EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2016/0004

BETWEEN:

ULTRAMARINE (ANTIGUA) LTD

Appellant

and

SUNSAIL (ANTIGUA) LTD

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony E. Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett with him, Mr. Javed Hewlett for the Appellant
Mr. Septimus Rhudd for the Respondent

2016: October 26;
2017: April 7.

Civil appeal – Application for security for costs pursuant to section 548 of Companies Act, 1995 of Antigua and Barbuda and rules 24.2(1) and 24.3(g) of Civil Procedure Rules 2000 – Whether learned judge erred in exercise of her discretion in granting security for costs – Delay in making application for security for costs – No evidence of prejudice to claimant caused by delay – Quantification of security for costs – Applicable costs regime – Whether sum of $350,000.00 ordered as security just in the circumstances

This is an appeal against orders made on a security for costs application filed by the respondent, Sunsail (Antigua) Ltd ("Sunsail"). The application was premised on section 548 of the Companies Act, 1995 of Antigua and Barbuda and Rules 24.2(1) and 24.3(g) of the Civil Procedure Rules 2000 ("CPR"). The appellant, Ultramarine (Antigua) Ltd ("Ultramarine") was ordered to give security for costs to Sunsail in the sum of EC$350,000.00 within 30 days, all further proceedings were stayed until security for costs

was provided, and costs of the application were awarded to Sunsail in the sum of EC$2,000.00.

Ultramarine appealed all the orders of the learned judge including the award of costs of $2,000.00 on the application. Its appeal centered on the following: (1) that its impecunious state was materially caused by Sunsail and it would be unjust to make an order for security for costs in such a case; (2) that there was no proper material before the learned judge to support an award of EC$350,000.00 as security for costs; (3) that the application for security for costs should not have succeeded due to the delay on the part of Sunsail in making the application, and the absence of any special circumstances justifying or explaining the delay; and (4) that the order for security was premised on a finding that Ultramarine was ordinarily resident outside the jurisdiction, and that, that finding was wrong.

Held: dismissing the appeal in part, setting aside the award of $350,000.00 as security for costs; replacing it with the sum of $73,125.00 and awarding costs to Sunsail in the amount of EC $1,000.00, that:

1. It is necessary for the party resisting an application for security for costs to show that an order for security for costs would, not merely create a difficulty but would probably stifle its claim. This burden remained on Ultramarine and it was required to discharge this burden by providing clear and unequivocal evidence of its means, so as to satisfy the court, not to a standard of certainty, but at least to a standard of probability, that the claim would be stifled if security was ordered. It was not sufficient for Ultramarine to show that it did not have sufficient or any assets in its own resources. It also needed to show that there did not exist third parties who could reasonably be expected to put up the security for Sunsail's costs. Ultramarine had not discharged its burden of placing before the learned judge any material on which she could reasonably conclude that ordering security for costs against it would probably stifle its claim. Thus, there was no error in the approach adopted by the learned judge.

   Keary Developments Ltd. v Tarmac Construction Ltd and another [1964] 3 All ER 933 applied; Al-Koronky and another v Time- Life Entertainment Group and another [2006] EWCA Civ 1123 applied; Brimko Holdings Ltd v Eastman Kodak Company [2004] EWHC 1343 (Ch) applied.

2. As a general principle, the amount of security ordered on an application for security for costs is fixed by reference to the probable costs of the action, which calculation is dependent on the applicable costs regime. The applicable costs regime is the specific regime that applies to the case at the date of the application and not any of the alternative regimes that might have otherwise applied had an application been made to apply any one of them. In awarding security for costs, a judge must exercise his or her discretion within the parameters of the applicable costs regime. In this case, at the time of the security for costs application, the applicable costs regime (at least for the substantive claim) was undoubtedly the prescribed costs regime as stipulated by CPR 65.5(1) and the learned judge was

so bound by that costs regime. There was no basis for the learned judge to have awarded an amount of EC$350,000.00 as security for costs and in so doing the learned judge committed an error of principle. In order to justify an award of EC$350,000.00 under prescribed costs the claim required a valuation of EC$44,750,000.00. There was no material before the court that could have justified such a valuation.

Next Level Engineering Services Ltd. v The Attorney General et al ANUHCVAP2007/0017 (delivered 24th July 2007, unreported) applied.

3. Applications for security for costs should be made promptly. The requirement for promptness does not exist in a vacuum. The reason for requiring applications to be brought in a timely manner is to prevent a claimant from being lulled into a belief that it would be permitted to proceed to trial without being asked to give security. This is to prevent a claimant from proceeding at possibly considerable expense to himself down to trial and then find himself faced with an order for security with which he is unable to comply. However, mere delay in and of itself should not be the determining factor. Consideration should also be given to whether there exists any evidence from the claimant demonstrating that the delay in making the application has somehow caused prejudice to the claimant. The materiality of the delay comes into play where the delay has led the claimant to act to his detriment. In the case at bar, the reasons advanced for the delay of almost three years were unconvincing but the effect of the delay should not be for the application to be denied. Additionally, Ultramarine advanced no evidence of any actual prejudice that it suffered, of any costs that it incurred during the period of delay that might be thrown away (if security was ordered and Ultramarine could not raise it), which could be pinned specifically to the lateness of Sunsail's application. There was no evidence that any such costs were incurred by Ultramarine due to it being deceptively lulled into a false sense of security.

Wall v Wells [1926] 4 D.L.R. 799 applied; Ontario Ltd. et al v Bank of Montreal (H.C.J.), 1988 CanLII 4678 (ON SC) applied; Stepps Investments Ltd et al v Security Capital Corporation Ltd. 1973 Can LII 631 (ON SC) applied.

4. The application for security for costs was premised on section 548 of the Companies Act, 1995 and CPR 24.2(1) and 24.3(g). Under section 548 of the Companies Act, the sole test is the impecuniosity of Ultramarine. The non-residency of the company is not an issue. Accordingly, the court below had jurisdiction to entertain the application relying solely on section 548 of the Companies Act.

Surfside Trading v Landsome Group Inc et al AXAHCV2005/0016 (delivered 20th January 2006, unreported) cited.

JUDGMENT

[1] GONSALVES JA [AG.]: This is an appeal against the judgment of Henry J dated 5th February 2016 where the appellant (the respondent below, and hereinafter "Ultramarine") was ordered to give security for the respondent's (the applicant below, and hereinafter "Sunsail") costs of the proceedings in the amount of EC$350,000.00 within 30 days, all further proceedings were stayed until security for costs was provided, and costs of the application were awarded to the respondent in the sum of EC$2,000.00.

[2] The orders were made pursuant to an application for security for costs filed by Sunsail against Ultramarine premised on section 548[1] of the Companies Act, 1995[2] and rules 24.2(1) and 24.3 (g) of the Civil Procedure Rules 2000 ("CPR"), in such amounts as the Court thinks fit, that all further proceedings be stayed until security for costs have been provided, and that the costs of the application be awarded to Sunsail. The notice of application did not specify the amount being sought for security for costs, but the draft order and affidavit in support both referred to the sum of EC$1,000,000.00. The grounds of the application were:

(i) The sole beneficial owner and director of Ultramarine is ordinarily resident out of the jurisdiction.

(ii) The provisions of section 548 of the Companies Act, 1995 allows for sufficient security to be given by a company which is a claimant in an action and it appears that that company will be unable to pay the costs of a defendant if the defendant is successful in its defence.

[1] Section 548 reads as follows: "Where a company is a plaintiff in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."
[2] Act No. 18 of 1995, Laws of Antigua and Barbuda.

(iii) Ultramarine is not known to be operating or otherwise involved in any business venture or activity within the State of Antigua and Barbuda.

(iv) Ultramarine has no assets or real estate within the State of Antigua and Barbuda against which Sunsail could move for recovery of costs if successful.

(v) Sunsail has a good prospect of realistically defending the claim and believes that should it succeed at trial Ultramarine will be unable to satisfy Sunsail's costs if ordered so to do by the court.

[3] The application was supported by an affidavit of Mr. Peter Cochran dated 11th December 2014. Paragraph 3 thereof stated that the application was primarily made under section 548 of the Companies Act, 1995. The application was opposed by Ultramarine by way of an affidavit of Mr. Andrew Moleta dated 17th February 2015. On 5th February 2016, Henry J delivered her judgment and granted the orders referred to in paragraph 1 above.

[4] Ultramarine appealed all of the orders made by Henry J, including the award of costs of EC$2,000.00 on the application, and relied on the following 9 grounds of appeal:

(i) The learned judge erred in her finding of fact and law that in accordance with CPR 24.3(g) Ultramarine is ordinarily resident outside of the jurisdiction.

(ii) The learned judge misguided herself in her finding of fact that Ultramarine has no current nexus with Antigua.

(iii) The learned judge misguided herself that it was just and fair and in keeping with the overriding objective to make an award for security for costs when such an order could amount to an

instrument of oppression, particularly in light of the unchallenged evidence on behalf of Ultramarine that actions of Sunsail had destroyed Ultramarine's business.

(iv) The learned judge erred in failing to have regard to the fact that Ultramarine's assets were in the custody of Sunsail and that no regard was to be had to the value and loss of those assets to Ultramarine in keeping the parties on an equal footing.

(v) The learned judge erred in failing to have proper regard for the overriding objective and that the impecunious nature of Ultramarine was brought about by the actions of Sunsail that were in breach of court orders and remained the subject of contempt proceedings.

(vi) The learned judge erred in ordering security for costs in the amount of EC$350,000.00, when there had been no determination that the value of the claim was such that prescribed costs would amount to EC$350,000.00.

(vii) The learned judge erred in her finding of fact that it was of no consequence whether Sunsail or a third party had paid certain expenses relating to the litigation as alleged or at all.

(viii) The learned judge erred in her finding of fact regarding the positions of the parties in the substantive claim.

(ix) The learned judge erred in the exercise of her discretion in making an order for security for costs in light of previous offers to settle from Sunsail, the lateness of the application and evidence on record and the pleadings tending to show that Sunsail did not have a properly arguable case.

[5] It will immediately be recognised that there is substantial overlap between a number of the grounds set out above, specifically grounds i and ii, and grounds iii, iv and v. At paragraph 7 of his written submissions on behalf of Ultramarine, Dr. Dorsett summarised Ultramarine's position as follows:

> "The Appellant's principal contention is that the learned judge wrongly exercised her discretion in awarding security of (sic) costs in the instant matter. In summary it is respectfully submitted that learned judge erred for the following reasons
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> 1. The court may make an order for security for costs 'only of it is satisfied, having regard to all the circumstances of the case, that it is just [emphasis supplied] to make such an order' (CPR 24.3). It would not be just to make an order for security of (sic) costs against a claimant where the claimant's impecunious state is in a material way caused by the actions of a defendant that has enforced custody of the claimant's assets, assets which may be used to satisfy an order for costs.
> 2. There is no information before the court justifying an order for security in the amount of $350,000.00 as there is no proper information from which it can be determined that the costs 'likely to be awarded' would be $350,000.00.
> 3. The application for security of (sic) costs was not promptly made and there is nothing arising in the instant case which justifies a departure from the settled principle and practice that an application for security of (sic) costs should be made promptly.
> 4. The order for security was made on a finding that the Appellant is ordinarily resident outside of the jurisdiction. Such a finding, it is respectfully submitted, is contrary to settled authority as a 'corporation resides for the purposes of suit in as many places as it carries on business'. The Appellant does not carry on business in the UK and cannot be said to be resident there for any purpose."

[6] In essence therefore, Ultramarine's appeal centers on the following propositions:

(a) that Ultramarine's impecunious state was materially caused by Sunsail and it would be unjust to make an order for security for costs in such a case;

(b) that there was no proper material before Henry J to support an award of EC$350,000.00 as security for costs;

(c) that the application for security for costs should not have succeeded due to the delay on the part of Sunsail in making it, and the absence of any special circumstances justifying or explaining the delay; and

(d) that the order for security was premised on a finding that Ultramarine was ordinarily resident outside the jurisdiction, and that that finding was wrong.

[7] I will therefore proceed on the basis that Dr. Dorsett's summary of Ultramarine's arguments amount to a distillation of the 9 grounds of appeal. To the extent that one can recognise as arising from grounds vii, viii, and ix additional arguments relating to (a) whether Henry J erred in her finding of fact that it was of no consequence whether Sunsail or a third party had paid certain expenses relating to the litigation as alleged or at all (ground vii), and (b) whether Henry J did not consider the relative strength of the parties in the substantive claim, including previous offers to settle made by Sunsail (ground viii and part of ground ix), no separate submissions were made by Dr. Dorsett in relation thereto. I am therefore inclined to assume that Dr. Dorsett either did not intend to press these points or assumed that they would be sufficiently covered by his analysis under the above-mentioned four main grounds.

Exercise of Judicial Discretion

[8] This is an appeal against orders made on a security for costs application. A statement of the general principles that are relevant on such an application is set out in Keary Developments Ltd. v Tarmac Construction Ltd and another.[3] Dr. Dorsett accepted, citing that authority and referring to the first principle set out therein, that Henry J would have had '… a complete discretion whether to order security' in the light of all the relevant circumstances. Dr. Dorsett also accepted the limitations placed upon an appellate court when considering whether it is

[3] [1995] 3 All ER 534. See also additional principles set out in Al-Koronky & Anor v Time-Life Entertainment Group Limited & anor [2006] EWCA Civ 1123.

entitled to interfere with the exercise of a lower court's discretion, as explained by Lord Guest in the case of Ratnam v Cumarasamy and Another:[4]

> "The principles on which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: Osenton (Charles) & Co. v. Johnston [1941] 2 All ER 245 at p 257 ... The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice ..."

He however submitted that Henry J had in fact exercised her discretion on a wrong principle and that her discretion should have been exercised in a contrary way or that there had been a miscarriage of justice.

[9] For Sunsail, Mr. Rhudd, on this point, also relied on the authority of Charles Osenton and Company v. Johnston[5] and focused initially on the fact that the appellate court starts with the presumption that the judge has rightly exercised his discretion, and must thereafter be clearly satisfied that the exercise of discretion was wrong. Reliance was also placed on the case of G v G[6] where the House of Lords held:

> "Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as "blatant error" used by the President in the present case, and words such as "clearly wrong," "plainly wrong," or "simply wrong" used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

[10] Neither party sought to refer to any of the well-known authorities of this Court on this point. In Dufour v Helenair Corporation Ltd,[7] Sir Vincent Floissac CJ explained the approach to be adopted by an appellate court as follows:

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[4] [1964] 3 All ER 933 at p. 934.
[5] [1942] AC 130.
[6] [1985] 1 WLR 647 at p. 652.
[7] (1996) 52 WIR 188.

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly of blatantly wrong."[8]

[11] In light of the foregoing, Dr. Dorsett has the task of demonstrating that Henry J erred in principle, and consequently that her decision in ordering security for costs exceeded the generous ambit within which reasonable disagreement is possible and was clearly wrong.

Grounds (iii), (iv) and (v) – Sunsail's actions a material cause of Ultramarine's impecuniosity

[12] In relation to these grounds, Dr. Dorsett submitted that it was necessary for Henry J to carry out a balancing exercise. Dr. Dorsett was here referring to the third principle in Keary Developments Ltd which is later discussed. According to Dr. Dorsett, Henry J was required to weigh the injustice to Ultramarine if prevented from pursuing a proper claim by an order for security, against the injustice to Sunsail if no security is ordered and at the trial Ultramarine's claim fails and Sunsail finds itself unable to recover from Ultramarine the costs which have been incurred by Sunsail in its defence of the action. The court, he said, relying on the case of Farrer v Lacy, Hartland, & Co.,[9] should be properly concerned not to allow the power to order security to be used as an instrument of oppression by stifling a genuine claim by an indigent company against a more prosperous company, particularly where the failure to meet that claim might itself have constituted a material cause of the plaintiff's impecuniosity. Dr. Dorsett, quite properly, also cited the counterbalancing principle, that the court will also be

[8] At p.190-191. See also Chemtrade Ltd v Fuchs Oil Middle East Limited BVIHCVAP 2013/0004, (delivered 18th September 2013, unreported) and dicta of Gordon JA in Edy Gay Addari v Enzo Addari BVIHCVAP2005/0002 (delivered 27th June 2005, unreported) at para. 10.
[9] (1885) 28 Ch D 482 at p. 485.

concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.[10] According to Dr. Dorsett, the essence of the third principle in Keary Developments Ltd. is that, as a general rule, the Court will not exercise its discretion to order security for costs against an indigent company when its adversary 'might in itself have been a material cause of the plaintiff's impecuniosity'. In articulating his third principle in Keary Developments Ltd., Peter Gibson LJ relied on dicta of Bowen LJ in Farrer v Lacy, Hartland, & Co.[11] where it was stated:

> "The Lord Justice Baggallay has expressed what appears to me to be the true view of Rourke v. White Moss Colliery Company [1 C. P. D. 556]. Suppose the plaintiff in that case had been right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action. To 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. The Court decided that case on its special circumstances, and not on any such rule as is now contended for."

[13] Bowen LJ's dicta in Farrer v Lacy, Hartland, & Co. was applied in Fakes v Taylor Woodrow Construction Ltd.[12] In that case, the plaintiff carried on business as a plumbing contractor. He was engaged by the defendants under sub-contracts made in 1967 and 1969 to carry out plumbing work on building sites where the defendants were the main contractors. The sub-contracts contained an arbitration clause which provided that any dispute, question or difference arising between the contractor and the sub-contractor in connection with the sub-contract 'shall be referred to arbitration'. The plaintiff carried out a substantial amount of work under the sub-contracts. He alleged, however, that because of breaches of contract by the defendants in delaying his work and in failing to pay him sums due at the times when payment should have been made, he was made insolvent and his business was ruined. Apparently, in 1970 the plaintiff was sued to judgment by various creditors and he, in consequence, was without means. In May 1971, the plaintiff obtained a full certificate for legal aid to bring an action against the defendants. A

[10] See Pearson v Naydler [1977] 3 All ER 531 at p. 537.
[11] At p. 485.
[12] [1973] QB 436.

writ was issued in February 1972 and a statement of claim was delivered in March 1972 alleging breaches of contract and claiming over £80,000.00 from the defendants for moneys due under the sub-contracts and as damages for the delay in paying the sums due. The defendants denied breach of contract. They took out a summons to stay the action on the ground of the arbitration clause in the sub-contracts as they wished to take the dispute to arbitration. The plaintiff resisted the summons on the ground that legal aid was not available for arbitration and he alleged that if he was forced to go to arbitration it was tantamount to losing the claim. The judge in chambers ordered the action to be stayed. The plaintiff appealed against the stay.

[14] The Court of Appeal, applying Bowen's LJ's dicta in Farrer v Lacy, Hartland, & Co., allowed the plaintiff's appeal. It was held that 'since there was a reasonable probability that the plaintiff's charges that his poverty was directly induced by the defendants' breaches of contract might be well founded, justice required that in the exceptional circumstances his action should not be stayed'. Lord Denning MR explained the court's reasoning at page 442, paragraphs B-F, as follows:

> "Mr. Fakes says that his misfortune and, in particular, his insolvency, has been brought about by Taylor Woodrow's breaches of contract, in that they did not give him the work as and when they should: so did not pay him as and when they should. It would be indeed "the most unkindest cut of all" if they in the first place break their contract and by doing so make him insolvent, and then in the second place say to him "Owing to your insolvency, which we have brought about, we are going to make you go to arbitration, which you cannot afford." A parallel can be found in the cases in which this court orders security for costs. In Farrer v. Lacy, Hartland & Co. (1885) 28 Ch. D. 482, 485, Bowen L.J. said:
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> > "Suppose the plaintiff in that case had been right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action. To 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."
> >
> > So here also, if Mr. Fakes' insolvency arose by reason of Taylor Woodrow's breach, it would be a denial of justice to require him

> now to go to arbitration – which he cannot afford – instead of proceeding in the courts – where he can get legal aid.
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> Mr. Lloyd was inclined to accept this proposition, but he said there must be a strong prima facie case that the insolvency was caused by the breach. I think it is sufficient if there are reasonable grounds for believing that Mr. Fakes' assertions may be correct or there is a triable issue about it. On the materials before us, I think there are reasonable grounds. At any rate there is an issue fit to be tried. It can only be tried if he is allowed to continue this action. I would therefore hold that the action should not be stayed."

[15] Mr. Rhudd's response on this point was, in essence, that the allegation that Sunsail caused Ultramarine's impecuniosity would only be a relevant consideration if Ultramarine was also arguing that the making of the order for security for costs against it would stifle its claim. According to Mr. Rhudd, the impecuniosity argument without the resulting stifling effect would be no argument. Mr. Rhudd suggested that the fact that a defendant may have been a cause of a claimant's impecuniosity is not itself sufficient to justify a refusal to grant security, if indeed security could be paid. He asserted that Ultramarine appeared to be continuing to advance its argument that the court should not have made an order for security for costs as to do so would stifle its genuine claim. He noted that while no appeal appears to have been made in respect of the stifling element of Ultramarine's argument, it must be correct that this argument is being maintained by Ultramarine as without it, the question of whether Ultramarine's impecuniosity was caused by Sunsail would become a moot point.[13]

[16] In support of his argument, Mr. Rudd relied on the case of In Re Little Olympian Each Ways Ltd[14] where Lindsay J stated:

> "The plaintiff's evidence quite fails to satisfy me that an award would probably stifle its proper claim. That conclusion draws the strength out of another of Mr. Potts's submissions, that here the impecuniosity of the plaintiff is the defendant's fault and is a consequence of the very acts

[13] Mr. Rhudd further submitted that the effect of the third principle in Keary Developments Ltd. is that the cause of impecuniosity leading to stifling adds additional weight to a claimant's argument against the grant of security.

[14] [1995] 1 WLR 560 at 575.

> complained of in the petition. He says this argument is independent of the stifle argument but, as I see it, if an award is not shown probably to stifle the action, the basic injustice, which is here of a person escaping the consequences of his wounding another by reason only of the severity of the wound, does not arise: see also Farrer v. Lacy, Hartland & Co. (1885) 28 Ch. D. 482, 485 per Bowen L.J"

[17] Consequently, Mr. Rhudd argued that the cause of the impecuniosity of Ultramarine would only be relevant if it would establish in the first instance that impecuniosity would act so as to prevent Ultramarine from advancing its cause in circumstances where security is granted. Further, according to Mr. Rhudd, that would in effect end the matter because Ultramarine did not appeal against the lack of a finding that the order for security would stifle a genuine claim.

[18] Notwithstanding his submission that Ultramarine did not appeal against the lack of any finding that the order for security for costs would stifle a genuine claim, and apparently out of an abundance of caution, Mr. Rhudd addressed the issues of:

(a) does (in this case) an order for security for costs stifle a genuine claim; and

(b) is the impecuniosity of Ultramarine caused by the actions of Sunsail.

[19] On the first issue, Mr. Rhudd argued that, by its submission, Ultramarine appears to have concluded that Henry J made a finding that the order for security for costs would stifle its claim, or that is was conceded by Sunsail that such was the case neither of which, according to Mr. Rhudd, was correct.

[20] Mr. Rhudd asserted that the ultimate beneficiary of the claim was Mr. Moleta in his own persona, and that it is believed (due to the fact that it has never been denied and there being no other likely explanation) that Mr. Moleta is funding the claim for Ultramarine. According to Mr. Rhudd, despite repeated requests over three years, Mr. Moleta failed to provide any details of his own financial position claiming that he is under no obligation to do so. Similarly, Ultramarine also failed to provide any

details of its financial position using the same argument. Mr. Rhudd suggested that their attitude undermined Ultramarine's argument that the order for security for costs would stifle a genuine claim because the burden was on Ultramarine to show the claim would be stifled. On this point Mr. Rhudd relied on the case of Al-Koronky and another v Time Life Entertainment Group Ltd and another [15] where Eady J stated:

> "It is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not."[16]

[21] This judgment was upheld in the Court of Appeal in Al-Koronky and another v Time- Life Entertainment Group and another.[17]

[22] Mr. Rhudd, also relied on the case of Brimko Holdings Ltd v. Eastman Kodak Company[18] where Mr. Justice Park stated:

> "First, the burden of establishing that a claim would be stifled by an order for security rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled if security was ordered. Second, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs."[19]

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[15] [2005] EWHC 1688 (QB).
[16] At para. 31.
[17] [2006] EWCA Civ 1123.
[18] [2004] EWHC 1343 (Ch).
[19] At para. 11.

[23] Further reliance was placed by Mr. Rhudd on Newman (t/a Newman Associates) v Wenden Properties Ltd (S Newman Consultants (a firm) (t/a Newman Consultants), Part 20 defendant)[20] where it was held that:

> "… the party resisting the application for security on the grounds that a genuine claim would be stifled must demonstrate how and why other sources of funding are not available. I am entirely confident that the defendant has not done that here. Indeed, on one view of the very recent evidence, it might be said that there are a number of obvious ways in which such financing could be provided …"

[24] Mr. Rhudd concluded on this issue by submitting that Ultramarine failed to discharge this burden and that Henry J properly exercised her discretion in not making a finding (of stifling) in favour of Ultramarine. He acknowledged that at paragraph 18 of the judgment, Henry J noted that there is some evidence that an order for security may "hamper" Ultramarine's claim, but that the court also mentioned both Ultramarine's and Mr. Moleta's failure to provide any details of their financial position. According to Mr. Rhudd, this finding of the possibility of hampering fell far short of a finding that the order for security would stifle a genuine claim and Henry J was entitled to order security in the circumstances where Ultramarine might find it difficult to raise these funds. On the specific point of the possible difficulty that Ultramarine might experience in raising funds, Mr. Rhudd relied on Pearson and Another v Naydler and Others[21] where it was held that:

> "It is inherent in the whole concept of the section that the court is to have power to order the company to do what it is likely to find difficulty in doing, namely, to provide security for the cost which ex-hypothesi it is likely to be unable to pay."

[25] Having considered the arguments presented and reviewed the authorities, I agree with Mr. Rhudd. Assuming for this purpose only that Ultramarine possessed a genuine claim and that it could demonstrate that there were reasonable grounds for believing that its impecuniosity was caused by Sunsail, or that there was at least a triable issue in relation thereto, it was necessary for Ultramarine to have gone further and show that an order for security for costs would, not merely create a

[20] [2007] EWHC 336 at para. 21.
[21] [1977] 1 WLR 899 at p. 906 – a case cited by Gibson LJ in Keary Developments Ltd.

difficulty,[22] but would probably stifle its claim. This burden remained on Ultramarine and it was required to discharge this burden by providing clear and unequivocal evidence.[23] It was not sufficient for Ultramarine to show that it did not have sufficient or any assets in its own resources. It also needed to show that there did not exist third parties who could reasonably be expected to put up the security for Sunsail's costs. Mr. Moleta was clearly such a person but there was no evidence of his financial position. Consequently, Henry J did not have a full account of the resources available to Ultramarine. As Sedley LJ stated in Al-Koronky v Time-Life Entertainment Group Limited,[24] with the requirements of the law having been exhausted, what remains is to set a suitable sum and 'This classically is where discretion fills the space left by judgment; the court has a choice of courses, none of which it can be criticised for taking provided it makes its election on a proper factual basis uninfluenced by extraneous considerations.'

[26] In relation to this point, Henry J was alive to the burden placed on Ultramarine to establish that its claim would be stifled by an order for security for costs, and its obligation to place before the court evidence of its means, so as to satisfy the court, not to a standard of certainty, but at least to a standard of probability, that the claim would be stifled if security was ordered. The court was also alive to the fact that it was not to restrict its evaluation of Ultramarine's ability to provide security to Ultramarine's own means, and that if Ultramarine could not provide security from its own resources the court could consider whether it could reasonably be expected to provide it from third parties. At paragraph 17 of the judgment Henry J stated:

> "In Brimko Holdings Ltd. v Eastman Kodak Company[5] [*2001 WL 1372366*] the court stated that the burden of establishing that a claim would be stifled by an order for security rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled if security was ordered. The court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide

[22] See Keary Developments Ltd. v Tarmac Construction [1995] 3 All ER 534 at 539-540.
[23] See New Tasty Bakery Ltd. v MA Enterprise (UK) Ltd [2016] EWHC 1038.
[24] [2006] EWCA Civ 1123 at paras. 27-29.

> the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties."

[27] At paragraph 18 of the judgment, Henry J considered the arguments by Ultramarine that the application for security was being used to stifle a genuine claim, which has more than a reasonable chance of success, and that Ultramarine has assets but these assets are in the enforced custody of Sunsail who has failed to turn over these assets to Ultramarine. Henry J noted that Ultramarine argued that the grant of the application would almost certainly prejudice Ultramarine in financing the litigation through to trial. Henry J noted the evidence that Ultramarine had not traded in several years and it has only one director. Her Ladyship further noted that no evidence of the means of Mr. Moleta (who was noted previously at paragraph 13 of the judgment to be the sole director and the alleged sole beneficial shareholder) was before the court. Henry J concluded that there was some evidence that an order for security may hamper Ultramarine's ability to pursue the claim, but this was the highest that Henry J put it. In the very next paragraph, Henry J alluded to the letter to Mr. Moleta in 2014[25] in which counsel for Sunsail set out the costs Sunsail had incurred to date, gave an assessment of future costs, and requested security for costs. Henry J reproduced in the judgment what she considered to be the pertinent parts of the letter as follows:

> "Despite numerous requests for clarification of your financial position and details of who is funding this claim on your behalf, you have refused to provide a response. Our client is extremely concerned that on the basis that you appear to be impecunious, do not appear to be ordinarily resident in Antigua and have not generated any income since 2007, you will not be able to comply with an Order to pay our client's costs should it successfully defend this claim.
>
> Consequently, our client requires security for its costs. Our client has already incurred the following costs in defending this claim:
>
> £59,376.38 pound sterling with ASB Law LLP
> EC$75,000.00 with Charlesworth Brown
> £29,839.20 pound sterling in expenses

[25] The letter was addressed to Ultramarine.

> Furthermore, we estimate that the additional costs of defending this claim to trial will be at least EC$400,000.00"

[28] Henry J noted that there was no response to the letter from Ultramarine and that in Mr. Moleta's further affidavit he challenged the credibility of the figures claimed by Sunsail. At paragraph 28 of the judgment, Henry J found that Ultramarine was impecunious. The combined factual scenario was that Ultramarine was an impecunious company that had been carrying on a claim which was apparently being funded by someone other than itself, but the identity of whom was not disclosed by Ultramarine to Sunsail or to the court below. Henry J did not make any finding that ordering security for costs would stifle the claim as Ultramarine had not discharged its burden of placing before her any material on which she could reasonably conclude that ordering security for costs against it would probably stifle the claim. Specifically, there was some evidence that implied that there might have been a third party funding option via Mr. Moleta, or at least that Mr. Moleta was a person to whom Ultramarine could reasonably look for funding security for costs. Henry J's consideration of this is demonstrated at paragraph 18 of the judgment when Her Ladyship stated 'No evidence of the means of Andrew Moleta is before the court'. This statement was made in the context of Mr. Moleta's position as explained in paragraph 13 of the judgment and the consideration of third party funders as explained in paragraph 17.

[29] In the circumstances, I agree with Mr. Rhudd. Firstly, there was no factual finding made by Henry J of stifling of Ultramarine's claim, and no appeal from the lack of such a finding. I also agree with Mr. Rhudd that the failure to appeal on this point on its own was sufficient to dispose of this point. Secondly, I can identify no error in principle in Henry J's approach in considering the burden on Ultramarine to demonstrate that an order for security for costs would probably stifle its claim. Consequently, Ultramarine fails in relation to grounds (iii), (iv) and (v).

[30] Mr. Rhudd, in his submissions, also sought to address whether the impecuniosity of Ultramarine was caused by the action of Sunsail. In so doing, he sought to set out

the various heads of claim asserted by Ultramarine and to answer them. The main purpose for this was to deny Ultramarine's assertion that the evidence in support of its contention that Sunsail had destroyed its business was unchallenged by Sunsail. Mr. Rhudd sought to identify each of the heads of claim made by Ultramarine and to identify the challenge to each made by Sunsail. This analysis would at best seek to isolate but not conclusively determine the issues. In Fakes v Taylor Woodrow Construction Ltd, the suggestion of counsel that there must be a strong prima case that the impecuniosity was caused by the defendant's breach was met with the response that it would be sufficient if there are reasonable grounds for believing that the claimant's assertions maybe correct or there is a triable issue about it. However, a determination on this point is rendered unnecessary in light of the finding above.

Ground (vi) – No Determination that the value of the claim was such that prescribed costs would amount to EC$350,000.00

[31] In relation to ground 6, Dr. Dorsett contended that Henry J erred in ordering security for costs in the amount of EC$350,000.00 when there had been no determination that the value of the claim was such that prescribed costs would amount to EC$350,000.00.

[32] Sunsail's application for security for costs did not contain a suggested figure. It merely requested security for costs 'in such amount as the court thinks fit'. The draft order accompanying the affidavit contained the figure of EC$1,000,000.00. Mr. Cochran's affidavit at paragraph 31 referenced a letter dated 1st April 2014, from Roberts & Co. which informed Ultramarine that Sunsail required security for costs from it, and enclosed a summary of costs incurred to the date of the letter and estimated future costs up to the date of the trial. The said letter requested "a proposal" for security up to circa EC$1,000,000.00 in total. Paragraph 58 of the affidavit included a statement by Mr. Cochran that 'The Claimant has not quantified the value of its claim nor has it provided any evidence for loss. However, the claimant has previously indicated that it considers that its claim is

worth in excess of ECD 4 million.' At paragraphs 64 to 66 of the affidavit, Mr. Cochran stated:

> "64. The Defendant has engaged the services of lawyers in the UK and in Antigua. UK solicitors have been used to liaise with TUI's in house Counsel in the UK, witnesses based in the UK and prepare witness evidence on behalf of the Defendant. The Estimate of Cost (as referred to above) sets out all legal costs paid by the Defendant to date. As at the date of this witness statement, the defendant has incurred legal costs of c.£189,171.60 including disbursements which at current exchange rates come out as ECD868,297.66.
>
> "65. It is anticipated that further significant costs will be incurred shortly. The Claimant has already issued an application for committal for contempt of Court against seven separate respondents. The Claimant is also threatening an application for specific disclosure, examination of witnesses by depositions (which would require witnesses to travel to Antigua from the USA and Europe), complaints to regulatory bodies for both our UK and Antiguan lawyers, an application debarring the Defendant from defending these proceedings and it intends to provide further and better Particulars in support of its claim which will require a further response from the Defendant. It is very difficult to estimate how much the costs of defending these proceedings may be because the Claimant is in the habit of issuing interim applications which I cannot anticipate. However, based on costs already incurred and the fact that the trial is likely to last not less than a week (with various witnesses being required to travel from outside the jurisdiction), I estimate those cost will be at least ECD$400,000.00.
>
> "66. Accordingly, the Defendant seeks security in respect of past and future costs in an aggregate sum of not less than ECD1,000,000.00 or whatever sum the court considers appropriate and stay of the proceedings pending payment into the Court of that security."

[33] The statement of claim filed in this action on 14th December 2007 by Ultramarine sought a multiplicity of remedies including general damages, special damages, orders for delivery up of certain items and interim injunctions.

[34] Apart from the allegation in paragraph 39 of the statement of claim (captioned 'particulars of proprietary estoppel', subparagraph 3), that Ultramarine expended approximately EC$300,000.00 to improve the property and the product it offered to Sunsail's guests, Ultramarine's claim was not quantified. Somewhat strangely, no

amounts were quantified or set out in the "Particulars of loss and Damage" and the claim for special damages was for damages to be assessed.

[35] Ultramarine filed an affidavit of Mr. Andrew Moleta in opposition to the security for costs application. At various points in the affidavit references are made to the suggested value of either individual losses or to the total loss suffered by the Claimant. At paragraph 9 of the affidavit Mr. Moleta stated:

> "The evidence of such physical loss and damage and failure to hand back assets are (sic) evidenced by the record, through communications in 2007, reports in 2008, assessment of damage in 2009, yet such knowledge of assets appears to have been deliberately omitted in the application and affidavit in support. The direct and indirect losses attributed to such unilateral action of enforced custody remain to be substantial and are the subject of an application for Summary Judgment against the Applicant/Respondent, amounting to millions of dollars."

[36] At paragraph 28 of the affidavit, Mr. Moleta stated:

> "To date the Applicant/Defendant has failed to restore the Claimant/Respondents (sic) property and allow it access to collect its belongings. The effect of such enforced custody has meant that the Claimants (sic) business has been destroyed with damages estimated to be well in excess of EC$4,000,000.00. The Applicant/Defendant has submitted costs to date of £189,171.60 (XCD 868,297.66), however most of the cost being submitted appear to be wholly unnecessary [as] the Defendant has not pursued this case economically."

[37] The foundation of Dr. Dorsett's submission on this point is premised on the general principle that the amount ordered as security for costs is fixed by reference to the probable costs of the action. It is Dr. Dorsett's argument that there was no material before Henry J which allowed Her Ladyship to conclude that the probable costs of the action would be EC$350,000.00 and consequently there was no material before the court justifying the grant of security for costs in that amount. Consequently, the sum ordered was totally unjustified. Dr. Dorsett relies on dicta of Barrow JA in Next Level Engineering Services Ltd. v The Attorney General et al [26] where His Lordship stated at paragraph 11:

[26] ANUHCVAP2007/0017 (delivered 24th July 2007, unreported).

> "On an application for security for costs the second most important consideration, after deciding whether or not to grant security, is in what sum to order security to be given. As was stated in Keary Developments Ltd[4] [*[1995] 3 All ER 634*] the court can order full security or any lesser sum provided it is more than a simply nominal amount; it is not bound to make an order of a substantial amount. Quantum, therefore, is not a peripheral matter, but a central consideration."

[38] Dr. Dorsett explained that Ultramarine's claim is not for a specified amount; the case did not attract fixed costs under CPR 65.4 and that the party entitled to costs would only receive prescribed costs in accordance with CPR 65.5 (1) and (2) which are in the following terms:

> "65.5 (1) The general rule is that where rule 65.4 does not apply [the rule dealing with fixed costs] and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.
> (2) The "value" of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant-
> (a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or
> (b) if the claim is not for a monetary sum it is to be treated as a claim for $50,000 unless the court makes an order under Rule 65.6 (1)(a).

[39] Dr. Dorsett continued that there was nothing in the judgment of Henry J which suggests that the "general rule" as stipulated in CPR 65.5 was being departed from or that there were matters which made it appropriate for CPR 65.5 to be departed from. Therefore, he submitted, the costs liable to be paid by Ultramarine in the instant action were prescribed costs in accordance with CPR 65.5. He continued that the claim does not specify an amount that was claimed as damages, that there was no agreement between the parties as to the value of the claim and there has been no sum stipulated by the court as the value of the claim. According to Dr. Dorsett, no application was made pursuant to CPR 65.6(1)(b) to have prescribed

costs calculated and no application was made for a costs budget under 65.8(2) and that in any event it was not now possible as the first case management conference had long gone.

[40] Dr. Dorsett relied on dicta from Barrow JA in Next Level Engineering at paragraphs 13 and 14 in support of his proposition where His Lordship stated:

> "Because the regime of prescribed costs is such a distinct feature of our CPR 2000 the concentration of our courts, when considering the amount in which security for costs should be ordered, has to be on the amount in which prescribed costs are likely to be quantified at the end of the trial or appeal …"
>
> "The amount the fourth respondent spent on the High Court proceedings, therefore, provides no assistance for the purpose of quantifying the likely costs that could be awarded on the appeal."

[41] According to Dr. Dorsett a prescribed costs figure of EC$350,000.00 would require a claim with a value of $44,750,000.00. He submitted that the amount of EC$350,000.00 ordered by the judge may have been triggered by Mr. Cochran's suggestion of an estimate of $400,000.00 for the costs of the trial of the matter, but that based on the authority of Next Level Engineering, that suggestion was wholly irrelevant. Consequently, there was no material, evidential or otherwise, from which it could be deduced that the sum of $350,000.00 was the amount in which prescribed costs were likely to be quantified at the end of the trial, and that accordingly, the learned judge erred. Dr. Dorsett suggested that the claim would therefore have a default value of $50,000.00 under CPR 65.5(2)(b). I pause here to observe that CPR 65.5(2)(b) applies to a non-monetary claim, not to an unquantified monetary claim.

[42] Mr. Rhudd, in response, suggested that the Court has a wide discretion as to the quantum of security in these circumstances taking into account what costs it considers that a defendant might receive on taxation during the proceedings. In support of this proposition, he sought to rely on the case of Procon (Great Britain)

Ltd. v Provincial Building Co. Ltd. and Another[27] in which the Court of Appeal refused to interfere with the discretion of a judge ordering security to be paid so as to cover the eventuality of an award of indemnity costs.

[43] Mr. Rhudd further submitted that in this instance, the sum of EC$350,000.00 falls far short of the actual costs already incurred by Sunsail and is also less than the costs estimated to be incurred by Sunsail given the fact that there are various matters to be resolved in this case including Ultramarine's appeal against the discharge of the injunctions (the progress of which is not known to Sunsail), Ultramarine's interlocutory application for summary judgment, Ultramarine's claim for committal for alleged contempt of court, a proposed interlocutory application for specific disclosure and the trial of the substantive claim. According to Mr. Rhudd, by the end of these proceedings Sunsail's true costs are likely to be several times the level of security which Ultramarine has been asked to provide.

[44] Mr. Rhudd further argued that Mr. Cochran in his affidavit makes reference to an Estimate of Costs which was exhibited at pages 2-24 of Exhibit PC3 and makes clear that the schedule contained therein sets out all of the legal costs paid by Sunsail to that point and an estimate of the further costs to be incurred. This Estimate of Costs was signed by Mr. Rhudd certifying that it was a true and accurate estimate and that the costs contained[28] in the estimate do not exceed those payable by Sunsail in the proceedings. He continued that Ultramarine did not make any representations that Sunsail would not be entitled to recover any costs in excess of the prescribed costs which it (Ultramarine) now considers would be the only applicable calculation of costs in these proceedings. He sought to rely on the fact (which he says Henry J appreciated) that the majority of the case so far has been spent dealing with various interim applications issued by Ultramarine, when the judge stated that the case had had a "tortured history".[29] He also sought to rely on Her Ladyship's reference to the hope of Michel J in 2012 that, having

[27] [1984] 1 WLR 557.
[28] The word "composed" was used.
[29] This description did not originate with Henry J; it was a report of what had been stated.

discharged the injunctions, the matter would proceed to trial expeditiously. Henry J noted that instead, more interlocutory applications followed. Mr. Rhudd, continuing in this vein, submitted that Ultramarine has ignored the fact that all costs in respect of interlocutory applications fall to be assessed either at the resolution of that application or (as is likely to be the case in the current proceedings) at the resolution of the claim pursuant to CPR 65.11. He asserted that Henry J was quite correct to specifically point to the substantial costs incurred and to be incurred in respect of interlocutory applications as those costs would fall outside the prescribed costs regime in any event. He submitted that the cost of each injunction application heard by the court to date and the cost of the respondent's application to have those injunctions discharged have yet to be determined with an order in each instance that there be costs in the cause.

[45] According to him, the costs of each application would fall to be determined in accordance with CPR 65.11 and not the prescribed costs regime, and the nature of these applications including demands for witnesses to travel from overseas would create special circumstances justifying costs in each application to be assessed and not capped by CPR 65.11(7). He further submitted that as regards the question of prescribed costs, whilst the court has not valued Ultramarine's claim, in his affidavit in opposition to the application, Mr. Moletta at paragraph 28 stated that the claim is worth well in excess of EC$4,000,000.00. Mr. Rhudd argued that at that level alone the costs associated with the substantive claim would be EC$136,500.00 [30] and this is before taking into account any of the various interlocutory applications.

[46] Moreover, he argued, Henry J was entitled at her discretion to consider to what extent the court may award costs at a higher or lower value other than the "likely value". Pursuant to CPR 65.6(1)(b), Sunsail is at liberty to request that a value be placed on the claim which is higher than the "likely value" on the basis that the prescribed costs based on the "likely value" are substantially inadequate.

[30] This is Mr. Rhudd's calculation.

According to Mr. Rhudd, the submissions made by Ultramarine fail to take into account the relevant provisions of CPR 65.6 which enabled a party to apply at case management to determine the value to be placed on a case which has no monetary value, or if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value.

[47] Mr. Rhudd concluded his submission on this point by stating that the question now before this Court is whether the Court can be clearly satisfied that Henry J exercised her discretion on a wrong principle. He suggested that given the various alternative ways in which a court may exercise its discretion to award costs in these proceedings, Ultramarine has no basis for concluding that Henry J went wrong in the exercise of her discretion on the subject of quantum.

[48] It is unfortunate that Henry J did not provide any explanation of how she arrived at the figure of EC$350,000.00 as security for costs. From the judgment, it is clear that Her Ladyship noted that Ultramarine had referred to the costs regime under CPR Part 65 as she refers to it in paragraph 5 thereof. The only reference to any basis for any quantification appears in paragraph 19 where Her Ladyship stated:

> "The applicant refers to a letter from its Counsel to Andrew Moleta in 2014, in which Counsel set out the costs it had incurred to date, gave an assessment of future costs and requested security for cost (sic). The letter stated as follows:
>
> > 'Despite numerous requests for clarification of your financial position and details of who is funding this claim on your behalf, you have refused to provide a response. Our client is extremely concerned that on the basis that you appear to be impecunious, do not appear to be ordinarily resident in Antigua and have not generated any income since 2007, you will not be able to comply with an Order to pay our client's costs should it successfully defend this claim.
> >
> > Consequently, our client requires security for costs. Our client has already incurred the following costs in defending this claim:
> >
> > £59, 376.38 pound sterling with ASB Law LLP
> >
> > EC$75, 000.00 with Charlesworth Brown

€29, 839.20 pound sterling in expenses

Furthermore, we estimate that the additional costs of defending this claim to trial will be at least EC$400,000.00'

"[20] There was no response to the letter from Ultramarine. In Mr. Moleta's further affidavit in response, he challenges the credibility of the figures claimed by the applicant."

[49] A fundamental difficulty with Mr. Rhudd's argument is immediately apparent. As a general principle, the amount of security ordered on an application for security for costs is fixed by reference to the probable costs of the action. A calculation of the probable costs of the action is dependent on the applicable costs regime. In awarding security for costs a judge must exercise his or her discretion within the parameters of the applicable costs regime. The applicable costs regime must mean the specific regime that applies to the case at the date of the application – not any of the alternative regimes that might have otherwise applied had an application been made to apply any one of them. In this case, at the time of the security for costs application, the applicable costs regime (at least for the substantive claim) was undoubtedly the prescribed costs regime as stipulated by CPR 65.5(1). Mr. Rhudd's argument that there was ample opportunity for Sunsail to apply to the court to disapply the prescribed costs regime and to utilise an alternative costs regime that would increase the award of costs cannot be accepted as providing a basis for quantifying costs for the simple reason that no such application had been made. Mr. Rhudd's approach would lead to speculation and eliminate the element of certainty in relation to costs calculations that CPR 65.5(1) introduced by making prescribed costs apply as the general rule. It would allow a judge hearing a security for costs application to simply consider the possibility of alternative regimes within which to quantify the likely costs, when a formal application to apply any particular regime had not been made, and also when such an application might very well not succeed if made later, or have an unanticipated result. There would then be no proper correlation between the amount ordered for security for costs and the actual amount likely to be awarded as costs in the action. It would appear that in following the United Kingdom practice of submitting a

schedule of costs in support of its application, Sunsail did not consider the particular costs regime within which it was operating. The position taken by this Court in Next Level Engineering is apposite. At paragraphs 13 and 14 of the judgment Barrow JA had this to say:

> "13. In that light, what would be an appropriate amount to order for security for costs, assuming without deciding that it would be appropriate to order security for costs? It seems fairly clear that counsel did not think about the amount of security by reference to the value of the claim on appeal. The affidavit filed in support of the application by the fourth respondent simply stated that the fourth respondent had spent some $75,000.00 as legal fees for the High Court proceedings and that figures would climb in view of the appeal. Because the regime of prescribed cost is such a distinct feature of our CPR 2000 the concentration of our courts, when considering the amount in which security for costs should be ordered, has to be on the amount in which prescribed costs are likely to be quantified at the end of the trial or appeal, and not nearly as much (if at all) on the costs actually incurred by a party.
>
> 14. The amount that the fourth respondent spent on the High Court proceedings, therefore, provides no assistance for the purpose of quantifying the likely costs that could be awarded on the appeal. Indeed, even if the fourth respondent had estimated the costs it will incur in resisting the appeal that would not have provided much, if any, assistance. As suggested above, what would provide definitive assistance would be the amount in which costs of the High Court proceedings are awarded, but as we have seen, those costs have not been quantified. Absent quantification, counsel could have sought to persuade this court as to the amount the High Court is likely to award. I am not sure how successful such an attempt would have been in this case because of the significant scope for difference in opinion as to how to interpret and apply the judge's order that the appellant must pay the defendants' costs. However difficult it might have been, counsel needed at least to have considered and made submissions as to what was the proper basis for this court to make an order for security for costs of this appeal."

[50] Consequently, I agree with Dr. Dorsett that, being restricted to the prescribed costs regime, there was no basis for Henry J to have awarded an amount of EC$350,000.00 as security for costs. I am left to conclude, based on paragraph 19 of the judgment, that Henry J relied on the submitted schedule of costs already

incurred and yet to be incurred in making her determination, and also must not have considered herself bound by CPR 65.5(1) and in so doing the learned judge committed an error of principle. In order to justify an award of EC$350,000.00 under prescribed costs the claim required a valuation of EC$44,750,000.00. There was no material before the court that could have justified such a valuation and which could have supported Henry J's award. I therefore also agree with Dr. Dorsett that the award of EC$350,000.00 as security for costs was plainly wrong and cannot stand. The award of EC$350,000.00 as security for costs is therefore set aside. This of course goes solely to quantification.

[51] However, there was material before the judge, which material is now before this Court, which can be utilised by this Court in determining the likely prescribed costs of the action. This was in the form of the statement by Ultramarine contained in Mr. Moleta's affidavit in opposition to the security for costs application, where he quantified Ultramarine's claim when he stated that the claim was for at least EC$4 million. In response to a question from this Court as to whether that statement could legitimately substitute for, and qualify as, a valuation, Dr. Dorsett was adamant that it could not. He submitted that such a figure had to be contained in the pleadings, and that the figure in the affidavit could not be accepted by this Court as it was not tested and needed to be scrutinised. This submission by Dr. Dorsett was nothing short of startling. It is tantamount to Dr. Dorsett discrediting the evidence of his own client that he submitted to the High Court, a position adopted, no doubt, out of sheer convenience. That submission might constitute a legitimate objection if coming from a third party, but it would lie ill in the mouth of Ultramarine to seek to question its own evidence. A similar situation arose in Astian Group Inc. et al v Alfa Petroleum Holding Limited et al.[31] There, the appellant's claim in the High Court was for general damages, and no amount was stated in the statement of claim. Security for costs was expressly ordered on the footing that the value of the claim was US$383,173,392.00 and the appellants were directed to give security for costs in the sum of $73,296.26. Although no figure had been stated in

[31] BVIHCVAP2004/0011 and 0017 (delivered 27th June 2005, unreported).

the statement of claim, the appellants in their skeleton arguments had asserted that the value of the claim was US$383,173,392.00. Additionally, the respondents pointed out that the appellants had also asserted that this was the value of their claim on their application for a without notice freeze order that the appellants had obtained against the respondents. I find Barrow JA's response to the argument of the appellants that there had been no application to either stipulate or determine the value of the appellants' claim to be superbly applicable to the present case:[32]

> "All the synonyms for nimble resonate in wonder at the argument of the appellants that neither Gordon JA nor the trial judge ever heard any application to either stipulate or determine the value of the appellant's claim and that, therefore, the claim remains, even now, an unvalued claim. Hence, the appellants argued, pursuant to rule 65.5 (2)(b)(iii) the court must treat their claim as having a value of EC$50,000.00. On that value the respondent would be limited to costs of 10% of EC$14,000.00=EC$1,400.00. Remarkably, the appellant simply ignored the fact that they had persuaded both the trial judge and Gordon JA that the minimum value of their claim was US$383,173,392.00. It is a matter of some regret that the short shrift that the appellants' argument deserves does not permit dilation upon the sleight in the appellants' attempt to escape the inescapable.
>
> "It is inescapable that the value of the claim was determined by both the High Court judge and by Gordon JA to be the amount stated by the appellants. That was the basis upon which the appellants obtained an order in the High Court freezing that amount and, also, the basis upon which the appellants argued about the amount of security for cost that they should be required to give. There was no need for an application to stipulate or determine a value when the claimants themselves stated to the court what was the value of their claim. It is simply not open to the appellants now to say that the value of their claim was never determined." (Emphasis provided)

[52] Utilising the figure of EC$4,000,000.00 as the value of the substantive claim, the resultant prescribed costs would be EC$146,250.00. That would provide the benchmark against which quantification of security for costs could be made. In relation to considering security for costs on the various applications mentioned by Mr. Rhudd, the same principle would apply. Quantification would be fixed by reference to the probable costs to be awarded on those applications, calculated in

[32] BVIHCVAP2004/0011 and 0017 (delivered 27th June 2005, unreported), at paras. 5 and 6.

accordance with the appropriate costs regime, which Mr. Rhudd suggested was CPR 65.11. But it should not be for this Court to attempt to estimate the likely costs awards that might be made on these applications without the appropriate information. Sunsail (and Ultramarine in response) would have been required to guide the court below by providing submissions sufficiently detailing the various applications, any costs orders made on such applications, and the costs likely to be awarded. No such submissions appeared to have been made. The uncertainty which this Court faces in such an unassisted exercise is further compounded by Mr. Rhudd's submission that the nature of the applications including demands for witnesses to travel from overseas would create circumstances justifying costs in each application to be assessed and not capped by CPR 65.11(7). I refer to and adopt the concerns expressed by Barrow JA at paragraph 14 in Next Level Engineering. Further, as Morrison J stated in Kevin Moore v Symsure Limited,[33] without this guidance '… the court will be engaged in the futility of groping for figures in the dark, which, of course, it will not do'.[34] For this reason, I am not in a position to properly determine what costs might be awarded on the various interlocutory applications and consider myself consequentially not merely hampered, but stifled, in determining what sums might be awarded as security for costs in relation thereto. Consequently I will not consider these applications when determining what amount, if any, should be ordered for security for costs.

Ground (ix) – Application for security for costs not made promptly

[53] On this point, Dr. Dorsett submitted that CPR 24.2 provides that where practicable an application for security of costs should be made at a case management conference or pre-trial review and that in keeping with settled principle and practice a late application for security for costs should in general only be entertained if there is a material change in circumstances, such as a marked deterioration in the financial position of the claimant or where there is blameworthy conduct on the part of the claimant that has caused 'the amount in which prescribed costs are likely to

[33] [2013] JMSC Civ 209.
[34] At para. 32.

be quantified at the end of the trial' to unduly escalate. According to Dr. Dorsett, Sunsail did not provide any justification or rationale, or any proper justification or rationale, for the extreme delay and accordingly the learned judge erred in exercising her discretion to order security for costs contrary to settled principle and practice. Dr. Dorsett submitted that Ultramarine could not be blamed for the lateness of the security for costs application and that the delay in applying for security for costs on 22nd December 2014 has to be viewed in the context of Sunsail's admitted knowledge of Ultramarine's financial condition as far back as 2006 as disclosed at paragraphs 46-47 of Mr. Peter Cochran's affidavit.

[54] In this regard, Dr. Dorsett relied on the seventh principle enunciated in Keary Developments Ltd. which states as follows:

> "7. The lateness of the application for security is a circumstance which can properly be taken into account (see The Supreme Court Practice 1993 vol 1, para 23/1-3/28). But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."[35]

[55] Dr. Dorsett submitted that the general rule is that an application for security for costs must be made promptly in litigation proceedings. He relied on the Canadian case of Wall v Wells[36] where MacDonald CJA held:

> "One rule, which so far as I can find, has never been departed from by English Courts, is that the defendant must apply promptly. Cases are to be found in which security was not applied for until considerable costs had been incurred, but when examined they will be found not to be inconsistent with the rule that costs must be promptly applied for, for example, when the right to security comes into existence in the middle of litigation by reason of bankruptcy or by reason of the departure of the plaintiff from the country. It can safely be said that where the defendant is entitled to security for costs at the beginning and does not apply with

[35] At p. 542.
[36] [1926] 4 DLR 799 at pp. 800-801.

> promptitude, having regard to the circumstances of the particular case, the Court will seldom, if ever, order security to be given.
>
> The reason so often expressed has been concisely restated by Cotton L.J. in Ellis v Stewart (1887), 35 Ch. D. 469, at pp.459-460 in these words:- "It is the duty of a respondent who applies for security for costs to be prompt in his application, that the Appellant may not go on incurring expenses which in the event of his being ordered to give security for costs and being unable to find it will be wholly thrown away."
>
> Such authorities as Costa Rica v. Erlanger (1876), 3 Ch. D. 62; Sturla v. Freccia, [1878] W.N. 161; Brocklebank v. King's Lynn, S.S. Co. (1878), 3 C.P.D. 365; Massey v. Allen (1879), 12 Ch. D. 807; Re Smith, Bain v. Bain (1896),75 L.T. 46; Pooley's Trustee v. Whetham (1886), 33 Ch. D. 76; Bell v. Landon (1881), 9 P.R. (Ont) 100; Standard Trading Co. v. Seybold (1902), 5 O.L.R. 8, and many others, show that the applicant must come promptly whether for a first or for a subsequent order, and while it is in the discretion of the Court to grant it even when there has been some delay it will never be granted in respect of past costs where there has been substantial accumulations thereof."

[56] In response, Mr. Rhudd accepted that the timing of an application for security for costs is a factor which the court can properly take into account when exercising its discretion both in terms of principle and quantum. He suggested, however, that it is only one of many factors, is rarely determinative, and is fundamentally one of discretion. He referred this Court to the case of Hniadzdzilau v Vajgel and Others[37] where in an appeal against an order not to grant security due to delay, Mr. Richard Millet, QC (sitting as a deputy judge in the High Court) stated that the question of delay is a classic area of the exercise of discretion with which appellate courts should be slow to interfere. Mr. Rhudd submitted that this admonition is as true in a situation such as this where the court of first instance has determined that the lateness of the application is not a reason not to grant security.

[57] The difficulty with Mr. Rhudd's argument, that this Court should not interfere with the exercise of Henry J's discretion on this point, is that there is nothing in Henry J's judgment to suggest that Henry J considered, or exercised any discretion

[37] [2015] EWHC 1582 (Ch).

whatsoever on, this point. The lateness point was raised in the application at paragraph 30 of the affidavit of Mr. Moleta in opposition but there is no evidence that Her Ladyship considered it. I am inclined to conclude that Henry J did not consider the point as Her Ladyship specifically mentioned principles 1 through 6 of Keary Developments Ltd.[38] in the judgment but did not mention principle 7 which deals with the issue of lateness. I will therefore proceed on the basis that Henry J did not consider the point. It would therefore be for this Court to determine what effect a proper consideration of this point should have had on the exercise of the court's discretion in the circumstances.

[58] In addressing this point, Mr. Rhudd explained that the circumstances surrounding the timing of the application were set out in the affidavit of Mr. Peter Cochran, and that there were various factors which led to the application being made in 2014, notwithstanding that proceedings were issued in 2007. He outlined these, which I choose to place into two categories, as follows:

(1) (a) Firstly, the fact that Ultramarine was no longer a trading entity was not known to Sunsail until 28th July 2011.[39] At that stage Mr. Moleta, on behalf of Ultramarine, had stated under oath that Ultramarine had several assets, "like boats, diving equipment, vehicles". Sunsail had no way of establishing the truth of this claim and if it had been true that Ultramarine had such significant assets this would have coloured Sunsail's decision as to whether to pursue an application for security.

(b) Consequently, on 6th September 2011 (less than six weeks later) Sunsail's legal representative wrote to Ultramarine's legal representative requesting evidence of the same. During the course of the next three years Ultramarine failed to properly advance the underlying claim and remained evasive, refusing to provide any

[38] See para. 16 of lower court judgment.
[39] See para. 34 of Mr. Cochran's affidavit.

information about its financial position or the financial position of Mr. Moleta.

(c) The correspondence showing the attempts made by Sunsail to ascertain this information[40] and the refusal of Ultramarine to provide the same is set out in the exhibit to Mr. Cochran's affidavit filed in support of the application. It was made clear to Ultramarine on a number of occasions that if it continued to refuse to provide information an application for security for costs would have to follow.

(d) Consequently, Mr. Rhudd argued that, it is not correct for Ultramarine to argue that Sunsail has not provided a rationale for the timing of the application[41] nor is it accepted that Ultramarine cannot be blamed for the lateness of the application.[42]

(2) (a) Secondly, whilst the application was made some seven (7) years after the commencement of the claim, the claim is still at a relatively early stage having not been expeditiously prosecuted by Ultramarine. There remains questions of disclosure and further exchange of witness evidence as well as further interlocutory applications issued by Ultramarine with which Sunsail will have to deal. The manner in which Ultramarine has conducted this litigation could not have been anticipated at the outset and was an important part of the evidence set out in the affidavit of Mr. Peter Cochran in support of the application for security for costs.[43]

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[40] Here referring to the clarification of Ultramarine's financial position and confirmation of who was funding its litigation.

[41] See para. 40 of Ultramarine's submissions filed on 11th April 2016.

[42] See para.39 of Ultramarine's submissions filed on 11th April 2016.

[43] From Mr. Cochran's affidavit, proceedings began by Ultramarine issuing a without notice application for injunctive relief on 23rd November 2007, the Statement of Claim was filed on 14th December 2007. Ultramarine made further applications for injunctive relief on 22nd June 2009 and 20th October 2009. On 2nd March 2010, Ultramarine made an application for committal of Mr. Cochran and Ms Saraita Waite for contempt of court. The application was dismissed on 27th July 2011 and costs of EC$3,000.00 ordered against Ultramarine which remain unpaid. Sunsail applied on 16th September 2010 to discharge the injunctions and the court discharged the injunctions in August 2012. At that stage Sunsail hoped that the matter would proceed promptly to trial but Ultramarine sought to appeal that decision (the outcome of which

[59] According to Mr. Rhudd,

> "Whilst in some instances the passing of time between the issue of a claim and the application for security for costs may be a factor in a decision not to grant an Order for security, in this instance the passing of time since the issue of the claim was a further factor in support of the Respondent's application because the proceedings have developed (both in terms of complexity and costs) in a manner that neither the Respondent nor the Court could have possibly anticipated at the outset."[44]

[60] In this regard, in seeking to cast some responsibility on Ultramarine for the lateness of the application, Mr. Rhudd sought to rely on the approach adopted by Gibson LJ in Keary Developments Ltd. where His Lordship stated:

> "The Official Referee misdirected himself, in my view, in taking into account, as a factor against the defendants the fact that the application was late, when that was caused by the plaintiff, and in treating it as a material consideration in not ordering security. It was proper for him to look at the lateness of the application, and to take note of the substantial costs that had already been incurred on both sides. But he should have paid attention to the fact that an even larger sum by way of costs was yet to be incurred. He should have exercised his discretion in relation to an order for security bearing that in mind, as well as the fact that he held the defendants to be blameless. As he says, they had had the lateness forced upon them by the course the action had taken."[45]

[61] As stated earlier, in his affidavit in support of the application for security for costs Mr. Cochran indicated at paragraph 34 that it was only in July of 2011 that it was revealed to Sunsail that Ultramarine was no longer a trading company, and it had previously been Sunsail's understanding that Ultramarine was still a trading business. Further during the hearing on 28th July 2011, Mr. Moleta, when referred to the undertaking as to damages that Ultramarine had given to the Court as part of its application for injunctive relief, indicated that Ultramarine would satisfy its undertaking that it gave on 14th December 2007 because it had several assets – like boats, diving equipment, vehicles. Mr. Cochran proceeded to outline the requests made to Ultramarine for clarification of its financial position and

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is unknown to Sunsail) and made an application on 30th October 2012 for committal and/or sequestration orders for contempt of court against 8 parties. On 22nd August 2014, Ultramarine made a further application requesting a 2 day hearing to consider its application dated 30th October 2012.

[44] Para. 71 of the respondent's submissions filed in 6th October 2016.

[45] At p. 544.

confirmation of who was funding this obligation for Ultramarine, commencing with the letter from Roberts & Co of 6th September 2011, i.e. less than two months after the revelation to Sunsail that Ultramarine was no longer a trading company. That request was followed by similar requests by correspondence of 9th January 2013, and 18th February 2013. Finally, following a further request made directly to Ultramarine, Mr. Moleta stated that he did not intend to provide the information (i.e. in relation to himself) and also that Ultramarine had no obligation to do so. Mr. Cochran's affidavit outlined that further requests for the financial information were made throughout 2014 including e-mails from Andrew Frake of ASB (the UK Law Firm) to Mr. Moleta dated 3rd April, 2nd July, 29th October, 28th November[46] and 2nd December and that Mr. Moleta continuously ignored these requests. In Mr. Moleta's affidavit in opposition a reference to the lateness of the application occurs in paragraph 30 where it was stated that Sunsail could have made the application at case management in 2013 and in paragraph 31 where it was suggested that the timing of the application showed that it was being used as an instrument of oppression.

[62] On the facts as set out in both affidavits, I am satisfied that Sunsail only learnt in July 2011 that Ultramarine was not trading. And even then Mr. Moleta was still asserting that Ultramarine had sufficient assets to satisfy its previous undertaking as to damages connected to its injunction application. In September 2011, Sunsail made its first of many requests to Ultramarine to confirm how Ultramarine was funding the proceedings and whether the proceedings were being funded by Mr. Moleta. Finally by e-mail of 18th January 2014, Mr. Moleta indicated that he did not intend to provide that information, whether in relation to Ultramarine or himself. Sunsail's legal representative in a letter of 1st April 2014 informed Ultramarine that Sunsail required security for costs and Sunsail then filed its application for security for costs on 22nd December 2014. Was this delay inordinate and inexcusable? Firstly, what should be considered to be the period of delay? From the

[46] In this correspondence Mr. Moleta was informed that a security for costs application had been prepared by that Sunsail was awaiting answers to certain (financial) questions regarding Ultramarine some of which were outstanding since September 2011.

impecuniosity standpoint, it is sensible that time should start to run only at the point when it would have been reasonable for Sunsail to conclude that Ultramarine would be unable to satisfy any costs order that might eventually be obtained against it if it lost the claim.[47] Sunsail would have been put on notice in July 2011 with the revelation that Ultramarine was not then trading. But in the very same hearing Mr. Moleta had asserted that Ultramarine had assets. The action taken by Sunsail in short order thereafter to request that Ultramarine disclose its financial condition was reasonable. This was in the form of the letter from Roberts & Co. of 6th September 2011 to Ultramarine's attorneys asking for clarification of Ultramarine's financial position and confirmation of who was funding Ultramarine's claim, which request according to Mr. Cochran was ignored. What then happened is that Sunsail persisted in its request for this information ending with the response from Mr. Moleta by his email of July 2014 indicating that the Ultramarine was not required to disclose the information. Granting to Sunsail a reasonable amount of time within which to wait for a reply from Ultramarine to the letter of September 2011, was Sunsail entitled to wait for almost three years before filing its application for security for costs? I think this period of delay on the part of Sunsail cannot be justified on the basis that it was still seeking clarification on Ultramarine and Mr. Moleta's financial condition. It is arguable that the very failure to receive the requested information within a reasonable time should have catapulted Sunsail into action.

[63] But all of the circumstances of the case must be considered and the question of what effect Sunsail's delay should have on its application for security for costs still remains entirely a matter of discretion. A determination of what effect, if any, Sunsail's delay should have, must commence with a consideration of the reason why security for costs applications should be made promptly in the first place. The requirement for promptness does not exist in a vacuum. The reason that is advanced for requiring applications to be brought in a timely manner is to prevent a claimant from being lulled into a belief that it would be permitted to proceed to trial

[47] Trillium Motor World Limited v General Motors of Canada Limited and Cassels Brock & Blackwell LLP 2016 ONCA 702, Paulson Investments Limited v Jons Civil Engineering Limited [2012] IEHC 541 at para. 48.

without being asked to give security.[48] This is to prevent a claimant from proceeding at possibly considerable expense to himself down to trial and then find himself faced with an order for security with which he is unable to comply. In **Wall v Wells** [49] MacDonald C.J.A. explained the reason as follows:

> "It is the duty of a respondent who applies for security for costs to be prompt in his application, that the Appellant may not go on incurring expenses which in the event of his being ordered to give security for costs and being unable to find it will be wholly thrown away."

[64] I do not think that mere delay in and of itself should be the determining factor.[50] Consideration should also be given to whether there exists any evidence from the claimant demonstrating that the delay in making the application has somehow caused prejudice to the claimant, 'in other words, evidence showing that they might have acted differently had they been aware that such a motion would be brought down the road'.[51] The materiality of the delay comes into play where the delay has led the claimant to act to his detriment.[52]

[65] In this case, I find the following factors to be pertinent. The reasons advanced by Sunsail for waiting for almost three years before bringing the security for costs application were unconvincing. When Ultramarine did not, within a reasonable time, provide the information requested in the letter from Roberts & Co. of September 2011, Sunsail shortly thereafter would have been entitled to move for security for costs. However, although that letter did not threaten an application for security for costs, it certainly foreshadowed it and the probability of a subsequent application for security for costs ought to have been apparent to Ultramarine. In fact,

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[48] See 423322 Ontario Ltd. et al v Bank of Montreal (H.C.J.), 1988 CanLII 4678 (ON SC), also described as being lulled into a false sense of security. See: Stepps Investments Ltd et al v Security Capital Corporation Ltd. 1973 Can LII 631 (ON SC).

[49] Supra note 21.

[50] 42332 Ontario Limited v Bank of Montreal, supra note 47, Shuter v Toronto Dominion Bank, 2007 Can LII 37475 (ON SC).

[51] Shuter v Toronto Dominion Bank, 2007 Can LII 37475 (ON SC), Stepps Investments Ltd et al v Security Capital Corporation Ltd. 1973 Can LII 631 (ON SC)., 408466 Ontario Ltd. v Fidelity Trust Co 10 C.P.C. (2d) 268, Keary Developments Limited, Paulson Investments Ltd v JONS Civil Engineering Ltd. [2012] IEHC 541.

[52] See Atkins Court Forms page 19 para 5 - citing Jenred Properties Ltd. v Ente Nazionale Italiano per il Turismo (1985) Financial Times, 29 October CA, Paulson Investments Ltd v JONS Civil Engineering Ltd. [2012] IEHC 541

Ultramarine did not argue that it was surprised by the application. Ultramarine's argument was that the application could have been brought at case management in 2013 and that it was being used as an instrument of oppression. Thus, on this particular point, as far as lateness is concerned, Ultramarine was therefore alternatively[53] complaining not of a three year delay but of approximately a one year delay. The evidence suggested that the case was not being prosecuted expeditiously by Ultramarine and that it still had a substantial way to go before it would be ready for trial, apparently predominantly due to various interlocutory applications either brought or threatened by Ultramarine. Further, and assuming a generous degree of weight from my perspective, apart from simply complaining of delay, Ultramarine advanced no evidence of any actual prejudice that it suffered, of any costs that it incurred during the period of delay that might be thrown away (if security was ordered and Ultramarine could not raise it), which could be pinned specifically to the lateness of Sunsail's application. There was no evidence that any such costs were incurred by Ultramarine due to it being deceptively lulled into a false sense of security. I am cognisant that we are operating with the prescribed costs regime and that under CPR Part 65 Appendix C, various percentages of prescribed costs are allocated between various stages of an action. Because the amount of any security that may be awarded is to be fixed based on the likely costs that may be ultimately awarded within the prescribed costs regime, one may be tempted to seek to also apply the prescribed costs regime in determining what costs if any may be deemed to have been incurred by a claimant between particular stages in an action. Continuing in that vein, it may be possible to infer, without more, and although somewhat imprecisely, that within particular stages, a certain percentage of prescribed costs would have been technically "incurred" by a claimant. But the prescribed costs regime applies to the quantification of costs as between parties, and not necessarily as between a legal practitioner and his client. The costs that would be incurred by Ultramarine to its legal practitioner would be primarily dependent on any agreement between them. I do not think that I am entitled to assume that that agreement would reflect the prescribed costs regime.

[53] I say "alternatively" because Ultramarine also complained of a longer period of delay.

Consequently, the onus would have been on Ultramarine to demonstrate what action it took and what costs it incurred during the period of delay, and which could now be potentially thrown away if an order for security for costs was made that it could not satisfy. This would cover the period between the date when Sunsail should have made its security for costs application and the date when it actually did so.[54] Those costs would have been the costs that would have been incurred by Ultramarine during a period when Sunsail would have had the requisite degree of knowledge of Ultramarine's poor financial position, and would therefore be relevant to the question of prejudice owing to the delay.[55] Any costs incurred by Ultramarine before that date would not. There was no evidence of any costs incurred by Ultramarine during this period, or specifically of any other prejudice that it would suffer. I am also cognisant of the fact stated earlier that the slow pace of this matter proceeding towards trial has been predominantly due to the multiple interlocutory actions brought by Ultramarine, and from Sunsail's perspective, a substantial percentage of costs still remains to be "incurred" up to trial within the prescribed costs regime. I also agree that some blame can be laid at the feet of Ultramarine for being evasive and failing to provide the requested financial information.

[66] Based on the foregoing, and in the exercise of my discretion, I do not agree with Dr. Dorsett that the effect of the delay should be for me to deny the application. I also see no basis on which to discount any figure that I would otherwise be inclined to grant as security for costs to reflect the delay in Sunsail making the application. In my discretion I am minded to award security for costs in the amount of 50 per cent of the likely prescribed costs of EC$146,250.00, amounting to EC$73,125.00.

[54] That is in 2012 before case management, and then in 2014 after case management. Apparently somewhere between stages 2 and 3 in Appendix C.
[55] Paulson Investments Ltd. v JONS Civil Engineering Ltd. [2012] IEHC 541.

Ground (i) – That the learned judge erred in determining that Ultramarine was ordinarily resident outside of the jurisdiction

[67] As will be explained below, as the application was premised both on section 548 of the Companies Act, 1995 and CPR 24.2(1) and 24.3(g), it was not necessary that Sunsail prevail on this ground if it prevailed on its section 548 application. However, on this ground it was Dr. Dorsett's submission that Henry J at paragraph 15 of the judgment determined that Ultramarine's 'directing mind and control is outside of Antigua. Therefore an order for security for costs ought to be given consideration'. According to Dr. Dorsett, this finding comes at the end of the section of the judgment entitled "Ordinarily Resident out of the Jurisdiction" and therefore it appears that Henry J made a finding that Ultramarine is ordinarily resident out of the jurisdiction. I agree with Dr. Dorsett that Henry J appears to have made that finding. According to Dr. Dorsett, that finding by Henry J was flawed. Dr. Dorsett's basic argument was premised on a statement in Davis v British Geon Ltd.[56] that 'it seems to me to be obvious that a company can only reside where it carries on business' and a statement in New York Life Insurance Company v Public Trustee[57] by Atkin LJ that '[i]t appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business', and repeated by the Privy Council in Kwok Chi Leung Karl (Executor of Lamson Kwok) v Commissioner of Estate Duty.[58]

[68] From the foregoing, Dr. Dorsett sought to elicit support for his submission that since it was not advanced by Sunsail that Ultramarine was doing business (or ordinarily doing business) outside of Antigua, there was no finding that Ultramarine carries on business outside Antigua, and therefore it cannot be said that Ultramarine is ordinarily resident outside the jurisdiction of Antigua. Dr. Dorsett's actual submission was as follows:

> "The Respondent at ground three of its application for security for costs contended that the Appellant 'is not known to be operating or otherwise involved in any business venture or activity within the State of Antigua and

[56] [1957] 1 QB 1 at para 21.
[57] [1924] 2 Ch 101 at 120.
[58] [1988] 1 WLR 1035 at 1041.

> Barbuda'. It was not advanced by the Respondent that the Appellant was doing any business (or ordinarily doing business) outside of Antigua. If there is no finding that the Appellant carries on business outside of the jurisdiction of Antigua it cannot be said, it is respectfully submitted, that the Appellant is ordinarily resident outside the jurisdiction of Antigua."[59]

[69] The authorities cited by Dr. Dorsett do not assist him. The statement in Davis v British Geon Ltd. does not mean that a company must be trading in a particular place before it can be said to be resident there. And the statements in New York Life Insurance Co v Public Trustee and Kwok v Commissioner of Estate Duty merely confirm that a corporation may be resident in more than one place.[60] It appears that Dr. Dorsett is defining the phrases "doing business" and "carrying on business" to mean carrying on trading activities. His suggestion must then be that for a company to be ordinarily resident in a certain place it must be carrying on business, in the sense of trading, in that place.[61] And since Ultramarine was not shown to be carrying on business (in the sense of actually trading) outside Antigua, it could not be found to be resident outside of Antigua. But I do not understand the phrase "carry on business" or any variation thereof to be limited to the trading activities of a company. A company can only act ultimately through a human agent and the activities of a company exercised by that human agent relative to the exercise of its central control and management must fall within the definition of "carrying on business". That is inherent in the decisions in DeBeers Consolidated Miners Ltd. v Howe (Surveyor of Taxes)[62] and Re Little Olympian Each Ways Limited.[63] In De Beers Lord Loreburn said at page 458:

> "…[T]he principle is that a company resides for purpose of income tax where its real business is carried on … I regard that as the true rule and the real business is carried on where the central management and control actually abides."

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[59] At para. 44 of the appellant's submissions filed on 11th April 2016.

[60] In that regard, the fact that a corporation may be resident within the jurisdiction does not negate the possibility that it may simultaneously be resident outside the jurisdiction. The former does not negate the latter and it is the latter that may give jurisdiction under CPR 24(3)(g). See Tjong Very Sumito and others v Chan Sing Eng and others [2010] SGHC 344.

[61] Trading operations can occur in one place while central control and management may be located elsewhere -see Wood & Anor v Holden (HM Inspector of Taxes) [2005] EWHC 547 at para. 21.

[62] [1906] AC 455.

[63] [1995] 1 WLR 560. See also Wood & Anor v Inspector of Taxes [2005] EWHC 547.

That analysis, made in the context of income tax, was comfortably applied to a security for costs application in Re Olympian.[64] The central management and control is normally exercised by the company's board of directors and so residence is normally determined by the place where the board of directors meets.[65] In the judgment at paragraph 12, Henry J correctly identified the management and control test and referred to the need to weigh several factors, including the place of incorporation, where the company's books are kept, where its administrative work is done, where the company's real trade or business is carried on, where its directors meet or reside, where its chief office is situate and where its secretary resides. At paragraph 15, Henry J concluded:

> "The Court has considered all the factors. Other than the fact that Ultramarine was incorporated here, it has no current nexus with Antigua. Its directing mind and control is outside of Antigua. Therefore an Order for Security for cost (sic) ought to be given consideration."

[70] Dr. Dorsett complains that while there is evidence that the managing director of Ultramarine is currently pursuing studies in England and hence for the time being is not resident in Antigua, there is no evidence that Ultramarine's books are kept in England, or that the company secretary or any of the company's secretarial work is done in England, or that company meetings are held in England. The complaint here appears to be that there was no evidence of the matters that Henry J listed for consideration.

[71] These complaints do not assist Ultramarine. Firstly, although there may not have been evidence in relation to every factor identified by Henry J, there was sufficient material on which Henry J could properly conclude that the central management and control of Ultramarine did lie outside Antigua. On the evidence, Mr. Moleta was the sole director and the managing director of the company. The company had ceased trading in Antigua and it appears that its only activity was and is the pursuit of this action. Mr. Moleta attributes his return to the United Kingdom to the actions by those in the United Kingdom in control of Sunsail and their attempts to

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[64] Supra note 47, at para 12.

[65] Wood & Anor v Inspector of Taxes [2005]EWHC 547.

frustrate justice which resulted in what he described as an extended trip in an attempt to address such matters. From his affidavit, he has not been resident in Antigua since after the summer of 2013. He has clearly been directing Ultramarine's activity and has, at least since late 2013, been doing so from outside of Antigua. In his affidavit, Mr. Moleta stated his intention to remain in the United Kingdom during 2015 and part of 2016. In relation to his connection to Antigua, he merely stated that he hoped to return to Antigua to continue his work across the region. Dr. Dorsett's argues that there was no evidence of board meetings held in England. But Mr. Moleta's position as sole director and his own evidence as to his relocating[66] to the United Kingdom late in 2013 to better pursue his claim, coupled with his swearing of the various affidavits in the United Kingdom adequately meet this argument. The clear inference was that Mr. Moleta alone has been directing Ultramarine and the activities of Ultramarine in relation to this matter from outside Antigua since summer of 2013. In light of this, there existed material to support the conclusion of Henry J. If there was material that would have pointed in the opposite direction, the evidential burden was on Ultramarine to present this to Henry J.

[72] As a related point, Dr. Dorsett complained that Ultramarine is a trading company but cannot now trade because Sunsail has enforced custody of its tools of trade. The suggestion appears to be that the fact that Ultramarine was not carrying on any trading activity in Antigua either ought not to be considered at all or ought to be heavily discounted because this inactivity was due to Sunsail's actions. The difficulty with this argument however is, assuming Sunsail was in fact responsible for Ultramarine's inactivity, the subsequent relocation of the central management and control of Ultramarine outside Antigua does not flow as a natural consequence from the fact that Ultramarine ceased trading, regardless of how this was caused.

[66] His actual words were "temporary relocation" para 6 ii of his affidavit in response to application for security for cost dated 17th February 2015.

[73] Dr. Dorsett further argued (as did Mr. Moleta in his affidavit) that as Mr. Moleta was in the United Kingdom for the purpose of pursuing academic studies, Mr. Moleta could not be found to be ordinarily resident there. I do not accept that, as a matter of principle, because Mr. Moleta was in the United Kingdom for the purpose of pursuing academic studies, he could not be found to be ordinarily resident there.[67] In Regina v Barnett London Borough Council, Ex parte Nilish Shah[68] the House of Lords held that:

> "… 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."

[74] What is required is that the place of residence should be adopted voluntarily and there should be a degree of settled purpose.[69] In Ex parte Nilish Shah Lord Scarman observed:

> "The purpose may be one; or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." [70]

[75] In the circumstances, I can find no error in principle in Henry J's identification of the correct legal principle for determining the ordinary residence of Ultramarine, or in Her Ladyship's application of the presented facts thereto. Ultramarine therefore fails on this ground. But I am obliged to point out that Sunsail's success on its security for costs application was not hinged to Ultramarine necessarily failing on this ground. The application for security for costs was premised on two grounds, section 548 of the Companies Act, 1995 and Part 24(2) of CPR. As was stated by Henry J at paragraph 9 of the judgment, 'Under section 548 of the Companies Act,

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[67] Reference is made to para. 6 of Mr. Moleta's affidavit which explains his return to the United Kingdom.
[68] [1983] 2 AC 309.
[69] Tjong Very Sumito and others v Chan Sing Eng and Others [2010] SGHC 344 at para. 11.
[70] At p. 344.

the sole test is the impecuniosity of Ultramarine. The non-residency of the company is not an issue.' The court below had jurisdiction to entertain the application relying solely on section 548 of the Companies Act, 1995. As George-Creque J stated in Surfside Trading v Landsome Group Inc et al: [71]

> "Most of the authorities cited in the course of argument concerned applications brought under mirror provisions to section 276 in other jurisdictions. It is clear however, given the claimant's admitted impecuniosity that it would have been open to the Applicants to apply solely on this ground. I am further of the view, given the clear wording of section 276 that notwithstanding an application being made under CPR 2000 Part 24, that where a claimant company admittedly is impecunious I am not precluded from a consideration of requiring security of such claimant company under this section even though such company may not fall within any of the categories set out under CPR 2000 Part 24.3 (a) to (g)."

The award of costs on the application of EC$2,000.00.

[76] Dr. Dorsett's final argument was that as the application for security for costs was not made at case management or at pre-trial review, the costs associated with the application fell to be quantified under CPR 65.11 (1) and (7). Under CPR 65.11(7), the costs allowed may not exceed one tenth of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances justifying a higher amount. Dr. Dorsett continued that as there was no determination of value of the claim, and no determination of prescribed costs Henry J was not in a position to assess or award costs pursuant to CPR 65.11. The foundation for that argument has disappeared as this Court has determined the value of the claim and calculated likely prescribed costs in the amount of EC$146,250.00. The $2,000.00 ordered by Henry J on the application would not infringe the one tenth rule. I therefore do not intend to interfere with the costs order made by Henry J.

[71] AXAHCV2005/0016 (delivered 20th January 2006, unreported) at para. 2.

Conclusion

[77] Consequently, Ultramarine fails in relation to grounds (i), (ii), (iii), (iv) and (v). Ultramarine succeeds partially in relation to ground (vi) and the award of EC$350,000.00 as security for costs is set aside. However, I find that there is sufficient evidence of a valuation of the claim, and that valuation would result in a prescribed costs award of EC$146,250.00. In relation to grounds (vii) and (viii), no submissions were made in relation thereto and I am unable to identify any substance in these grounds. Consequently, these grounds naturally fail. In relation to ground (ix), on the specific issue of delay, I find that having considered all the factors, this should not be a reason for denial of the security for costs application, or for discounting any amount that I would otherwise have been minded to order as security for costs. In my discretion, I award the sum of EC$73,125.00 as security for costs representing 50 per cent of the likely prescribed costs. On the issue of the alleged previous offers to settle as it arises in ground (ix), this was not pursued by Dr. Dorsett. In any event, I would not have been minded to ascribe any weight to the fact that Sunsail may have made offers to settle (on its own) as offers to settle are not necessarily indicative of any acceptance of liability, or the strength of any party's case.[72]

[78] The result of this appeal is that the sum of EC$350,000.00 contained in sub-paragraph (1) at paragraph 29 of the judgment of Henry J is set aside and replaced with the sum of EC$73,125.00. I consider Sunsail to be the predominantly successful party on this appeal, with Ultramarine having succeeded partially only on ground (vi). Based on the two-thirds rule the costs on this appeal

[72] New Tasty Bakery v MA Enterprise (UK) Ltd [2016] EWHC 1038.

would be EC$1,333.33. In the circumstances I award costs to Sunsail on this appeal in the amount of EC$1,000.00.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal

By the Court

Chief Registrar