum meruit* for services rendered in respect of the developments. The claimant was resident in Israel, but Lightman J. recognised that an individual can have two ordinary residences and said that if it had been necessary to hold that he was also resident in England he would so have held.

22. Lightman J. said at paragraph 6:

"It is clear from the authorities cited to me'[which Lightman J then lists] 'that.....
.....during the 19th century the practice was established that claimants living abroad were prima facie bound to give security for costs.....On the basis of these authorities the submission has been made that a foreign claimant should be ordered to provide security whenever the claimant fails to discharge the onus upon him to prove that he has fixed and permanent property here. This submission however founders because the practice of the courts has now fundamentally changed. [My emphasis] 'Security cannot now be ordered as a matter of course from a foreign claimant: to avoid the making of an order he does not have the burden of establishing the ownership of fixed and permanent property here or indeed any property at all: the simple and single criterion for ordering security is what is just in the circumstances of the particular case. The authorities relied on by the Defendants are no longer of any relevance or assistance. they are a distraction and should no longer be cited."

He then dismissed the appeal.

23. So the battle lines are clearly drawn: Mr Richardson contending that I should apply the modern case law principles as regards a non-resident plaintiff, and, having regard to all the circumstances of this case, make an order which is just in all those

circumstances. If the Court does that, Mr. Richardson says, it must inevitably find that the security furnished under the 2003 Order is adequate.

24. Mr. Dawes, on the other hand, says that the Court should not shrink from finding that Ashdene is not an entity of substance, that the potential costs have materially increased since 2003, not the least because two forensic accountancy experts are now involved (and I have noted Mr. Dawes' criticism of the lateness of the Plaintiff's intimation that it wished to call such a witness) and that the claim has been grossly inflated. Mr. Dawes submitted it would be manifestly unjust if the Defendant were not protected to the tune of £100,000, which is not proportionately excessive as against a claim of over £1.3 million.

25. At the outset of his address Mr. Dawes drew attention to the fact that the action had 'gone to sleep' effectively from the date of the Plaintiff's Application for specific discovery on 2nd July, 1999, until September, 2003, when the Plaintiff applied to amend the Cause (for which a consent Order was recorded on 24th October, 2003). During the intervening period of nearly four years, apart from desultory correspondence between the Advocates in mid 2000, and no less that six Court adjournments between 2001 and 2003, no steps were taken by the Plaintiff.

26. I do not consider it can be said that it was necessarily incumbent on Bachmann to do so. True, it might have applied for a strike-out because of the Plaintiff's inaction. On the other hand, its advisers might reasonably have taken the view that while the action was apparently no longer live it was not in Bachmann's interests to stir matters up and thus incur further costs. In this connexion I note that, very shortly after the case was revived in 2003, and within a fortnight after the amendment to the Cause, Ozannes sought security for their client's costs.

27. The period of inactivity on the Plaintiff's part to a large extent matches that covered by the events related in Mr. Marcinski's Affidavit of 25th December, 2003. In that Affidavit he gives a lengthy and detailed account of the domestic problems which beset him following his departure from Guernsey in the Autumn of 1998. In paragraph 9 he says:

"By far the most important reason for the consumption of my energy and time that would otherwise have been available to pursue more vigorously the Plaintiff's litigation against the the Defendant pertained to the ultimate tragic vortex of psychiatric illness that my wife's only child (who was living with us on a full-time basis, save as described below when he was pursuing treatment) experienced....."

I have no doubt that the events he narrates, and which culminated in the untimely death of his stepson on 11th May, 2002, and the aftermath thereof which he describes in paragraph 9.31, prevented him from concentrating on recovering the large sum of money which he says represents the losses which flowed from the Defendant's breach of the Agreement.

28. Added to the foregoing is the series of documents forming Exhibit GSKD 3 to Mr. Dawes' third Affidavit of 10th February, 2006, produced at a late stage during the adjourned period between the two hearings of this Application, which demonstrate that Mr. Marcinsky remained as the sole director of the Company at least from December, 1998, until he resigned on 14th March, 2001, and that on 22nd December, 1999, some twenty-one months after he emigrated to Canada, he was still playing a significant role in Ashdene's affairs. Coupled with this Mr. Dawes attempted to show, by close analysis of the Schedules comprising the particulars to paragraph 15 of the Cause, that the manner in which the claim for loss and damage is formulated indicated that they were

suffered by the animate, or real, plaintiff, namely Mr. Marcinski, rather than the inanimate and nominal Plaintiff Ashdene.

29. For example, Mr. Dawes submitted that Schedule B, (page 28b of TAB 4 in the green Bundle) is framed as reflecting a loss of emoluments rather than a loss of profits, as would be the case if the Company was the true plaintiff. A further indication was the column allowing for the deduction of Guernsey Income Tax which is appropriate to an individual rather than to a juridical person. This form of presentation, Mr. Dawes continued, demonstrated that this was far from being a simple case of wrongful dismissal, as Mr. Richardson had claimed, and would in truth require an in depth trial both as to liability and *quantum*.

30. All these matters show, in my judgment, support for Mr. Dawes' submission that Ashdene's role in these proceedings is that of a nominal plaintiff, and that Mr. Marcinski has had control, or was in a position to exercise control, of them throughout. If that were not so the action would not have effectively 'died' for most of the period when most distressing events were occurring in his domestic life. I understood from Mr. Richardson's submissions on the 13th February that he did not seriously contend that that was not the situation, or that Mr. Marcinski is the *alter ego* of Ashdene.

31. Can it therefore be said that there is 'reason to believe' that Ashdene will be unable to pay Bachmann's costs if ordered to do so? Mr. Richardson says that there is no evidence of this key component which now appears in both condition (c) and condition (f) which relate respectively to a claimant limited company and a nominal claimant. In this connexion I note that condition (c) does not now expressly require that there shall be 'credible testimony' of its inability to pay those costs.

32. This brings me to that part of Mr. Dawes' argument that the Guernsey Royal Court should not stand still but should move on from the position of acceptance of the 1999 Rules of the Supreme Court as guidelines, and should look to the current ones—at least for the purposes of this Application. It seems to me that there is force in this contention, for whereas, in contrast to the old Order 23 Rule 1(1) (b) which applied to a nominal plaintiff suing for the benefit of some other person and merely specified that there should be 'reason to believe' that he would be unable to pay the defendant's costs, Section 726(1) of the Companies Act 1985 provided that there had to be that which was described as 'credible evidence' to this effect.

33. The position under the C.P.R's, however, is now that the phrase regarding credible evidence has been omitted from sub-condition (c), so that the requirement of 'reason to believe' is now common to both conditions. I do not consider the omission can possibly be regarded as accidental, because in the 1999 Commentary there is a specific passage at paragraph 23/3/21 which states:

"Apart from such a case' [that is to say where a company is in liquidation, which is of itself *prima facie* evidence of an inability to pay, a matter stressed by Mr. Dawes in his address in Reply] 'the application for security must be supported by an affidavit which credibly and reasonably shows the inability of the company to pay the costs of a successful defendant."

34. Apart from stating that Rule 25.13.2 (c) (not (e), which is a misprint) 'to a large extent' duplicates Section 726(1), the 2005 Commentary is silent on the point. Mr. Richardson cited the passage at 25.13.14 of that Commentary and submitted that the Applicant needed to show credible and reasonable evidence of the alleged inability to pay, in order to get to the level of proof required by both sub-conditions (c) and (f). He said that despite the third attempt in the shape of Mr. Dawes' Affidavit of 10th February to fill the gap there was still no evidential basis for such a conclusion. He deprecated

those which he termed the Applicant's attempts to engraft 'spin' on the documents now adduced and said that the Report of Mr. Rowland Hogg, the Defendant's expert witness, merely gave a distorted view of the Plaintiff's potential losses and did not discharge the burden required in the two sub-conditions in Rule 25(2)(c) and (f).

35. Mr. Dawes, on the other hand, instances the Minutes of the Meetings of the Company, the Application for Exempt Status of 14th January, 2005, the other responses to the tax authorities, and especially the absence of any accounts and the successive statements by Ashdene that it has no income (all of which are included in GSKD 3, and which are emphasised in paragraph 9.16 of Mr. Hogg's Report of 10th February) point to a conclusion that it would be unable to meet any costs order against it. Moreover, Mr. Dawes said, the very nature of the arrangements whereby this shell of a company was controlled by a plaintiff who was a considerable distance away must lead inevitably to the inference that it either could not, or would not, do so. The entire set-up (if I may use that expression) Mr. Dawes said, was tailored so as to ensure that any assets existed were beyond the reach of any party who might wish to enforce a Court Order. The circumstances all demonstrated that Ashdene is well-versed in asset protection. Mr. Dawes further argued that the term 'burden of proof' is not appropriate to the language of Rule 25 as it now appears and that it is more a burden of persuasion. He went on to say that if the language of sub-conditions (c) and (e) is regarded in that light a finding that there is reason to believe that Ashdene will be unable to pay his client's costs if so ordered is inescapable.

36. I agree with Mr. Dawes that times have moved on, and that Guernsey, now being an important financial centre, should keep abreast of English judicial thinking, and should not, as it were, be frozen in time to the year 1999. The decisions in the leading authorities cited in this Application all based themselves on the English C.P.R's and not the former Rules of the Supreme Court. It is true that in most of the cases which I have heard on security for costs the Court has accepted that guidance should be sought from the 1999 R.S.C's. But this is because Counsel appearing have agreed on that course, and, for example in William Gilliham's case (*infra*), the 1999 Rules were included in the Bundle of Authorities which went in by consent.

37. William Gilliham's case was decided in early 2002, before either Nasser or Naghsineh were decided, but in my view it would be both illogical, and to the extent that the modern rules differ from the former ones (as for example, sub-condition (c) differs in an important respect from its statutory predecessor) misleading at this later stage, to apply English *dicta* which are pronounced in relation to one set of rules to an earlier set of rules—I should interpolate here that Leyvand's case was decided under R.S.C Order 23 Rule (1)(i) and before the new Rule replaced Order 23 Rule (1), the decision being 15th February and the amendment coming into force on 2nd May, 2000.

38. I pause now to consider Mr. Richardson's submission that there is no, or, at best, scanty, evidence adduced either that the Company would be unable to pay Bachmann's costs if so ordered, or (assuming Mr. Marcinski is the true plaintiff) any basis for concluding that the Defendant would face 'any substantial obstacle or extra burden' (to use Mance L.J's phrase at paragraph [64]) in enforcing an order for costs in Canada, so as to bring him within the principles stated in the passage from the Judgment of Mr. Crow Q.C. set out at paragraph 14 above. Is it, however, a requirement that some evidential basis must be shown before the Applicants can, as it were, get to first base?

39. It cannot be gainsaid that the modern Rule provides at 25.12—(2) that an application for security for costs must be supported by written evidence. In my judgment there is written evidence here, comprised in GSKD 3 and summarised at

paragraphs 27 and 35 above that Ashdene has no income and virtually no tangible assets, but none that Bachmann would encounter difficulties of and obstacles to enforcement of an Order made here in Canada, and the position remains that in considering both conditions (c) and (f) the requirement exists that there must be reason to believe that the defendant's costs will not be paid before an Order can be made. I therefore ask myself the question:

‘Does it follow, twenty-seven months on from the previous Order for Security, that it is just that the Defendant should remain with the same level of protection that was regarded as appropriate at that time?’

Before answering this question I will refer again to the judgment of Mance L.J at paragraph [64]:

“The courts may and should....take notice of obvious realities without formal evidence”.

40. It is true that the passage occurs in the context of the issue of obstacles to, or even impossibility of, enforcement in certain parts of the world where that would be the natural assumption. However in my view that observation can legitimately be given a wider meaning. It is obvious, and virtually conceded by the Respondent to the Application, that Mr. Marcinski is the moving spirit behind and the controlling mind of Ashdene. He is a professional man resident with a family in Canada at a considerable distance from Guernsey. There is no legislation or treaty between the two countries for reciprocal enforcement of Court Orders. While there is no material on record providing reason to question the probity of Mr. Marcinski (see Lightman J. at paragraph 6 in Ley- vand) from the material put forward by Mr. Dawes I consider I am entitled to infer that there is a risk that the Company might not pay if it is ultimately condemned in costs.

41. I digress for a moment to note that in the Porzelack case (*infra*), while Browne-Wilkinson V-C declined to grant to the defendant an order for security for costs, even though the plaintiff company was registered abroad (which is not the case here) nevertheless he made his decision subject to an undertaking that one, Bendel, whom he described as the ‘moving spirit’ behind Porzelack A-G, would be joined as a plaintiff, with the consequence that he would be personally amenable to any order for costs that might be made. That would not have been the case if the company had remained as sole plaintiff because section 726 of the Companies Act 1985 did not afford the same protection to a defendant in the case of a plaintiff foreign company as it did in respect of an English registered company.

42. If, as in the Porzelack case, Ashdene had been registered abroad it could well (subject to the fulfilment of any other necessary criteria), provide a foundation for a further order because, as Mance L.J. said at paragraph [61] of Nasser:

“Impecuniosity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation since the power under r25.13(2)(c) applies to companies wherever incorporated and resident, and is not discriminatory.”

43. However, this is not such a case, and the possibility of securing an undertaking to join Mr. Marcinski as a party has at no time been canvassed. Had Mr. Dawes considered this as a reasonable course, he would doubtless have included it in his argument. Mr. Richardson did refer to the issue of stifling a claim by this type of Order in his main address, but he did not seriously suggest that this is such a case, nor

did he produce evidence of impecuniosity, other than the reference in paragraph 9.32 to the cost of Zhubin's prolonged and ultimately unsuccessful treatment in Mr. Marcinski's Affidavit sworn over two years ago.

44. Mr. Richardson's remarks as to stifling a claim were made in response to Mr. Dawes submission that there is ample evidence here that Mr. Marcinski is not a poor man, and in the context of his submission that the two linked issues of impecuniosity and stifling should be regarded as shields with which to resist an application and not as swords with which to attack a plaintiff. This issue had arisen at an early stage in Nasser where Curtis J said that if the Master's order was maintained the plaintiff's claim would be 'snuffed out'. The Courts' attitude towards stifling a claim was admirably stated by Mars-Jones J. on first appeal from the Master in Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 AER 273, at page 280, that the Court:

".....is always mindful of the possibility that an order for security can become a weapon of oppression available to the strong to prevent the weak from getting access to the courts or the arbitrator to have their claims properly adjudicated according to law."

See also Mr. Dawes' book at page 432 which cites Lord Denning's remarks in that case as regards oppressive applications for security for costs.

45. Returning to the main theme of the submissions in this case, it is in my opinion an obvious reality that *some* further costs must have been run up since November, 2003, and I therefore pass to consider the Bill of Costs submitted and described as it is as 'Anticipated'. Despite the heading the first two Items are clearly actual figures as at the date of the Bill, namely 5th December, 2003, and not estimated. Secondly, the defendant has not lodged a further Bill supplementary to the existing one, so as to update the earlier Bill and show the current position as to where the point of demarcation between actual and estimated costs lies, on the lines of those submitted in Porzelack or Gilliham.

46. I agree with Mr. Richardson on this issue. It seems to me that when a party includes in its Bundle a Bill of Costs, it is incumbent on that party, at each stage of the proceedings, to indicate with clarity which portion of it represents the costs already incurred and which is an estimate of the costs to be incurred, so that the Court can gauge, not perhaps precisely, but at least arrive at a fair estimate of the *quantum* of the Security (if any) which would meet the justice of the case at that particular point in time. It follows that if the Bill is updated for the purpose of a subsequent Application the cut-off point (see page 4 of the Judgment in William Gilliham's case (*infra*)) between the actual costs incurred and those estimated will need to be revised so as to reflect the true position at the moment in time when it is being considered by the Court.

47. It is also material to observe that the Defendant has not lodged a further Bill of Costs supplementary to that appearing at pages 4 and 5 of GSKD 2, in which the first two items claimed are actual figures, and not estimates. The total of the actual costs as at 5th November, 2003, is therefore £38,513, leaving the Defendant a 'margin' of £11,487, which comes nowhere near the total of the Bill of £129,477. As to Item b) on page 5 for £6,513 for 'unbilled costs', this matches Item 2 and I therefore do not need to take it into account separately.

48. We are now twenty-seven months on. But no further Bill has been put in, on the lines of, say those submitted in Porzelack A.G v. Porzelack (UK) Ltd [1987] 1 AER 1074 or in the local case of William Gilliham v. N.R.G. Benelux B.V [2002] 2nd January (referred to at page 430 of Mr. Dawes' eminent Work on the Laws of Guernsey at TAB 9 of the green Bundle), thus advancing the point of demarcation between actual and potential costs so as to reflect the position as at 14th December, 2005.

49. Notwithstanding the deficiencies in the supporting material put forward by the Applicant, to which I have alluded in the two preceding paragraphs, it seems to me that I should adopt as realistic a view as is possible on the existing material regarding the costs situation. As I said, there remained to the Defendant a balance out of the £50,000 then ordered as security of £11,487. Coming to Item 4 on page 4 (which appears to be bracketed with Item 3) namely 20 hours' attendances in 2004, is reasonable even though it is said to be in prospect of the trial which has not, as of now, taken place. That gives £3,480, making a total of £9,993 to add to the £38,513 represented by Items 1 and 2. I am prepared to take a similar view regarding Item 5, because it is obvious, and appears in the Bundles, that correspondence has occurred and twenty hours' spent on it is not unreasonable. That gives a further £3,480.

50. I take Item 7 next. There have been only three appearances before me, on the 16th December, the 30th January and the 13th February (the hearing on the 23rd January was vacated through no fault of Counsel). I am prepared to accept that twenty hours is reasonable for this Item. For the avoidance of any doubt, as with the other Items, I have considered these on a recoverable and not an indemnity basis. Bearing in mind that there have been since late 2003, the further Court appearances to which I have just referred, one Affidavit with 64 pages of Exhibits, this Application, instructions therefor, a Directions hearing and 1½ hearing days, I would have estimated more than twenty hours, but I cannot, for this purpose, go beyond the figure claimed. It bears out my earlier remarks as to the desirability of updating bills of costs in these applications. I therefore allow Item 7.

51. What about Item 6? There have been no skeleton arguments, but there must have been research, obviously painstaking on both sides. I consider I should assess this at half the sum claimed, namely sixteen hours. As regards Mr. Dawes' third Affidavit and the Bundle put in on the last working day before the concluding hearing of this Application, subject to what I shall shortly say I consider this as being lodged too late to take it into the equation. I assess this Item at £2,784.

52. As regards the next set of Items from 8 to 11 my interpretation of their descriptions is that they are more likely to be potential or anticipated. I am not prepared, without more particulars, to take these into account on the present exercise. This brings me to Item 12, in which only one forensic accountant/expert is mentioned. From the correspondence in GSKD 2 the Plaintiff's Advocates knew as early as 13th January, 2004 (page 6) that Ozannes were contemplating the enlistment of the services of a forensic accountant on behalf of their client. This possibility had crystallised into a firm intention certainly by the 15th July (page 22).

53. On the 18th July Collas Day registered a complaint to Mr. Dawes that his firm (Ozannes) had been extremely dilatory in taking the appropriate steps to instruct the expert, and concluded with this sentence:

“Lastly, we confirm that our client does not intend to serve any expert evidence”.

Yet, barely three months later Collas Day write as follows (page 34):

“For our client's part, contrary to our earlier instructions, our client has now decided to appoint a forensic accountant to prepare a report.”

They then suggest the meeting between the experts which was foreshadowed in the Order made in the Interlocutory Court on 16th December.

54. I therefore consider that the remarks in paragraph 17 of Mr. Dawes' second Affidavit regarding the sudden decision by the Plaintiff to elicit the services of a forensic accountant, announced on 26th October, 2005, despite frequent references in the intervening correspondence on this topic, are amply justified. Aside from this, it has this implication as regards the present Application: clearly Ozannes will be entitled to include in their Bill in due course, provision for perusal of, and taking instructions on, the Report of their opponent's expert who has now been instructed. It would not be realistic to provide for less than the amount Ozannes have billed for their own expert, namely £10,000, but in view of the material produced in support—two thick Bundles, which were compiled by Messrs. B.D.O. Stoy Hayward, on the last working day before the second hearing, I consider a fair sum under this head should be set at £12,500.

55. I agree with Mr. Richardson that the amount claimed in the instant Application is excessive. He did leave the door open for that which he referred to as 'a more modest amount'. The sum total of the foregoing is £64,237, which represents the total of the estimated costs incurred to date, plus my estimate of the costs in relation to the Plaintiff's expert accountants. In arriving at this figure I have borne in mind Mr. Dawes' point that the *quantum* of the sum claimed in the action is a factor to be considered when assessing an amount to be provided by way of Security.

56. From the amount I have just stated there has to be deducted the £50,000 already furnished, giving £14,237, which I consider should be rounded down to £14,000.

57. I therefore consider the Plaintiff should furnish £14,000 by way of further Security for Costs—in addition to that already provided in 2003. The manner of providing the extra security may be agreed between Counsel, but taking into account that instructions will probably have to be taken from Canada, I direct that it be furnished by the close of business in Guernsey on 10th March, 2006. The Plaintiff may have liberty to apply for an extension, which shall be made no later than Interlocutory Court on the 24th February, 2006. Costs of this Application reserved.

58. Orders accordingly.

A.R.W.Hancox
Lieutenant Bailiff
17th February 2006.