EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO.BVIHC(COM) 2014/0090

BETWEEN:

HUALON CORPORATION (M) SDH BHD (in receivership) Acting by its Receiver and Manager Dr. Duar Tuan Kiat

Claimant/Respondent

and

Marty Limited

Defendant/Applicant

Appearances:

Ms. Nadine Whyte, with her Dr Alecia Johns for the Defendant/Applicant
Mr. John Carrington QC for the Claimant/Respondent

2015: December 22;
2016: January 20.

JUDGMENT

Application for security for costs CPR 24.2 - applicable principles - Claimant ordinarily resident outside jurisdiction- Claimant's prosecution of claim being funded by third party - Whether application premature CPR 24.2(2) - Whether just to order security and if so, in what sum CPR 24.3

The Application

[1] **FARARA, J [AG].:** On 22 December 2015 I heard an application by Notice filed 19 November 2015 by the Defendant, Marty Limited, for security for costs of these proceedings in the sum of $300,000. The application was made pursuant to CPR 24.2. It is supported by the Affidavit of Rhonda Brown sworn and filed 19 November 2015 and the documents exhibited thereto as "RB-1".

[2] These documents include a letter dated 9 November 2015[1] from O'Neal Webster, the legal practitioners for the Defendant, to Sabals Law, the legal practitioners for the Claimant, inquiring as to whether the Claimant would be agreeable in principle to providing security for the Defendant's costs in these proceedings. In its letter, the Defendant relied on three bases or reasons why the Claimant ought to agree to provide security for its costs in the proceedings. These are (i) the Claimant is not ordinarily resident in this jurisdiction and has no assets in the BVI; (ii) the Claimant has failed to honour its obligation to pay costs in the sum of US$50,000 to the then First Defendant, which sum was to be paid by 8 October 2015 pursuant to the order of this court made 30 September 2015; and (iii) these proceedings are being funded by a third party, namely, Canterbury Capital PTE Ltd, a Singapore company, which is not a creditor of the Claimant. There was no response by or on behalf of the Claimant to this letter.

[3] Also exhibited as part of "RB-1", is the Defendant's estimate of costs incurred and to be incurred in these proceedings. This shows costs and disbursements incurred thus far of $130,983.85. These relate, in the main, to the various applications by both sides, and resulting hearings in these proceedings. The estimate of future costs, ranging from preparation of the defence to trial and closing submissions, total $166,412.50 (inclusive of disbursements estimated at $10,000).

[1] See page 43.

[4] Also included as part of "RB-1", is a series of correspondence relating to the funding of this litigation (and the arbitration) passing between the Defendant's BVI lawyers and the Claimant's BVI lawyers, and between the Defendant's Singapore lawyers and the Claimant's French lawyers.[2] The highlights of this correspondence is that the Claimant's BVI lawyers, by letter dated 7 May 2015, stated that they are instructed that these proceedings are being funded "with the agreement of all major creditors and the receiver, by one of the creditors of the Claimant." However, Tidmarsh & Associates, the French lawyers for the Claimant, in a letter dated 21September 2015 to Rajah & Tamm Singapore LLP, lawyers for the Defendant, stated: "In regard to your question in respect of funding, you are correct that the claim is being funded. The arbitration, as well as the proceedings in BVI, are not however being funded by a creditor of the Claimant, as erroneously reported by our colleagues at Sabals in the BVI, but by Canterbury Capital PTE Ltd, a Singapore company." Also, on this aspect, by letter dated 3 November 2015, Tidmarsh & Associates, on behalf of the Claimant, advised that the funding agreement entered into between the Receiver of the Claimant and Canterbury Capital PTE Ltd, was confidential and the Defendant was not entitled to a copy.

Previous applications, pending decision and appeal

[5] The application history of this matter was summarised at paragraphs [1] to [4] of my written judgment delivered 20 November 2015, on the Defendant's successful application to discharge the interim injunction obtained ex parte by the Claimant on 16 September 2014. I do not propose to reiterate what I said there in giving this ruling. Suffice it to be said, there is a pending decision of Leon J on the Claimant's application to stay these proceedings in favour of arbitration proceedings commenced elsewhere, which are said to relate to the same issues the subject of the claim in these proceedings. There is also a pending appeal by the Claimant from my decision on 20 November 2015 discharging the injunction obtained ex

[2] See pages 38 - 42.

parte by the Claimant. This appeal was heard at the sitting of the Court of Appeal in Tortola last week and the decision of the Court of Appeal reserved.

[6] Finally, for completeness, I should also mention the unsuccessful application by the Defendant before Bannister J for an order that the court ought not to exercise jurisdiction over it in this matter, which was the subject of a ruling on 10 February 2015. As a matter of principle, the Defendant is not entitled to an order for security for costs which includes any costs awarded against it in relation to any unsuccessful application in these proceedings.

The Defendant's Security for Costs Application

[7] There is no opposing affidavit or other evidence filed by the Claimant in relation to the application for security for costs. However, the said application was vigorously opposed at the hearing by Mr Carrington QC, learned counsel for the Claimant, on the back of his written submissions (with authorities) lodged 21 December 2015. I have also fully considered the written submissions of Ms Nadine Whyte, learned counsel for the Defendant/Applicant, and her oral submissions made at the hearing in support of the Defendant's application for security for costs.

Is the Application for Security Premature?

[8] CPR 24.2 states

> (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
>
> (2) When practicable such an application must be made at a case management conference or pre-trial review.
>
> (3) An application for security for costs must be supported by evidence on affidavit.
>
> (4) The amount and nature of the security shall be such as the court thinks fit.

[9] Mr Carrington submits that this application is premature for two reasons. The first is that CPR 24.2(2) contemplates such an application being made at a case management conference or pre-trial review, that is, after the pleadings have been filed, including the defence. The Defendant has not filed its defence in these proceedings which were commenced in July 2014. Secondly, as regards the pending decision on the Claimant's application for a stay of these proceedings in favour of arbitration proceedings commenced elsewhere by the Claimant, Mr. Carrington submits that this court ought not to make an order for security for costs while that decision is pending.

[10] To these two preliminary points Ms Whyte, on behalf of the Defendant, submits that CPR 24.2 does not preclude an application for security being made before the filing of the defence and, in any event, since there is an application by the Claimant for a stay of these proceedings, it is not proper for the Defendant to file its defence. As regards the arbitration proceedings themselves, she submits that the Claimant has asked the tribunal to rule on its own jurisdiction,[3] and the tribunal has not as yet issued a directive requiring the filing of a defence in those proceedings.

[11] I am satisfied that CPR 24.2, while it contemplates an application for security for costs of the proceedings being made, as a matter of practicality, at either a case management conference or pre-trial review, does not preclude an application being made earlier in the proceedings, and before the defence is filed. In an appropriate case where, as here, substantial costs have and are likely to be incurred prior to the close of proceedings, it may not be practicable or in the interest of justice for a defendant to have to wait until a CMC to obtain security for

[3] See Tab 27 – para.9.

his costs from a claimant who has brought him to court and has obtained interim relief.

[12] Furthermore, having regard to the various affidavits filed by the Defendant in relation to other applications in these proceedings, including its application to discharge the interim injunction, neither the court nor the Claimant is left with any uncertainty as to what the likely defences to the claim will be. In this vein, the court has already, in its judgment on 20 November 2015, given some consideration of the relative merits of the claim, including the affidavit evidence from the Claimant's side, in determining whether the Claimant had made out a serious issue to be tried. As regards the quantum of costs incurred and to be incurred by the Defendant, up to and including the trial, the Defendant has submitted a detailed breakdown in support of its application for security. Accordingly, the court has been provided with sufficient materials to properly assess, at this stage, the Defendant's cost of the proceedings up to trial. In these particular circumstances the court is not at any disadvantage in assessing the amount of any security to be ordered. I therefore reject this first preliminary point. As to Mr Carrington's second preliminary point, relating to the pending decision on the stay application, this is addressed at paragraphs [25] and [26] of this judgment.

The Law

[13] It is settled law that a court has a general discretion whether to order a claimant to provide security for the defendant's costs of the proceedings. This discretion must be exercised in a judicial manner, in accordance with the applicable rules of court, any principles or guidance authoritatively stated in the decided cases, and taking all relevant circumstances into account in deciding whether it is just to grant the application.

[14] CPR 24.3 states-

The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-

(a) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;

(b) the claimant-
  (i) failed to give his or her address in the claim form;

  (ii) gave an incorrect address in the claim form; or

  (iii) has changed his or her address since the claim was commenced; with a view to evading the consequencecs of the litigation;

(c) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) the claimant is an external company; or

(g) the claimant is ordinarily resident out of the jurisdiction.

[15] An applicant for security must bring its claim within one of the conditions at sub-paragraphs (a) to (g) of CPR 24.3. It is only after this threshold requirement has been met, that the court's discretion to decide whether it would be just to make the order in all the circumstances becomes engaged: **De Bry v Fitzgerald and Another**.[4]

[4] [1990] 1 WLR 552 per Dillon LJ at 559-560.

[16] In its application, the Defendant relies on having satisfied the requirements at (a) - a person other than the Claimant has agreed to and has been funding these proceedings; and (g) - the Claimant is ordinarily resident out of this jurisdiction. That both conditions have been met, is conceded by the Claimant at paragraph 11 of its written submissions. I am therefore satisfied, on the evidence before me, that both of these conditions (albeit the Applicant need only satisfy one) have been met, and thus I must go on to consider under CPR 24.3 whether it is just in all the circumstances to make an order for security.

[17] The main area of contention between the parties is whether the court ought to exercise its discretion to grant the Defendant's application for security for costs and, if so, in what sum and on what terms. Put differently, whether it is just, in all the circumstances of this matter, to order the Claimant to provide security for the Defendant's costs in these proceedings and, if so, in what sum and on what terms.

[18] The relevant principles which a court ought to take into account in the exercise of its discretion under CPR 24.3 whether or not to order security, are helpfully summarised by Peter Gibson LJ at pages 539 to 542 in **Keary Developments Ltd v Tarmac Construction Ltd**.[5] They do not bear repeating here in detail. The court has a complete discretion whether to order security and must act taking all relevant circumstances into account. An important consideration is that the court must carry-out a balancing exercise, that is, it must weigh the injustice to the claimant if prevented from pursuing a proper claim by an order for security, against the injustice to the defendant if no security is ordered and the claim fails at trial, and the defendant is unable to recover from the claimant its costs incurred in defence of the claim. The court should also have some regard to the claimant's prospects of success, although the court ought not go into the merits of the claim

[5] [1995] 3 AER 534.

in detail, unless it can clearly be demonstrated that the claim has a high probability of success.

[19] In this matter, it has not been asserted that an award of security, even in the sum asked for by the Defendant, would stifle the Claimant's claim. What is contended on behalf of the Defendant/Applicant is that the Claimant has no assets in this jurisdiction upon which a costs order can be enforced, and the evidence of the Claimant in other applications before the court demonstrates that the Claimant's liabilities far exceed its assets. Its debts are said to be approximately RM$2.6 billion (US$611 million) and its assets RM$136 million (US$31 million).[6] It is therefore submitted by Ms Whyte, learned counsel for the Defendant/Applicant, that the Claimant will not have sufficient assets to satisfy any costs order made against it, including costs orders already made by this court.

[20] As regards the Claimant's prospects of success on its claim, I have been referred by counsel on both sides to what I said at paragraph [75] of my judgment on the discharge application. There, in assessing whether the Claimant had made out a serious issue to be tried on the merits, I stated: "Having reviewed the Amended Statement of Claim and the arguments and submissions of both counsel on this issue, I am of the opinion that the Claimant's case, albeit seemingly a weak one, has met the test of a 'good arguable case' in the sense described in Ninemia."

[21] Where an application for security for costs is grounded on the sole basis that a claimant is non-resident or not ordinarily resident in the jurisdiction, it is no longer an inflexible rule that security will be ordered as a matter of course: **DSQ Property Ltd v Lotus Cars Ltd**.[7] The court must take into account all relevant circumstances in determining whether it is just to order a claimant to provide security. Relevant circumstances include but are not limited to: (i) what difficulties,

[6] See Affidavit of Corine George in support of application for interim injunction exhibit "CG1" Tab 16 page 123.
[7] [1987] 1 WLR 127 per Millet J at page 133.

extra costs or delay a successful defendant may encounter or incur in seeking to enforce an award of costs in the foreign jurisdiction where the claimant is ordinarily resident or his assets located: **Nasser v United Bank of Kuwait**[8]; (ii) while the existence of a relevant treaty or Convention between the country where the claim has been brought and the other jurisdiction where the claimant's assets may be located is of some relevance in the exercise of the court's discretion, the absence of such treaty or Convention is not itself a ground for ordering security: **Union Zone Management Ltd v Wang Zhongyong and Others**[9]; (iii) the costs and inconvenience of enforcement of a costs award at common law by suing on the judgment in the foreign court, are not intrinsically likely to be more than the costs and inconvenience of making an application to register the judgment in the foreign jurisdiction: **Union Zone**.[10]

Applicant's Case for Security

[22] In summary, the Defendant/Applicant submits that, unlike Union Zone, it will be forced, as a BVI company, to litigate in a foreign jurisdiction to enforce any costs order made in its favour in these proceedings. The Claimant has no assets in this jurisdiction and the Claimant will be unable to meet any costs order from its assets, as its liabilities far exceed its assets, there being a shortfall of in excess of US$1 million.[11] Ms Whyte also submits that there are significant concerns as to the funding of this litigation, and the conduct of these proceedings by the Claimant, given the discrepancies in or false information given by the Claimant through its BVI lawyers to the effect that these proceedings were being funded by a creditor of

[8] [2002] 1 WLR 1868 per Mance LJ at 1887.
[9] Claim No. BVIHC (Com) 0126 of 2011 per Bannister J at [11] and [12].
[10] ibid, per Bannister J at [12].
[11] See para. 16 Amended Statement of Claim.

the Claimant when, as later disclosed by its French lawyers, they are being funded by a Singapore company, Canterbury Capital PTE Ltd ("Canterbury"). She also points to the refusal by the Claimant to provide a copy of the funding agreement with the third party, as one of the matters which the court can take into account in the exercise of its discretion in this matter.

[23] As regards evidence of the Claimant's inability or refusal to meet costs orders, the Defendant/Applicant points to the non-payment of the costs ordered by the Commercial Court on 30 September 2015 in the sum of $50,000 in favour of Oung Da Ming, the then First Defendant, when the claim was discontinued against him. This is certainly conduct which I am entitled to take into account when exercising my discretion whether to order security.

[24] Regarding the prospects of success, the Defendant/Applicant relies on my previous assessment of the three transfers upon which the Claimant bases its claim, and the statement at paragraph [75] of my judgment on the discharge application, where I characterised the claim as a 'weak' one. The Defendant/ Applicant submits in the round that the Defendant has a good prospect of successfully defending the claim.

Claimant's Case in Opposition

[25] Mr Carrington QC, learned counsel for the Claimant, submits that the matter of security for costs should await the outcome of the Claimant's application for a stay of these proceedings in favour of arbitration commenced elsewhere involving the same issues. As stated above, that application was heard by Leon J and his decision is pending. This is certainly a matter for consideration by the court in the exercise of its discretion. In doing so, it must be borne in mind that it is the Claimant who commenced this claim against the Defendant in the BVI. Accordingly, it is the Claimant who, presumably, in breach of the relevant

arbitration agreement (on the Claimant's own case), brought this claim against the Defendant in BVI, causing it to incur substantial costs thus far, even putting aside, for argument sake, the applications brought by the Defendant itself.

[26] In any event, the Defendant was entitled to challenge and to move to set aside the interim injunction obtained on a without notice basis by the Claimant. In this regard, the Defendant has been successful and costs were awarded in their favour, subject to the outcome of the Claimant's appeal. Furthermore, it is not known what will be the outcome of the Claimant's application to stay these proceedings, in favour of arbitration proceedings which it subsequently commenced in another jurisdiction. In all the circumstances, I am not satisfied that the application is premature or that it would be just to delay an award of security for the Defendant's costs, on the basis that a decision on the Claimant's stay application is pending.

[27] Dealing specifically with circumstances where, as here, the claimant is not ordinarily resident in the jurisdiction in which the claim is brought, Mr Carrington relies on the statement of principle at paragraph [67] in **Nasser**. There Mance LJ states-

> "The risk against which the present defendants are entitled to protection is thus not that the claimant will not have assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored **in amount** to reflect the nature and size of the risk against which it is designed to protect." (emphaisis added)

[28] Mr Carrington submits that enforcement of a costs order in Malaysia, where the Claimant is registered, is quite straightforward and will not result in significant delay, since Malaysia is a Commonwealth country and common law jurisdiction, where a money judgment may be enforced simply by suing on the judgment and applying for summary judgment. Accordingly, the additional costs to be incurred, he says, will be in the region of US$10,000.

[29] While the ease with which a costs judgment may be enforced against assets of a foreign claimant in the jurisdiction in which they may be found, is certainly a relevant consideration in the exercise of the court's discretion whether to order security, it is but one such factor. Additionally, as Ms Whyte points out, there is no clear or cogent evidence that any of the foreign assets of the Claimant, as identified by Mr Carrington in his submissions, are currently of any value, particularly where there is clear and cogent evidence from the Claimant that its liabilities far exceeds its assets. Furthermore, pursuing collection against the Claimant's shareholding in Hualon Vietnam, is likely to involve enforcement proceedings in Vietnam itself, which is not a common law jurisdiction.

[30] Mr Carrington also relies on the dictum of Bannister J at paragraph 11 of the decision in **Union Zone**. There the learned judge, referring to the decision in Nasser, states, in part-

> "The English Court of Appeal explains that the underlying risk against which an order for security is made [in circumstances where the claimant is ordinarily resident outside the jurisdiction] is that enforcement in the jurisdiction where the non-resident claimant is to be found (or perhaps, where his assets are to be found) will be so problematic that the only just course is to protect the defendant by making an order for payment of security for the costs of the proceedings in question. This principle as so stated has nothing to do with and is independent of the position under the

> Convention and in my judgment provides a sound and self-serving guide for deciding when it will be just to make an order for security against a non-resident claimant on the ground only that he is ordinarily resident outside the jurisdiction."

[31] Reliance is also placed by the Claimant on paragraph [12] of **Union Zone**, in particular, this statement by Bannister J-

> "The costs of common law (or equivalent) enforcement of a judgment for costs are not intrinsically likely to be more, nor is the process likely to be more inconvenient, than the costs and inconvenience of making an application to register a foreign judgment."

[32] As regards the Claimant's ability to meet any costs judgment, Mr Carrington refers to it having US$31 million in assets (not factoring in its liabilities which clearly far exceeds its assets); to a cost order in these proceedings against the Defendant in respect of the latter's unsuccessful jurisdiction application (which costs have yet to be quantified); and to its less than 1% interest in Hualon Vietnam. I have already dealt with the $31 million in assets and the less than 1% interest in Hualon Vietnam above. With regard to the costs order already obtained by the Claimant against the Defendant in these proceedings, this is not strictly speaking an 'asset' of the Claimant within this jurisdiction, capable of enforcement proceedings by the Defendant in satisfaction of a costs order obtained by it in the same proceedings. At best it may be that a costs order obtained by a party can be 'set off,' so to speak, against other costs orders obtained against that party, in the same proceedings.

[33] Additionally, Mr Carrington, in reliance on the passage from the judgment of Millett J in **DSQ Property Ltd v Lotus Cars Ltd** at page 133, submits that the Claimant

has a good arguable case on the merits, and that this is a relevant factor to be taken into account in the exercise of the court's discretion.

[34] In this vein, Mr Carrington submits that the essence of the Claimant's case is that it is the wrongful actions of the Oung Brothers, including their transfer of shares in Hualon Vietnam to the Defendant, that have contributed to the Claimant's poor financial situation. Accordingly, the Defendant cannot rely on the Claimant's financial inability to meet a costs order, as a basis for an order for security for costs. He cites **Farrer v Lacy, Hartland & Co**[12] where Bowen LJ at 485 opined that where a defendant had been responsible for causing the plaintiff's insolvency, "[t]o have required security for costs on the ground of an insolvency which (if the plaintiff was right) the defendant had wrongly caused, might have been a denial of justice." In its claim in these proceedings, the Claimant alleges that the Oung Brothers were the ring leaders in the transfer of its shareholding in Haulon Vietnam to themselves and, ultimately, to the Defendant. They rely on three such 'transfers' in their Amended Statement of Claim. These allegations have been strenuously challenged by the Defendant in its affidavit and documentary evidence filed thus far.

[35] Further, in my judgment on the Defendant's discharge application, I have concluded that while the Claimant's case is seemingly a weak one, there is a serious issue to be tried within the meaning of that expression in **Ninemia Maritime Corporation v Trave Schiffahrtsgesellshaft Gmbtt ("The Niedersachen")**,[13] that is, one which is more than barely capable of serious argument, but not one that one would consider would have more than a 50 percent chance of success. If the Claimant is correct, then the Defendant would have been

[12] [1885] 28 ChD 482.
[13] [1984] 1 AER 398 at 404.

used to carry-out the wrongful actions by the Oung Brothers, which are said to have deprived the Claimant of its valuable interest in Hualon Vietnam.

[36] At this stage of the proceedings, it is not possible to say much more than I have said already as to the relative strengths or merits of the Claimant's case and the Defendant's defence, albeit not yet filed in these proceedings. I am certainly not able to say, on the pleadings, affidavits and materials put into evidence thus far, that this is a case in which the Claimant is highly likely to succeed on its claim. In my view the position of both sides is 'arguable'.

Conclusions

[37] The Defendant/Applicant having brought its application for security for costs within one of the limbs set out in CPR 24.3, the court has a discretion whether to order security, and in what sum and on what terms. The court must consider whether, in all the circumstances, it is just to make the order. I have taken into account all the factors put before me on both sides, including that the Claimant is in receivership, it has no assets in this jurisdiction and, having regard to its current financial position as disclosed in its affidavit evidence in these proceedings, its liabilities far exceed its assets. Accordingly, the Claimant itself is unlikely to be in a position to meet any costs orders made in favour of the Defendant in these proceedings.

[38] I have also taken into account the past history and conduct of the Claimant in these proceedings, whereby a costs order of $50,000 made in favour of the (original) First Defendant has not been paid, in circumstances where the court discontinued the claim against that defendant. In my view, this conduct is indicative of either a refusal or inability to pay or to meet costs orders made against the Claimant in these proceedings. As the funding agreement has not been disclosed, it is not possible to say whether its terms extend to or cover the payment of adverse costs orders. This raises the serious likelihood that the

Claimant is either unable or unwilling to pay or to meet any costs awarded to the Defendant in these proceedings.

[39] In coming to my decision on this application, I have also considered the Claimant's prospects of success on its claim, including its assertion that it has a proprietary claim to the unissued share capital in Hualon Vietnam, as articulated by Mr Carrington. I have also considered and assessed the likelihood of the Claimant being deterred by an order for security from pursuing its claim. It is my view that this is most unlikely in the circumstances, especially having regard to the admitted fact that the claim is being funded by a third party, which seems to be satisfactorily meeting its responsibility or commitment to do so. The Claimant has consistently been able to brief, and to be represented by leading counsel, in respect of all steps taken thus far in these proceedings, including its recent appeal before the Court of Appeal.

[40] Having considered all relevant factors put before me, in my judgment the justice of this matter lies with making an order for security in favour of the Defendant, and at this stage of the proceedings. Accordingly, the Defendant's application for security for costs of these proceedings is granted.

[41] As to quantum, the Defendant/Applicant seeks an order for $300,000 security for its current and future estimated costs. It relies on the estimate of costs and disbursements exhibited to the Affidavit of Rhonda Brown. Mr Carrington criticises this as being excessive and submits that any sum awarded as security should not exceed US$10,000. He submits further that 50 percent of the Defendant's costs incurred thus far relates to what he termed 'peripheral' applications.

[42] As the reasoning of Peter Gibson LJ at page 543 of the decision in **Keary** confirms, a defendant is entitled to security for costs in a sum necessary to cover, inter alia, costs orders already made in his favour. This would apply to the costs

order made in respect of the application to discharge the injunction, subject to the outcome of the Claimant's appeal. It would also include the costs to be awarded on this application for security. By contrast it will not relate to proceedings or applications in respect of which the Defendant was not successful. I must also be mindful of any areas of possible double recovery.

[43] In perusing the Defendant's statement of costs incurred thus far, it is clear that much of what is claimed relates to its unsuccessful application to persuade the court to decline jurisdiction in this matter (in respect of which the Claimant is the beneficiary of a cost order) and, to a lesser extent, also to the application to strike out the claim as disclosing no reasonable cause of action, which the Defendant elected not to pursue before me at the same time it pursued the discharge application. Likewise, a significant portion of the costs incurred to date, as claimed, relate to its opposition to the Claimant's application for a stay, the outcome of which, and incidence of costs, is to be decided by Leon J.

[44] As to future costs, the Defendant estimates the sum of $166,412.50 from preparation of the defence up to and including the trial and closing submissions. I do not regard this sum as being unreasonable. However, incurring most of these costs will be directly dependent upon whether these proceedings are stayed in favour of the foreign arbitration proceedings.

[45] This notwithstanding, and doing the best I can on the materials before me, I would order the Claimant to provide security for the Defendant's costs of these proceedings in the sum of US$200,000 to be paid into court as follows: $50,000 within 21 days to cover up to the current stage of the proceedings; and $150,000 to be paid within 21 days of delivery of the court's ruling on the Claimant's application for a stay of these proceedings, where the result is that no stay is

imposed. If the court grants a stay in favour of arbitration proceedings, then this second payment need not be made.

[46] The claim is accordingly stayed, except for the determination of the Claimant's stay application by Leon J, pending payment of security for costs in the sums and within the periods as ordered. If such security is not paid by the Claimant in accordance with the terms of this order the claim shall stand struck out.

[47] The Defendant/Applicant shall have its costs of this application to be assessed if not agreed.

Gerard St.C Farara QC
Commercial Court Judge