

Judgment 31/2012

**Jefcoate & Jefcoate v Spread Trustee
Company Limited et al
Civil Action File 1563
Royal Court
13th August 2012**

Application for security for costs.

THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 13th day of August 2012 before Richard James McMahon, Esquire Deputy Bailiff sitting alone

Between:

**(1) SIDNEY GEORGE JEFCOATE
(2) STUART LAWRENCE JEFCOATE**

-AND-

**(1) SPREAD TRUSTEE COMPANY LIMITED
(2) COSIGN SERVICES LIMITED
(3) SPREAD SERVICES LIMITED
(4) COSIGN NOMINEES LIMITED
(5) SPREAD NOMINEES LIMITED
(6) CHRISTOPHER JOHN NICHOLSON
(7) JOHN FIELD
(8) JOHN PIPER**

WHEREAS on the 19th and 20th June 2012 the Deputy Bailiff considered an application for security for costs and heard thereon Advocate P T R Ferbrache and A Lund counsel for the Sixth to Eighth Defendants and Plaintiff respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and GRANTED the said application and

1. ORDERED that £315,000 be paid within 14 days of this judgment, followed by a further payment of £185,000 by no later than the date on which the Plaintiffs are required to apply for a date to be set for a case management conference and then followed by a final payment of £220,000 no later than 35 days before the date fixed for trial with liberty to apply on 48 hours notice.
2. DIRECTED that any submissions the parties wish to make on the question of costs should be submitted in writing within 14 days or re-listed for oral submissions at a mutually convenient interlocutory Court.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
13.08.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN: (1) **SIDNEY GEORGE JEFCOATE**
(2) **STUART LAWRENCE JEFCOATE**

Plaintiffs

-and-

(1) **SPREAD TRUSTEE COMPANY LIMITED**
(2) **COSIGN SERVICES LIMITED**
(3) **SPREAD SERVICES LIMITED**
(4) **COSIGN NOMINEES LIMITED**
(5) **SPREAD NOMINEES LIMITED**
(6) **CHRISTOPHER JOHN NICHOLSON**
(7) **JOHN FIELD**
(8) **JOHN PIPER**

Defendants

APPLICATION OF 6TH TO 8TH DEFENDANTS FOR SECURITY FOR COSTS
Hearing dates: 19th June (pm only) & 20th June 2012

Judgment handed down: 13th August 2012

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for Sixth to Eighth Defendants: Advocate P T R Ferbrache
Counsel for Plaintiffs: Advocate A L Lund

Cases, Texts & legislation referred to:

Royal Court Civil Rules, 2007
Lillicrap v Nalder & Son (unreported, 29 June 1992)
Gilliham v NRG Benelux BV [2003-04] GLR N7
R v Ealing Justices [1999] Crim LR 840
de Souza v Law Officers (unreported, 19 November 1999)
Ashdene Consultants Limited v Bachmann Group Limited [2005-06] GLR N22
Arkus v Balchan Management Limited (unreported, 14 October 2010)
Mitco Realty Limited v Devlica Deutschland Limited (unreported, 11 April 2011)
Part 25, Civil Procedure Rules
Somerset-Leeke v Kay Trustees [2003] EWHC 1243 (Ch)
Semler v Murphy [1968] Ch 183
Allen v Bloomsbury Publishing Limited [2011] EWCA Civ 943
Phaestos Ltd v Ho [2012] EWHC 662 (TTC)
Nasser v United Bank of Kuwait [2001] EWCA Civ 556
Trusts (Guernsey) Law, 2007, section 35(2)

M. V. Yorke Motors (a firm) v Edwards [1982] 1 WLR 444

Leeds United Association Football Club Limited v Phone-In Trading Post Limited [2009] JLR 186

Royal Court (Costs and Fees) Rules, 2010

Ladbroke plc v Galaxy International Limited [2007-08] GLR 101

Introduction

1. By application dated 30 April 2012, Christopher Nicholson, John Field and John Piper, the Sixth to Eighth Defendants in proceedings brought by the Plaintiffs, Sidney Jefcoate and Stuart Jefcoate, have applied pursuant to rule 82(1)(b) of the Royal Court Civil Rules, 2007 for security for their costs in the sum of £1,778,789.40, as more particularly set out in the Schedule attached to the application, or such other sum as the Court sees fit. The application further seeks a stay of the Plaintiffs' proceedings pending payment of such security as may be ordered and, if security is not given within 14 days of the order, that the Cause against the Sixth to Eighth Defendants be dismissed.
2. By application dated 8 May 2012, the Plaintiffs applied for the Sixth to Eighth Defendants' application for security for costs to be stayed until the Plaintiffs' part-heard application for leave to amend their Cause has been determined. The hearing in respect of that amendment application commenced in February and is due to resume before the Bailiff for two days on 29 and 30 August 2012.
3. In the Interlocutory Court on 11 May 2012, I decided that the application for security for costs and the stay application should both be dealt with together and directed that materials be lodged in accordance with a timetable running up to a hearing I fixed for 1½ days, commencing on the afternoon of 19 June 2012. The Sixth to Eighth Defendants were represented by Advocate Peter Ferbrache and the Plaintiffs by Advocate Lund. I am grateful to them for the assistance provided through their helpful written and oral submissions.

Background

4. The Plaintiffs' Cause was tabled, by consent, on 12 November 2010. It claimed just over £14 million from the Defendants or, in the alternative, accounts and enquiries leading to the Defendants making good losses alleged to have been suffered by the Plaintiffs' trust structures or damages for breach of duty and/or fiduciary duty or for conspiracy.
5. The First to Fifth Defendants, represented by Carey Olsen, filed their Defences and a Counterclaim in February 2011. The Sixth to Eighth Defendants filed their Defences in March 2011. I note they contain *Exceptions de Fonds*. The Plaintiffs filed their Replique and Defence to Counterclaim of the First to Fifth Defendants in May 2011. They also filed their Replique to the Defences of the Sixth to Eighth Defendants at the same time.
6. Within a week of filing those Repliques, the Plaintiffs sought leave to file an Amended Cause. Their amendment application was progressed during the summer and autumn of 2011 with the parties lodging and serving their respective Skeleton Arguments. That application currently stands part-heard, the two days set aside in February 2012 having proved insufficient.
7. In the meantime, in October 2011, the Plaintiffs requested further information from the Defendants pursuant to rule 60 of the Royal Court Civil Rules, 2007. That request was answered on behalf of the Sixth to Eighth Defendants in January 2012. Further, in January 2012, the Eighth Defendant applied to strike out the action against him, resulting in evidence being filed and Skeleton Arguments being prepared on behalf of the Eighth Defendant and the Plaintiffs. The hearing of that strike out application has been listed to follow the conclusion of the hearing of the amendment application.

8. At the risk of over-simplifying the facts pleaded, it is alleged that there was a joint venture to acquire a number of former National Coal Board sites in Wales with a view to enhancing their value. That joint venture involved the First Plaintiff and the Sixth Defendant and trusts in which they had interests respectively, all with a view to paying the proceeds of the enhanced values into those trusts. The Seventh Defendant is apparently an associate of the Sixth Defendant. The Eighth Defendant is a tax consultant who has known the First Plaintiff and the Sixth Defendant for over 25 years. The Second Plaintiff is the First Plaintiff's son. The opportunities for benefiting the trusts in the manner envisaged did not, however, materialise, so these proceedings aim to restore the trusts in respect of which the Plaintiffs are beneficiaries to the level they would have been but for the alleged wrongdoing involving the Defendants.

Evidence

9. The application for security for costs was supported primarily by an Affidavit declared and affirmed by the Eighth Defendant on 8 May 2012, in which he explained that the Plaintiffs do not appear to have personal assets and that the First Plaintiff has arranged his affairs, through using offshore trusts, with the consequence that, at the times to which the Eighth Defendant refers, he declares comparatively little income. The First Plaintiff owns a property jointly with his wife, which was purchased for £2.4 million, but is subject to a registered charge in favour of Coutts and Company, although there was no evidence as to the amount in question. The Eighth Defendant also says that the Second Plaintiff has not been as successful in business as his father and refers to his two properties and the possible equity in them. His conclusion is that he does “*not believe that either [Plaintiff has] sufficient incomes or material unencumbered assets from which they could personally satisfy a seven figure costs order in these proceedings*”.
10. On behalf of the Plaintiffs, the Second Plaintiff swore an Affidavit on 28 May 2012, indicating that his net unencumbered assets are valued at some £520,000, suggesting that should be “*more than adequate to satisfy any adverse costs order which the [Sixth to Eighth] Defendants may obtain.*” He also points out that the First to Fifth Defendants have not applied for security for costs, leading to the inference that they are satisfied that the Plaintiffs have sufficient assets to satisfy any costs order that might in due course be made against them.
11. The other affidavit evidence came from Advocates for the parties. On behalf of the Sixth to Eighth Defendants, three Affidavits from Advocate Williams, sworn on 11 May, 1 June and 15 June 2012, were filed. They contain explanations of the proceedings and the steps taken to clarify the Plaintiffs' finances. They also exhibit correspondence between the parties' Advocates. On behalf of the Plaintiffs, two Affidavits from Advocate Lund, sworn on 25 May and 14 June 2012, were filed. They deal with the procedural history, especially as it affects the timing of the application for security for costs, and the additional costs that would be incurred if a costs order made by this Court needed to be enforced in England and Wales.
12. The Second Plaintiff's Affidavit also raised an issue about the admissibility of the Eighth Defendant's Affidavit, which was pursued by Advocate Lund in her submissions. The objection is founded on the fact that the information to which the Eighth Defendant deposed came to him as a result of him providing professional services to the Plaintiffs and, as such, a duty of confidentiality attached to it. It was suggested, therefore, that the Eighth Defendant's Affidavit should be treated with “*the greatest caution*”.
13. In response, Advocate Ferbrache submitted that, where a client brings proceedings against the adviser, there is an implied waiver of the obligations arising where a duty of confidence has existed. He supported that submission by reference to the English Court of Appeal's decision in Lillicrap v Nalder & Son (unreported, 29 June 1992), which involved proceedings for professional negligence against a firm of solicitors. Whilst these are not proceedings against the Eighth Defendant for professional negligence, they do allege that he involved himself in a conspiracy as a result of which the trust structures of which the Plaintiffs are beneficiaries are claimed to have sustained losses. As such, those allegations put into question the bona fides of

the Eighth Defendant and, on that basis, I will not disregard the evidence contained in the Eighth Defendant's Affidavit. However, I recognise that not everything set out within that Affidavit is up-to-date and that some of its content is more speculation than fact, but it paints a picture of two people who have real property assets in England and comparatively few other assets in their own names. The Second Plaintiff's Affidavit really confirms that that is his position. Further, the equity of some £520,000 to which he admits is the extent of the Plaintiffs' assets to which I can have regard as available to satisfy any adverse costs orders.

14. During the course of his submissions, Advocate Ferbrache suggested that the Second Plaintiff is a family man and that he does not live alone, meaning that his stated equity position may be affected by rights of occupation. There was, however, no evidence placed before me to this effect and so I am disregarding any such possibility and proceeding on the basis that the Plaintiffs' financial position is as stated in the evidence.
15. The First Plaintiff has chosen not to submit any evidence himself. That is, of course, his prerogative, but it does mean that I have to determine this application without the benefit of knowing with any accuracy what his assets actually are and it more readily exposes the Plaintiffs to the possibility that I will conclude that there is "*reason to believe*" that they will be unable to satisfy a costs order, a matter to which I will turn in detail subsequently. For example, as agreed by Counsel, I can infer that the amount secured by the registered charge against the property jointly owned by him and his wife is unlikely to exceed the purchase price of the property and indeed that it is likely to be no more than the usual maximum percentage (if there is such a thing) of loan to value advanced by reputable lenders such as Coutts and Company. However, aside from imagining that the First Plaintiff has the benefit of some equity from his share in the property, I do not know the amount involved and whether there is scope to enforce any order that might be made in favour of the Sixth to Eighth Defendants. This means that I cannot properly take it into account when considering whether or not to order security for costs.

The stay application

16. On behalf of the Plaintiffs, Advocate Lund argued that the determination of the application for security for costs should be deferred until the Plaintiffs' application to amend their Cause had been determined. She accepted that the application was effectively to adjourn the hearing, or the determination, of the security for costs application to a later date. The principles set out in Gilliham v NRG Benelux BV [2003-04] GLR N7 to which she referred were accepted by Advocate Ferbrache as being uncontentious and applicable, being a non-exhaustive list of matters that could properly be considered before deciding whether to grant an adjournment of an application.
17. At the conclusion of the hearing on 20 June 2012, I informed the parties that I had not been persuaded that I should grant the Plaintiffs' application and that I would, therefore, deliver a reserved judgment in due course on the substance of the security for costs application. I outlined my reasons for not granting the adjournment, or stay, sought. For the sake of completeness, I can state here briefly what they were.
18. The considerations set out in the Gilliham note were drawn from the commentary to the short report of the decision in R v Ealing Justices [1999] Crim LR 840, to which Deputy Bailiff Day had referred in de Souza v Law Officers (unreported, 19 November 1999). In Gilliham, the issue was whether to adjourn a trial with Jurats that had been fixed some months previously not, as here, the hearing of an interlocutory application before a judge alone. The differences between these cases show that each case turns on its own facts and circumstances. Bearing in mind the guidance offered on relevant considerations, I also remind myself of the need "*to deal with cases justly*", in accordance with the overriding objective in rule 1 of the Royal Court Civil Rules, 2007.

19. Whilst accepting that the Bailiff will already be more familiar with the issues in the case than I am, Advocate Lund has not persuaded me that if I proceed to decide the application for security for costs it will inevitably lead to adverse consequences for the Plaintiffs. The assessment of the merits in the case will, in my view, turn on the way in which the pleadings are regarded. This is because, aside from the affidavit evidence submitted in support of, and in opposition to, the applications before me, there has been no evidence in relation to the substance of the dispute between the parties. Ultimately, any discretion needs to be exercised judicially and, insofar as making an assessment on the relative merits of the parties' cases is applicable to determining the application for security for costs, it should make no difference to the outcome of the application if it is dealt with by me or the Bailiff.
20. It was suggested on behalf of the Plaintiffs that there was no urgency about the security for costs application. However, once an application is made, it should be dealt with as expeditiously as is appropriate. In my view, it is more appropriate, once the parties have prepared themselves to do so, to progress towards the resolution of disputes, or discrete applications in the context of disputes, then to defer dealing with them. The old adage "*justice delayed is justice denied*" can properly be borne in mind. In my opinion, it is important for all parties to know the outcome of the application at this stage of the proceedings because they need to know where they stand before taking other decisions about how to progress the case.
21. Although there was some risk of the Plaintiffs adopting an inconsistent position about the timing of the application (saying on the one hand that the application for security for costs should have been made much earlier and before the level of costs incurred in the case had already been expended and on the other hand suggesting that waiting until the conclusion of the amendment application before taking stock would have been appropriate), I do not regard the timing of the application for security for costs as being determinative of the question whether to adjourn the proceedings. In Ashdene Consultants Limited v Bachmann Group Limited [2005-06] GLR N22, a decision of Lieutenant Bailiff Hancox on 17 February 2006, for example, the proceedings were well underway before security for costs was sought. Accordingly, whilst delay in making the application may be relevant to the exercise of discretion if the gateways for security for costs are satisfied, it does not affect my decision on whether or not to accede to the Plaintiffs' stay application.
22. Turning back to the considerations derived from the Gilliham case, I take the view that the prejudice to the parties in not knowing the outcome of the security for costs application outweighs any prejudice inherent to all of them in granting the adjournment sought. In particular, the Eighth Defendant has made an application to strike out the action as it affects him. Whilst he may obtain an award of costs if he is successful in that application, there is a difference between his position as it would be if the security for costs issue had already been determined than if it were still open because he will know better where he stands vis-à-vis the Plaintiffs.
23. For these reasons, I reached the conclusion that it will be more cost-effective for the parties and more convenient for the efficient despatch of the Court's business for the adjournment, or stay, of the security for costs application to be refused. In my judgment, that conclusion is consistent with the overriding objective in rule 1 of the 2007 Rules. Accordingly, my decision on the question of whether the Plaintiffs should be ordered to provide security for costs was reserved and now follows.

Grounds for ordering security for costs

General principles

24. Rule 82 of the Royal Court Civil Rules, 2007 (Costs and security therefore) provides:

“(1) *The Court may, in any action – ...*

(b) *order any party to give security for costs in such amount, on such terms and in such manner,*

as the Court thinks just.

(2) *An order under paragraph (1)(b) for the giving of security for costs may provide that–*

(a) *the proceedings shall be stayed until the security is given, and*

(b) *If the security is not given within such time as may be specified in the order, the proceedings may be dismissed by order of the Court.”*

Counsel were agreed that rule 82 confers a wide discretion on the Court and that, consistently with the approach of this Court in previous cases (eg, Ashdene Consultants Limited v Bachmann Group (supra), Arkus v Balchan Management Limited (unreported, 14 October 2010) and Mitco Realty Limited v Devlica Deutschland Limited (unreported, 11 April 2011)), guidance about the appropriate approach to take can properly be obtained by having regard to the English Civil Procedure Rules and decisions thereunder.

25. In England and Wales, an application for security for costs is made pursuant to rule 25.12 in Part 25 of the CPR, which is similar in substance to rule 82 of Guernsey’s 2007 Rules, save that it expressly requires the application to be supported by written evidence. However, rule 25.13 sets out the grounds that must be satisfied before the court can grant an application for security for costs, which provides *inter alia* as follows:

“(1) *The Court may make an order for security for costs under rule 25.12 if–*

(a) *it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and*

(b) *one or more of the conditions in paragraph (2) applies ...*

(2) *The conditions are– ...*

(f) *the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant’s costs if ordered to do so;*

(g) *the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.”*

26. The importance of identifying the ground or grounds relied on was stressed by Jacob J (as he then was) in Somerset-Leeke v Kay Trustees [2003] EWHC 1243 (Ch) (at para. [5]):

“In applications for security, the relevant ground should always be identified and the relevant evidence aimed at that ground. ... it is essential to be clear which ground is being talked about and what factors are being used in support of that ground, both as a matter of law to establish that the ground exists, and secondly as a matter of fact to be taken into account in exercising a discretion.”

Accordingly, although Advocate Lund also sought to address condition (a), which applies where the claimant is resident out of the jurisdiction, but not resident in a place covered by an international law regime for enforcement of judgments, Advocate Ferbrache was quite clear that condition (a) is not one of those on which the Sixth to Eighth Defendants base their claim, so I do not need to consider it further.

27. As in previous cases before this Court, helpful guidance on the approach to be taken is set out in the commentary to Part 25 of the CPR. It is, in my opinion, appropriate to have regard to that guidance, remembering always that the rules to be applied to the application are those contained in Guernsey’s 2007 Rules, including the overriding objective in rule 1. At the outset, I consider that it is important to remember the general guidance offered in para. 25.12.2 of that commentary:

“The purpose of an order for security for costs is to protect a party in whose favour it is made against the risk of being unable to enforce any costs order they may later obtain.”
Condition (f)

28. Reliance on this condition requires me to decide first whether the Plaintiffs are nominal claimants. If they are, then I need to go on to decide whether there is also “*reason to believe that [they] will be unable to pay the [Sixth to Eighth Defendants’] costs if ordered to do so*”.
29. The only type of nominal claimant not covered by condition (f) is “*a representative claimant under Part 19*”. I can deal with this element quickly because, although para. 16 of the Plaintiffs’ Cause states that, in the circumstances specified, “*the Plaintiff (sic) will seek permission of the Royal Court to bring a derivative action against the Second or Third Defendant*”, no such application for permission has been made. Accordingly, if the Plaintiffs are nominal claimants the first element of condition (f) will be satisfied.
30. In Semler. v Murphy [1968] Ch 183, Lord Denning MR indicated that “*A nominal plaintiff is a man who is a plaintiff in name but who in truth sues for the benefit of another*”. In the light of the guidance set out in para. 25.13.17 of the CPR, the exercise involves looking to see whether the Plaintiffs are claiming directly for themselves or for some other person’s benefit. In short, one can pose the question “*who stands to gain from the proceedings?*”
31. Allen v Bloomsbury Publishing Limited [2011] EWCA Civ 943 offers a recent example of a case in which the claimant was held to be a nominal claimant. The case concerned a claim for damages for breach of copyright in respect of *Harry Potter and the Goblet of Fire*, it being alleged that substantial parts of *Willy the Wizard*, written by the late Adrian Jacobs, had been copied. The claimant had had the copyright in *Willy the Wizard* assigned to him by the son of the late Adrian Jacobs, who had also appointed the claimant as trustee of the estate of the late Adrian Jacobs. The claimant was, therefore, not suing for his own benefit but rather for the benefit of the estate of his late father.
32. In this respect, having regard to the submissions made by Advocates Ferbrache and Lund, I have analysed that prayer to the Plaintiffs’ Cause (and the only change in the proposed Amended Cause is to correct what looks like a typographical error) to see for whose benefit these proceedings are being brought. The principal claim cross-references paragraph 39 of the Cause, which is couched expressly in terms of loss to the trust structures, requiring the Trustees to make good that loss. The first alternative claim for an account and enquiry and payment to the trust structures of compensation similarly results in monies being paid to the trusts rather than to the Plaintiffs. Advocate Lund accepted that paragraphs 1 to 3 of the prayer are for the benefit of the trusts. Indeed, the Sixth to Eighth Defendants are not directly engaged in those aspects of the action.
33. In relation to the claims for damages for breach of duty and/or fiduciary duty (para. 4) or, in the alternative, damages in conspiracy or such further or other relief as the Court considers just or expedient (para. 5), Advocate Lund submitted that such damages could be payable to the trust structures or to the Plaintiffs directly, in their capacities as beneficiaries. I do not accept that alternative premise advanced by Advocate Lund. If this action proceeds to resolution and the Plaintiffs are successful on either para. 4 or 5 of the prayer, I cannot see that the damages payable would be ordered to be paid to either or both of the Plaintiffs personally. Such damages would, in my view, similarly be for the benefit of the trust structures.
34. The whole tenor of this action is that the Plaintiffs are suing for the benefit of the trusts and not for themselves. Whilst there may be some indirect benefit because they are beneficiaries of the trusts, I regard these proceedings as an attempt to recover monies into the trust structures, which will then be dealt with in accordance with the terms of the trusts deeds. In this respect, my conclusion is comparable to that of Lieutenant Bailiff Hancox in the Ashdene case, where he found (at para. [30]) that the plaintiff was a nominal plaintiff because *inter alia* “*the manner in*

which the claim for loss and damage is formulated indicated that they were suffered by the animate, or real, plaintiff ... rather than the inanimate and nominal Plaintiff” (see para. [28]).

35. Although I have not seen the answers given by the Plaintiffs to the Exceptions de Forme raised by the First to Fifth Defendants, one answer is quoted in the letter dated 16 March 2012 from Advocate Williams to Advocate Lund and exhibited to his First Affidavit, in which it was accepted that *“The Plaintiffs sue as beneficiaries of the [trust structures] for the reconstitution of the two trust funds by reason of (a) the breaches of trust of the First Defendant; (b) liability in equity of the Second to Seventh Defendants and (c) conspiracy as is now more particularly set out in the Amended Cause”*. In my opinion, this is an accurate categorisation of the Plaintiffs’ case and confirms that they are acting as nominal plaintiffs.
36. Advocate Lund further submitted that when Lord Denning referred to *“another”* that other person must be a natural or legal person. In this case, the trust company is being sued so the benefit of the Plaintiffs’ action cannot be for the trustees because any recovery made against them will be for the benefit of the beneficiaries, thereby giving them an interest in the proceedings which means they are not nominal claimants. Whether or not the First Defendant continues to act as trustee does not, in my view affect the position here. The beneficiaries could seek directions from the Court about the trusts, including the removal of the First Defendant as trustee and its replacement with someone else. In those circumstances, any sums recovered in the Plaintiffs’ action would be trust property vested in the trustee at the time. Accordingly, the proceedings are properly categorised as being for the benefit of someone other than the Plaintiffs, whoever the trustee is.
37. For these reasons, I am satisfied that the Plaintiffs are nominal claimants, or plaintiffs, and that the first requirement of condition (f) is met.
38. I have found helpful guidance on the second element of condition (f), ie, the *“reason to believe”* aspect, in Phaestos Ltd v Ho [2012] EWHC 662 (TTC), which related to the same wording as it appears in condition (c) but is equally applicable, it seems to me, to condition (f) (at para. [71]):

“As a threshold requirement, the Defendants must establish that there is reason to believe that the Claimants will be unable to meet any costs order: see CPR Part 25.13(2)(c). Thus, it is not enough for the Defendants to show that the Claimants might not be able to repay. More must be done, namely justification for a reason to believe that the Claimants will not be able to pay. In that regard:

- (i) The Defendants do not need to demonstrate on a balance of probabilities that the Claimants will not be able to satisfy any costs order: see Jirehouse v Beller [2009] 1 WLR 751 at [26]. However, there must be evidence that the company “will be unable to pay”, which is more than mere doubt or concern about the future ability to pay: see Re Unisoft Group Limited [1993] BCLC 532 per Sir Donald Nicholls VC at 534e-I, as followed by Jirehouse at [24]. As stated by Sir Donald Nicholls VC in Unisoft, the test is not “watered down” by the presence of the wording “reason to believe”.*
- (ii) Similarly, in Texuna International Limited v Cairn Energy plc [2004] EWHC 1102 Gross J stated at [10]: “I emphasise that the inquiry is whether the Claimant “will be unable” to pay the Defendant’s costs if ordered to do so – not whether it might be unable to pay them.”*
- (iii) The burden is upon the Defendants. It is not incumbent upon the Claimants to prove that they have the means to pay: see Golden Grove Estates v Chancerygate Asset Management [2007] EWHC 968 per Lindsay J at [35].*
- (iv) However, if legitimate concerns about the Claimants financial position are raised, if the Claimants choose to provide no or incomplete information in response, that in itself can lead to a court reaching the belief that the Claimants are unable to pay. In Mbasago v Logo Limited [2006] EWCA Civ 608, Lord Justice Auld stated (at paragraph 12) that “where it arises as a*

result of the party against whom the order is sought either providing unsatisfactory financial information as to his or its affairs, or as in this case none at all, it is not a big step for the court to take to conclude that there is reason for such belief’.”

39. As I have already stated, on the evidence presented, the assets of the Plaintiffs appear to be confined to the equity the Second Plaintiff has in his real property, which he put at some £520,000. Equally, however, I do not know how readily all of that equity could be realised if there were to be an adverse costs order made against the Plaintiffs. There are no assets within Guernsey so any enforcement of a costs order would occur elsewhere.
40. The schedule of costs attached to the application for security for costs led to the amount of £1,778,789.40 being included in the application. During the hearing, Advocate Ferbrache acknowledged that this full amount was unsustainable, if only because the hourly rates specified for fee earners at the firm of English solicitors, whose past and future costs were included in the schedule, were put at rates higher than would be likely to be ordered on any costs taxation, being themselves higher than the rate of recoverable costs applicable to Advocates and their staff. That said, were this matter to proceed to a full trial and result in a costs order in favour of the Sixth to Eighth Defendants, the quantum of those costs would, I strongly expect, be substantial and, quite possibly in excess of £520,000. In my judgment, there are, therefore, legitimate concerns raised about the Plaintiffs’ financial position to be able to satisfy such a costs order. Clearly, if the costs ultimately ordered were to exceed £520,000, there is a real doubt that they would be met from the Plaintiffs’ assets and, in any event, even if they approached that amount, because of the form of the assets relied on, any enforcement may not be straightforward and there remains a question mark about the value that could be achieved in the current economic climate.
41. For these reasons, subject to the more detailed analysis I will undertake when it comes to the exercise of discretion, I am also satisfied that this is a proper case in which to conclude that *“there is reason to believe that [these nominal Plaintiffs] will be unable to pay the defendant’s costs if ordered to do so”*. Therefore, condition (f) is met, meaning that the threshold for an order has been satisfied, and I will now proceed to consider whether it is just to exercise my discretion to make an order for security for the Sixth to Eighth Defendants’ costs.

Condition (g)

42. In these circumstances, I do not need to go on to determine whether condition (g) is also met. However, in case it is relevant, had I needed to do so, I would have been minded to conclude that it was not.
43. The evidence from the Eighth Defendant points to the fact that the Plaintiffs, particularly the First Plaintiff, have settled assets into offshore trusts. This was done some time ago. Although the guidance in para. 25.13.18 of the CPR indicates that there is no requirement to show that the steps taken were taken with the specific intention of defeating enforcement, there were, no doubt, many reasons why the Plaintiffs’ financial affairs have been arranged in the way they are. Had there been some evidence that steps were taken when proceedings were in train or contemplated, then that would have been more damning. On the material before me, I take the view that someone like the First Plaintiff was entitled at the time he settled the trusts to divest himself of his personal assets without being criticised some years later for having thereby somehow hindered the enforcement of any costs order against him.
44. I note that in Somerset-Leeke v Kay Trustees (supra), the only evidence in support of condition (g) was that Mr Somerset-Leeke had moved to Monaco and had moved his assets out of the jurisdiction of England and Wales when he did so. Jacob J concluded that moving countries, especially to a place where judgments are enforceable, does not by itself make it more difficult to recover money, meaning that condition (g) was not satisfied. In my view, applying similar reasoning, having settled personal assets on trust some years before the events that led to the

litigation in which an application for security for costs is made does not by itself constitute a step “*in relation to his assets that would make it difficult to enforce an order for costs against him*”.

Exercise of discretion

45. As noted in para. 25.12.5 of the CPR:

“Proof of one or more of the grounds for seeking security does not by itself ensure that an Order will be made. The Court has the widest possible discretion whether to award a security and, if so, in what amount”.

I agree with Judge Finch’s comment in Arkus v Balchan Management Limited (supra) that the Court’s discretion must be exercised “*in a sensible way*”. In order to do so, it is necessary to have regard to all the circumstances of the case (see, eg, para. 25.13.17 of the CPR).

46. Insofar as the timing of the application is relevant to the exercise of discretion, I take note of the fact that, as a result of the application to amend the Cause, the pleadings cannot be regarded as closed. Whilst it may have been desirable for the Sixth to Eighth Defendants to have applied for security earlier than they have, I cannot say that the present application has been made so late in the day that I should decline to make an order for security for costs.

47. The evidence submitted by the parties sets out less information than might have been desirable. There have been hints made about the motives of the Sixth to Eighth Defendants in relying on the evidence of the Eighth Defendant when it is the Sixth Defendant who is more squarely in the Plaintiffs’ firing line, which have been countered by suggestions made about the inability of the Plaintiffs to give straight answers to questions posed about how they are funding this litigation, leading to the suspicion that they must have access to trusts funds for this purpose. Aside from the guidance offered in Nasser v United Bank of Kuwait [2001] EWCA Civ 556 that “*The courts may and should, however, take notice of obvious realities without formal evidence*” (para. [60]), I cannot engage in any such speculation and have to determine the application in the light of the evidence submitted and what the obvious realities are.

48. The Plaintiffs have chosen to bring the Sixth to Eighth Defendants into this action. As a result, what would otherwise be trusts-based litigation has been extended to encompass the allegations of conspiracy. The Sixth to Eighth Defendants are, of course, entitled to resist those allegations as they affect them as strenuously as is appropriate. If successful, there is the prospect that costs orders will fall to be dealt with in the usual manner. Insofar as the merits of the claims against the Sixth to Eighth Defendants are relevant, nothing leaps out from the pleadings to suggest that the Plaintiffs are bound to succeed or bound to lose. As such, these are all factors to be borne in mind when considering how to exercise the wide discretion afforded to the Court but do not take matters much further.

Contrast with First to Fifth Defendants

49. Advocate Ferbrache referred to rule 1(2)(a) of the 2007 Rules (“*ensuring that the parties are on an equal footing*”) as a reason to compare and contrast the positions of the First to Fifth Defendants, emphasising that all parties should, so far as practicable, be on that equal footing. I accept that it is appropriate to have regard to the wider litigation to which the Sixth to Eighth Defendants have been made parties.

50. Section 35(2) of the Trusts (Guernsey) Law, 2007 provides:

“A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust.”

Although I have not had the benefit of seeing the relevant trusts deeds to be able to ascertain what they say about the position of the trustees, I can quite legitimately take into account that

the First to Fifth Defendants apparently have the comfort of being able to access the trusts funds in the event that the Plaintiffs have a costs order made against them in favour of those Defendants. Their position, therefore, differs from that of the Sixth to Eighth Defendants, who do not have similar access to the trusts funds. I take the view that this points towards exercising the discretion of the Court in favour of granting some appropriate security for costs.

Position of Plaintiffs

51. On behalf of the Plaintiffs, Advocate Lund stressed that they were not arguing that the making of an order for security for costs would stifle their claim. They were not claiming impecuniosity. As a result, although Advocate Ferbrache had drawn attention to the requirement that the Plaintiffs should have provided full and frank disclosure, relying in particular on the commentary in the CPR at para. 25.12.7 referring to M. V. Yorke Motors (a firm) v Edwards [1982] 1 WLR 444, she submitted that the absence of evidence from the First Plaintiff should not be regarded critically. Whilst I have noted that it may have assisted me to know a little bit more about the financial circumstances of the First Plaintiff, I have approached my decision on the basis that he is not saying that an order for security for costs will mean that his claim against the Defendants is incapable of proceeding and, therefore, he has not failed in any duty to the Court in respect of tendering evidence.
52. Advocate Lund further reminded me to have regard to the consequences for the Plaintiffs of making an order for security for costs, referring to the summary given by the Jersey Court of Appeal in Leeds United Association Football Club Limited v Phone-In Trading Post Limited [2009] JLR 186 (at para. [20]):

“... we do not accept the Deputy Bailiff’s view that, if a plaintiff’s claim is not stifled by an order for security, he suffers no substantial prejudice by providing it. The plaintiff is forced to lay out funds equal to the other side’s costs in addition to paying his own, at a time when the court is rarely in a position to form any view of the merits. The provision of cash security by the usual method of paying it into court has implications for his cash flow which are likely to be significant, even if they are not ruinous. It ties up funds which would otherwise have been used in his business or deposited at interest. If the security is not funded from cash balances, it will cause him to incur borrowing or guarantee charges.”

I agree that the satisfying of condition (f), as I have found to be the case, does not automatically mean that security for costs will be ordered. I have borne in mind the likely impact on the Plaintiffs of an order for security for costs.

Conclusion on granting security

53. Recognising that the Sixth to Eighth Defendants bear the burden of establishing that an order for security for costs should be made, I am satisfied that this is an appropriate case in which an order should be made. I have already indicated that I have concluded that the Plaintiffs are nominal claimants and that, if the case were to conclude following a full trial with a costs order in favour of the Sixth to Eighth Defendants, despite the assets of the Second Plaintiff, I have reason to believe that the Plaintiffs will be unable to satisfy such a costs order. I have carefully considered the arguments against exercising my discretion to grant security for costs but, on balance, have decided that an order should be made to protect the position of the Sixth to Eighth Defendants.

Amount of security

54. Advocate Lund submitted that I should be sceptical about the amount set out in the schedule attached to the security for costs application. In particular, she submitted that I should only have regard to what costs could be sought if recoverable costs were to be awarded, ie, by reference to the requirement in rule 2(1) of the Royal Court (Costs and Fees) Rules, 2010 that Advocates’ fees be “*reasonable in amount and reasonably incurred*”. I agree with both

submissions and have adopted such an approach. I have also, in general terms, had regard to the commentary set out in para. 25.12.7 of the CPR.

55. In the Ashdene case (at para. [46]), Lieutenant Bailiff Hancox offered helpful guidance as to the approach to be taken when submitting material in support of an application for security for costs:

“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.”

56. This exercise has been carried out by Mourant Ozannes on behalf the Sixth to Eighth Defendants. The hours billed by the personnel at that firm are set out in Section A of the schedule to the application, albeit in summary form only. Section B of that schedule then deals in slightly more detail with the future estimated costs. I have also seen a costs schedule, exhibited to the First Affidavit of Advocate Williams, in which the costs of Mark Humphries Legal, a firm of English solicitors assisting with this case, already incurred by February 2012 are set out. In summary, the costs involved are as follows:

Costs and Disbursements incurred to date	
Court fees, travel costs, photocopying etc	£5,445.20
English Solicitors’ costs (inc VAT)	£562,874.20
Mourant Ozannes costs	£155,770.00
Future costs and disbursements	
Total future Mourant Ozannes disbursements	£20,000.00
Total Future English Solicitors’ costs (inc VAT)	£350,000.00
Total future Mourant Ozannes costs	£684,700.00
Total of incurred and future costs/disbursements	£1,778,789.40

57. I can deal quite quickly with the submission made on behalf of the Plaintiffs that, if security for costs are to be awarded, the approach should be to limit them to the additional costs likely to be incurred in undertaking enforcement of any costs order in England. This submission derives from the Nasser case (at para. [64]):

“... there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases – particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920) – it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs. Even then, it seems to me that the court should consider tailoring the order for security to the particular circumstances. 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.”

This was the approach adopted by Judge Finch in the Arkus case.

58. If the Plaintiffs were shown to have sufficient assets in England to satisfy costs orders made against them in favour of the Sixth to Eighth Defendants, then a similar approach might be adopted here, limiting any order for security for costs to the costs arising in surmounting those

additional hurdles. However, on the limited evidence before me presented by and on behalf of the Plaintiffs, I am not satisfied that sufficient assets exist to enable me to tailor an order in this manner. Accordingly, I am not minded to make such a limited security for costs order and approach the matter on the basis that the Sixth to Eighth Defendants should have security in respect of costs reasonably incurred and to be incurred in this action.

59. In respect of the amount of security, Advocate Lund invited me to have regard to the judgment of Lieutenant-Bailiff Southwell QC in Ladbroke plc v Galaxy International Limited [2007-08] GLR 101, in which he had conducted a taxation of the costs ordered to be paid by the respondent to the plaintiff. At para. [15], it was confirmed that the Court has a discretion to permit recovery of fees paid to non-Guernsey lawyers:

“... the Royal Court does have a discretionary power by virtue of Section 1(1) of the [Royal Court (Costs and Fees) (Guernsey) Law, 1969] to permit the recovery of fees and disbursements of external lawyers, in circumstances in which such fees and disbursements have been reasonably incurred and are reasonable in amount.”

However, the learned judge continued (at para. [22]) that *“those who tax costs in Guernsey proceedings should be careful not to allow fees of external lawyers at rates higher than those permitted for Guernsey Advocates and their employees, except in the relatively rare cases where this can clearly be seen to be reasonable”*. The general guidance given was that *“the public interest of Guernsey requires that in the majority of cases only the fees and disbursements of Guernsey Advocates’ firms should be allowed”* (para. [21]) and some examples of the relatively few cases in which the fees and disbursements of external lawyers might be allowed were set out in para. [22].

60. Advocate Ferbrache accepted that the schedule of costs already incurred by the English solicitors gave hourly rates for qualified solicitors in excess of those that would be recoverable in respect of a Guernsey Advocate (and so also a solicitor in the employment of a firm of Guernsey Advocates). Consequently, when considering what amount, if any, to allow in respect of the fees of the English solicitors, he accepted that there should be a reduction in the amounts set out in the schedule covering the £562,874.20 to reflect what could potentially be claimed in the light of the Ladbroke case approach.
61. Advocate Lund subjected section B of the schedule to the security for costs application to detailed analysis, suggesting that Mourant Ozannes were deploying multiple Advocates on the same aspect of the proceedings. In response, Advocate Ferbrache explained that each of the Advocates involved have slightly different roles to play, depending on their areas of expertise. I accept that team-working is part and parcel of modern legal practice. However, I am also conscious of the need for a costs judge to be alive to the possibility that some of the work for which a client is billed (and in respect of which recoverable costs are sought) will be duplication and so not recoverable from a paying party if those costs are subjected to detailed taxation. The best I can do in these circumstances is to take a reasonably broad brush approach to the costs as set out in the schedule prepared by the Sixth to Eighth Defendants.
62. In relation to the future estimated costs of Mourant Ozannes, Advocate Lund suggested that various items should be disregarded as effectively involving the luxury of duplication or alternatively that the number of hours being estimated was simply too high in respect of certain elements of the proceedings. It is fair to say that the estimated aggregate time to be spent by Advocate Williams is 1673 hours and, when coupled with the 942 hours estimated for Advocate Ferbrache and the 310 hours estimated for Advocate Robilliard, looks on the high side. There is also an item described as *“Miscellaneous including attendance, photocopying, telephone calls, correspondence, factual and legal research, conferences and advices”* in respect of which 1000 hours of Advocates’ time has been allocated and for which the total estimated recoverable costs,

including trainee and paralegal time, comes to £259,000. Given the other detailed items, as a form of contingency amount, this also looks to me to be a high estimate.

63. At the conclusion of Advocate Lund's analysis, the upshot was that she suggested the estimate should be reduced by some £294,900. In round terms, she was not objecting to approximately £390,000 of the estimated future costs of Mourant Ozannes. Accordingly, I take the view that this is the lowest level at which this part of the overall amount for which security is being sought can be put and so I consider it clearly just to err on the side of caution and rely on Advocate Lund's concessions here. I therefore propose to use the amount of £390,000 as the basis for assessing the amount of security for costs for this element of the overall order.
64. Turning to the costs already incurred in respect of the fees payable to the English solicitors, I note that in excess of 2,000 hours of time has been billed. The largest single item is in respect of proofing witnesses and preparation of witness statements and responding to requests for information, where 621.05 hours are recorded. The second largest item relates to what is described as "*review and marshalling of documentary evidence, preparation of chronological, witness and issue bundles*". I offer these simply as examples of what is set out to show that the work undertaken by the English solicitors has been extensive, but there is no evidence that it has all been undertaken at the direction of Mourant Ozannes for use in the proceedings in which the Sixth to Eighth Defendants are now engaged. That will be one of the factors to bear in mind in due course if the question of what can legitimately be recovered is raised. At this stage, I am going to approach the amount of time recorded with some caution.
65. I doubt whether every hour recorded in the part of the schedule of costs incurred dealing with fees for the English solicitors will be recoverable in the event that any costs awarded to the Sixth to Eighth Defendants fall to be taxed. When contrasted with the hours recorded by Mourant Ozannes, which aggregate to just under 750 hours, apparently over the same period, it strikes me that some of the work undertaken by the English solicitors will fall the wrong side of the line. The question is what allowance, if any, to make in respect of those costs.
66. I accept the submission made by Advocate Ferbrache that an element of the work undertaken by the English solicitors is work that would have been undertaken, on a recoverable basis, by personnel at his firm had the English solicitors not acted, effectively as Mourant Ozannes' agents. I do not have the material before me to do anything other than apply a very rough and general discount to what is set out in the schedule. Rather than allow in excess of 2,000 hours of professional time, I am going to reduce it quite significantly and regard the involvement of the English solicitors broadly in line with the involvement of the partners and staff at Mourant Ozannes. Accordingly, for present purposes, I am going to use 700 hours of time and, because I do not know what level to pitch that time at, I propose to split it evenly between the equivalent of an Advocate and the equivalent of a lawyer who is not an Advocate. Using the recoverable rates referred to in section A of the schedule attached to the security for costs application, this would result in a composite rate for the 700 hours of £200 per hour or a total amount of £140,000. I have not added in anything on top in respect of Value Added Tax, regarding the total amount as potentially inclusive of all expenses to be paid to the English solicitors for services rendered to a firm of Guernsey Advocates.
67. The time recorded in respect of costs incurred at recoverable rates for work already undertaken by Mourant Ozannes is put at £155,770. Although Advocate Lund did not subject these amounts to the same rigour as she did estimated future costs, in case there has been some element of duplication of work between the Advocates involved, I propose to subject this amount to a smaller discount to reflect that possibility. Again, without more detail as to what work has been carried out by whom, all I can do is apply an inexact discount and, for present purposes, I will allow £125,000 in respect of the costs already incurred.
68. The estimate of the costs of utilising the English solicitors in the future is put at £350,000. There is no clear indication of what work the English solicitors would carry out and how that

inter-relates to the work for which an estimated amount has been included in respect of the personnel at Mourant Ozannes. In those circumstances, I am minded to do no more than to make a small, notional allowance, for any future work to be carried out by the English solicitors. If the reality proves to be different from my current perception, this aspect can always be re-visited. I am prepared to allow just £50,000 in respect of such work to be undertaken by the English solicitors.

69. The final elements of the schedule relating to costs are with respect to actual disbursements. I note that £5,445.20 is recorded as having already been expended. I suspect that the same amount again, and possibly a little more, is quite feasible in proceedings of this kind. However, I think that the estimate of £20,000 may well be on the high side. Accepting that there are some areas where the discount I have applied may be regarded as harsh, on this occasion I propose to be slightly more generous in my approach. In an attempt to keep the amounts in round figures, I think that a total amount of £15,000 is an appropriate amount to allow, thereby covering what was spent up to February 2012 and offering a little leeway going forward.
70. The consequence of my analysis of the costs set out in the schedule to the application is that, in my judgment, it is appropriate to order that the total amount of security for costs that should be paid by the Plaintiffs is £720,000.

Payment in tranches

71. In the light of the guidance offered in para. 25.12.8 of the CPR that “*If the amount of security is large, payment may be staged over two or more specified dates so as to give the respondent time to raise the security in an orderly fashion*”, I invited Advocate Lund to make submissions in relation to the phasing of any order. She suggested that the costs incurred and estimated to be incurred could be separated into five tranches: (a) up to the end of pleadings; (b) discovery and preparation for, and dealing with, any interlocutory applications; (c) taking witness statements and the preparation of any expert evidence; (d) preparation; and (e) trial.
72. I take the view that splitting the amount that I am ordering to be paid into five tranches over-complicates matters. There should be an amount to be paid within a short period of time reflecting the costs incurred up to the making of the application and the earlier stages of the future costs. There should then be a second tranche to be paid by way of security in respect of the next pre-trial stage. Finally, there should be a tranche to be paid reflecting the balance of the £720,000 I have found should be provided by way of security to cover the trial and final preparation for it.
73. Given the analysis I have undertaken, the costs already incurred for which I have made allowances are the fees of Mourant Ozannes at £125,000, the reduced amount of £140,000 in relation to work undertaken by the English solicitors and the disbursements, which I will round down to £5,000 for ease of arithmetic. In very rough terms, the amounts set out in the schedule by Mourant Ozannes for work up to the time of close of pleadings, disregarding the aspects that Advocate Lund has persuaded me should be disregarded, could result in an amount in the region of £45,000. Accordingly, the first tranche will be fixed at £315,000.
74. Working from the opposite end, the final tranche relating to the preparation for trial and the hearing itself, again disregarding the elements that Advocate Lund suggested should properly be ignored, comes to approximately £140,000. The general item to which I have referred as the contingency amount was accepted by Advocate Lund at £150,000. In the absence of any more detailed guidance, I propose simply to split that amount equally between the second and third tranches. I also propose to split the balance of the disbursements between the tranches. In relation to the involvement of the English solicitors, it appears to me that they should be involved in the pre-trial phases rather than in the trial itself, so I will allocate the whole of the amount I am allowing for their work to the second tranche.

75. My conclusion, therefore, is that the third tranche to be paid, reflecting the costs estimated to be incurred in the final stages of the action where preparation for the hearing is being undertaken, will be £220,000. The second tranche, therefore, will be the balance, including the allowance of £50,000 in respect of work undertaken during these stages by the English solicitors, namely £185,000.
76. As regards the timing of the payments, I see no reason why the first payment of £315,000 should not be required within 14 days of this judgment. The payment of the second tranche will be required at or around the close of pleadings. By virtue of rule 39 of the Royal Court Civil Rules, 2007, the Plaintiffs will be required to apply for a date for a case management conference within 14 days of the inscription of the action on the Rôle des Causes en Preuve. The second payment by way of security must be provided by the Plaintiffs no later than the date on which they apply for a date to be set for a case management conference. The third and final tranche will have to be paid close to the date fixed for the trial. I am conscious that this should not be too early, in case the trial date is then vacated before the preparation properly gets underway, but equally it should not be so close to the trial that it becomes meaningless. On balance, therefore, I will order that the third tranche should be paid no later than 35 days before the date fixed for trial.

Additional aspects of application

77. Having decided that an order for security for costs, with payments being required at the times I have indicated, I also need to consider the other paragraphs of the Sixth to Eighth Defendants' application.
78. I am prepared to order that the Plaintiffs' proceedings as against the Sixth to Eighth Defendants should be stayed pending the payment of the first tranche of security for costs I am ordering. Similarly, in relation to the second and third tranches, if either is not paid by the time specified, the action will then be stayed until payment is made.
79. Turning to the application for an "unless" order, I have taken note of the guidance offered in para. 25.12.8 of the CPR:

"An order to raise a large sum of money should not be made subject to the 'unless' sanction until the claimant has been given a real opportunity to find the money."

In my judgment, it is premature at this stage to make the order sought by the Sixth to Eighth Defendants to dismiss the Plaintiffs' action as against them in the event that the first (or any subsequent) tranche remains unpaid within 14 days of my order (or a relevant date for payment). I consider that it will be better to leave the Plaintiffs with the ongoing obligation to make payment of the security ordered, with the proceedings stayed in the meantime, and to leave the Sixth to Eighth Defendants to make an appropriate application to dismiss the proceedings when they feel it is the right time to do so. Given the amounts involved, I do not at this stage regard it as just to make dismissal of the action automatic.

Conclusions

80. For the reasons I have explained, the Plaintiffs have brought these proceedings to benefit the trusts of which they are beneficiaries and not for their direct personal benefit. They are, therefore, nominal claimants. Having regard to the evidence about their finances, I am satisfied that, if the Sixth to Eighth Defendants were successfully to defend the Plaintiffs' action and be awarded costs, the Plaintiffs would be unable to pay those costs. Accordingly, having regard to all the material before me and because it is just to do so, this is an appropriate case in which to consider exercising my discretion to make an order for security for costs.

81. Although the Plaintiffs are in England and enforcement against them in that jurisdiction could be attempted to be effected there, in my view the justice of the case calls for a substantial amount to be paid by way of security for costs. The Plaintiffs stressed that they were not arguing that impecuniosity means that an order to pay a substantial amount would stifle their claim. In order to put all the parties to this action on an equal footing, the Sixth to Eighth Defendants deserve the comfort of an order for security for costs.
82. The amounts to be paid by way of security can sensibly be staged into three distinct phases. Those phases are up to the close of pleadings, ongoing interlocutory stages (including disclosure and inspection), and finally preparation for and participation in the hearing. The majority of the costs to be covered by such an order should reflect the fees for the work undertaken by Mourant Ozannes but smaller amounts can be allowed in respect of work usefully undertaken on behalf of Mourant Ozannes by a firm of English solicitors used for such purposes. If the security ordered is not paid by the dates I have fixed, the Plaintiffs' proceedings against the Sixth to Eighth Defendants will be stayed until payment is made, but I do not consider that it would be just to order the dismissal of the action in the event of non-payment by way of an "unless" order.
83. I will, therefore, grant the application for security for costs and order that £315,000 be paid within 14 days of this judgment, followed by a further payment of £185,000 by no later than the date on which the Plaintiffs are required to apply for a date to be set for a case management conference and then followed by a final payment of £220,000 no later than 35 days before the date fixed for trial. In case there is any need to do so, the parties will have liberty to apply on 48 hours' notice.

Costs

84. I will, of course, entertain any submissions the parties wish to make on the question of costs if they are submitted in writing within 14 days. Alternatively, the matter can be re-listed for oral submissions at a mutually convenient interlocutory Court. However, I can give an indication on the basis of what I have already heard and the decision I have taken that I would be minded to order that the costs be in the cause and, in default of any submissions being forthcoming, that is the order I propose to make.