EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2014/0105 and 134

BETWEEN:

[1] HALLIWEL ASSETS INC
[2] PANIKOS SYMEOU
[3] MARIGOLD TRUST COMPANY LIMITED

Applicants/Judgment Creditors

and

HORNBEAM CORPORATION

Respondent/Judgment Debtor

Appearances:

Paul Girolami, Q.C. and Robert Nader of Forbes Hare for the Applicants/Judgment Creditors

Oliver Clifton and Colleen Farrington of Walkers for the Respondent/Judgment Debtor

Christopher Parker, Q.C. and Francesca Gibbons of Harney Westwood & Riegels for Bracha Foundation, an Interested Person

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2015: October 9
2016: April 22

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JUDGMENT

Judgment creditors and non-party objector cross-applied for security for costs in respect of pending application to make final a provisional charging order on shares to satisfy unsatisfied orders against judgment debtor – Shares, said to be held in trust for a known ultimate beneficial owner ("UBO"), had been transferred for nominal consideration from judgment debtor to non-party objector almost immediately following making of the orders – Court concluded transfer was to make satisfaction of its orders more difficult and involved judgment debtor, non-party objector and UBO acting in coordinated and consistent manner in interests of UBO – Inferred that judgment debtor and non-party objector doing so with UBO's 'blessing' and encouragement, likely at his request, and possibly with his direction, coordination, support and/or other involvement.

Court has jurisdiction to order security for costs by virtue of its case management power to "make any other order for the purposes of managing the case and furthering the overriding objective" and by virtue of its inherent jurisdiction to control its own processes – Non-party objector required to give security for costs – Debarring it from making its objections if it fails to give security for judgment creditors' costs required in interests of justice and fairness – Will not preclude non-party objector from pursuing objections – Will only have that consequence if it fails to give security as ordered – No evidence or submission that cannot afford to give security – Requiring security necessary to ensure compliance with Court's orders – Court has interest in compliance with its orders – Fair and reasonable that security should cover costs of entire charging order proceedings, including before non-party objector filed its objections.

No basis to require judgment creditors to give security.

[1] **LEON J [Ag]** The Court is asked to determine if security for costs should be required to be given in connection with an application ("**Application**") by the Applicants/Judgment Creditors ("**Judgment Creditors**") for the Court to make final a provisional charging order ("**Provisional Charging Order**").

[2] There are cross-applications for security for costs, as described below, neither of which are formal applications.

[3] The matter of security for costs was raised during the hearing of the Application on 9 October 2015, with only introductory and logistical submissions being made. There was insufficient time to conclude the hearing of the Application (which will resume on a date to be scheduled). It was agreed that written submissions with respect to security for costs would be filed, which have been filed and which this Court has considered fully in coming to this Judgment.

[4] The Provisional Charging Order charges shares ("**Shares**") of Halliwel Assets Inc ("**Halliwel**")[1] registered in the name of the Respondent/Judgment Debtor ("**Judgment Debtor**") for amounts owed by it to the Judgment Creditors ("**Judgment Debt**") pursuant to two orders of this Court dated 10 December 2014 ("**Orders**").[2] The Orders are in respect of costs of proceedings brought by the Judgment Debtor against the Judgment Creditors. No payment has been made in respect of the amounts payable pursuant to the Orders.

[5] The Shares, as recited in the Provisional Charging Order, "are or may be held by the [Judgment Debtor] as nominee". The main issue on the Application is whether in the particular circumstances, the Shares can be made subject to a charging order.

[6] Two Notices of Objection to the Charging Order[3] being made final were filed, one by the Judgment Debtor ("**Judgment Debtor's Notice of Objection**") and one by Bracha Foundation ("**Bracha**").

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[1] 33,332 ordinary shares of USD 1.00 each.

[2] Orders in the amount of USD 629,250 in 2014/105 and USD 25,000 in 2014/134 plus interest at the rate of 5% per annum from 13 October 2014 pursuant to Section 7 of the Judgments Act (Cap. 35). The Orders are for costs of proceedings awarded to the Judgment Creditors in proceedings brought by the Judgment Debtor.

[3] Both dated 25 September 2015.

[7] Bracha also filed the Affidavit of Fabrizio Nicola Campanile ("**Campanile**") sworn 1 October 2015 ("**Campanile Affidavit**") "on behalf of Bracha" in support of its Notice of Objection ("**Bracha's Notice of Objection**").

[8] Campanile, a lawyer in Zurich, Switzerland, states that he has "the conduct of this case on behalf of Vladimir Shulman [("**Shulman**"), the ultimate beneficial owner of the Shares], [the Judgment Debtor] and [Bracha]." [emphasis added][4] Presumably "this case" at least refers to the Application.

[9] According to the Campanile Affidavit, Bracha is "an entity registered in Liechtenstein"[5] to which the Judgment Debtor transferred the Shares almost immediately after the Orders were made, leaving the Judgment Debtor with "mere legal title to the Shares"[6]. Needless to say, the transfer makes more difficult the Judgment Creditors' efforts to try to satisfy the Orders with the Shares (subject to the bases raised on the Application which are said to preclude them from doing so).

[10] Bracha took the position that it is an "interested person", within the meaning of the CPR Part 48 "Charging Orders", with a right to file an objection[7], and alternatively it applied "to be joined (only if necessary) for the limited purpose of contesting the Court's jurisdiction to make the [Provisional Charging Order] and/or to have it set aside and on the basis that its application is not otherwise a submission to the jurisdiction of this Court."[8]

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[4] Campanile Affidavit, paragraph 1.
[5] Campanile Affidavit, paragraphs 1 and 3.
[6] Campanile Affidavit, paragraphs 4 and 15.
[7] CPR 48.6 and 48.8(2)(a): CPR 48.6 specifies that an "interested person" is, among others, "any other person who has an interest in the personal property to be charged" and CPR 48.8(2)(a) provides that any interested person may file objections to a provisional charging order.
[8] Bracha's Notice of Objection, paragraph 2.

[11] Both Notices of Objection dispute this Court's jurisdiction to have made and to make final the Provisional Charging Order, and assert that the application for the Provisional Charging Order was an "abuse of process" and involved "deliberate, material misrepresentations" and/or a breach of the duty of full and frank disclosure. Those issues will need to be determined on the Application.

[12] Security for costs is sought by the Judgment Creditor from Bracha, and by Bracha from the Judgment Creditor.

RELATIONSHIP AMONG JUDGMENT DEBTOR, BRACHA AND ULTIMATE BENEFICIAL OWNER OF THE SHARES

[13] Of relevance to the issue of security for costs, in this Court's opinion, is that both the Judgment Debtor and Bracha assert, and Bracha's evidence is, that the Judgment Debtor held – and now Bracha holds on the same terms – the Shares on trust for the ultimate benefit of Shulman.

[14] They assert that legal ownership of the Shares was transferred by the Judgment Creditor to Bracha on 19 December 2014 for USD 1.00[9] – which was seven days after the date of the Orders – and that when Shulman attempted to register Bracha as legal owner of the Shares[10], Halliwel "refused to register the transfer on spurious grounds"[11].

[15] No explanation for the transfer has been provided by Bracha or the Judgment Debtor. While the Campanile Affidavit describes what is alleged to have occurred, notably Campanile does not tell this Court why the transfer took place.

[9] Campanile Affidavit, paragraph 15 and Exhibit FNC-1 [17], "Instrument of Transfer".
[10] Campanile Affidavit, paragraph 8.
[11] Judgment Debtor's Notice of Objection and Bracha's Notice of Objection, paragraph 4(3).

[16] It is reasonable to infer that the Orders motivated the transfer, with the objective of those involved in the transfer that execution on the Shares would be more difficult if they were no longer in the name of the Judgment Debtor. If there is some other explanation, the Judgment Debtor, Bracha, Campanile and Shulman failed to provide it.

[17] Campanile states that the Judgment Debtor "held the Shares on trust for Bracha"[12] and now Bracha holds the Shares "as a nominee for the eventual beneficiary", Shulman[13]. As noted above, Bracha holds the Shares "subject to the same terms on which [the Judgment Debtor] held them."[14] While there are some discrepancies in the documents that are exhibited to the Campanile Affidavit, they are not material to these applications for security.

[18] The Judgment Debtor asserts that it "has no financial interest in" the Shares and while represented on the hearing of the Application, is standing back and leaving the case against the Provisional Charging Order being made final to be made by Bracha. It made no substantive submissions on the matter of security for costs.

[19] Campanile, in the Campanile Affidavit, repeatedly asserts that at all material times Shulman has been the ultimate beneficial owner of the Shares.[15]

[20] As Campanile represents Shulman, the Judgment Debtor and Bracha in connection with at least this Application, it can be inferred that there is no conflict among them and that there is no information relevant to the Application that has not been and is not being shared among them.

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[12] Campanile Affidavit, paragraph 10.
[13] Campanile Affidavit, paragraph 2.
[14] Campanile Affidavit, paragraph 15 and Exhibit FNC-1 [17], "Instrument of Transfer", 19 December 2014: "to hold unto [Bracha] … subject to the several conditions upon which I/we hold the same at the time of execution hereof."
[15] Paragraphs 4, 5, 10, 11, 12 and 14.

BRACHA'S PARTICPATION IN THE APPLICATION

[21] The question of Bracha's submission to the jurisdiction of this Court in order to participate in the Application was resolved by consent during the first day of the hearing of the Application on 9 October 2015. Bracha is subject to this Court's jurisdiction in all respects on the Application but not otherwise in respect of the Orders.[16] (The point is relevant to the gateway for service of proceedings out of the jurisdiction but is not of concern in respect of the issue of security for costs or the Application generally.)

[22] What was not resolved is the basis upon which Bracha may appear to object to the relief sought on the Application.

[23] The written submissions on costs proceeded on different assumptions or positions in that regard.

[24] If Bracha is an "interested party" within the meaning of the rule on charging orders, which it claims to be, as explained below it has a right to appear and object to a final charging order on the Application, subject of course to its compliance with any order for security for costs that this Court may make against it. The jurisdiction of the Court to order security for costs against an "interest party" is discussed below.

[25] On the other hand, if Bracha needs to seek to be added as a party under the relevant CPR provisions in that regard, being CPR 19.3 "Procedure for adding and substituting parties", as submitted by the Judgment Creditor, the Court may have

[16] See Transcript of Hearing, 9 October 2016, page 105, lines 10 – 15. The wording of the term in the Order to be issued in that regard will prevail over the summary expression of the agreed term, both as set out in this Judgment and as set out in the Transcript.

the additional ability under its case management powers, in particular CPR 26.1(3) and (4)[17], to order security for costs as a condition of it being joined.

[26] On this issue, the Court finds, for the purposes of the security for costs determination only[18], that Bracha is an "interested person" based on its assertion and evidence that brings it within the definition in CPR 48.6(1) and (2), which includes "(h) any other person who has an interest in the personal property to be charged." Bracha asserts that it has an interest in the Shares.

[27] Pursuant to CPR 48.8, "Making of final charging order", in particular CPR 48.8(2)(a), an interested person "may file objections to a provisional charging order."

[28] The result of this determination is that any security for costs order which this Court has jurisdiction to make at this time cannot be under the case management power of the Court in CPR Part 26 to impose a condition (e.g.: "requiring a party to give security" – CPR 26.1(4)(a)) when a person is added in proceedings under CPR Part 19. If this Court has jurisdiction to make a security for costs order, there must be some other basis or bases for it.

JURISDICTION TO ORDER SECURITY FOR COSTS

[17] "(3) When the court makes and order or gives a direction, it may make the order or direction subject to conditions."
(4) The conditions which the court may impose include – (b) required a party to give security;
… (d) requiring payment of money into court or as the court may direct;"

[18] In the course of submissions on the Application to date, alleged inconsistencies in the evidence about Bracha were asserted to the Court. The determination regarding Bracha therefore should be confined to the determination of the basis upon which is has standing to object and for the purposes of the determination of the security for costs questions.

[29] Both the Judgment Creditors and Bracha asserted or accepted, on different bases, that this Court has jurisdiction to make the respective security for costs order they seek.

[30] Bracha, in effect, pointed to the Court's case management powers under CPR Part 26, "Case Management – The Court's Powers", and in particular appears to rely on CPR 26.1(2)(w) which permits the Court to "make any other order for the purposes of managing the case and furthering the overriding objective". Of course the Overriding Objective is as set out in CPR 1.1(1) as follows:

> "The overriding objective is to enable the court to deal with cases justly".

[31] The Judgment Creditors pointed to the Court's inherent power to control its own processes, and English authority that enables the Court to require security for costs in support of the enforcement of its orders.

[32] The Judgment Creditors relied in particular on the 2006 judgment of the English High Court (Queens Bench Division) in Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd and Others[19] ("**Days**") in which the court debarred defendants from taking part in a detailed assessment of costs because of their failure to comply with an order against them requiring them to pay interim costs.

[33] The court in Days noted that the defendants could afford to pay but were 'thumbing their noses' not just at the claimant/judgment creditor but the court, and then explained the court's power to debar the defendants from participating in the

[19] [2006] 5 Costs LR 788 (QBD per Langley J).

assessment if they were in breach of the court's order for them to make an interim payment. The court states as follows:

> Nothing has been paid. Nor is it a case of want of means. The defendants have the means but refuse to pay. They choose not to pay and challenge not just Days but the court to make them do so.
>
> … I have no doubt at all that the defendants will not honour any orders which involve payment or of which they otherwise disapprove made by any court in this country and will pay nothing unless and until the legal machinery in a country where they have assets successfully executes an order against those assets.
> They have, in contrast, paid and no doubt will continue to pay the legal and other costs incurred on their own behalf in this country …
>
> It is this court's powers and orders which the defendants seek to use insofar as they may suit their purposes but to ignore when they do not. That is not just holding Days to ransom but making this court and its orders look impotent and pointless.
>
> … it would, indeed, be concerning if the court was unable to impose appropriate sanctions on those who choose to ignore its orders and yet continue to seek its processes for their own ends. It is commonplace for orders to be made debarring parties from defending claims where justice and fairness require such a course. It should also be emphasised that the order sought would not preclude the defendants from pursuing their arguments on the assessment, it would only have that consequence should they fail to make the payment the court ordered them to make towards the costs the subject of the assessment.

> … In my judgment, quite apart from any specific rule, the court has an inherent jurisdiction to control its own processes sufficient to enable it to make an order of the nature sought here.[20]

[34] This Court holds that it has the jurisdiction to order security for costs in connection with the Application, in the appropriate circumstances, both by virtue of its case management power in CPR 26.1(2)(w) to "make any other order for the purposes of managing the case and furthering the overriding objective" and by virtue of its inherent jurisdiction to control its own processes. The jurisdiction would enable it, in appropriate circumstances, to order either Bracha or the Judgment Creditors to give security for costs in respect of the Application.

[35] The Court now turns to whether it should exercise its jurisdiction to order the security for costs sought on either of the two applications.

POSTIONS REGARDING BRACHA GIVING SECURITY

[36] The Judgment Creditors' position is that whatever the precise arrangements among the Judgment Debtor, Bracha and Shulman, the Judgment Debtor sued the Judgment Creditors in the proceedings in which the Orders were made for the benefit of and at the instigation of Bracha and/or Shulman; the Orders were not appealed and remain unpaid; there is no suggestion that the Judgment Debtor cannot pay; there appears to have been a crude attempt to discourage enforcement of the Orders; and Bracha has not suggested that a security for costs order would prevent it from participating in the Application.

[20] Days, paragraphs 6, 10, 13, 19 and 20.

[37] Bracha's position is that no security for costs is necessary from it. The Judgment Creditors, if awarded their costs based on their success on this Application, will be able to obtain a charging order against Bracha.

[38] The reasoning goes that this Court, and any appeal from any judgment in the Judgment Creditors' favour, will have confirmed the availability of a charging order against a person in Bracha's position, which it submits is the same as the Judgment Debtors' position in respect of the Orders – namely a person holding legal title to shares (as it claims it does) for another person (Shulman) in whose interests proceedings are brought or defended).

[39] Of course Bracha is not subject to the Orders and is not in default in honouring them, although it may have made it more difficult for the Judgment Creditors to obtain satisfaction of the Orders by recourse to the Shares, if such recourse is available to the Judgment Creditors at all. Bracha has, based on the evidence, a separate legal personality from the Judgment Debtor and from Shulman, as discussed further below.

BRACHA SHOULD GIVE SECURITY FOR COSTS

[40] The Court, relying on both its inherent jurisdiction and its case management power, as described above, is of the opinion that Bracha should be ordered to give security for the costs of the Judgment Creditors on the Application.

[41] Requiring Bracha to give security will further the overriding objective of enabling this Court to deal justly with the Application, including any costs order that may be made in connection with it. It is just that the Judgment Creditors should be able to recover costs from Bracha if such costs are awarded and there is a real risk that they will not be able to do so if security is not given.

[42] As in Days, when the Court looks at what is really going on and what the relationships are among Bracha, the Judgment Debtor and Shulman, debarring Bracha from making its objection on the Application if it fails to give security for the Judgment Creditors' costs of the Application is required in the interests of justice and fairness. It should also be emphasised, as the court did in Days, that the security for costs order sought will not preclude the Bracha from pursuing its objections to the Charging Order being made final. It will only have that consequence should Bracha fail to give the security for costs as ordered. There has been no evidence or submission that Bracha cannot afford to give security for costs.

[43] Further, requiring security for costs from Bracha is an action that the Court deems necessary in the interest of doing what it can do to ensure that there will be compliance with its orders. The Court has an interest in respect for its orders and in the enforcement of them.

[44] While it may be true, as Bracha submitted, that the Judgment Creditors will have the ability to seek a charging order if they are awarded costs from Bracha in the Application, enforcement of a court order through the charging and subsequent sale of shares is as a practical matter more of a challenge than enforcement against cash or cash-like security in the hands of the Court, or an acceptable third party under a clear escrow arrangement.

[45] Apart from any possible tactical challenge to the charging order (such as on meritless or weak non-disclosure allegations), the sale of minority shares in a company whose shares are not widely traded on an established public stock market can be a difficult, expensive and time-consuming task, particularly if

resisted by a judgment debtor intent on not voluntarily paying and actively and vigorously opposing enforcement of the judgment and the sale of the shares.

[46] Leaving aside the nondisclosure allegations on the Application which have yet to be assessed and determined, in the case of the Orders, the Judgment Debtor, Bracha and Shulman as ultimate beneficial owner of the Shares, have shown their approach to be to resist payment and make enforcement of the Orders by the Judgment Creditors more difficult. There is nothing to indicate Shulman's and Bracha's approach would be different in the case of a costs order against Bracha. Indeed it can be inferred, for reasons more fully explained below, that such is likely.

[47] It is important not to lose sight of the relationships, coordination and shared interests that Bracha has with the Judgment Debtor and Shulman.

[48] The proceedings that led to the Orders being made were brought, as they had to be, by the Judgment Debtor as the registered owner of the Shares but obviously in the interests of Shulman as ultimate beneficial owner. They resulted in the Orders. The Judgment Debtor has not paid anything towards the Orders, said that it cannot afford to pay, or explained why it has not paid.

[49] Indeed, the Judgment Debtor, and it can be inferred Shuman and Bracha, by reason of the transfer to legal title to the Shares, have resisted and continue to resist efforts by the Judgment Creditors to recover the monies due under the Orders. They may be legally entitled to do so if they do so by proper means (and in saying that the Court is not making any determination that the transfer was proper). However, whether proper or not, the fact remains that there has been and continues to be an unexplained breach of this Court's Orders by the Judgment Debtor with the apparent support, in part, of Bracha.

[50] The evidence of Bracha made clear that the positions being taken by Bracha and the Judgment Debtor on the Application are for the interests of Shulman.

[51] This Court should at least ensure that the situation of non-compliance with its Orders will not be compounded by the possibility that a further costs order it may make on the Application against Bracha, as the entity representing Shulman's interests, will go unsatisfied.

[52] Of course presumptively the Judgment Debtor, Bracha and Shulman are three separate legal persons. They must be viewed that way unless and until they are shown not to be so under one of the established (and arguably evolving) bases to "lift the corporate veil", as it is often referred to.[21]

[53] Nothing in this Judgment is about lifting the corporate veil.

[54] Rather, this Judgment is about drawing character and anticipated behaviour inferences about presumptively (unless and until shown otherwise) separate legal persons.

[55] There is an expression that you are "known by the company you keep".

[56] This Court can and does infer that each of the Judgment Debtor, Bracha and Shulman can be characterised by the fact they "keep company" together, and that they share a motivation to resist the Judgment Creditors recovering what they are owed under the Orders, and as part of that, to resist the Application (as they are entitled to do, and indeed may be found to be correct in doing so).

[21] In some jurisdictions there is said to be a "group of companies doctrine", although some might debate if there really is anything beyond the accepted legal bases to lift the corporate veil.

[57] Bracha, the Judgment Debtor and Shulman have been and are acting in a coordinated and consistent manner. They are doing so in the interests of Shulman as the ultimate beneficial owner of the Shares. It may be inferred, at a minimum, that Bracha and the Judgment Debtor are doing so with Shulman's 'blessing' and encouragement, likely at his request, and possibly with his direction, coordination, support and/or other involvement – formal or informal, direct or indirect.

[58] In this case, on the evidence primarily put forward on behalf of Bracha and certain undisputed facts, there are the following points, among others that are referenced elsewhere in this Judgment, that characterise Bracha, and have led this Court to conclude that the Judgment Creditors' application for security for costs should be granted and, as determined below, Bracha's application for security for costs should be dismissed:

1. The judgment debt of the Judgment Debtor under the Orders has not been paid in whole or in part and no reason has been asserted for non-payment.
2. It can be concluded that the actions of the Judgment Debtor and Bracha are being taken for the ultimate benefit of Shulman as the ultimate beneficial owner of the Shares.
3. It is a reasonable inference that Shulman's hand has been involved, and continues to be involved, in guiding or at least inspiring some or all of the relevant action of the Judgment Debtor and Bracha.
4. Bracha, the Judgment Debtor and Shulman can be inferred to have joined in "common cause" in all or parts of the litigation with the Judgment Creditors in this Territory.
5. The unexplained transfer of the Shares to Bracha by the Judgment Debtor, for nominal consideration, almost immediately after the Orders

were made is telling of their intent to try to make enforcement of the Orders more difficult.

6. Bracha and the Judgment Debtor's "common defence" of the Application (borrowing the term from the concept of the privilege that often arises in various jurisdictions when two or more separate defendants cooperate and coordinate in their defence of litigation) further evidences their unity of purpose in relation to resisting the Judgment Creditors' enforcement efforts.

[59] To be clear, none of these factors in connection with the security for costs application are intended in any way to suggest or imply that the Judgment Debtor and Bracha are not legally entitled to take the positions they take on the Application. The Court is in the course of hearing submissions and has come to no decision on whether they will or will not prevail on any one or more, or all, of their objections to the Charging Order being made final. They raise legal issues and issues regarding the manner in which the Charging Order was obtained. Those issues are independent of the findings made in this Judgment based on the available evidence for the purposes of the security for costs applications.

POSITIONS REGARDING JUDGMENT CREDITORS GIVING SECURITY

[60] Bracha sought security for its costs from the Judgment Creditors on the basis that if it is successful on the Application, it will have no means of enforcing its cost award against the Judgment Creditors.

[61] It relied on the Court's case management jurisdiction, discussed above, but focuses on just one factor that is part of dealing with cases justly, namely "ensuring, so far as practicable, that the parties are on an equal footing" (CPR

1.1(2)(a)). It says that both parties (itself and the Judgment Creditors) should be in the same position with respect to the recovery of their costs, and that equality can only be achieved if the Judgment Creditors are ordered to give security for Bracha's costs.

[62] While Bracha did not base its submission on the Court's inherent jurisdiction, discussed above, that jurisdiction would be another basis upon which the Court could consider ordering security for costs in an appropriate case.

[63] Bracha asserted that while the Judgment Creditors have offered to set off such costs, if awarded, against the amounts due to them under the Orders, the Judgment Debtor and Bracha "are entirely separate entities".

[64] The Judgment Creditors' position was that there is no jurisdiction under CPR 24, "Security for Costs", to order the Judgment Creditors to give security for Bracha's costs of the Application.

[65] They submitted that Part 24 deals with the costs of proceedings as a whole, and applies only to a claimant in the proceedings as a whole, not to a defendant in an application within the proceedings, which is what is what the Judgment Creditors are here.

[66] While that appears to be the correct reading of Part 24, given the limited argument and absence of authorities submitted for or against the proposition, and that the Court does not need to decide the point, it will leave that issue for another day.

JUDGMENT CREDITORS SHOULD NOT GIVE SECURITY FOR COSTS

[67] Assuming, without deciding, that the Court could order security on an application within a proceeding, it would not do so here as, for the reasons set out below, it would not be just to do so (which is a requirement under CPR 24.3). Additionally, Bracha has not submitted or established on this security for costs application that any factor in CPR 24.3(a) - (g) is applicable to the Judgment Creditors.

[68] The Judgment Creditors also submitted that Part 26 is inapplicable. For Part 26 to apply, Bracha would need to be seeking to be joined as a party to the Application on the condition that the Judgment Creditors give it security, which of course is not the condition it would want because that would mean if the Judgment Creditors failed to give security, Bracha would not be joined. The Judgment Creditors submitted that in any event there are no factors that apply to them which would make it just to order them to give security. The Court agrees with both of these submissions. Further, because (as already held) Bracha is an "interested party", there is no order being made to join Bracha as a party so no "order or direction" is being made to which a condition could be attached by the Court.

[69] There is the Court's case management jurisdiction and inherent jurisdiction which may nevertheless enable the Court to order the Judgment Creditors to give security for Bracha's costs.

[70] However, this Court does not consider the basis exists for an order for security for costs under either of those jurisdictions. Not only would it not be necessary or desirable in the interests of justice and dealing with the Application justly, it would run contrary to those interests.

[71] Perhaps "justice", like beauty, is in the eye of the beholder. However, in this Court's view, the position of Bracha regarding this Court dealing with this case justly shows what can fairly be described as chutzpah.[22]

[72] Standing back, the "case" (the term used in the Overriding Objective) includes at its heart the Orders of this Court with which there has not been compliance, nor any explanation for non-compliance, and as set out in the discussion and disposition of the Judgment Creditors' application for security for costs from Bracha, above, the greater interests are in favour of the factors, set out above, that led the Court to order Bracha to give security for the Judgment Creditors' costs.

PROPORTIONALITY

[73] What about proportionality? The Overriding Objective states that dealing with cases justly includes dealing with cases in ways that are proportionate to the amount of money involved; the importance of the case; the complexity of the case; and financial position of each party.

[74] Given the focus on the Overriding Objective in this Judgment, a word should be said about that factor in relation to these applications.

[75] It appears more will be spent collectively on the Application than the quantum of the Orders.

[76] If that were all that were going on, the Court might have more to say. But clearly the Application, and the Judgment Creditors' efforts to enforce the Orders, is a

[22] A Google search reveals a range of meanings of the word, some stronger than others, but a fair definition exists in Wikipedia: Chutzpah (/ˈhʊtspə/ or /ˈxʊtspə/) is the quality of audacity, for good or for bad. The Yiddish word derives from the Hebrew word ḥutspâ (חֻצְפָּה), meaning "insolence", "cheek" or "audacity": https://en.wikipedia.org/wiki/Chutzpah.

battle in a larger war, and to the parties more is at stake in one way or another than the amount of the Orders.

[77] Absent one of the parties asking the Court to consider in some manner proportionality, in multijurisdictional disputes, or perhaps even in multiple disputes in this jurisdiction, to consider proportionality properly the Court would need to know more, and to be in a position to engage in robust case management, quite possibly coordinated with the other jurisdiction(s).

QUANTUM OF SECURITY TO BE POSTED AND TERMS

[78] The Judgment Creditors submitted two Schedules of Cost, one showing costs (fees and disbursements) from early February 2015 through the 9 October 2015 hearing, being a total of $281,849.09, and one showing estimated future costs of $437,385.00, being a total of $719,234.09. This total includes the costs (fees and disbursements) of Forbes Hare, legal practitioners for the Judgment Creditors and (obviously as disbursements, as discussed above) the fees of Field Fisher Waterhouse LLP (London), English solicitors for the Judgment Creditors, and the fees of Counsel.

[79] The costs for the first period included work done in relation to the Provisional Charging Order and other related work beyond responding to Bracha's Notice of Objection.

[80] Bracha, with its submissions on the security for costs applications, submitted a schedule of costs (fees and disbursements) "for the 9 October 2015 hearing" of $117,794.16 and estimated future costs to be $192,252.14, being a total of $310,046.30. These figures include the costs of Harney Westwood & Riegels

("**Harneys**"), legal practitioners for Bracha; Walkers, former legal practitioners for Bracha; and Counsel.

[81] Bracha also submitted, following receipted of a draft of this Judgment, "Bracha's Costs Submissions" dated 15 April 2016. (The matter of the draft Judgment is discussed towards the end of this Judgment.)

[82] Bracha's position was that the sum of $719,234.09 (see paragraph 78 above), being the Judgment Creditors' asserted costs (fees and disbursements) from early February 2015 through the 9 October 2015 hearing, and their asserted estimated future costs, included costs incurred on these security for costs applications and hence the provision of security for costs in that amount and an order in favour of the Judgment Creditors for costs of the security for costs applications would involve a form of 'double-counting'. This point is well taken and accordingly a mechanism needs to be provided, and is provided below, to avoid such 'double-counting'.

[83] As noted above, the costs put forward by the Judgment Creditors included Field Fisher Waterhouse LLP (London), English solicitors for the Judgment Creditors, as well as costs of Counsel. The schedule of costs (fees and disbursements) included those costs in Appendix One and Appendix Two, respectively. While perhaps not expressly stated, it is obvious that in the usual manner those costs are to be claimed as disbursements, not as fees.

[84] Bracha submitted that "a party to British Virgin Islands proceedings can only recover legal fees in respect of services provided by persons entitled to practice in

this Territory." While that is true, the fees of foreign lawyers can be recovered as a disbursement.[23]

[85] Bracha submitted that the schedule included "research" which isn't usually allowed on inter partes assessments. In the view of this court, "research" should be allowed if it is on a complex or novel issue or otherwise justifiable and reasonable. It is not realistic assume that the law is fully known and at the fingertips of legal practitioners. The type of research that should be disallowed is research that is merely self-education, or to assist in the education of someone else, on matters with which a legal practitioner of reasonable skill and competence practising in the subject area would be expected to be fully familiar.

[86] Further Bracha submitted that "one would expect a figure based on no more than two-thirds of the costs of the highest possible claimable figure to be used." Even if ordinarily this type of balancing is appropriate, in the circumstances here, and as discussed below, that led this Court to require Bracha to give security for the full charging order proceeding, it is appropriate that the Judgment Creditors should have adequate protection for their costs. In this Court's view, two-thirds of the amount of the Judgment Creditors' cost schedule amounts are inadequate. Further going above that percentage is not an unfair balancing of the interests of the Judgment Creditors and Bracha, particularly as there has been no suggestion or evidence that an order for Bracha to give security will impede it from participating in the application to make final the Provisional Charging Order.

[87] Bracha's position in respect of both applications for security for costs was that security should only be for the costs that have been and will be incurred, in the

[23] BVIHC 2009/389 Grand Pacific Holdings Ltd. v Pacific China Holdings Limited, 3 December 2010, Bannister, J., paragraph 22: "The fees of instructed foreign lawyers are themselves treated as a disbursement in an BVI assessment. In other words, they have to be justified as a reasonable expense incurred by the BVI lawyers."

case of Bracha's application for security for cost, in the preparation and prosecution of, or in the case of the Judgment Creditors' application for security for costs, in responding to, Bracha's opposition to the to the making final the Provisional Charging Order.

[88] At first blush, there is a superficial appeal to Bracha's position in that regard. Without considering carefully the real context, and Bracha's role and participation, one might say that it would be difficult to justify Bracha having to give security for costs incurred by the Judgment Creditors for the period prior to Bracha becoming involved in the Application or for costs incurred that do not relate to Bracha's Notice of Objection.

[89] However, Bracha's involvement arises because a week after the Orders were made, it accepted a transfer of the Shares, for nominal consideration, and as found above, cooperated and coordinated with the Judgment Debtor and Shulman. Having provided no explanation for the transfer, the Court determined, as discussed earlier in this Judgment, that it is reasonable to infer that the Orders motivated the transfer, with the objective of those involved in the transfer that execution on the Shares would be more difficult if they were no longer kept in the name of the Judgment Debtor.

[90] The proceedings to obtain the Provisional Charging Order were directed to executing on the Shares. They were understandably directed to the Judgment Debtor. However, Bracha stepped into the role of owning legal title to the shares – at least according to Bracha, the Judgment Debtor and Shulman. It is fair and reasonable that Bracha should give security to cover the entire charging order proceedings. Otherwise, the Judgment Creditors, if awarded costs, will be left to look to the Judgment Debtor only for their costs until the time of Bracha's

involvement. This is so because Bracha accepted the Shares which may have been available to satisfy those costs (albeit with the difficulty of selling them discussed above in the context of Bracha's rejected submission that the Judgment Creditors do not need to have security for their costs).

[91] Accordingly, this Court has concluded that Bracha should be ordered to give security for the full amount of the Judgment Creditors' estimated costs, being $719,234.09. This security shall be given in the manner set out below under "Orders". To deal with the 'double-counting' issue discussed in paragraph 82, the costs to be made payable by Bracha to the Judgment Creditors below, once agreed or assessed, may be withdrawn by the Judgment Creditors from the security given by Bracha, or at Bracha's option, it may pay those costs directly to the Judgment Creditors, following which the security given shall be reduce by an equivalent amount. The option is provided in case there is a logistical reason that one method is more efficient or cost-effective than the other.

[92] The Judgment Creditors sought that any security ordered to be given be given within 14 days and Bracha sought that the security be given within 28 days. 21 days is a reasonable mid-point deadline for the giving of security (i.e. compliance with the Order made herein).

[93] The Judgment Creditors asked that the amount of security be lodged in the Harneys' Treasury Account, which Harneys should undertake to hold and only deal with in accordance with the Court's directions. As set out below under "Orders", this method of giving security may be utilized if agreeable to Bracha and the Judgment Creditors, and of course to Harneys.

[94] If security is not given within the 21 days allowed for doing so, or if any costs payable by Bracha to the Judgment Creditors in connection with these security for costs applications is not paid within the time provided below under "Orders", Bracha shall be debarred from participating as an objector or otherwise in the Application, and in any proceedings in relation to the Shares arising in the event the Provisional Charging Order is made final, subject to any relief from sanctions that may be ordered by this Court following the giving of the security and Bracha showing cause why relief from sanctions should be granted.

[95] In the event Bracha is debarred, and if the Judgment Debtor seeks to assume a role as the active objector on the Applications, first, the Judgment Debtor shall forthwith give notice to the Judgment Creditors of its intention to do so, and second, the Judgment Creditors have liberty to apply to the Court on an expedited basis for an order that the Judgment Debtor give security for the Judgment Creditors' costs that are subject to the Order arising from this Judgment.

DRAFT JUDGMENTS

[96] In accordance with a common practice is this jurisdiction, a draft of this Judgment was sent to counsel for limited purposes, and on the basis that it could be disclosed to the parties, but was otherwise confidential (embargoed) until handed down.

[97] The prime purpose of providing a draft judgment is so that counsel and the parties may review it and provide to the Court corrections such as typos, citation errors, grammatical and spelling errors, computational errors, double-counting, misnomers, and so forth. It is helpful to all concerned to receive such input, which

the Court has found uniformly is done diligently by counsel and is always much appreciated by the Court.

[98] Also on occasion counsel will suggest that a wording clarification should be considered by the Court to make the expression of what has been decided and ordered, and/or the reasons therefor, clearer and more intelligible or to make what has been ordered more workable mechanically.

[99] Having an opportunity to consider a draft judgment enables counsel and the parties to prepare for any submissions to be provided thereafter in relation to the judgment, such as with respect to costs if costs will be address with written submissions before the handing down of the judgment or orally at the handing down of the judgment. It may enable counsel to bring an appropriate application at the handing down of the judgment such as for an interim stay pending an application to the Court of Appeal and/or for leave to appeal. From the parties' perspective, it enables them to prepare internally before the judgment becomes public, if it will become public.

[100] In this case, there was said by counsel for Bracha to have been a misunderstanding of the process of written submissions so that Bracha did not address the quantum of security for costs being sought by the Judgment Creditors. In this case, in the Court's discretion, the Court concluded that it was not inappropriate to raise the concern so the Court could ensure that due process took place, as the misunderstanding was said to be due to no fault of the affected party (although the Court was somewhat puzzled why the point did not become evident to Bracha earlier and was not raised earlier).

[101] In raising the point, short written submissions were made already (Bracha's Costs Submissions dated 15 April 2016), and an opportunity for any reply submission by the Judgment Creditors could be and was extended to the Judgment Creditors by the Court. The matter could be and was resolved without undue disruption to an orderly process. The alternative might have been an appeal based on a lack of due process, which would not be in the interest of any party or the Overriding Objective (equal footing; saving expense; expedition – all of which are part of dealing with cases justly).

[102] There may be other appropriate purposes for providing a draft Judgment not listed here and other appropriate responses from parties.

[103] However, one matter is clear. The provision of a draft judgment is not for the purpose of inviting a re-opening or re-argument of the substance of matters decided in the draft Judgment before the Judgment is handed down.

[104] It is important to maintain that distinction in order to preserve the integrity and value of the draft judgment process.

[105] Otherwise matters could carry on indefinitely, which is not the intended nature of the judicial process. The law enabling reconsideration by a court of its judgment provides the appropriate basis to seek reconsideration, and provides appropriate restrictions on the ability to do so.[24]

[106] Any initiative to seek to reopen and make further submissions on matters decided in the draft judgment, and then in the judgment as handed down, should be by

[24] BVIHIC 2015/0008 Malitskiy and Filpenko v Stockman Interhold S.A., 21 October 2015, paragraphs 79 – 99.

application following the handing down of the judgment in accordance with the applicable tests for doing so.

[107] While a court can be more liberal in admitting additional evidence or hearing additional submissions before judgment has been rendered, where there is no question of the court changing its mind or a successful party being deprived of a judgment already rendered, once the parties receive a draft judgment they are in a form of 'time warp' – effectively for these purposes the position is that the post-handing down situation is applicable. The court is being asked to change its mind.

[108] In this case, the Court suggested to counsel for Bracha that matters which it seeks to raise regarding the draft Judgment be sought to be raised, in an appropriate manner and subject to the applicable restrictions, at an appropriate point after the Judgment has been handed down.

ORDERS

[109] Accordingly, for the reasons set about above in this Judgment, this Court orders as follows:

1. The Judgment Creditors' application for security for costs of the Application is granted.

2. Bracha's application for security for costs of the Application is dismissed.

3. Bracha shall give security for the Judgment Creditors' costs of the Application, including the proceedings to obtain the Provisional Charging Order, in the sum of $719,234.09.

4. Bracha shall pay into Court within 21 days of this date the sum of $719,234.09 as security for the costs of the Judgment Creditors on the Application unless Bracha and the Judgment Creditors agree before that date that the security may be given by that date (a) by Bracha lodging the sum in Harneys' Treasury Account, with a written personal undertaking by Harneys to the Court and the Judgment Creditors to hold the funds and only deal with them in accordance with the Court's direction or (b) in some other manner acceptable to the Judgment Creditors and Bracha.

5. In the event that Bracha does not comply with this order to give security for costs set out at subparagraph 4 above, Bracha shall be debarred from participating in the Application and in any proceedings in relation to the Shares arising in the event the Provisional Charging Order is made final, subject to any relief from sanctions that may be ordered by this Court following the giving of the security and Bracha showing cause why relief from sanctions should be granted.

6. Bracha shall pay the Judgment Creditors their costs of these security for costs applications ("**Costs of the Security for Costs Applications**"), to be assessed if not agreed, within 10 days.

7. The Costs of the Security for Costs Applications shall include costs associated with preparing and reviewing written submissions on security for costs, including any work that can be identified as having been done before 9 October 2015 on the question of security for costs, and the work done leading up to and attending upon the handing down of this Judgment.

8. The Costs of the Security for Costs Applications shall not include any time or disbursements in connection with dealing with security for costs at the 9

October 2015 hearing. The short time spent during the 9 October 2015 hearing developing a process to deal with these applications for security for costs is not sufficiently material to segregate cost-effectively.

9. The Costs of the Security for Costs Applications payable by Bracha to the Judgment Creditors may be withdrawn by the Judgment Creditors from the security given by Bracha, or at Bracha's option, it may pay those costs directly to the Judgment Creditors, following which the security given shall be reduce by an equivalent amount.

10. In the event Bracha is debarred by its failure to comply with the order for giving security for costs, above, and if the Judgment Debtor seeks to assume a role as the active objector on the Applications, first, the Judgment Debtor shall forthwith give notice to the Judgment Creditors of its intention to do so, and second, the Judgment Creditors have liberty to apply to the Court on an expedited basis for an order that the Judgment Debtor give security for the Judgment Creditors' costs that are subject to the Order arising from this Judgment.

Justice Barry Leon

Commercial Court Judge

22 April 2016