Trust Corporation of the Channel Islands et al & East Forest Green Limited (in voluntary liquidation)
Royal Court
22nd January, 2014

JUDGMENT 05/2014

Defendants' applications for security for costs.

Approved Text
22.01.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

(1) TRUST CORPORATION OF THE CHANNEL ISLANDS
(2) DAVID VOGT AND PARTNER TRUST REG
(3) TWISTER MANAGEMENT SA
(4) TRISUNA MANAGEMENT SA **Plaintiffs**

-AND-

(1) EAST FOREST GREEN LIMITED (previously known as EFGCI TRUST COMPANY LIMITED) (IN VOLUNTARY LIQUIDATION)
(2) NERINE TRUST COMPANY LIMITED
(3) KEITH BADEN CORBIN
(4) NEAL MAUGER DUQUEMIN
(5) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED **Defendants**

Defendants' applications for security for costs

Date of hearing: 28th November 2013

Judgment handed down: 22nd January 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the First and Fifth Defendants: **Advocate C H Edwards**
Counsel for the Second to Fourth Defendants: **Advocate M C Newman**
Counsel for the Plaintiffs: **Advocate A M Ozanne**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
Prinespo Foundation v Desside Holdings Limited (unreported, 15 January 2014)
The Civil Procedures Rules 1998

Somerset-Leeke v Kay Trustees [2003] EWHC 1243 (Ch)

Jefcoate v Spread Trustee Company Ltd (unreported, 13 August 2012)

Phaestos Ltd v Ho [2012] EWHC 662 (TTC)

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534

The Trusts (Guernsey) Law, 2007

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000

Nasser v United Bank of Kuwait [2002] 1 WLR 1868

Slazengers Limited v Seaspeed Ferries Ltd; The Seaspeed Dora [1987] 1 WLR 221

Introduction

1. The five Defendants in these proceedings seek orders for security for costs. By an application dated 22 August 2013, the First and Fifth Defendants, who were represented by Advocate Edwards, seek the deposit of £1,550,923 with Her Majesty's Greffier, which are the costs incurred and estimated to be incurred calculated on the indemnity basis and for all stages up to and including a trial estimated at 15 days. The application dated the same day on behalf of the Second to Fourth Defendants, for whom Advocate Newman appeared, seeks an order on a similar basis, but in this case the amount is £1,651,549.50. Both applications also seek orders that, if security is granted, the proceedings should be stayed pending it being deposited and that failure to comply with the requirement to deposit should result in the Plaintiffs' proceedings being dismissed. The Second to Fourth Defendants further seek an order that, upon such dismissal, costs be awarded on the indemnity basis. These applications have been opposed on behalf of the Plaintiffs, for whom Advocate Alison Ozanne appeared.

2. The evidence in support of the application on behalf of the First and Fifth Defendants is contained in an Affidavit sworn on 22 August 2013 by Stephen Watts, managing director of the Fifth Defendant, and a further Affidavit sworn by Michaela Ryan on 3 October 2013. The evidence in support of the application on behalf of the Second to Fourth Defendants is contained in two Affidavits sworn by the Third Defendant on 28 August and 3 October 2013 respectively. The evidence on behalf of the Plaintiffs is contained in an Affidavit sworn on 23 September 2013 by Michael Heyworth, who is a director of the First Plaintiff.

Background

3. The Plaintiffs' Cause was tabled on 15 February 2013. The action pleads breach of trust (amounting to gross negligence) and dishonest assistance and seeks restitution to the Settlement concerned of £7 million, together with appropriate declarations and accounts. Defences were tabled on 28 June 2013, with those of the First and Fifth Defendants containing a counterclaim. Further pleadings were filed on 25 October 2013. The case has not yet progressed to a case management conference. The First Defendant has also commenced third party proceedings against three of the beneficiaries of the Settlement.

4. The Settlement in question was established in late 1995. The Fifth Defendant was the sole trustee of that Settlement from 30 November 2003 to 30 March 2005, at which time it retired in favour of the First Defendant. After a period as sole trustee, the First Defendant was joined by the Second, Third and Fourth Plaintiffs as co-trustees. The First Defendant retired on 22 July 2010, at which time it was replaced as a trustee by the First Plaintiff. The Fifth Defendant also provided banking services at the relevant times to the company which is the legal owner of the assets of the Settlement. The Second Defendant managed the First Defendant in Guernsey from November 2004. The Third and Fourth Defendants were directors of the Second Defendant and undertook roles, including as directors, in respect of

the First Defendant. The allegations against the Defendants principally relate to advances made between March 2004 and November 2008 for the benefit of two of the three beneficiaries against whom the third party proceedings have been issued. The Defendants deny that they are liable as alleged or at all.

5. The pleadings span a considerable timeframe and are necessarily quite extensive. The *Exceptions de forme* raised have been answered and are being considered. However one looks at matters, this is a substantial piece of litigation, even if the amount of money involved does not run into many multiples of millions of pounds. It appears to be recognised by all parties that the claim is a complex one, making any assessment of the likelihood of the claim or the defences succeeding correspondingly harder. There is, however, one area of factual agreement and that is that the First Plaintiff is a Guernsey company and the Second to Fourth Plaintiffs are companies resident outside the jurisdiction.

6. The issue of providing security for the Defendants' costs was first raised on behalf of the First and Fifth Defendants in correspondence on 18 April 2013. Assurances were sought that there was a sufficient asset base to meet any adverse costs order or, in default of such an assurance, details of the funding arrangements for the Plaintiffs to support the proceedings. Details of the assets of the Settlement were also sought. These issues were raised on behalf of the Second to Fourth Defendants by way of a letter dated 24 April 2013.

7. The first response on behalf of the Plaintiffs was dated 30 April 2013 and sent to the Advocates for the Second to Fourth Defendants. At that time, it was conceded that the Plaintiffs fell into the category of "*nominal plaintiffs*", an issue to which I will return in due course, but focused on the question of whether there is reason to believe that the Plaintiffs will be unable to satisfy any adverse costs order. That letter included information that the Advocates had been "*instructed that our clients should be able to meet an order to pay your clients' costs in full without the need for any payment into Court, as it will have alternative means of meeting such an order*". Clarification as to what this meant was sought by a letter dated 20 May 2013 and also sought on behalf of the First to Fifth Defendants by letter dated 28 May 2013. The response on behalf of the Plaintiffs was given in two letters dated 22 July 2013. In the context of being nominal plaintiffs, that letter simply stated that the value of the assets of the Settlement exceeded the Defendants' estimated costs, which at that time aggregated to £2,650,000. In relation to the residences of the Plaintiffs, it was highlighted that the First Plaintiff is a Guernsey company, meaning that the first stage in any enforcement process would be domestically, commenting that there was no suggestion that the grounds for awarding security had been made out. That letter also queried the amount of security being sought and whether it might be ordered all at once or in tranches.

8. The bare assertion on behalf of the Plaintiffs that the value of the Settlement's assets exceeded the estimate of costs on an indemnity basis was met with requests for further information and clarifications made on behalf of the Defendants by letters dated 1 and 2 August 2013. An asset statement was forwarded to the Advocates for the Defendants under cover of letters dated 7 August 2013 setting out the asset position of the Settlement as at that date. This asset statement did not provide the Defendants with any comfort, resulting in responses being sent dated 16 August 2013, in which the Defendants also queried how the asset value had reduced so significantly since 2010, especially in the light of the sale of a property known as 18 Addison Road and the purchase of another property, which they suggested should have resulted in a positive net balance shown in favour of the Settlement. The Advocates for the Plaintiffs declined to respond to what they viewed as "*complicated questions to do with the administration of the settlement*" on the basis that little further would be gained in relation to whether any of the tests for awarding security for costs could be established.

9. In summarising the exchanges in correspondence as briefly as I have, I am not overlooking the fuller detail contained in those letters, which has been referred to extensively in the

affidavit evidence, particularly Mr Watts' First Affidavit (see, eg, paragraphs 30 to 51, covering just over 13 printed pages, including one quotation at paragraph 49 running to just over two pages of text) and Mr Corbin's First Affidavit (see, eg, paragraphs 15 to 35). I do not regard repeating what is already contained in correspondence being exhibited to the affidavit as consistent with the overriding objective in rule 1 of the Royal Court Civil Rules, 2007 because such unnecessary repetition inevitably means that the costs of the application are increased. By exhibiting the correspondence, it becomes part of the evidence, forms material on which submissions can be made and, in any event, will be considered before the application is determined. Further, the affidavit evidence also purports to elaborate on the grounds on which the Defendants rely. In my view, this is also inappropriate because there is no need for a deponent to facts 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. 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.

10. In Mr Heyworth's Affidavit, he deals more fully with the asset position of the Settlement, expanding on the bare figures in the asset statement as at 7 August 2013. He states, in particular, that he does not believe that the Settlement has any liabilities. He refers to the fact that the investments held with Pictet & Cie, valued at €2,358,580 (which on a very rough conversion I calculate equates to approximately £2 million) could, if the need arose, be liquidated within a few days, save for 13.3% invested in hedge funds with quarterly dealing days, which could therefore take up to 3 months to realise. In relation to the loans listed, Mr Heyworth explains that the loans to Mr Nigg in respect of the trust known as "Strasbourg 8" and to GFH Investments Limited, which aggregate to in excess of £4 million, are repayable on demand. He also highlights that a different approach has been taken in lending directly to GFH Investments Limited, rather than to either of the two beneficiaries in person, because that company owns the estate at Glendalough, which is in the course of being developed, so the worst case scenario is that the monies lent can be recovered on a sale of that property. Further, although the statement indicates that the loans to the beneficiaries, which exceed €7 million, are being treated as non-recoverable, which is consistent with the Plaintiffs' case that they were tantamount to distributions, on the Defendants' case they could potentially be regarded as assets of the Settlement, something which is repeated at paragraph 19 of Ms Ryan's Affidavit, albeit subject to a query as to whether the demands for repayment made in early 2006 now mean that any action for recovery would be prescribed. If those loans are capable of being treated as assets, it would mean the asset position could be regarded as significantly better than the figure of €9.2 million, represented by the other assets listed, to which Mr Heyworth has referred.

11. Mr Heyworth's Affidavit also deals with events since the First Plaintiff became trustee of the Settlement in 2010, addressing the concerns raised on behalf of the Defendants about dissipation of assets. The valuation placed on the investments with Pictet & Cie dropped because of the need to settle fees that were outstanding at the time of the change of trustee. The sale of 18 Addision Road was undertaken by the trustee of the Strasbourg 8 Trust. The proceeds of sale were used to purchase a property in Oxshott and the trustee of the Strasbourg 8 Trust also made a loan repayment of approximately £2 million through another company held within the Settlement. The ongoing expenses of the Settlement relate to maintaining, educating and insuring the beneficiaries, which costs approximately €300,000 per annum, together with the fees payable for the trustees' and others' services in respect of the trust.

12. In Mr Corbin's Second Affidavit, he comments on the issue of the difference in the asset position in 2010 and in 2013 and what this may mean moving forwards. I understand him to be suggesting that the extent of dissipation may be greater than Mr Heyworth acknowledges, thereby questioning the figure Mr Heyworth gives for how the assets of the Settlement will be used in the months and years to come. He also suggests that a margin should be allowed for

market fluctuations should the need to realise the Settlement's assets arise. There was no further evidence as to what margin might be appropriate, and this was a topic explored briefly at the hearing. Advocate Newman hazarded a guess that up to 20% of the value might be a reasonable margin.

13. The Defendants have also referred to their positions in relation to indemnities extended to them. As former trustees, the First and Fifth Defendants assert that they have indemnities and that they might be in the position of having those indemnities confirmed yet find there are no assets of the Settlement from which they can be paid. The Second Defendant has no such indemnity, although the Third and Fourth Defendants may seek to rely on their positions as former officers. The Plaintiffs submit that it is premature to discuss indemnities because none has yet been established as applying. I have proceeded on the basis that the possibility of indemnities being engaged is sufficient for me to consider the applications by reference to the estimates of costs calculated on the indemnity basis, rather than the standard recoverable basis. For the reasons that follow, although I am sceptical about the reasonableness of the costs estimates, bearing in mind the monetary value of these proceedings and the need for dealing with cases in a proportionate manner, I do not need to say anything further on this issue.

Form of application

14. Advocate Ozanne's initial ground of opposition to the applications was the same one that she took in a previous case (*Prinespo Foundation v Desside Holdings Limited* (unreported, 15 January 2014), complaining that the forms of each application were materially defective because they failed to identify the specific bases on which the application was being made. For similar reasons to those given in that recent judgment, and largely repeated here, I reject that submission.

15. Applications for security for costs are made pursuant to rule 82 of the 2007 Rules, 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 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 may prescribe, eg, in rule 25.12, does not have to be adhered to in Guernsey in order for the application to satisfy our 2007 Rules. It would, however, be consistent with 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 because it is necessary for any respondent to the application for security of costs to be aware of the case it has to meet.

16. I am, however, satisfied that the two applications made on behalf of the Defendants meet the requirements of the 2007 Rules. The bases on which the applications were being made were presaged in the correspondence beforehand and are sufficiently clear from the affidavit evidence in support. As I will explain, it is possible that the Defendants have expanded on the bases on which their applications are put but, in many respects, the acknowledgement in correspondence on behalf of the Plaintiffs that they were nominal plaintiffs, although they have subsequently resiled from that position, was enough for the Plaintiffs to realise that the principal issue between the parties was whether the second limb of the gateway test in that regard was met. Overall, therefore, 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.*"

Legal principles

17. The parties were 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 there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so; …*
>
> *(f) the claimant is 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.*"

18. On behalf of the First and Fifth Defendants, Advocate Edwards has relied on all four of the conditions at (a), (c), (f) and (g). Initially, Advocate Newman, on behalf of the Second to Fourth Defendants, relied only on conditions (a) and (f). However, when Advocate Ozanne's Skeleton Argument argued that the Plaintiffs were not nominal plaintiffs, in his Skeleton Argument in Reply he aligned himself to the position of Advocate Edwards that condition (c) was engaged. I take the view that he was permitted to do so because of the change in position of the Plaintiffs. In any event, each of these conditions is merely a gateway to be established by the applicant for security for costs before the Court can consider whether to exercise its discretion to make an order. Moreover, all that the applicant has to do is to demonstrate that one of the conditions is satisfied, although the approach to the quantum of security might differ as between for example, condition (a) and condition (c) or condition (f). Having established one (or more) of those conditions, the Court proceeds to decide whether it is just to order that security be given and, if so, in what amount and manner.

19. It was also common ground that the applicant Defendants bear the burden of establishing that an order for security for costs should be granted. In addition, I have also borne in mind 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.*"

Condition (g)

20. I will deal with condition (g) first because it is, in my judgment, clearly not satisfied. This basis was advanced only on behalf of the First and Fifth Defendants and, in their Skeleton Argument, concentrates on the dissipation of assets from 2010 to 2013 and "*the inevitable future dissipation of those assets … which will hinder the Applicants' ability to enforce any order for costs*".

21. The passage in the commentary to rule 25.13 of the CPR has been relied on (see para. 25.13.18):

> "*The purpose of condition (g) is to prevent injustice to a defendant where the assets available to enforce any order for costs he obtains have been or are being put beyond the reach of enforcement. The steps taken may be the dissipation of assets, their transfer overseas or into the names of third parties, or their transfer or removal to places unknown to the defendant. The defendant is not required to show that the steps were taken with the specific intention of defeating enforcement (Aoun v Bahri [2002] EWHC 29 (Comm); 2002 3 All E.R. 182) or that those steps were taken during the litigation or in contemplation of it (Harris v Wallis [2006] EWHC 630 (Ch); The Times, May 12, 2006). If all or most of the claimant's assets are put beyond the defendant's reach, the injustice to the defendant if no security is given may be just as great as it would be if the claimant himself had transferred overseas or disappeared. That said, the proof of a specific intent to stultify future orders for costs will generally increase the likelihood that an order for security will be made. The principles to be applied are, in some respects, analogous to the principles governing applications for freezing injunctions (as to which see above para. 25.1.23) save that, in Condition (g) the applicant must also prove the taking of steps in relation to assets which will hinder enforcement (Chandler v Brown [2001] C.P. Rep. 103). The applicant may seek to prove a specific intent to stultify future orders for costs in a variety of ways, e.g. evidence of dishonest behaviour by the claimant, unreliability in the past, evasiveness in these proceedings and statements of intent by the claimant.*"

22. Although Mr Corbin has attempted to show that the assets of the Settlement will be dissipated by the Plaintiffs during the course of this litigation at a faster rate than that set out in Mr Heyworth's Affidavit, I reject those contentions. There is, in my view, a difference between the position where a new trustee is appointed and sets about sorting out the affairs of the trust, which is what Mr Heyworth has explained the First Plaintiff had to do, and the ongoing administration of the trust assets once that phase has been completed. Accordingly, to the extent that there was a diminution in value of the assets of the Settlement at the beginning of the First Plaintiff's trusteeship, I do not consider that I can properly extrapolate from that to find that the same rate of expenditure will occur from now onwards. Further, at that time these proceedings had not commenced. Once the proceedings were commenced and defended by the Defendants, the Plaintiffs are obliged to bear in mind the possibility that they will be liable for costs and make appropriate provision to ensure that the Settlement continues to be solvent. Mr Heyworth has explained what the expenditure of the Settlement will be in future. Even if I scale it upwards to €500,000 per annum, and allow a further two years before that stage is reached, the asset base will still be large enough to satisfy any costs order. Accordingly, this is not a case in which it can be said that the "ordinary" expenditure of the Settlement will put assets that would otherwise be available in respect of any enforcement pursued by the Defendants beyond their reach. There is no merit in the attempt of the First and Fifth Defendants to rely on condition (g).

Conditions (c) and (f)

23. Both condition (c) and condition (f) involve ascertaining whether "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*". In the case of the former, the first requirement is to show that the plaintiff is a company or other incorporated body and in the latter whether the plaintiff is a nominal plaintiff. I fear that a lot of time and effort has been expended unnecessarily on whether these Plaintiffs are nominal plaintiffs when it is unnecessary to resolve that question. Rule 25.13 must, in my view, be considered as a whole and, if one of these conditions is plainly engaged, it becomes a point of academic interest only as to whether the other one might also be engaged. Thus, where a plaintiff is a company, or a similar body, wherever it is incorporated, the only real issue is whether "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*". There is simply no requirement to consider whether such a company also satisfies the requirements of being a nominal plaintiff.

24. For that reason, interesting though the arguments are, I do not need to re-visit my decision in *Jefcoate v Spread Trustee Company Ltd* (unreported, 13 August 2012) and resolve whether that was correctly decided or not. All I will say is that, because of the requirement to read rule 25.13 of the CPR as a whole, I venture the view that condition (f) is designed for persons who do not fall within condition (c). If that were to be the correct approach, the concession made on behalf of the Plaintiffs in correspondence that they were nominal plaintiffs, which was subsequently withdrawn, was wrongly made. However, there should have been an acknowledgement that each of the Plaintiffs is a company, as was set out when listing the parties in their Cause, with the consequence that condition (c) was potentially engaged. Either way, the only question I need to resolve is whether, on the evidence adduced, there exists reason to believe that the Plaintiffs will be unable to satisfy any adverse costs order.

25. Once again, in accordance with the submissions of all three Advocates, I have found it helpful to have regard to the principles set out in para. 71 in *Phaestos Ltd v Ho* [2012] EWHC 662 (TTC), to which I also referred in the *Jefcoate* case (*supra*) and in the *Prinespo* case (*supra*):

> "*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'."

26. Advocate Ozanne has also drawn attention to the guidance offered by Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (at page 540):

"*3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).*

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see Porzelack KG v Porzelack (UK) Ltd

> *[1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgement not so much of the prospects of success but of the nuisance value of a claim.*"

Although this aspect of the guidance to be derived from English cases focuses more on how the Court's discretion might be exercised after conducting the required balancing exercise, I mention it at this point to highlight that the Court has to be forward looking when considering condition (c), taking into account what the evidence suggests the position will be at the conclusion of the proceedings, but by reference to the position as it is at the time of determining the application. Throughout that exercise, the Court will be conscious of the need to weigh the competing interests in the balance.

27. The position of the Defendants is that they have raised legitimate concerns about the ability of the Plaintiffs to meet costs orders which are estimated to amount to £3.2 million and they have received incomplete or unsatisfactory financial information. As a result, they invite the Court to draw adverse inferences.

28. In Advocate Edwards' Skeleton Argument on behalf of the First and Fifth Defendants, he states that the information provided "*is clearly insufficient for the Defendants to be satisfied whether [the Plaintiffs] will be able to personally pay adverse costs orders*" and that "*the Asset Statement does not provide the Applicants any comfort*". It is, of course, the Court that must hold the reason to believe in the Plaintiffs' inability to satisfy any costs award rather than any of the Defendants. The Court will objectively assess the asset position, and have regard to the liquidity of those assets, on the basis of the evidence adduced.

29. Whilst I have some sympathy with the position in which the Defendants have found themselves, because the explanations on behalf of the Plaintiffs might have been more forthcoming than they have been, all with a view to avoiding having to answer to these applications, I do not, on balance, find that this is a case where the Plaintiffs have failed to give adequate information entitling me to have reason to believe that they will be unable to pay.

30. In that context, it needs to be remembered that the Plaintiffs did eventually provide the asset statement on which assets well in excess of the aggregate estimated costs of the Defendants, calculated by reference to costs being awarded on the indemnity basis, are shown. (The timing of doing so and the overall approach taken do not, in my view, affect the substantive issues to be resolved on these applications, but might, if so desired, be referred to on the question of costs.) Accordingly, the evidence actually adduced on behalf of the Plaintiffs prima facie provides a complete answer to the suggestion that they might otherwise not be able to satisfy a costs order at the conclusion of these proceedings. The attack on that evidence comes from the Defendants querying whether all the assets shown should really be regarded as assets in a form that would be realisable at the required time.

31. The first thing to note about the asset statement is that a portion of the assets is represented by cash at the bank. It was readily accepted that this is something to which the Plaintiffs can have recourse when needed with practically immediate effect. The amount involved is a little over £250,000. Further, the evidence of Mr Heyworth is that the investments held with Pictet & Cie are also realisable within a reasonably short space of time. Even if I were to make use of the 20% discount suggested by Advocate Newman, the present value of this element of the assets is approximately £2 million, resulting in realisable assets of £1.6 million. Indeed, I regard that discount as being very much at the upper end and imagine that a more appropriate assessment of the value of this element of the assets would be between the two figures. For

present purposes, therefore, I am minded to treat the cash and these investments as representing fairly liquid assets of at least £2 million.

32. The Defendants have queried, in particular, the Plaintiffs' assessment of the assets represented by loans, including, it seems, the loan interest said to be receivable in respect of monies loaned to the Strasbourg 8 Trust. The amount of loan interest recorded in the asset statement is just over €1.5 million. If that amount is added to the cash and investments, it roughly equals the amount of security sought by the Defendants. On the basis that Mr Heyworth has explained that Mr Nigg, as trustee of the Strasbourg 8 Trust, used some of the proceeds of sale of 18 Addison Road to reduce the indebtedness represented by that loan, I see no reason to question whether this interest amount could, if needed, be enforced against that trustee. For a similar reason, I also accept the evidence of Mr Heyworth that the loans owed to the Plaintiffs as trustees of the Settlement by the trustee of the Strasbourg 8 Trust and GFH Investments Limited are going to be capable of being enforced should it be necessary to realise the Settlement's assets. In particular, the comparatively recent lending to GFH Investments Limited must, I believe be regarded as arm's length transactions between two distinct corporate entities and, although it would have been preferable for the Plaintiffs to have produced some evidence confirming the way in which those loans have been recorded by them, in the absence of any evidence from the Defendants suggesting differently, I accept what Mr Heyworth says about them being repayable on demand. Those loans may not have been secured because of the adverse consequences of taking security, but I also accept that there are underlying assets against which the parties involved can have recourse should the need arise. It may not be the most straightforward case of how to go about realising the assets represented by those loans, but I take the view that I can properly have regard to the loans being between companies and so more likely than not to have been recorded in a fashion that means steps could be taken to enforce the payments due under them. On that basis, the loans to GFH Investments Limited in an aggregate amount exceeding £1,250,000 constitute assets that I consider will be available to meet any costs award.

33. I would, if needed, take a similar view in relation to the loan to the trustee of the Strasbourg 8 Trust. Again, it would have been preferable for the Plaintiffs to have adduced some evidence of the way this loan has been recorded. I suspect that there may have been an inclination not to do so on the basis that the Defendants are assumed by the Plaintiffs to know the terms agreed at the relevant time. However, adopting that stance overlooks the fact that it is the Court that needs to be satisfied on the evidence actually adduced as to whether something represents an asset to be taken into account and, if so, the value to be attributed to it and the relative ease with which that asset is capable of being realised. I have reached my conclusion on this issue because Mr Heyworth's Affidavit states that this particular loan is repayable on demand and Mr Corbin's Second Affidavit does not challenge that statement. Accordingly, because there has been no rebuttal from Mr Corbin, who I consider would be well-placed to challenge anything said by Mr Heyworth that is factually incorrect, I accept the bare assertion from Mr Heyworth and therefore treat this loan as also being an asset to which recourse could be had if needed in due course. I have also borne in mind Mr Heyworth's explanation about the underlying asset position of the Strasbourg 8 Trust, including the amount paid for the Oxshott property, and so am satisfied that there would be some steps that could be taken to enforce the loan should that step be required. Although Advocate Edwards submitted that the explanations about the loans are weak so the valuations must also be weak, I reject this contention. In the absence of something more substantial put in evidence by the Defendants about the prospects of enforcement, I can take Mr Heyworth's evidence at face value, remembering that the Plaintiffs do not bear the burden and have just about answered the Defendants' concerns. I consider that the Defendants have attempted to place too much reliance on the purported unsatisfactory nature of the Plaintiffs' responses to their concerns.

34. There is one other heading on the asset statement, namely chattels, comprising jewellery, motor vehicles and other items, valued at a little under £125,000. Very little was said about

this element of the assets, but I regard them in a similar fashion to the cash and investments at Pictet & Cie. Even if I apply an element of discount for any quick sale to realise their value, I see no reason not to allow £100,000 in respect of them.

35. The final assets recorded are the loans to the beneficiaries. The Plaintiffs say that these loans should be treated as having no value, whilst noting that, on the Defendants' cases, there is a suggestion that some value should be given to them, which would produce the effect of further enhancing the asset base of the Settlement. For the purposes of these applications, it matters not whether any value should be attributed to them and I am prepared to proceed on the basis of Mr Heyworth's evidence. As a result, I find that the asset position of the Settlement is accurately reflected in the statement provided.

36. Following the analysis of the asset statement provided on behalf of the Plaintiffs, as supplemented by Mr Heyworth's explanations, I am satisfied that the Settlement is currently adequately funded to meet its ongoing expenditure and leaving plenty, should the Defendants obtain costs orders in the amounts estimated to be possible at the conclusion of these proceedings, to pay any order. Although Advocates Edwards and Newman have sought to persuade me that the financial information is inadequate, thereby entitling adverse inferences to be drawn, I have reached the clear conclusion that the evidence put forward on behalf of the Defendants does not undermine Mr Heyworth's explanations to the extent that such inferences are justified. The responses given on behalf of the Plaintiffs are, in my judgment, just the right side of the line to be "*satisfactory*" for the purposes of para. 71(iv) in *Phaestos v Ho* (*supra*). This is a case where I take the view that the Defendants should have been pragmatic enough in the light of the asset statement and their collective appreciation of the obligations under which the Plaintiffs are obliged to operate in accordance with the Trusts (Guernsey) Law, 2007 to accept that their applications for security for costs would not succeed under condition (c).

37. There has been a further issue canvassed on behalf of the Plaintiffs, which I can deal with briefly. The First Plaintiff is an entity licensed by the Guernsey Financial Services Commission. On that basis, it has drawn attention to the minimum requirements for maintaining its licence under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 as set out in Schedule 1 to that Law. Paragraph 5(2)(a) of that Schedule requires a licensee to maintain a capital base and insurance cover "*of an amount which the Commission considers appropriate*". Whilst the evidence of Mr Heyworth does not explain the exact levels of the First Plaintiff's capital base and insurance cover, I do not regard that omission as meaning that I should draw an adverse inference against the Plaintiffs of the type suggested. Instead, I believe I can properly take into account the fact that the First Plaintiff is a regulated entity in this jurisdiction, which means that it must, on an ongoing basis, satisfy the Guernsey Financial Services Commission that it is complying with the 2000 Law. As a result, I consider that I can draw the conclusion that, whatever else the position may be in relation to the Settlement, the First Plaintiff is more likely than not to be in a position to meet any adverse costs order. In effect, this is an aspect of the "*obvious realities*" referred to in para. 64 of *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 to which I can have regard in reaching my conclusions on the applications in all the circumstances of the case.

38. For the reasons given, I have not found that "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*", so the Defendants have failed to establish that condition (c) (and, if it were relevant, condition (f)) has been met.

Condition (a)

39. The final condition to which the Defendants have referred is condition (a). Because the First Plaintiff is a Guernsey company, this condition is advanced in respect of the Second to Fourth

Plaintiffs. It is accepted that they are resident in countries outside of Guernsey, namely Liechtenstein and Panama, and that they are countries with which Guernsey does not have reciprocal enforcement arrangements, which is how I read the condition to apply.

40. It is common ground between the parties that simply being non-resident is no longer sufficient in itself to warrant making an order for security for costs. Where, as in this case, there is a combination of resident and non-resident plaintiffs, the parties have agreed that the approach to be followed is that set out in *Slazengers Limited v Seaspeed Ferries Ltd; The Seaspeed Dora* [1987] 1 WLR 221, helpfully summarised in para. 25.13.10 in the commentary in the CPR:

> "*Where some claimants are resident out of the jurisdiction, but others are not, the court has jurisdiction to order security for costs if, having grant [sic] to all the circumstances of the case, the court thinks it is just to do so. In deciding whether to order security, the court should take into account the likely prospect that, if the claim fails, an order for costs will be made which will be fully enforceable against the claimants within the jurisdiction. Another factor for consideration is whether any of the claimants has funds within the jurisdiction which are sufficient to meet any liability for costs (Slazengers Limited v Seaspeed Ferries Ltd; The Seaspeed Dora [1987] 1 W.L.R. 221; [1987] 2 All E.R. 90, CA). Security may well be ordered if the English claimant is impecunious and is not a genuine claimant, but was joined merely in the hope of defeating any application for security for costs (Jones v Gurney [1913] W.N. 72).*"

41. From the analysis I have undertaken of the asset statement in respect of the Settlement and also the consequences of the First Plaintiff being a regulated entity within this jurisdiction, it is clear that enforcement of any adverse costs orders made against the Plaintiffs is more likely than not to be capable of taking place in Guernsey without the need to enforce elsewhere against any of the Second to Fourth Plaintiffs. Although, once again, it might have been preferable for the evidence on behalf of the Plaintiffs to have been explicit about the position, I think I can properly take into account that the four Plaintiffs would cooperate between themselves to the extent necessary to satisfy any adverse costs order. By referring to cooperation I mean that, if necessary, the trustees will organise their affairs in such a way that assets are placed in the hands of the First Plaintiff for that purpose even if currently the legal ownership is held in such a way that any of the Second to Fourth Plaintiffs control them. By virtue of section 23 of the Trusts (Guernsey) Law, 2007, I can have regard to the fact that they have a duty to get the Settlement's assets under their control. This is a further example of the "*obvious realities*" to which the Court can have regard without the need for formal evidence.

42. In those circumstances, even though the Court retains a discretion to make an order for security for costs to be given, it would not, in my judgment, be just to do so where I am satisfied that the Plaintiffs have access to sufficient assets, whether within the Settlement or of their own, from which to satisfy any adverse costs order made in respect of these proceedings. Accordingly, without needing to refer to the other authorities to which Counsel drew my attention, for this reason alone I also reject the Defendants' arguments that condition (a) can be relied on.

Conclusions

43. For the reasons set out above, I dismiss the applications dated 22 August 2013. In doing so, I am conscious that the Defendants have the burden of satisfying the Court that it would be just to order security for costs. Although the Defendants have attempted to sow the seeds of doubt about the way Mr Heyworth has explained the asset position, they have not persuaded me that I should disregard any of the figures set out in the asset statement, save to the extent perhaps of applying a small discount to reflect market fluctuations and the possibility that quick

realisations may not produce optimum returns. The consequence is that, even allowing for expenditure from the Settlement to occur during the course of these proceedings, including the Plaintiffs' own costs of funding the litigation, the position of the Defendants is already adequately protected without there being any need to deposit sums of money with Her Majesty's Greffier, whether in one amount or in staged tranches, or to provide security by other means by way of an order pursuant to rule 82 of the 2007 Rules.

44. I will reserve the cost of these applications. My provisional view is that the costs are likely to follow the event, but until any of the parties seeks an order for costs, the issue is best left in abeyance.