[2023 Gib LR 670]

TCHENGUIZ v. ALVAR FINANCIAL SERVICES LIMITED and ENTAIN PLC

SUPREME COURT (Restano, J.): September 28th, 2023

2023/GSC/036

Civil Procedure—costs—security for costs—CPR r.25.13(2)(g) to prevent injustice where assets available to pay costs order put beyond reach of enforcement—well-known and successful businessman, living lavish lifestyle but claiming to have no personal assets as merely beneficiary of trust set up by father, ordered to provide security for costs

The defendants applied for security for costs.

The claimant brought a claim concerning losses arising from contracts for difference, or positions, taken by the claimant in shares in FirstGroup plc. The positions were taken using margin trading services provided by the first defendant. The relationship between the claimant and the first defendant was governed by an account agreement. In 2019, the claimant had instructed the first defendant to enter into positions on his behalf in respect of 45 million shares in FirstGroup plc. The first defendant did not itself purchase any FirstGroup shares but established matching positions with its own prime brokers, which in turn purchased the shares. In 2020, following falls in the global equity market, the price of FirstGroup shares collapsed. The first defendant's prime brokers made margin calls on the first defendant, and the first defendant made margin calls on the claimant. The margin calls required the claimant to pay more than £27m. but he only paid around £6.7m. As a result, his positions were closed out. The first defendant had to use its own funds and borrow a substantial amount to pay the margin calls made by its prime brokers.

The claimant alleged that the first defendant acted in breach of the account agreement, its fiduciary duties and its statutory duties when it closed out his positions, and that it caused him loss. He also alleged that the second defendant (previously the first defendant's parent company) wrongfully procured the first defendant's breaches of contract. He claimed damages or equitable compensation of between £23m. and £40m.

The first defendant counterclaimed for the outstanding balance due by the claimant on his account, namely £8,975,011, together with contractual interest due under the account agreement.

The defendants applied for security for costs under CPR r.25.12. The condition relied upon to justify the grant of security was CPR r.25.13(2)(g),

that "the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him." The defendants claimed that the claimant was a well-known and successful businessman, who had made large amounts of money over the years in high profile investments, and who lived a lavish lifestyle. However he did not appear to have any substantial personal assets and his wealth was tied up in trusts, the trustees of which held assets of over £200m.

The defendants submitted that CPR r.25.13(2)(g) was satisfied because the claimant had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. The defendants relied on the proposition that if it was reasonable to infer on the evidence that a claimant had undisclosed assets, his failure to disclose them could itself lead to the inference that he had put them out of reach of creditors. In all the circumstances, it would be just to make an order for security for costs for the following reasons: (a) it would be grossly unfair to allow the claimant to use trusts to pursue a profit but to then be able to hide behind them when his pursuit of profit was unsuccessful; (b) an order for security would not stifle the claim given the way that the claimant arranged his business affairs, with trustees clearly willing to support him. Further, in the absence of any explanation as to what happened to the wealth accumulated by the claimant, it could be inferred that he routinely settled substantial sums into discretionary trusts for his benefit; (c) the claimant's evidence about not being in default of a previous order did not say that the judgment debt had been paid in full. In any event, even if it were, that did not mean that an adverse costs order would be paid in this case; (d) there had been no material delay in bringing this application. The costs had increased significantly when the claim was expanded following amendment in November 2022. In any event they were only seeking security from March 14th, 2023 onwards, which was when they first wrote seeking security; (e) there was no question of a late application for security for costs leading the claimant to act to his detriment, as that only applied in cases where a claimant might not have the funds to provide security, which was clearly not the case here; and (f) although the defendants had a counterclaim, the claim was not just a defence to that counterclaim but went beyond it.

A witness statement filed by the claimant's in-house counsel in opposition to the application stated that the trust arrangements had been set up by the claimant's father in 1986 for the benefit of the claimant and other family members, the claimant had not settled assets on discretionary trusts and was not a settlor of any trust. The arrangements were not unusual for high net worth individuals.

The claimant submitted that CPR r.25.13(2)(g) was not satisfied because it only concerned cases where there was sufficient evidence of actual steps, or positive acts, taken by a claimant which made enforcement difficult, and it was aimed at the illegitimate hiding of assets. There was no evidence of any such steps having been taken, and the defendants were relying on historic events that were not the sorts of steps envisaged under the rule. The defendants' approach was self-evidently wrong because it would mean that

any claimant who was a beneficiary of a trust, irrespective of how long ago the relevant assets were settled or by whom, would be vulnerable to a security for costs application. Furthermore, it would not be just in all the circumstances to order security because the claim and the counterclaim involved overlapping claims, and because of the lateness of the defendants' application.

Held, ordering the claimant to provide security for costs:

(1) CPR r.25.13 provided that the court could make an order for security for costs under CPR r.25.12 if (a) it was satisfied, having regard to all the circumstances of the case, that it was just to make such an order; and (b) one of the conditions in CPR r.25.13(2) was met. The question to be determined was therefore whether the defendants had established jurisdiction for the making of an order for security for costs under CPR r.25.13(2)(g) which was the threshold condition relied on in this case. The court must then be satisfied, in the exercise of its discretion, that it was just in all the circumstances to make such an order (para. 31).

(2) The purpose of CPR r.25.13(2)(g) was to prevent injustice to a defendant where the assets available to enforce any order for costs he might obtain were put beyond the reach of enforcement. The defendants' evidence showed that the claimant was a well-known and successful businessman, who had made large amounts of money over the years in high profile investments, and who lived a lavish lifestyle. However he did not appear to have substantial personal assets and his wealth appeared to be tied up in trusts. The impression given was that the claimant was little more than the passive beneficiary of family trusts. The witness statement filed in opposition to the application referred to the fact that the trust arrangements were put in place by the claimant's father in 1986 but failed to address the wealth accumulated by the claimant over the years. The court was concerned with the effect of steps taken and not the motivation behind those steps. The fact that the claimant did not intend to put assets beyond the reach of the defendants was not a requirement for this gateway to be engaged. Nor was it relevant that the steps taken were legal. There was no temporal limitation as to when the steps were taken. Therefore the fact that the steps in question pre-dated this claim or took place when this claim was not even in contemplation was not a bar to this gateway being engaged. Whilst the evidential burden was on the defendants as applicants to show that the threshold condition was satisfied, it was the claimant who was in the best position to provide evidence about his financial affairs, especially when, despite stating that he had no significant personal assets, he pursued multi-million pound investments personally and was funding expensive litigation. The claimant had however chosen not to put his cards on the table. The evidence presented on his behalf raised more questions than it answered. On the facts of the present case the court could reasonably draw the inference that assets existed and the relevant steps had been taken by the claimant in relation to them that would make it difficult to enforce an order

for costs against him. The requirements of CPR 25.13(2)(g) were therefore satisfied (paras. 32–45).

(3) The court was satisfied that it was just in all the circumstances to make an order for security for costs. The claimant raised two arguments against the exercise of the court's discretion to grant security, namely the existence of the counterclaim and delay. Although the claim arose from the same transaction as the counterclaim, the claim raised issues which went well beyond the issues which the counterclaim raised, and which gave it a life of its own. The first defendant's counterclaim was a straightforward claim for breach of contract for around £9m. exclusive of interest. The claimant claimed for consequential losses for up to around £40m. exclusive of interest. Whilst the fact that the claimant's claim overtopped the counterclaim was not conclusive, it indicated a disparity between the two claims, and that they were not merely two sides of the same coin. This could also be seen from the relative brevity of the counterclaim compared to the claimant's lengthy and complex claims. In addition, the claimant was making a claim against the second defendant for procuring a breach of contract. This amounted to a separate claim in circumstances where the second defendant was not bringing a claim against the claimant. This was not a case where the claims overlapped to such an extent that it would not be appropriate for security to be ordered. There was some overlap but it would be disproportionate to refuse to order security for that reason alone. The just way to deal with this could be to order security for only a proportion of the costs, after excluding the costs which were attributable to the first defendant's counterclaim, which the defendants accepted. Turning to the question of delay, the defendants' application for security was filed on June 22nd, 2023, following a request made on March 14th, 2023. This was over two years after the claim was commenced, namely on January 22nd, 2021, and close to the trial date of November 6th, 2023. There was no doubt that this application had been brought late in the day. The defendants claimed that the reason for the delay was that the potential costs of the claim significantly increased when the scope and scale of the claimant's most recent amended claim in November 2022 became clear. Whilst the claim did expand in scope significantly at this stage, the claim had always been a multi-million pound claim which, although more straightforward to start with, would no doubt have generated significant costs. Delay was clearly a material factor when considering whether to grant security but it was not in itself a reason to refuse an application for security. There were no hard and fast rules, and the only immutable principle was that the discretion must be exercised justly. Although delay could sometimes lead to unfairness, there was no evidence that this would be the case here. In the circumstances, delay was not a reason to refuse an order for security for costs altogether. Rather, the just exercise of the court's discretion in this case required the fashioning of an order for security that provided for future costs only (which was what the defendants were seeking in any event). Taking into account all the factors, it was just

to make an order requiring the claimant to make security for costs of these proceedings (paras. 51–62).

(4) In the circumstances, the appropriate date from which estimated costs should run was the date when the application was filed, namely June 22nd, 2023. The defendants said that the costs of dealing with non-overlapping issues as from March 14th, 2023 was £597,911.50. This was based on a schedule of costs claiming 60% of the witness statement costs, 100% of the experts phase costs, and 30% of the pre-trial and trial costs. The court considered these percentages were broadly appropriate. The costs claimed in the schedule of costs relied on by the defendants included Gibraltar lawyers, solicitors and other fee earners based in London, as well as fees for leading and junior London counsel. The sum sought by the defendants did not take into account the fact that not all costs and hourly rates claimed would necessarily be allowed in due course if the defendants were successful. On a broad-brush basis, a reasonable sum up to and including trial was £300,000 (paras. 63–66).

Cases cited:

(1) *Ackerman* v. *Ackerman*, [2011] EWHC 2183 (Ch); [2012] 3 Costs LO 303, followed.

(2) *Beriwala* v. *Woodstone Properties (Birmingham) Ltd.*, [2021] EWHC 6 (Ch), referred to.

(3) *CMC Spreadbet plc* v. *Tchenguiz*, [2022] EWHC 1640 (Comm), considered.

(4) *Compagnie Noga d'Imporation & d'Exportation SA* v. *Australia & New Zealand Banking Group*, [2004] EWHC 2601 (Comm), considered.

(5) *Dubai Islamic Bank PJSC* v. *PSI Energy Holding Co. BSC*, [2011] EWCA Civ 761, considered.

(6) *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.*, 2014 GLR 121; 18 ITELR 1; further proceedings, [2018] UKPC 7; [2019] A.C. 271; 2018 GLR 97; [2018] 2 W.L.R. 1465; [2018] 4 All E.R. 738; [2019] WTLR 95, referred to.

(7) *RBS (Rights Issue Litigation)*, *Re*, [2017] EWHC 1217 (Ch); [2017] 1 W.L.R. 4635, considered.

(8) *TC Developments (South East) Ltd.* v. *Investin Quay House Ltd.*, [2019] EWHC 1432 (TCC); [2019] Costs L.R. 765, considered.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.25.13(2)(g): The relevant terms of this provision are set out at para. 1.

A. de Garr Robinson, *K.C.* with *M. Levy* and *T. Foxton* (instructed by Hassans) for the defendants/applicants;

S. Isaacs, *K.C.* with *K. Power* and *P. Kuhn* (instructed by TSN) for the claimant/respondent.

1 **RESTANO, J.:**

Introduction

This is an application by the defendants for security for costs under CPR r.25.12 made by way of an application notice dated June 22nd, 2023. The condition relied on by the defendants to justify the grant of security is CPR r.25.13(2)(g) which states: "the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

2 Although this claim was commenced on January 22nd, 2021, the defendants are only seeking an order for their costs as from March 14th, 2023 onwards, which is the date when they first wrote to the claimant seeking security for costs. The sum of security sought is £597,911.50.

3 This application was originally listed for hearing on August 15th, 2023 together with an application for specific disclosure but, due to lack of time, the hearing of the application was adjourned to September 20th, 2023 along with various other matters.

The litigation

4 This claim arises from losses arising from contracts for difference, or positions, taken by the claimant in shares in FirstGroup plc. These positions were taken using margin trading services provided by the first defendant, previously known as "Intertrader" and which, for the sake of convenience, I will refer to as Intertrader in this judgment. The second defendant, Entain plc, was previously Intertrader's parent company.

5 The relationship between the claimant and Intertrader was governed by a written "Account Agreement." These services enabled the claimant to take a position in the market for a small stake, and he stood to profit from the entire increase in value of those shares. If the value of those shares fell, however, Intertrader could make margin calls requiring payment of the entire decrease in the value of the shares.

6 During the period July 9th to December 3rd, 2019, the claimant instructed Intertrader to enter into positions on his behalf in respect of 45 million shares in FirstGroup plc. Intertrader did not itself purchase any FirstGroup shares. Instead, it established matching positions with its own prime brokers, which in turn purchased the shares.

7 During February and March 2020, following falls in the global equity market, the price of FirstGroup shares collapsed. This led to Intertrader's prime brokers making margin calls on Intertrader, and Intertrader making margin calls on the claimant. These margin calls required the claimant to pay more than £27m., but he only paid around £6.7m. As a result, the claimant's positions were closed out. Intertrader had to use its own funds

and borrow a substantial amount of money from its immediate parent company to pay the margin calls made by its prime brokers.

8 The claimant alleges that Intertrader acted in breach of the terms of the account agreement, its fiduciary duties, and its statutory duties when it closed out his positions, and that this has caused him loss. Further, he alleges that the second defendant wrongfully procured the breaches of contract alleged against Intertrader. The claimant claims damages or equitable compensation for between £23m. and £40m.

9 Intertrader alleges that under the account agreement it was entitled to close out the claimant's positions as it did in March 2020 and that had it not done so, the deficit would have grown even more as the FirstGroup shares continued to fall in value. Intertrader is therefore counterclaiming for the outstanding balance due by the claimant on his account, namely £8,975,011, together with contractual interest due under the account agreement.

The evidence

10 The application is supported by the second witness statement of Lyle Risk dated July 21st, 2023. Mr. Risk is employed by Entain Holdings (UK) Ltd., a subsidiary of Entain plc, and he is its Group Head of Litigation.

11 Mr. Risk states that pleadings have been drawn out over a lengthy period, and that on March 14th, 2023 the defendants wrote to the claimant asking about his ability to satisfy any adverse costs order. Further, this concern was heightened following a reference in a judgment of the English High Court handed down on July 1st, 2022 which referred to the claimant's lack of assets in *CMC Spreadbet plc* v. *Robert Tchenguiz* (3) and to the way that the claim was developing generally. As regards the High Court judgment, Mr. Risk drew attention to the following paragraphs, with his emphasis added, in the *CMC Spreadbet* judgment ([2022] EWHC 1640 (Comm), at paras. 120–160):

> "120. Ms Nicole Anne Martin, a trustee of a number of trusts of which the Defendant was beneficiary, gave evidence in support of the attempts by the Defendant to address his losses. In an email to InterTrader forwarded by Mr Tchenguiz to Mr Garbacz at 20:46, Ms Martin stated:
>
> > 'As you know, I act on behalf of the trustees of certain trusts which Robert is a beneficiary of. Robert has explained his personal position, which has arisen as a consequence of the unprecedented market conditions, to the trustees, and has asked the trustees for assistance, as *Robert himself has no personal assets and as such is unable to meet the demands being made of him today*. The trusts however are discretionary trusts, and

> although the trustees may be willing to help Robert, they are not obligated to do so and need to consider the request in all of the circumstances.
>
> With this in mind I have been asked to contact you to see whether there is a compromise that can be reached with all the brokers (InterTrader, IG, RJ O'Brien, Spreadex, CMC, ETX) in respect of the existing First Group position. The existing value of the position today is c.£33 million. The trustees have identified an asset that possibly could be made available to support Robert's position; I understand that Robert has already provided you some information in relation to this asset, which is a long leasehold of a property in Cardiff let for 54 years to Whitbread. Before any recommendation can be made to the trustees however, I would appreciate it if you could let me know whether this proposal is viable. I expect that we would need to agree an extension of time for at least 12 months for regularising Robert's position, given the current state of affairs. Could you please revert urgently as to whether in principle you consider this is a viable option, and whether you believe you will be able to enlist the co-operation of the other brokerage firms.'

121. However, as the evidence demonstrated, there was only limited information regarding this asset and, critically, it had a number of features which made it unlikely to be attractive to CMC:

> (1) It was not a cash asset and not readily available to make good the deficit in Mr Tchenguiz' account but was only being offered as security. Ms Nicole Anne Martin made in clear in evidence that she was not aware that the provision of security was not appropriate since Mr Tchenguiz did not own shares but only a contractual spread bet position. Moreover, it was clear from her evidence that she had not been provided with information as to Mr Tchenguiz' exposure—'I truly do not recall Mr Tchenguiz giving me any total amount of exposure at all.'
>
> (2) The property was not vested in Mr Tchenguiz and, looking at the matter as beneficially as possible, it would have taken time to secure its availability even if it had been of sufficient value and even if the provision of security rather than cash had been acceptable to meet contractual obligations.

122. *Moreover, as the email made clear, and Ms Martin subsequently confirmed in evidence, Mr Tchenguiz held no substantial assets other than personal effects*. It was also the case that no instructions were given to transfer Mr Tchenguiz' position to another broker.

. . .

125. A further proposal was made on 17 March when Ms Martin sent an email proposal at 09:38:

> 'I write further to the positions held by Mr Robert Tchenguiz with your various firms in relation to FirstGroup PLC. As you will be aware, Mr Tchenguiz is a beneficiary of certain discretionary trusts and he has approached his trustees for assistance to help deal with the present situation.
>
> I have spoken to the trustees who are potentially willing to assist Mr Tchenguiz, subject to certain conditions. Their proposal is as set out below.
>
> 1. The trustees will replace Mr Tchenguiz's personal guarantee with their own guarantee for FirstGroup shares at 40p/share; *the trustees hold assets of over £200m—Mr Tchenguiz has no personal assets . . .*'

. . .

160. . . . The forms of security offered were not advanced to do this, would have been well outside the contractual funding obligations Mr Tchenguiz owed, *and it was clear Mr Tchenguiz did not hold substantial assets in his own name*."

12 Mr. Risk then points out that the claimant is a well-known businessman who has amassed significant wealth, and he refers to several of his multi-million high-profile investments. He then goes on to state that despite the clear wealth generated by the claimant, by his own admission he has all his assets tied up in trusts over which he purports to have no control but which he appears to be able to access without undue difficulty when he so wishes. His conclusion, set out at para. 20, is as follows:

> "In the circumstances, by arranging his funds in a manner whereby he himself has no personal assets, but yet his trustees hold assets of over £200m, the Claimant has taken steps in relation to those assets that would make it difficult to enforce an order for costs against him . . ."

13 Mr. Risk also explains that the application was brought later in the day because the pleadings stage has been extremely involved and only formally concluded on January 9th, 2023. Further, it was only at this point that the defendants were able to understand properly the claimant's case, the extent of the expert evidence required, and to make an estimate of the costs up to trial.

14 In opposition to the application, the claimant filed the third witness statement of Nicole Martin dated July 19th, 2023. Ms. Martin is the claimant's in-house counsel, and the head of the legal department of R20 Advisory Ltd. which provides services to the trustees of various trusts related to the claimant. Ms. Martin refers to the fact that the defendants had

been aware of the claimant's financial circumstances since March 2020 when the parties were dealing with the closing out of his account. Further, she points out that they only sought comfort about the claimant's ability to meet an adverse costs order in March 2023, over two years after the commencement of the claim.

15 As for the paragraphs relied on by Mr. Risk from the *CMC Spreadbet* judgment (3), she states as follows in her witness statement:

> "14. It is incorrect that the Claimant has settled assets on discretionary trusts: the Claimant is not a settlor of any trust. The trust arrangements were originally put in place in 1986 by the Claimant's father for the benefit of the Claimant and other family members. It is therefore ill-advised to suggest or imply that they were put in place to avoid any form of liability such as a costs order in this action as arrangements pre-date these significantly. It is not unusual for high net worth individuals or families to settle assets on trusts for family wealth planning reasons.
>
> 15. The Claimant and his family are beneficiaries of those trusts. The Defendants have been aware of these arrangements since the commencement of these proceedings and, pursuant to the *CMC* judgment, it is also a matter of public record.
>
> 16. In the *CMC* case, the court ordered the sum of c. £1.675m to be paid by 15 July 2022 being the principal judgment, interest and costs (the CMC Order). Now produced and shown to me marked NM1 at page 1 is a true copy of the CMC Order. I can confirm that the Claimant is not in default of the CMC Order and there are no consequential proceedings in relation to the CMC Order, or the *CMC* judgment, that have been brought by CMC."

16 At para. 20 of her witness statement, Ms. Martin confirms that she has personal knowledge of the claimant's financial position and goes on to confidently state that the claimant has taken no steps (if he would have been able to do so) to dissipate any assets so as to frustrate a possible adverse costs order. In her view, the late request for security is nothing more than an attempt to obstruct the claimant's ability to pursue his claim.

17 Mr. Risk then filed a third witness statement dated August 2nd, 2023 in which he makes the point that Ms. Martin fails to address what the claimant has done with the substantial wealth he has accumulated from his business ventures since 1986, and how that wealth is made available to him. Mr. Risk provides further details of the claimant's entrepreneurial activities since 1986 involving hundreds of millions of pounds, and he refers to the fact that his positions in FirstGroup alone were worth over £100m. Further, he refers to the fact that the *CMC Spreadbet* judgment shows that the trustees of discretionary trusts were willing to provide trust

assets said to be worth over £200m. when he wanted to keep his FirstGroup positions open. Against this background, he says that it is striking that Ms. Martin has failed to provide any information about any of this.

18 Mr. Risk also refers to the following two judgments which provide details of relevant trust structures: *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.* (6) (April 23rd, 2018, Privy Council, and June 27th, 2014, Guernsey Court of Appeal). These judgments refer to the fact that whilst the claimant's father settled a family trust in 1988, naming the claimant and his brother as beneficiaries, a decision was taken to separate the trusts in 2007 which led to the settlement of the Tchenguiz Discretionary Trust ("TDT"). The beneficiaries of the TDT are the claimant, his children and remoter issue, and any person or charity added to the class of beneficiaries. R20 Advisory Ltd., of which the claimant and Ms. Martin are both directors, acts as investment advisor to the trustees of the TDT. The assets which were transferred into the TDT comprised companies which held investments in public equity, private equity, and real estate. The TDT was then used to build a highly leveraged investment portfolio comprising real property, equities, and other asset classes, including several BVI intermediate holding companies. It was using this structure that several of the claimant's high-profile recent business activities were carried out, including large equity positions in both Sainsbury's and Mitchells & Butlers.

19 Mr. Risk also refers to the 2018 BBC documentary *Robbie's War. The Rise and Fall of a Playboy Billionaire*, a transcript of which is provided. In the documentary, the claimant explains how he lost approximately 80%–85% of his £3bn. fortune in the global financial crisis, that he earned enough money from 2011 to 2017 to keep his office going, and that his standard of living had not changed. Ms. Martin, who also features in the documentary, considers that the claimant's estimate that he had £40m. worth of legal debt might be "conservative," and the BBC presenter explained that the claimant was spending up to £1m. a month on lawyers. Mr. Risk also points out that the claimant has been able to fund this litigation as well as three related actions in England. Ms. Martin also said in the documentary that bankruptcy was a "very real possibility" for the claimant, who needed to borrow money from his friends and family to fund "not just the litigation but his lifestyle." Mr. Risk, however, considers this to be at odds with the claimant's lavish lifestyle shown in the documentary and includes a £20m. seven-storey residence, full-time live-in support staff, hosting a 450-person party to celebrate his sister's birthday, and the cars he drives throughout the documentary.

20 Mr. Risk then states as follows at para. 24 of his witness statement:

> "The evidence strongly indicates that the Claimant has arranged his financial affairs in such a way so as to technically have 'no assets' to

his name, while retaining access to funds as and when they are required by him. In other words, he has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

21 Mr. Risk also states that Ms. Martin's choice of words in relation to the *CMC Spreadbet* order is odd because Ms. Martin does not actually say that the amounts due under it have been paid. In any event, he makes the point that even if the claimant has discretionary trustees who may have previously discharged orders against him it is of no comfort to the defendants as there is no assurance that they would do so again here, particularly as the potential liability is greater here.

22 Mr. Risk also considers that Ms. Martin has missed the point when she confirmed that the claimant had taken no steps to dissipate any assets to frustrate any adverse costs order. In his view, the claimant's use of trust structures means that he has no need to dissipate assets in the first place.

The parties' submissions in summary

23 The defendants submitted that CPR r.25.13(2)(g) is satisfied because the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. They said that the claimant is clearly a successful businessman in his own right and refer to various articles in newspapers which provide details of some of the claimant's successes over the years. In their view, however, the claimant's evidence seeks to give the false impression, whilst not saying so in terms, that he is nothing more than the beneficiary of arrangements put in place by his father. Further, the defendants referred to the fact that the claimant's position is that he has no substantial personal assets and point out that he appears to have access to trust funds of up to £200m.

24 The defendants relied on the third proposition set out in *Ackerman* v. *Ackerman* (1), namely that if it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself lead to the inference that he has put them out of reach of creditors. This is because the claimant has undertaken profitable business activities as set out above, and that there is evidence that he has used discretionary trusts of which he is the primary beneficiary for the purpose of holding and protecting assets which he has generated from that business.

25 Further, the defendants said that in all the circumstances of the case it is just to make an order for security for costs for six reasons, namely:

(1) It would be grossly unfair to allow the claimant to use these structures to pursue a profit but for him to then be able to hide behind them when his pursuit of profit is unsuccessful.

(2) An order for security would not stifle the claim given the way that the claimant arranges his business affairs, with trusts clearly willing to

stand behind him. This is clear from the trusts' offer to provide security to keep the claimant's positions in FirstGroup open. Further, in the absence of any explanation as to what happened to the wealth accumulated by the claimant, it can be inferred that he routinely settles substantial sums into discretionary trusts, for his benefit.

(3) The claimant's evidence about him not being in default of the *CMC Spreadbet* order is striking because it does not say that the judgment debt has been paid in full. In any event, even if it were, that does not mean that an adverse costs order would be paid in this case.

(4) Contrary to what the claimant says, there has been no material delay in bringing this application. The defendants say that the costs increased significantly when the claim was expanded following an amendment in November 2022 and that in any event they are only seeking security from March 14th, 2023 onwards, which is when they first wrote seeking security.

(5) There is no question of a late application for security for costs leading the claimant to act to his detriment, as that only applies in cases where a claimant might not have the funds to provide security. That is clearly not the case here where the claimant has the backing of trusts.

(6) Although the defendants have a counterclaim, there are two respects in which the claim does not just operate as a defence to that counterclaim and goes beyond it. The first is that the claimant is making a claim against the second defendant for procuring a breach of contract. Secondly, the claim is far more involved than the counterclaim, as is evident from the fact that the claimant is claiming consequential losses of over £40m. plus interest, compared with the first defendant's claim of around £9m. plus interest.

26 The claimant, on the other hand, submitted that CPR r.25.13(2)(g) is confined to cases where there is sufficient evidence of actual steps, or positive acts, taken by a claimant which makes enforcement difficult, and it is aimed at the illegitimate hiding of assets. Examples given of this conduct include the dissipation of assets, their transfer overseas or into the names of third parties, and their transfer or removal to places unknown to the defendant. In the claimant's submission, there is no evidence of any such steps having been taken, and the defendants are relying on historic events that are not the sorts of steps envisaged under this rule. Further, this is not a case where inferences should be drawn based on vague assertions, newspaper articles, or the claimant's lifestyle, and the evidence of Mr. Risk should be approached with caution especially as many of the investments referred to by him are acquisitions made in the early 2000s, before the financial crash.

27 The claimant further submitted that the defendants' approach is self-evidently wrong because it would mean that any claimant who is a

beneficiary of a trust, irrespective of how long ago the relevant assets were settled or by whom, would be vulnerable to a security for costs application.

28 Further, the claimant submitted that it would not be just in all the circumstances to order security. The two main arguments advanced in this regard were the fact that the claim and counterclaim involve overlapping claims, and the lateness of the defendants' application.

29 As regards the first of those points, the claimant submitted that this is a case where if the claimant had not brought a claim, the defendants would have brought a claim themselves. In this connection, the claimant refers to the fact that a claim was issued in England against him, although this was not then pursued. According to the claimant, it is nothing more than happenstance that he finds himself in the position of a claimant and would just as easily have ended up defending a claim where the facts and issues would have been largely the same.

30 As regards delay, the claimant submitted that his financial position was known to the defendants since March 2020, as can be seen from an email dated March 16th, 2020 from Nicole Martin to Simon Tyson. He therefore said that the application has not been made promptly, and pointed out that it is usual for such claims to be made at the first CMC.

Discussion

31 CPR r.25.13 provides that the court may make an order for security for costs under CPR r.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) one of the conditions in CPR r.25.13(2) is met. The first question that needs to be determined, therefore, is whether the defendants have established jurisdiction for the making of an order for security for costs under CPR r.25.13(2)(g) which is the threshold condition relied on here. The court must then be satisfied in the exercise of its discretion that it is just in all the circumstances to make such an order.

32 The purpose of CPR r.25.13(2)(g) is to prevent injustice to a defendant where the assets available to enforce any order for costs they may obtain have been or are being put beyond the reach of enforcement. The principles to be applied under this ground are set out in CPR 25.13.16, and were summarized by Mr. Justice Roth in *Ackerman* v. *Ackerman* (1) ([2011] EWHC 2183 (Ch), at para. 16) as follows:

> "16. The general principles that govern the making of an order for security and the application of CPR 25.13(2)(g) are well-recognised. They include the following:
>
> i) The requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is

not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible: *Chandler v Brown* [2001] CP Rep 103 at [19]–[20];

ii) The test in that regard is objective: it is not concerned with the claimant's motivation but with the effect of steps which he has taken in relation to his assets: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] CLC 776, at [25]–[26];

iii) If it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself, although it might not necessarily, lead to the inference that he had put them out of reach of his creditors, including a potential creditor for costs: *Dubai Islamic Bank v PSI Energy Holding Co* [2011] EWCA Civ 761 at [26];

iv) There is no temporal limitation as to when the steps were taken: they may have been taken before proceedings had been commenced or were in contemplation: *Harris v Wallis* [2006] EWHC 630 (Ch) at [24]–[25];

v) However, motive, intention and the time when steps were taken are all relevant to the exercise of the court's discretion: *Aoun v Bahri*, ibid; *Harris v Wallis*, ibid.

vi) In the exercise of its discretion, the court may take into account whether the claimant's want of means has been brought about by any conduct of the defendant: *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609 per Lord Denning MR at 626; *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 at [14].

vii) Impecuniosity is not a ground for ordering security; on the contrary, security should not be ordered where the court is satisfied that, in all the circumstances, this would probably have the effect of stifling a genuine claim: *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at 540, para 6. Thus the court must not order security in a sum which it knows the claimant cannot afford: *Al-Koronky v Time-Life Entertainment* [2006] CP Rep 47 at [25]–[26] (where this was referred to as 'the principle of affordability');

viii) The court can order any amount (other than a simply nominal amount) by way of security up to the full amount claimed: it is not bound to order a substantial amount: *Keary* at 540, para 5.

ix) The burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others who could assist him in

> pursuing his claim, such as relatives and friends: *Keary* at 540, para 6. However, the court should evaluate the evidence as regards third party funders with recognition of the difficulty for the claimant in proving a negative: *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch) at [12].
>
> x) When a party seeks to ensure that any security that may be required is within his resources, he must be full and candid as to his means: the court should scrutinise what it is told with a critical eye and may draw adverse inferences from any unexplained gaps in the evidence: *Al-Koronky* at [27]."

33 The defendants' evidence shows that the claimant is a well-known and successful businessman, who has made large amounts of money over the years in high profile investments, and who lives a lavish lifestyle. He does not, however, appear to have any substantial personal assets and his wealth appears to be tied up in trusts, the trustees of which hold assets of over £200m. and were prepared to stand behind him when he found himself in financial difficulties at the time of the close out of the FirstGroup shares.

34 Ms. Martin's witness statement filed in opposition to the application is very circumspect in the language used. She states that it is incorrect that the claimant has settled assets on discretionary trusts, and that he is not a settlor of any trust. She also refers to the fact that trust arrangements were put in place in 1986 by the claimant's father for the benefit of the claimant and other family members, and that it is ill-advised to suggest that they were put in place to avoid any form of costs order, and pre-date these proceedings significantly. She then goes on to say that these arrangements are not unusual for high net worth individuals. Ms. Martin, however, fails to address the wealth accumulated by the claimant over the years.

35 Pausing there for a moment, there are a couple of points made by Ms. Martin which can be cleared away quickly before getting to the main point that arises in relation to this threshold condition.

36 First, and as the second principle set out in *Ackerman* makes clear, the test is objective. This means that we are concerned with the effect of steps taken, and not the motivation behind those steps. The fact, therefore, that the claimant did not intend to put assets beyond the reach of the defendants is not a requirement for this gateway to be engaged. Nor is it relevant that the steps taken were legitimate.

37 The fourth *Ackerman* principle also makes it clear that there is no temporal limitation as to when the steps were taken. This means that the fact that the steps in question pre-date this claim or took place when this claim was not even in contemplation is not a bar for this gateway to be engaged either.

38 This then leaves the financial arrangements themselves, and whether they are sufficient to engage threshold condition (g). The defendants rely on the double inference approach, as set out in the third *Ackerman* principle. That provides that a reasonable inference can be drawn from the evidence that the claimant has undisclosed assets, and that his failure to disclose them is such that it can be inferred that he has put them out of the reach of his creditors.

39 *Dubai Islamic Bank PJSC* v. *PSI Energy Holding Co. BSC* (5), is the authority cited in *Ackerman* (1) in support of this principle. In that case, the court ordered security for costs based on this double inference. Answers provided by a Mr. Nil pursuant to disclosure requirements contained in a worldwide freezing order were to the effect that his financial position was one of insolvency. This then prompted inquiries about Mr. Nil's expensive lifestyle, which he said was funded by loans from family and others. Mr. Nil, however, failed to provide details about those loans, and that lack of detail enabled the court to infer, in the circumstances, that he had undisclosed assets that he had put beyond the reach of creditors. The court concluded that CPR 25.13(2)(g) was engaged, and that an order for security for costs should be made. Tomlinson, L.J. stated as follows ([2011] EWCA Civ 761, at paras. 30–31):

> "30. Considerations such as these apply in my judgment by analogy when one is concerned with the question whether or not a claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. Where a party seeks to suggest that he is devoid of assets and yet able to maintain an expensive lifestyle and to fund litigation on the basis of loans from his family or other third parties, it is incumbent upon him in my judgment to provide details of the nature of those loans, the terms upon which they are granted and in particular to condescend to some further detail in relation to the efforts he has made in order to obtain further funds from the same sources.
>
> 31. When no such details are given and when the evidence is at such a high level of generality as to say that the source of living expenses and legal expenses is mostly loans from family and family affiliated companies and third parties without any further details volunteered, it is in my judgment possible and in many cases appropriate for the court to draw the double inference on which Langley J spoke in the *Noga* case, which is to the effect both that there are undisclosed assets and also that the failure to disclose them leads to the inference that they have been put out of reach of creditors including of course a potential creditor for costs."

40 *Compagnie Noga d'Importation & d'Exportation SA* v. *Australia & New Zealand Banking Group Ltd.* (4), which was cited by Tomlinson, L.J.

in *Dubai Islamic Bank*, was a case where the court did not feel it appropriate to draw this double inference on the facts, albeit recognizing the principle. In that case, the defendants did not know anything about the claimant's assets so they could not show that he had taken steps in relation to them, which would make enforcement of a costs order difficult. Although the judge felt that there were worrying features about the evidence which aroused suspicion, on balance he did not feel able to conclude that the double inference of existence of assets and relevant steps taken in relation to them had been established. He said that it remained sufficiently possible that the claimant's assets remained where they always had been. Mr. Justice Langley stated as follows ([2004] EWHC 2601 (Comm), at paras. 117–118):

> "117. There is also little authority on the application of this rule which first appeared with the CPR. However, in *Chandler v Brown* 20th July 2001, Park J considered the rule in a case in which the individual claimant had 'a record of dishonesty and creditors (had) been victims of it'. Park J held that was not enough to satisfy the rule which required by its terms that it be shown that the claimant had taken steps in relation to his assets which would make a costs order difficult to enforce. It was not enough to show propensity that he might take such steps in the future. Actual 'steps' already taken were required. I respectfully agree. The rule is not aimed at the impecunious or the dishonest as such but at the illegitimate hiding of assets.
>
> 118. The difficulty which faces the defendants is that they know nothing about Mr Gaon's assets and so cannot show that he has taken any steps in relation to them which would make enforcement of a costs order against him difficult or indeed at all. Both Mr Stanley and Mr Bright submitted that if it was a reasonable inference on all the evidence that Mr Gaon did have undisclosed assets then his failure to disclose them could itself lead to the inference that he had put them out of reach of his creditors including a potential creditor for costs. There are worrying features about the evidence which arouse suspicion: see paragraphs 72 to 81. But on balance I do not feel able to conclude that the double inference of the existence of assets and relevant steps taken in relation to them has been established by the defendants. It remains, I think, sufficiently possible that such assets as Mr Gaon has remain where they have in effect always been. It follows that there is also no jurisdiction to order him to provide security under this rule."

41 *Beriwala* v. *Woodstone Properties (Birmingham) Ltd.* (2) was another case where the court refused to grant security for costs. In that case, the lack of formality in family arrangements was held to be consistent with the way they conducted their affairs and not a basis to draw an inference that the claimant had undisclosed personal assets or that she had put such assets beyond the reach of creditors.

42 Whilst these cases are helpful in enunciating this principle and showing how courts tend to approach these sorts of applications, each case must of course turn on its own facts. One aspect of the evidence before the court in this case which is striking is how little Ms. Martin says about the claimant's financial position, and the impression given that the claimant is little more than the passive beneficiary of family trusts. This impression is at odds with the claimant's profile as a businessman, and the evidence of Mr. Risk. As well as providing further material of the claimant's high-profile business activities, Mr. Risk's third witness statement refers to two Guernsey judgments that provide further background about the claimant's trust arrangements. These judgments refer to the fact that whilst the Tchenguiz family trust was set out in 1988, which included the claimant and his brother as beneficiaries, a decision was then taken in 2007 to separate the assets of the trust which were notionally held for the claimant and his brother resulting in the TDT being established.

43 It is also important to bear in mind that the claimant appears to undertake his business activities in his own name. This is clear from some of the various newspaper articles exhibited by Mr. Risk, although on their own these articles might not be regarded as particularly weighty items of evidence. More importantly, however, the account agreement with Intertrader was entered into by the claimant in his personal name. It is also clear from the *CMC Spreadbet* judgment (3) that the business arrangements which gave rise to that claim were also made by the claimant in his personal name. When the price of the FirstGroup shares plummeted, however, it was trustees that came forward to stand behind the claimant.

44 Whilst the evidential burden is on the defendants as the applicants to show that the threshold condition is satisfied, it is the claimant who is in the best position to provide evidence about his financial affairs, especially when, despite stating that he has no significant personal assets, he pursues multi-million pound investments personally and is funding expensive litigation. The claimant, however, has chosen not to put his cards on the table about this or about his interest as a beneficiary of a trust or trusts. The evidence presented on his behalf raises more questions than answers considering the claimant's well-documented business activities, his wealth and the material obtained by Mr. Risk, including the TDT.

45 During his oral submissions, Mr. Isaacs, K.C. submitted that trust arrangements of this sort were not unusual for high net worth individuals. That might well be the case, and there is nothing inherently improper about legitimate wealth planning. As stated above, however, the test is objective, and we are not concerned with a claimant's motivation but the effect of steps taken in relation to assets. On the facts of this case, my view is that the court can reasonably draw the inference that assets exist, and that relevant steps have been taken by the claimant in relation to them that would make it difficult to enforce an order for costs against him. In my

judgment, therefore, the requirements of CPR r.25.13(2)(g) are satisfied. That then brings me to the question of discretion.

46 Even though a gateway has been established under which security can be ordered, the court must then be satisfied that it is just in all the circumstances to make the order. The interests of justice are ordinarily best served if successful litigants recover the costs of their litigation from the unsuccessful parties. If the defendants are successful, it is likely that an order for costs against the claimant would be difficult to enforce given the way that he appears to have structured his financial affairs. On the one hand, the claimant trades on his own account, he can fund expensive litigation, and has trustees willing to stand behind him when it suits him, yet on the other hand, he claims that he has no assets other than personal effects.

47 There are, however, two main arguments advanced by the claimant which he says operate against the exercise of the court's discretion to grant security. These are the existence of the counterclaim and delay.

48 Before I turn to those points, however, I should deal with the fact that the claimant is "not in default" of the *CMC Spreadbet* judgment (3) where he was ordered to pay £1.675m. by July 15th, 2022. That order for costs made against the claimant followed his unsuccessful challenge in the English High Court to the close out of his FirstGroup positions held in his spread betting account with CMC Spreadbet. Mr. de Garr Robinson, K.C. said that this was careful language which did not confirm that the judgment debt had been fully paid and might mean that a compromise was reached based on a partial recovery. Mr. Isaacs, K.C. said that this was speculation but did not go further than what Ms. Martin had stated in this regard. It may be that the claimant's lawyers are being somewhat coy about this, but I do not consider that this assists one way or another.

49 Turning to the counterclaim, the claimant said that he might just as easily have ended up as a defendant, and that the defendants would be gaining an advantage if security were ordered against him.

50 The relevant principles where a claim and counterclaim overlap were summarized by Stuart-Smith, J. in *TC Developments (South East) Ltd.* v. *Investin Quay House Ltd.* (8) as follows ([2019] EWHC 1432 (TCC), at para. 22):

> "19. The following propositions are well-established:
>
> i) An order for costs against a counterclaiming defendant should not ordinarily be made if all the defendant is doing, in substance, is to defend himself: *Hutchison* at 317d;
>
> ii) The question may be expressed as 'is the defendant simply defending himself, or is he going beyond mere self-defence and

launching a cross-claim with an independent vitality of its own': *Hutchison* ibid. An alternative way of expressing the same principle is to ask 'whether in the particular case the counterclaim is a cross-action or operates as a defence, that is to say merely operates as a defence': *Hutchison* at 313a per Dillon LJ, with whom Bingham LJ agreed;

iii) An order for security against a counterclaiming defendant is not precluded because the counterclaim arises out of the same transaction as the claim: *Hutchison* at 311h, 317f;

iv) The Court should look at the substantial position of the parties and not the form as appearing from the pleadings or otherwise: *Hutchison* at 317e. Thus, for example, the fact that the Defendant in the present case has pleaded all material facts in the Defence and then adopted a short form of Counterclaim is not determinative or even of any real influence if the reality is that it has gone beyond merely defending itself and has launched a cross-claim with an independent vitality of its own;

v) It is clearly a relevant consideration that if the claimant had not issued proceedings the defendant would have done, because in such a case it may be almost a matter of chance whether a party happens to be the Claimant or the Defendant; and if the proper inference is that the defendants would have sued anyway, that fortifies the inference that the counterclaim has an independent vitality of its own and is not a mere matter of defence: *Hutchison* at 317g–h. If, however, the proper conclusion is that the claim by the claimant and the cross-claim by the defendant raise essentially the same issues and are going to be litigated anyway so far as one can tell, that would militate against making an order for security: *Crabtree* at 54, per Bingham LJ;

vi) It is not conclusive that the Counterclaim overtops the claim, though this may be a relevant consideration and a marked discrepancy in size between the amount claimed in the action and the very much greater amount claimed by the cross-claim will be a relevant factor: *Hutchison* at 314h, 317f–g."

51 When one looks at the substantial position of the parties, one can see that although the claim arises from the same transaction as the counterclaim, the claim raises a host of issues which go well beyond the issues which the counterclaim raises, and which give it a life of its own. Intertrader's counterclaim is a straightforward claim for breach of contract for around £9m. exclusive of interest. The claimant's claim makes claims for consequential losses for up to around £40m. exclusive of interest. Whilst the fact that the claimant's claim overtops the counterclaim is not conclusive, it indicates a disparity between the two claims, and that they are not just

two sides of the same coin. This can also be seen from the relative brevity of the counterclaim, which is a straightforward claim for amounts due, when compared to the claims being advanced by the claimant which are lengthy and complex, and which involve claims based on a vast array of statutory and fiduciary duties.

52 Another important feature of the claim which points to it having an "independent vitality of its own" is the fact that the claimant is making a claim against the second defendant for procuring a breach of contract. This amounts to a separate claim in circumstances where the second defendant is not bringing a claim against the claimant. It is also worth noting in this context that a significant portion of the evidence being relied on at trial by the defendants relates to that claim.

53 Consequently, the claim raises several additional factual, expert and legal matters that would not be before the court if it were only adjudicating upon the first defendant's counterclaim. I do not therefore consider that this is a case where claims overlap to such an extent that it would not be appropriate for security to be ordered.

54 There is, of course, some overlap between the claim and counterclaim. In my view, however, it would be disproportionate to refuse to order security for that reason alone. The just way to deal with this would be to order security for only a proportion of the costs, after excluding the costs which are attributable to the first defendant's counterclaim, which the defendants accept.

55 Turning next to the question of delay. The application for security was filed by the defendants on June 22nd, 2023, following a request made on March 14th, 2023. This was over two years after the claim was commenced, namely January 22nd, 2021, and close to the trial date, namely November 6th, 2023.

56 The *Commercial Court Guide*, 11th ed. (2022) states at para. 1 of Appendix 10 that:

> "applications for security for costs should not be made later than at the Case Management Conference and in any event any application should not be left until close to the trial date. Delay to the prejudice of the other party or the administration of justice might well cause the application to fail, as will any use of the application to harass the other party."

57 The first CMC in this case was held on February 3rd, 2022, and there is no doubt that this application has been brought late in the day. The defendants say that the reason for this delay is that the potential costs of the claim significantly increased when the scope and scale of the claimant's most recent amended claim in November 2022 became clear. Whilst the claim did expand in scope significantly at this stage, the claim was always

a multi-million pound claim and which although more straightforward to start with, would no doubt have generated significant costs.

58 Although delay is clearly a material factor when considering whether to grant security, it is not in itself fatal. In *Re RBS (Rights Issue Litigation)* (7), applications for security were made on March 16th and 17th, 2017, which was shortly before the trial which was listed to begin on May 22nd, 2017. Mr. Justice Hildyard made the order against one of the claimants and said that the lateness of the application was justified. Further, he stated as follows ([2017] EWHC 1217 (Ch), at paras. 42–45):

> "42. As submitted by LNCP, that exercise includes being concerned not to allow the power to order security to operate as an instrument of oppression, particularly where a defendant's failure to meet a claim might in itself have been a material cause of a claimant's impecuniosity.
>
> It also means that the Court will consider, in the context of delay, cases such as *Re Bennet Invest Ltd* [2015] EWHC 1582, where per Richard Millett QC (sitting as a Deputy High Court Judge):
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> > '28 Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see CPR 25.12.6). The question of delay must be assessed at moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in Prince Radu of Hohernzollern v Houston *[2006] EWCA Civ 1575* (cited at White Book p 823–4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial.
> >
> > . . .
> >
> > 36 . . . The later the order for security is made and the more a claimant has spent on legal costs before that date (or in any case before the application) the smaller the opportunity to the claimant to have a real choice. Here the Claimant had already

> invested over £150,000 in his claim even before D3 was joined, and doubtless a great deal more since, and his choice would therefore not be between putting up security as the price of continuing or else giving up, but doing so as the price of not only continuing but saving his past investment. That is inevitable when the order sought is being made so close to trial. Each case will always turn on its own facts but the absence of evidence about his means would not persuade me, if I were exercising my discretion to order security myself, that it was just to do so in all the circumstances.'
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> 44. Once again, however, there are no hard and fast rules. An order for security for costs can be made at any stage of the proceedings. For example, in *Warren v Marsden* [2014] EWHC 4410 (Comm) an application for security against a claimant was made three months before the date fixed for the trial, in an action which had commenced 2 years and 3 months before the hearing of the application. Teare J held that the material being relied upon to support the application had been available for 'a very long time' and that the application could have been made at the commencement of the action rather than shortly before trial. However he nevertheless granted security (albeit limited to future costs). Thus the balance may be struck in the context of delay by fashioning the order so as to restrict it in its application to costs from and after a later point.
>
> 45. All this serves to emphasise and illustrate that the '. . . *only immutable principle is that the discretion must be exercised justly*': *Deutsche Bank v Sebastian Holdings* [2016] 4 WLR 17 *per* Moore-Bick LJ (in his 'postscript' at paragraphs 61 to 62)."

59 As these passages make clear, delay is not in itself a reason to refuse an application for security. There are no hard and fast rules, and the only immutable principle is that the discretion must be exercised justly. Although delay can lead to unfairness in the sorts of examples referred to above, there is no evidence that this will be the case here. There is no evidence that the claimant will have acted to his detriment, that hardship will be caused if an order is made, or that an order will operate as an instrument of oppression.

60 TSN's reply to the request for security on March 27th, 2023 stated that on a balance of probabilities an order for security would stifle the claim from proceeding. This assertion, however, was not repeated in Ms. Martin's evidence filed in opposition to the application, nor was it relied on by the claimant in his submissions at the hearing.

61 In these circumstances, it seems to me that delay is not a reason to refuse an order for security for costs altogether. Rather, the just exercise of the court's discretion in this case requires the fashioning of an order for

security that provides for future costs only, which is what the defendants are seeking in any event.

Conclusion

62 Taking into account all the factors set out above, I consider that it is just to make an order, in appropriate terms, requiring the claimant to make security for costs of these proceedings.

Amount of security

63 The first question which needs to be answered when determining the sum to be ordered is the date when the order should run from. There was some debate as to whether this should be the date when the request was made, namely March 14th, 2023, or the date when the application was filed, namely June 22nd, 2023. As far as I can see, there is no clear-cut answer to this question. TSN refused the request in their letter dated March 27th, 2023 and for some reason the application was not filed until almost three months later. In these circumstances, it seems to me that the appropriate date from which estimated costs should run is the date when the application was filed, namely June 22nd, 2023.

64 As I have stated above, it would not be appropriate to order security for overlapping features of the claim and counterclaim. Mr. Risk's second witness statement concludes that the costs and disbursements dealing with non-overlapping issues as from March 14th, 2023 comes to £597,911.50. This is based on a schedule of costs exhibited to his witness statement, and claiming 60% of the witness statement costs, 100% of the experts phase costs, and 30% of the pre-trial and trial costs. Although this sort of exercise is far from an exact science, I consider that these percentages are broadly appropriate.

65 The costs claimed in the schedule of costs relied on by the defendants include Gibraltar lawyers, solicitors and other fee earners based in London, as well as fees for leading and junior London counsel. The sum sought by the defendants does not take into account the fact that not all costs and hourly rates claimed will necessarily be allowed in due course if the defendants are successful.

66 Doing my best with these percentages and general figures, in the absence of costs budgets, and on a somewhat broad-brush basis, I have concluded that a reasonable sum up to and including trial is £300,000.

67 On the handing down of this judgment, I will hear further from the parties as to the terms of an order to be made if they have been unable to reach agreement on these matters.

Judgment accordingly.