IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO : FSD 140 of 2019 (CRJ)

BETWEEN

(1) TRADED LIFE POLICIES FUND (IN OFFICIAL LIQUIDATION)

(2) MICHAEL PENNER (IN HIS CAPACITY AS A JOINT OFFICIAL LIQUIDATOR OF TRADED LIFE POLICIES FUND) **Plaintiffs**

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) SOVEREIGN HIGH SECURITY FUND SPC

(8) CORINTHIAN GROWTH FUND

(9) TRADED POLICIES FUND **Defendants**

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Appearances:	**Mr. James Eldridge and Mr. Justin Naidu of Maples and Calder for the Plaintiffs**
	Mr. Christopher R. Parker Q.C. instructed by Mr. Richard Annette of Stuarts Walker Hersant Humphries for the First and Third to Ninth Defendants
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Hearing:	**22nd September 2020**
Draft Judgment:	**19th January 2021**

HEADNOTE

Companies Act *- S. 74 – Security for costs, test to be applied, causation of insolvency, quantum, application of a buffer, indemnity costs.*

JUDGMENT

1. There are two matters before the Court for consideration. By Summons filed on the 14th January 2020, the First and Third to Ninth Defendants apply for security for costs in such sum and on such terms as the Court may deem just and appropriate. As at the date of hearing, the amount of security for costs claimed by way of updated cost schedules is US$4.85 million. The application is made pursuant to s.74 of the ***Companies Act*** (2018 Revision) and is said to be made on the basis that there is a real risk that the First Plaintiff, a company in liquidation, will not be able to meet the Defendants' costs in responding to the litigation, should an adverse costs order be made.

2. The application is opposed by the Plaintiffs on a number of grounds, primarily that the First Plaintiff will be able to pay the costs if the sum claimed is discounted to what is said to be a reasonable and proportionate sum. Secondly, that in any event, the Court ought not to exercise its discretion to grant security for costs in circumstances where it is said that the First Defendant, Mr. Jeremy Leach, through his controlling mind as director of the First Plaintiff and or his ownership interests or controlling roles in the corporate Defendants, is responsible for the insolvency of the First Plaintiff.

3. By way of Summons dated 24th July 2020 the Plaintiffs sought an order that the Defendants be required to serve on or before the 1st October 2020, a list of all documents which are or have been in their possession, custody or power relating to any matter in question in this cause. As at the date of the hearing there was agreement with respect to this second matter save for the issue of costs.

THE BACKGROUND AND WRIT ACTION

4. The First Plaintiff, Traded Life Policies Fund (in Official Liquidation), ("TLPF"), is a Cayman Islands Company. It was incorporated on the 11th November 2010 under an earlier name. Its most recent name change was on the 24th November 2013. Its stated purpose was to operate as an investment company whose business was to invest in traded life policies or in companies which invested in traded life policies.

5. It is common ground that TLPF was largely inactive until about September 2013 when there was a restructuring of another company, the Ninth Defendant, Traded Policies Fund, ("TPF"). By this restructuring TLPF received all of the assets of TPF which were 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 (extendable (Series 2 Bonds).

6. TLPF was placed into voluntary liquidation on the 28th June 2017 by resolution of its sole voting shareholder, the Third Defendant, Managing Partners Limited, ("MPL"). The Joint Voluntary Liquidators, Michael Penner and Stuart Sybersma were appointed by the Court as Joint Official Liquidators, ("JOLs") on the 21st July 2017. No declaration of solvency was signed on their appointment. The JOLs filed a certificate of insolvency on the 28th July 2017 and, in a recent report of April 2019, record potential liabilities in respect of Bond holders as being in the region of some US$80.7 million[1].

7. By Writ of Summons and the Statement of Claim filed 25th July 2019, TLPF and Mr. Penner, the Second Plaintiff, claim against nine Defendants. The action has now been discontinued against the Second Defendant, William McClintock, a former non-executive director of TLPF.

8. The seven corporate Defendants either provided administrative or management services to TLPF or received from or transferred assets to it. Each corporate Defendant is connected in some way to the First Defendant, Jeremy Leach. The Claim alleges multiple breaches of fiduciary duties owed to TLPF and that one or more of the Defendants 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 Defendants 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

[1] Page 306 of hearing bundle

Ninth Defendants, 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.

10. The Claim further alleges fraudulent trading, that the First Defendant 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 Plaintiffs' claim that is presently unliquidated.

11. The Defendants deny any wrong doing.

THE EVIDENCE ON THE APPLICATION

12. The Application for security for costs is supported by three Affidavits of Richard Annette[2] and the First Affidavit of Mr. Leach.[3] Mr. Penner has provided three Affidavits[4], the third of which is relied on by Mr. Annette as showing the asset position of TLPF. As at 21st August 2020 TLPF had cash of US$3,791,649.00 net of unpaid liquidation expenses, receivables of $402,205.00 and an investment in Liquidus Investment Fund (LIF) in the sum of $611,797.00 for a total of $4,805,651.00. This figure does not include any potential assets in another entity, Diversified Settlements Fund ("DSF"), of which TLPF claims to be the sole economic stakeholder. Neither does it include, then, un-invoiced fees and expenses. Mr. Annette exhibits to his Second Affidavit, correspondence dated 27th August 2020 which gives these figures as totaling US$71,070.90. Thus the amount would be reduced to US$4,734,580.10.

13. There is disagreement between the parties as to whether the LIF investment should be deducted. The position of the Defendants is that this amount should be deducted as this receivable is not presently redeemable due to a suspension of redemptions thereby

[2] First Affidavit dated 28th January 2020, Second Affidavit dated 4th September 2020, Third Affidavit also dated 4th September 2020, Fourth Affidavit dated 17th September 2020
[3] Dated 9th September 2020
[4] First Affidavit dated 6th February 2020, Second Affidavit dated 28th February 2020, Third Affidavit dated 21st August 2020.

reducing assets by that amount, to a balance of $4,122,783.10. The Plaintiffs' position is that the valuation of the asset is one provided by Mr. Leach and that, by the time of the trial which is anticipated to be in 2021/2022, this investment surely would be capable of redemption.

14. By his Third Affidavit Mr. Annette provides updated cost schedules and indicates that the Defendants are undertaking a discovery exercise involving some 470,000 documents which is a key factor which has resulted in increased costs. The estimate provided in January 2020 at the time of the filing of the application, was US$3,422,080.75 to 3,618,580.75[5]. Actual costs to 31st July 2020 amount to US$1,073,241.00. Estimated further costs to trial, US$2,310,606.00 and costs of Queens Counsel – US$1,467,200.00.

Incurred and Projected Costs as at January 2020:

	US$
Costs to 31st December 2019	679,855.75.00
Estimated future Attorney costs	1, 301, 225.00
Disbursements	-
Future disbursements and Expert Fees	None provided
Queens Counsel costs	1, 441,000 to 1,637,500.00
Disbursements	None provided
Total	3,442,080.75 to 3, 618,580.75

Incurred and Projected Costs as at September 2020:

	US$
Costs to 31st July 2020	999,716.00
Disbursements (Document management system)	73,525.00
Estimated future Attorney costs	1, 827,950.00
Future disbursements and Expert Fees	482,656 to 552,656.00
Queens Counsel costs	1, 467,000.00 to 1, 663,700.00
Total	4, 851,047.00 to 5, 117,547.00

15. It is submitted that the amount held by TLPF is already insufficient to satisfy costs. This taken together with the fact that the Plaintiffs will face additional costs of the JOLs and

[5] Hearing bundle, volume 1, page 349

legal costs of their own is said to make the position even worse. The invoiced fees of the JOLs are $1,678,189.50 as at August 2020 an increase of close to US$600,000.00 over less than a year and half.

16. Mr. Annette points to the fact that the Plaintiffs' position is essentially a static one. There are no more policies to be sold and thus no future proceeds are anticipated.

17. The parties are agreed that any adverse costs order would rank in priority ahead of the fees of liquidators. This priority ranking means, according to Mr. Annette, that should it be necessary, the JOLs would be required to repay remuneration received in order to contribute towards the payment of any order of costs in favour of the Defendants.

THE LAW

18. Section 74 of the ***Companies Act*** states:

> *"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 proceedings until such security is given."*

19. GCR O.23 r.1 provides *inter alia:*

> *"Where, on the application of a defendant to an action or other proceedings it appears to the Court*
>
> *a. that the plaintiff is ordinarily resident out of the jurisdiction; or*
>
> *b. that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or*
>
> ...
>
> *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 such security for the defendant's costs of the action or other proceedings as it thinks just.*
>
> ...

Manner of giving security (O.23, r.2)
(2) Where an order is made requiring any party to give security for costs, security shall be given in such a manner, as such time, and on such terms (if any), as the Court may direct."

APPLICABLE PRINCIPLES

20. The applicable principles are set out in the case of ***Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd.***[6] These were reaffirmed in the case of ***Keary Developments Ltd v Tarmac Construction Ltd***[7]. In the latter case, the Court in England and Wales considered the relevant principles attendant upon an application for security for costs pursuant to s.720 (1) of the ***Companies Act*** 1985 and the applicable Supreme Court Rules. Section 720(1) bears some similarity to s.74 of the ***Companies Act*** of the Cayman Islands. The English Court set out seven principles which may be summarised as follows:-

i. The court's power to order security for costs is a discretionary one and accordingly it will act in light of all the relevant circumstances.

ii. Given the wording of the section, the possibility or probability that an impecunious plaintiff company may not be able to pursue its claim if ordered to pay security for costs is not without more sufficient reason for not ordering security.

iii. The Court in considering an application must carry out a balancing exercise. This includes weighing on the one hand the injustice to the plaintiff if it is prevented from pursuing a proper claim. On the other hand, the injustice to the defendant if the claim fails and the defendant is unable to recover costs incurred in defence of the claim. The court will be concerned that the power to order security not be used as an instrument of oppression whereby a genuine claim is stifled. This is particularly so when the failure to meet that claim may have been a material cause of the plaintiff's impecuniosity. The court will also be

[6] 1973 Q.B. 609
[7] 1995 3 ALL ER 534

concerned that not ordering security for costs becomes a weapon whereby the impecunious company puts unfair pressure on the more prosperous company.

iv. The court will have regard to the plaintiff company's prospects of success but it should not conduct a detailed analysis of the merits of the claim. It should only do so if it can be clearly demonstrated that there is a high probability of either success or failure. If there is an offer or payment into court this should be considered.

v. In considering the amount of security that may be ordered the court is not bound to make an order of a substantial amount, the court should bear in mind that it can order any amount up to the amount claimed.

vi. Before refusing to order security for costs on the basis that the claim would be stifled, the court must be satisfied that it is probable in all the circumstances that the claim would be stifled. It is for the plaintiff company to satisfy the court that it would be prevented by an order for security from continuing the litigation.

vii. While there may be cases where it would be proper for the court to draw inferences even without direct evidence that a claim would be stifled. Those cases are likely to be rare. The court will consider whether the company will be able to meet any costs ordered from its own resources or may be able to raise the amount from other sources. In the usual course the court will require evidence from the plaintiff in support of the assertion that the claim would probably be stifled if an order for security for costs to be made.

viii. The lateness of an application for security for costs.

21. In ***Cesar Hotelco (Cayman) Limited v Ryan***[8], the Grand Court stated that on an application for security for costs in respect of an action brought by a limited company,

[8] 2012 2 CILR 164

a two-stage process is involved. Firstly the court should consider whether it is satisfied that there is reason to believe that the assets of the company will be insufficient to pay the defendants' costs. Secondly whether applying the reasoning in the case of ***Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd.***, the court should exercise its discretion to order security for costs. The Court further stated:

> *"It is convenient to adopt the summary of the seven circumstances referred to by Lord Denning (ibid., at 626 et seq.) from 1 Civil Procedure 2012, at para. 25.13.13: Among the circumstances which the court might take into account are the following:*
>
> *(1) Whether the claimant's claim is bona fide and not a sham; (2) Whether the claimant has a reasonably good prospect of success; (3) Whether there is an admission by the defendants in their defence or elsewhere that money is due; (4) Whether there is a substantial payment into court or an 'open offer' of a substantial amount; (5) Whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim; (6) Whether the claimant's want of means has been brought about by any conduct by the defendants, such as delay in payment or in doing their part of the work; (7) Whether the application for security is made at a late stage of the proceedings."*
>
> *In my opinion, Lord Denning in Lindsay Parkinson was not setting out an exhaustive list of circumstances. This is clear from his use of his words "might take into account."*[9]

22. In line with these principles, the parties in the instant case are agreed that three questions fall to be addressed on this application:

    1. The ability of the First Plaintiff to meet an award in the event that it is unsuccessful;
    2. The factors attendant upon the exercise of the Court's discretion to award costs which are applicable to this particular case; and
    3. Should the Court determine that it is appropriate to order costs, the amount of security for costs.

23. Counsel for the Plaintiff in oral submissions invited the Court to consider the question of causation as a first step, arguing that a decision on that limb may be determinative of the matter. I consider that it is appropriate to approach the matter in the usual way with the jurisdictional element as a first step.

[9] Paragraph 47

ABILITY OF THE PLAINTIFFS TO MEET AN AWARD OF COSTS

24. In respect of the first question, the Court requires to be satisfied that there is a real risk that the Defendants' costs will not be paid if they are successful. This does not require proof at the level of the balance of probability. (***BTU Power management Company v. Hayat***.[10])

25. The Defendants rely on the cases of ***Northampton Coal, Iron and Waggon Company v. Midland Waggon Company***[11] and ***Pure Spirit Company v. Fowler***[12] in which the statement is made that the fact of the plaintiff company being in liquidation would be sufficient reason to believe that its assets are insufficient unless evidence to the contrary is provided.

26. Counsel on behalf of the Defendants submitted that where a plaintiff is insolvent then *prima facie* the test is satisfied and the Court has jurisdiction to make an award. Counsel argued that the burden is therefore on the Liquidators to satisfy the Court that there is the ability to pay. In this case, said Counsel, where the Court is considering the evidence of assets of an insolvent company the Court must also have regard to the liabilities in addition to the assets, i.e. the net asset position and in particular those liabilities which may rank ahead of any costs which may be awarded in the Defendants' favour in accordance with the ***Winding Up Rules*** 2018, O.20 r.1(f). These provide that the expenses and disbursements properly incurred by the Official Liquidators rank in order of priority to any costs to be paid in favour of any other person in proceedings to which a company is a party.

27. Counsel on behalf of the Defendants in oral submissions sought to show that even using the smaller costs figure put forward by the Plaintiffs as being a more reasonable sum, there is a real risk that the Plaintiffs would be unable to meet those costs. Counsel argued that assuming a realisation of one-half of $300,000.00 in respect of the LIF investment, the total assets available would be in the region of US$4.5 million.

[10] 2011 1 CILR 315
[11] 1878 7 Ch. D. 500
[12] 1890 25 QBD 235

28. Counsel suggested that while the Plaintiffs have not provided evidence as to what their costs are likely to be in respect of this matter, extrapolating from the suggested defence costs of $2.7 million ($2,716,434.38) as being the equivalent of likely Plaintiffs' costs, the assets would be reduced to only US$1.8 million dollars which would be inadequate to meet the Defendants' estimated costs of US$2.7 million as put forward by the Plaintiffs even before taking into account possibly additional JOL costs which are estimated to be some US$700,000.00. This means, said Counsel, that there is a real risk that an award of costs in the Defendants' favour would not be able to be met at the end of the trial.

THE SUBMISSIONS OF THE PLAINTIFFS

29. Counsel on behalf of the Plaintiffs accepts that the fact that a company is in liquidation is *prima facie* evidence that it would be unable to satisfy an adverse costs order but submits that, on a holistic review of all the evidence, there is no basis to conclude that TLPF would be unable to pay an adverse costs order and that the presumption in respect of an insolvent company is displaced. Thus it is argued that the Court would have no jurisdiction to grant security for costs.

30. Counsel gave the basis for this submission as being that the amount of security sought by the Defendants is manifestly high given the way in which the costs estimates have been compiled relying as they do on excessive past and projected costs and that the overall costs claimed are disproportionate to the liquidated claim.

31. It is urged that the Court should adopt the approach in ***Ahmad Algosaibi and Brothers Company v. Saad Investments Company Limited & Others (in Liquidation)***[13] with respect to the likely buffer built into the cost estimates and the application of discounts.

32. In respect of the estimates provided, Counsel made a number of observations which may be summarised as follows:

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[13] 2016 (2) CILR 244, 2017 (2) CILR 602

i) The claim to date is for $999,716.25 when all that has happened are the closure of pleadings and partial discovery. In connection with this, 63% of the dollar value is attributable to attorneys of over 20 years' experience.

ii) 57% of the hours claimed with respect to the discovery exercise are attributable to an attorney of over 25 years' experience. Only 0.06% are attributable to a paralegal.

33. The discovery exercise in this case has been protracted and delayed with the Defendants seeking additional time to complete the exercise. Additionally, it is noted from correspondence which has been exhibited, that the Defendants have had to review aspects of the exercise in order to ensure that the material provided is in native format with metadata attached.

34. While Counsel for the Defendants submitted that these are costs actually incurred, Counsel for the Plaintiffs submitted that it cannot be said to be reasonable or proportionate to have an attorney of over 25 years' call conducting more than one half of the discovery work and that it would be appropriate to apply a broad brush of 30% to this figure.

35. With respect to expert witness costs, it was submitted by Counsel for the Plaintiffs that there has been no agreement between the parties as to expert witnesses and no direction has been obtained from the Court, thus that these items, (US$163,400.00 in respect of attorney costs and $280,000 to $350,000.00 in respect of expert fees) should be removed.

36. With respect to the costs to trial, claimed at US$1,827,950.00, Counsel submitted that this includes 88% of dollar value for attorneys of 11 years or more call, with 76% of this being in respect of attorneys of over 25 years call. Counsel was robust and pointed in his submission that a partner and senior associates should not be collating and reviewing documents for discovery purposes. Further discovery of 700 hours is proposed with what appears to be a lack of utilisation of junior level assistance.

37. Additionally, it is said that at present the length of the trial cannot be properly estimated as the discovery exercise is not yet completed. A five week estimate as is proposed by the Defendants may or may not be accurate. The overall suggested buffer is 20% and a further taxation discount of 30%.

38. As to the rate for leading counsel, it is submitted that this should be $900.00 per hour and not $1,310.00 as claimed. The amounts claimed include an unparticularised brief fee which does not allow for an assessment as to whether or not there has been duplication and an amount for advising on discovery, which item is also included in a claim by Cayman attorneys. For these reasons it is suggested that the Court apply a broad-brush reduction of 20% to account for a buffer, and an additional 30% to reflect the maximum allowable rate.

39. Counsel submitted that if the proposed discounts are applied, the claim would be reduced to:

Defendant's costs incurred to 31 July 2020	$699,801.38
Estimated costs through to trial	934,052.00
Estimated Leading Counsel's fees	806,400.00
Disbursements incurred	73,525.00
Estimated disbursements (excluding expert)	202,656.00
Total US $	2,716,434.38

40. Counsel argued that the Court would have to be satisfied that in addition to the US$2.7 million claimed for costs following the suggested reductions of fees, the Plaintiffs would be incurring more than the balance of US$2,089,216.63, in order to be satisfied that TLPF will be unable to satisfy any adverse costs order. Counsel submits that the Court should not be satisfied that it is likely that TLPF will have insufficient assets and thus that the Court does not have jurisdiction to order security for costs.

41. While there was the recognition that if the Defendants' argument as to repayment by the JOLs were to be accepted, this would increase the available amount to $5,767,406.13 which would be more than enough to satisfy an adverse costs order, this argument is not

one which the Plaintiffs accept[14]. I therefore approach the matter on the basis of the level of funds said to be in hand.

42. On this issue the position put forward by Counsel for the Defendants appears to be a sensible one. It is accepted that the financial position of the Plaintiffs is largely static. While the points made on behalf of the Plaintiffs as to the level of costs claimed are well made and will be more fully dealt with later in this judgment, even if the lower level put forward were to be accepted that cannot be considered in isolation from other costs such as the Plaintiffs' own legal costs which will rank in priority ahead of a possible costs order[15]. Considering the rate of billing of the costs of the liquidation as evidenced over the past year and a half as well as the likely costs of trial for the Plaintiffs, even if those are at a more modest level than is claimed by the Defendants, there is in my view a real risk that an adverse costs order would be unable to be met.

43. I am also concerned that the reduced level of costs which makes the costs appear more manageable for the Plaintiffs is arrived at by excluding costs for potential experts in circumstances where no decision has yet been agreed or taken on this and where this may yet be a costs factor.

44. I conclude on this aspect that there is reason to believe that the Plaintiffs will be unable to meet an adverse costs order if ordered to do so at or after the trial is concluded and thus that there is jurisdiction to order security for costs.

THE EXERCISE OF DISCRETION

45. I next turn to a review of the circumstances of the case.

46. From the available material including the Statement of Claim, Defence and Affidavits, in my view, the Plaintiffs' claims are *bona fide* made and not a sham. Indeed the Defendants do not suggest to the contrary.

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[14] Paragraph 59, written submissions of the Plaintiffs' Counsel
[15] CWR O.20 r. 1

47. At this stage, it would be difficult to form a view as to the merits of the case on either side. There is no admission by the Defendants and no demonstration of high probability of success or failure in the sense discussed in the case of ***J.M. Bodden and Son International Ltd***[16].

48. No admission is made by the Defendants that any sum is due and owing. There is 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. Two circumstances have been highlighted and require detailed consideration.

CAUSATION

49. The Plaintiffs place significant reliance on the case of ***Grisel & Others v. Grand Cay Development Ltd. (in Liquidation)***[17]. At first instance the Grand Court declined to order security for costs in part on the basis that the defendants' conduct appeared to have contributed to the impecuniosity of the plaintiff company and stated that in such circumstances it would be oppressive to do so. The Appellate Court dismissed the appeal of the defendants against the decision of the Grand Court. In doing so the Court pointed to the structure of the scheme which the defendants had put in place. This involved the establishment of the plaintiff company in order for it to incur and pay debts for the improvement of land owned by other companies. The plaintiffs' company's ability to pay was dependent on the funding provided to it by or through the defendants. In these factual circumstances the Court expressed the view that a finding that the company's impecuniosity was due to action or inaction of the defendants would not equate to a finding of liability in respect of the claim which had been brought. The Court stated:

> *"It is the operation by the Griesels of a corporate scheme under which debts were incurred by the plaintiff company for the improvement of land held by another of their companies, and their conduct thereafter in failing to ensure that the plaintiff company 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. This insolvency results from the nature of*

[16] 1990-1991 CILR 220
[17] 2004 -05 CILR Note 51, Unreported, Grand Court 19th May 2004; CICA Unreported 21st October 2005

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."

50. In the cited case of ***Cesar Hotelco***, the plaintiffs were property owners who had been provided services by the defendants. The plaintiffs and the defendants were all part of the same group. The Grand Court dismissed an application for security for costs made by the defendants. The Court expressed the view that:

"Lord Denning's circumstance (6) is not, in my opinion, to be read like a statute. Further, it is necessary to look at all the circumstances of the case."

51. The Court declined to exercise its discretion and noted *inter alia* that the case was not one in the ordinary course where an unconnected defendant who had dealt with the plaintiff at arm's length was being sued. All of the plaintiff and defendant companies were ultimately owned by Mr. Ryan, the First Defendant. Mr. Ryan had been a director of each of the plaintiff companies up until the date of appointment of the receiver when he resigned. By that date the liabilities of the entities were such that there was a total deficit in excess of $340 million dollars. The conclusion was that the conduct of Mr. Ryan, as a director of the companies in the broad sense, was responsible for the insolvency and that:

"this was a relevant circumstance to be taken into account when considering whether security for costs should be ordered in favour of Mr. Ryan and the companies he owned 100%."

52. In this case the connection between Mr. Leach and TLPF as well as the corporate Defendants is for the most part admitted. 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 Defendants place emphasis on the fact that there was a co-director who was responsible for providing independent oversight.

53. As a director of 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 Defendant, 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 Defendant, Taurus Administration Services S.L., ("Taurus"), is a company incorporated in Spain. It was the in-house Administrator for the Plaintiff 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 Defendant, 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.

57. The Sixth Defendant, PIF, is a company incorporated in the Cayman Islands in February 2013. Upon its incorporation, Mr. Leach was a director, a position which he held for two months. Mr. McClintock was a director through to June 2013. Mr. Leuba was a director from February 2013 through 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 Defendant, 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 Defendant Corinthian Growth Fund ("CGF"). Its management shares are owned by MPL as are the shares of TPF.

60. The Ninth Defendant, TPF, was a registered mutual fund under the Mutual Funds Law. Mr. Leach was its sole executive director at the material time.

PLAINTIFFS' SUBMISSIONS ON CAUSATION

61. Against this background Counsel on behalf of the Plaintiffs submitted that *prima facie*, Mr. Leach was responsible for the solvency of TLPF and that in these circumstances, the Court ought not to award security for costs. It is argued that this case is very similar to the cases of ***Cesar Hotelco*** and ***Griesel*** and that responsibility is established from underlying facts which are not in dispute:

- TLPF was a company created by Mr. Leach;
- By virtue of being the CEO of the Manager he was the sole executive director from beginning to end;
- He was also the director of the predecessor company TPF;
- He was the director and CEO of the Manager and he also controlled the various other Defendants; and
- He was the co-owner of the Administrator of the Plaintiff.

62. The Plaintiffs argue that these underlying facts mean that not only is he responsible for the insolvency of TLPF having been responsible for the operation of TLPF up to the point of its entering into liquidation but that all the other Defendants were also under his control in one way or another and cannot be distanced from him. Counsel points to the structure which was in place as set up by Mr. Leach and his co-director, which structure failed and that it is not in dispute that the Company at inception had a huge debt burden given the manner of its formation, as a successor to TPF.

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 Plaintiffs also submit that Mr. Leach and/or the Third, Fourth and Fifth Defendants 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.

66. In drawing a parallel with the cited cases Counsel submitted that the First Defendant had been in control of the company and *"indisputably ran the ship upon the rocks,"* and that it would be inequitable in these circumstances to award security for the Defendants' costs. Counsel submitted that every potential cause for TLPF's insolvency was within the control of Mr. Leach whether as a director of TLPF or as a director of the corporate Defendants save for perhaps Taurus. Counsel highlighted the following statement by the Court in ***Griesel v. Grand Cay Developments***:

> *"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."* [18]

67. Counsel submitted further that:

> *"The court doesn't need to try the case. That a finding of the Company's impecuniosity is due to action or inaction of the directors would not mean they are liable. There is a difference between who is responsible and who is liable. You can be responsible without being liable, and that's my point. He was responsible, may be not liable, we say he will be, but should be responsible."*

[18] Supra, Page 3

68. Counsel on behalf of the Defendants accepted that it is a relevant factor in the exercise of the Court's discretion as to whether the Defendants have caused the insolvency of TLPF. Counsel argued that this factor requires the existence of a particularity or peculiarity about the connection between the conduct of the Defendants and the insolvency. It was said that if the Plaintiffs are seeking to resist the application for security for costs on the basis that the Defendants caused the insolvency, the Plaintiffs require to identify a clear and obvious connection which is not an issue in the case, and one which does not require further investigation. If the causation of insolvency is a disputed issue in the case, then this would have to be disregarded as the Court is not at this stage concerned with the merits of the case.

69. In developing this argument, Counsel sought to distinguish the two cases relied on by the Plaintiffs in which the factor of causation of insolvency lead to an award not being made by submitting that in those cases, the insolvency was of an extraordinary nature.

70. It was submitted that in the case of ***Griesel v. Grand Cay Developments***, the fact that the defendants caused the insolvency was due to an underlying business arrangement which was set up for the benefit of the defendants and directly enriched the defendants. The insolvency resulted from the nature of the scheme which had been established together with the way in which the plaintiffs had been funded by the defendants. This is said to be in contrast to the instant case, where the matter relates to the adequacy of the values given for certain payments and where the assertions in the Statement of Claim are no more than allegations that the Defendants caused the insolvency, which allegations are denied. In response to the claim made in the Second Affidavit of Mr. Penner[19], that there is causation, particularly so where this relates to the systemic overcharging of fees and the improper transfer of the assets of the First Plaintiff to related parties who were under the control of Mr. Leach, Counsel stated that these are unproven claims on which the Court cannot act.

71. In addition to highlighting Mr. McClintock as an independent co-director for TLPF, Mr. Leach in his Affidavit states that the assertions of the Plaintiffs also fail to take into

[19] Affidavit sworn on the 28th February 2020/filed 2nd March 2020 at paragraph 21

account the actual functions and roles of the Third, Fourth and Fifth Defendants as service providers and of other service providers being independent professionals who are not parties to the proceedings who carried out critical aspects of TLPF's business[20].

72. It was also argued that in this case given the indirect nature of the allegations, there could be any number of reasons for the insolvency including the misfortunes of normal commercial trading. It would be unjust in these circumstances to deprive these Defendants of an award of security for costs that they would otherwise obtain.

DATE OF INSOLVENCY

73. As to the allegation that TLPF was doomed from its start, Counsel for the Defendants submitted that this is an issue which requires investigation as to possible causes. One likely cause is the conduct of the previous entity TPF and not that of Mr. Leach.

74. Counsel submitted further that no attempt is made by the JOLs to show what the position would have been if there had not been a transfer of assets to TLPF from TPF and that no attempt is made to show the effect upon investors. Additionally the assertion in the Statement of Claim that TLPF was insolvent from no later than the 15th December 2014 and that Mr. Leach knew of this, is the very issue to be decided in the case and is disputed. As at that date, the liabilities were based on the Series 1 and 2 Bonds which had been issued. It was submitted that insolvency cannot be plain and obvious simply from the face value of liabilities. Counsel relied on the case of ***Burnden Holdings (UK) Ltd. v. Fielding***[21] in which the Court stated that the relevant date is the date at which the liability will fall due and the likely value of the asset at that time.

75. Thus the approach of the JOLs in looking at the face value of the Bonds compared to the market value of the life policies as at December 2014 in order to reach of a conclusion of insolvency was said to be incorrect. It was noted that there was no pronouncement by the Auditors until 2016. It was further said that the actuarial review which is relied on by the JOLs as a basis for saying that by May 2015 the Defendants must have been aware

[20] Paragraph 9 of Affidavit of Jeremy Leach dated 9th September 2020.
[21] 2019 EWHC 1566 (Ch.), paragraphs 285 and 286.

of the insolvency of TLPF, was not critical of the underlying approach of a mark to model valuation of the life policies. The criticism made related to the discount rates applied. While a disclaimer of opinion was given by the auditors for the year 2015, they did not then state that the accounts did not present a fair view and did not give this opinion until 2016.

76. I considered all the submissions on this important point. In doing so 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 to or impacted TLPF's business operations such that for example it did not buy policies?

77. Mr. Leach explains in his Affidavit[22] that the genesis of TLPF was the restructuring of TPF in 2013. TPF faced adverse shareholder and creditor activity and in order to avert a possible fire sale and winding up proceedings, he, together with Mr. McClintock, decided on a restructuring in order to create a new investment vehicle. The belief at the time was that longer term redemptions (5-year terms) and extendable bonds would provide opportunity for maturities to rise.

[22] Paragraph 25 of Affidavit dated 9th September 2020

78. TLPF issued the Bonds between December 2013 and October 2015. The JOLs allege that TLP was insolvent from no later than 15 December 2014 when its liabilities exceeded its assets by more than US$20 million, that it had no realistic prospect of ever being able to pay its debts.

79. On 11th May 2015, a report was issued by the actuarial Firm Oliver Wyman, which was engaged by MPL. This concluded that the discount rate applied by Mr. Leach and Mr. McClintock of 2.5 % was low compared to other market rates and that a rate of 17.9% would have been more appropriate. The Firm gave its opinion that the application of the market rate would mean that the valuation of the Fund would be reduced by approximately 45-55 %.

80. An audit of the 2014 financial statements by TLPF's auditors gave a disclaimer of opinion on the basis that the discount rate applied to TLPF's traded life polices was not in accordance with IFRS 13 and that application of the rate advised by the actuary would result in TLPF being in deficit.

81. The JOLs say that while TLPF's financial statement showed its net asset value as some US$30 million, the audit of its 2014 financial statement concluded that its liabilities exceeded its assets. The audit report for 2015, issued in 2016, gave an adverse opinion and stated that they were unable to obtain any reliable evidence to determine that the Fund could remain a going concern.

82. The marked value of the policies is important for a number of reasons. Following the issue of the Bonds, TLPF's largest financial liability was repayment of these in the amount of about US$74 million. The marked value of its assets was in the amount of about US$110 million. The JOLs allege that the asset values were severely overstated and were maintained at overstated levels despite a disclaimer of opinion, an adverse audit opinion and an adverse valuation opinion. The allegation also is that these high asset values lead to increased management and administrative fees but low returns when policies were sold.

83. The Defendants deny that TLP was insolvent as at 15th December 2014 and state in the Defence that the real value of TLPF's assets was US$110,126,820 and that it was able to pay its debts as they fell due. It is admitted that the Directors and MPL knew that the marked value of the TLPF's portfolio did not reflect their market value, i.e. the amount which could be obtained for them on a sale. It is said that the marked value was not intended to reflect their market value.

84. Paragraph 30 of the Defence states that:

> *The "mark to model" valuation methodology is (and was) commonly utlised in the industry in connection with traded life policies funds where there is an intention on the part of the fund to retain its traded life policies until maturity. It is to be contrasted with a "mark to market valuation, which is based on valuing the asset at a perceived tradable market value and is more commonly utilised by funds that intend to actively trade policies as opposed to holding them to maturity."*

85. The further response of the Defendants on other aspects of the Claim is that the fees paid were for work done to which they were entitled for the running of TLPF. The fees charged were based on the marked values of the policies.

86. Thus the valuation methodology is a primary issue joined in the case and the determination of this issue, one way or another, will likely be a significant factor in arriving at any conclusion as to whether TLPF was doomed to fail from its start, its state of solvency while in operation and upon its liquidation.

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. Against the background of these factual disputes, to use the analogy employed by the Plaintiffs, I do not think that it is sufficient to ground responsibility to say that the Defendant 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 Defendants and with the First Plaintiff is by and of itself sufficient to ground responsibility.

88. I accept the arguments of the Defendants 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 of 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 Defendants or is a material cause of the insolvency of the First Plaintiff.

STIFLING OF THE CLAIM

89. In response to the suggestion of the Plaintiffs that security for costs is being claimed with a view to stifling the Claim, Counsel for the Defendants argued that unless the claim is likely to be stifled, an award of security will generally be made. (See ***Premier Motor Auctions Ltd. (in Liquidation) et al v. PWC LLP et al.***[23]) Counsel drew the Courts attention to a number of cases.

90. In ***Pitman Blackstock White Solicitors Limited v. Lloyds Bank PLC***[24]**,** the plaintiff was acting on behalf of the subrogated insurer, Enterprise which had been put into liquidation. It was accepted that the threshold conditions for security for costs were satisfied but argued by the Plaintiffs that it would be unjust for it to be ordered as this would serve to stifle the claim. The Court said this-

> *"13. The cases on stifling effectively centre on the difference between showing a risk that the claimants will be unable to provide the security ordered and genuine evidence of stifling. In Al-Koronky v Time Life Entertainment Group Ltd [2006] EWCA Civ 1123, [2006] CP Rep 47 it was said: "The Court must not order security in a sum which it knows the Claimant cannot afford".*
>
> *14. Before the Court refuses to order security on the ground that it would stifle a valid claim, "the court must be satisfied that, in all the circumstances, the claim would be stifled" and in that regard should "consider ... whether [the claimant] can raise the amount needed from its directors, shareholders or other backers or interested persons." (Keary, at 540 (g) and (j) and also Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736).*

[23] 2017 EWCA Civ 1872
[24] 2016 EWHC 3374

> 15. *The burden of satisfying the court that a claimant would be prevented from continuing in the litigation is in all but the most unusual cases on the Claimant; that established also at Keary 540(j) and Kufaan Publishing Ltd v Al-Warrak Publishing Ltd (Unreported, 1 March 2002)."*

91. The Court further stated that it was not enough to show that a risk or even a substantial risk of stifling could be inferred, the Claimant needed to be candid and provide full evidence as to why stifling would result in order for the Court to conclude that security for costs ought not to be awarded because it would stifle the claim.

92. Counsel for the Plaintiffs relied on the case of ***Arnage Holdings Limited and Others v. Walkers (a Firm).***[25] It was submitted that given the high level of costs claimed, which is inordinate, excessive and disproportionate, it is in fact designed to stifle the Claim.

93. In ***Automotive Latch Systems v. Honeywell International Inc***[26], the Court stated that the amount of security is a real factor to be considered. The amount claimed may not only cause oppression of itself but may also indicate that the motive for the application is to kill the claim or is a tactical one rather than to secure the risk for an unsatisfied costs order.

94. In arriving at a conclusion on this aspect, it is noted that while there may be cases where stifling can be inferred without direct evidence, in the usual course the Court would be required to consider all the evidence to include not only whether the Plaintiffs have the resources to provide security but also whether the amount of security can be raised from other sources, such as its shareholders, backers or other interested persons (See ***Keary Developments Ltd. v. Tarmac Construction Ltd.)***

95. Counsel for the Plaintiffs was candid in saying that he would not put it as high as saying that if the order is granted the Claim will in fact be stifled, it may be possible to explore other avenues but says that the security claimed is unjust for a number of other reasons and that the Defendants are using it to stifle the claim.

[25] Unreported, Grand Court 8th August 2020
[26] 2006 EWHC 2340

96. Given the frank response of Counsel that no definitive statement is being made, I am not able to conclude that an award of security for costs would stifle this Claim. Additionally, while there is cause for concern as to the level of costs claimed, I do not go so far as to ascribe an improper motive to the Defendants.

QUANTUM OF SECURITY FOR COSTS

97. In ***Automotive Latch Systems v. Honeywell International Inc***[27], the Court carried out a broad assessment of the sum claimed.

98. In ***Stokors S.A. and Others v. IG Markets Ltd.***[28] it was stated that it is necessary for the court to approach the evidence about the amount of costs, past and future estimates and the reasonableness of such costs on a robust basis and to apply a broad brush. The guiding principles were detailed as follows:

> *"5. In approaching the task of determining the appropriate amount of security, I have in mind the following principles. Firstly, that under CPR 25.13(1)(a), the court's discretion to award security is a discretion to award it an amount which it considers just, having regard to all the circumstances of the case. The appropriate amount will generally be the sum which the court considers the applicant would be likely to recover in a detailed assessment if awarded its costs on a standard basis following the trial (see, for example, Procon (Great Britain Limited v Provincial Building Company Limited & Anor [1984] 1 WLR 557).*
>
> *6. Secondly, on such an application what the defendant will recover on an assessment are such costs as are reasonably and proportionately incurred, and reasonable and proportionate in amount, having regard in particular to the factors which are set out in CPR 44.5(3). I observe that in relation to a number of those factors, the particular circumstances of this case would point to costs being recoverable on a more generous scale or in a more generous amount than in other cases. In particular, the factors include: (b) the amount or value of any money my or property involved: the amount at issue in this case is very substantial, now something not far short of €100 million; and (c) the importance of the matter to all the parties: it is apparent from what I have seen that the parties to this case treat the dispute as a matter of high importance involving, as it does, not only large sums of money but also serious allegations of dishonesty against individuals, which are having a significant effect on their personal and professional lives.*
>
> *7. I also bear in mind that although the exercise required looks forward to what will happen at a detailed assessment of costs, it is not the task of the*

[27] 2006 EWHC 2340
[28] 2012 EWHC 1684

court when hearing an application for security to undertake a similar exercise, to seek to carry out a detailed assessment. It is necessary to approach the evidence about the amount of costs which have and will be incurred, and their reasonableness or otherwise, on a robust basis and applying a broad-brush.

8. *The next matter of principle which I bear in mind is that where the court is asked to choose between rival contentions which it cannot and should not seek to decide definitively on disputed evidence, it is right to have in mind the nature and degree of prejudice which might fall on each party if the figure turns out to be on the one hand too high, or on the other hand too low. If a defendant is under-secured, the likelihood is that that defendant will be prejudiced by the amount of the shortfall in security because that is the amount of costs which it is unlikely to be able to recover. If on the other hand the defendant is provided with excessive security so that it is over-secured, the excessive security will ultimately be returned to the claimant. In those circumstances, the prejudice to the claimant in providing excessive security is not the whole amount of the excess but only potentially the cost to the claimant of providing that excess, to the extent that such cost proves to be irrecoverable.*

9. *Assuming it to be irrecoverable, which I do not decide, the financial impact of getting it wrong in the defendant's favour is therefore usually less, indeed usually much less, compared with the financial impact of getting it wrong in the claimant's favour. That factor, which is sometimes referred to as the balance of prejudice, is usually the reason for resolving any doubts in favour of a defendant rather than a claimant. This is all the more so in a case to which paragraph 5 of Appendix 16 of the Commercial Court Guide applies (2A-185). That paragraph provides, in appropriate cases, that an order for security for costs may be made on terms that the applicant gives an undertaking to comply with any order that the court may make if the court later finds that the order for security for costs has caused loss to be suffered, and the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant."*

99. ***Stokers SA and Others v. IG Markets Ltd.*** was applied by the Grand Court in the case of ***Ahmad Hamad Algosaibi and Brothers Company v. Saad Investments Company Limited, Maan Al Sanea and Others.***[29] The Court said that in determining the quantum of security the aim would be to arrive at an amount which was just in the circumstances, it need not be perfect or complete security. The Court applied discounts with a foremost consideration being the reasonableness of the amounts.

[29] 2016 (2) CILR 244

ARGUMENT AS TO FRAUD AND INDEMNITY COSTS - THE QUANTUM OF COSTS

100. The Defendants sought to argue that any discounts to be applied in the instant case should be limited as if successful, they would be entitled to costs on an indemnity basis. Counsel on behalf of the Defendants argued that while awards are usually made on a standard basis, as the Plaintiffs' Claim in this case is based on the high bar of dishonesty, if it fails it would attract indemnity costs and thus the award of security for costs should be calculated on an indemnity basis.

101. Counsel relied on the English case of ***Clutterbuck v. HSBC***[30] and highlighted the following passage:

> *"16. Mr. Ilyas on behalf of the claimants submits that an allegation of fraud being made in the proceedings which are then discontinued is not of itself reason to order indemnity costs. The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course, the court retains a complete discretion in the matter and there may well be factors which indicate that, notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.*
>
> *17. The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail, they should be marked with an order for an indemnity costs because , in effect, the defendant has no choice but to come to court to defend his position.*
>
> *18. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, in my judgment, it is appropriate for court to approach the question of costs in the same way."*

102. In the instant case, Counsel on behalf of the Defendants points to the Statement of Claim and in particular paragraphs 102-103 thereof as evidencing the fact that the entirety of the Plaintiffs' claim is based on dishonesty with an added claim of fraudulent trading which is also based on dishonesty. These refer to allegations of breaches of fiduciary duties and duties to act with reasonable skill and care. Paragraph 109, summarises the allegations as follows:

[30] 2015 EWHC 3233 (Ch.)

> *"These breaches of duty were wilful and were designed to enrich (and in fact had the effect of enriching) the First Defendant. In the premises, these breaches were also dishonest".*

103. Counsel for the Plaintiffs points out that the Defendants did not initially raise fraud as a basis for the justification of entitlement to indemnity costs and appeared to provide estimates on the standard basis only. It was upon receiving the responsive submissions from the Plaintiffs that they then raised the issue of fraud and thus an entitlement to indemnity costs. This alone, says Counsel, illustrates the exorbitant nature of the costs claimed.

104. In further response the Plaintiffs rely on ***Al Sadik v. Investcorp Bank BSC and Five Others***[31] a decision of Jones J. in arguing that the position in the Cayman Islands is different from the position in England and Wales. It is said that the rules as to indemnity costs in the Cayman Islands are not as broad and that the Defendants are not correct that if a claim which alleges fraud is filed which is not successful, indemnity costs would be awarded. This would be different from a case in which fraud is alleged and subsequently withdrawn.

105. I accept the Plaintiffs' argument in this respect. I note also that even in the case relied on by the Defendants (***Clutterbuck***), the matter is still a discretionary one. It does not appear that without more, an allegation of fraud which does not succeed must inevitably give rise to an award of indemnity costs such that an award of security for costs must be calculated on that basis.

APPLICATION OF A BUFFER

106. While accepting the argument of the Plaintiffs that in considering the quantum of costs, the Court is likely to proceed on the basis that some sort of buffer is built into the amount of the claim, (as in the cited case of ***AHAB v. Saad***), Counsel on behalf of the Defendants submitted that the buffer would only be applicable to future costs as distinct from past costs which have already been incurred.

[31] 2012 (2) CILR 33

107. In response to the submissions of the Plaintiff that there should be a reduction on the application of a buffer of 20% and a further reduction of 30% to reflect anticipated taxation of costs, the position of the Defendants is that no buffer should be applied given the details provided in the preparation of the schedule of costs and that given the submissions made as to indemnity costs, the assessment on taxation is likely to be as high as 85%. It is said that the criticism of the schedule which is used to justify the application of a buffer is misplaced and that there is no credible basis for suggesting that a buffer is needed in the circumstances of this case.

108. On the schedule of costs, Counsel urged that it is not a case that the most generous view has been taken of likely costs. Counsel put forward seven matters in support:-

i) The case has so far involved a significant amount of work which is properly chargeable legal costs. The allegations are of some complexity. This has included responding to a Statement of Claim of 50-pages and filing a Defence of 81 pages;

ii) The schedule lists actual costs which are properly claimed;

iii) The hourly rates claimed are within the Guidelines;

iv) The rates claimed have been reduced by 25% for the discovery exercise;

v) Future discovery costs have been charged applying an estimate on the basis of the lowest rate of any member of the Firm representing the Defendants;

vi) A reasonable estimate of trial time has been put forward; and

vii) The estimate properly includes a recognition that there is likely to be expert evidence called.

DISCUSSION AND CONCLUSIONS

109. I have to balance the potential for injustice to the Plaintiffs if an order of security for costs is made as against the potential injustice to the Defendants if an order is refused. I am satisfied that in this case, the balance is in favour of ordering security for costs.

110. I am mindful that the figure ultimately ordered should not be too high or too low. In my view there is much force in the arguments made by the Plaintiffs as to the extensive nature of the costs claimed. The January 2020 estimate increased in 8 months by US$1.5

million to US$5 million. The Claim itself is said to be no more than US$17 million. Costs are therefore being claimed at a rate of 25% rather than the usual rule of thumb of 10%. This matter does not appear to me to be at the higher end of complexity, neither does it appear from the document figures given to be at the higher end for a discovery exercise.

111. I also accept the submissions made that it does appear that Counsel of some seniority are being utilised in circumstances where juniors would usually assist. Counsel for the Plaintiffs highlighted that 75% of the costs that are being incurred is by attorneys of 11 or more years call, 63% by attorneys of over 20 years call. Counsel questioned whether the discovery exercise required 150 hours spent by an attorney of 25 years call for a medium-sized discovery exercise involving documents which the Defendants already had and whether it also required leading counsel of 36 years call to advise on it. Counsel also highlighted that the proposal is to have attorneys of 25, 30, 10 and 7 years post-qualification experience in addition to leading counsel for the case which he says appears to be a top heavy structure. In my view even allowing for the fact that the weight of the discovery exercise is more on the Defendants than on the Plaintiffs, the exercise being carried out by the Defendants already appears to be unduly protracted and overly complicated.

112. Applying the principles of reasonableness and proportionality, I am satisfied that the figures claimed by the Defendants should be significantly discounted.

113. Given the issues identified above, to the figure for the costs already incurred, I apply a discount rate of 30%.

	US$		
Costs to 31st July 2020	999,716.25	30% reduction of this	699,801.38
Disbursements	73,525.44		73,525.44
Estimated future Attorney costs	1, 827,950.00		
Future disbursement and Expert Fees	482,656 to 552,656.00		
Queen's Counsel costs	1, 467,000.00 to 1,663,700.00		
Total	4, 851,047.00 to 5,117,547.16		

STAGED PAYMENTS

114. The Defendants do not object to security being ordered in a staged fashion and suggest that doing so would reduce uncertainty as to what these costs would be.

115. They propose a payment of US$1.4 million to be paid into Court in 28 days to cover the period up to completion of the discovery exercise with a further payment into court of US$250,000.00 to be paid on the 1st March 2021. The figure of $1.4 million is proposed on the basis that this would amount to 85 %, of $1.64 million and taking the percentage that would apply on an assessment on an indemnity basis, the total would be $1.481 million.

116. For the next stage, 85% of US$301,500.00 or approximately US$250,000.00 is proposed. Payment into court is requested. Thereafter it is proposed that there can be discussions as to the appropriate amount of further security.

117. At this stage there are a number of matters which are unknown which make accurate estimates difficult, discovery is not yet complete, the length of the trial is uncertain as is the number of experts if any, who are to be called. It is entirely appropriate that security for costs be awarded on a staged basis and I do so.

118. Part B of the Defendants' Schedule for costs relating to completion of the discovery exercise claims the sum of US$551,250.00. For the reasons set out above and accepting the submissions of the Plaintiffs, I apply a discount rate of 30% and a buffer rate of 20% for a total of US$275,625.00.

119. For the fees of leading Counsel up to this stage, the figure is reduced by one half.

120. Consequently up to and including completion of the discovery exercise, security for costs in the sum of US$1,098,076.82.is ordered[32]. Thereafter amounts can be determined as the matter progress.

[32] US $699,801.38 + 73, 525.44 + $275, 625. 00 + ½ of GBP$75,000.00, (US$49,125.00) = US $1,098,076.82.

121. The JOLs have asked to be heard further on the form of any such security if there cannot be agreement. They are afforded the opportunity to make representations on this aspect following the issue of this judgment.

APPLICATION FOR INDEMNITY COSTS - DISCOVERY

122. The Plaintiffs applied for indemnity costs in respect of its discovery Summons. This on the basis that they had been requesting for some time, a definitive alternative date for completion of discovery. The Pleadings closed in January 2020 and by letter dated 27th February, a discovery deadline was initially agreed of 22nd May 2020.

123. On the 24th March 2020, the Defendants said that they were unable to comply with the May deadline because of the pandemic. The Plaintiffs note that this raised issues as to what had been done over the prior six months and that further correspondence provided little detail as to the nature of ongoing work and the details as to when it was anticipated that discovery would be competed. Throughout a series of correspondence in April, and May no proposed final date was provided. On the 22nd May 2020, the Defendants provided 5,000 documents and a further 6,000 documents on the 27th May 2020. On the 9th June the Defendants provided an update which indicated that there were 200,000 documents held on e-mail files which was the first time this had been communicated to the Plaintiffs. Counsel for the Plaintiffs, submitted that this was indicative of the apparently cavalier approach which the Defendants have taken to discovery. On the 10th July 2020, the Plaintiffs wrote again seeking a precise deadline for the completion of the exercise. The Defendants responded on the 17th and 20th July 2020 with updates but provided no proposed completion date. On the 24th July 2020 the Plaintiffs filed the Summons referenced above. By September 2020 the Plaintiffs had been notified that there are a further 400,000 documents subject to review.

124. It was not until shortly before the hearing of the Summons, a matter of hours before the Plaintiffs' submissions were due to be filed that the Defendants finally responded with a specific date, and proposed the 29th January 2021 as a date for completion. The

Plaintiffs have agreed to this but sought costs on an indemnity basis on this application urging that an application ought never to have been necessary.

125. Counsel for the Defendants rightly acknowledges the unfortunate nature of what has occurred. He seeks to explain that the attorneys were unable to provide a specific response because of their own uncertainty as to the position. He prays in aid the letter of 20th July 2020 which he submitted is not evidence of a cavalier approach and one that is dismissive of the Plaintiffs' concerns but rather of a law firm struggling with the difficulty of the sheer volume of documents. He points to the Third Affidavit of Richard Annette which at paragraph 8 sets out the amount of work that has been done to date.

126. I reviewed all the correspondence exhibited which included a reference to the Defendants having to change course to ensure that discovery is provided in the appropriate format. Ultimately I accepted the explanation given and the submissions of Counsel for the Defendants that the conduct though unfortunate was not so unreasonable, negligent or improper as to give rise to indemnity costs within the meaning of GCR O.62 r.4. (11) and as discussed in ***Al Sadik v. Investcorp Bank BSC and Five Others***[33]. I advised the parties of this on the 28th September 2020 and provide these short reasons for the order made that costs are awarded on the standard basis.

Dated this the 26th day of January 2021

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court

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