



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal No 5 of 2020
(FSD 105 of 2014 (DDJ))**

BETWEEN:

WALKERS (A FIRM)

Appellant

AND

**(1) ARNAGE HOLDINGS LIMITED
(2) BROOKLANDS HOLDINGS LIMITED
(3) EAST FARTHING HOLDINGS LIMITED
(4) KATIA RABELLO
(5) FERNANDO TOLEDO**

Respondents

BEFORE:

**The Rt. Hon. Sir Bernard Rix, Justice of Appeal
The Hon John Martin, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal**

Appearances:

**Mr. Sebastian Said, Mr. Nico Leslie, Mr. Daniel Hayward-Hughes, Mr. David Lewis-Hall and Ms. Mehreen Siddiqui for the Appellant
Mr. Graham Chapman, QC, Mr. Ben Hobden, Ms. Roisin Liddy-Murphy and Ms. Sean-Anna Thompson for the Respondents**

Heard: 25 May 2021

**Draft circulated
To attorneys: 20 July 2021**

Judgment delivered: 2 August 2021

JUDGMENT ON APPEAL ON SECURITY FOR COSTS

Sir Bernard Rix

1. This is an appeal from the judgment of the Hon Anthony Smellie, Chief Justice, dated 8 August 2020 inter alia on the subject of an application by the Defendant, in this court the Appellant, Walkers, a firm of attorneys, for security for costs from the Plaintiffs, here the Respondents,

being Katia Rabello, Fernando Toledo, and three Cayman Islands companies, Arnage Holdings Limited, Brooklands Holdings Limited and East Farthing Holdings Limited, whom I shall refer to as the Companies or the corporate Plaintiffs.

2. The Chief Justice refused security for costs against any of the Plaintiffs. In this court, Walkers did not at the hearing pursue its appeal against Mr. Toledo, which had in any event been limited in Walker's recent submissions to USD 50,000.
3. The Chief Justice's primary reason for his refusal was that he had already given summary judgment, with damages to be assessed, against Walkers on the Plaintiffs' substantive claim. He therefore considered, understandably, that Walkers' application could not succeed, and that Walkers conceded that that was so.
4. Thus, the Chief Justice said this:
 - 47 ... In the event, as the Judgment found in favour of the Plaintiffs' claims on liability, the Defendant must be taken as having conceded that its application for security for costs could not succeed.
 48. To be clear, that is indeed as I have found but it might be helpful to explain my primary reason, which is that an order for security for costs against the Plaintiffs would be wrong in principle because the liability of the Defendant for more than minimal loss is now established. In other words, the Plaintiffs are shown to have proven claims against the Defendant in respect of which money is likely to be due to the Plaintiffs, not the other way round so as to justify an order for security for costs.
5. The Chief Justice might perhaps have considered whether what remained of the issues between the parties as a matter of causation and quantum might have justified pursuit of the Defendants' application at any rate for future costs: but, be that as it may, he clearly thought that the Defendants had not pitched their application in such an alternative way.
6. The Chief Justice's judgment might have stopped there, on the basis of his decision in principle; but he continued by mentioning two factors which were relevant to his discretion: one was whether the Plaintiffs' claim had a reasonable prospect of success, and the other was whether the Plaintiffs' want of means had been brought about by the Defendant. As to the former, he referred again to the Plaintiffs' success in obtaining summary judgment on liability, adding "*In the circumstances, security should not be granted*" (at para 53). As to the latter, in the light of his summary judgment he was able to say that Walkers "*may be regarded prima facie, as having brought about any consequential financial distress*" rendering an order for security for costs as "*oppressive, wholly inappropriate and unjust*" (at para 61).

7. As for the personal Plaintiffs, Ms. Rabello and Mr. Toledo, the Chief Justice went on to find that in any event any order for security would have had to be conservatively adjusted and limited to the additional costs of enforcing any judgment in Brazil or Florida (at para 68). In saying this, he was thinking in terms of “*the approach taken in*” *Gong v. CDH China Management Company Limited* [2011] (1) CILR 57 and “*principles as more recently re-examined in*” *AHAB v. SICL* [2016] (2) CILR 208, to the effect that an order for security against a personal plaintiff could not be made merely on the basis, and thus on a discriminatory basis, that a plaintiff was foreign. This is because, unlike the position which obtains in the case of companies, which is separately covered by the Companies Act, in the case of a personal plaintiff resident in the Cayman Islands there is no jurisdiction to order such security on the grounds of a foreseen risk of their inability to pay costs when called upon to do (unless the plaintiff is a nominal plaintiff suing for the benefit of some other person).
8. On this appeal, the Chief Justice’s primary reason, as a matter of principle, for denying security has now been upset by this court’s judgment on appeal from the Chief Justice’s substantive judgment in favour of the Plaintiffs. In *Walkers v. Arnage* (1 February 2021, CICA Appeal No 5 of 2020) this court decided that the Chief Justice was in error in granting summary judgment to the Plaintiffs, with the result that the whole of the Plaintiffs’ claim must go to trial. In the circumstances, Mr. Graham Chapman QC, on behalf of the Plaintiff/Respondents, is in difficulties in upholding the Chief Justice’s judgment for the reasons which he gave. He does not formally concede that the Chief Justice’s decision, in as much as it was in any sense based on discretion, cannot stand. On the contrary, he submits that the Chief Justice’s decision was essentially based on a discretion which cannot easily be departed from. Neither does he formally concede that, on the underlying merits of their claim, the Plaintiffs have anything other than an overwhelming case. Nevertheless, we consider that the Chief Justice’s security for costs judgment below cannot survive the overturning of his summary judgment on the merits. It is clear that he relied on his earlier judgment as the essential basis “*in principle*” for his decision with regard to security for costs.
9. If therefore the result of the judgment below is to be supported, it must be on the basis that a new discretion arises in this court. Mr. Chapman submits, however, that in terms of a new exercise of discretion, the burden of persuasion remains on the applicant Walkers, and that among the factors of importance remain the matters highlighted by the Chief Justice. Moreover, Mr. Chapman submits with respect to Ms. Rabello, that the Chief Justice was right to say that any security must be limited to the additional costs of enforcing in Brazil, as compared to enforcement at home in the Cayman Islands.

The litigation and the application for security for costs

10. It is unnecessary to say much about the litigation in which this procedural appeal arises, for this court's judgment in *Walkers v. Arnage* may be referred to for a full description of it. In a nutshell, however, the Plaintiffs sue to recover damages for disclosure of documents obtained in the Cayman Islands and deployed in litigation in Brazil in alleged breach of retainers contracted between Walkers and the Plaintiffs over many years: and it is alleged that the damages caused by such breach are very heavy, including the loss of Ms. Rabello's banking empire in Brazil. Arnage and Brooklands are Cayman Islands companies owned and controlled by Ms. Rabello. East Farthing is another Cayman Islands company owned entirely by Mr. Toledo. Mr. Toledo is a close and trusted friend, and regarded as a member, of the Rabello family.
11. The litigation in Brazil and in the Cayman Islands has been going on for many years. The litigation in Brazil arises out of attempts to make the Rabello family business empire and Ms. Rabello personally responsible for the losses of another Brazilian business, the Petroforte Group, which fell into bankruptcy in 2003. The disclosure of documents for which Walkers is blamed arose out of a *Norwich Pharmacal* order obtained, with Walkers' assistance, from the Cayman Islands' court in 2010. Walkers was then acting for Dr Braga, as administrator of the Petroforte bankrupt estate.
12. The Plaintiffs' litigation against Walkers was commenced in 2014. Walkers' application for security for costs from the Plaintiffs goes back in its origins to 24 July 2014, when Walkers issued its summons both for summary judgment against the Plaintiffs and, if that did not succeed, for security for costs. In 2018 both the Plaintiffs' and Walkers' cross-applications for summary judgment were heard, and the Chief Justice's judgment rejecting Walkers' strike-out but finding in favour of the Plaintiffs on liability, for damages to be assessed, was issued in May 2019. The Chief Justice gave his reasons for both refusing Walkers' leave to appeal from his substantive judgment, and for refusing security for costs, by his judgment dated 8 August 2020. Both those judgments have now been overtaken by this court's reversal of the Chief Justice's summary judgment in favour of the Plaintiffs.
13. Walkers' security for costs application is premised, as the law requires, on separate grounds against the three corporate Plaintiffs, and against Ms. Rabello. Thus, as against the Companies, Walkers invokes section 74 of the Companies Act (2021 Revision), which provides:

Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all such proceedings until such security is given.

14. As against Ms. Rabello, on the other hand, Walkers relies on Order 23 Rule 1 of the GCR, which provides:

Where on the application of a defendant in an action or other proceedings it appears to the Court –

- (a) that the plaintiff is ordinarily resident out of the jurisdiction...

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give security for the defendant's costs of the action or other proceedings as it thinks just.

15. Walkers claims security on the grounds that the Plaintiffs appear to be impecunious, indeed claim to have been rendered so by Walkers' breach of fiduciary duty; and that, as regards Ms. Rabello, not only has she been in bankruptcy since 2010, with the Petroforte bankruptcy having been extended to her and the entirety of her estate, but it would be much more difficult and costly to enforce a judgment for costs in Brazil against her, even if she had assets, than it would be to enforce against an individual in the Cayman Islands.
16. Walkers therefore claims security at present in respect of the costs so far expended in this litigation. The costs of the proceedings to date have been agreed to be costs in the cause; and the trial of the Plaintiffs' action has been agreed as requiring 12 weeks, for hearing, subject to the availability and approval of the designated trial judge, Justice Doyle, in the autumn of 2022. Costs incurred up to 30 April 2021 have been evidenced in the first affidavit of Daniel James Hayward-Hughes at USD 8,490,441.12. Walkers seeks security in the sum of two thirds of that expenditure, in the sum of USD 5,660,294.08 (or such other sum as the Court sees fit). It hopes that if it succeeds in this appeal, security for further, future, costs can be agreed, but it reserves the right to apply for further security in default of agreement.

The submissions on appeal

17. The parties have filed a great number of affidavits and witness statements, and skeleton arguments, over the years, but the essence of the matter can be summarised as follows.

18. Although the Plaintiffs appear to be impecunious, they have not explained how the expense of this litigation has been supported, or what the source of their funds for fighting it has been. Consistently with that, the Plaintiffs ultimately accept that they cannot say that the ordering of security would stifle their claim. However, they submit that the Chief Justice was right to focus on two aspects of the circumstances of the case: first, that the merits of their claim are not only reasonable and bona fide, but can be described as very strong; and secondly, that their impecuniosity has been caused by Walkers' wrongdoing as a fiduciary.
19. In those respects, the Plaintiffs point to jurisprudence such as *Sir Lindsey Parkinson & Co Limited v. Triplan Limited* [1973] QB 609, *Fernhill Mining Ltd v. Kier Construction Ltd* [2000] CP Rep 69, *Spy Academy Limited v. Sakar International Inc* [2009] EWCA Civ 985, *Mastermailer Stationery Limited v. Sandison and Black* [2011] EWHC 4304 (Ch), *Deleclass Shipping Company Limited v. Ingosstrakh Insurance Company Limited* [2018] EWHC 1149 (Comm), and *Fine Care Homes Ltd v. National Westminster Bank Plc* [2019] EWHC 3623 (Ch).
20. As for the case of Ms. Rabello herself, Mr. Chapman points out that in the case of a personal plaintiff, as distinct from a corporate plaintiff, impecuniosity is not a ground of jurisdiction for security for costs, even if being foreign is. He then submits that, because it would be discriminatory and therefore wrong to order security against a foreign plaintiff where it would not be ordered against a domestic plaintiff, therefore security may only be ordered for the extra costs and difficulties of enforcing in Brazil as compared to enforcing in the Cayman Islands. In this context he refers to *Nasser* and *Gong*.
21. On behalf of Walkers, on the other hand, Mr. Sebastian Said submits that, especially in the light of this Court's judgment on the appeal of the summary judgment applications, the merits are poised and therefore cannot assist one way or the other on the application for security for costs; and that in the circumstances, the allegation that Walkers has caused the Plaintiffs' loss and thus impecuniosity takes the matter no further, because it is simply part of the disputed overall merits. What is really significant, however, is that the Plaintiffs do not dispute, but rather assert, their impecuniosity coupled with the fact that the Plaintiffs cannot assert that the ordering of security would stifle their claim.
22. As for the case of Ms. Rabello, her impecuniosity remains highly relevant, coupled with (unopposed) evidence of Brazilian law to the effect that enforcement in Brazil of any costs award by the Cayman Court would take between 7 and 10 years to enforce, and that it was relevant to take into account that there was a real risk that enforcement would be frustrated as well as delayed: see *AHAB v Saad* [2017] 2 CILR 602.

The jurisprudence

23. It is true that in *Sir Lindsay Parkinson v. Triplan* Lord Denning MR acknowledged as “helpful” some suggestions from counsel as to “some of the matters which the court might take into account”, including whether a claim “is bona fide and not a sham” and whether it “has a reasonably good prospect of success” (at 626F). However, it has to be said that these particular factors need to be regarded with care in the light of developing jurisprudence. As for whether a claim is bona fide and not a sham, that is a very low threshold of respectability indeed: if a claim was not bona fide but a sham, it could be struck out, and that factor has tended only to operate as supporting an application for security. As for whether a claim has reasonably good prospects of success, that might be a stronger test: but in the absence of something stronger still, the courts have been reluctant to take the merits of the parties’ dispute into account. Thus, in *Danilina v Chernukhin* [2018] EWCA Civ 1802, [2019] 1 WLR 1802, Hamblen LJ, supported by Longmore LJ and Sir Stephen Richards, said this:

69 In relation to the appropriateness of considering arguments on the merits, the position is correctly summarised in the notes to the *Civil Procedure 2018*, vol I, p 836, para 25.13.1: “Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. See *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420.”

70 I agree with the judge that the summary in the following paragraph of the notes in the White Book is inconsistent with this well-established approach and should not be followed. It is there stated: “In considering an application for security for costs against a claimant, the court must take into account the claimant’s prospects of success...” This statement should not be followed.

24. In the present case, the judgment of this Court on the appeal from the Chief Justice’s award of summary judgment in favour of the Plaintiffs demonstrates that the merits of this litigation are very much up in the air. This is certainly not a case where it can be said that “there is a high degree of probability of success or failure”.

25. It seem to us to follow that, even though it may be a relevant factor in a court’s overall discretion that a defendant’s acts may have caused or contributed to a claimant’s impecuniosity, it is hard to find much momentum in that factor in circumstances where the merits of that allegation may be very much bound up in the overall merits of the parties’ dispute.

26. In this connection, it is instructive to see how that factor has been deployed in the cases relied on by Mr. Chapman and the jurisprudence generally. Thus, in *Keary Developments Ltd v.*

Tarmac Construction Ltd [1995] 3 All ER 534 (CA), Peter Gibson LJ pointed out that it was the *combination* of stifling a claim with the defendant's causation of impecuniosity which might concern the court. He said (at 540b):

The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v Lacy Hartland & Co* (1885) 28 Ch D 482 at 485 per Bowen LJ).

Those observations have been frequently cited in subsequent cases.

27. Similarly, in *Fernhill Mining Limited v. Kier Construction Limited* (unreported, 27 January 2000, CA), it was the *combination* of the claimant's "*very substantial and high probability of succeeding*" (at para 49, per Evans LJ), together with the consequence of the defendant's alleged repudiation in causing the claimant's financial difficulties (at para 50), which the court there found to weigh strongly in favour of the claimant's resistance to an order for security. It is true that Judge LJ's language (at para 58) to the effect that the claim had "*real merit*", strongly relied on by Mr. Chapman, did not perhaps by itself reach as far as Evans LJ's description of the claim's strength: however, in context it must be doubtful whether Judge LJ intended any difference in that respect from Evans LJ, and certainly Clarke LJ saw none, for he agreed with both judgments (at 62). Moreover, Judge LJ coupled his reasoning with a finding that the defendant's application there ran the risk of "*if not quite stifling this claim into extinction*" nevertheless creating significant problems for the claimant.
28. In *Spy Academy Limited v. Sakar International Inc* [2009] EWCA Civ 985, security was refused on appeal, the court of appeal in London exercising its discretion anew. The argument before the court "*has mainly focused on the issue as to whether the application is being used oppressively to stifle a genuine claim*" (at para [16]). On that issue, the court found that the grant of security "*would have the effect of stifling the claimant's claim*", adding "*This factor is not determinative of the matter but obviously points strongly against making an order for security*" (at para [19]). Earlier in its judgment (at para [15]), the court had referred merely in passing to the issue whether the claimant's want of means had been brought about by the defendant's conduct, saying that it was something which "*the claimant can say...since it is a company formed for the sole purpose of this transaction*". If that was a finding in favour of the claimant, then this was another case, like *Keary*, in which it was the combination of arguable cause of impecuniosity with stifling (and other factors, such as the late application for security) which affected the decision there.

29. In the *Mastermailer* case, in an unreported judgment, Vos J distinguished between the applications of separate defendants. In the case of Mr. and Mrs. Black (the second and third defendants), he refused security for costs. This was principally (“heavily affected”) by the fact that the judge viewed these defendants as having no defence to the claim, because “*no defence has been put forward to it*” and these defendants had not even appeared at the appeal, which “*speaks volumes*” (at para 36). In the case of Mr. Sandison (the first defendant), the judge allowed the application for security, principally because the financial difficulties of the claimant raised a presumption in favour of the application and because there was no clear evidence that the claim would be stifled. In both cases, the judge referred in passing to the issue of whether the defendants’ conduct had caused or contributed to the claimant’s financial difficulties: as to that he found that it was “*very hard to judge*”, and that although it could be said in some measure to have worsened the claimant’s situation, nevertheless that was “*only one factor to be drawn in the balance*” (at para [31]). When, however, it came to his decisions, the judge relegated it to low on his list of considerations (at paras [36] and [41]).
30. Finally, in the *Deleclass Shipping* case, in another unreported judgment, Andrew Henshaw QC, sitting as a deputy judge of the High Court, directed himself (at paras [37]-[38]) to the effect that the defendant’s alleged conduct as a cause of the claimant’s impecuniosity was “*a factor relevant to the overall discretion*”. However, he qualified that by the observation that –

this factor may not be decisive in itself, otherwise, as the defendant points out, a great many security for costs applications would founder on this point. It is a matter to be weighed in the balance along with others.

However, in the final analysis, the judge found that it was the stifling of the claim which was decisive (citing Peter Gibson LJ in *Keary*). Thus, he concluded (at para [98]):

In the present case, viewing the matter in the round and taking account as part of the overall circumstances of my conclusion that an order for security would be likely to stifle the claim, I do not consider it would be just to make an order for security for costs.

Analysis and decision regarding the Companies

31. In the present case, there is no allegation that an order for security, even in the large amount requested, would stifle the Plaintiffs’ claim. Given the scale of this litigation, and the apparent ability of the Plaintiffs, somehow or other, to finance it, this acceptance, even if it came somewhat late, is understandable. Therefore, the cases which demonstrate that an order for security for costs will generally not be made where it would stifle a bona fide and reasonably arguable claim, are of no ultimate assistance.

32. As for the merits of the claim, we would gratefully adopt the firm reminder from the London court of appeal in *Danilina* to the effect that parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. That has been said in many cases since *Porzelack v. Porzelack*. We consider that the fact that a claim is bona fide and reasonably arguable is relevant only in the sense that if it was not, and that can be clearly demonstrated, it would be a relevant, indeed highly relevant, factor in the overall balancing of justice between parties to an application for security for costs.
33. As for an issue as to whether a defendant has caused or contributed to a plaintiff's impecuniosity (or financial difficulties), we acknowledge, what the jurisprudence demonstrates, that this is a possible factor. However, standing by itself it is perhaps unlikely to take things very much forward. In many cases, the issue of causation will be bound up in the overall merits of the claim: and these will not help unless there is a clearly demonstrated high degree of probability of success for the plaintiff. It is the combination of this factor with some other factor, such as stifling, that will be of greater importance in the ultimate balance.
34. In the present case, we intend and wish to say nothing which qualifies in any way what this court has said in its judgment on the summary judgment appeal. Nevertheless, we observe that in that judgment, the question of causation of loss to Ms. Rabello and her business empire (or to any of the Plaintiffs) is highly contentious: see for instance paras [124]ff of the judgment of Sir Alan Moses JA, and in particular paras [148] and [155].
35. There is perhaps an additional factor which arises on the facts of this dispute, and that is the allegation that Walkers had been retained, indeed had been retained on many occasions and over a number of years, by the Rabello family and business interests, and that Walkers therefore owed a fiduciary duty to the Plaintiffs. Perhaps it could be said that there is something odd and even unjust in permitting a fiduciary to obtain security for costs for the purpose of disputing its liability to its client for breach of that duty. The Chief Justice considered that it was undeniable that Ms. Rabello was a client of Walkers (see para [45] of this Court's judgment in the summary judgment proceedings). Moreover, Walkers admitted that Arnage and Brooklands had been former clients (in 2000) and that East Farthing was a client at the date of the Braga retainer.
36. Nevertheless, this Court considered that there was a considerable question-mark over the alleged retainer from Ms. Rabello, which has never, it seems, been documented (see this Court's judgment in the summary proceedings at para [57]). And as for Arnage and Brooklands, which are controlled by Ms. Rabello, the retainer which Walkers admitted ended, it says, in 2000 or

shortly thereafter, some ten years before Dr Braga appeared on the scene: so that Walkers denies any duties of any kind to those companies, other than ongoing duties of confidentiality. In circumstances where no documents obtained by Dr Braga came directly from Walkers, its acknowledgment of those duties of confidentiality did not extend beyond an apology for accepting the Braga retainer because of the risk that documents which it continued to hold might have been disclosed (*ibid* at para [80]).

37. No distinction has been drawn in the submissions of Mr. Chapman between the case of East Farthing and those of Arnage and Brooklands. In these circumstances, we are left with the Plaintiffs' impecuniosity and little else to put into the balance of justice. In our judgment, therefore, subject to a special consideration which affects the position of the personal Plaintiff, Ms. Rabello, we consider that Walkers is entitled in principle and in justice to security for costs, and will revert to the quantum of such security below.

The special case of the personal plaintiff, Ms. Rabello

38. In the case of Ms. Rabello, the applicable statutory provision is not the Companies Act, but Order 23 Rule 1 of the GCR (see above).
39. Order 23 differs from the Companies Act in that the jurisdiction to order security for costs is not founded on the risk of impecuniosity but (inter alia) on a plaintiff being ordinarily resident out of the jurisdiction. Therefore, a plaintiff resident within the jurisdiction cannot in general be made to provide security for costs simply because of the risk of its inability to pay such costs: this can only be done against a corporate plaintiff under the Companies Act. In these circumstances, jurisprudence has established that it is necessary to apply Order 23 in a way which does not discriminate against foreign personal plaintiffs.
40. The leading cases in this connection are *Nasser v. United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 WLR 1868, and *Bestford Developments LLP v. Ras Al Khaimah Investment Authority*, both decisions of the London court of appeal.
41. In *Nasser*, the London court of appeal had to consider an application for security for costs of an appeal by the personal claimant appellant, Ms. Nasser. Ms. Nasser was resident in the USA. The provisions governing security for costs of an appeal essentially incorporated the same provisions as security for costs at first instance. Those provisions were to be found in CPR Rule 25.13(1) and (2), as follows:

- (1) The court may make an order for security for costs under rule 25.12 if – (a) it is satisfied, having regard to all the circumstances of the case, that it is just to

make such an order; and (b)(i) one or more of the conditions in paragraph (2) applies, or (ii) an enactment permits the court to require security for costs.

- (2) The conditions are – (a) the claimant is an individual – (i) who is ordinarily resident out of the jurisdiction; and (ii) is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention...; (b) the claimant is a company or other incorporated body – (i) which is ordinarily resident out of the jurisdiction; and (ii) is not a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention; and (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant’s costs if ordered to do so...

42. The significance of a claimant or appellant being someone against whom a claim can be enforced under the Brussels or Lugano Conventions was that all such persons were considered to be for enforcement purposes within the same “*single legal market*” (see at para [46] of *Nasser*).

43. Previous law had been to the effect that once the precondition of foreign residence had been satisfied, the court could make an order for security for costs where just to do so, such as in the case of impecuniosity (see at para [35] of *Nasser*). However, considerations of discriminatory treatment on grounds of residence have now been recognised, so that Mr. Chapman has submitted that the essential question is what *additional* costs will be caused by the fact that enforcement will have to be made outside the home jurisdiction.

44. Mance LJ (with whom Simon Brown LJ agreed) explained the matter as follows:

61. Returning to rules 25.15(1) and 25.13(1) and (2)(a) and (b), if the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular claimant or country concerned. The former principle was that, once the power to order security arose because of foreign residence, impecuniosity became one along with other material factors: see the *Thune* case [1990] 1 WLR 562 cited above. This principle cannot, in my judgment, survive in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniosity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation, since the power under CPR r 25.13.2(c) applies to companies wherever incorporated and resident and is not discriminatory.

62. The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some – it may well be many – cases there are likely to be substantial obstacles to, or a substantial extra burden (eg, of costs or delay)

in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state. In so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as *do* exist abroad or (ii) as a practical matter, to make it more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad.

...

64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumptions would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases – particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920) – it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs...

45. In *Bestford Developments*, the main issue, with which we are not concerned in this case, is whether the test of impecuniosity was one of real risk, or proof on the balance of probabilities. It was held that that it was the former. However, other matters which the London Court of Appeal made clear included the decision that the discrimination of which the courts had to be conscious was not the much more serious discrimination arising out of nationality, but a lesser discrimination based on residence. In such a case, the court did not have to find very weighty reasons to justify the discrimination (at para [69]):

It has to exercise the discretion on objectively rational grounds by reference to the difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic. But, in my judgment, that exercise is not subject to the ‘severe scrutiny’ requirement. All that is required is some objectively justifiable rationale for the exercise of the discretion.

46. In that case, it was held that, notwithstanding expert witness to the contrary, there was “*a real and serious risk that an order for costs might not be enforced in Georgia*” as a result of which an order was made for the prospective costs of the appeal proceedings in question, in addition to security already given for the costs of proceedings below. No attempt appears to have been

made to find an *additional* costs burden in enforcement in Georgia, but security had to be given generally for the past or prospective costs of the proceedings in question.

47. *Bestfort Developments* has been considered and applied in two subsequent court of appeal decisions in England. In *De Beer v. Kanaar & Co* [2001] EWCA Civ 1318, [2003] 1 WLR 38, the court took into account the ease with which assets in Switzerland could be moved and that enforcement in the United States might be difficult or even impossible. It therefore concluded that there was a real risk that the defendant might be unable to enforce an order for costs “*whether in part or at all, due either to lack of available assets against which such an order could be enforced, or to the enforceability of such an order in Florida, or both*” (at para [90]), and therefore ordered security for the prospective costs of the action up to the end of trial. In the *Danilina* case, a similar order was made. In the judgment of Hamblen LJ in that case the court made clear that an order for security should be tailored to cater for the particular foreign claimant and country concerned, as well as for the relevant risk. So far as the latter was concerned, a distinction was to be made between merely additional costs and delay, and the risk of non-enforcement, such as in the form of “*substantial obstacles*”. In the former case, security would be ordered by reference to the extra burden of enforcement; in the latter case, security would be ordered by reference to the costs of the proceedings (as occurred in both *De Beer* and *Danilina*).
48. In this jurisdiction, *Nasser* has been applied in *Gong v. CDH China Management Company Limited* [2011 (1) CILR 57]. It seems that the sole basis on which security was sought was that Mr. Gong did not have assets in the Cayman Islands, not that he was impecunious, and that enforcement would therefore have to take place in China, where he was resident and where he held his assets. Jones J therefore directed himself that the question was “*whether that would be a materially more difficult and expensive exercise than enforcing in this jurisdiction*” (at para [14]). He also held that the anti-discrimination principles of the European Convention of Human Rights “*must reflect the public policy of the Cayman Islands*” and that the purpose of Order 23 Rule 1 “*is to protect defendants against the additional difficulty and expense, if any, of enforcing a costs order in the particular country in which the plaintiff’s assets are located*” (*ibid*); and that there was no evidence on which the court could require Mr. Gong to provide security for the whole or any part of the prospective costs of Mr. Gong’s action.
49. *Bestfort Developments* has also been applied in these courts, in *AHAB v. SICL* [2017 (2) CILR 602] at paras [9]-[10] and [22]-[26]. There Smellie CJ accepted the submission that the Cayman Islands Constitution and Bill of Rights lead to require the right to a fair trial requiring the rule contained in Order 23 Rule 1 to be applied in a non-discriminatory way, so that (at para [18])

In the case of a non-resident plaintiff, this principle will therefore exclude the making of security for costs orders on the merely discriminatory basis of such a plaintiff's foreign status...

The Chief Justice continued:

24. Where no real risk of unenforceability is shown to exist, there may well, however, be the different entitlement to security for the costs of enforcement in recognition of the likelihood – or one might even say in many cases, inevitability – of significant costs to be incurred in having to enforce in the foreign jurisdiction.
 25. This is the dichotomy of considerations for the court in deciding whether to award full security rather than security for the costs of enforcement. And this is all clearly explained by Gloster, L.J. in *Bestfort* (*ibid.*, at paras. 71-77) by reference to *Nasser – Bestfort* being a case where an award of full security was made, and *Nasser*, a case where only the costs of enforcement were awarded.
 26. For the reasons that follow, I am satisfied that this remains a case where there is a real risk that the defendants' efforts at enforcement in Saudi Arabia will fail because of difficulties or obstacles there to enforcement and the order I make will therefore be of security for the as yet unsecured part of the recoverable costs of the proceedings, not merely any additional costs of enforcement.
50. Further security for the costs of AHAB's appeal was ordered by this Court in *AHAB v. SICL* (16 November 2018).
51. In the present case, the facts are unusual and striking. It is not simply that Ms. Rabello has no known assets in the Cayman Islands, or even that there is a real risk that she will be unable to meet a costs order against her out of assets in her country of residence, Brazil. Nor is it merely that there is evidence from a Brazilian lawyer that a delay of up to 10 years and great expense could be anticipated in an attempt to enforce. The position is rather that she has been made formally bankrupt in Brazil and all her assets have been taken in that bankruptcy and rendered amenable to the creditors of the Petroforte bankruptcy. She entered bankruptcy in 2010 and remains so to this day, despite much Brazilian litigation on her part, up to Brazil's highest court. Nevertheless, despite that bankruptcy, she and the other plaintiffs in these proceedings have had the wherewithal to conduct extremely expensive proceedings over many years (in circumstances where it is not said that an order for security would stifle these proceedings in the Cayman Islands); and such litigation has not only been conducted in the Cayman Islands but elsewhere, and its costs form part (some USD 15 million) of the claim in these proceedings. It is reasonably clear therefore that Ms. Rabello is, or has at some time been, able to find the means, possibly through an international network of arrangements, to dispose of funds located

in several jurisdictions in the world. It appears, therefore, that Walkers, if successful in these proceedings, would not merely find it especially difficult and expensive to pursue Ms. Rabello, already shown to be a resourceful and determined litigant, through Brazilian enforcement proceedings, but might suffer the real risk of it being impossible to seek a way through Ms. Rabello's bankruptcy to obtain any successful enforcement at all.

52. In sum, there is a real risk that enforcement of a Cayman Islands costs award would be not only delayed, but substantially obstructed or ultimately frustrated, even though (and/or in part because) Ms. Rabello appears able to draw on assets to support her litigation in spite of her bankruptcy.
53. In these circumstances, we would consider that, in accordance with the decisions in *Bestfort*, *De Beer* and *Danilina*, and in this jurisdiction in *AHAB v. SICL*, it would not be discriminatory or unjust for Ms. Rabello to be liable, alongside the corporate Plaintiffs, for security for the costs of these proceedings.

Quantum

54. Walkers requests security in the sum of USD 5,660,294.08, in respect of its costs incurred to date. It assesses those costs as amounting to USD 8,490,441.12 up to 30 April 2021, and seeks security in an amount of two-thirds of that sum, hence the figure of about USD 5.6 million, or such other figure as to the court may seem fit. The figures, and the basis for them, are set out in the affidavit of Mr. Hayward-Hughes dated 10 May 2021.
55. We have taken into consideration the length of these proceedings to date, currently at seven years; the amount which the Plaintiffs claim herein, some USD 490 million; and the fact that the Plaintiffs have pleaded among their losses some USD 15 million which they allege they have expended in legal fees in various jurisdictions of the world in order to deal with the consequences of what they allege to be Walkers' wrongful conduct. In all the circumstances discussed herein above, we consider that security for costs should be given by the Plaintiffs (with the exception of Mr. Toledo), that is to say by the corporate Plaintiffs and Ms. Rabello, in the sum of USD 4.25 million.
56. Each of these four plaintiffs are to be jointly and severally liable to provide such security; but it matters not which one or more of such plaintiffs provide such security, as long as it is available to meet the potential liability in costs of each and all such plaintiffs. The security should be given by payment into court, by guarantee from a first-class bank, or otherwise in a form agreeable to Walkers or directed by the Court. Subject to any further submissions in writing, such security shall be provided within 30 days. The Court has not heard submissions

as to the consequences of default; and the Parties are at liberty also to make submissions in writing thereon within 14 days.

57. Subject to any further submissions in writing as to the costs of this appeal and the proceedings for security for costs below, we consider that prima facie Walkers should be entitled to such costs here and below. It is possible, but we know not, that some special order should be made, in the absence of agreement, in the case of Mr. Toledo.