(1) Prinespo Foundation; (2) Zolla Holdings Limited And Desside Holdings Limited
Royal Court
15th January, 2014

JUDGMENT 04/2014

Defendant's Application for security for costs.

Approved Text
15.01.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **(1) PRINESPO FOUNDATION**

(2) ZOLLA HOLDINGS LIMITED **Plaintiffs**

-and-

DESSIDE HOLDINGS LIMITED **Defendant**

Defendant's application for security for costs

Date of hearing: 22nd October 2013

Judgment handed down: 15th January 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Defendant: Advocate R G Shepherd
Counsel for the Plaintiffs: Advocate A M Ozanne

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
The Civil Procedures Rules 1998
Somerset-Leeke v Kay Trustees [2003] EWHC 1243 (Ch)
Texuna International Limited v Cairn Energy plc [2004] EWHC 1102 (Com)
Mitco Realty Limited v Devlica Deutschland Limited (unreported, 11 April 2011)
Phaestos Ltd v Ho [2012] EWHC 662 (TTC)
Jefcoate v Spread Trustee Company Ltd (unreported, 13 August 2012)

Leyvand v Barasch (unreported, 15 February 2000)
R v Inland Revenue Commissioners, ex parte T C Coombs & Co [1991] 2 AC 283
Arkus v Balchan Management Limited (unreported, 14 October 2010)
Nasser v United Bank of Kuwait [2002] 1 WLR 1868

Introduction

1. By a Cause tabled on 10 May 2013, the Plaintiffs seek the rectification of a document entitled "Loan and Guarantee Agreement" dated 31 January 2012 made between the Second Plaintiff as Borrower, the Defendant as Lender and the First Plaintiff as Guarantor, which is expressed to be governed by, and to be construed in accordance with, the laws of Guernsey. The proceedings are fully defended. The First Plaintiff is a Liechtenstein foundation and the Second Plaintiff and the Defendant are companies registered in the British Virgin Islands.

2. On 8 August 2013, the Defendant applied for security for costs against both Plaintiffs. The application was supported by an Affidavit of the same date sworn by Sally French. By an amended application dated 15 October 2013, security for costs is now sought only as against the First Plaintiff. This change of position arises from the fact that the court in the British Virgin Islands placed the Second Plaintiff in liquidation on 23 September 2013. The amount of security sought has increased from £33,736.60 to £60,815.60. On behalf of the Defendant, Advocate Shepherd explained that the increased amount reflects certain developments since the time the application was initially made, such as the Second Plaintiff being placed in liquidation and the passage of time enabling a better estimate to be made. The amount sought is made up of costs of £28,085.60 incurred at the standard recoverable rate up to 14 October 2013 and the ongoing recoverable costs envisaged up to the conclusion of applications from both sides made with a view to summarily ending these proceedings. The application for security for costs has been opposed on behalf of the First Plaintiff, for whom Advocate Alison Ozanne appeared. The evidence in opposition is contained in an Affidavit of Gregory Tee sworn on 6 September 2013.

3. During the course of the hearing on 22 October 2013, Advocate Ozanne referred to the possibility that adequate security already exists because the First Plaintiff holds shares in HHA Aviation Holdings AG (hereafter referred to as "HHA") to a nominal value of €9,000 and has provided a Stock Pledge Agreement dated 31 January 2012 in favour of the Defendant. Reference to this security agreement was made in paragraph 6.1 of the Cause and a copy of it appended to that pleading. This was an asset that had not been mentioned in Mr Tee's Affidavit and was not something on which Advocate Shepherd had instructions so as to enable him to respond immediately. I therefore gave Advocate Shepherd the opportunity to lodge any material the Defendant wished dealing with this question and for Advocate Ozanne to have the opportunity to respond. Both parties were asked to indicate whether they wished the Court to re-convene to hear further oral submissions.

4. Advocate Shepherd lodged an Affidavit of Michael Underdown sworn on 1 November 2013 and a short Supplemental Skeleton Argument of the same date. In response, an Affidavit of Anton Wyss sworn on 18 November 2013 has been lodged on behalf of the First Plaintiff. Neither party wished to make any further oral submissions, so I have proceeded to consider all the material placed before me and the submissions made on 22 October 2013 before giving this reserved decision.

Form of application

5. Applications for security for costs are made pursuant to rule 82 of the Royal Court Civil Rules, 2007, which 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.*"

This rule does not prescribe any particular requirements about how an application should be made or presented. This Court follows the guidance contained in Part 25 of the Civil Procedures Rules 1998 (hereafter referred to as "the CPR") applying in England and Wales but that regime is not binding on the Court or the parties. As such, whatever the CPR prescribe, for example in rule 25.12, does not have to be followed slavishly, although it would always be good practice to ensure that the Court has before it the material of a similar kind to what might be expected in an English court.

6. Because this Court has not been prescriptive about what is to be included in the body of an application for security for costs, I reject Advocate Ozanne's submission that the Defendant's application is defective in material respects, in particular for failing to set out the grounds. The omission of the face of the application to specify which conditions derived from the CPR are being relied on does not, as suggested, go "*to the heart of the jurisdiction of the Court*". I take the view that the application meets the requirements of the 2007 Rules. In any event, Advocate Ozanne's criticism of the application fails to recognise that the bases on which the application was being made were sufficiently clear in the affidavit evidence in support and the inter-Advocate correspondence preceding it. By way of example, there was simply no suggestion that the Defendant was arguing that the First Plaintiff is a nominal plaintiff, meaning that condition (f) was not in issue. What has occurred has, in my view, been sufficient to meet what was highlighted 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.*"

7. The parties were largely agreed about the approach the Court should follow, namely having regard to the conditions set out in rule 25.13 of the CPR, one of which has to be established before the court can consider whether to exercise its discretion to grant the application for security. For present purposes, the relevant elements of rule 25.13 are:

> "*(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) (i) one or more of the conditions in paragraph (2) applies …*
>
> *(2) The conditions are–*
>
> *(a) the claimant is–*

> *(i) resident outside of the jurisdiction; but*
>
> *(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982; …*
>
> *(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and where there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*".

8. Before turning to each of those grounds, I can preface my comments by indicating that I accept Advocate Ozanne's submission that the burden of establishing that an order for security for costs to be provided rests on the applicant for such an order (see, eg, *Texuna International Limited v Cairn Energy plc* [2004] EWHC 1102 (Com)). I have also reminded myself, as urged upon me by Advocate Shepherd, of what is set out in para. 25.12.2 of the commentary to the CPR:

> "*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.*"

On the basis that the two conditions raised on behalf of the Defendant constitute gateways, thereafter enabling the Court to consider whether security for costs should be ordered and, if so, in what amount, I will deal with condition (c) first.

Condition (c)

9. The First Plaintiff is a Liechtenstein foundation. Although no direct evidence has been given about the precise status a foundation has under the law of Liechtenstein, I am satisfied that it has a distinct legal personality and so is brought in principle within this condition. Paragraph 1 of the Cause pleads that the First Plaintiff is "*a foundation registered in Liechtenstein under number FL-002.176.729-2*" and that the foundation "*holds the entire issued share capital of the Second Plaintiff*". The Stock Pledge Agreement of 31 January 2012 refers to the foundation as if it were an entity in its own right. A Guernsey foundation, which I understand to be modelled on foundations elsewhere, including those registered in Liechtenstein, will have legal personality distinct from its founder. In my view, everything points towards a foundation being a body of the type referred to in condition (c). Whilst it would have been preferable for direct evidence to have been adduced so as to avoid any alternative suggestion, as has been advanced on behalf of the First Plaintiff, that this aspect of the gateway has not even been established, I conclude that the evidential threshold has been passed in much the same way as if the party were obviously a different corporate entity. The central question, therefore, is whether "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*".

10. In that regard, Advocate Shepherd has drawn attention to the way this element is approached in English law, which was accepted by Deputy Bailiff Collas (as he then was) in *Mitco Realty Limited v Devlica Deutschland Limited* (unreported, 11 April 2011), in which reference was made to the commentary in what is now para. 25.13.12 in *The White Book*:

> "*An applicant for security for costs relying on Condition (c) must show that the company would not (as opposed to may not) be able to meet its debts when an Order for Costs was made against it. This question has to be answered at the time of the*

application although the Court can take into account evidence of what is to be expected in the future before any Order would be made. Unisoft Group (No. 2), Re [1993] B.C.L.C. 532, construing similar words in s.726(1) of the Companies Act 1985. A company with assets with a value exceeding its debts will nevertheless be unable to meet its debts if those assets are illiquid. Thus, a net asset balance is not determinative of the question whether a company can pay a costs liability when it falls due. That issue involved consideration of the nature and liquidity of the assets (Thistle Hotels Ltd v Gamma Four Ltd [2004] EWHC 322, (Ch); Longstaff International Ltd v Baker & McKenzie [2004] EWHC 1852; [2004] 1 W.L.R. 2917, (Ch)).

In order to establish ground (c) the applicant must show "there is reason to believe that it [i.e. the claimant company] will be unable to pay the defendant's costs if ordered to do so". The opening words "there is reason to believe" have the effect of watering down the obligation which follows, i.e., the obligation to prove the company's inability to pay costs if ordered to do so. The defendant does not have to show on a balance of probabilities that the claimant company "will be unable to pay" etc: the defendant may well be able to show that there is reason to believe that the company will not be able to pay even if the company can adduce substantial evidence to the contrary (see generally Jirehouse Capital v Beller [2008] EWCA Civ 908; [2009] 1 W.L.R. 751)."

11. The position summarised para. 71 in *Phaestos Ltd v Ho* [2012] EWHC 662 (TTC), to which I referred in *Jefcoate v Spread Trustee Company Ltd* (unreported, 13 August 2012), sets out the relevant considerations in similar fashion:

"*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*'."

12. It is the final element of that summary of the principles on which Advocate Shepherd relies. In response, Advocate Ozanne has argued that the Defendant has failed to adduce any evidence to satisfy the burden placed on it. In doing so, she has referred to paragraph 6 of the judgment of Lightman J in *Leyvand v Barasch* (unreported, 15 February 2000):

> "*Security cannot now be ordered as a matter of course from a foreign claimant: to avoid the making of such 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 not [sic] longer of any relevance or assistance: they are a distraction and should not [sic] longer be cited. The common sense principle applies that the existence of assets within the jurisdiction, their fixity and performance, are among a number of potentially relevant factors, their importance depending on the particular facts of the case. The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid there being available to satisfy a judgment for costs unless there is reason to question the probity of the claimant: there is no such reason in this case. If there is reason to question the claimant's probity, the character of his property within the jurisdiction is relevant in assessing the risk: the risk may be greater if the property is cash or immediately realisable or transportable, and less if fixed and permanent.*"

13. The evidence in support of the application is brief, but it does not question the probity of the First Plaintiff. The Affidavit of Ms French recites that "*there are no publically available documents regarding the First Plaintiff's financial position*" and, aside from the pleaded shareholding in the Second Plaintiff, "*the Defendant has no information regarding the current assets of the First Plaintiff. No information regarding how the First Plaintiff intends to fund this litigation has been provided*". That Affidavit also exhibited the inter-parties correspondence, during the course of which clarification was sought about this last point, to which no satisfactory answer was received. However, by letter dated 19 June 2013, the First Plaintiff's Advocates sought information from the Defendant's Advocates about the basis on which security for costs would be sought, together with an estimate of the costs incurred and to be incurred in respect of the various stages of the proceedings. That letter expressly preserved the First Plaintiff's position in relation to providing security. The estimates sought were provided under cover of a letter dated 26 July 2013, which also enclosed a draft of the application and affidavit in support. The First Plaintiff's Advocates' response dated 1 August 2013 still failed to provide the clarification sought on behalf of the Defendant and chose to raise the points repeated by Advocate Ozanne at the hearing about the form of the application, to which I have already referred.

14. The approach taken on behalf of the First Plaintiff (and also at that time on behalf of the Second Plaintiff) was not, in my view, helpful. Where a party seeks clarification on a question, the other party should provide it. That is one of the elements of assisting the Court to deal with cases justly. Where a party declines to respond to what is a reasonable request from the other party seeking clarification to assist it in deciding whether or not there is merit in making an application to the Court for some interlocutory remedy, the Court will consider whether that is a legitimate stance to adopt or whether it appears to be unnecessarily obstructive. In this instance, I regard the stance taken on behalf of the First Plaintiff as unnecessarily obstructive because it could have addressed its mind to the clarification sought and potentially avoided the need for a contested application or to have narrowed its ambit. What I stated at paragraph 15 of the *Jefcoate* case (*supra*) is potentially equally applicable in the present case:

> "*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.*"

15. In relation to the drawing of adverse inferences, Advocate Ozanne has referred to the general principle stated in ***R v Inland Revenue Commissioners, ex parte T C Coombs & Co*** [1991] 2 AC 283 (at page 300):

> "*In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case, But, if a silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.*"

In doing so, she submitted that the Defendant had failed to adduce any, or any sufficient, evidence even calling for an explanation from the First Plaintiff or that the First Plaintiff's silence has been credibly explained.

16. I am satisfied that the principles summarised in ***Phaestos Ltd v Ho*** (*supra*), which post-date this comment of Lord Lowry's, mean that the Defendant can properly invite this Court to draw inferences adverse to the First Plaintiff, if the evidence adduced so permits. The explanation advanced justifying the First Plaintiff's silence is largely premised on the form of the application for security for costs being flawed, which is an argument that I have rejected. Accordingly, provided that the Defendant has surmounted the hurdle of adducing adequate evidence legitimately questioning the financial position of the First Plaintiff, I then need to consider whether the response has been satisfactory or whether, due to the unsatisfactory information provided, I am able to conclude that there is the requisite "*reason to believe*".

17. The evidence that has actually been given about the assets of the First Plaintiff largely relies on what was pleaded on its behalf. This establishes that the First Plaintiff holds all the shares in the Second Plaintiff. It is understandable that the Defendant argues that it cannot value those shares and relies on the First Plaintiff to do so. The evidence given in Mr Tee's Affidavit singularly fails to put any value on that shareholding. Indeed, that Affidavit contains much material that it is quite inappropriate to include in an affidavit. Affidavit evidence should only contain the facts that are material to the application to which that evidence relates. Those facts should be the evidence that the deponent would be able to give to the Court in examination-in-chief. There is, in my view, no need for the deponent to rehearse any legal arguments. That is the task of Counsel, whether in a Skeleton Argument or orally, and it is not the place of a factual witness to purport to do this in the body of his or her evidence.

18. The other asset mentioned in the pleadings, and developed more fully during the course of the hearing, is the First Plaintiff's shareholding in HHA. In Mr Underdown's Affidavit, he has attempted to set out the financial position of HHA from the materials available to him, exhibiting a rough translation of its interim financial statements as at 31 October 2012, readily accepting that it is not authoritative. HHA is the sole shareholder of HHA Hamburg Airways Luftfahrtgesellschaft mhH, the income statement of which shows losses from the beginning of 2012 to August 2013 exceeding €16.5 million and assets of only just over half of its liabilities. As a result, Mr Underdown questions whether HHA's shareholding has the value of €3 million attributed to it in HHA's financial statements. In any event, those financial statements

appear to show that assets and liabilities are equally matched, meaning that there is no residual value on which the First Plaintiff can rely enabling it to meet any adverse costs order arising from these proceedings.

19. As Mr Underdown further notes, the shareholding has already been pledged as security for the €7 million loan and so the first use to which those shares would be put would not be as a means of satisfying any such adverse costs order. Paragraph 3 of the Stock Pledge Agreement of 31 January 2012 provides:

> "*The Pledge shall secure all present and future obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) held by the Pledgee against Zolla Ltd. arising under or in connection with the Loan Agreement, together with all costs, charges and expenses incurred by the Pledgee in connection with the protection, preservation or enforcement of its respective rights under this Agreement and the Loan Agreement on a full indemnity basis (the* ***"Secured Liabilities"****). The Secured Liabilities shall furthermore include any claims based on unjust enrichment (ungerechtfertigte Bereicherung) or tort (Delikt) including any claims arising from the insolvency administrator's discretion to perform obligations in agreements according to Section 103 Insolvency Code (Insolvenzordnung).*"

This wording does not appear to extend to cover the costs associated with the First Plaintiff's action for rectification.

20. The evidence in response is contained in the Affidavit of Mr Wyss. He is highly critical of the approach taken on behalf of the Defendant by Mr Underdown, commenting at paragraph 17 that "*From the financial statements disclosed it is simply not possible to provide a definitive valuation regarding Prinespo's shares in HHA*". That may be so but, given that Mr Wyss has confirmed that he is a board member of the First Plaintiff and has been a professional adviser to foundations and trusts for nearly two decades, he has failed to offer any alternative material from which to gain a more accurate picture. At paragraph 14 of his Affidavit he states that "*The financial statements as of 31 December 2012 ought to be available and include the necessary notes*". It is unsatisfactory for him to raise the possibility of the Court being better assisted and not take steps to provide that assistance when I imagine he is in a better position to access that information than Mr Underdown is. I accept what he has to say about it not being the duty of the First Plaintiff as a minority shareholder to maintain HHA's financial statements, but I am unimpressed by his lack of cooperation in at least seeking to obtain up-to-date information to place before the Court.

21. In relation to the solvency or otherwise of HHA, even if I can draw an inference that HHA is solvent because it might be an offence under German law for it to continue trading when insolvent, Mr Wyss does not even offer any suggestion as to what valuation the First Plaintiff currently puts on its shareholding and how that is affected by the terms of the Stock Pledge Agreement. In those circumstances, I feel able to drawn an inference that any information that could be supplied on behalf of the First Plaintiff would not show that there is sufficient value or liquidity in those shares enabling it to pay any adverse costs order from this source.

22. Turning to the First Plaintiff's shareholding in the Second Plaintiff, all that Mr Wyss says in his evidence is that he understands that the liquidation process in the British Virgin Islands in which the Second Plaintiff is currently engaged will result in further liquid assets being held by the Second Plaintiff. What he does not explain is whether the First Plaintiff expects to receive any return on its investment and, if so, in what amount. In those circumstances, the Defendant has identified an asset and suggested that it has little or no value and the First Plaintiff has not assisted by ascribing any particular value to it.

23. In Advocate Ozanne's submissions and in the Affidavit of Mr Wyss, the fact that the Defendant accepted on 31 January 2012 that the First Plaintiff's shareholding offered sufficient security for a loan of €7 million has been relied on as indicating that the First Plaintiff will be in a position to satisfy any adverse costs order. There is, of course, a difference between a person's assessment of adequacy on a given date and the position nearly two years later. The balance sheet of HHA Hamburg Airways Luftfahrtgesellschaft mhH gives the impression that the shareholding is unlikely to be worth its nominal value, which puts in question whether the security given in respect of the loan continues to be adequate. Although the picture of difficult trading conditions in the aviation industry relates to the entity held by HHA, there has been no suggestion that HHA has any other assets, meaning that the First Plaintiff's assets are indirectly reflected in the underlying value of HHA Hamburg Airways Luftfahrtgesellschaft mhH. Accordingly, I do not accept, as suggested in the final paragraph of the Affidavit of Mr Wyss, that the First Plaintiff "*is unaware that the position has changed since 31 January 2012*" because the outline financial information exhibited to Mr Underdown's Affidavit suggests differently. Mr Wyss may question the weight that should be placed on that information but, in the absence of anything different adduced on behalf of the First Plaintiff, it is the best material before the Court from which to reach conclusions.

24. Having regard to the approach summarised in *Phaestos Ltd v Ho* (*supra*), I take the view that the Defendant has just managed to pass the evidential threshold of setting out its view on the assets to which the First Plaintiff might have recourse to satisfy any adverse costs order. Once it passes that threshold, the First Plaintiff is left with a choice as to whether to explain its financial position as fully as it can or to leave open the possibility that adverse inferences will be drawn from its failure to do so. It is clear that the approach of the First Plaintiff has been to keep whatever financial information it has, or could have obtained, to itself and rely instead on the historical position. However, the purpose of security for costs is not backwards looking but forwards looking, as made clear from the passage in para. 25.12.2 of the commentary to the CPR. Accordingly, I have reached the conclusion that the Defendant has raised legitimate concerns about the financial position of the First Plaintiff and that the First Plaintiff has chosen to provide incomplete financial information to allay those concerns. This conclusion does not overlook the fact that the First Plaintiff does not have to prove it has the ability to pay as summarised at paragraph 71(iii) in *Phaestos v Ho*, but recognises that the Defendant's evidence amounted to more than mere doubt or concern where the First Plaintiff has its part to play in responding with satisfactory information about its financial position. Because I am satisfied that the First Plaintiff could have been more forthcoming than it has, I have concluded that there "*is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*". The Defendant has, therefore, satisfied me that this gateway has been opened, meaning that I can properly proceed to consider whether I am minded to exercise the Court's discretion to make an order for security for costs.

Condition (a)

25. In the light of my conclusion on condition (c), there is strictly no need for me to proceed to consider condition (a), but I will do so briefly in case it becomes relevant.

26. It is accepted that the First Plaintiff, being a Liechtenstein foundation, is resident outside jurisdiction. I approach the remainder of condition (a) as referring to whether or not reciprocal enforcement of judgments under an international law regime applicable to Guernsey exists. There has been no suggestion that a costs order of this Court would be capable of enforcement directly in Liechtenstein. Advocate Ozanne has, however, suggested that enforcement may be achieved by interposing the additional step of registering any judgment obtained by the Defendant in England as a first stage, with a view to then relying on enforcing that judgment in Liechtenstein under the relevant international law regime.

27. It is also accepted that simply being non-resident is no longer sufficient in itself to warrant making an order for security for costs. Instead, the approach adopted by this Court previously (see, eg, *Arkus v Balchan Management Limited* (unreported, 14 October 2010)) has been to have regard to the guidance in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 (at paragraphs 62 to 64):

> "*62. The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some – it may well be many – cases there are likely to be substantial obstacles to, or a substantial extra burden (eg, of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state. In so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as do exist abroad or (ii) as a practical matter, to make it more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad.*
>
> *63. It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of residence or wherever his or her assets may be. If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be unencumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).*
>
> *64. The courts may and should, however, take notice of obvious realities without formal evidence. There may be some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and 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.*"

28. Advocate Ozanne has criticised the Defendant's evidence for not addressing what the obstacles or extra burdens of enforcement are in its evidence and has referred to what Gross J (as he then was) said about this in *Texuna International Ltd v Cairn Energy plc* (*supra*). The approach described in para. 23 includes the comment at sub-para. (ix) that "*even if the court is minded to take a broad brush, common sense approach, it will be necessary for the applicant at least to show some evidential basis for the conclusion that there would be a realistic risk of additional obstacles or burdens in the way of enforcement in a country outside the zone*". However, that passage is preceded by the recognition that "*evidential requirements will*

necessarily depend on the facts of the individual case". Further, what Gross J was describing was the position where the only threshold condition satisfied for ordering security for costs is condition (a) (see sub-para. (iii)). In those circumstances, where the Defendant in the present case has relied on condition (c), which I have found has been satisfied, the position in relation to evidence directed specifically at condition (a) is that the "*obvious realities*" can have a larger part to play.

29. It is not suggested on behalf of the Defendant that enforcement in Liechtenstein will effectively be impossible as a matter of procedure. As was conceded by Advocate Ozanne and so is obvious, there is no direct route to enforcement in that country meaning that there is some additional burden, in time and/or costs, before any judgment in the Defendant's favour will be capable of enforcement. If this were the condition being relied on, Advocate Ozanne has submitted that the quantum of any order for security for costs should reflect the small amount of additional expense entailed in registering a Guernsey judgment in England. It is the extent of those extra burdens on which the evidence is missing but, in such a situation, as in the *Arkus* case (*supra*), a common sense outcome is permissible. Accordingly, although it would have been preferable for the Defendant's evidence to address these issues squarely, I am satisfied that condition (a) would also be met, meaning that there are dual gateways enabling the Court to consider whether to exercise its discretion in favour of ordering security for costs.

Conclusions

30. As noted in paragraph 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 the comment in the *Arkus* case (*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) before reaching an outcome that is just.

31. The First Plaintiff has not suggested that its claim for rectification will be stifled if the Court orders security for costs. Accordingly, this does not appear to me to be an application brought oppressively with a view to the Defendant extricating itself from the proceedings. Further, the application has been made at an early stage of the proceedings.

32. From the pleadings, this appears to be a case that will turn on whether the Court accepts that there was an oral agreement in the terms asserted on behalf of the First Plaintiff, which will also involve considering the capacity of the persons attending the meeting at which it is alleged that oral agreement was concluded, and whether it is appropriate to rectify the written agreement because it fails to reflect those terms. I cannot, therefore take any view as to whether the First Plaintiff has reasonable prospects of succeeding.

33. Because the parties to the agreement subject to the First Plaintiff's rectification application chose to have it governed by the laws of Guernsey, I can treat the First Plaintiff as having chosen to litigate this dispute before this Court. In taking the steps of seeking rectification, I consider that the First Plaintiff, having no other connection to Guernsey, must have contemplated that some form of security for its costs would be sought by the Defendant. As I have indicated, the gateways advanced by the Defendant have both, in my judgment, been satisfied and the only remaining questions are whether I should exercise my discretion to award security for costs and, if so, in what amount and on what terms. For the reasons given, the First Plaintiff has placed undue reliance on technical pleadings points, which I have

rejected, and appears to have misunderstood how the evidential burden operated once the Defendant had sought clarification about how the First Plaintiff was funding these proceedings, receiving no satisfactory response. Accordingly, I see no reason why I should not afford the Defendant the protection it seeks by making an order that the First Plaintiff provide security for costs.

34. Had condition (a) been the only gateway established, I would have assessed the amount of security at £5,000, being a broad brush figure for the additional burdens of off-Island enforcement. However, because I have found that the financial evidence, including the unwillingness of the First Plaintiff to provide assistance by explaining what assets it has and their value, gives rise to there being reason to believe that the First Plaintiff will be unable to pay the defendant's costs if ordered to do so, I will make an order in a larger amount, more accurately reflecting the level of costs that the Defendant might receive if successfully resisting the First Plaintiff's claim.

35. As regards quantum, however, I note that the estimated costs incurred by the Defendant up to 14 October 2013 is a global figure and so does not take into account that the proceedings were brought against it by two parties. Without in any way pre-judging what costs order might be forthcoming, in ordering security for costs, I do not take the view that it would be appropriate to order that full amount sought. Whilst recognising that the Defendant might ultimately be awarded more than half of those costs, at this stage of the proceedings I consider that the simplest solution is to divide the estimate in two and treat £14,000 (rounding it down a little) as the appropriate amount to reflect the costs incurred to the date of that estimate.

36. In relation to the estimate of future costs, I note that approximately £3,500 is attributable to addressing issues arising from the liquidation of the Second Plaintiff and the possibility of that Plaintiff withdrawing from the proceedings. It strikes me that the costs associated with that step might not be attributable to the First Plaintiff and so might fall outside any award of costs made. Accordingly, I am disregarding that amount in any event for the purposes of this application. Of the remainder of the estimated costs, I have compared the original estimate of the number of hours likely to be needed to conduct an application for the summary determination of these proceedings with the number of hours in the updated estimate and feel that a further small reduction in the amount of costs likely to be incurred is warranted, thereby reducing the amount from the £30,030 estimated to £26,000.

37. Adding those two amounts produces a total of £40,000 and that is the amount of the security for costs that will be ordered. Because this amount of security reflects costs previously incurred and costs to be incurred in respect of the next stage of the proceedings only, I will order that it be deposited in a single amount rather than in tranches. Further, the Defendant's application seeks an order that any security awarded should be deposited with the Greffe within 14 days of the order being made. Although the First Plaintiff did not suggest any different period, for the reason that follows, I will grant 21 days within which the security ordered must be deposited. In the meantime, pursuant to paragraph 2 of the application, the First Plaintiff's action will be stayed until the security is given.

38. Because the amount of security is not in a particularly large amount, I will also grant paragraph 3 of the application and order that, in default of security being given within the 21-day period, the First Plaintiff's action against the Defendant shall be dismissed with costs awarded to the Defendant on the standard recoverable basis, to be taxed if not agreed. It is because of these consequences of default that I have chosen of my own motion to provide an additional 7 days in which the security must be deposited. I regard it as more cost-effective for the parties to afford the First Plaintiff that additional week at this stage, but provide the certainty sought by the Defendant of setting out the consequences of failing to comply, rather than ordering the shorter period but leaving open the consequences or forcing the First Plaintiff to make any application to vary the order because the timescales involved are too

short for it to obtain the necessary funds. In my judgment, the slightly longer period offers a just outcome to both parties.

39. As regards the costs of this application, I will reserve them. If the First Plaintiff does not deposit the security ordered and its action is dismissed, the costs order made by reason of that default will cover these costs. If the security is deposited and the action proceeds to its next stage, arguments about costs can best be dealt with later in the proceedings because the Defendant's costs position is already protected.