[2021 Gib LR 116]

MULVEY v. CASTLE TRUST AND MANAGEMENT SERVICES LIMITED and SOVEREIGN TRUST INTERNATIONAL LIMITED

SUPREME COURT (Yeats, J.): April 6th, 2021

2021/GSC/06

Civil Procedure—costs—security for costs—claimant resident in Malaysia ordered to pay security for costs Gibraltar defendant might incur in enforcing costs award against claimant in Malaysia

The first defendant/applicant applied for security for costs and for the striking out of the claim against it.

The claimant/respondent, Mr. Mulvey, a British citizen resident in Malaysia, brought a claim against the first defendant/applicant ("Castle Trust") in respect of loss of value of investments in a retirement annuity trust scheme which was administered in Gibraltar by Castle Trust.

Mr. Mulvey was initially represented by counsel at case management hearings in June and July 2020 at which directions were given and the case was set down for hearing. At a subsequent case management conference in August 2020, Mr. Mulvey appeared by telephone as a litigant in person. He participated in the same manner at a further case management conference in October 2020, at which Castle Trust applied for an unless order because Mr. Mulvey had not complied with earlier directions. The court did not make an unless order but made a number of directions. On December 9th, 2020, which had been the first date set down for the hearing, Mr. Mulvey did not appear and requested that the matter be adjourned to a date from February 2021. The court granted the adjournment and ordered that the costs thrown away be paid by Mr. Mulvey. The costs were to be agreed or assessed, but £500 was to be paid on account within 14 days.

Castle Trust applied for security for costs of any additional steps which it might need to take in Malaysia to enforce the payment of any costs which might be awarded to it. The application was made pursuant to CPR r.25.12. Rule 25.13 provided:

"(1) The court may make an order for security for costs under rule 25.12 if—

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

(b)
(i) one or more of the conditions in paragraph 2 applies, or
(ii) an enactment permits the court to require security for costs.
(2) The conditions are—
(a) the claimant is—
(i) resident out of the jurisdiction, but
(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdictions and Judgments Act 1982."

Castle Trust also applied for Mr. Mulvey's claim to be struck out.

Mr. Mulvey was notified of the February 2021 hearing date by email, at the email address which he had previously used to communicate with the court and Castle Trust.

At the hearing, Castle Trust advised the court that it had not heard from Mr. Mulvey since December 9th, 2020 and that he had not paid the £500. He had also not communicated with the court.

Held, ruling as follows:

(1) Although Mr. Mulvey did not participate at the hearing or otherwise communicate with the court, the court was satisfied that he had been properly notified of the hearing by email, his preferred method of communication. Email service was proper service under the Supreme Court Rules (paras. 15–17).

(2) The strike out application would be adjourned to a date to be fixed on application by Castle Trust (para. 20).

(3) Mr. Mulvey would be ordered to pay security for Castle Trust's costs of any enforcement proceedings in Malaysia. The court was satisfied that Mr. Mulvey was resident in Malaysia and Malaysia was not a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State. In all the circumstances of this case, it was just to make an order for security for costs. No reciprocal agreement appeared to exist between Gibraltar and Malaysia allowing for the mutual recognition of judgments. There was a real risk of Castle Trust facing serious obstacles in any enforcement proceedings in Malaysia. Additional proceedings would need to be commenced and there was a real likelihood that they would be contested by Mr. Mulvey (paras. 25–33).

(4) As to quantum, the court was concerned by the absence of a proper estimate from Castle Trust of the likely costs of enforcement. The court would order that Mr. Mulvey pay into court £10,000 by way of security for Castle Trust's costs of enforcement in Malaysia. In the event of default in payment, the claim would be struck out and Castle Trust would be awarded the costs of the proceedings. £10,000 was a conservative figure but the

court was not prepared to order a higher amount in the absence of a proper costs estimate. If the security were paid, the court would allow Castle Trust to renew its application for further security. On a renewed application the court would expect to be presented with evidence of the estimated costs of enforcement (paras. 35–40).

Cases cited:
(1) *Bestford Devs. LLP* v. *R'as Al Khaimah Inv. Auth*., [2016] EWCA Civ 1099, referred to.
(2) *Danilina* v. *Chernukhin*, [2018] EWCA Civ 1802; [2019] 1 W.L.R. 758; [2018] 4 Costs LR 859, considered.
(3) *Nasser* v. *United Bank of Kuwait*, [2001] EWCA Civ 401; [2002] 1 W.L.R. 1868; [2002] 1 All E.R. 401, considered.
(4) *Texuna Intl. Ltd.* v. *Cairn Energy plc*, [2004] EWHC 1102 (Comm), referred to.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.3.4(2)(c): The relevant terms of this provision are set out at para. 19.
r.25.13: The relevant terms of this provision are set out at para. 23.

O. Smith (instructed by TSN) for the first defendant/applicant;
The claimant/respondent did not appear and was not represented.

1 **YEATS, J.:** The first defendant ("Castle Trust") has made two applications. The first, an application filed on October 7th, 2020 for security for costs. The second, an application filed on February 10th, 2021 for the claimant's claim to be struck out. The applications were heard together on February 18th, 2021. The claimant ("Mr. Mulvey"), as respondent to the applications, did not appear and was not represented.

Introduction

2 The background to the claim is the following. On or about March 31st, 2013, Mr. Mulvey, who is a British citizen resident in Malaysia, applied to join the Equus Retirement Annuity Trust Scheme which is administered by Castle Trust here in Gibraltar. This is a Qualified Recognised Overseas Pension Scheme (commonly referred to as a "QROPS") for United Kingdom tax purposes. The application form indicated that a Mr. James Ricardo would be performing the role of investment adviser. A declaration of trust was executed by Castle Trust on April 10th, 2013 declaring that it would hold the funds in scheme MUL330 upon trust for Mr. Mulvey. Shortly thereafter, Mr. Mulvey transferred funds held by a pension provider in the United Kingdom totalling £543,855.02 into the scheme. According to the particulars of claim, the sum of £527,511.78 was then invested by Castle

Trust through an international investment firm, Cornhill Management Ltd. Decisions on the investments were at all times made by Mr. Ricardo.

3 By 2015, the portfolio's value was decreasing and, as a result, Mr. Mulvey decided to transfer the scheme from Castle Trust to Sovereign Trust International Ltd., the second defendant to the claim. In his particulars of claim, Mr. Mulvey asserts that as at November 30th, 2015 the value of the investments in Cornhill had decreased to £437,583.33 and the fund had therefore lost £89,928.45. Further losses of £76,814.00 were incurred by way of surrender and early exit charges on removing the funds from the Cornhill investments. This claim was then issued by Mr. Mulvey on May 23rd, 2019 alleging that Castle Trust had failed in its fiduciary duties to Mr. Mulvey. (The second defendant was added to the claim because it is the current trustee of the scheme, but no claim is made against it.)

4 At para. 25 of the particulars of claim, Mr. Mulvey sets out the particulars of the breach of trust alleged as against Castle Trust. These include allowing Mr. Ricardo to invest the funds when he was not a fit and proper person to be appointed as an investment adviser; failing to take appropriate advice before investing; investing in speculative and risky investments; failing to monitor the investments and replace Mr. Ricardo; and failing to consider what the appropriate level of risk was, considering Mr. Mulvey's age and circumstances. (An important aspect of Mr. Mulvey's claim is his assertion that he did not choose or appoint Mr. Ricardo as the investment adviser.) Although the deed of trust provides that Castle Trust is not liable for any losses arising from its management of the scheme, this does not apply in a case of gross negligence. Mr. Mulvey alleges that Castle Trust was grossly negligent in its handling of the scheme and investments.

5 Castle Trust's defence is that it is simply a licensed trustee which provides trustee administration services. It is not a professional pensions manager nor did it provide pensions investment advice in this particular case. (Indeed, Castle Trust says that the licence from the Gibraltar Financial Services Commission, under which it operates, does not allow it to provide such investment advice.) Castle Trust also says that it did not appoint Mr. Ricardo and that the investments had been chosen prior to it assuming responsibilities as trustee.

6 The application for security for costs is supported by a witness statement by Colin Gibbs dated December 4th, 2020. Mr. Gibbs is Castle Trust's managing director. At para. 31 of the witness statement he says:

> "From our perspective this claim appears to be a try on, advanced on allegations that the Claimant knows to be untrue, and which do not properly represent the nature of the relationship between the Claimant and Castle or Castle's role as a trust manager and administrator. The purpose, we assume, is to extract a settlement from Castle to reduce

> the losses (if any) that the Claimant has sustained as a result of his own investment decision and his decision to move the QROPS away from Castle and cancel his Cornhill account."

This concept appears to have underlined Castle Trust's approach to the proceedings.

The procedural history

7 When the claim was commenced, Mr. Mulvey was represented by Messrs. Hassans. They continued to represent him up until a notice of change of solicitors was filed on August 4th, 2020. The matter has come before me on five separate occasions prior to the hearing of these applications. It is necessary to go into the procedural history as this is relevant to the orders that I am being asked to make by Castle Trust.

8 The first case management conference took place on June 3rd, 2020. Mr. Mulvey was represented by counsel. I ordered that there be a split trial and gave directions. These included directions on the filing of expert evidence and on disclosure. The matter returned for further directions on July 3rd, 2020. Mr. Mulvey continued to be represented by counsel. I varied the June 3rd, 2020 order insofar as an aspect of disclosure was concerned and ordered that the matter be set down for hearing. The registry then listed the case to December 9th, 2020 for a three-day trial (as well as setting the matter down for a further case management hearing).

9 The first time that Mr. Mulvey appeared as a litigant in person was on August 5th, 2020 for a case management conference. He attended by telephone as it was impractical for him to travel to Gibraltar from Malaysia for a short hearing. After hearing the parties, I adjourned the matter without making any further orders. It appeared that Mr. Mulvey was keen to speak directly with Castle Trust's solicitors to narrow down issues.

10 However, matters did not progress and the case came before me for a further case management conference on October 6th, 2020. On that day, Castle Trust applied for an "unless order" because directions made on June 3rd, 2020 (as varied on July 3rd, 2020) had not been complied with. Mr. Mulvey participated at that hearing by telephone once again. After submissions had concluded, and as I was adjourning the hearing for a few minutes to consider my ruling, the telephone communication cut off. Mr. Mulvey did not reconnect. I then handed down my ruling without him being in attendance and a transcript of this was provided to him that same day. I did not make the "unless order" but I did make a number of directions. I ordered that Mr. Mulvey provide an address for service in Gibraltar; that he re-submit his disclosure statement; and that he revise the scope of the electronic disclosure sought from Castle Trust. At para. 7 of the transcript of the ruling, I say the following:

> "[7] This brings me to whether or not, in addition to the directions I have just set out and further directions which will also follow, I should make the unless order. It seems to me, having considered the matter carefully, that I should provide Mr. Mulvey, the claimant, with one further opportunity to comply. Perhaps this hearing has served to enable the claimant to understand exactly what his obligations are and I trust that he will now comply with the directions. I shall set a date for a further case management conference after the 6 November 2020 as proposed in the draft order, but I shall also order that if Mr. Mulvey does not comply with the directions that I am making by the 20 October 2020 that I will then consider whether the claim should be struck out at the next hearing."

11 At that case management conference, Owen Smith, who appears for Castle Trust, indicated that Castle Trust intended to make an application for security for costs. The application was in fact filed on October 7th, 2020 and listed for hearing to January 20th, 2021. (It should of course have been listed to a date prior to the substantive hearing, which was still set down for December 9th, 2020, but that was not done.) In any event, in November 2020 I reviewed the case and directed that the date originally set down for the first day of the substantive hearing be used to hear the application for security for costs. The matter was clearly not ready to proceed to trial and it seemed to me to be an efficient use of the court's time to bring the application for security for costs forward.

12 Mr. Mulvey did not appear at the hearing of December 9th, 2020. As I explain in my judgment of December 9th, 2020, Mr. Mulvey informed the court on the eve of the hearing that he could not appear and asked that the matter be adjourned to a date as from February 2021 when he would either attend himself or be represented by counsel. In the event, I granted the adjournment and ordered that the costs thrown away be paid by Mr. Mulvey. The costs were to be agreed or assessed, but I made an order that the sum of £500 be paid on account within a period of 14 days. I also ordered that compliance with any previous directions be stayed. The registry then re-listed the application for security for costs to February 18th, 2021. Mr. Mulvey was notified of this by email on December 10th, 2020.

13 On February 10th, 2021, Castle Trust filed their application for the claim to be struck out. I directed that it be listed for the same date and time as the security for costs application. Mr. Smith informed the court that he had sent a copy of the application notice to Mr. Mulvey on February 10th, 2021 and advised him that he would ask that it be listed for February 18th, 2021. He then served the dated application notice on Mr. Mulvey at the second respondent's address on February 16th, 2021.

14 At the hearing, Mr. Smith advised the court that since December 9th, 2020 he has not heard from Mr. Mulvey. He did not effect the payment of

the £500 on account of the costs that I ordered, and has not engaged with Mr. Smith in any way. There has similarly been no communication from Mr. Mulvey to the court. There was no reaction to him being notified by the Listing Officer of the hearing date or to a further communication from the court on February 8th, 2021 advising him that these applications were going to be dealt with by remote video hearing. He has not sought any information on the outcome of the applications in the intervening period between the hearing and the handing down of this judgment. No solicitors have come on the record for him. It appears that Mr. Mulvey has all but abandoned his claim.

Notification of hearing

15 In light of the fact that Mr. Mulvey did not participate at the hearing or otherwise communicate with the court, a matter which I need to deal with is whether Mr. Mulvey was given proper notice. As I have explained, Mr. Mulvey was advised of the hearing date by email from the registry sent on December 10th, 2020. It was sent to the same email address that Mr. Mulvey had previously used to communicate with the court and with Mr. Smith. It is the email address which was set out in the notice of change of legal representative which he filed on August 4th, 2020. The last communication received by the court from Mr. Mulvey from that email address was a curt one-line email which he sent on December 9th, 2020 and which was addressed to Mr. Smith. (The email simply states: "I regard this as a procedural ambush." It appears to be in reply to Mr. Smith's email of the previous day where Mr. Smith confirmed that Castle Trust was objecting to the adjournment of the hearing.)

16 One of the directions that I gave on October 6th, 2020 was that Mr. Mulvey had to provide an address for service in Gibraltar. This is a procedural requirement. He provided the second respondent's address as his address for service in Gibraltar, although Mr. Smith informed the court that the contact person Mr. Mulvey nominated was not aware that her contact details had been provided and did not appear to have consented to the address being used. Be that as it may, email service is proper service under the Supreme Court Rules. I also observe that Mr. Mulvey's preferred method of communication was by email. In the notice of change of legal representative, Mr. Mulvey expressly stated "By Email only" in the box headed: "Address to which documents about this claim should be sent."

17 I am satisfied that Mr. Mulvey was properly notified that this hearing was to take place on February 18th, 2021. He was provided with a copy of the listing notice by email on December 10th, 2020. Aside from any communications which may have also been sent to him by Mr. Smith, there was then a further email from the court on February 8th, 2021 advising both parties that the hearing was to be a remote video hearing and inviting

them to submit email addresses for all participants who wished to connect. A reminder was sent on February 10th, 2021 (which incorrectly referred to the hearing date as Tuesday, February 18th instead of Thursday, February 18th, but this was corrected by a further email on February 16th, 2021.) An email, which contained the link to join the remote hearing, was then sent by the court to both Mr. Smith and Mr. Mulvey on February 17th, 2021. Mr. Mulvey could have participated at that hearing from Malaysia had he wished to do so. Alternatively, he had ample time within which to instruct lawyers in Gibraltar if that had been his preferred course.

18 If, for some reason, he did not receive any of the emails sent to him after his last email of December 9th, 2020, I have no doubt that he would have by now been in contact with the court by some other means. At the end of the day, on December 8th, 2020 he sought an adjournment of the December 9th, 2020 hearing to a date as from February 2021. If he had not heard from the court as to the outcome of the December 9th hearing, or as to the date of any further hearing, he would undoubtedly have made enquiries.

Strike out application

19 The application for the claim to be struck out is made pursuant to Civil Procedure Rules, r.3.4(2)(c). This provides that a statement of case may be struck out if: "there has been a failure to comply with a rule, practice direction or court order." Here, the application is made following Mr. Mulvey's failure to pay the sum of £500 on account of the costs thrown away by the adjournment of the hearing on December 9th, 2020. The order provided for payment of that sum within 14 days.

20 At the hearing, Mr. Smith actually concentrated his oral submissions on the application for security. Frankly, it seemed to me to be a pragmatic approach. If Mr. Mulvey has indeed abandoned the claim, then a requirement to pay a sum as security for Castle Trust's costs, which will result in the claim being struck out if it is not paid, will deal with the matter. For the reasons that follow, I will be making an order for security for costs. In the circumstances, I consider that the most practical way to proceed is to adjourn the application for the strike out to a date to be fixed on application by Castle Trust. If the security is posted, Mr. Mulvey may then still have to answer the application for the strike out before the claim proceeds any further.

21 In following this approach, I have taken into account that this application was filed quite late and Mr. Mulvey was only served on February 16th, 2021 at his address for service in Gibraltar. Although time can be abridged, ordinarily application notices must be served at least three days before the hearing. (Mr. Mulvey had been provided with a copy of the application notice on February 10th, 2021 and had been advised by Mr. Smith that Castle Trust was asking that it be dealt with on February 18th,

2021 together with the application for security, but that does not constitute proper service.) Whilst it is also true that Mr. Mulvey has been on notice since October 6th, 2020 that a strike out application could be considered at a future hearing, this application is premised on the failure to pay the sum adjudged on December 9th, 2020 and not on any previous failure to comply with directions.

The application for security

22 According to Mr. Gibbs' witness statement, Castle Trust have already incurred costs in excess of £60,000 and are advised that, if the matter proceeds, costs could exceed £120,000. Mr. Smith remarked that Castle Trust's fear that Mr. Mulvey would simply disappear into the night has now actually become a reality. Nevertheless, the application is limited to the payment of security for the costs of the additional steps which may need to be taken in Malaysia to enforce the payment of any costs which may be awarded to Castle Trust.

23 The application for security for costs is made pursuant to Civil Procedure Rules, r.25.12. This provides that a defendant to a claim may apply for security for his costs of the proceedings. The application must be supported by evidence. The conditions to be satisfied on such an application are set out in CPR 25.13. The relevant parts of this rule are the following:

> "(1) The court may make an order for security for costs under rule 25.12 if—
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> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
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> (b)
>
> (i) one or more of the conditions in paragraph 2 applies, or
>
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are—
>
> (a) the claimant is—
>
> (i) resident out of the jurisdiction, but
>
> (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdictions and Judgments Act 1982."

24 The manner in which courts should approach an application for security under CPR 25.12 and 25.13 was discussed by the English Court of Appeal in *Danilina* v. *Chernukhin* (2). The court gave the following summary of the applicable principles in the judgment of Hamblen, L.J. ([2018] EWCA Civ 1802, at para. 51):

> "51. Having regard to the guidance provided by these authorities the position may be summarised as follows:
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> (1) For jurisdiction under CPR 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.
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> (2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR 25.13(1) if 'it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order'.
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> (3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 ECHR—see *Bestfort* at [50]–[51].
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> (4) This requires 'objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned'—see *Nasser* at [61] and *Bestfort* at [51].
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> (5) Such grounds exist where there is a real risk of 'substantial obstacles to enforcement' or of an additional burden in terms of cost or delay—see *Bestfort* at [77].
>
> (6) The order for security should generally be tailored to cater for the relevant risk—see *Nasser* at [64].
>
> (7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings—see, for example, the orders in *De Beer* and *Bestfort.*
>
> (8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement—see, for example, the order in *Nasser.*"

25 The first question to determine is therefore Mr. Mulvey's place of residence. At the hearing, I confirmed that Mr. Smith was to proceed on the basis that I was satisfied that Mr. Mulvey is resident in Malaysia. My reasons for this are the following. In the application form to join Castle Trust's Equus Retirement Annuity Scheme, which was signed by Mr. Mulvey on March 31st, 2013, he gave an address in Kuala Lumpur,

Malaysia. (The form further states that he left the United Kingdom on November 15th, 2008.) Then, more importantly, the documents filed in these proceedings also confirm this. The claim form sets out another address in Kuala Lumpur and para. 1 of the particulars of claim states: "The Claimant is a British citizen who is resident in Malaysia." The notice of change of legal representative also says that he is "based" in Malaysia, although it does not give an actual address. However, on August 25th, 2020, Mr. Mulvey responded to a request by Mr. Smith for confirmation of his "residential address in Malaysia" by providing the same Kuala Lumpur address. The latest confirmation was in his email to the court of December 8th, 2020 asking that December 9th, 2020 hearing be adjourned, where he stated that he was in Malaysia. Furthermore, when Mr. Smith has written to him asking him to provide his reasons as to why security need not be required, he has at no time suggested that he is not resident in that country.

26 Malaysia is clearly not a Brussels contracting state, a state bound by the Lugano convention or a Regulation state, as these are comprised of European countries only. Furthermore, on the basis of the information that has been provided to me, I am satisfied that Malaysia is not a state bound by the 2005 Hague Convention (on choice of court agreements).

27 The next step is to determine whether, having regard to all the circumstances of the case, it is just to make an order for security for costs. This discretion must be exercised in a non-discriminatory manner.

28 The application being made by Castle Trust is for payment of security to cover the cost of any additional steps to be taken to enforce a costs order in Malaysia. It is not seeking security for the costs of the litigation in Gibraltar. In order to ensure that the discretion is exercised in a non-discriminatory manner, the court needs to apply the test set out in the English Court of Appeal case of *Nasser* v. *United Bank of Kuwait* (3), where Mance, L.J. said the following ([2001] EWCA Civ 556, at para. 61):

> "61. Returning to Part 25.15(1) and 25.13(1) and (2)(a) and (b), if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned."

29 Mr. Smith submitted that there was no actual requirement for formal evidence as to the obstacles that an applicant would be faced with in the foreign jurisdiction. He relied on the *Nasser* judgment (*ibid.*, at para. 64):

> "64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption

> would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay."

30 The courts in Malaysia are not recognized courts for the purposes of the Judgments (Reciprocal Enforcement) Act 1935. Furthermore, no reciprocal agreement appears to exist between Gibraltar and Malaysia allowing for the mutual recognition of judgments. In order to enforce a costs judgment against Mr. Mulvey in Malaysia, Castle Trust would have to commence an action in that country. Mr. Smith referred me to an extract of a practitioner text entitled *International Comparative Legal Guides—Enforcement of Foreign Judgments 2020*, 5th ed. (2020). At ch. 25, s.2.6 (dealing with Malaysia) the text sets out the procedure for bringing an action to enforce a foreign judgment:

> "An action on a judgment may be commenced by way of a writ action. Once the writ and relevant statement of claim have been served on the defendant and the defendant has entered an appearance, the plaintiff may file an application for a summary judgment, annexing a certified sealed copy of the foreign judgment. The court may grant a summary judgment if no triable issue is raised by the defendant.
>
> Alternatively, an action on a judgment may be commenced by way of presentation of an originating summons with a supporting affidavit, with a certified sealed copy of the foreign judgment annexed. At the hearing of the originating summons, the court will, if it is satisfied that the judgment ought to be recognised and enforced, grant an order in terms of the originating summons."

At s.2.7 the text then sets out the grounds upon which recognition or enforcement can be challenged. This reads:

> "An action on a foreign judgment under common law may be opposed on the following grounds:
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> a) that the foreign court had no jurisdiction;
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> b) that the judgment was obtained by fraud;
>
> c) that enforcement of the judgment would be contrary to public policy; or
>
> d) that the proceedings in which the judgment was obtained were opposed to natural justice."

31 It was consequently submitted that the recognition in Malaysia of a costs judgment from Gibraltar would not be automatic and that this means that there are objectively justified grounds for holding that there are obstacles to enforcement or that this would amount to an additional burden on Castle Trust. In addition, Mr. Smith relied on *Bestfort Devs. LLP* v. *R'as*

al Khaimah Inv. Auth. (1) for the proposition that the test is whether there is a real risk that there will be obstacles or added burdens. In that case, the English Court of Appeal (Gloster, L.J.) said ([2016] EWCA Civ 1099, at para. 77):

> "77. In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively justified grounds relating to obstacles to or the burden of enforcement', there is a *real risk* that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden' but whether the evidence is sufficient in any particular case to satisfy the judge that there is a *real risk* of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test was one of 'likelihood', which involved demonstrating that it was 'more likely than not' (i.e. an over 50% likelihood), or 'likely on the balance of probabilities', that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents. Accordingly, I reject Mr Millett's submission in this respect."

32 Mr. Smith also referred me to *Texuna Intl. Ltd.* v. *Cairn Energy plc* (4). The case concerned an application for security for costs against a claimant that was resident in Hong Kong. It was relied on by Mr. Smith as it is a similar jurisdiction to Malaysia. In deciding to direct that the claimant pay security for the additional cost of enforcing in Hong Kong, Gross, J. said the following ([2004] EWHC 1102 (Comm), at para. 25):

> "First, as is common ground, enforcement in Hong Kong is by way of action and can only be resisted on familiar and limited grounds. Hong Kong is not therefore one of those jurisdictions where enforcement is effectively impossible. That said, I do think that, realistically, there is the likelihood of a relatively substantial extra burden arising from enforcement in Hong Kong rather than within the zone. I decline to make the assumption for which Mr. Swaroop contended, namely, that the matter should be assessed on the basis that there would be an uncontested summary judgment for costs. No doubt if there are no good defences, it would make sense for the Claimant not to resist enforcement of a judgment for costs. Faced, however, with a judgment for costs in the region of (say) £400,000, short term considerations of putting off the evil day may govern the

> Claimant's thinking. Accordingly, the risk against which the Defendant should be protected is that of the extra burden arising from the Claimant engaging in determined resistance to enforcement."

33 Mr. Smith submitted that in this case there is indeed a real risk that Castle Trust would meet significant obstacles in attempting to enforce in Malaysia a costs order which may in due course be made in its favour. He pointed to two factors in particular. First, as has been explained, enforcement in Malaysia is not automatic. It will require the issue of additional legal proceedings and there would be grounds to contest the validity of the claim. (If, on the other hand, enforcement were to take place in Gibraltar no such issues would arise and the order could only be contested on an appeal.) Secondly, Mr. Smith accused Mr. Mulvey of being a difficult litigant. According to Castle Trust, he has filed an unmeritorious claim; he has been uncooperative; he has failed to appear at two different hearings; and he has defaulted in the payment of a modest sum in costs. I agree that, leaving aside the merits of his claim, in respect of which I make no observation at this stage, these factors all point to there being a real risk of Castle Trust facing serious obstacles in any enforcement proceedings in Malaysia. Additional proceedings will need to be taken and there is a real likelihood that these will be contested by Mr. Mulvey. I therefore conclude that I should make an order providing that Mr. Mulvey pay security for this aspect of Castle Trust's potential costs.

Quantum

34 As to the quantum of these costs, no estimate of the likely expenses has been produced by Castle Trust. Mr. Smith however referred me to the *Texuna Intl.* case (4). There, the judge ordered that the sum of £50,000 be paid as security for the additional costs of enforcement in Hong Kong and a further sum of £50,000 for the costs of enforcement in other jurisdictions should it become necessary. Mr. Smith suggested that the sum of £50,000 would be reasonable in this case.

35 I am concerned by the absence of a proper estimate of costs. I accept of course that litigation has to be conducted proportionately and that Castle Trust are already facing a large bill in a case where the claimant appears to have disengaged from the proceedings. It is therefore understandable that Castle Trust have chosen not to incur further costs in obtaining such an estimate—although I observe that the application for security was filed at a time when Mr. Mulvey was still actively pursuing his claim. Unfortunately, this leaves the court in a difficult position. I note that the sum of £50,000 was considered appropriate in *Texuna Intl.*, but the judge there had the benefit of an estimate of costs prepared presumably by a practitioner in Hong Kong and which would have been relevant to that case.

36 I propose to deal with quantum in the following way. I will make an order that Mr. Mulvey pay the sum of £10,000 into court as security for the additional costs of enforcement of an adverse costs order in Malaysia. This is undoubtedly a conservative figure, particularly when compared to the security posted in *Texuna Intl.*, but I am not prepared to order a higher amount in the absence of a proper estimate of the likely costs. However, if the security is paid, I will then allow Castle Trust an opportunity to renew their application for further security if they deem it appropriate. On a renewed application being made, I expect to be presented with evidence of what the costs of enforcement are estimated to amount to. Mr. Mulvey would of course be entitled to be heard on such an application.

37 At no time has Mr. Mulvey suggested that he is unable to pay any security or that paying security would cause him hardship. I also note that his last stated position before he ceased communicating with the court or Mr. Smith was that he was considering instructing a new firm of solicitors in Gibraltar. This suggests, although I put it no higher than that, that he has funds available to him.

38 Mr. Smith suggested that I give Mr. Mulvey a period of 14 days within which to make the payment into court. In my judgment, a longer period would be more appropriate. Mr. Mulvey lives in Malaysia and may need time to make the necessary arrangements to pay the security in accordance with the requirements of the Supreme Court Fund Rules. I will give Mr. Mulvey a period of 28 days.

39 What should be the consequences of a failure to pay the sum in the time that I have stipulated? Mr. Mulvey has failed to appear at two hearings and nothing has been heard from him since December 9th, 2020. I do not consider that it is fair that I put Castle Trust to the extra expense of having to make a further application if Mr. Mulvey defaults. I shall therefore order that unless security is given as ordered, the claim shall be struck out. If the claim is struck out, Castle Trust shall be entitled to the costs of the proceedings, which are to be the subject of a detailed assessment.

Conclusion

40 For the reasons set out in this judgment I will adjourn the application that Mr. Mulvey's claim be struck out to a date to be fixed on application by Castle Trust. I will also order that Mr. Mulvey pay into court the sum of £10,000 by way of security for Castle Trust's costs within 28 days of service upon him of the sealed order. In the event of default in payment, the claim shall be struck out and Castle Trust shall be awarded the costs of the proceedings.

41 Finally, and for the avoidance of doubt in light of the issues regarding communications with Mr. Mulvey which have been highlighted above, I

shall direct that service of the sealed order be effected both by email and by delivery to the second respondent's address (this being Mr. Mulvey's stated address for service in Gibraltar). Time shall start to run from the date that service is effected by both of these methods.

Ruling accordingly.
