Fairhead et al v Praxis Holdings Ltd et al
Royal Court
17th March, 2015

JUDGMENT 12/2015

Defendants' applications for security for costs.

Approved Text
17.03.2015

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **(1) NIALL FAIRHEAD**

(2) DUBLIN LAND SECURITIES LTD

Plaintiffs

-and-

(1) PRAXIS HOLDINGS LTD
(2) PRAXIS FUND SERVICES LTD
(3) PRAXIS WEALTH SOLUTIONS LTD
(4) DAVID BREUER-WEIL
(5) IAN DU FEU
(6) DR CLARE McANDREW
(7) [*no longer a party*]
(8) MARY NELL BROWNING
(9) ROY LESLIE PETLEY
(10) SEPHAR LTD
(11) DR SIMON JOHN THORNTON
(12) JUSTIN WILLIAMS

Defendants

Defendants' applications for security for costs

Hearing dates: 26th January 2015

Judgment handed down: 17th March 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiffs: **Advocate N J Barnes**
Advocate for the First, Second, Third, Fifth, Sixth, Eighth and Eleventh Defendants: **Advocate R G Shepherd**
Advocate for the Fourth and Tenth Defendants: **Advocate I C Swan**

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
The Civil Procedure Rules (*The White Book*)
Texuna International Limited v Cairn Energy plc [2004] EWHC 1102 (Com)
Mitco Realty Limited v Devlica Deutschland Limited (unreported, 11 April 2011)
Prinespo Foundation v Desside Holdings Limited (unreported, 15 January 2014)
Phaestos Ltd v Ho [2012] EWHC 662 (TTC)
Longstaff International Ltd v Baker & McKenzie [2004] 1 WLR 2917
In re Unisoft Group Ltd (No. 2) [1993] BCLC 532
Eagle Ltd v Falcon Ltd [2012] EWHC 2261 (TCC)
Arkus v Balchan Management Limited (unreported, 14 October 2010)
Nasser v United Bank of Kuwait [2002] 1 WLR 1868
Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd. [1973] 1 QB 609
Pearson v Naydler [1977] 1 WLR 899
Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 10 March 2014)

Introduction

1. The Plaintiffs commenced proceedings against the Defendants in July 2013. The Cause was first tabled against some of the Defendants on 26 July 2013. On the same date, applications for leave to serve the non-resident Defendants out of the jurisdiction were made. These proceedings were commenced shortly before the time at which prescription defences would possibly have been available to the Defendants. The Cause has since been amended through a mixture of consent and leave from the Court. The original Seventh Defendant has ceased to be a party. The Ninth Defendant has only comparatively recently been served. Advocate Barnes, who appears for the Plaintiffs, has indicated that they wish to make further amendments, which appear to be quite extensive. However, until such amendments are agreed by the other parties or leave is given to make them, the Court must proceed on the basis of the case as currently pleaded.

2. The Plaintiffs acquired their entitlement to institute these proceedings by virtue of the causes of action vested in Art Investment PCC Limited and Art Trading Limited having been assigned to them by the joint liquidators of those two companies on 11 June 2013. They paid £2,500 to obtain that assignment. The Plaintiffs also bring their claim in their capacity as investors in the Fund operated by the two companies.

3. By an application dated 25 October 2014, the Fourth and Tenth Defendants, represented by Advocate Swan of Babbé, seek an order for security for their costs pursuant to rule 82 of the Royal Court Civil Rules, 2007. Leave to amend the Application was given at the hearing so as to modify the amounts of security sought and the consequences of security not being provided. By an application dated 20 November 2014, the First, Second, Third, Fifth, Sixth, Eighth and Eleventh Defendants, represented by Advocate Shepherd of Mourant Ozannes, seek a similar order for security in respect of their costs. Again, the application was amended with leave to seek a higher amount in the first proposed tranche of security to be ordered. I will refer to both applications together as "*the Applications*" and, in order to distinguish the two sets of Defendants, will refer to them respectively as "*the Babbé Defendants*" and "*the Mourant Ozannes Defendants*". Both of the Applications seek orders in respect of costs incurred already (£257,972.92 and £187,409.66 respectively), and future anticipated costs split into nine monthly payments of £50,000 following by final payments of £200,000 to be paid in respect of each set of Defendants no later than eight weeks before the trial of the action commences (ie, £650,000 in total of future anticipated costs for each).

4. The Application of the Babbé Defendants is supported by two Affidavits of Bryan de Verneuil-Smith sworn on 30 October 2014 and 9 January 2015. The Application of the Mourant Ozannes Defendants is supported by an Affidavit of Sally French sworn on 21

November 2014, as well as an Affidavit of the Eleventh Defendant sworn on 9 January 2015. It is apparent that the question of seeking security for costs has been a live one between the parties since soon after the proceedings commenced in 2013. The evidence in opposition to the Applications on behalf of the First Plaintiff comprises his own Affidavits sworn on 21 November 2014 and 25 January 2015 and, on behalf of the Second Plaintiff, one of its directors, Peter White, has sworn two Affidavits on 21 November and 10 December 2014 respectively.

5. Both of the Applications have been advanced on similar bases. As against the First Plaintiff, it is alleged that he has taken steps in relation to his assets that would make it more difficult to enforce an order for costs against him. As against the Second Plaintiff, it is alleged that there is reason to believe that that company will be unable to meet an adverse costs order made against it. In relation to both Plaintiffs, the fact that they are resident outside of the jurisdiction is advanced in the alternative.

Facts

6. The First Plaintiff lives in North London. The Second Plaintiff is a company with a registered office in Dublin. As such, both are admittedly resident outside the jurisdiction. There is no suggestion that either has assets within the jurisdiction of this Court.

7. The First Plaintiff is a dealer in fine art. He was a sole trader, conducting his business under the name "Images". He invested his SIPPS Pension Fund in an Art Fund established by Art Investment PCC Limited and Art Trading Limited. Those two companies were placed in administration in April and May 2010. As an investor in those companies, the First Plaintiff consulted a firm of solicitors, Salans, in the summer of 2011. An e-mail from an associate at that firm dated 13 June 2011 confirms that the firm would, if so requested, undertake a free preliminary view of the possibility of action being taken by the Fund against a number of persons, suggesting that this option be raised at a creditors' meeting scheduled for a few days later.

8. On 3 November 2011, the First Plaintiff caused Fairhead Fine Art Limited (hereafter referred to as "FFA") to be incorporated. He and his wife are the two shareholders and the directors. FFA has continued to trade as "Images". The business he conducted as a sole trader was acquired by FFA on 14 November 2011. FFA's financial statements for the year ended 31 October 2012 record that the purchase price was £729,275, being £379,275 in respect of the assets of the First Plaintiff's business and £350,000 representing goodwill. The figure for goodwill appears to have been derived from a valuation dated 8 March 2012 prepared by Francis Clark LLP.

9. In his First Affidavit, the First Plaintiff has explained that when he caused FFA to be incorporated he was acting on the advice of his accountants, who then became FFA's accountants. He has exhibited an e-mail dated 10 March 2010 in which his accountants made the suggestion that incorporation rather than continuing his status as a sole trader would be likely to result in tax efficiencies.

10. On 2 December 2013, FFA and the First Plaintiff executed a debenture. Despite the entries in FFA's financial statements, this document records that the purchase of FFA from the First Plaintiff as a going concern of the business known as "Images" for £729,275 took place on 2 December 2013. The debenture creates a fixed and floating charge in favour of the First Plaintiff over the assets of FFA. It is a term of the debenture that the balance due to the First Plaintiff is repayable on demand. In his Second Affidavit, the First Plaintiff has clarified that the amount still owed to him by FFA was £558,268 as at 31 October 2014. That amount had reduced to £542,411 by 25 January 2015. The value of the stock of FFA as at 31 December 2014 was approximately £460,000. This is broadly consistent with the figures recorded in FFA's balance sheets for the 2012 and 2013 year ends, which show an upward trajectory. In many respects, the "Images" business appears to be operating in a similar fashion and with similar results to as it had done when the First Plaintiff operated as a sole trader.

11. A valuation dated 9 October 2014 of the residential property owned by the First Plaintiff and his wife suggests that, on a sale, a price in the region of £1.6 million is achievable. A mortgage statement from the lender dated 8 October 2014 indicates an outstanding balance of approximately £40,000. The First Plaintiff indicates that he has the facility to borrow a further £150,000 against the security of his home. He also has approximately £50,000 in his personal bank account.

12. The activities of the Second Plaintiff are dealing in traded investments, property investment and rental management. The two shareholders are Peter and Alicia White, both of the same address in Dublin. They are both directors of the company. The third director is Trevor White, also resident in Dublin. It appears to be a family held business. The Second Plaintiff has a number of wholly-owned subsidiaries, some of which are not currently trading. However, Blue Nile Holdings Limited, registered in the Isle of Man, and Wilmace Limited, registered in the Republic of Ireland, are both currently active. The three Whites are the directors of both of these subsidiary companies.

13. The most up-to-date financial statements before the Court relate to the year ended 31 July 2013, which were approved by the directors on 9 May 2014. The Second Plaintiff also relies on a commentary on its financial position provided by its accountants, Phelan Prescott & Co dated 19 November 2014, which has been prepared by Colin Davitt.

14. The balance sheet as at 31 July 2013 of the Second Plaintiff taken in isolation shows net liabilities of €1,091.745. Its investment in its subsidiaries is recorded at cost as a little over €2.5 million. Its traded investments are put at a little over €3.3 million. Its creditors were owed in excess of €8.1 million. Of that amount, over €5.5 million represented secured bank loans and some €2.2 million was in the form of loans from other companies within the group. The security held by Bank of Scotland plc includes a first fixed and floating charge over all the property, assets and undertakings of the company, a legal charge over the Second Plaintiff's shareholding in Blue Nile Holdings Limited and assignments over the rental income of the two active subsidiary companies. The auditors' report contains the following paragraph:

> "***Emphasis of matter: Going Concern***
>
> *In forming our opinion, which is not qualified, we have considered the adequacy of the disclosure made in Note 1 to the financial statement concerning the Company's ability to continue as a going concern and its reliance on the continued support of the Company's bankers. This matter indicates the existence of a material uncertainty which may cast significant doubt about the Company's ability to continue as a going concern. The financial statements do not include the adjustments that might result if the Company was unable to continue as a going concern.*"

15. The balance sheet of the group, of which the Second Plaintiff is the parent, as at 31 July 2013 shows net assets of €2,546,323. Allowing for the fact that, on consolidation, inter-company debtors and creditors cancel each other out, the main difference in the figures for the Second Plaintiff alone and its group is as a result of the value of the real property held by Blue Nile Holdings Limited.

16. Blue Nile Holdings Limited holds a property at 119 St Stephen's Green, Dublin, which is leased and operated as a restaurant. The value in the financial statements is given as €4 million. This value has been provided by Peter White, who is a member of the Royal Institute of Chartered Surveyors and has in excess of 40 years' experience. (In the previous year the valuation used had been €5 million.) In a valuation report from Savills dated 10 May 2014, 119 St Stephen's Green, subject to the abated rent of agreed by the landlord, is given a market value of €3,750,000. The value of the premises with vacant possession is given as €2,975,000. The other significant asset of this company is a loan to its parent company of in excess of €1.3 million. In the year ended 31 July 2013, Blue Nile Holdings Limited recorded a profit after taxation of €163,159 and distributed €124,000 as a dividend to its parent company. This company has also provided a guarantee to Bank of Scotland plc over the debts

of the Second Plaintiff and Wilmace Limited, in support of which it has given a first legal charge over 119 St Stephen's Green and an assignment of the rental income from that property.

17. Wilmace Limited holds the freehold of 857/859 Fulham Road, London. The retail element of that building is let to The Carphone Warehouse. There is also a sub-lease. One residential apartment within the building is currently vacant and the other attracts only a small ground rent. The building, which occupies a prominent corner site, is currently on the market for £2.11 million. The property was previously recorded in the balance sheet at cost, but has been revalued by Peter White at £300,000 above cost, making it broadly equal to the price at which it is on the market. There is a bank loan with Bank of Scotland plc, in respect of which there is a charge over the property, a first floating charge over the assets of the company and an assignment of its rental income. The other principal creditor is the Second Plaintiff. As a result of the revaluation, the total assets marginally exceed the current liabilities. Overall, the company appears to have a small operating profit, although this fluctuates depending on currency conversions.

18. The Second Plaintiff has been engaged in discussions with its bankers. This has arisen because the facilities with both Bank of Scotland plc and Bank of Ireland had expired. As explained in Mr Davitt's report, the indebtedness to Bank of Scotland plc of the group of companies was approximately €7 million and the indebtedness to Bank of Ireland was approximately €700,000. The intention is to settle the indebtedness to Bank of Scotland plc, thereby contributing to that bank's stated wish to leave the Irish banking scene and to replace the group's borrowing with a fresh and extended facility offered by Bank of Ireland. The exhibit to Peter White's Second Affidavit is said by him to be the text of an e-mail sent by a business manager at the Bank of Ireland dated 27 November 2014. It is surprising that the text has been extracted from an actual message, even if it were considered appropriate to redact anything regarded as confidential, as it puts in question the authenticity of both the message and the attachment also exhibited.

19. The offer of facilities set out in that document explains:

> "*I propose that the bank raise €2,330K in total as this should cover off all existing BoI debt and funds required to close BoSI debt. Any funds released would have to be used for these purposes only. We would not be in a position to release any additional funds.*
>
> *I have attached, a breakdown of what assets you expect to sell and funds required to refinance BoSI. I have also split out how I see the facilities being structured. Facility 1 is term debt and facility 2 is interest only with bullet payments due.*"

Facility 1 appears to be associated with security being provided by 119 St Stephen's Green. The attachment then sets out that the expected value of this security is €3.975 million, with further security being available in respect of the Davy's share portfolio of €2.8 million. The existing debt to the Bank of Ireland was put at €800,000. It was envisaged that the Fulham Road property would be sold and, after settling the loans associated with its acquisition, there would be a surplus of €850,000 to be returned to the Second Plaintiff. It was also envisaged that there would be a sale of shares held by the Second Plaintiff, comprising all of its holding in Bank of Ireland itself, valued at €270,000, all of its Stenham holdings, valued at €900,000, and part of its Ethemba holdings, to the value of €900,000. Through selling these assets, it was envisaged that the group would receive €2,920,000 (and Wilmace Limited would have cleared its indebtedness in respect of the Fulham Road property). Because the amount required to settle the remaining indebtedness to the Bank of Scotland plc, as shown in a letter dated 4 September 2014, is €4.25 million, the shortfall of €1.33 million would be needed from the Bank of Ireland re-financing. Accordingly, when adding the estimated costs of doing everything required of €200,000, the funding required by the group from Bank of Ireland aggregates to €2,330,000. It was proposed to split this between a term loan for €1.33 million and an interest only facility of €1 million with expected lump sum repayments taking place in

2016, 2017 and 2018 when certain of the Second Plaintiff's investments would provide the funds to enable it to make those repayments.

20. The commentary provided in Mr Davitt's report differs slightly from the approach set out on behalf of the Bank of Ireland, but not in ways that are material to the matters I need to consider. More pertinently, he points out that the Second Plaintiff, as the holding company of Blue Nile Holdings Limited and Wilmace Limited "*has the authority and power to sell its shareholding in these companies or, if preferred, to liquidate the companies themselves and crystallise their value*". Mr Davitt has also undertaken a restatement at current values of the group's consolidated balance sheet, adding his comments. He regards 119 St Stephen's Green as readily realisable. The value of the Fulham Road property has been increased to €2.7 million and he comments on a favourable exchange rate since 2013. However, I can properly take judicial notice that more recent events in relation to the exchange rate may have affected that assessment. He acknowledges that the Davy portfolio is not immediately realisable and values it at a little over €2.5 million. The expectation was that the Stenham holding would generate a premium of €900,000 by the end of 2014 and that half of the Ethemba holding (ie, around €625,000) was realisable in the short-term with the other half realisable within two years. According to his calculations, the net asset value of the group at the date of his report was just above €4 million. The computed short-term solvency shortfall is then calculated at €98,249.

21. The Eleventh Defendant, who has a background in accountancy, has undertaken his own analysis of the financial positions of the Plaintiffs. He has highlighted that the First Plaintiff has liquid or partially liquid assets of only £237,025, which would not meet an order in respect of the costs already incurred by the Defendants. In particular, he is critical of the approach taken by Mr Davitt, which he considers has over-valued some of the assets. For example, he notes Savills' the valuation of 119 St Stephen's Green with vacant possession at €2.975 million. In terms of liquidity, he points out that the shareholding termed "*Plc shares*" is the only such asset. It may have a value as high as £235,000 but could well be lower.

Legal principles

22. The starting point is to note that rule 82 of the 2007 Rules provides a wide discretion to the Court when dealing with an application for security for costs:

> "*(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.*"

In deciding what is just, the consistent recent practice of this Court is to follow the guidance contained in Part 25 of the Civil Procedure Rules 1998 (hereafter referred to as "the CPR") applying in England and Wales. In doing so, it considers whether one of the conditions set out in rule 25.13(2) and, if so, moves on to consider whether it is appropriate in all the circumstances of the case to exercise its discretion in favour of granting the application.

23. The conditions relied on by the applicant Defendants are conditions (c) and (g) and, if necessary, condition (a), which are:

> "*(a)(i) [the claimant is] resident out of the jurisdiction;*
>
> *(c) the claimant is a company … and there is reason to believe that it 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.*"

24. In general, the burden of proof rests on the Defendants to establish that an order for security for costs should be made (see, eg, *Texuna International Limited v Cairn Energy plc* [2004] EWHC 1102 (Com)). The commentary at para. 25.12.2 of *The White Book* explains that:

> "*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.*"

25. Condition (g) is advanced against the First Plaintiff. The rationale behind it is set out in the commentary to the CPR, which states (at 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 they obtain 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 it was the claimant who had transferred overseas or disappeared. That said, the proof [of - sic] 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. In Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC, [2011] EWCA Civ 761, an order under r.25.13(2)(g) was made in respect of an appeal where the appellant denied owning substantial assets and sought to explain his expensive lifestyle by saying that he was receiving loans from family, family affiliated companies and third parties: in the circumstances of the case the court felt able to draw a double inference, as to the existence of assets and also as to steps taken to hinder enforcement.*"

26. Condition (c) is a more familiar one, having been dealt with by this Court on a number of occasions recently. In a passage from *Mitco Realty Limited v Devlica Deutschland Limited* (unreported, 11 April 2011) I have quoted in other cases (eg, *Prinespo Foundation v Desside Holdings Limited* (unreported, 15 January 2014)), Deputy Bailiff Collas (as he then was) referred 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).*"

27. Once again, I find the summary in *Phaestos Ltd v Ho* [2012] EWHC 662 (TTC) helpful, where the position was set out as follows (see para. 71):

> "*As a threshold requirement, the Defendants must establish that there is reason to believe that the Claimants will be unable to meet any costs order: see CPR Part 25.13(2)(c). Thus, it is not enough for the Defendants to show that the Claimants might not be able to repay. More must be done, namely justification for a reason to believe that the Claimants will not be able to pay. In that regard:*
>
> *(i) The Defendants do not need to demonstrate on a balance of probabilities that the Claimants will not be able to satisfy any costs order: see Jirehouse v Beller [2009] 1 WLR 751 at [26]. However, there must be evidence that the company "will be unable to pay", which is more than mere doubt or concern about the future ability to pay: see Re Unisoft Group Limited [1993] BCLC 532 per Sir Donald Nicholls VC at 534e-i, as followed by Jirehouse at [24]. As stated by Sir Donald Nicholls VC in Unisoft, the test is not "watered down" by the presence of the wording "reason to believe".*
>
> *(ii) Similarly, in Texuna International Limited v Cairn Energy plc [2004] EWHC 1102 Gross J stated at [10]: "I emphasise that the inquiry is whether the Claimant "will be unable" to pay the Defendant's costs if ordered to do so – not whether it might be unable to pay them."*
>
> *(iii) The burden is upon the Defendants. It is not incumbent upon the Claimants to prove that they have the means to pay: see Golden Grove Estates v Chancerygate Asset Management [2007] EWHC 968 per Lindsay J at [35].*
>
> *(iv) However, if legitimate concerns about the Claimants financial position are raised, if the Claimants choose to provide no or incomplete information in response, that in itself can lead to a court reaching the belief that the Claimants are unable to pay. In Mbasago v Logo Limited [2006] EWCA Civ 608, Lord Justice Auld stated (at paragraph 12) that "where it arises as a result of the party against whom the order is sought either providing unsatisfactory financial information as to his or its affairs, or as in this case none at all, it is not a big step for the court to take to conclude that there is reason for such belief*"."

28. The significance of the liquidity of a party's assets has been highlighted in a number of cases. Advocate Swan drew attention to what Park J had to say in *Longstaff International Ltd v Baker & McKenzie* [2004] 1 WLR 2917 (a case, I note, in which the brother of the witness on behalf of the Babbé Defendants acted for the claimant). At para. 17, His Lordship noted that

"*Longstaff, I imagine, could pay in the end, but the nature of its asset position is such that it could not pay with any high degree of promptness*" and he continued (at para. 18):

> "*In this connection I refer particularly to the decision of Sir Donald Nicholls V-C in In re Unisoft Group Ltd (No 2) [1993] BCLC 532, 534. His Lordship said: "the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met?" On the facts Sir Donald Nicholls V-C's answer to the question was no. Therefore security was ordered.*"

In *In re Unisoft Group Ltd (No. 2)* [1993] BCLC 532, the Vice-Chancellor referred to the way in which the court would review the evidence adduced and draw appropriate inferences and that "*it will not let common sense fly out of the window*". The Court has to assess from the evidence whether the company in question will be unable to pay.

29. In *Eagle Ltd v Falcon Ltd* [2012] EWHC 2261 (TCC), Coulson J referred to the agreed fact that the claimant was balance sheet insolvent and to two express warnings from its auditors on the face of its last audited accounts, the second of which related to the company's ability to continue as a going concern, and stated (at para. 28):

> "*In my view, by reference to the principles noted in paragraph 22 above, the balance sheet insolvency, together with these two warnings, are sufficient on their own for me to conclude that there is reason to believe that Eagle will be unable to pay any order for costs made against it.*"

The principles in para. 22 were some of those already cited from *The White Book*. His Lordship further drew attention to the differences of approach between applications to wind up a company under the statutory regime and applications for security for costs, commenting that the application for security for costs requires a different, and lower, test than for winding up a company. The case also deals with how to approach groups of companies, where some clear verifiable evidence of the inter-company position is required but, perhaps more importantly, what the Court is looking for in any event will be evidence of cash or readily realisable assets. Before leaving this case, I also adopt what His Lordship stated (at para. 25):

> "*As to the second stage, it is very difficult (if not impossible), in a complex commercial dispute like this, for the court to form a view as to the respective merits of the claim and defence. An application for security for costs should not be sidetracked into an investigation into the merits of the case, unless it can be clearly demonstrated that there is a high degree of success or failure: see Fernhill Mining Limited v Kier Construction Limited [2000] CP 69.*"

30. In relation to condition (a), which has been advanced very much as a secondary position by both sets of Defendants, it is accepted that simply being non-resident is insufficient in itself to justify 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."

31. In any event, whether or not to order security for costs involves an exercise of discretion, which must, of course, be performed judicially. As Lord Denning MR indicated in <u>*Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd*</u>. [1973] 1 QB 609 (at page 626E):

> "*If there is reason to believe that the company cannot pay the costs, then security <u>may</u> be ordered, but not <u>must</u> be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.*"

These principles and some examples of the application of them to condition (c) are summarised in para. 25.13.13 of the commentary to the CPR.

32. Insofar as there is any suggestion that an order for security for costs will stifle a plaintiff's claim, it was common ground that the onus is on the plaintiff making that claim to do so by putting before the Court proper and sufficient evidence of this. If there is only incomplete material relating to the party's resources, including how realisable they are, in the exercise of its discretion, the Court will endeavour to make its best estimate of what is affordable.

33. In response to a query that arose at the hearing about how the Court should approach the fact that one Plaintiff is a natural person and the other a company when considering what order might be just, Advocate Barnes has referred to *Pearson v Naydler* [1977] 1 WLR 899. With respect to him, this case does not deal directly with the issue with which I felt I might need to grapple, namely what to do if I found a condition met as against one of the Plaintiffs but not the other or, if I found a condition met against both, how, if at all, to apportion the security to be provided between them. The facts were also different in that the natural person involved was a director of the company in question, whereas in the present case there is no such link between the First and the Second Plaintiffs. What the case appears to confirm, however, is the fact that how to reach a just outcome is a matter for the Court's discretion, always bearing in mind the concern that an order might deprive a litigant of its access to the Court. For example, Sir Robert Megarry V-C stated (at page 906F):

> "*It seems plain enough that the inability of the plaintiff company to pay the defendants' costs is a matter which not only opens the jurisdiction but also provides a substantial factor in the decision whether to exercise it. It is inherent in the whole concept of the section that the court is to have the power to order the company to do what it is likely to find difficulty in doing, namely, to provide security for the costs which ex hypothesi it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company.*"

Discussion

First Plaintiff

34. Both of the Advocates for the Defendants referred in their written submissions to condition (g) applying where steps have been taken in respect of assets which would make it more difficult to enforce a costs order. By doing so they have added a word to the condition that does not appear in the CPR. The condition does not involve considering how easy it would be to enforce a costs order if the step had not been taken and simply comparing that with the ease of enforcement following the step in question. In my view, the test calls for an objective assessment of whether the steps taken in relation to the party's assets mean that difficulties arise in relation to enforcement. As the commentary in *The White Book* clarifies, the types of situation covered are where the party dissipates assets against which enforcement could be executed, transfers them out of the jurisdiction or into the hands of third parties or where their whereabouts are no longer known. The motivation for the taking of the steps may affect the exercise of the Court's discretion but does not impact on whether the steps taken "*would make it difficult to enforce an order for costs*".

35. When the First Plaintiff was a sole trader, he personally owned the stock of his business "Images". When he sold that stock to FFA, he swapped the physical assets for a debt due from FFA. Because of the inclusion of goodwill in the purchase price, the amount due to him now exceeds the value of the stock he held and would now hold if it had not been sold to FFA. However, the value of the debenture is really limited to the amount of stock now owned by FFA, save perhaps for any additional value were FFA to be sold to someone else as a going concern. The First Plaintiff's other assets remain the same. He has some cash at the bank and his interest in the residence owned by him and occupied by him and his wife. He has the possibility of borrowing against the security of his home. Accordingly, the only step advanced against him by the Defendants is that he no longer owns the stock of his business personally because it has been placed in the hands of a third party, FFA. The debenture, it is argued, makes enforcement more difficult and less certain as to what value could be realised.

36. As soon as the argument is put in that way, it is apparent that it does not fulfil condition (g). The difficulties relating to enforcement of a costs order against the First Plaintiff are, in my view, broadly the same as they were before. The First Plaintiff's assets are not in Guernsey. Enforcement will, in the event of any costs order not being satisfied voluntarily, have to take place in England. The value of his assets is effectively unchanged. The stock he owned before has been substituted with the debenture. This does not hinder the process of

enforcement. The step taken of selling physical assets to a third party in return for a debt now secured by a debenture does not, in my judgment, satisfy condition (g).

37. If I am wrong about that and I should have moved on to consider how to exercise my discretion on the basis that condition (g) is satisfied, I would take into account that the majority of the First Plaintiff's assets remain in the same form as they were previously. On the basis that motivation for the step taken becomes a relevant factor, I find that the sequence of events does not demonstrate that FFA was incorporated and the First Plaintiff's stock transferred into its ownership for any purpose other than the possible tax efficiencies involved. In my view, there is a coincidence over timing but nothing more. Further, although the assets themselves are no longer owned by the First Plaintiff, they have effectively been substituted with an asset in the form of the debenture. In the event that the Defendants, or any of them, obtain an order for costs against the First Plaintiff (or an order for costs against both Plaintiffs and look to enforce it against the First Plaintiff) enforcement will necessarily have to take place in England. FFA has to be treated as a third party, but I consider that I can, before deciding what is just, take into consideration that the two directors and shareholders of FFA are the First Plaintiff and his wife. The Defendants have not adduced any evidence to suggest that the assets of the First Plaintiff and his wife are going to be split, which is why I treat the position as being little different to what it was before.

38. I am conscious that the burden of establishing that an order for security for costs will stifle his claim rests on the First Plaintiff and that his evidence in this regard is, putting it at its highest, sketchy. However, in respect of how I would have proceeded to exercise my discretion had I found condition (g) satisfied, I am satisfied that the First Plaintiff would be unduly inconvenienced by an order for security in the form sought by the Defendants and so would not have been minded to make the order sought. Whilst the Plaintiffs have not seen fit to explain fully the funding arrangements they have between themselves in respect of this litigation, when focusing solely on the First Plaintiff, it seems to me that his asset position has not really changed and that, even with condition (g) being satisfied, I would not regard it as just to make the order for security for costs sought. Put another way, I am not satisfied that "*the risk of being unable to enforce any costs order*" is any different from what it always has been with a plaintiff who is not resident in the jurisdiction. There is an overlap, therefore, with condition (a), to which I will return in due course.

Second Plaintiff

39. The position of the Second Plaintiff is different. The Defendants have shown that the Second Plaintiff itself is balance sheet insolvent. The Second Plaintiff has not produced evidence suggesting that is incorrect, but has referred instead to the solvency of the group of companies of which it is the parent. Whilst this may well be something to bear in mind when considering the exercise of discretion, I am satisfied that the first stage of the process is to ascertain whether the Defendants have satisfied the Court that condition (c) is met. In that regard, the focus has to be on the asset position of the Second Plaintiff itself. The explanation about its position offered in Mr Davitt's report and Peter White's Affidavits does not, in my judgment, lead to any conclusion other than that condition (c) has been satisfied.

40. The Second Plaintiff and its subsidiary companies are dependent on bank financing. The importance of completing the necessary arrangements with Bank of Ireland so as to put before the Court evidence of a satisfactory outcome should have been apparent to the directors of the Second Plaintiff. Whilst I am prepared to take into account the material exhibited to Mr White's Second Affidavit, I do not afford it the same weight as I would if it had been a formal offer letter of terms on which the re-financing needed would be provided. The financial position of the Second Plaintiff would be improved if the Fulham Road property is sold and the indebtedness to it of Wilmace Limited cleared. It would also be improved by it selling some of its own assets, ie, liquidating the parts of its portfolio of investments that it can. However, the clear inference I draw from the Bank of Ireland material Mr White has exhibited is that the exercise is moving liabilities and assets around but not providing any new cash to the Second Plaintiff. More importantly, because of the extent of the security currently in place with Bank of Scotland plc and the security apparently being required by Bank of

Ireland, the Second Plaintiff will still be unable to deal with its most valuable assets. It has not been suggested on behalf of the Second Plaintiff, save through Mr Davitt's commentary on the possibilities that exist, that the Second Plaintiff wishes to bring into its direct ownership 119 St Stephen's Green. I appreciate that this is a valuable piece of prime Dublin real estate and that Blue Nile Holdings Limited itself has not borrowed money against it. However, it is currently being used as security for the group's loans and will continue to be used as security if the Bank of Ireland arrangements are put into place. Therefore, even if the step of transferring its ownership into the Second Plaintiff were to be taken, it would not be readily realisable. Consequently, I reject Mr Davitt's suggestion in his report that this asset is readily realisable. Indeed, looking at his commentary on the document restating at current values the Second Plaintiff's group's consolidated balance sheet, this was the only asset other than the item "*Plc shares*" in respect of which he had even made that suggestion. There has been a recognition that the Second Plaintiff's assets, whether held directly or indirectly are generally not of sufficient liquidity to meet a costs order were one to be made, which in itself speaks volumes.

41. Although the Second Plaintiff has shown that it would potentially have the ability to meet a costs order made against it at some time in the future, whether that is soon or at the end of the proceedings, its assets are not in a form where it has demonstrated to me that it could satisfy the order made with any promptness. Therefore, taking into account that the burden lies on the Defendants, and not on the Plaintiffs, in the light of all the guidance to which I have referred and, in particular, the ***Eagle*** case (*supra*), I have concluded that there is reason to believe that the Second Plaintiff will be unable to pay any order for costs made against it.

42. Because I am satisfied that condition (c) has been established, strictly speaking, I do not need also to consider condition (a). However, it was conceded that, as a non-resident company, condition (a) was also met, so I will comment on that condition, especially as it also applies to the First Plaintiff, in relation to the exercise of the Court's discretion.

Discretion

43. Following my consideration of the gateway conditions, it is open to me to make an order that both Plaintiffs provide security for the costs being incurred and to be incurred by the Babbé and Mourant Ozannes Defendants. The real question is whether it would be just to do so and, if so, the manner in which appropriate security should be provided.

44. The evidence adduced on behalf of the Plaintiffs has not explained fully how they have agreed to fund this litigation between themselves, although the first Plaintiff has indicated that he is contributing half of the costs. Nor is there any indication of what one of them will do if made subject to an order for security for costs with the other not being subject to an order in similar terms. In argument, it was suggested that I needed to be alive to the possibility of one of the Plaintiffs being given a "*free ride*". I am aware that both Plaintiffs have, subject to the outcome of these proceedings, sustained losses through their investments in the Art Fund. Their payment for the assignment of the rights of action can be seen as part speculation, designed to reap a very substantial profit, and part a desire to pursue their losses where the liquidators would not do so on behalf of them as creditors of the two companies involved in the Art Fund. I can make no sensible assessment of the merits of their action but I can take into account that the Cause has already been amended and that Advocate Barnes indicated that the next stage in these proceedings will be for him to seek the agreement of the Defendants to the making of further amendments, which appear to be significant, or that he will be instructed to seek leave from the Court to re-amend. A portion of the costs involved to date can, therefore, be seen to be those that the Plaintiffs will be required to pay in order to be able to plead their case as they now wish. Alternatively, the costs involved in the next stage could fall to be paid by them if the Court makes a specific issue costs order arising from a failed application to re-amend. Because the Plaintiffs have no assets within the jurisdiction of the Court and the purpose of ordering that security be given would be to protect these Defendants against the risk of being unable to enforce any costs order they may obtain, I have concluded that it cannot be just to make no order at all on their Applications. In my

judgment, it is just to make an order that security for costs be given but the situation of these two Plaintiffs makes it far from straightforward to decide what that order properly should be.

45. If the case had been brought only by the First Plaintiff, I would find it difficult to make any order for security to be given. As I have found that condition (g) has not been satisfied, the basis for ordering security to be provided by the First Plaintiff rests on condition (a). There has been no evidence as to any increased costs of enforcement against him in England and his evidence shows that he is a man of some substance as he jointly owns a valuable residence and has a small business. His assets are jointly owned with his wife, but there is no suggestion that he has anything lower than an equal share in these assets and it is more likely than not that his wife is aware of and content to share in funding his participation in these proceedings. Accordingly, looked at in isolation, he would not be required to pay security for costs.

46. If the case had been brought only by the Second Plaintiff, an order for security for costs would follow. Looking at the amounts sought, I could not rule out at this stage that some of the costs incurred through instructing solicitors in England would be found to be recoverable. As Advocate Swan put it, art-related matters are not an area that comes before this Court on a regular basis and where expertise in this area is found elsewhere, utilising such experts may well be more cost-effective than an Advocate or his firm's staff grappling with such new areas without recourse to that expertise elsewhere. Equally, however, the bases of the Plaintiffs' action and the amendments that have been dealt with so far, are not so unfamiliar that the lion's share of the work to date of preparing matters to file with the Court should not have been capable of being done locally. Accordingly, I approach the amounts in respect of past work carried with a degree of caution in order to reach an outcome that is just. In ***Investec Trust (Guernsey) Limited v Glenalla Properties Limited*** (unreported, 10 March 2014), McNeill JA noted (in para. 24) that in commercial litigation amounts recoverable are regularly taxed by deductions in the region of 35% to 45%. In order to be realistic, whilst also recognising that the Mourant Ozannes Defendants were involved in the contested application to amend in 2014 and so should be liable to a lower deduction than might apply to the Babbé Defendants, I propose to move away from the amounts on the face of the Applications and use lower figures in respect of those past expenses. The approach I have taken is first to round the figures pleaded to make the arithmetic easier and then to apply discounts broadly within the range mentioned by McNeill JA. In respect of the Babbé Defendants, this leads to a figure of £150,000. In respect of the Mourant Ozannes Defendants, this leads to a figure of £130,000. Accordingly, taking this broad brush approach, my starting point for an award of security for costs against the Second Plaintiff would be that £280,000 should be provided to reflect recoverable costs already incurred.

47. Looking ahead to estimated anticipated costs, it is clear that significant costs are likely to be incurred in resisting this claim. However, although it may seem pragmatic, the concept of monthly payments "*feeding the meter*" is not attractive. Litigants faced with orders for security for costs are put to their election: if they wish to proceed with the action, they must provide the security ordered but they can also choose not to do so and abandon their claims, albeit in the knowledge that consequences will follow. Although the 2007 Rules are designed to move actions forwards through the various procedural stages in a timely manner, I take note of the fact that pleadings in this case have still not closed and that there has not yet been a case management conference. That milestone in the proceedings will only be reached when the Plaintiffs' Cause is finalised, whether through re-amendment or rejection of an application to re-amend, and the parties, including the Ninth Defendant, finalise their Defences. It is not inconceivable that, were an order for £50,000 monthly for each set of Defendants to be made covering the remainder of 2015 the bulk of those monies would have been paid before the case management conference takes place. In those circumstances, it does not strike me as just to make any order taking matters beyond the case management conference. The landscape of the action may be quite different by then and, if so, I consider it appropriate that if further security is sought, the case management conference is the time to re-visit this question. That said, I regard it as just to protect the Defendants through ordering that there be an additional amount of security paid at this stage to reflect the costs that will inevitably be incurred before

reaching the case management conference. As a very conservative estimate, I have decided that an additional £35,000 in respect of each set of Defendants is appropriate, ie, £70,000 in total.

48. If I were taking the approach of looking just at the Second Plaintiff, therefore, I would be ordering a single payment of security of costs to be made by it now in the sum of £350,000 and leaving open the possibility of further security being ordered at the case management conference, or before then if events so dictated. Equally, if the Second Plaintiff were in the meantime to re-organise its assets in such a way that adequate security could be provided otherwise than through making a financial payment, it would be open to the Second Plaintiff to seek to vary the terms of the order.

49. However, I do not believe that an order only against the Second Plaintiff provides a just outcome to all the parties. There is a risk that the Second Plaintiff would simply disappear from the proceedings and the Defendants, who in my view deserve some protection, would be left without it. The basis on which that happened would then need to be scrutinised carefully in order to understand the position of the First Plaintiff, assuming he continued the action alone. This would inevitably entail further, potentially unnecessary, costs being incurred by all parties and, in my view, this would not be consistent with the overriding objective. Because these Plaintiffs have jointly chosen to bring this action, having decided to join their forces in taking the assignment of the rights of action from the liquidators of the two Art Fund companies, I consider it does justice to all concerned to treat them together rather than take each in isolation. In doing so, I am conscious that the First Plaintiff will face an order for security for costs that he would not otherwise have faced (or not to the same extent) but I regard that as the consequence of him and the Second Plaintiff having adopted the joint course of action they have and without him explaining why the Court should treat them any differently now.

50. The amount of security to be ordered of £350,000 will be a joint liability of both Plaintiffs. If, as I might infer to be the case, they are sharing the costs of the action equally, ordering the First Plaintiff to contribute £175,000 will not stifle his claim because his own evidence points to £200,000 of funds being readily accessible. Because of the overall solvency of the Second Plaintiff's group of companies, I am similarly satisfied that the Second Plaintiff will be able to arrange its affairs to provide its share of that security. If, as I suspect is the case, this is a White family business, the individuals themselves can, if it assists, support the Second Plaintiff as they see fit. Whether the Plaintiffs choose to make the payment ordered otherwise than through equal contributions is a matter between them. The amount of £350,000, apportioned £185,000 in respect of the application brought by the Babbé Defendants and £165,000 in respect of the application brought by the Mourant Ozannes Defendants, in my judgment, is sufficient to afford those Defendants the protection they deserve but not of such a high amount that these Plaintiffs will struggle to fund it.

51. Although the application of the Mourant Ozannes Defendants seeks an order for payment within 14 days of the order, I am satisfied that the 21 days sought by the Babbé Defendants is an appropriate time in which the security ordered should be paid into Court in cleared funds. The consequential orders of the proceedings being stayed pending payment and dismissed in default of payment, having regard to all the circumstances of this case, will follow as being appropriate sanctions to order.

Conclusions

52. These Applications have highlighted the problems that can arise where proceedings are commenced jointly by a natural and a legal person each of whom reside in a different place and neither of whom are within the jurisdiction of the Court. The Court naturally has to bear in mind that access to justice is an important concept. No one who has a legitimate claim properly justiciable before this Court should be precluded from pursuing it. Equally, save in particular circumstances, Defendants should not be put to the expense of resisting claims where there is a real risk that they will not be able to enforce any costs award made in their favour. A careful balancing exercise has to be conducted. The 2007 Rules require no more

than that an order for security for costs be just. They do not prescribe anything further. I have chosen to follow the usual approach in respect of an application made pursuant to rule 82 for security for costs because it remains, in my view, extremely helpful guidance as to the best way to consider such applications. Because of the different circumstances of these two Plaintiffs, it has led to rather a circuitous approach being taken. If I step back a moment from the guidance offered by *The White Book* and simply ask whether, in all the circumstances of the case brought jointly by the First and Second Plaintiffs against the Babbé and Mourant Ozannes Defendants, it is just to make an order for security of costs against them, the answer, in my judgment, is plainly "yes". Further, in the absence of any practical way to distinguish between the First Plaintiff and the Second Plaintiff, the terms of such an order for security for costs must be that it applies to both of them jointly.

53. The orders I make, therefore, are as follows:

    (a) On the amended application of the Fourth and Tenth Defendants, the First and Second Plaintiffs jointly are ordered to deposit with the Greffe £185,000 within 21 days of the order handing down this judgment. Until that payment has been made by way of cleared funds, the Plaintiffs' action against the Fourth and Tenth Defendants shall be stayed. If that security is not paid within the 21-day period, the Plaintiffs' action against the Fourth and Tenth Defendants shall be dismissed.

    (b) On the amended application of the First, Second, Third, Fifth, Sixth, Eighth and Eleventh Defendants, the First and Second Plaintiffs jointly are ordered to deposit with the Greffe £165,000 within 21 days of the order handing down this judgment. Until that payment has been made by way of cleared funds, the Plaintiffs' action against the First, Second, Third, Fifth, Sixth, Eighth and Eleventh Defendants shall be stayed. If that security is not paid within the 21-day period, the Plaintiffs' action against the First, Second, Third, Fifth, Sixth, Eighth and Eleventh Defendants shall be dismissed.

54. Because of the consequences of non-payment, if less than the aggregated amount of £350,000 is paid by way of security within the 21-day period, the Plaintiffs must indicate in respect of which order the payment is being made. In other words, if the Plaintiffs choose not to pay the whole amount, it is open to them to elect to proceed against either the Babbé Defendants or the Mourant Ozannes Defendants. Similarly, if only one of Plaintiffs wishes to lodge the security ordered on his or its own behalf and not for the benefit of the other Plaintiff, that must be made clear. In other words, unless both orders are fully complied with, at the end of the 21-day period, Advocate Barnes must clarify who, if anyone, is continuing the action against which Defendants.

55. Both Applications seek costs orders in respect of bringing them. Accordingly, I invite the Advocates to explore whether there is agreement that the Defendants' costs be paid by the Plaintiffs on the basis that an order for security in a substantial amount has been made. If there is no agreement as to the appropriate costs order, those paragraphs of the Applications can be listed for determination at a mutually convenient Interlocutory Court or, if the parties prefer, the costs can be reserved.