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 18 of 2021
(FSD 140 of 2019 (CRJ))

BETWEEN:

(1) TRADED LIFE POLICIES FUND (IN OFFICIAL LIQUIDATION)
(2) MICHAEL PENNER (IN HIS CAPACITY AS
JOINT OFFICIAL LIQUIDATOR OF TRADED LIFE POLICIES FUND)

Appellants

AND

(1) JEREMY LEACH
~~(2) WILLIAM MCCLINTOCK~~
(3) MANAGING PARTNERS LIMITED
(4) TAURUS ADMINISTRATION SERVICES S.L.
(5) MPL ASSET MANAGEMENT SA
(6) PRAESIDIUM INVESTMENT FUND
(7) SOVEREIGH HIGH SECURITY FUND SPC
(8) COINTHIAN GROWTH FUND
(9) TRADED POLICIES FUND

Respondents

BEFORE:	**The Hon. C Dennis Morrison, Justice of Appeal** **The Rt. Hon Sir Alan Moses, Justice of Appeal** **The Hon Sir Michael Birt, Justice of Appeal**
Appearances:	Mr Graham Chapman QC instructed by Mr Justin Naidu of Maples and Calder (Cayman) LLP for the Appellants Mr Christopher Parker QC instructed by Mr Richard Annette of Stuarts Walker Hersant Humphries for the Respondents
Heard:	**7 September 2021**
Draft Circulated:	**8 December 2021**
Judgment delivered:	**21 December 2021**

JUDGMENT

MORRISON JA

Introduction

1. This is an appeal against an order for security for costs made by Richards J ('the judge') on 26 February 2021. The broad issue in the appeal, which is brought with the leave of the judge[1], is whether the exercise of her discretion to order security for costs under section 74 of the Companies Act (2021 Revision) ('the Act') was flawed, given the established criteria for the making of such an order.

2. Section 74 of the Act provides as follows:

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

3. It is common ground on the appeal, as it was before the judge, that section 74 requires the court hearing the application for security for costs to adopt what Cresswell J described in **Cesar Hotelco (Cayman) Limited et al v Ryan et al**[2] (**'Cesar'**) as a "*two-stage approach*". First, "*to consider whether it is satisfied that there is reason to believe that if the defendant is successful in the defence, the assets of the company will be insufficient to pay the defendant's costs*"; and, second, if the judge is so satisfied, to decide, as a matter of discretion, whether "*to order security for costs having regard to all the circumstances of the case*".

4. It is also common ground that the principles applicable to the exercise of the court's discretion in the second stage of the analysis under section 74 are as set out[3] in the oft-cited judgment of Lord Denning MR in the case of **Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd**[4] (**'Parkinson'**).

5. **Parkinson** confirmed that the court's power to order security for costs is a discretionary one and that, generally speaking, the applicable criteria are as follows:

   (i) whether the claim is *bona fide* and not a sham;

   (ii) whether the claim has a reasonably good prospect of success;

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[1] See order granting leave to appeal dated 16 June 2021
[2] [2012 (2) CILR 164], paras 45-46

[3] In relation to the comparable section 720 of the Companies Act 1965
[4] [1973] 1 QB 609

(iii) whether there is an admission in the Defence or elsewhere that some money is due;

(iv) whether there is a substantial payment into court or a substantial open offer;

(v) whether the application for security is being used oppressively, for example, to stifle a genuine claim;

(vi) whether "the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work"[5];

(vii) whether the application is made at a late stage of the proceedings.

6. As regards the second question mentioned in this list, that is, whether the claim has a reasonably good chance of success, the authorities are clear that the application for security for costs is not the occasion for a detailed exploration of the merits of the case, given the fact that it is usually made at a preliminary stage of the proceedings, sometimes on incomplete material. As Sir Nicholas Browne-Wilkinson V.-C. explained in **Porzelack KG v Porzelack (UK) Ltd** ('**Porzelack**')[6]:

> "… The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
>
> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure."

(See also **J.M. Bodden and Son International Limited v Dettling and Sparks**[7], in which Malone CJ applied **Porzelack**.)

7. In this appeal, there is no challenge to the judge's decision that, taking into account all the circumstances of the case, the court had jurisdiction to order security for costs, in that there is reason to believe that the appellants (the plaintiffs in the court below) will be unable to meet an adverse costs order in favour of the respondents (the defendants in the court below), if ordered to do so after the trial.

8. However, the appellants contend that this was not an appropriate case for the making of an order for security for costs. They submit that the judge erred in failing to consider that the want

[5] Per Lord Denning MR at page 626
[6] [1987] 1 WLR 420, 423
[7] [1990-91 CILR 220]

of means complained of by the respondents was brought about by their own conduct ('the impecuniosity factor'). In these circumstances, the appellants say, the judge ought to have refused the application.

The parties

9. The first appellant, Traded Life Policies Fund ('TLPF'), is a Cayman Islands company, which was incorporated on 11 November 2010, in the name of Corinthian Capital Plc ('Corinthian'). Corinthian changed its name to Traded Policies Portfolio on 22 April 2013 and then to TLPF on 24 October 2013. Registered as a mutual fund with the Cayman Islands Monetary Authority, TLPF was at all material times an investment company carrying on the business of investing in traded life policies or companies that invested in traded life policies.

10. The second appellant ('Mr Penner') is one of the two Joint Official Liquidators ('JOLs') of TLPF. Mr Penner and his fellow JOL, Mr Stuart Sybersma, were appointed by order of the Grand Court on 21 July 2017.

11. The first respondent ('Mr Leach') is an individual resident in the United Kingdom, Switzerland and/or Malta, and was at all material times the executive director of TLPF. He was also the Chief Executive Officer ('CEO') of the third respondent ('MPL').

12. Mr William McClintock, a former non-executive director of TLPF, was originally named as second defendant, but the action against him was subsequently discontinued.

13. The third respondent, MPL, is a company incorporated in the Cayman Islands. MPL was at all material times the Investment Manager and the sole voting shareholder of TLPF.

14. The fourth respondent ('Taurus'), is a company incorporated in Spain. Taurus was appointed as TLPF's Administrator on 1 December 2015.

15. The fifth respondent ('MPL AM') is a company incorporated in Switzerland. MPL AM was appointed as TLPF's Investment Adviser on 1 September 2013.

16. The sixth to the eighth respondents are corporate entities which either provided administrative or management services to TLPF, or received from or transferred assets to it.

17. The ninth respondent ('TPF') is a Cayman Islands company. TPF, which was established by Mr Leach and Mr McClintock to carry on business as an investment company, investing in traded life policies or companies that invested in traded life policies, was in effect the predecessor fund to TLPF.

The background

18. For this purpose, I will borrow from the judge's admirable summary[8].

19. TLPF was largely inactive until about September 2013, when, consequent upon the restructuring of TPF, TLPF received all the assets of TPF. These assets comprised 187 life policies and cash of US$119,082.00. In exchange for their shares, investors in TPF were issued bonds in TLPF which were to mature in five years (Series 1 Bonds), or in one year (Series 2 Bonds).

20. By resolution of MPL, its sole voting shareholder, TLPF was placed into voluntary liquidation on 28 June 2017, at which point Mr Penner and Mr Sybersma were appointed Joint Voluntary Liquidators ('JVLs'). The JVLs were appointed by the court as JOLs on 21 July 2017. The JOLs filed a certificate of insolvency on 28 July 2017 and, in a report made in April 2019, recorded TLPF's potential liabilities to bondholders as being in the region of US$80.7 million.

21. By Writ of Summons and Statement of Claim filed on 25 July 2019, TLPF and Mr Penner (in his capacity as one of the two JOLs of TLPF) commenced action against the eight respondents and Mr McClintock. However, as I have already indicated, the action was subsequently discontinued against Mr McClintock.

22. This is how the judge summarised the claim[9]:

> *"*8. … The Claim alleges multiple breaches of fiduciary duties owed to TLPF and that one or more of the [respondents] caused or permitted TLPF to overstate and to dissipate its assets by various means which are said to have been illegitimate.
>
> 9. The means alleged by the Claim include that the [respondents] caused TLPF to overpay management, directors, adviser and administrative fees, to pay management expenses, and policy movement fees which were unmerited, to repay a loan to MPL at a time when TLPF did not have the means to pay, to make payments for the benefit of the Sixth and Ninth [respondents], Praesidium Investment Fund ("PIF") and TPF, when it had no obligation to do so, and to make improper shareholder redemptions and creditor payments and transfers.
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> 10. The Claim further alleges fraudulent trading, that [Mr Leach] failed to act with reasonable skill, care and diligence in performing his duty as a director and that the breaches of duty were wilful and dishonest. The damages and or equitable compensation claimed is in the region of US$17.8 million plus an aspect of the [appellants'] claim that is presently unliquidated."

[8] Judgment, paras 4-10
[9] Judgment, paras 8-10

23. The action is hotly defended. As the judge put it succinctly[10], "[t]*he* [respondents] *deny any wrong doing*".

The application for security for costs

24. By letter dated 12 December 2019, Stuarts Walker Hersant Humphries ('Stuarts'), attorneys-at-law for the respondents, notified Maples and Calder ('Maples'), attorneys-at-law for TLPF, that the respondents intended to apply for security for costs.[11]

25. By a letter in reply dated 17 December 2019, Maples indicated that the appellants intended to "oppose any such application, including on the basis that [TLPF's] insolvency is as a result of your clients' own conduct".[12]

26. By summons dated 13 January 2020, Mr Leach and the third to ninth respondents applied to the Grand Court for orders that, among other things, TLPF provide security for their costs pursuant to section 74, and that the proceedings be stayed until security was given.

27. The application was supported by three affidavits sworn to by Mr Richard Annette, a partner and head of litigation at Stuarts, and an affidavit sworn to by Mr Leach. It was opposed by three affidavits sworn to by Mr Penner in his capacity as one of the JOLs.

28. The burden of Mr Annette's affidavits was to demonstrate that, if unsuccessful in its claim against the respondents, TLPF would be unable to meet their costs. Mr Annette's evidence also sought to indicate the appropriate quantum of security to be ordered.

29. In light of the fact that there is no issue on appeal as to the judge's finding that there was reason to believe that the appellants will be unable to meet an adverse costs order in favour of the respondents if ordered to do so after the trial, there is no need to refer to some aspects of the affidavit evidence in any detail for present purposes. However, other aspects of the evidence remain relevant to the issue of how the judge exercised her discretion and I will set them out briefly below.

30. In his second affidavit ('Penner 2')[13], Mr Penner deals in considerable detail with, first, Mr Leach's multiple roles as sole executive director of TLPF, CEO of MPL, and Director of MPL AM. Against this background, Mr Penner stated that[14]:

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[10] At para 11
[11] First affidavit of Richard Thomas William Annette, sworn to on 24 January 2020, para 10
[12] Ibid, para 11
[13] Second Affidavit of Michael Penner, sworn to on 28 February 2020

> "17. It is clear from the above, that there was practically no facet of the management of TLPF's affairs that was not the responsibility of, or under the control of, Mr. Leach. That, is not to say that Mr. Leach (or MPL, MPL AM and/or Taurus under his stewardship) acted properly or diligently in performing their various duties: as is discussed further below, they did not. For present purposes, however, it is abundantly clear that Mr. Leach was at all material times 'at the helm' of TLPF (and indeed, the other corporate defendants)."

31. Secondly, Mr Penner dealt with the claims against the respondents. By way of background, he stated the following[15]:

> "8. TLPF was set up as a 'phoenix fund' to TPF ... Both companies were established for the stated purpose of investing in traded life policies ("TLPs") (or companies which invested in TLPs). On or around 23 September 2013, TPF's investors were informed that TPF would be subject to a restructuring and that a new company, TLPF, had been set up. On or around 29 November 2013, purportedly all of TLP's assets (namely its portfolio of 187 TLPs), plus cash of US$119,082, were transferred to TLPF in exchange for 1,309,007.3101 non-voting participating shares in TLPF. On 3 December 2013 (after the transfer of assets had already taken place), TPF's investors were informed that they had the 'option' of either becoming shareholders or bondholders of TLPF, or to remain as a shareholder of TPF ... However, the option was in reality illusory as those TPF investors who did not make an election to redeem their shares (in exchange either for TLPF shares or bonds) had their shares in TPF compulsorily redeemed in exchange for shares in TLPF.
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> 9. Between December 2013 to October 2015, TLPF issued 474,362 Series 1 bonds with a total issue price of US$45,690,857 ... and 293,043 Series 2 bonds with a total issue price US$17,550,394 ...
>
> 10. The Series 1 Bonds were issued with a maturity period of five years and a maturity price of 133% of the original issue price. The Series 2 Bonds were issued with a maturity period of one year and a yield of 5% per annum (compounded). Series 2 Bonds were issued only to TPF investors who had redeemed their shares in TPF and were due payment of the redemption amounts.
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> 11. Through the 'restructuring', TLPF acquired substantially all the assets and investors from TPF. At all material times, TLPF also had common directors with TPF, with Mr Leach being the sole executive director of both entities ... Moreover, TLPF had the same investment manager, being [MPL] ...The Bonds were TLPFs largest financial liability ..."

32. Mr Penner exhibited TLPF's financial statements prepared by Kinetic Partners Cayman LLP ('Kinetic'), the company's auditors, for the period 29 November 2013 (the date of TLPF's

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[14] Para 17
[15] Penner 2, paras 8-11

inception) to 15 December 2014[16] ('the 2014 Financial Statements'). These statements confirmed that, as at 15 December 2014, Series 1 and Series 2 bonds were the company's largest financial liability (US$74,038,025), while the marked value of the company's assets was US$100,826,820, US$69,140,150 of which was attributable to its investment in traded life policies[17].

33. Mr Penner then summarised the pleaded claims against the respondents as follows[18]:

> "18... In short, these arise as a result of Mr Leach's breaches of fiduciary duties owed to TLPF as a director, having caused and/or permitted TLPF, to dissipate its assets through a combination of (i) obvious and dramatic mismarking of asset values; (ii) improper related party transactions; and (iii) overpayment of fees charged by related party service providers which Mr Leach controlled and/or had a personal financial interest.
> 19. TLPF's claims include (i) breaches of fiduciary duties (against Mr Leach in his capacity as a former director); (ii) knowing receipt (against MPL, MPL AM and Taurus, the related party service providers, and TPF, PIF, Sovereign, Corinthian and TPF in their capacity as improperly redeemed and/or repaid investors, who received disproportionately high payments from TLPF, prior to its ultimate demise); (iii) dishonest assistance (against MPL); (iv) unlawful means conspiracy (against all of the Defendants). The JOLs also have statutory claims of (i) fraudulent trading under s. 147 of the Companies Law (against Mr Leach in his capacity as a former director); and (ii) voidable preference (against MPL) under s. 145 of the Companies Law."

34. Thirdly, Mr Penner commented on the conduct of Mr Leach and the other respondents in relation to TLPF's affairs[19]:

> "21. It seems to me unconscionable that the Defendants are now seeking to use TLPF's insolvency as a basis for seeking security for costs against it (thereby attempting to stifle its legitimate claims against them) in circumstances where Mr Leach (and the other defendants, who are his affiliates) plainly caused that insolvency. This is particularly so when the claims themselves (summarised below) relate to the systematic overcharging of fees, and improper transfer of TLPF's assets to related party entities which were under the control of Mr Leach, or in which he had a financial interest.
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> 22. As is clear from the above, Mr Leach was (through his multiple roles), responsible for every aspect of TLPF's management and conduct of its financial affairs. Following a detailed review and analysis of TLPF's books and records (and all the available information), the JOLs believe that TLPF was insolvent from effectively the date of inception or very shortly thereafter upon issuance of the Bonds, and doomed from the start to fail, with no realistic prospect of ever being able to pay its debts in full. That would have been obvious to any competent director – and the Plaintiffs' position at trial will be that it was in fact obvious to Mr Leach. The only reason TLPF was

[16] Penner 2, exhibit MP-1
[17] Note 5 to the financial statements
[18] Penner 2, paras 18-19
[19] Penner 2, paras 21-22

kept alive (and indeed, it would appear, the only reason it was created) was to enable Mr Leach and his affiliates to harvest fees and other valuable assets from it, as further explained in the Statement of Claim."

35. Fourthly, Mr Penner set out the factors which led him to the view that the respondents, through Mr Leach, "must have been aware of TLPF's insolvency as at May 2015 at the very latest:

(i) A May 2015 report from Oliver Wyman, an independent firm of actuaries engaged by MPL, which concluded that the discount rate of 2.5% "applied by the directors when valuing TLPF's life policy assets was 'significantly lower than those seen elsewhere in the market'", and that '[t]his issue should be addressed with high priority"; further, that the "market discount rate as at December 2014 was 17.9% p.a. and that when using this rate 'the valuation of the Fund reduces by approximately 45-55%'"[20].

(ii) The fact that, between 27 February 2014 and 27 February 2017, 106 policies were sold at an average sale price of 19.8% of their marked value, including in particular a sale on 27 February 2014 in which 55 policies (representing 29% of the entire portfolio by number of policies), with a marked value of US$26.5 million, were sold to a third party for US$5.8 million. (Mr Penner's comment on this was that: "Ironically, throughout the life of TLPF, sales appear to have been made in significant part in order to pay the fees being claimed by MPL (and other Leach affiliates) – which fees were so large because they were based on a percentage of their (plainly overstated) marked value. Notwithstanding this, Mr. Leach and his affiliates continued to mark the policies at inflated value, including for the purpose of calculating GAV [Gross Asset Value] and GAV based fees[21].")

(iii) An email dated 8 July 2015 from Apex Fund Services Ltd ('Apex'), the former administrator of TLPF, to Mr Leach and Mr Calleja (at their MPL email addresses), raising various concerns in relation to TPLF. Among them that, "we continue to get requests from investors concerned about valuations and continued gating of the MPL funds … it appears that [MPL] does not respond or acknowledge these emails ... [o]f particular concern to a number of investors is the selling price of policies at well below valuations in order to meet premiums, management fees and fund costs … [t]his causes a significant fall in AUMs [assets under management] each time one of these events takes place and also brings into question the current valuations …"[22]. (Apex resigned as administrator of TLPF on 11 August 2015, and was replaced by Taurus.)

[20] Penner 2, para 23.1
[21] Penner 2, para 23.2
[22] Penner 2, para 23.3

(iv) Based on their audit of TPLF's 2014 Financial Statements, to which I have already referred[23], Kinetic issued a "disclaimer of opinion", to the effect that the financial statements of TLPF as approved by its directors were not accurate. The auditors were particularly concerned that the discount rate being applied by TLPF was not in compliance with the applicable regulatory standards[24], and that, applying a discount rate recommended by an independent actuary in order to secure compliance, "would result in the Fund's total liabilities exceeding its total assets by US$21,760,734"[25]. In the auditors' view, this "casts doubt over the Fund's ability to continue as a going concern"[26].

(v) Kinetic's audit report for the period 16 December 2014 to 15 November 2015 in respect of TLPF's 2015 Financial Statements (which showed the bonds payable to be US$68,607,600, as against assets of US$75,483,554) revealed similar concerns about the discount rate being applied by the directors. This led the auditors to again observe that they were "unable to obtain reasonably reliable evidence to determine that the Fund can remain a going concern for the foreseeable future", and to issue the adverse opinion that "the financial statements do not present fairly the financial position of the Fund as at 15 November 2015"[27].

(vi) On 4 March 2015, the directors of TLPF (Messrs Leach and McClintock) resolved to extend the maturity dates of the Series 2 Bonds that matured in January 2015 for an additional year[28], followed by a similar resolution on 16 March 2015, in respect of the Series 2 Bonds due to mature on that date[29].

(vii) By email dated 21 October 2016, Mr Leach wrote on behalf of TLPF to investors informing them of the intention to immediately appoint Delta Group Ltd, an insolvency and liquidation specialist, to advise on the best options[30] for liquidating TLPF, in light of the auditors' adverse opinion on the 2015 Financial Statements. As a result, Mr Leach advised, "the directors … will be working diligently to wind up the affairs of the Fund as soon as possible"[31].

(viii) The fact that TLPF nevertheless remained in operation for another six months, during which further correspondence was sent to Series 2 Bondholders by MPL, advising them

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[23] See para 31 above
[24] IFRS 13
[25] Penner 2, para 23.4
[26] ibid
[27] Penner 2, para 23.5
[28] Statement of Claim, para 28 and Defence para 32
[29] Penner 2, para 24, and see MP-2, page 109
[30] Penner 2, para 26; and see MP-2, page 111
[31] Penner 2, para 26, and see MP-2, page 110

of one-year extensions to the maturity dates of their bonds, citing as the reason "the liquidity constraints of the Fund"[32].

(ix) The fact that Mr Leach advised the JVLs prior to their appointment that "he would not be willing to sign a declaration of TPLF's solvency"[33].

36. Mr Penner concluded the affidavit by stating that –

> "… it is clear from all the available evidence that Mr Leach (through his various roles) was responsible for the conduct of TLPF's financial affairs … As a result of his conduct, TLPF was in a state of deep and irrecoverable insolvency prior to the commencement of its liquidation."[34]

37. In his first and only affidavit sworn to on 9 September 2020 ('Leach 1'), Mr Leach made no specific response to any of the matters set out in paragraphs 34-35 above; nor did he say anything about Mr Penner's conclusion that "TLPF was in a state of deep and irrecoverable insolvency prior to the commencement of its liquidation". However, he did make the point at the outset that[35], "[w]here I do not address matters referred to in Penner 2 and Penner 3 that should not be taken as an indication that I accept the truth or accuracy of those matters".

38. The main objective of Leach 1 was, firstly, to refute "[t]he impression wrongly given in Penner 2 … that I was almost single-handedly running TLPF and the third to Ninth [respondents]". This was, Mr Leach stated, "entirely incorrect". It failed to take into account the fact that "TLPF had, at all material times, independent board oversight through my fellow Director, Mr. McClintock". It also failed to take into account "the actual functions and roles of the Third, Fourth and Fifth [respondents] in their capacities as service providers for TLPF … and the numerous staff members engaged by those service providers".[36]

39. Mr Leach thereafter devoted several paragraphs to explaining Mr McClintock's background and his active participation in TLPF at all material times, emphasising that[37]:

> "… Mr. McClintock was appointed as a non-executive Director of TLPF *specifically* in order to provide independent oversight of TLPFs business, which is a function he fully performed. Such an appointment was entirely conventional, and Mr. McClintock was fully conversant with the TLP asset class, and with the affairs of the funds that he was involved with. In that capacity and prior to his resignations in June 2019, Mr. McClintock attended

[32] Penner 2, para 28; and see MP-2, pages 123-127, for a series of similar letters to investors
[33] Penner 2, para 29; and see MP-2, pages 128-132, for Deloitte's letter of engagement dated 26 June 2017, signed as agreed by Mr Leach on behalf of TLPF, which notes that "We understand that it is not anticipated that a Declaration of Solvency in respect of [TLPF] will be signed".
[34] Penner 2, para 32
[35] Leach 1, para 2
[36] Leach 1, para 9
[37] At para 38

the quarterly board meetings and monthly investment strategy meetings for TPF, SHSF, TLPF and DSF. Mr. McClintock was therefore involved in the management of the traded life policy asset class for in excess of twenty years".

40. Secondly, Mr Leach gave his own account of the TPF restructuring and the reactivation of TLPF[38]:

> "24. The genesis of TLPF is the TPF restructuring commencing in 2013. Whilst … TLPF had been incorporated in November 2010, the company had not been used for any business activity (and it had been contemplated to strike it off) prior to the said restructuring.
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> 25. As set out in the … Defence in the Proceedings (paragraph 16):
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> (1) In early 2013 and as a result of increased redemption activity, the Directors of TPF (being myself and Mr. McClintock) determined that permitting further redemptions would be materially adverse to TPF and damaging to its asset base of TLPs.
> (2) By way of Written Resolution dated 16 April 2013, Mr. McClintock and I (as Directors of TPF) determined to suspend redemptions in TPF from and including the April 2013 dealing day.
> (3) TPF faced adverse shareholder and creditor activity as a result of, inter alia, the suspension of redemptions, including the possibility of winding up proceedings being initiated against TPF.
> (4) Mr. McClintock and I were concerned that any liquidation of TPF would result in a fire sale of its TLPs at a time when the pricing of TLPs was very weak, which would be directly contrary to TPF's best interests.
> (5) In light of the foregoing, Mr McClintock and I determined to restructure TPF to create a new investment vehicle. The establishment of a new investment vehicle, TLPF, would enable investors of TPF to exchange their TPF holdings for shares or bonds issued by TLPF.
> (6) We believed that establishing TLPF, incorporating a discretionary lock-up period of 5 years in respect of TLPF's shares (in which shareholders could not require a redemption), the 5 year term of the Series 1 Bonds and the extendable I year term of the Series 2 Bonds … would provide an opportunity for maturities to arise, for the TLP market to recover, and for new investment to be attracted to the Fund. Further, to the extent that policy trades were subsequently necessary, we (acting on advice from MPL and MPLAM) would be more able to control the sale process of TLPs, and the timing thereof, in contrast to a mass forced sale of TLPs in response to a run of redemption requests or upon a liquidation."

[38] Leach 1, paras 24-25

41. After explaining the mechanics of the process whereby TPF shareholders were invited to redeem their shares in exchange for shares or bonds in TLPF, Mr Leach stated that "[t]he restructuring was undertaken in good faith by the Directors of TPF and TLPF in the best interests of TPF's shareholders and redemption creditors"[39].

42. Thirdly, Mr Leach explained the role and function of each of the third to the ninth respondents, and his relationship to each, in detail.

43. And fourthly, Mr Leach refuted the various claims against him and the other respondents, again in detail.

The judge's ruling

44. I will first set out the judge's summary, unchallenged in this appeal, of the evidence regarding Mr Leach's role in TLPF and the other corporate respondents[40]:

> "52. … Mr. Leach admits to being a non-executive director of TLPF. The JOLs say that he was in fact the sole executive director of TLPF. This is because TLPF's offering document stated that he acted in this capacity by virtue of the fact that he was also an executive director of the Third Defendant, MPL. The JOLs place significance on this, while the [respondents] place emphasis on the fact that there was a co-director who was responsible for providing independent oversight.
> 53. As a director of the TLPF, Mr. Leach had responsibility for signing off on its various operating documents, approving the engagement of service providers and participating as a member of its investment strategy committee. The JOLs say that it is significant that he had principal responsibility for determining the calculation methods applicable to the company's net and gross asset values.
> 54. The Third [respondent], MPL, was the Investment Manager of TLPF. It is a Cayman Islands Company of which Mr. Leach was one of two directors and CEO. In September 2013, Mr. Nicholas Calleja was appointed as the second director. MPL is owned by the Mandrake Trust of which Mr. Leach is a potential beneficiary.
> 55. The Fourth [respondent], Taurus Administration Services S.L., ("Taurus") is a company incorporated in Spain. It was the in-house Administrator for [TLPF] from December 2015 following the resignation of Apex Fund Services in August 2015. Taurus is owned by another entity Taurus Fund Administration PLC which in turn is jointly owned by Mr. Leach and Mr. Calleja.
> 56. The Fifth [respondent], MPL Asset Management (S.A.) ("MPLAM"), was the Investment Advisor to TLPF. It is a company incorporated in Switzerland. Mr. Leach is an executive director of MPLAM. Mr. Jacques Leuba was a co-director. MPLAM is owned by the Mandrake Trust of which Mr. Leach is a potential beneficiary.

[39] Leach 1, para 37
[40] Judgment, paras 52-60

> 57. The Sixth [respondent], PIF, is a company incorporated in the Cayman Islands in February 2013. Upon its incorporation, Mr. Leach was a director, a position he held for two months. Mr. McClintock was a director through to June 2013. Mr Leuba was a director from February 2013 to June 2019. PIF is owned by corporate entities which are in turn owned by the Mandrake Trust of which Mr. Leach is a potential beneficiary.
> 58. The Seventh [respondent], Sovereign High Security Fund SPC, ("SHSF"), is a Cayman Islands Company Fund. Both Mr. Leach and Mr. McClintock were directors.
> 59. Mr. Leach was a co-director, together with Mr. McClintock of the Eighth [respondent] Corinthian Growth Fund ("CGF"). Its management shares are owned by MPL as are the shares of TPF.
> 60. The Ninth [respondent], TPF, was a registered mutual fund under the Mutual Funds Law. Mr. Leach was its sole executive director at the material time."

45. After considering the evidence relied on by the parties, the judge concluded that there was reason to believe that the appellants would be unable to meet an adverse costs order if ordered to do so after the trial; and that, as a result, she had jurisdiction to order security for costs. As I have already indicated, there is no appeal against this aspect of the judge's ruling.

46. Turning next to the discretionary factors set out in **Parkinson**, the judge readily accepted that the appellants' claims were *bona fide* and not a sham, observing that, "the [respondents] do not suggest to the contrary"[41]. As regards the merits of the claim, the judge considered that "it would be difficult to form a view as to the merits of the case on either side", there being "no admission by the [respondents] and no demonstration of high probability of success or failure …"[42]. In addition to the fact that there was no admission by the respondents that there was any sum due and owing, there was "no substantial payment into Court or open offer of a substantial sum and there is no suggestion that the application for security is being made at a late stage in the proceedings". And, as regards the question of whether an order for security would stifle the claim, the judge concluded that, in light of the fact that counsel for the respondents did not feel able to make any "definitive statement" on the issue, "I am not able to conclude that an award of security for costs would stifle this Claim"[43].

47. So that left only the question of whether it could be said that, because Mr Leach and the third to ninth respondents were responsible for the impecuniosity of TLPF, there should be no order for security for costs in the circumstances of this case.

48. In this regard, the judge recorded the appellants' contention as follows[44]:

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[41] Judgment, para 46
[42] Judgment, para 47
[43] Judgment, para 96
[44] Judgment, paras 63-65

"63. In summary, as I understand the point, it is that quite separate from whether or not Mr. Leach's actions render him liable to the Claim, his directorship and operational activity make him responsible for the financial state of TLPF to the extent that it can be said that he caused its insolvent condition.

64. Further it is said that the question of ordinary commercial misfortune is not an applicable description to the instant circumstances. Having received a number of policies from its predecessor, it is not contested that TLPF never bought any policies. While it sold policies and it is a contested issue as to whether the sales were appropriate or not, it did not operate as a normal fund in that it never had a business and did not attract investors.

65. The [appellants] also submit that Mr. Leach and/or the Third, Fourth and Fifth [respondents] took approximately US$6 million out of the Fund in various fees, which is admitted. Whether or not these fees were legitimate or illegitimate which is a disputed issue in the case, the fact is that he caused this money to be paid out mostly to affiliated entities which were under his control."

49. Having rehearsed the competing arguments as to, among other things, the date and the causes of TLPF's insolvency; the valuation methodology adopted by TLPF; and the JOLs' assertion that the company's asset values were severely overstated, in the face of adverse actuarial, audit and valuation opinions, the judge said this[45]:

"… I bore in mind the distinction between responsibility and liability. The latter is not to be determined at this stage. In my view a finding of responsibility to the limited extent necessary for the purposes of this application can only be made where this is clear-cut and un-shadowed by questions which will arise on consideration of the latter. In considering the aspect of responsibility, there were a number of lingering questions which I had. The fact of these questions made it clear to my mind that the two aspects are so inextricably bound together in this particular case so as to make it difficult to identify a clear factual position in advance of any trial. These included:

a. Whether it is clear that TLPF on its establishment was doomed to fail and the reasons for this;
b. What was the basis for and circumstances surrounding TLPF's valuation strategy; and
c. What lead [sic] to or impacted TLPF's business operations such that for example it did not buy policies?"

50. Then, after further reviewing the facts, the judge stated her conclusion as follows[46]:

"87. I have referenced the above factual matters not to delve into the merits of the case but to illustrate the issues which fall to be determined.

[45] Judgment, para 76
[46] Judgment, paras 87-88

> Against the background of these factual disputes, to use the analogy employed by the [appellants], I do not think that it is sufficient to ground responsibility to say that [Mr Leach] ran the ship on the rocks without there being an admitted or *undisputed* fact which identifies clearly that he did so and how and by what means. I do not consider that it is sufficient to say in the context of all the circumstances of this particular case that the fact of interconnectedness and association among all the [respondents] and with [TLPF] is by and of itself sufficient to ground responsibility.
>
> 88. I accept the arguments of the [respondents] on this point that there requires to be some peculiarity of the connection if that connection is to be relied on without more. I bear in mind that the cases do not suggest that an element of wrong doing needs to be established. Examples include a circumstance such as ninety percent or more common ownership, the establishment of the connection as part of a deliberate scheme, the existence of an arrangement which would unhesitatingly lead to lifting the corporate veil or other such matters. In the circumstances of this case I am not able to conclude without more that the lack of available assets has been brought about by the failure of the [respondents] or is a material cause of the insolvency of [TLPF]."

51. In the result, the judge concluded that, having balanced the potential for injustice to the appellants if an order were made against the potential injustice to the respondents if an order was refused, she was satisfied that the order should be made in this case. And, after hearing submissions from counsel as to quantum, the judge ordered security for costs in the sum of US$1,098,076.87.

The grounds of appeal

52. Dissatisfied with this result, the appellants filed notice of appeal on 30 June 2021. In their Memorandum of Grounds of Appeal dated 28 July 2021, the basis of the appeal was set out as follows:

> "1. The Grand Court erred in holding that, in exercising its discretion in relation to the [respondents'] application for security for costs, as the [respondents'] conduct that was alleged to have caused the insolvency of [TLPF] was itself an issue in dispute in the proceedings, the impecuniosity factor could not be considered …
>
> 2. The Grand Court should have found that, provided the [appellants'] claim was arguable then the question was whether, if that claim was found to be correct, it indicates that conduct of the [respondents] caused [TLPF's] impecuniosity. The Grand Court should also have held that if the answer to that question was 'Yes' then this … was a factor relevant to the overall exercise of discretion.

3. Further, but separately, the Grand Court should have also found that the impecuniosity factor was engaged on a separate basis that [TLPF's] relevant impecuniosity was caused by [Mr Leach] while he was in control of [TLPF] and the Third to Ninth [respondents].

4. When given due consideration and weight, the Grand Court should have found that the abovementioned bases of the impecuniosity factors rendered the award of security for costs unjust in the circumstances …

5. …

6. …

7. …

8. Accordingly, the learned judge erred in holding … that, as the cause of [TLPF's] insolvency was in dispute in the main proceedings, the cause of the impecuniosity could not be considered as part of exercising the Court's discretion with respect to the … application for security for costs. If the Grand Court had adopted the correct approach then, approaching the analysis on the basis of the [appellants'] claims being arguable and *bona fide* claims brought by officers of this Honourable Court, the Grand Court should have found that the cause of [TLPF's] impecuniosity would have been a material factor which militated heavily against an award of security for costs in favour of the [respondents] and should have declined to exercise its discretion in favour of making such an award."

The appellants' submissions

53. For the appellants, Mr Chapman QC submitted that the judge erred as a matter of law by failing to take the impecuniosity factor into account at all. Had the judge taken it into account, it would have led to the conclusion that, looked at broadly, the relevant impecuniosity in this case was caused by the respondents. The judge's approach was inconsistent with the established jurisprudence of this court, which showed that, while it was generally the case that, if proof of the impecuniosity factor is integrally tied up with the claim, it might carry little or no weight at the interlocutory stage, there were cases in which the circumstances were such as to make it a relevant and even decisive factor.

54. Mr Chapman submitted further that in this case, as the evidence accepted by the judge demonstrated, Mr Leach, in his capacity as executive director of TLPF and the moving force behind several of the other corporate respondents, played an active part in all of the events which led to TLPF's impecuniosity by the time the application for security for costs came to be made. This court should therefore exercise its discretion afresh and rule that the application for security for costs be refused.

55. For these submissions, Mr Chapman placed great reliance on, among other authorities, the decisions of this court in **Charlotte Griesel, Paul Griesel and Grand Cay Investments Ltd v Grand Cay Developments Ltd (in Liquidation)** (‘**Griesel**’)[47], and of Creswell J in **Cesar**. It may be convenient to consider these cases before turning to Mr Parker QC’s submissions.

56. In **Griesel**, Mr and Mrs Griesel and their investment company, Grand Cay Investments Ltd (‘GCIL’), sought security for costs as defendants in an action brought against them by another of their companies, Grand Cay Developments Ltd (‘GCDL’). GCDL, which had fallen into insolvency and was being managed by liquidators, was used by the family to engage contractors to work on the improvement of commercial and residential property held in the name of GCIL, which was a company created and used by the Griesels to acquire and hold title to the land. The result of these corporate arrangements was that the contractors who effected improvements to property held in the name of GCIL could not look to that company for payment, but were obliged to look to GCDL (the insolvent company), which had no interest in the property. GCDL’s ability to pay the contractors was dependent on the funding made available to it by or through the Griesels and or GCIL, and how those funds were used. GCDL, having been allowed to become insolvent, brought a claim at the instigation of its liquidators against the Griesels as former directors, alleging among other matters, mismanagement and neglect of its affairs, and against GCIL, on grounds that include the allegation that debts were incurred by GCDL for its benefit on its behalf.

57. GCIL and the Griesels’ application for security for costs was opposed by GCDL and the liquidator on the ground that, if proved, the allegations which they made against GCIL and the Griesels would show that GCDL’s insolvency was due to their actions. In these circumstances, it was submitted that it would be a denial of justice to order security for their costs.

58. In the Grand Court, this argument succeeded before Levers J, who, in refusing the application, observed that –

> “… in view of the fact that the action has been commenced by liquidators performing their statutory duty and the fact that the Defendants conduct on the facts appears to have contributed to the impecuniosity of [GCDL] and its financial distress … an order for security for costs would be oppressive in all the circumstances of the case.”

59. While this court declined to support Levers J’s first ground for her decision, the decision itself was upheld on the basis of the second reason. After observing that, “[T]he claims cannot at this

[47] Civil Appeal No 16 of 2004, reasons released 21 October 2005

stage be said to be likely either to fail or to succeed"[48], Taylor JA (with whom Zacca P and Forte JA agreed) said this[49]:

> "The question on which the outcome of the appeal turns is whether Mr. and Mrs. Griesel and their investment company can rely on the fact that the company has been allowed to become insolvent as a ground for requiring that it secure the potential liability to them for costs that it would incur should the action fail. Could it be said to be unjust that they rank in such circumstances with the company's other creditors? An answer to this question does not require that we reach any conclusion on the issues of fact and law on which the action itself will turn. A finding that the company's impecuniosity is due to action or inaction of the defendants would not mean that they should be held liable to compensate the company on that account. Much more would, of course, have to be established in order for the present claims to succeed."

60. Then, after referring to **Parkinson**, Taylor JA went on to explain his conclusion in this way[50]:

> "It is the operation by the Griesels of a corporate scheme under which debts were incurred by [GCDL] for the improvement of land held by another of their companies, and their conduct thereafter in failing to ensure that [GCDL] was so managed and funded as to meet those obligations, that has resulted in the present insolvency. This is not an ordinary case of commercial misfortune, in which impecuniosity has arisen in the normal course of a trade or business or as a result of the operation of market forces. The insolvency results from the nature of the corporate scheme established by the Griesels and the manner in which [GCDL] has been funded by the defendants and those funds used by it."

61. In **Cesar**, the plaintiffs brought claims against the defendants for, among other things, breach of fiduciary duty and the defendants counterclaimed for, among other things, breach of contract. The plaintiffs were property owners to which the defendants provided services in connection with developing a luxury resort. All the plaintiff and defendant companies were part of the same group and were ultimately over 90% owned by the first defendant, Mr Ryan. A loan of US$250 million had been made by Column Financial Inc. to the first to fourth plaintiffs ('the receivership companies'), secured by, among other things, a debenture granting a fixed and floating charge over the first plaintiff's assets and undertaking and the collateral debenture over the second to fourth plaintiffs assets and undertakings, both securities being later assigned to RC Cayman Holdings LLC ('the lender'). Mr Ryan was a director of each of the receivership companies until, when the plaintiff's total deficit reached US$340,640,000.00, the lender took steps to enforce its security and receivers were appointed. The plaintiffs brought various claims against the defendants, as a result of which the defendants sought (i) security for their costs;

[48] At page 3
[49] Ibid
[50] At page 4

and (ii) an advance payment towards Mr Ryan's costs, pursuant to a claimed director's indemnity under the articles of the first to third plaintiffs.

62. Despite the fact that he considered it[51] "difficult (if not impossible) … to form a view as to the respective merits of the claims, defences (and counterclaims) at this stage of the proceedings", Cresswell J held that, in all the circumstances of the case, an order for security for costs was inappropriate. Although the court would assume that the plaintiffs' assets would be insufficient to pay the defendants' costs, it would not exercise its discretion to order security. While in the ordinary case of a company, acting by a receiver, suing an unconnected defendant with whom the company had contracted, the defendant could normally obtain security for costs, in the present case Mr Ryan and the defendant companies were not independent parties who had dealt with the plaintiffs at arm's length, but were closely connected parties forming part of the same group. Further, Mr Ryan had been responsible as director for the receivership companies, and his conduct of their affairs was such that, immediately prior to the receivership, their deficit was US$340,640,000. Since the plaintiffs' want of means had been brought about by the defendants' conduct, it would be unjust to order that they be given security for their costs, in preference to the plaintiffs' other unsecured creditors.

63. Among the factors which Cresswell J considered was that all the plaintiff and defendant companies were ultimately over 90% owned by Mr Ryan, who had been a director of each of the receivership companies for several years until the date at which the deficit was said to be US$340,640,000.

64. Despite describing the circumstances in **Griesel** as "very different from those in the present case", Cresswell J nevertheless considered that a similar question to that posed by Taylor JA in that case was apposite[52]:

> "Could it be said to be unjust that Mr. Ryan and the defendant companies which he owns 100% should rank in all the circumstances with the plaintiffs' other unsecured creditors? Mr. Ryan and the companies which he owns are not independent parties who have dealt with the plaintiffs at arm's length, but are very closely connected parties forming part of the same group".

65. Creswell J accordingly explained the basis of his decision as follows[53]:

> "It is necessary to stand back and look at all the circumstances of the present case set out above in the round. I pay appropriate regard to all the

[51] Judgment, para 65
[52] Para 71
[53] At para 73

> circumstances set out above. There is one circumstance which is worthy of emphasis and repetition. All of the plaintiff and defendant companies are, I repeat, ultimately over 90% owned by Mr. Ryan. The plaintiff and defendant companies formed part of the group described above. Mr. Ryan was responsible as director for the affairs of the receivership companies and his conduct (in the broad sense) of the affairs of the receivership companies is such that immediately prior to the receivership their position was, according to Deloitte, US$340,640,000. I do not consider in the exercise of my discretion under s. 74 that I should order security for costs having regard to the (most unusual) circumstances of the present case identified above."

66. Submitting that the position in this case was virtually indistinguishable from **Cesar**, Mr Chapman drew particular attention to the facts that (i) the claims in **Cesar** were not against an independent third party, but against a director, on whose watch the company's impecuniosity had occurred; and (ii) as in **Griesel**, the company's impecuniosity had arisen from the structure of the management and from particular decisions taken, rather than from the usual course of commerce.

The respondents' submissions

67. For the respondents, Mr Parker QC submitted that there was no error of law in the judge's approach to the application for security for costs. Accordingly, it is not open to this court to disturb the manner in which the judge exercised her undoubted discretion. In her deliberation, having fully considered all the arguments in relation to Mr Leach's position in TLPF and the other corporate respondents, the judge gave them appropriate weight. It was also necessary to keep in mind Mr McClintock's role as an independent director of TLPF and the fact that no allegation was now being pursued against him. The judge was correct in saying that there needed to be something more than the fact of interconnectedness and association between the respondents and TLPF in order to ground responsibility for the company's impecuniosity.

68. And, as regards Mr Chapman's reliance on **Griesel** and **Cesar**, Mr Parker submitted that it was wholly misleading to refer to those cases as if they had laid down any principle of law. Both cases turned on their own facts and neither of them offered any true analogy to the present case. In any event, they were contrary to established English authority and now had to be read in light of this court's more recent decision in **Walkers (A Firm) v Arnage Holdings Limited et al** ('**Walkers**')[54], which showed that the judge's decision in this case was unassailable. It may also be convenient to consider **Walkers** briefly at this point.

[54] CICA (Civil) Appeal No 5 of 2020, judgment delivered 2 August 2021

69. **Walkers** was an appeal against Smellie CJ's refusal to order security for costs in favour of the appellants, a firm of attorneys, in long-running litigation against the firm by a combination of personal and corporate plaintiffs ('the respondents'). The Chief Justice's primary reason for his decision was that he had already given summary judgment, with damages to be assessed, against the appellants on the respondents' substantive claims. In these circumstances, as Rix LJ, who delivered the leading judgment (with which Martin and Moses JJA agreed) explained[55], the Chief Justice, "considered, understandably, that [the application] could not succeed, and that [the appellants] conceded that that was so".

70. However, by the time the appellants' appeal against the refusal to order security for costs came on for hearing, the Chief Justice's previous order for summary judgment had already been set aside by this court in a separate appeal[56], on the ground that the Chief Justice had erred in making it; and the court ordered that the substantive action should proceed to trial in the usual way. Accordingly, the basis of the Chief Justice's order refusing security for costs had completely fallen away. So the question for this court was whether the order could nevertheless be supported on a fresh exercise of discretion by this court.

71. In this regard, the applications for security for costs against the respondents were based on the grounds that they appeared to be impecunious. In response, the respondents contended 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 [the appellants'] wrongdoing as a fiduciary"[57].

72. After referring to **Parkinson**, and to the decision of the Court of Appeal in **Danilina v Chernukhin**[58] (in which Hamblen LJ referred with approval to a note of caution[59], based on **Porzelack**, against parties "attempting 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"), Rix JA said this[60]:

> "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 appellants] 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*".

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[55] At para 3
[56] **Walkers v Arnage**, CICA Appeal No 5 of 2020, judgment delivered 1 February 2021
[57] Per Rix JA, at para 18
[58] [2018] EWCA Civ 1802
[59] in the Civil Procedure 2018 Vol. 1, p. 836, para 25.13.1
[60] Paras 24-25

> 25. It seem [sic] 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."

73. Rix JA then went on to discuss a number of cases in which the impecuniosity factor had been successfully deployed as an obstacle to the making of an order for security for costs, but almost invariably in combination with one or more of the other factors mentioned in **Parkinson**[61].

74. On this basis, Rix JA concluded his discussion on the impecuniosity factor as follows[62]:

> "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 …
>
> 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 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."

75. In the result, Rix JA considered that, in the case before the court, "we are left with the [respondents'] impecuniosity and little else to put into the balance of justice". In those circumstances, it was held that the appellants were "entitled in principle and in justice to security for costs ...", and the appeal against the Chief Justice's judgment refusing it was therefore allowed.

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[61] At paras 26-30
[62] At paras 31-33

Discussion

76. Rix JA's conclusion in **Walkers** that the issue whether a defendant has caused or contributed to a plaintiff's impecuniosity is "a possible factor" is, of course, uncontroversial. As has been seen, it was specifically identified as a factor to be considered in **Parkinson**, and has been discussed in a number of subsequent English cases, many of which were considered by Rix JA in his judgment in **Walkers**[63]. In light of that, I will only mention three of them.

77. In **Mastermailer Stationery Limited v Sandison, Black and Black**[64], the Master hearing an application for security for costs approached the issue whether the defendants' conduct had caused or contributed to the claimant's impecuniosity on the basis that the claim would be unsuccessful. In those circumstances, the Master considered that, "... by definition, it would have been found that what the defendant did and for which the claimant was claiming was not a wrongdoing, and the defendant has been vindicated"[65].

78. The Court of Appeal held that the Master had fallen into error. As Vos J observed[66], having revisited Lord Denning MR's judgment in **Parkinson** –

> "28. … It seems to me that the true factor to consider is whether the conduct alleged has, if it is proved, in fact brought about or contributed to the insolvency of the claimant company. It would be rather ridiculous to assume that the claim is unsuccessful and therefore that there was no conduct that could improperly have brought about the insolvency of the claimant company, because, if that were assumed, the factor would never be relevant to a claim for security for costs."

79. Vos J went on to add that[67]:

> "31. … whilst I am quite certain that the defendants' conduct, if proved, could be said to have worsened the company's financial position and could even be said in some measure to have brought about a greater measure of impecuniosity than would otherwise have been the case, this … is only one factor to be drawn in the balance when one comes to consider whether security should be granted. I shall return then to the overall balance, having determined that I need to look again at it."

80. In the result, taking all factors into account, the appeal against the Master's order for security for costs was allowed and the order discharged.

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[63] A paras 23-30
[64] [2011] EWHC 4304 (Ch)
[65] The extract from the Master's judgment is quoted by Vos J at para 28 of his judgment
[66] At para 28
[67] At para 31

81. In **Deleclass Shipping Company Limited v Ingosstrakh Insurance Company Limited** ('**Deleclass**')[68], after considering some of the modern authorities, Andrew Hensham QC (sitting as a deputy judge of the High Court of England and Wales) said this[69]:

> "37. It seems to me, therefore, that the correct approach on this particular issue is first to ask whether the claimants' claim is bona fide and arguable, since if it is not then the argument that the defendant's conduct caused the claimants' impecuniosity should carry little weight. Provided the claim is arguable then the question is whether, if it is correct, it indicates that the defendant's conduct caused the claimants' impecuniosity. If the answer to that is 'Yes' then this is a factor relevant to the overall discretion.
>
> 38. As to its potential significance, the claimants refer to the statement of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* at page 540 to the effect that the court should be concerned not to allow security to be used as an instrument of oppression 'particularly when the failure to meet that claim might itself have been a material cause of the plaintiff's impecuniosity'. However, this factor may not be decisive in itself, otherwise, as the defendant points out, a great many security applications would founder on this point. It is a matter to be weighed in the balance along with others."

82. And finally, in **Fine Care Homes Ltd v National Westminster Bank PLC**[70], Mr James Pickering (sitting as a Deputy High Court Judge), in considering the impecuniosity factor on an application for security for costs, observed that:

> "30. … [Counsel for the defendant] … helpfully and very fairly took me to the *Deleclass* case, and indeed and in particular the useful conclusion in that case where it seemed to me that it was made clear that it is something which I can take into account. In other words, it is open for me to consider this factor on the hypothesis that the claim is ultimately successful … it does seem to me that if the claimant's claim is successful it would follow that there is a real argument that the claimant's lack of cash would have been caused, at least in part, by the matters complained of. So, it does seem to me that to a certain extent the claimant's impecuniosity may have been caused by some of the conduct. Therefore that is a factor which I take into account in favour of the claimant."

83. However, at the end of the day, having weighed up all the relevant factors, Mr James Pickering concluded[71] that, on balance, security for costs should be ordered, not least of all because "it does not seem to me that the making of an order for security would stifle the case".

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[68] [2018] EWHC 1149 (Comm)
[69] At paras 37-38
[70] [2019] EWHC 3623 (Ch), para 31
[71] At para 35

84. So, although, as Rix JA demonstrated in his review of these and other authorities in **Walkers**, the impecuniosity factor has tended to work best in combination with some other factor, such as stifling of the claim, it is clear that it nevertheless remains a factor that must be weighed in the overall balance in the discretionary exercise.

85. Each case must therefore be approached on the basis of its own particular circumstances, always bearing in mind the issue of causation. In that regard, as Rix JA indicated, that issue will in many cases "be bound up in the overall merits of the claim, and these will not help unless there is a clearly demonstrated high probability of success for the plaintiff".

86. It is no doubt with these considerations in mind that Mr Parker submitted, with some force, that the decisions in **Griesel** and **Cesar** cannot stand in light of **Walkers**.

87. In considering this submission, I note, in the first place, that we were told by Mr Chapman who also appeared in **Walkers**, both **Griesel** and **Cesar** were cited to the court in that case. However, Rix JA made no mention of either of them in his judgment. In the absence of any adverse comment on them, therefore, I approach the matter on the basis that nothing that was said in **Walkers** was intended to reflect on or qualify the authority of **Griesel** and **Cesar** in any way.

88. But, putting that on one side for the moment, it also appears to me to be quite possible for the two strands of authority to live together. Taking **Walkers** first, there is nothing new or unusual in the proposition that, where it is impossible to separate the cause of the impecuniosity from the overall merits of the case, which remain "poised"[72], the impecuniosity factor is, as Rix JA put it[73], "perhaps unlikely to take things very much forward".

89. In **J.M. Bodden and Son International Limited v Dettling and Sparks**[74], for instance, a case to which the respondents referred in their skeleton argument, Malone CJ considered that, because the case was not one in which it could be "clearly demonstrated one way or another that there is a high probability of success or failure", he could not take on board the plaintiff's contention that the defendants' conduct was responsible for the plaintiff's financial distress. To do this would presuppose the truth of the allegations made on the substantive factual issues.

90. The respondents also rely on a number of English cases, which, Mr Parker submitted, were entirely consistent with **Walkers** on this point. Among them were **Automotive Latch Systems Limited v Honeywell International Inc**[75], in which Langley J observed that, "[t]he submission

[72] As counsel for the appellants put it in **Walkers**, para 21
[73] **Walkers**, para 33
[74][1990-91 CILR 220]
[75][2006] EWHC 2340 (Comm), para 17

that [the defendant] caused the financial difficulties of [the claimant] is not one which can, I think, be properly taken into consideration ... [s]o to determine would be to pre-judge one of the major issues in dispute in the proceedings"; **Startwell Limited v Energie Global Brand Management Limited**[76], in which Warby J[77] held that, "I am not persuaded that I am in any position to make a reliable assessment of the merits of the claims that remain in issue, save to treat them as bona fide claims which are not a sham, but have reasonable prospects ... This means that I cannot reach a reliable conclusion on whether or not the claimant's want of means has been brought about by any *wrongful* conduct on the defendant's part"[78]; **Absolute Living Developments Limited (In liquidation) v DS7 Limited and Ors**[79], in which Marcus Smith J commented that "... in a case as complex as this one, I do not consider that I can appropriately conclude that the fact that the Claimant is now in liquidation is down to the Defendant's breach of duty as alleged by the Claimant"; and **Everwarm Ltd v BN Rendering Ltd**[80], in which Cockerill J considered the question of want of means being the cause of the impecuniosity (describing it as "an unusual point on which the respondent in an application for security can succeed"), and concluded that "it is only in unusual circumstances that at this point in the litigation timeline it is possible to say in the context of all these issues which lie between the parties, that that is this sort of case".

91. It seems to me that Taylor JA obviously had the principle of these cases in mind in **Griesel**. In that case, having said that the claims in that case could not be said "to be likely either to fail or succeed"[81], he observed that the answer to the question whether the relevant impecuniosity in that case was caused by the applicants for security for costs "does not require that we reach any conclusion on the issues of fact and law on which the action itself will turn".

92. In my view, on their facts, cases like **Griesel** and **Cesar** stand on a different footing. In **Griesel**, the court considered that the relevant impecuniosity arose distinctly from "the nature of the corporate scheme established by the Griesels and the manner in which the plaintiff has been funded by the defendants and those funds used by it"[82].

93. In **Cesar** - which was also a case in which the court found it "very difficult (if not impossible) ... to form a view as to the respective merits ... at this stage of the proceedings" – the decisive factor was the fact that all of the plaintiff and defendant companies were over 90% owned by

[76][2015] EWHC 421 (QB), paras 99-100
[77]Applying Langley J's decision in **Automotive Latch Systems Limited v Honeywell International Inc.**
[78] Emphasis as in the original
[79] [2018] EWHC 1432 (Ch), para 15
[80] [2019] EWHC 1985 (TCC)
[81] **Griesel**, page 3
[82] Per Taylor JA, at page 4

Mr Ryan, who was the director of the receivership companies. Accordingly, "[h]is conduct (in the broad sense) of the affairs of the receivership companies" was ultimately responsible for their parlous financial condition. It is in these circumstances (which he described as "most unusual") that Creswell J declined, as a matter of discretion, to order security for costs.

94. On their facts, of course, as Creswell J observed in the latter case, **Griesel** and **Cesar** were completely different cases. But it seems to me that the common feature which they share is that in both cases the court found it possible to answer the question whether the conduct of the defendant was the cause of the plaintiff's impecuniosity without reference to the overall merits of the case; or, I might add, any disputed fact. Both cases are therefore clearly distinguishable from **Walkers**, in which, as has been seen, the merits of the impecuniosity contention were "very much bound up in the overall merits of the parties' dispute".

95. In my view, therefore, the **Griesel/Cesar** line of authority is reconcilable with the decision in **Walkers**. It follows from this that, in appropriate circumstances, that line of authority may be of assistance in resolving a case in which the impecuniosity factor is prayed in aid as a bar to an application for security for costs.

Conclusions

Can this court disturb the judge's exercise of her discretion?

96. It is common ground that the judge's order security for costs in this case was, as **Parkinson** confirmed, an exercise of discretion. In order to disturb the judge's conclusion on appeal, therefore, it is necessary for the appellants to show that the judge either erred in principle, or omitted or considered some factor that she should, or should not, have considered, or that her decision was wholly wrong[83].

97. Mr Parker maintains that this high bar was not met in this case and that the judge's decision ought not to be disturbed. However, in light of the authorities which I have been considering, in particular **Griesel** and **Cesar**, I think that, as Mr Chapman submitted, the judge fell into error by excluding the impecuniosity factor from her consideration altogether. All of the authorities, **Walkers** included, accept that the impecuniosity factor is a matter to be weighed by the court in the overall balance in deciding whether or not to order security for costs. Although it is well established that that factor may not take the matter much further in a case in which the facts surrounding it are tied up with the merits of the case, it seems to me that, in this case, it was

[83] **Hadmor Productions v Hamilton** [1982] 1 All ER 1042, per Lord Diplock at page 1046; **Roache v News Group Newspapers Ltd** [1998] EMLR 161, per Stuart-Smith LJ at page 172

open to the judge to consider, without reference to the disputed factual and legal issues in the action itself, whether the respondents' conduct was responsible for TLPF's impecuniosity. I therefore disagree, with respect, with the judge's conclusion "that the two aspects are so inextricably bound together in this particular case as to make it difficult to identify a clear factual position in advance of any trial".

98. I therefore consider that the judge exercised her discretion on an erroneous basis, with the result that it is open to this court to revisit the matter; and, if necessary, to exercise a fresh discretion.

Can it be said at this stage that Mr Leach was in sole and effective control of TLPF?

99. As Mr Leach himself confirmed, he and Mr McClintock, as directors of both TPF and TLPF, were entirely responsible for the decision to restructure TPF and to establish a new investment vehicle in TLPF. I have already set out the judge's summary, about which no complaint has been made in this appeal, of the factual position as regards ownership and control of TLPF[84]. It seems to me to be clear from this summary that, on the admitted, or not seriously disputed, facts of the case, Mr Leach was in fact in sole and effective control of TLPF.

100. In this regard, I take into account especially:

(i) his operational responsibilities for TLPF, as its principal signing officer and a member of its investment strategy committee with principal responsibility for determining the calculation methods applicable to the company's net and gross asset values;
(ii) his position as an executive director of (a) MPL (the sole voting shareholder of TLPF and a company owned by Mandrake Trust, of which Mr Leach was a potential beneficiary), (b) Taurus (the in-house Administrator of TLPF from December 2015), and (c) MPL AM (the Investment Advisor to TLPF); and
(iii) the fact that Taurus and MPL AM were both owned by Taurus Fund Administration, which was in turn owned by Mr Leach and Mr Calleja (who was himself also a director of MPL over the relevant period).

101. Although Mr Leach was careful to point to the fact that Mr McClintock was for much of the relevant period also a director of TLPF with responsibility for providing independent oversight, as he had also been of TPF, there was no evidence of any occasion on which Mr McClintock's input had been contrary to Mr Leach's or decisive in any regard. In any event, it seems to me that the fact that Mr McClintock might have shared formal decision-making authority with Mr Leach at board level for a certain period of time, does not detract from the clear inference to be

[84] See para 44 above

drawn from the undisputed evidence that Mr Leach was the director who took the lead at all times.

Can it be said at this stage of the proceedings that Mr Leach and the third to ninth respondents were responsible for TLPF's impecuniosity?

102. Mr Chapman submitted that the net effect of the restructuring exercise was to transfer TPF's state of financial distress to TLPF. This view of the matter is to a large extent supported by Mr Leach's own account, in which he explained that, in the run-up to the decision to restructure, "TPF faced adverse shareholder and creditor activity as a result of, inter alia, the suspension of redemptions, including the possibility of winding up proceedings being initiated against TPF". It was in these circumstances that, in order to avoid a liquidation, which "would result in a fire sale of its TLPs at a time when the pricing of TLPs was very weak", it was decided that TLP should be restructured and a new investment vehicle, TLPF, created in its stead. The thinking was that the combination of the "discretionary lock-up period of 5 years in respect of TLPF's shares (in which shareholders could not require a redemption), the 5 year term of the Series 1 Bonds and the extendable I year term of the Series 2 Bonds … would provide an opportunity for maturities to arise, for the TLP market to recover, and for new investment to be attracted to the Fund".

103. It is therefore against this background that the new TLPF started out life. But, thereafter, while TLPF did not buy any policies, it sold a number of policies at what Mr Penner described as an average sale price of 19.8% of their marked value.

104. By May of 2015, consulting actuaries engaged by MPL raised concerns about the discount rate being applied by TLPF's directors, pointing out that it was "significantly lower than those seen elsewhere in the market"; and that, using the market discount rate as at December 2014 would result in a 45-55% reduction in the value of the fund.

105. In July 2015, Apex, TLPF's then administrator, conveyed to Mr Leach and Mr Calleja (as it turned out, a month before resigning from the position) the concerns of investors about "the selling price of policies at well below valuations in order to meet premiums, management fees and fund costs …", an activity which, among other things, "also brings into question the current valuations".

106. In its audit report dated 14 August 2015, Kinetic issued a "disclaimer of opinion", which I will quote in full:

> "... a key variable in the valuation of investments is the discount rate for traded life policies. The Directors have applied an estimated discount rate in accordance with the Funds offering document, however this is not in

> accordance with IFRS 13 as explained on page 31. The application of a discount rate advised by an independent actuary to conform to IFRS 13, would result in the Fund's total liabilities exceeding its total assets by US$21,760,734. This position under the IFRS basis of accounting casts doubt over the Fund's ability to continue as a going concern. Also, note 7 explains the liabilities include certain bonds and related interests that have a 5 year term to maturity. The Directors state that they are confident the Fund's investments will realise their carrying amounts over the term of the bonds and that, based on cash flow forecasts, the Fund will be able to meet its liabilities as they fall due for the foreseeable future. Accordingly the Directors have prepared the financial statements on a going concern basis.
>
> We have been unable to obtain reasonably reliable audit evidence that the Fund will be able to realise its traded life policies at their carrying amounts and that the Fund will have sufficient resources to meet its liabilities as they fall due for the foreseeable future. As a result, we are unable to determine whether the financial statements are appropriately prepared on the going concern basis under the IFRS basis of accounting.
>
> **Disclaimer of opinion**
>
> Because of the significance of the matter described [above], we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion. Accordingly we do not express an opinion on the financial statements."

107. There is no evidence that Mr Leach, MPL, Taurus or MPL AM did anything or took any corrective action in light of the concerns expressed by the actuaries, Apex (its own administrator) or the auditors. Indeed, in their audit report for the following period dated 7 October 2016, based on the identical concern about discount rates and the impact of understating them, the auditors escalated their opinion to the adverse opinion that "the financial statements do not present fairly the financial position of the Fund as at 15 November 2015"[85].

108. Over this entire period, on the other hand, TLPF continued to mark TLPs at, the appellants say, inflated values. And over the same period, the appellants say further, an amount of approximately US$6 million, a fact which the judge treated as admitted, was paid by TLPF in various fees and the like, to MPL, Taurus, MPL AM and the other corporate respondents. As the judge observed, the question whether or not those fees were legitimate or illegitimate is a disputed issue in the proceedings. But Mr Chapman nevertheless submits that, had these payments not been made, TLPF would not have been impecunious by the time the JOLs came to be appointed.

[85] Penner 2, para 23.5

109. Within two weeks of the auditors' adverse opinion (and in light of it), Mr Leach wrote to investors on behalf of TLPF informing them of the intention to seek immediate advice on the best options for liquidating TLPF.

110. As has been seen, the judge drew a distinction between responsibility (for TLPF's impecuniosity) and liability, indicating that "the two aspects are so inextricably bound together in this particular case so as to make it difficult to identify a clear factual position in advance of any trial"[86].

111. In this, in my respectful view, the judge fell into error. This was a case in which, prior to the restructuring, TPF was already, in the view of its directors (including Mr Leach), at risk of liquidation. In order to forestall that event, it was decided to transfer the portfolio of traded life policies to TLPF, in the hope that the breathing space afforded by the share and bond structure of the new TLPF "would provide an opportunity for maturities to arise, for the TLP market to recover, and for new investment to be attracted to the Fund". But, in the ensuing period, in addition to the fact that no new investors were attracted to the fund, the directors adopted a discount rate policy for its traded life policies which elicited immediate warnings from the actuaries, the administrator and the auditors that they were embarked on a course which could in short order result in insolvency. Some evidence of TLPF's liquidity strains could be seen in the directors' decision to extend the maturity dates of the Series 2 Bonds in 2015. But the discount rate policy persisted and substantial payments, to the tune of US$6 million, continued to be made by the company to related parties by way of fees and the like. And, in short order, on 28 June 2017, as explicitly foreshadowed by the auditors, TLPF, by resolution of its sole voting shareholder, opted for voluntary liquidation, not quite four years after the completion of the restructuring.

112. Nothing that I have set out in the preceding paragraph is seriously in issue. Indeed, much of it is confirmed by Mr Leach himself. In my view, it provides cogent evidence that, looked at broadly, by virtue of the manner in which TLPF was (i) organised as result of the restructuring, and (ii) operated by Mr Leach in its immediate aftermath, TLPF's want of means to meet any potential costs liability by the time the application for security for costs was made was caused by Mr Leach and the other respondents. In this case, as in **Griesel**, a finding that TLPF's impecuniosity is due to action or inaction of Mr Leach and others "would not mean that they should be held liable to compensate the company on that account". It seems to me that this conclusion involves no element of prejudgment of the substantive issues raised in the proceedings: issues such as the propriety of the payments made by TLPF to MPL, Taurus, MPL

[86] Judgment, para 76

AM and others, breaches of fiduciary duties, and all the other wrongs alleged in the statement of claim and not admitted in the defence remain completely at large and fall to be resolved at the trial.

113. I accordingly consider that, taking into account all the material circumstances of the case, the appellants have made good their opposition to an order for security for costs against them in this case.

Disposal

114. I would therefore allow the appeal and set aside the order for security for costs made by the judge. On the question of the costs of the appeal, I would propose that the parties should file written submissions within 21 days of the date of the court's order on this appeal, and that the matter be thereafter dealt with by the court on paper.

BIRT JA

115. I agree.

MOSES JA

116. I also agree.