

Security for costs. Sought against company in liquidation suing as co-plaintiff with its non-resident Joint Liquidators; general review of jurisdiction.

[2022]GRC072

THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

BETWEEN:

(1) **CARL BOWLES, BEN CAIRNS, MARK FIRMIN and RICHARD FLEMING
together the Joint Liquidators of
Joannou & Paraskevaides (Overseas) Limited**

(2) **JOANNOU & PARASKEVAIDES (OVERSEAS) LIMITED
(in liquidation)**

Plaintiffs

-and-

(1) **LEONIDAS JOANNOU**
(2) **CHRISTOS JOANNOU**
(3) **Estate of THELMA PARASKEVAIDES deceased
(By Order to Carry On made on 17 August 2022)**
(4) **ANDREAS PAPATHOMAS**
(5) **CHRISTINA PARASKEVAIDES**
(6) **COSTAS KYRIAKIDES**

Defendants

Before Her Honour HAZEL MARSHALL KC, Lieutenant Bailiff Sitting Alone

Hearing dates: 17, 18 and 25 August 2022

Judgment handed down: 14th October 2022

Counsel for the Plaintiffs:	Advocate	J Greenfield
Counsel for the First and Second Defendants:	Advocate	D O'Hanlon
Counsel for the Fourth and Fifth Defendants:	Advocate	A Williams
Counsel for the Sixth Defendant:	Advocate	J Barclay

Cases and legislation referred to

Legislation:

Guernsey

The Companies (Guernsey) Law 2008 ss 309, 397, 413, 417,422, 433 and 434
The Trusts (Guernsey) Law 2007 s 42(1)
Royal Court Civil Rules 2007 rr 10, 82,83
Royal Court (Costs and Fees) Rules 2012 r 2 (2)

England and Wales

Joint Stock Companies Act 1857 s 24
Civil Procedure Rules 1998-2022 Parts 19, 25.12-14

Cases:

Guernsey

Ladbroke PLC v Galaxy International Limited (2009) (Royal Court 11/2009)
Mitco Realty Limited v Develica Deutschland Limited (Guernsey Judgment 9/2011)
Jefcoate and anor v Spread Trustee Company Ltd and others (Guernsey Judgment 31/2012)
In re a Guernsey Company: Royal Court, (Talbot LB unreported) 30 April 2013
Fairhead and another v Praxis Holdings Ltd and others (Guernsey Judgment 12/2015)
Broadhead v Spread Trustee Company Ltd and others (Guernsey Judgment 10/2015)
Savile AD4 Ltd and anor v Marlborough Trust Co Ltd and anor (Guernsey Judgment 3/2016)
Kazzaz and ors v Standard Chartered Trust (Guernsey) Ltd (in liquidation) and anor (Unreported, Guernsey Royal Court 28 April 2022)

England and Wales:

Sykes v Sykes (1869) LR 4 CP 645
D'Hormusgee & Co and anor v Grey [1882] 10 QBD 13
White v Butt [1909] 1 KB 50
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 1 QB 609
John Bishop (Caterers) Ltd v National Union Bank Ltd [1973] 1 All ER 707
Pearson v Naydler [1977] 1 WLR 899
BJ Crabtree Insulations Limited v GPT Communication Systems Limited [1990] 59 BLR 43
Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474
Nasser v United Bank of Kuwait [2002] 1 WLR 1868
Mbasogo v Logo Limited [2006] EWCA Civ 608
Jirehouse Capital Ltd v Beller [2008] EWCA Civ 908
Allen v Bloomsbury Publishing plc [2011] EWCA Civ 943
Stokors SA v IG Markets Ltd [2012] EWCA 1706
Hello Quo the Movie and another v Duroc Media [2014] EWHC 4622
Holyoake and Hotblack Holdings Ltd v Candy and others [2016] EWHC 3065 (Ch)
Chuku v Chuku [2017] EWHC 541
Premier Motor Auctions Ltd (in liquidation) v PriceWaterhouseCoopers LLP [2018] 1 WLR 2995
Danilina v Chernukhin [2018] EWHC 2503, and [2018] EWCA Civ 1802
Rowe v Ingenious Media Holdings plc and ors [2020] EWHC 235 (Ch)
Phones4U Ltd (in administration) v EE Ltd [2020] Costs LR 1065
Tamiz v Offley [2022] EWHC 305

Northern Ireland:

Tennyson v Devlin [2013] NIQB 9

J U D G M E N T

Introduction

The parties

1. The Second Plaintiff (“**JPO**” or “**the Company**” as seems natural) is a Guernsey company in insolvent liquidation, by order of this court made on 24 October 2018. It is the ultimate holding company of a complex and extensive group of subsidiary companies incorporated in many jurisdictions, the details of which are not material at present.
2. The First Plaintiffs in this Action (“**the Liquidators**” for brevity) are the four Joint Liquidators of JPO and are partners in Alvarez & Marsal Europe LLP, a firm of international accountants and insolvency practitioners. They reside in the UK and are based in London. All the Plaintiffs are represented by Advocate Greenfield.
3. JPO was incorporated in Guernsey in 1961 as a vehicle for the expansion of a construction business founded by Stelios Joannou and George Paraskevaides. The business was successful and became a very major company operating in that sector in, in particular, the Middle East. After the deaths of the founders, their families remained in control of the business, holding (each) 40% of the voting shares in JPO. Two other families each held 10% of the Company’s shares, but without voting rights. Nothing turns on this for present purposes, and these minor families can be ignored for simplicity.
4. Relations between the two principal families became strained, and in 2012 a settlement agreement was reached between them, compromising hostile proceedings. Amongst other things, this governed the structure of JPO thereafter. It seems to have effectively split (or worked towards the split of) the Company’s business into two distinct operational parts under the separate management control of the two families, with a view to an ultimate demerger or public listing, but this was never done in any formal legal way, so as to create a legal separation of the two parts of the enterprise. The families appear to have fallen out even more seriously, subsequently, when each in turn refused to approve company assets or resources to be used to give assistance to projects within the other family’s allocated sphere of operations and also regarding whether the nominal loan accounts attributable respectively to each family cohort were required to be, or ought to be, settled. However, JPO remained, in law, a single autonomous corporate entity.
5. It is convenient, for the purpose of this application, to refer to the Defendants by number. The First Defendant, Mr Dakis Joannou (“**D1**”) is the son of Stelios Joannou, and was Director and Chairman of the Company during the relevant period.
6. The Second Defendant, Mr Christos Joannou (“**D2**”) is the son of D1 and was his alternate Director. Both D1 and D2 (together the “**JDs**”) are represented by Advocate O’Hanlon.
7. The Third Defendant Mrs Thelma Paraskevaides (“**D3**”) is the wife of George Paraskevaides, who died on 5 December 2007. She herself sadly died very recently but it has been agreed that proceedings should carry on against her estate until a formal representative can be substituted. There is no problem with this, as she has been having common legal representation with the Fourth and Fifth Defendants. During the relevant period she was a Director of JPO until her resignation on 30 June 2016.
8. The Fifth Defendant, Christina Paraskevaides (“**D5**”) is the daughter of George Paraskevaides and D3.

9. The Fourth Defendant, Mr Andreas Papathomas (“**D4**”) is the domestic “partner” of D5 and was the alternate Director of JPO for D3 until her resignation, when he became a Director of JPO. In July 2018 he was replaced by Leonie Paraskevaides (sister of D5) who appointed her brother Efthymoulos Paraskevaides, as her alternate Director. Advocate Williams represents D3, D4 and D5 (together the “**PDs**”).
10. The Sixth Defendant, Mr Costas Kyriakides (“**D6**”) was the Chief Financial Officer of JPO from 2001 until 13 April 2018. He is represented by Advocate Barclay.

The Claims

11. In this Cause the Liquidators make statutory claims under The Companies (Guernsey) Law 2008 (“**the Companies Law**”) against D1-D4 and D6 in respect of the following stated causes of action, dating from around 2012 through to 2018:
 - i. Unlawful means conspiracy, misfeasance and breach of fiduciary duty under s 422;
 - ii. Fraudulent trading under s 433 alternatively wrongful trading under s 434.
12. The Company (JPO in liquidation) also makes claims in respect of the following causes of action:-
 - (i) against D1-D4 for wrongful distributions of JPO’s assets, under s 309 of the Companies Law;
 - (ii) against D1-D4 and D6 for unlawful means conspiracy, misfeasance and breach of fiduciary duty, and further or alternatively, for breach of the customary or common law and/or contractual duties to exercise reasonable skill care and diligence and/or negligence;
 - (iii) against D1-D5 for equitable compensation or restitution for “unconscionable receipt” [sc. of JPO property];
 - (iv) against D5 and D6 for equitable damages or compensation for dishonest assistance in breaches of fiduciary duty (therefore, breaches by D1 – D4);
 - (v) further or alternatively against D3 and D5 for repayment of a debt claimed to be due,

with various consequential claims for remedies against all Defendants as appropriate, such as for declarations that property is held on trust for JPO, for orders for its return and/or for an account, and/or equitable compensation and/or damages, and interest.
13. Whilst the above claims cover various individual elements, not all pleaded against all Defendants, and whilst there is undoubtedly duplication within the summary below, an idea of the scale of the claim is provided by the facts that:
 - a. The claims with regard to personal benefits improperly received by D1-D5 (it is not alleged that any were received by D6) are:
 - D1: \$42,897,619
 - D2: \$15,155,525
 - D3: \$47,317,593
 - D4: \$ 9,490,232

D5: \$33,965,299;

- b. The claims for debts repayable by D3 and D5 are:

D3: \$10,446,133 or \$743,957

D5: \$ 2,607,048 or \$ 10,695

(dependent on the facts);

- c. There are claims for restoration in respect of alleged improper payments, or financial assistance rendered, to four third party entities in the sums of \$32,621,379, \$161,125,851, \$19,673,932 and \$3,000,000 respectively; and
- d. The claimed loss caused by the umbrella claim of fraudulent trading is quantified at \$844,595,303, and the loss alternatively claimed to have been caused by wrongful trading is quantified at between \$401Mn and \$917Mn, depending on when the relevant period is found to have commenced.

The Applications

14. By the three Applications before the Court, the Defendants all seek security for costs:-

- a. D1 and D2 together seek security up to the point of giving disclosure in the sum of £5,419,464.67;
- b. D3-D5 together seek security up to the point of having reviewed the other parties' disclosure in the sum of £5,150,191.32; and
- c. D6 seeks security up to the point of giving disclosure in the sum of £1,215,487.20.

15. The applications are supported by the affidavit evidence of D2 himself and of Emma Taylor of Collas Crill on behalf of D1 and D2, of Alex Thornton de Mauroy of Appleby on behalf of D3-D5, and of D6 on his own behalf. The Plaintiffs adduced evidence in response from Elliot Aron of Carey Olsen. The purpose of such affidavit evidence was mainly to exhibit *inter partes* correspondence and estimated bills of costs and also to put into evidence the relevant terms of ATE ("After The Event") insurance cover which the Plaintiffs wished to rely on in support of their argument that no order for further or other security for costs was necessary.

My jurisdiction

16. Rule 82 of the Royal Court Civil Rules 2007 (the "RCCR") reads

"(1) The Court may, in any action –

(a) ...

(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”

My discretion is thus simply to do what I think is “just”, and there is no fetter on this discretion except that I must, of course, act judicially.

17. There having been little corpus of original authority on this point in Guernsey law it has been natural to look to English authority for guidance. However, I think it is appropriate to remind myself what “guidance” means, for this situation.
18. The English law requirements on the topic of security for costs are now laid down in Part 25 r 12-14 of the Civil Procedure Rules 1998 (the “CPR”), but the relevant provisions of CPR Part 25 are not the same as those of RCCR r 82 (1). The relevant CPR rule, Part 25.13, reads

“25.13 (1) The Court may make an order for security for costs under rule 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 or***

(ii) an enactment permits the court to require security for costs” (emphasis added).

Sub-paragraph (2) then provides a number of conditions, lettered from (a) to (g), which provide “gateway” conditions for the making of an order.

19. There are thus two conditions under CPR Part 25 which have to be met before an English court will make an order for security for costs, and only the first is the equivalent of the RCCR r 82. The second condition is that the case must also be brought within one of the specific provisions of Rule 25.13 (2), which are thus *jurisdictional* conditions: see, eg, *Danilina v Chernukhin* [2018] EWCA Civ 1802 at [51(2)]. There are no such conditions in Guernsey law; the jurisdiction itself is entirely general. I note that the extra breadth of the complete generality of the jurisdiction in Guernsey was expressly acknowledged by Collas B in *Mitco Realty Limited v Develica Deutschland Limited*, Guernsey Judgment 9/2011 at [3].
20. This is not to suggest that the English cases are of no assistance at all. It is only to be expected that the laws in two civilised and constitutionally similar jurisdictions are likely to come to much the same overall general conclusions as to matters of what is “just”. However, they may well differ with regard to detail, especially regarding matters of procedural law, and especially where their evolution is different. The result in one jurisdiction may not be exactly the same as one would find or expect in the other.
21. The “gateways” laid down in Part 25.13 (2) are the codification of the earlier accrued body of piecemeal English common law authority with the addition of statutory provisions, introduced to deal with the situation of impecunious company plaintiffs from as early as 1857 (Joint Stock Companies Act 1857 s 24). Guernsey law has not developed like this and whilst the English specific gateway provisions may well be expected to highlight factors which would be indicative of where ordering security would be regarded *prima facie* as just (at any rate in the context of English law), the fact that they are now codified means that applying these provisions introduces issues of the proper interpretation of the words used in the codification. That is just not part of Guernsey law, at all. In addition, the order and wording of sub-paragraphs (a) and (b) of Part 25.13(1) seems to produce the rather odd proposition that it could be possible for an English court to find that “*having regard to all the circumstances*” it was “*just*” to order security, but then to conclude that it could not do so because none of the listed conditions in

paragraph 25.13 (2) were met. That would be irrelevant in applying Guernsey law (and in practice the English authorities seem to approach any particular case the other way around, which is clearly logical). But the degree of persuasiveness of any English cases (it is a little misleading to call them “authority”) must be weighed against the above background.

22. In short, I consider that the guidance which English decisions give can only be regarded as indicative examples prompting consideration of factual situations in which it might be thought to be “just” (or not) to order security, and perhaps thereby shedding useful light on policy considerations. However, whilst the commentary in the English CPR on Part 25.12-14 is helpful general reading, English decisions which turn on the application of one of the “gateway” provisions of Part 25.13(2) are of quite limited relevance to the application of RCCR r 82(1), because my jurisdiction is not constrained, either directly or indirectly, by any such qualification.
23. As I said more than once during the hearing: **I am not applying CPR Part 25.13; I am applying RCCR r 82 (1) (b).**

The arguments

24. The arguments on these applications divide into two parts. First there is the issue of whether security should be ordered at all. Second, if it should be, there is the issue of the appropriate quantum. The three Advocates for the Defendants have economically divided the relevant points between themselves for the purposes of argument.

(1) Should I order security for costs in principle?

Preliminary

25. I start with some basic points which underly a general assessment of what would, or may, be “just”, and which I consider are pertinent background to these applications.
26. First, although as a principle of the administration of justice in Guernsey it has been decided that (as a general rule and within the limits imposed by the principles of taxation) the losing party to a suit must pay the winning party’s consequential costs, the normal position is that security for costs is not required to be posted in order to invoke the jurisdiction of the court. It is therefore for the applicant for security to satisfy the court that it is appropriate (ie “just”) to depart from that normal position.
27. Second, the reason for ordering security for costs is to provide some protection to the party in whose favour it is made against the risk of being unable to enforce costs orders which he or she may later be granted. But because becoming a plaintiff is a voluntary act whilst becoming a defendant is not, security will only be granted to a party in the (effective) position of defendant.
28. Third, the strong fundamental principle of affording universal access to justice demands that a natural person (I will use the term “**individual**”) may not be ordered to give security for costs in respect of a viable claim (ie a claim which cannot be struck out; if it can be struck out, it should be), simply on the grounds that s/he is apparently impecunious, even very impecunious. The courts of law are open to everyone, rich or poor. In English law, this tenet long pre-dated human rights legislation, but support for it is found there, in particular, in the well-known rights enshrined in Article 6. The consequence is that there needs to be some further or other matter made out by the applicant for security, to make it just to require security to be given, even (or especially) by an impecunious individual as a plaintiff. English law identified some such factors and enshrined them in the jurisdictional “gateways” listed in Part 25.13 (2). Guernsey law has not developed in such a formulaic fashion.

29. However, and fourth, this principle of unfettered access to justice, does not have the same force in relation to non-natural persons, ie corporate bodies - by far the most common being limited liability companies which can easily be liquidated if costs debts are too great or inconvenient to bear. Consequently, it is quite likely to be just to grant security for costs against such a plaintiff on the grounds merely of apparent impecuniosity. The formulation of this principle in English law is found in CPR Part 25.13(2)(c), and has become that there is “*reason to believe that [such claimant] will be unable to pay the defendant’s costs if ordered to do so*”, but although the operative word is “*will*”, the opening phrase waters this down to a threshold test which is not as high as proof on balance of probability: *Jirehouse Capital Ltd v Beller* [2008] EWCA Civ 908. Thus, it simply has to be a “real” (ie not insignificant) possibility. (In passing, that case itself illustrates the complications which arise from having to surmount a statutorily defined gateway. In Guernsey, it is unnecessary to consider such minutiae, because the test is simply the impressionistic one of what appears to be “just” in any particular case.)
30. Fifth, though, even that fourth point may be tempered, when it comes to the exercise of the court’s discretion, by other relevant matters, such as whether the application for security is apparently being used oppressively, or whether the plaintiff company’s lack of means has been brought about by the actions of the defendant (see *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609 at 626G-H).
31. Sixth, there is an even more important principle that, on any basis, security for costs should not be ordered if it appears that doing so will have the effect of stifling a viable claim. Here, though, the burden of proof shifts to the plaintiff once the defendant satisfies the court that it would otherwise be just to order security. This is a re-emergence of the principle of universal access to justice, as part of the balancing exercise. As this consideration is simply an inherent “common law” type of requirement there is no particular standard of proof, and it becomes part of the overall assessment of justice and reasonableness. The only thing which needs to be noted is that such an assertion by a plaintiff, being self-interested, would need to be rigorously examined.
32. Seventh, it has been frequently said in England that the merits of the case itself are not material to the question whether security for costs should or should not be granted, unless the party relying on this can demonstrate the probability of success (or failure) to a very high degree: see, most recently, *Danilina v Chernukhin* [2018] EWCA Civ 1802. However, consideration of the merits feels, intuitively, like a very natural circumstance which could reasonably affect the justice of granting security for costs. Indeed, in 1973 in England it was listed as such with apparent approval in the *Sir Lindsay Parkinson* case (above). But disinclination to consider the merits of a case at an interlocutory stage of any proceedings has increased significantly in England since 1973, largely because of the increasing length and complexity of trials of any significance. An application for security for costs needs to be capable of being dealt with in relatively short order at a high general level of factual investigation. Being an interlocutory matter, the application will necessarily have to be determined on limited evidence in the interests of proportionality. An investigation of the merits in any detail is not compatible with this, and the principle, therefore, that the merits of the case should not be investigated in any detail is generally an appropriate attitude for the court to take, even though it is a consideration of policy, expedience and proportionality rather than substantive principle. However, it does not seem to me that this approach requires that the court should be entirely blind to the general nature of the case and the proceedings, and in any event, its force is, in my judgment, greater in English law than in Guernsey law because of the formulaic and precedent-oriented development of the former.
33. Eighth, as already mentioned, authority on the interpretation of the jurisdictional gateways imposed in England by CPR Part 25.13(2) has utility in Guernsey for being examples of matters which English law came to regard as being sufficiently significant to constitute *prima facie* grounds for the justice of ordering security for costs, although these then became translated

from empowering factors at common law into legislated jurisdictional conditions. Looking at these, therefore, as such general background:-

- (i) Gateway (a) (into which gateway (b) was later amalgamated) permits security for costs to be ordered against a claimant who is resident out of the (English) jurisdiction except where such claimant is resident in a “Hague Convention” country. The exception covers countries which recognise and apply reciprocal enforcement of judgments with the UK. The exception can therefore (obviously) have no application in Guernsey, and it has a complex legislative history, which it is not necessary to go into. The authorities regarding this gateway condition show, though, that the reason for granting security in the case of a jurisdictionally non-resident plaintiff was not general xenophobia as to whether “foreigners” could be expected to pay bills, but was the practical consideration that there might be difficulty in *enforcing* an English costs order in the country of the plaintiff’s residence. Such difficulty could be either with regard to outright enforcement at all, or to increased expense in order to do so. The practical consequence is, therefore, that the measure of security ordered upon this ground must relate to the costs associated with that particular anticipated difficulty (which is a matter of fact), because it is that which is the risk against which it is just to give the defendant some protection.
- (ii) Gateway (c) deals with impecunious corporations, already discussed above.
- (iii) Gateways (d), (e) and (g) all go to facts from which it might be inferred that the plaintiff may be intending to try to avoid, or insulate himself from, adverse costs consequences in the action. The specific acts are those of changing, or avoiding giving, a correct address or dealing with assets so as to make it difficult to enforce a costs order.
- (iv) Gateway (f) is different and concerns a claimant who is “*acting as a nominal claimant*” but as to whom there is also “*reason to believe that he will be unable to pay the defendant’s costs if ordered to do so*” (ie similarly to the case of an impecunious corporation). The point of this is that defendants should not have to face impecunious plaintiffs with no genuine interest in the action. However, persons acting in recognised “representative” situations specified in CPR Part 19 (these are court-authorized representative parties for the purpose of group litigation or trust administration applications: see *Allen v Bloomsbury Publishing plc* [2011] EWCA Civ 943 at [24]) are expressly excluded from being “*nominal claimants*”. Whilst not similarly covered by the reference to Part 19, (an omission which again illustrates the problems caused by having to interpret legislation), trustees and executors/administrators of deceased estates suing in that capacity are also not to be regarded as “*nominal claimants*” in England, even if they have no beneficial interest in the relevant trust or estate (see: *White v Butt* [1909] 1 KB 50 at (56); and *Chuku v Chuku* [2017] EWHC 541 at [26(ii)]). (However, the relevant considerations on this point may not be the same in Guernsey given that a trustee’s personal liability in Guernsey is not necessarily unlimited in principle as it is in English law, but may be limited to the value of the trust assets: see *The Trusts (Guernsey) Law, 2007 s 42(1)*).

The principles distilled in *Chuku* were that (1) a person with a “*significant interest*” (not necessarily financial) in the outcome of the litigation will rarely, if ever, be treated as a “nominal plaintiff”, (2) persons in the position of trustees will not be nominal plaintiffs, even if they have no beneficial interest and (3) “*at least typically*” there will need to be some element of window-dressing or duplicity for a person to be a “nominal plaintiff”. However, in *Tamiz v Offley* [2022] EWHC 305, Ritchie J at [67] preferred the more general summary that

“the heart of the test ... is the lack of any straight forwards interest in the claim by the front man or woman in whose name the action is issued”

combined with the familiar appearance of inability to pay an adverse costs order. The value of considering this gateway, therefore, is to underline the fundamental point that the justification for ordering security is to protect a defendant from an *unfair* risk of an unsatisfied costs order if he is successful. Giving him protection can therefore be justified where it appears that an impecunious person is “put up” as plaintiff so as to enable others with the real interest in the outcome of the litigation to evade the risk of an adverse costs order if the claim fails.

34. Ninth, the position is considerably complicated where (as here) there is more than one plaintiff, and the plaintiffs have different material characteristics. Historically in England, where such co-plaintiffs were individuals, the presence of a (genuine) plaintiff resident within the jurisdiction simply precluded the granting of security against a “foreign” resident co-plaintiff at all, apparently on the grounds that unless there were grounds for ordering security against all plaintiffs, it could not be ordered against any: *Sykes v Sykes* (1869) LR 4 CP 645 per Brett J at 650. But these historic cases are confusing and difficult to reconcile or understand. That “rule” has not survived, at any rate in such a blunt form, and an attempt to apply it by analogy to an impecunious company plaintiff which was co-plaintiff with an individual resident within the jurisdiction failed in *John Bishop (Caterers) Ltd v National Union Bank Ltd* [1973] 1 All ER 707. It was rejected again in *Pearson v Naydler* [1977] 1 WLR 899, although in neither instance was this the only point in the case. The position in England now seems to be that jurisdiction is established against particular plaintiffs according to their own characteristics and position, but the presence of a second plaintiff who is better placed to resist an application for security for costs is to be treated as a factor to be taken into account - for whatever it is worth as a practical matter, on the actual facts – at the (later) overall discretion stage with regard to the first plaintiff.
35. This therefore emphasises the need to look separately at the overall circumstances in relation to the application against each plaintiff. An English example is *Holyoake and Hotblack Holdings Ltd v Candy and others* [2016] EWHC 3065 (Ch) where Mr Holyoake was resident within the jurisdiction, and Hotblack was an impecunious company. Mr Holyoake had small separate claims of his own, but was otherwise accepted (apparently) to be potentially jointly liable with Hotblack for any adverse costs orders in the proceedings, with the argument therefore being as to whether he was “good” for the relevant costs (being any excess of such potential costs above the level of ATE insurance which had been obtained, and which was accepted to be sound security), so as to make it unnecessary and unjustifiable to order any security for costs. Nugee J said at [52]:

“Since security for costs can only be ordered against Hotblack and not against Mr Holyoake, it is accepted that security can only be ordered for the costs of Hotblack’s claims”.

In the event, Nugee J did order security for costs against Hotblack, but apparently because he was not satisfied that Mr Holyoake’s financial circumstances made him sufficiently clearly “good” for the amount of such excess costs, so as to remove the “reason to believe” that Hotblack might be unable to pay them if called on.

36. Moving on from this point, lastly, and tenth on these general aspects, a further relevant complicating factor is the extent to which claims by different parties within the proceedings overlap as regards their subject matter. This arises acutely in the context of a claim and a “mirror image” type of counterclaim, ie where the same matters would fall to be litigated on both the claim and the counterclaim to come to the right end result. In such a case ordering the plaintiff to give security for costs creates a tactical distortion, because if the plaintiff fails to do

so and the claim is therefore dismissed, the counterclaim involving the self-same issues will still continue, with an unfair tactical advantage to the defendant/counterclaimant. That is, therefore, a good reason not to order security for costs; see, in particular, *BJ Crabtree Insulations Limited v GPT Communication Systems Limited* [1990] 59 BLR 43. That position does not arise here, but the principle of considering the impact of the “overlap” of issues has been held to apply also to co-plaintiffs bringing claims with a sufficiently great overlap of material supporting facts, such that ordering security against one plaintiff will not prevent the case being continued in a substantially similar way, but without security, by the other plaintiff. In *Hello Quo the Movie and another v Duroc Media* [2014] EWHC 4622 the argument on appeal was that security for costs ordered against the first claimant company on the grounds of its impecuniosity had been wrongly ordered because it had not been appreciated by the judge that the second claimant, a director of the first claimant, was advancing a good and arguable separate personal claim to pursue a precisely similar right to enforce the relevant contract, being personally party to it. The appeal against the judge’s order that security be granted by the company plaintiff was therefore allowed, in a very short judgment by Mr Nicholas Strauss QC, by reference to the principle in *Crabtree*. Where this stands in English law (the case precedes *Holyoake* and it does not appear that *Pearson* can have been referred to) may be unclear, but on any basis it indicates a judicial approach to such a circumstance.

37. In the end, none of the above authorities and their particular outcomes applies specifically in Guernsey law, however much they may exercise the reasoning powers of English judges, because the jurisdiction in Guernsey is simply to do what appears “just in all the circumstances”, without restriction. It is therefore very much fact specific. What one does take as general guidance is that the starting point is that security for costs is not (without more) to be ordered against individuals who are genuine plaintiffs, but that there is a presumption in favour of granting security for costs against corporate plaintiffs if it appears that there is a real possibility of their being unable to meet adverse costs orders which might be made if they fail.

Guernsey law

38. Inevitably, given the starting point of their arguments, the Advocates in this case have addressed me largely on the basis of English case law, but I have been referred to five Guernsey cases on the issue of security for costs. These were *Mitco* (above) in 2011, *Jefcoate and anor v Spread Trustee Company Ltd and others* (Guernsey Judgment 31/2012), *Fairhead and another v Praxis Holdings Ltd and others* (Guernsey Judgment 12/2015), *Savile AD4 Ltd and another v Marlborough Trust Co Ltd and another* (Guernsey Judgment 3/2016), and *Kazzaz and ors v Standard Chartered Trust (Guernsey)Ltd (in liquidation) and anor* (Unreported, Guernsey Royal Court 28 April 2022). All these are decisions at first instance only. The latter two were cited more on the issue of quantum than of basic principle. In any event, they are all simply examples of the exercise of the Guernsey court’s uncircumscribed discretion. However, *Fairhead* has figured the most in argument and I have found it the most illuminating.
39. In *Fairhead* (above) a claim was brought by two plaintiffs, one an individual businessman resident in London, and the other a company operating in Ireland. It is not perfectly clear from the report what or how much the claim was for, but the Plaintiffs had acquired their rights of action by assignment from the liquidator of two Art Investment Funds in which they had both been investors and which had gone into administration, for the sum of £2,500, and possibly, therefore, on the basis of sharing any fruits of the litigation. Security for costs was sought on the grounds, drawn from CPR Part 25, that the first plaintiff was resident out of the jurisdiction and/or had taken steps to deal with his assets so as to make it “more” difficult to enforce any costs orders against him, (although this word does not appear in the English gateway (g)), and that the second plaintiff was resident out of the jurisdiction and was a company whose financial position was such that there was reason to believe that it would be unable to pay any costs order made against it.

40. A great deal of the evidence and argument therefore focused on the plaintiffs' respective financial positions. McMahon DB (as he then was) rejected, on the evidence, the proposition that actions taken by the first plaintiff had been taken with a view to making it difficult to enforce any costs order against him. He also held that, as there was no particular difficulty in enforcing a Guernsey costs order in England and the first plaintiff was a man of "*some substance*" (apparently owning assets to a value well exceeding any likely costs liability), he would not have ordered security for costs against the first plaintiff had he sued alone (see [45]). However, the learned Deputy Bailiff was satisfied that there was reason to believe that the second plaintiff, the non-resident company, would be unable to pay any costs order which might be made against it, and he would therefore have ordered security for costs (in the sum of £350,000) if the second plaintiff had sued alone (see [46]). There was then, therefore, the question of the appropriate order to be made, on the basis that they were co-plaintiffs. The Deputy Bailiff's decision was that he should make an order against both plaintiffs, jointly, because they had chosen to sue jointly, because he considered that the defendants deserved some protection, and because if he ordered security against only the second plaintiff, that plaintiff could simply disappear from the proceedings and leave the defendants without such protection as he felt was deserved [49]. This arose, though, principally from his reaction to the way in which the two plaintiffs had joined forces in bringing the proceedings (*ibid*). He then emphasised that, if he stood back and simply asked himself the question whether such an order was "just" in all the circumstances, he was perfectly satisfied that in principle it was, and that in the "*absence of any practical way to distinguish*" between the two plaintiffs (see [52]), the order should be made against them jointly, even though it meant that the first plaintiff would be ordered to give security which he would not otherwise have had to do.
41. Although an application for leave to appeal was made, by both plaintiffs, to the single judge and remitted to the Full Court of the Court of Appeal, it does not appear to have been pursued.
42. I consider this case, in particular, to be a powerful illustration of the point that the court's discretion under RCCR r 82 is to be regarded as one of simply doing justice according to the particular facts of the case, and is not trammelled by comparison with the outcomes of cases under English law. Unsurprisingly, the Defendants found heavily upon this case in support of the outcome of these applications for which they contend.

Defendants' submissions

43. As an agreed sensible division of submissions for the Defendants, Advocate O'Hanlon argued the general circumstances justifying orders for security against the Liquidators personally and against JPO itself, Advocate Williams concentrated on the question whether the ATE insurance proffered by the Plaintiffs was sufficient to displace any need for security, and Advocate Barclay dealt with the issues arising from the position of co-plaintiffs.
44. Advocate O'Hanlon, having emphasised the extreme breadth and depth of the matters to be investigated under the claims made in the Cause (and the fact that his two clients insisted that those claims were misguided and would fail) pointed to the dual facts that (a) JPO is a company in insolvent liquidation, and (b) the Liquidators are all resident in the UK and out of the jurisdiction, as basic grounds justifying the grant to the Defendants of security for costs.
45. First, as to JPO itself, he submitted, as is obviously accepted, that the fact that JPO is in insolvent liquidation gives rise to a *prima facie* presumption that it would be unable to pay costs orders; it would then, he submitted, require some other factor to displace the consequent reasonableness and justice of ordering security for the Defendants' costs.
46. As to this, the central fact advanced by the Plaintiffs was an ATE Insurance policy for adverse costs up to £10.5Mn which had been obtained but only recently disclosed, but with redactions of portions which the Plaintiffs asserted were not material but were commercially sensitive.

For reasons which would be dealt with by Advocate Williams, he submitted that this was inadequate to demonstrate that adverse costs orders could be met by JPO.

47. The only other factor suggested to displace the *prima facie* position was an offer made by the Liquidators to accept personal liability, themselves, as regards any and all adverse costs orders made against the Plaintiffs, without distinction between themselves and JPO. As to this Advocate O’Hanlon invited some scepticism, I think, in the light of the fact that previously in correspondence the Liquidators had apparently denied any personal liability for costs. Clarification of this offer was therefore sought in the course of the hearing. I asked whether Advocate Greenfield had instructions to give such an undertaking to the Court, and whilst this was not confirmed during the hearing itself, this offer was formalised a day or two afterwards, in a letter to the Court in which, on behalf of his clients, Mr Aron of Carey Olsen confirmed that the Joint Liquidators were willing to give the following undertaking to the Court:

“The Joint Liquidators undertake not to raise any arguments in relation to costs contrary to the position that they are personally jointly and severally liable with Joannou & Paraskevaides (Overseas) Limited (In Liquidation) in respect of any adverse costs order resulting from the claims brought by the Plaintiffs.”

I do not think that there is any possibility of adverse costs orders against the Plaintiffs in these proceedings which would not fairly be regarded as “resulting from” the claims they had brought, and so, although I find the precision of this wording a little disconcerting, I conclude that that is the product of formality, and the undertaking is of blanket application. I interpret this undertaking as being that the Joint Liquidators are, thus, assuring the Court that they accept personal liability for any costs ordered in favour of any of the Defendants against either themselves or JPO.

48. As to this point, Advocate O’Hanlon submitted that in the absence of any sound evidence (and there was none) that those who gave such an undertaking had the means to make it good, such an offer was not effective to relieve JPO, in overall justice, from any obligation to provide security for costs arising out of its own apparent inability to meet such orders, citing *Holyoake v Candy*, above. The risk to the Defendants had not been removed.
49. With regard to the Liquidators’ own position, he relied on the fact that they were admittedly resident out of the jurisdiction as a ground for awarding security, but he also went on to submit that, as liquidators, they should be regarded as being in the position of “nominal plaintiffs”, by analogy with gateway (f) of CPR Part 25.13 (2). This meant, he submitted, that security could and should be ordered for the amount of the Defendants’ prospective costs themselves, rather than simply in respect of costs potentially attributable only to difficulties of enforcement. In support of this he cited *Jefcoate and anor v Spread Trustee Company Ltd and others* (above: Guernsey Judgment 31/2012) in which, McMahon DB (as he then was) had awarded security for costs against plaintiffs who, as beneficiaries of certain trusts, were suing the trustees and others for breach of trust and accessory liability, with the relief claimed therefore being the restoration of funds to the trust. The Deputy Bailiff held that this did put the plaintiffs in the position of “nominal plaintiffs” because they did not have a direct interest in the subject matter of the claim but were suing for the benefit of the trust estate and he awarded “full” security for costs, accordingly. Advocate O’Hanlon argued that the situation of Liquidators was analogous, as they too were suing “for the benefit of others” namely JPO (or more accurately, its creditors).
50. Once again, therefore, he submitted that the Liquidators’ means to meet any adverse costs orders became material, and that in the absence of any evidence as to their personal means, or other source of funding (apart from the ATE insurance referred to below), despite the fact that this omission had been highlighted in correspondence, there was sufficient “reason to believe” that they would be unable to meet adverse costs orders. He referred to *Mbasogo v Logo Limited* [2006] EWCA Civ 608 as support for the proposition that the absence of any, or any satisfactory

evidence, of a claimant's financial position justified drawing such an inference sufficiently for the purpose of supporting the awarding of security.

51. Thus, he submitted, insofar as the issue was whether the Defendants ought to have comfort as to their ability to recover upon any costs orders which might be made in their favour, the Liquidators' joint liability for these, whether flowing from their advancing of claims on their own behalf or based on their personal acceptance of costs liabilities imposed on JPO, did not provide any effective and sufficient comfort to the Defendants. On this basis, the argument would boil down, once again, to the (contested) worth of the ATE insurance, considered later.
52. Advocate O'Hanlon made some arguments with regard to the position of co-plaintiffs, where one could be obliged to give security and the other could not. He submitted that the extended *Crabtree* principle, regarding overlap of claims and the causation of costs, did not apply here. This was, first, because there was not a sufficient overlap between the claims advanced by the Liquidators and those advanced by JPO itself to justify it. He relied, I think, on the presence of the fraudulent and wrongful trading claims by the Joint Liquidators. He submitted that it could only be in the situation of an effectively total overlap, in substance, that a plaintiff who ought to give security could be relieved from doing so by the presence of a co-plaintiff who could not be, or was not, obliged to do so. He cited *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474, in which, even where there was virtual identity of the claims, the Court of Appeal had held that it was "not wrong" for the judge to have required the "foreign" company plaintiff to post security, despite the fact that the claim by the first plaintiff would proceed without security on precisely the same set of facts and issues anyway. (In that case, the plaintiffs were an English resident individual and his *alter ego* Nigerian trading company, and they had both sued because it was disputed which of them had made the relevant contract with the defendant). He submitted, therefore, that the *Hello Quo* case had been wrong to take the position with regard to a claim and a mirror counterclaim and apply that by analogy to the position of co-plaintiffs; it was just not a proper analogy.
53. He submitted, therefore, that *Pearson v Naydler* (above) showed that the correct test was simply whether the defendant needed security, and the strong presumption was that where there was an impecunious company plaintiff, the defendant should have the comfort of such security, whatever the position of the other plaintiff. He pointed out that in *John Bishop* (above) security had been ordered against an impecunious company despite the presence of a co-plaintiff against whom security could not be ordered – and by contrast, the position in this case with regard to the Liquidators was at best "should not" rather than "could not" be ordered. In reliance on *Fairhead* (above) he therefore submitted that it would be appropriate to order security against both the Liquidators and JPO, jointly and severally, because there were really no grounds for distinguishing between the positions of the two Plaintiffs in pursuing the Defendants. However, even if the court were of the view that no, or only reduced, security was appropriately ordered against the Liquidators, that was no reason for not ordering "full" security against JPO itself.
54. He then proceeded to review the general features which would go to justifying an order, as set out in the *Sir Lindsay Parkinson* case, whilst suggesting (as I accept) that they were not of major impact in this case. Submitting that the merits of the claim could not be investigated, he also accepted that the claim was not a "sham", even if (as his clients contended) it was misguided and would ultimately fail against them; however, and by the same token, it could not be said at this interlocutory stage that the claim was so clearly likely to succeed that this was an argument for not awarding security. Equally, there was no basis for suggesting, certainly at this stage, that JPO's lack of means could be attributed to his clients' conduct. It was not suggested that awarding security would stifle the claim, and the onus would be on the Plaintiffs to prove any such assertion. There could be no suggestion that the application had not been made promptly.

55. The effects of the existence of ATE insurance have assumed much importance in these applications and Advocate O’Hanlon submitted that the ATE insurance policy which had been disclosed was inadequate to remove the need for security for costs. He advanced this in detail in his Skeleton Argument, but at the hearing this submission was taken up and addressed in full on behalf of all the Defendants by Advocate Williams.
56. Advocate Williams first took me through the *inter partes* correspondence regarding the Plaintiffs’ reliance on the ATE insurance, and the difficulty which the Defendants had had, he submitted, in obtaining the relevant information from the Plaintiffs as to its terms, emphasising both the unsatisfactory (he submitted) process of production and the unsatisfactory end result which left many reasonable concerns unanswered. He cited *Premier Motorauctions Ltd (in liquidation) v PriceWaterhouseCoopers LLP* [2018] 1 WLR 2955, in which it was definitively decided in the English Court of Appeal that the existence of an insurance policy covering adverse costs orders was a matter which could be taken into account, and might be determinative by showing, in effect, that there was no “reason to believe” that an otherwise apparently impecunious company would be unable to pay the defendant’s costs – but this possibility was heavily dependent on the terms of the policy, and whether they did, indeed, provide adequate comfort, or security, for the defendants. Important points to be taken from that case were that this rested not only on whether the level of cover was adequate, but also whether there were “anti-avoidance” provisions in the policy, disentitling the insurer from avoiding the policy for alleged misrepresentation or non-disclosure after the event, and also some assurance that the proceeds of the policy could not be diverted elsewhere (see *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 at [60]). The highly professional and responsible status of those procuring any such policy was said not to be enough to provide sufficient reassurance of this (see [28]).
57. Advocate Williams then took me through the terms of the ATE policy as these had been disclosed, and listed the various matters which he submitted meant that the “reason to believe” that JPO would be unable to meet adverse costs orders had not been displaced by these insurance arrangements. He concentrated principally on five matters.
58. First, he pointed out that – he submitted unusually – it was not the Plaintiffs who were the “Insured”, but the litigation funders. The policy is provided by Burford Worldwide Insurance Limited but “The Insured” is a Guernsey company and two Delaware LLPs who have been described by the Plaintiffs as “*the Burford Entities which have provided funding to [the Plaintiffs]*”. Consequently, the ultimate availability of funds to meet any costs orders in favour of the Defendants depended on the further assertion that the benefit of the insurance would “flow through” from the Insurer to the Insured, and on to the Plaintiffs, as well as then on to the Defendants. This, however, depended not only on the terms of the insurance policy itself, but also on the terms of the arrangements between the Plaintiffs and their litigation funders, and insofar as these latter had been disclosed (again the Plaintiffs had redacted parts of the agreement on grounds of privilege and/or commercial sensitivity) these were insufficient to provide comfort that the Defendants’ position was secure. The interaction of the litigation funding agreement, the insurance policy and the terms of the retainers between the Plaintiffs and their solicitors/Advocates produced many points at which any obligation on the Insurer, or monies paid out by them in respect of Defendants’ adverse costs orders, could be imperiled, thereby exposing the Defendants to additional layers of risk. For example, the “Capital Providers” who are obliged to indemnify the Plaintiffs under the funding agreement, are not even clearly identified with the “Insured” under the ATE policy, and their obligation to indemnify the Plaintiffs is conditional on their obtaining the benefit of the indemnity under the ATE policy. Thus, the possibility of “holes” in the suggested “flow through” upon which the Defendants would have to rely was quite real, and was a definite and unreasonable risk.
59. Second, and linked with this, the identity of the actual Insured under the ATE policy was unsatisfactory in itself. They were entities about whom nothing was known, and there was no

reassurance as to their substance. This emphasised the fact that funds paid over to them were not inevitably bound to be paid over even to the Plaintiffs, let alone to the Defendants in respect of the Plaintiffs' possible costs liabilities.

60. Third, and very importantly even to the point of being crucial, there were no anti-avoidance provisions in the policy at all. This exposed the Defendants to the possibility that the policy could be avoided after the event for misrepresentation or non-disclosure, and insurers were not unknown to take this course if it were available. In addition, the policy terms provide a wide range of circumstances in which the Insurer might refuse to pay, including for termination of the appointed solicitors' retainers and failure to follow solicitors' recommendations (unless the Insurer consented). The policy contains unpalatable exclusions, such as that the Insurer is not obliged to pay in respect of adverse costs orders on a settlement unless it consents to the settlement. It excludes any payment of adverse costs orders if the proceedings are terminated as a result of the Plaintiffs' not having the funds to continue, which has the unattractive result that the capital funders (which are "Burford Entities") could apparently decline to advance funding, thereby entitling the Insurer (Burford) to avoid paying adverse costs. The wide range of conditions which could entitle the Insurer to refuse to pay out, all, obviously to protect the Insurer but by the same token increasing the Defendants' exposure, undermine the solidity of the policy as protection on which the Defendants could reasonably be expected to rely. None of the matters which could give rise to termination is within the Defendants' control, and there is no mechanism for protecting them, therefore, against happenings between others which could expose them to a real risk of funds being unavailable under the policy to meet any adverse costs orders made in their favour.
61. Fourth, linked with this, there was no covenant by which the Insurer undertook to pay any costs orders made in favour of the Defendants directly to them, as was frequently found in ATE insurances, in order to meet the above problems.
62. Fifth, the level of indemnity for adverse costs (at £10.5Mn) was completely inadequate. This could be envisaged from the size of the claims having to be resisted, and the long period of time to which the claims pleaded related, but it could already be seen directly by the fact that there were three groups of Defendants, whose combined estimated costs, merely up to the point of disclosure, were estimated at over £11Mn. The cover was expressed only to be in respect of the "fully mitigated" costs of the Defendants; it was difficult to understand this term, but it could only be intended to have a reducing effect on the Insurer's liability. Moreover, the general inadequacy of the limit of indemnity was alarmingly compounded by the fact that the policy contained an average clause, which would entitle the Insurer to reduce payment of adverse costs proportionately if their total exceeded the level of cover taken out, on the grounds of underinsurance.
63. For all the above reasons, it was submitted that the ATE policy was quite inadequate to provide any proper or reasonable security to the Defendants in respect of their ability to recover their costs if these were awarded against the Plaintiffs, such that its existence should be ignored in considering whether or not to grant security for costs.
64. Advocate Barclay, appearing for the Sixth Defendant, had submitted an admirably concise skeleton argument, adverting to all the above points, but at the hearing, by agreement with the other Defendants, he addressed the court only briefly on the question of joint plaintiffs. In short, he submitted that the very old cases on joint plaintiffs could really be disregarded, first because of their age and second because, in Guernsey, the question was simply one of what was "just" in the particular circumstances and was eminently fact sensitive.
65. As to this, he submitted that the Liquidators' "standing behind" the Company in respect of adverse costs was not worth anything in all the circumstances; whilst they might not be obliged to disclose their financial position with regard to the question whether it was just to award

security for costs against themselves as Plaintiffs, because they were individuals, where their support was relied on in effect as a “financial backer” of the Company, this support could only be of weight if there was evidence of their substance - and there was none. (The position was lucidly explained in *Tennyson v Devlin* [2013] NIQB 9.) The ATE policy being of no value, this meant that security certainly should be ordered against the Company, and he invited me to take a “step back” in the same way as McMahon DB had done in *Fairhead* and conclude that the appropriate course was to grant security to all the Defendants against both sets of Plaintiffs, jointly and severally, even if one might not have granted it against the Liquidators alone. This was because the position of the Liquidators was effectively indistinguishable from and aligned with the Company’s interests.

Plaintiffs’ submissions

66. For the Plaintiffs, Advocate Greenfield first referred me to the list of claims in the Cause (see above at Paragraphs 11-13) and pointed out that the largest claims by quantum (those for fraudulent and wrongful trading under ss 433 and 434 of the Companies Law) were claims which could not be made by the Company but only in a winding up, by (inter alia) the liquidator. The Liquidators also have express statutory *locus* to bring other claims under s 422 of the Companies Law, for misfeasance and breach of fiduciary duty. (I observe that the Cause also adds unlawful means conspiracy, though I am not sure about that since it is not included in s 422, nor am I sure what it actually adds to the claims in practice.)
67. Reiterating that the Liquidators would accept personal responsibility for all adverse costs orders in the action, whether made against themselves or JPO, he submitted that the right approach was to decide whether it would be just to make an order for security against the Liquidators (as to which he submitted not) and if not, then to consider if the presence of the Company’s claims added anything to the scope of the necessary enquiry in the action, as to which he again submitted that it would not. On this basis, there was therefore no reason to find that the presence of the Company as a plaintiff in the action caused any extra costs beyond what would inevitably be incurred in respect of the Joint Liquidators’ claims. There was therefore no need to order security for costs against the Company and thus no need to order security for costs at all, and the court therefore should not do so. In other words, Advocate Greenfield sought, by this first argument, to invoke the *Crabtree* “overlap” principle of examining the causation of costs.
68. As regards the Joint Liquidators’ own position, he argued that the starting point was that security for costs was not to be ordered against an individual (ie a natural person) as plaintiff without some further recognised factor justifying departure from this. He refuted the suggestion that the Liquidators could be regarded as some kind of disparaged “nominal”, plaintiff, citing the fact that they acted in all matters for the benefit of the Company – more accurately in the circumstances, for its creditors. There was no artificiality about this (see *Chuku*) and no suggestion of a “man of straw” being put up as a plaintiff in order to evade possible adverse costs consequences for those with the real interest in the outcome of the case.
69. Even having regard to the Joint Liquidators’ being resident in England, residence out of the jurisdiction only justified an award of security in respect of the potential additional costs of enforcement of costs orders as a result, and this had to be proved by evidence. No such evidence had been adduced. He relied also on McMahon DB’s holding in *Fairhead* that there was nowadays no reason to assume that there were any appreciable extra costs of enforcing a Guernsey judgment in England, at all. Therefore, he submitted, there were no grounds for ordering security for costs against the Joint Liquidators themselves.
70. As regards the Company, he referred to the English cases which had held that where there was an individual plaintiff resident in the jurisdiction, against whom, therefore, security for costs could not be awarded, no security would be awarded against a co-plaintiff resident out of the jurisdiction, regardless (apparently) of whether either of them was insolvent, citing, *inter alia*,

Sykes v Sykes (above) and *D'Hormusgee & Co and anor v Grey* [1882] 10 QBD 13. In the *John Bishop* case (above), the court had refused to apply that principle in favour of an impecunious company suing together with a resident individual co-plaintiff by analogy - but this was not on the grounds of any difference between the basic positions of (a) a resident and non-resident pair of individuals as co-plaintiffs and (b) a resident individual and an impecunious company as co-plaintiffs, but on the grounds that in *John Bishop* the resident individual's claim overlapped only very little with the impecunious company's claim, whereas in the authorities cited with regard to resident and non-resident individuals, the overlap had been very substantial if not total. Therefore, security for costs could and should be ordered against the impecunious company co-plaintiff in that case, (ie *John Bishop*) because the presence of the resident individual plaintiff was not the determining factor. In *Pearson v Naydler*, whilst the overlap of claims was considerable, other considerations were (he submitted) what caused the order also to be made in that case, namely the court's concerns over the plaintiffs' association with each other and the individual plaintiff's "zigzagging" behaviour in the action; these suspicious facts were in effect held to outweigh any possible effects of the "overlap" principle, and they militated in favour of security being ordered. But, in each case, it was ordered against the impecunious company (only) as a matter of discretion, jurisdiction having been established on the facts; it was still not ordered against the individual co-plaintiff.

71. Thus Advocate Greenfield submitted, the real, basic principle operating at the level of the exercise of the court's *discretion* (importantly, not as a matter of jurisdiction, which was a mandatory and crucial consideration in English cases) was that of overlap of issues, and specifically whether the presence of a plaintiff against whom security *could* be ordered in fact increased the costs which the Defendants were going to have to incur, anyway, in meeting the claim(s) which could and would be brought by a co-plaintiff against whom security could *not* be ordered. *Hello Quo* (above) was therefore, he submitted, both correctly decided and a powerful example of the proper effects of this principle on the court's exercise of discretion. He submitted also, that *Holyoake* was not authority as regards this point, because this point was not argued; by concession (see [57]) the application proceeded solely on the grounds (which were eventually unsuccessful) of whether the individual co-claimant was a good "mark", also, for costs orders made against the impecunious company co-claimant.
72. Advocate Greenfield sought to distinguish (but also criticised) *Fairhead v Praxis* (above) particularly as to the fact that security had there been ordered against the (admittedly) non-resident individual plaintiff but only (apparently) because it was felt that security ought to be ordered against the impecunious company co-plaintiff. He observed that neither *Hello Quo* nor *Crabtree* appeared to have been cited in that case and he submitted, in effect, that this had resulted in the crucial issue of overlapping claims not causing increased costs never having been focused on for consideration. The court had held that it would not have ordered security for costs against the individual co-plaintiff despite his residence abroad, but that it would have ordered security for costs against the impecunious co-plaintiff, if either had sued alone. For the court then to find that it was "*impossible to distinguish between*" them (which had to be a reference to their claims arising on the same set of facts), but that this was a reason *in favour* of ordering security for costs against *both* plaintiffs, was (he submitted) to stand the principle of looking at the question of whether increased costs were occasioned by the presence of the plaintiff against whom security might otherwise be ordered, on its head; such lack of distinction was, rather, a reason for ordering security against *neither* plaintiff. However, Advocate Greenfield relied on the fact that, on any basis, this decision was the exercise of the court's unconstrained discretion in the particular circumstances of that case, and was therefore in no way binding as an approach.
73. He submitted, therefore, that the Court should not order security against either the joint Liquidators or JPO, but if, despite his submissions the court were minded to order security against JPO, there could be no proper grounds for ordering security against the Liquidators personally as well.

74. In summary, he submitted that the guidance which could be derived from the practice in England was clearly that (i) a claimant who was entitled to sue without giving security could not be rendered vulnerable to having to give security solely by the presence of a co-plaintiff who was so vulnerable, and (ii) whether the vulnerable co-plaintiff should be ordered to give security depended on whether his presence in the action increased the costs which the defendant would have to incur in defending the non-vulnerable plaintiff's claim(s), to any sufficiently significant extent. This, in turn, depended on the extent of the overlap of the vulnerable co-plaintiff's claim with that of the non-vulnerable plaintiff. The position in Guernsey should be no more burdensome on co-plaintiffs than that.
75. As regards the existence of the ATE policy as a "fall back" reason why no order for security for costs is necessary, Advocate Greenfield argued that the Defendants' professed concerns were either exaggerated or misconceived.
76. As to the argument that the insurance policy was vulnerable to avoidance for breaches, or for misrepresentation, or non-disclosure, Advocate Greenfield made what was in effect an appeal to practical common sense. He pointed out that the actual funding agreement provided that the funders were obliged to indemnify the Plaintiffs (and therefore to meet adverse costs orders) even if the insurance policy were avoided through the funders' breach, and that it is the Plaintiffs who were obliged to meet the duty of candour as regards the policy, such that mishaps or oversights as to the disclosure of relevant material circumstances of the case or claims could be discounted. He submitted that, on examination the clauses entitling the Insurer to avoid the policy were only in cases of fraud or deliberate misrepresentation by the Plaintiffs, or innocent misrepresentation on a matter so fundamental that the Insurer would not have written the policy, and therefore, whilst the policy did not contain classic "anti-avoidance" language it could only be avoided in circumstances amounting to fraud or gross professional negligence by the Liquidators, a prospect which could be regarded as fanciful.
77. He pointed out the size and reputation of Burford as a litigation funder and submitted that it was again fanciful to suppose that they would renege on their liability; the meeting of any liability to the Defendants would also be administered by the Liquidators who were reputable professionals and, in any event, the Defendants would have remedies to obtain payment from them in respect of any costs orders. With regard to the particular matters which were said to create unreasonable vulnerability to the insurance being terminated, he submitted, once again, that the breaching of conditions with regard to such matters as terms of the policy, retainers, conduct of proceedings, following lawyers' recommendations, etc were in themselves fanciful, and it was fanciful to suggest that any such step referred to would be taken without the Insurer's consent, where required. Finally, he suggested that the level of cover was not only reasonable in itself (when one considered likely levels of reasonably recoverable overall costs), but was irrelevant at this stage because the present applications, extended only to disclosure and it could not (he submitted) be seriously argued that the Defendants would incur more than £10.5Mn in recoverable costs up to that point.

Defendants' responsive arguments

78. In brief response to the above, the Defendants invited me to follow the *Fairhead* line and take a step back to consider the totality of the situation, as I was entitled to do since making an order depended solely on my perception of what was "just". Advocate Barclay submitted that the fundamental question was; was there a "real" risk that costs orders would not be met? If so it was clearly appropriate to order security for costs, and as the immunity of a party from the requirement to give security depended on the fundamental principle of access to justice (a party should not be prevented from having recourse to the courts by poverty) that objection fell away if it was not shown that ordering security would stifle the claim.

79. Advocate Williams submitted, putting it a slightly different way, that the question was whether the presence of the Joint Liquidators as Plaintiffs provided adequate security for the Defendants' costs. Here, the answer was "no" because there was no evidence of the means of the individual plaintiffs, and the ATE policy was insufficiently solid.
80. Advocate O'Hanlon submitted that it was singular that in every case, except *Hello Quo*, where an insolvent company was involved, security had been ordered notwithstanding the presence of an individual claimant; he referred back to *Holyoake*. *Hello Quo* had relied on old cases dealing with the presence of plaintiffs within and outside the jurisdiction, which were now out of date. *Hello Quo* was actually wrong, and the question of "overlapping claims" was a red-herring.

Discussion and decision

81. The question whether to order security for costs in favour of any or all of the Defendants (there are technically three separate applications) and against either or both sets of Plaintiffs is entirely a matter of my discretion as to what I consider to be "just in all the circumstances". As McMahon DB observed in *Fairhead*, (see [52]) a careful balancing exercise has to be conducted. This involves weighing all the various relevant factors which might point one way or the other together, although they necessarily have to be considered sequentially in a judgment.
82. I have reminded myself, first, of the preliminary background considerations in regard to security for costs which I set out above at [25] to [37].
83. I remind myself also that the English decisions, whilst a useful reminder of potentially relevant points, are themselves decisions based on English law which has evolved with something of a rigidity of application embedded as previously discussed, and as to which the two step approach has produced what seems to me to be an ethos that there is an assumption that security should be ordered if one of the jurisdictional gateways is made out, followed, consequently, by a burden on the Plaintiffs then to displace the underlying presumption thus created. I further remind myself that such an approach simply does not apply in Guernsey law where all relevant matters fall to be considered in the round, and it is for the applicant defendant to make out the justice of his/its case. I then add the following more specific points.

No stifling

84. At the outset of the hearing, I asked Advocate Greenfield if he was contending that my ordering security would stifle the claim, and I did so on at least one further occasion for confirmation. He said it would not. He did so without qualification, even as to the amount (although, to be fair, he may possibly have been assuming that I would not be minded to order security in the full amount sought by all three groups of Defendants.) I therefore proceed on the assumption that there is no issue to be taken into account as to whether ordering security would stifle the claim; I can assume that it would not.
85. However, that is not, in my judgment, a matter which militates in favour of granting security; it merely removes an impediment. To order security where it would stifle the claim would clearly be unjust. That does not mean, however, that it would be just to order security because it will not stifle the claim. The justice of doing so requires a positive balance in favour of doing so, from other material factors.

The question of merits?

86. At the outset of the hearing, all the parties agreed, in answer to my query, that I was not being asked to go into the merits of the claims. I accept that a consideration of the merits in any detail is not required and would be inappropriate for the reasons I rehearsed at [32] above.
87. However, and as I commented there, that does not seem to me to require that I should be entirely blind to the *nature* of the case (as contrasted with its detailed relative merits), nor, indeed, and by the same token, to the nature of the defences. This is because it seems to me that these may quite fairly be regarded as part of “all the circumstances” even at a high-level appreciation of what appears to be the nature of the disputes, and what appears to be just with regard to them, without conducting any mini-trial as to their actual merits. Indeed, I note that Advocate O’Hanlon submits that I can have regard to just such “nature” of the case, in the context of his arguments on quantum. I will revert to this later.

The Joint Liquidators

88. Turning to the position of the Joint Liquidators, the salient factors are, first, that they are individual Plaintiffs, on the record under their own names and will therefore potentially be subject to costs liabilities accordingly. Whilst they are resident out of the jurisdiction, I do not regard that as a matter making it just to order security against them, first, for the reason given by the then Deputy Bailiff in *Fairhead* at [45], namely that there has been no evidence of any increased costs of enforcement against the Joint Liquidators in England, and second because I can intuitively see no reason to think that enforcement of a Guernsey costs order in England would be more expensive or more difficult than here, to any sufficiently significant degree if at all. I therefore pay no regard to this.
89. Next, I reject Advocate O’Hanlon’s submission that I should order security for costs on the basis that the Joint Liquidators are “nominal plaintiffs” against whom security can, therefore justly be ordered if there is reason to believe that they will be unable to pay the Defendants’ costs. As I am not interpreting statute, the scope and application of such a factor is a matter of impression on the facts, having regard to the purpose of such a consideration, and treating this as illuminated by English authorities. In my judgment this whole basis for ordering security against an individual arises from the fairly incontrovertible proposition that it is unjust to expose a defendant to risk in costs in respect of a claim by a person who does not have, at least some, genuine personal interest in the outcome of the claim unless such person can demonstrate that s/he can meet such costs if ordered to do so, or can provide security therefor. However, there is nothing requiring such an interest to be financial, so long as it is real, and neither does it necessarily have to be in the whole subject matter of the claim. The further suggestion, in *Chuku*, (above) that there is likely to be some element of artificiality about a “nominal plaintiff’s” position (“*window-dressing or duplicity*”), whilst I agree that it is not necessary, nonetheless underlines the general impression that the justice of ordering security lies in some element of apparent, or possible, manipulation. All these features, though, are a matter of fact and degree, and part of the totality of the circumstances which must be weighed up, because the judgment of what is “just” is supremely fact-specific. In Guernsey at any rate, therefore, no rules as to what might or might not qualify in this regard can be, or should be, laid down.
90. Here, though, I am quite satisfied that the Joint Liquidators are not to be regarded as akin to insubstantial or suspicious “nominal” plaintiffs. They are pursuing these proceedings under their powers and duties, as court-appointed Liquidators of JPO, under provisions of the Companies Law - not only ss 422 and 433 and 434, but also, more basically, s 413 (4) (a) and s 397 which power, if not expressly written into the Companies Law in relation to compulsory liquidations, is plainly incorporated implicitly under ss 413 (4)(d) and 417 (1). They are acting in pursuance of their statutory duty to get in and realise JPO’s assets for the benefit of the company’s creditors, and of their powers to pursue also specific liquidation claims, again, for the ultimate benefit of the company’s creditors. Moreover, they have been sworn by the Court as Liquidators and are officers of the Court, acting as such. Whilst their interest in the

outcome of the claim is not financial or direct, they plainly, in my judgment, have a proper interest in the pursuit of these claims which has no element of artifice or lack of straightforwardness about it. Therefore, I am quite satisfied that the interests of justice do not require me to treat the Joint Liquidators as “nominal plaintiffs” as between themselves and the Defendants.

91. I should add for completeness, that I have not been persuaded that the *Jefcoate* case (above) provides any persuasive authority, or assistance, on this point, and I note that, on any basis, it was decided before *Chuku v Chuku*.
92. With regard to the Joint Liquidators’ means to meet any adverse costs orders, on the footing that they are individuals with a genuine case, English authority would suggest strongly that if they are not “nominal plaintiffs” then their means become an irrelevant consideration, under the overriding principle of access to justice, regardless of means. However, whilst this may be a rigid proposition in English law, I consider that it can only be a persuasive, even if very highly persuasive, in the context of the exercise of my discretion, in Guernsey law.
93. My reasons for saying this are that there is, it seems to me, an inherent inconsistency and tension between two principles which the English authorities apply. The first is the principle that it is only just to individual plaintiffs that they should have access to justice regardless of means, although that privilege must not be abused (with abuse being identified, in English law, by reference to the jurisdictional gateways in CPR Part 25.13 (2) (a) and (d) to (g)). The second, however, is the recognition that, in principle, it is also unjust to defendants to oblige them to defend claims in court without some assurance that they will be able to recover their costs if they win. These two principles come into obvious potential conflict. English law, through rules and precedents, has come to lay down a formulaic approach in resolving that conflict, with (it seems to me) the dominant principle having been decided to be the former. Defendants can be exposed to suits from impecunious individuals as plaintiffs without any protection as to their ability to recover any costs ordered in their favour. In Guernsey, with the court’s discretion being entirely general, it seems to me that it is not necessarily improper to have regard to the likely means of plaintiffs, when considering the careful balancing exercise as to what is “just” to all parties in all the circumstances, but always, of course, in the context of all other material considerations. So, whilst the means of the Joint Liquidators in fact assumes greater significance when considering their position together with that of JPO, I will discuss the Joint Liquidators’ means at this point.
94. As to this, I accept that they have not seen fit to provide any evidence as to their individual means – contrast Mr Fairhead in *Fairhead v Praxis*. All I know about them, therefore, is that they are each “partners” in a large international limited liability partnership of accountants specialising (apparently) in insolvency work. Although I recognise that the description “partner” may connote various positions, ranging from salaried posts through local, national, regional or worldwide equity partnerships, there can be no doubt that they are senior personnel, and I am entitled to, and do, assume that they are responsible professional people. I also know that they have been willing to accept personal individual liability for all adverse costs orders in this very large action, and they have done so after gaining an initial idea of the likely costs which the Defendants apparently anticipate spending. I obviously have no evidence as to the actual means or substance of the individual Joint Liquidators, but their position as such partners seems to me to be some small indication that their combined assets would be quite likely to be sufficient to meet all reasonably likely adverse costs orders.
95. Much more significantly than the above general overview of the little I know directly, it seems to me that their willingness to accept personal liability for adverse costs orders in an undertaking given to the Court indicates that they have themselves confidently assessed that they would be able to meet such liabilities. This is, first, because such an undertaking could not conscientiously be given unless they had such confidence and second because they are

surely in a position where it would have a catastrophic effect on their respective careers to be bankrupted as a result of any such liabilities not being met, quite apart from the reputational effect on their firm. Such apparent confidence may possibly be as a result of insurances or financial arrangements which they have not disclosed, or possibly because of their actual confidence in the reliability of the ATE insurance, which has been discussed. At any rate, I do not consider that this is a circumstance which I am obliged to leave entirely out of account.

96. I therefore would not, in the circumstances of this case, draw any inference from the Joint Liquidators' failure to disclose their own individual means that they would not, in aggregate, be "good" for any likely adverse costs of this action (I regard this case as totally different from *Mbasogo* above), even assuming the worst-case scenario that adverse costs orders ran to many £ millions. However, and by the same token, I accept that I have no positive evidence that they would be able to meet such costs. I find, therefore, that this point is of limited impact, and it is certainly nothing like a decisive factor in my decision.
97. To return: thus far, I would not think it right to order security for costs against the Joint Liquidators, looking solely at their position if they had sued alone. Although there is one other factor feeding into this view, it is more convenient to discuss that later.

The Company - JPO

98. I turn now, therefore, to the position of JPO. JPO is undoubtedly insolvent and there is obviously, therefore, strong reason to believe that it would not be able to pay the Defendants' costs if ordered to do so. That proposition alone makes it *prima facie* just, in my judgment, to order appropriate security for costs to be given.
99. Advocate Greenfield has not asked me to find in favour of JPO on the basis that JPO's lack of means has been caused by the Defendants, and any such assertion would, in any event, require too deep an investigation of the merits of the claim to be appropriate and proportionate at this stage.
100. The first and main reason why the Plaintiffs contend that no order for security should be granted on the basis of JPO's insolvency is the existence of the ATE insurance policy.
101. With regard to this, however, I accept the Defendants' arguments as regards the inadequacy and potential unsatisfactoriness of the terms of the ATE policy which has been produced. Despite Advocate Greenfield's quite attractive submissions that these concerns are exaggerated and unrealistic, I cannot say that I am satisfied that this insurance does produce a sufficiently solid basis to comprise (as effectively what is being argued) security for the payment by JPO of all reasonably possible adverse costs orders against it – or indeed all the Plaintiffs – if they lost the case and such payment were ordered. I do this because of the clear general upshot of the English authorities, which shows that if the question is whether such insurance does provide sufficient security for a defendant's position and this is the crucial deciding factor, then the absence of anti-avoidance provisions, as here, is virtually decisive: see the *Premier Motorauctions* case (above) at [27] [29] and [31]. There may be some slight leeway if the only possible ground of avoidance is outright fraud and if the possibility of this appears sufficiently unreal, but in principle, for such insurance to provide sufficient security, there must be no possibility of its being avoidable for contingencies which are not within the control of either the Defendants or the Court and the possibility of which cannot be accurately assessed as nil or at least vanishingly small. I am not satisfied that that is the case here. Also, in this case, the apparent lack of substance of the actual insured entities, without clearer evidence that their solidity can be reliably assumed, is a further disquieting factor. The above might be cured by the presence of some form of direct covenant from the Insurer in the Defendants' favour, but there is none.

102. I also have some misgivings about the level of cover, for the costs of a trial of claims of this magnitude, even if focusing on the costs of the claims advanced only on behalf of JPO itself, and even if I take the view that the Defendants' present claims for security for costs are ambitious. I also have serious misgivings about the possible impact of the average clause.
103. In short, the existence of the ATE insurance which has been disclosed would not be sufficient to satisfy me that it would not be just to order security for costs against JPO itself. I record, though, that whilst this might be an absolutely decisive factor in the English law context, I do not think it is of quite such weight in the Guernsey context. It has considerable weight in favour of the Defendants' contentions but, equally, this does not mean I need leave it entirely out of account in a general balancing exercise. I repeat, though, that it does not suffice to satisfy me that it would not be just to order security for costs if JPO were the sole Plaintiff in the action. I would therefore have done so in that situation.

Summary so far

104. My conclusions thus far are that viewing the position of the Joint Liquidators alone, I would not order them to give security for costs, but viewing the position of JPO alone, I would do so. The question therefore arises as to whether, and if so how, the fact of their being co-Plaintiffs (being thus part of "all" the circumstances) affects my overall view of what is just.

The overall position

105. With the combination of two sets of Plaintiffs, I have, logically, four options as regards ordering security for any of the Defendants' costs: I can order that security be given by one of the Plaintiffs, but not the other, either way round (thus, two of the options); I can order that both should give security jointly and severally (a third), or I can make no order against either (the fourth). Thus far, my views of their individual positions suggest that I would not order security against the Joint Liquidators, but would do so against JPO, ie one of the first pair of options.
106. The Plaintiffs and Defendants both submit that I should depart from this, but their competing contentions as to how the fact of co-plaintiffs should affect the ultimate decision start from different points. The Defendants start from JPO, and contend that, as I would (as they submit I obviously should) grant them security against JPO, I am recognising that the Defendants deserve security and therefore, either for simplicity or because of the practical identity of their positions, I should grant them security jointly and severally against both JPO and the Joint Liquidators. In support of this they can, in effect pray in aid the Plaintiffs' acceptance that the order to give security will not stifle the claim and they can also point to this being the approach adopted by McMahon DB in *Fairhead*, even though of course, this is not binding authority on me.
107. They add that if this is wrong, then there can still be no good grounds for relieving JPO of an obligation to give security, even if I do not order it against the Joint Liquidators.
108. The Plaintiffs' start from the Joint Liquidators, and contend that if (as they submit I equally obviously should not) I would not grant security against the Joint Liquidators, I should start from that position, and consider whether the presence of JPO as a co-Plaintiff increases the likely costs burden beyond that which the Defendants must incur anyway against the Joint Liquidators. If I conclude that, owing to the coincidence of JPO's claims with those of the Joint Liquidators, it does not do so (or not to any sufficiently significant degree) then there is no reason to grant the Defendants security against either JPO or the Joint Liquidators. The Joint Liquidators' claims would continue whether or not security were put up by JPO and JPO's involvement in the proceedings therefore causes no additional disadvantage to the Defendants, to make them deserve security. I think Advocate Greenfield also points to the fact that the Joint Liquidators have undertaken to be responsible for all costs orders against all the Plaintiffs

as support for the justice of making no order, although I have already indicated that I cannot and do not place any determinative reliance on this.

109. In the end, evaluating these competing arguments seems to me to boil down, in simple terms to whether it is more just (or less unjust) to allow JPO to avoid giving security because it is suing together with the Joint Liquidators, than to require the Joint Liquidators to provide security because they are suing together with JPO. I would then, in either case, have to consider whether the result would then seem more or less just than ordering JPO (but JPO only) to give security.

Ultimate decision and reasons

110. I have concluded, in the end, that I do not think it would be just to order any security for costs to be given by either of the Plaintiffs, in this case, on these applications.
111. I find the “overlap” argument of Advocate Greenfield highly persuasive on its own on the issue of “justice” in this context, and I am quite satisfied, from his arguments, that the claims which are being advanced in the name of JPO require no appreciable extension of the sphere of factual investigation beyond that which would be engaged under the claims advanced by the Joint Liquidators, and which would continue to be advanced by them in any event. It seems to me to be really only as to arguments of law and quantum regarding the Joint Liquidators’ claims in fraudulent/wrongful trading that significant different considerations are raised, but in those instances it is the Joint Liquidators’ claims which cover the wider area, not JPO’s and so the presence of JPO as co-plaintiff has no effect in increasing costs. The inclusion of JPO’s s 309 claim has negligible effects. In any event as the difference is largely arguments of law, none of this applies up to the point of disclosure of documents which is what is under consideration here.
112. I come to that conclusion simply on the mechanistic basis of looking at the claims in the action, (and also, although it is a small point, I note that the Plaintiffs are all jointly represented, so there is no increase in practical costs caused to the Defendants by separate representation) but there is, in my judgment, a further factor which is a circumstance of this case which militates powerfully in favour of adopting this course. It is that it is the Joint Liquidators who are, in fact and in practice, the real and essential Plaintiff in this action, and the Company is there, really, only itself in a nominal capacity, in order to constitute the proceedings properly as a matter of the record.
113. All the claims in the proceedings are, in substance and reality, being brought by the Liquidators as part of their powers and duty to get in JPO’s property and realise its assets for the benefit of JPO’s creditors. They are statutorily entitled to use JPO’s name to do so by s 413(4) (b) of the Companies Law, but they are themselves the real drivers and the protagonists in the litigation. Of course, liquidators usually bring claims by this authority in the name of the company, because in that way they are personally protected from liability in costs in the normal course. In this instance, though, the Liquidators are obliged to bring the blanket claims in respect of fraudulent or wrongful trading in their own names (as these are statutory claims only), and they have chosen to put their names to the statutory misfeasance, and breach of fiduciary duty claims, and also to claims for conspiracy to injure by unlawful means.
114. When I probed this aspect of *locus standi* initially at the hearing, I understood the parties to accept that, apart from the claims made under s 309 of the Companies Law, in respect of wrongful distributions, all the claims set out in the Cause could have been brought in the name of the Liquidators under their statutory powers, if they had chosen to plead them that way, and the *substance* of this latter claim, if not its statutory basis, could in any event be pursued under the head of misfeasance or breach of duty. Later, I think there may have been some rowing

back from this, and perhaps a suggestion that claims such as for “dishonest assistance” against D5 and D6 would be JPO’s claims only.

115. Advocate Greenfield submitted in his skeleton argument, however, that in reality all the claims apart from the statutory claims could be and were pursued “jointly” by the Joint Liquidators and the Company. Whether or not my understanding is technically correct that, in effect the whole of the subject matter in the Cause could have been pleaded and pursued by the Joint Liquidators in their own names, the position remains, as I see it, that the vast majority of the claims could certainly have been so pursued and, and most importantly, the driving force behind all claims is the impetus of the Liquidators. They are using the Company’s name solely in order to prosecute the claims in valid form, if required.
116. In those circumstances, I consider that the reality is that these are the Joint Liquidators’ claims. The reality is that JPO has no necessary separate or independent part of its own to play in these proceedings, either legally or as a practical matter, and in any event JPO is acting only through the agency of the Joint Liquidators. These are not proceedings in which two independent plaintiffs have jointly chosen to commence proceedings as in *Fairhead*, and although Advocate Williams submits as much in Paragraph 33 of his skeleton argument, I regard that as a completely unreal assertion.
117. In those circumstances, I consider it not only appropriate, but correct, to discount JPO’s presence as co-plaintiff in the proceedings in the context of whether it is right to order security for costs. This is, to recap, first for the procedural reason that their name on the pleadings is a matter of form only and second because of the practical consideration that I have formed the view that all the investigations which will inevitably or conveniently be undertaken for the purposes of pursuing the claims which the Joint Liquidators themselves can pursue will overlap with, and indeed exceed, the scope of investigations required for the purposes of the claims made in the name of JPO.
118. I would note, in passing, that amongst the significant number of authorities to which I have been referred on these applications, I was unable to find any authority, whether in Guernsey or elsewhere, where security was sought against a plaintiff company in liquidation which was named as co-plaintiff with its compulsory, or even voluntary, liquidator(s). The cases cited have all concerned, either (a) suits in the name solely of a company or companies in liquidation, without joining their liquidators or (b) a company or companies in poor financial straits but not in liquidation, suing either alone or with a co-plaintiff, usually an individual, but not, therefore, being a liquidator. This absence of authority would seem to suggest, either that in such a situation security is not sought because it is not expected to be granted, or that the likelihood that it will be granted is assumed to be so great that an application is never contested. This in turn may reflect an understanding of practice which has evolved under English law and rules - but that is not relevant to Guernsey. On any basis, though, the point is that assistance from a comparison of this actual situation being analysed in other cases has not been available.
119. In view of the strength of the apparent general presumption, though, that defendants deserve to have security when they are pursued by an impecunious, and in particular, therefore an insolvent, company, I have then asked myself, anxiously, whether justice would still be better served by ordering security against JPO, but only JPO. I have, of course, been told that doing so will not stifle their claim, although in the light of what I have said above, I imagine that this would force the Plaintiffs to consider the advantages or disadvantages of letting JPO disappear from the action. I do not see, however, that it would be right to pressurise them towards this course and the expense of taking advice on any such decision. Moreover, it seems to me that ordering security only against JPO could potentially cause complications from possibly having to identify costs which are properly attributable to particular matters on an “issue” basis, or as to what attribution of a single piece of work between the two sets of Plaintiffs was correct or appropriate. I consider there are therefore quite strong grounds of practicality, proportion

and convenience, which militate against courting any such possible consequence. This all somewhat reinforces my view that the appropriate choice is between security from both Plaintiffs or security from neither, and my firm view is that the overall “just” course is actually the latter.

120. By the same token, in view of the strength of the apparent general presumption in favour of giving security against an impecunious company, I have again asked myself whether, as a final consideration, it would conduce more to justice to order security since the Plaintiffs have admitted that such an order will not stifle the action. I have, though, still concluded that this would be wrong. The fact that ordering security would stifle a claim can only, in my judgment, be a reason to draw back from ordering security if one would otherwise do so. It can never, in justice, be a reason for ordering security if one otherwise would not do so, as that would be to impose a burden on a plaintiff which it has already been decided would be unjust, simply because he could apparently shoulder it. A party should not be ordered to give security just because it has accepted that it could do so if there is no just reason otherwise for ordering it to do so. To take that course would, in my judgment, just be a rather pusillanimous way of making what might be a difficult decision.
121. There is, though, one further matter, which I should mention because it does strengthen my view, when taking the “stand back” test advised by McMahon DB in *Fairhead* and in much the same way as he did, that the result which I have come to above is “just” overall. That is a consideration of the nature of the case, but (I emphasise) as distinguished from its actual merits.
122. I have read the hugely lengthy pleadings in this matter. The Defences, in particular (with the commendable exception of that of D6) go well outside the bounds of properly focused and efficient pleading in a Guernsey action, which should be confined to the material facts relied upon, but not the evidence by which those facts are to be proved (see RCCR r 10 (2), stipulated expressly in relation to a Cause, but equally applicable, by parity of reasoning, common sense and regard for the Overriding Objective, to other pleadings). They contain much material which is simply discursive and more in the nature of witness statements and even argument or mere comment. I say this having taken into account the length, and indeed the style, of the Cause, and the fact that defendants must naturally be accorded more leeway in their pleading, as they are necessarily having to work in response to a pleading presented to them. But the point here is that, whilst not judging the validity or merits of allegations and assertions contained in any of the pleadings at this stage, I must be entitled to consider the nature of the claims and defences, as it can be distilled.
123. I am not going to summarise the matters and events pleaded on the pleadings since, on any basis, this would be a huge over-simplification. Essentially, the Joint Liquidators complain that the conduct of Ds 1-5 (with which D6 was complicit), was, from at least 2012, concerned very much with their own respective personal and family financial interests, causing the Company to make extremely large payments to them, or for the personal benefit of themselves or their relatives, friends and affiliates, which the Company simply could not afford, and that the pursuit of these interests, and the internal disagreements of the two, equal controlling families (Joannou and Paraskevaides), caused the Defendants both to breach their duties to JPO itself as a whole, and to take some questionable actions, and ultimately led to JPO’s collapsing into insolvent liquidation owing hundreds of millions of US dollars to creditors.
124. The Defendants’ response is that, quite apart from any question of preemption or limitation, the Liquidators have got entirely the wrong end of the stick. They have failed to take account of the background of unfortunate disagreements and differences between the two controlling families which it was in JPO’s interests to resolve, that much of what is supposedly complained of was the result of compromise agreements entered into in 2012 and even (I think) sanctioned by the court, to effect these, and of ultimately unsuccessful, but genuine, attempts to work these through, and that business decisions were being taken in this difficult context. They have also

failed to appreciate the nature of the Company's operations as a heavy construction company, and the substantial "up front" borrowings that such operations require. The large payments made to family members and associates were justified remuneration for services. At all times those concerned were acting bona fide and in the Company's overall best interests, in this whole context, albeit the two controlling factions were on poor terms with each other. The admittedly huge insolvency of JPO was the result of factors outside the Defendants' control or anticipation, including political changes in the Middle East countries in which the businesses operated, decline in business owing to oil price fluctuations, defaults in payments owed to the Company's operating subsidiaries, major projects meeting unexpected difficulties and not delivering expected returns, and unforeseen, or unmanageable, changes in the attitudes of the Company's lenders, and suchlike. They themselves acted bona fide and responsibly and did nothing wrong.

125. The above short description is simply a general overview, and I make it clear that I do not have (and have not even begun to form) any view as to the merits of each side's contentions. At the moment, I proceed on the basis that there is an equal likelihood that either will be borne out.
126. However, at this very high level of assessment I am still struck by the fact that, in this action, the Joint Liquidators are essentially seeking to hold the Defendants to account for their conduct, not just, or even so much, as regards operating decisions within the management of the Company's business, but, and very much, in the case of Ds 1-5, as regards their own personal financial relationships with the Company. With a company having collapsed into insolvent liquidation, ultimately owing many hundreds of millions of dollars to hapless creditors, it is only just that those in control of it should be held to account for their conduct of its affairs, but, in particular given this further dimension of the nature of the case here, I do not find it unjust that the Defendants should be expected to justify themselves without requiring those who are charged with holding them to account in the interests of the Company's unsatisfied creditors to go to the trouble, expense, or even just inconvenience, of having to provide security for the Defendants' costs of doing so.
127. I also make it clear that this is not according some special merit or tenderness to the position of the Joint Liquidators as litigants just because they are liquidators. They must conduct litigation subject to the same rules, and on the same basis as to proper and reasonable conduct, as any other litigant. The only difference in their position as litigants is that, as liquidators, they will not themselves have been involved in the events which form the subject matter of the litigation, but must rely on reports and information from others, and in particular information from company records and from documents, and their proper conduct of litigation has to be carried on from this position. That is, though, simply a recognition of fact. (For completeness, I should record, here, that I am aware that, in this particular case, the Joint Liquidators or some among them, were previously called in as Administrators of the Company, and that before that they or their firm had also been called in as financial advisers to the Company, during 2018, but it has not been suggested, and it does not seem to me, that anything turns on this for the purpose of these applications.) The point I am making here – and now beginning to over-labour – is one entirely of my impression of the general nature of the case as a circumstance of these applications.
128. I add that this last point did cause me to consider carefully whether there was any aspect of the different positions of each of the three groups of Defendants which should cause me to take a different view in their/his particular case; I am conscious that there are three discrete applications before me. However, I have concluded that there is not. The cases advanced against Ds 1-2 and Ds 3-5 are similar in nature, and the facts, comprising the train of conduct of JPO's affairs, are very much intertwined even if some aspects concern the JDs rather than the PDs or *vice versa*. More distinct is the position of D6, who points out that he did not benefit personally from the matters of complaint alleged against the other Defendants, that he claims to be a creditor of the company as to \$3.7Mn in unpaid salary, and that his personal

means are far more modest than those of Ds 1-5. Whilst I take these points on board, in the overall scheme of things they do not cause me to think it just to order security for costs in his case in contrast to the others.

Conclusion on principle

129. In summary, therefore, for the reasons outlined above, but considering the situation entirely in the round, the Defendants have not satisfied me that it is just to order security for costs in their favour against both or either of the Joint Liquidators themselves, or the Company JPO alone, in the circumstances of this case. If I carry out the appropriate “standing back” exercise, I find myself satisfied that this decision is just to all parties in all the circumstances.

(2) Quantum

130. The issue of quantum does not arise in the light of my decision above. However, in case this matter should go further, and because it was fully argued, I think it right to express the view I would have come to with regard to the appropriate quantum of security if I had been minded to order it. I will try to do this suitably briefly.

131. On any basis, I would ignore the implications of ordering security against the Joint Liquidators solely on the basis of their residence out of the jurisdiction, and therefore on the basis of anticipated additional costs of enforcement against them because of this. This is because I have rejected this possibility on the facts, having received no evidence as to any such extra potential costs, and also in the light of the then Deputy Bailiff’s view in *Fairhead*, which accords with my own perception, that any such costs would be insignificant in the general scheme of things.

Full security

132. Therefore, I will deal with this exercise on the basis that, had I found it to be just to order security at all, then, absent any specific vitiating factor such as delay in making the application (not applicable here), it would be appropriate to order an amount of security relating to the entirety of the Defendants’ costs which are the subject of their applications.

133. This appears to be the presumptive position in the English cases, on the basis that, once it is decided that security for costs should be awarded in principle, the protection which it has *ex hypothesi* been determined should be granted to the defendant must necessarily apply to all his presumptively relevant costs, or it is no such protection at all (see *Danilina v Chernuhkin* (above) at [57]).

134. I have to say, however, that given the untrammelled breadth of the Guernsey Court’s jurisdiction, it would seem to me that the Court’s general discretion as to “amount” in RCCR 2007 r 82 (2) would justify making an order for only a degree of security, if other factors did cause the court to feel it was “just” to do so. The Guernsey Court has greater flexibility than the English court. That cannot apply here, however, since I have already decided that I do not find it just to order security for costs at all. A tempering of any decision on the basis of degree (which, I will say, I did consider and reject in relation to the point of principle, above) is therefore just not possible in the present exercise. In the hypothetical situation which I am examining here, therefore, I will simply determine the quantum of security which I would have thought it appropriate to order, if it were just to do so in all the circumstances, having regard to the Defendants’ estimates of their incurred and future estimated costs, as put into evidence.

Defendants’ Costs Schedules

135. As mentioned, all three groups of Defendants have produced estimated costs schedules up to a specific point in the process of disclosure of documents:-

(i) Advocate O’Hanlon on behalf of the JDs has taken this to the point of giving disclosure and has submitted a bill for actual estimated costs, to this point of £5,419,464.67, with a bill reduced to include only those costs recoverable at the at the Guernsey current maximum “recoverable rate” of £2,709,386.82 - almost exactly 50%.

(ii) Advocate Williams on behalf of the PDs has produced a schedule of anticipated costs up to the stage of reviewing other parties’ disclosure in the sum of £5,150,191.32. This is again a schedule based on actual costs, which the PDs have maintained throughout is the appropriate sum to be ordered. They have also, however, recalculated their total sum based on the “recoverable rate” at £2,496,345.40. That is 48.5%.

(iii) Advocate Barclay, on behalf of D6, has produced a schedule actual and of anticipated costs up to the giving of disclosure (ie like the JDs) but only in the sum of £1,215,487.20. This is again a schedule of actual incurred plus anticipated contractual expenditure. The figure for the adjusted “recoverable” basis is given as £589,889.60, which is similarly 48.5% in aggregate.

The great difference in amounts between the groups of Defendants may be partly accounted for on the basis that D6’s involvement in the issues is not as great or as direct as that of Ds 1-5, but, as already mentioned, Advocate Barclay also explains it on the basis that D6’s personal means are more modest than those of either the JDs or the PDs.

Basis of assumed recovery – indemnity basis?

136. The Defendants have all made applications in respect of the full amount of their anticipated costs. Advocate O’Hanlon for the JDs argues that it is justifiable to order security for such full amount on the basis that there is a “real prospect” that at the end of the day, if they succeed (as they are confident they will) they will be awarded costs on the indemnity basis, rather than merely on the recoverable basis, because of the nature of the claims being made. He cites *Danilina v Chernukhin* [2018] EWHC 2503, and *Rowe v Ingenious Media Holdings plc and ors* [2020] EWHC 235 (Ch) as authority for this submission, although he then recognises that even on this basis the actual sum awarded was only 75% of the defendant’s estimated costs.
137. Advocate Greenfield counter-cited *Stokors SA v IG Markets Ltd* [2012] EWCA 1706 and *Phones4U Ltd (in administration) v EE Ltd* [2020] Costs LR 1065 as undermining the authority of *Danilina* and *Ingenious*, in which they had not been cited. In *Stokors*, the Court of Appeal observed at [42], with apparent approval, that it was unaware of any case in which security for costs had ever been awarded on a more generous basis on the grounds of some prospect that indemnity costs might ultimately be awarded to the defendant. In *Phones4U*, Roth J therefore disapproved *Danilina* and *Ingenious* but in any event distinguished them on the grounds that the claimed likelihood of indemnity costs arose there from the argument that, if the Defendant succeeded, it would inevitably (given the nature of the case) be because the claims and the claimant’s evidence had been false, a rather different and special proposition.
138. In the only relevant Guernsey case, *Kazzaz v Standard Chartered Bank (Guernsey) Ltd* (above), the Deputy Bailiff considered that there was jurisdiction under RCCR 2007 r 82 to order security for costs on an indemnity basis, (or other appropriately generous basis) if the prospect of an order for indemnity costs seemed sufficiently likely, but without defining any test to be met. She was unpersuaded that there was sufficient reason to do so in that case.
139. The court undoubtedly has a jurisdiction to order security for costs to be given on the basis of a prospective order for indemnity costs, as this must flow inexorably from the combination of RCCR 2007 rr 82 and 83. However, I do not consider that there are any grounds for doing so in this case. Indemnity costs will only be awarded if the conduct of the case itself has taken it

“out of the norm”, in a way which the court considers deserves sanction, as a mark of its displeasure, and this must always boil down to unreasonable conduct, in relation to the litigation itself. Merely pursuing claims on a forthright (if offensive) basis, and doing so forcefully is not sufficient. Neither is hard-nosed, determined and dogged pursuit of claims, so long as any such “aggressiveness” does not step over the mark so as to become oppression or harassment, or, become, in other words, “unreasonable” (see RCCR r 83 (2) (b)). The situation is highly fact-dependent, and can generally only be judged after the event; only in extremely rare cases could it possibly take effect as something to be anticipated. Whilst pursuing allegations of dishonest conduct may become a factor which could found an award of indemnity costs if not made out in the event, merely making such allegations on a pleading is not; such allegations are only a candidate to become such a factor if it is subsequently shown that they were not only baseless but ought also to have been known or suspected to be such by the plaintiff, so that they should never have been made. It would be an extraordinarily strong thing to pre-judge this possibility, and the circumstances of this case do not, in my judgment, come anywhere near this, certainly at this stage. I would therefore order security only on the basis of security for potentially “recoverable” costs.

Staging

140. Advocate Greenfield’s next point is that the three groups of Defendants have not sought security up to exactly the same stage of the proceedings and, whilst accepting that dealing with security on a staged basis is both convenient and appropriate, he submits that, if security is to be ordered, it is untidy and inconvenient to have security operating in such an unsynchronized fashion, and I should, therefore, make any orders with regard to the same stage of proceedings in respect of all three applications. This would mean making an order in respect of costs only up to the stage of giving disclosure in each case, and leaving out of account, for present purposes, the further costs claimed by D3-D5 in respect of their reviewing the disclosure of other parties. This reduces the scope of their application by £1,531,715 (£711,475 + £820,240 for their claimed “Section C” costs”, disregarding data hosting as minimal), ie from £5,150,191.32 to £3,618,476. Taking his equivalent recoverable rate figures, this amounts, I estimate, to roughly £1,733,380.40.
141. Advocates O’Hanlon and Barclay were (unsurprisingly) neutral on this point. Advocate Williams argued that there was no reason and no disadvantage to the Joint Liquidators if each application were treated as free standing according to its terms.
142. When pressed on any disadvantages of actual substance, Advocate Greenfield suggested that there might be an unfairness or disadvantage to his clients in that an early decision with regard to security for the costs of a review of disclosure in favour of Ds 3-5 could forejudge the basis of any later application made by Ds 1-2 and D6 in this respect. I am not persuaded that there is anything in this. Advocate Williams suggested that a refusal to grant his clients security for this extra stage on this application could prejudice their ability to apply for such security later, as they would then have to demonstrate a “change of circumstance” to justify a further application. I do not accept this either and it could, in any event, be dealt with by an appropriate term in the court’s order. In the end, I consider that this is simply a case management issue, and, that the interests of simplicity, uniformity and synchronisation would tip the balance in favour of harmonising any orders for security as Advocate Greenfield suggests. It would and should, of course, remain open to the Ds 3-5 to seek security in relation to this further aspect of case preparation costs at a later time, as appropriate. A further factor in favour of deferring this part of the present application would be that estimating the costs of considering other parties’ disclosure before one has actually received it are much more speculative and less reliable than estimating the costs of preparing one’s own disclosure.

Appropriate quantum - percentages

143. It is convenient to consider, next, the general question of “percentages” by which I mean the calculation of an appropriate quantum resting, in the first place, on the recognised principle that any costs awarded to a party on the recoverable basis, being limited to “reasonable costs reasonably incurred” as recognised under the court’s taxation processes, will invariably, (experience says), amount only to a fraction of the costs actually incurred by the receiving party.
144. Advocate Greenfield submits that as a general starting point, the relevant likely percentage recovery on the recoverable basis, as against actual costs incurred, is between 50% and 60%. However, whilst this is a generalisation, specific factors can cause any such starting point for an assessment to be reduced still further. He named three different such specific factors, taken from examination of the costs schedules put in evidence by the three groups of Defendants. I identify these as being: (1) over-generous assessment of time required (generally), (2) “over-lawyering” leading to unnecessary potential duplication of work generally, and (3) excessive use of “foreign” (ie English) lawyers.
145. He made direct reference to some features in the estimates for time and costs for the various stages of work set out in the Defendants’ respective costs schedules and, whilst emphasising (in my view quite correctly) that he was not suggesting that I should apply direct arithmetical reductions in respect of any of these particular points, he relied on these as examples justifying the general criticisms which he advanced.
146. He also invited comparison between the costs schedules of D6 with those of the JDs and the PDs as “illuminating” supporting, he suggested, the excessive extent of the latter’s estimates. All the Defendants rejected this comparison as unfair, however, not least because D6 is not involved in several of the matters of complaint made by the Joint Liquidators.
147. Advocate Greenfield’s submissions in his skeleton argument were that, in relation to all three groups of Defendants, I should first make a reduction on their overall estimated actual costs of 50% as an appropriate reduction to account for the general discount to get to the level actually recoverable, ie at the lower end of his average spectrum above. He submitted, though, that I should then make a discount of a further 50% on that figure to take account of the additional specific items of particular excessiveness, referred to above, on the grounds that these features would not have been adequately reflected in the general discount. In other words, he submitted that I should not order security in excess of 25% of the figures in the Defendants’ “actual” costs schedules submitted.
148. In relation to D6, in the course of submissions, I understood Advocate Greenfield to accept that D6 appeared to have started from a more “reasonable” base, in his estimation, than had the other Defendants, and that therefore a reduction only to 70% rather than 50% was appropriate at the first stage. I do not think he made any particular submission as to how this might then affect the second stage. In fact, D6 calculated his estimated costs on the “recoverable” basis to be only 48.5% of his actual estimated costs based on the applicable contractual rates, which I take to have been done for illustrative simplicity.
149. For the Defendants, each Advocate naturally supported the costs schedules advanced on his clients’ behalf as being reasonable, although realistically accepting that there would be a significant reduction from “actual” (incurred or estimated) figures if security were ordered with regard to the “recoverable” basis of recovery. Advocate O’Hanlon emphasised the size and complexity of the case, and rejected criticisms by Advocate Greenfield as to the excessive quantum of suggested necessary work for such matters as the next case management conference and further rounds of pleading such as considering any Replique from the Plaintiffs, and possibly requiring a Duplique to be drafted. He drew attention to the very great number (I think he said over 400) of individual Requests for Further Information which had been served on his clients by the Joint Liquidators and must be dealt with. He defended, in the case of Ds

1-2, the anticipated instructing of very senior English counsel, Mr John Brisby KC (as he now is) on the grounds that he had been instructed in the previous proceedings which were compromised in 2012.

150. Both he and Advocate Williams rejected the criticism that their clients were contemplating unreasonable and excessive use of English solicitors and counsel in the case, emphasising, again, its intricacy and complexity, and its very large monetary value. Advocate Williams submitted that it was unreasonable for Advocate Greenfield to seek to pull apart the costs schedules which had been submitted at the kind of level at which he had argued (for example, as to the total of hours proposed as regard two anticipated one day case management conferences, at 140 hours for Guernsey Advocates and 70 hours for London solicitors and counsel) stressing that the Defendants must be reasonably entitled to defend, as fully and effectively as they had been advised, the case which the Plaintiffs had chosen to bring against them.
151. Advocate Barclay confined his responsive comments to making the practical point (which I accept) that in the light of the timing of many of the matters alleged, complicated legal and possibly factual issues regarding the issue of prescription or (and this could well be different) limitation would be likely to arise, and that this was, therefore, a case where a substantive Duplique might very possibly, if unusually, be appropriately served.

Discussion and decision

152. The parties rightly recognise that the quantification of security is a “broad brush” exercise. The appropriate quantum cannot be fixed on a spuriously refined or detailed basis, not least because it is, at least to some extent, a prediction. The court will, of course, have the kind of criticisms raised by Advocate Greenfield in mind, in order to form a view of whether, on a broad basis, an application for security for costs is excessive, and an obvious starting point is a broad assessment of the likely level of costs which would be awarded in a taxation on the recoverable basis. This is therefore my approach. I preface it with two points.
153. First, an Advocate’s maximum “recoverable” fee in Guernsey is limited (unless the court otherwise orders) to a specified figure, under the *Royal Court (Costs and Fees) Rules 2012* r 2 (2). The figure is updated annually on 1st January. The figures applied as assumptions in the Defendants’ costs schedules appear to have been either £277 per hour (Ds 1-5), or £292 per hour (D6). I assume the difference arises from an update occurring since work on the matter started and the precise figure is not of great significance for present purposes.
154. More important though is a matter arising from this, namely how this is used in the Defendants’ derivation of the global figure for their costs assessment at the “recoverable” rates from their assessment of their costs at their actual contractual rates. At the hearing I understood that this had been done by applying the Guernsey Advocates’ recoverable rate figure to the contractual rates of both the Guernsey *and the English* lawyers’ projected fees, producing, as indicated above, a total just short of 50% of the contractual rate estimates. No doubt this was done commendably in the interests of simplicity, but I enquired whether this was the approach which would be taken on a taxation. I did not get a clear answer, and I have to say that such an approach strikes me as illogical.
155. English lawyers’ fees incurred with regard to litigation in Guernsey are not subject to taxation as local Advocates’ fees, governed by the applicable rates. They are disbursements. They are fees for additional assistance reasonably required by the Guernsey Advocates on the record in the action in order to conduct the litigation competently in this jurisdiction. The limits on Guernsey Advocates’ recoverable fees are therefore simply not relevant. The question is whether their fees and charges are “reasonable costs, reasonably incurred”, as disbursements. This must depend on whether it was reasonable to instruct the (relevant) English lawyer,

whether solicitor or counsel, to provide the particular service or advice in question. It is a matter for the judgment of the Guernsey Advocates who are in charge of the litigation in this Court, together with their clients, to decide whether the assistance of English lawyers is properly required in any particular instance, or perhaps whether there is any real cost-effectiveness achieved in doing so. The rate charged is a factor to be taken into account in making that judgment. The recoverability under a costs order of the fees charged will be judged in that context.

156. What cannot be assumed, in my judgment, is that if English lawyers are instructed and their contractual fees exceed the Guernsey maximum recoverable rate, then their fees can simply be reduced to that rate and this will make the disbursement “reasonable” in principle upon a Guernsey costs taxation. That is simply not the test. Making the disbursement at the contractual rate is what must be shown to have been reasonable. To do as described above would simply be to treat English lawyers as if they were Guernsey Advocates. They are not; they are assistance to Guernsey Advocates. Whilst therefore, I accept the calculation which has been made as some degree of guidance as to what eventual costs might in fact be recoverable, without knowing the practice on taxation I cannot be sure whether this gives even a tolerably reliable “ball park” figure for the claimed costs of English legal assistance which will be allowed. This leads to the second point.
157. The recovery of any costs of instructing English lawyers from the other party under an order for costs must be positively justified. I dealt with this issue when considering submissions on costs (but made after trial) in *Broadhead v Spread Trustee Company Ltd and others* (2015) Guernsey Judgment 10/2015 at paragraphs [30]-[42]. At [31], I paraphrased the five recognised possible justifications for doing so listed by LB Southwell in *Ladbroke PLC v Galaxy International Limited* (2009) Royal Court 11/2009) as being:-
- i. Guernsey being a small jurisdiction, where a case involves some highly specialist field of law which rarely arises for decision in Guernsey and Guernsey Advocates do not have the necessary specialist expertise;
 - ii. Where litigants from outside Guernsey may have pre-existing ties with foreign lawyers, justifying their being instructed in order to ensure the conveying and continuity of knowledge (a situation which LB Southwell considered would be rare);
 - iii. Where Guernsey law requires consideration of principles of English law, or laws of other jurisdictions, and research into that law cannot be readily carried out by the Guernsey Advocate’s firm;
 - iv. Where getting to the heart of a problem involving complex facts and law is most efficiently done by going to a specialist lawyer in another jurisdiction, as “the best lawyer available”;
 - v. Where a case involves such a large amount of documentation that management of it may reasonably be beyond the capabilities or resources of the Guernsey firm.
158. Such costs are allowed only sparingly and exceptionally. This is because of the public interest in Guernsey’s having its own pool of well-qualified trained and experienced Advocates capable of handling the great majority of proceedings in Guernsey effectively and within in a reasonable time and at a reasonable cost, and the reasonable expectation of the public that they should be able to litigate locally in Guernsey without the additional costs of having to resort to external lawyers unless this is plainly justified. This is, not least, because of the obvious danger of expensive and wasteful duplication of work which is likely to occur in such circumstances. Normal allowance of this certainly does not extend to English lawyers being got in to assist Guernsey Advocates simply on doing ordinary “Advocacy tasks”: per Talbot

LB in *In re a Guernsey Company*: Royal Court, (unreported) 30 April 2013. Moreover, since LB Southwell listed the above reasons in 2009, they have probably receded in force, first because the Guernsey Bar has swelled considerably in numbers since then and second because advances in technology have become ever more available in the interim, to assist Advocates within the jurisdiction as regards both research and document handling.

159. In fact, looking at the justifications given above, I have difficulty seeing that any of them immediately provides clear and obvious, sufficiently strong, justification for involving English lawyers. Although the sums claimed are, of course, large and the timescale covered is quite lengthy, those factors do not in themselves call for particular expertise only found in England. The relevant principles of law are not especially difficult or abstruse; they have not been as extensively litigated in Guernsey as in England, but dealing with that is a matter of research, although possibly it would be reasonable to have a review and overarching advice from expert counsel. The involvement of English counsel 10 years ago does not immediately suggest that his current involvement is required for indispensable “continuity” of knowledge. The Guernsey firms involved in this action are not small; they are the Guernsey branches of worldwide offshore partnerships with considerable skills and resources available.
160. D6’s use of English lawyers is apparently limited to advice from senior counsel. In general terms, this is what I would expect. Ds 3-5 propose to instruct not merely middle-ranking English counsel occasionally (so far so good), but also several grades of personnel (Partner, Senior Associate, Associate and occasionally Trainee) in a major English solicitors’ firm, Herbert Smith Freehills. Whilst their English lawyers’ fees will apparently not exceed those of the Guernsey Advocates except in respect of the disclosure exercise – which the English solicitors appear to be conducting – it is nonetheless significant involvement, and it may well be that the extent of the involvement of, in particular, English solicitors, in a case being conducted in Guernsey, is questionable. Ds 1-2, however, appear to be going even further. Not only are they instructing a full range of personnel from an equally major London firm of solicitors, CMS Cameron McKenna, from Partner down to Paralegal, but also three grades of English counsel, ranging up to the extremely senior and expensive Mr John Brisby KC. The fees of all the English lawyers, both incurred and proposed, and even their hours involved, equal or exceed those of the Guernsey Advocates involved except in respect of local application hearings. In fact, my impression from these Schedules is that it is as if the litigation is being run from England with the assistance of Guernsey Advocates rather than vice versa. The Costs Schedule of Ds 1-2 is therefore significantly higher than both other groups of Defendants for the same stages, and I have considerable reservations, therefore, as to whether such extensive involvement of English lawyers, which would certainly seem to be as to carrying out ordinary advocacy tasks, and with, I would have thought, inevitable significant duplication of work amongst personnel across the board, would be held to fall within the scope of reasonable disbursements in a Guernsey taxation.
161. In the end the current exercise is a generally impressionistic one and I should come up with a round figure. I have come to the conclusion that if I were to order full security for costs as I thought appropriate in amount in favour of the Defendants up to the stage of completing their own disclosure and in respect of all the claims in the action I would do so as follows:

D6: £700,000 This is approximately 60% of D6’s actual costs level, being the higher end of Advocate Greenfield’s sliding scale.

D3-D5: £1,350,000. This is approximately 80% of their assessment of their adjusted “recoverable” rate costs (40% of their actual).

D1-D2: £1,500,000 This is approximately 55% of their assessment of their recoverable rate resting principally on my reservations as to their intended use of English lawyers - and I would award this only on the basis that I am treating each

application as free standing, because I have some difficulty in seeing any real distinction between their position and that of Ds 3-5, and why they should be incurring significantly greater costs.

162. I would make no adjustment on the above figures to take account of the ATE insurance, having regard to my discussion of this above.
163. The above figures are those which I would apply if I were to order security in respect of the whole of the costs of all the claims. If I were to confine security to the costs simply of the claims brought by JPO then I would reduce those figures by 10% on account of the impact on costs of the separate claims of the Joint Liquidators alone.

Conclusion

164. For the reasons given above the three applications are dismissed. The order will record the Joint Liquidators' undertaking and otherwise dismiss the applications accordingly. I would propose to do so with costs on the recoverable basis unless any party wishes to make submissions to the contrary and notifies the Court and the other parties of their intention to do so within 7 days of the hand down of this judgment.

Her Hon Hazel Marshall KC, Lt Bailiff

14th October 2022