IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 284 OF 2021 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF THE LIMITATION ACT (12 OF 1991) (1996 REVISION)

BETWEEN:

(1) MARK LAURENCE ROBERT ASHURST
(2) CHRIS NARBOROUGH
(3) VASILE FRANK TIMIS

PLAINTIFFS

AND

(1) PAN AFRICAN BURKINA LIMITED
(2) BANCO BTG PACTUAL S.A. (CAYMAN ISLANDS)

DEFENDANTS

Before:	The Hon. Mr Justice Segal
Appearances:	Tony Beswetherick KC instructed by Bhavesh Patel and Bryan Little of Travers Thorp Alberga for the Defendants
	Harry Shaw and Nienke Lillington of Campbells LLP for the Plaintiffs
Heard:	5 June 2023
Draft judgment distributed:	6 June 2023
Judgment delivered:	12 June 2023

JUDGMENT

1. I have before me three applications in these proceedings:

   (a). the Second Defendant's (***D2***) application, made by its summons dated 15 March 2023, to strike out or stay the claim against it brought by the Plaintiffs (the ***Strike-Out Application***).

   (b). the Plaintiffs' cross-application (the ***Plaintiffs' Application***) against the First Defendant (***D1***) and D2, made by their summons dated 21 April 2023, for (i) an order that D1 provide security for the Plaintiffs' costs of the proceedings pursuant to section 74 of the Companies Act (2023 Revision) and GCR O.23, r.1(1)(b) (the Plaintiffs originally also applied for an order for security for costs against D2 but withdrew that application at the hearing); (ii) an order that if the Strike Out Application is granted, D2 remains or is joined as a party to the proceedings for the purpose of (A) being subject to the Court's costs jurisdiction (in the proceedings which continue as against D1) and (B) being required to give discovery (the Plaintiffs had originally sought an order declaring or directing that even if the Strike Out Application was granted, D2 was to be liable to meet any adverse costs award against D1 and be ordered to give discovery pursuant to GCR O.24).

   (c). D1's application, made by its summons dated 12 May 2023, pursuant to GCR O. 23, r.1(a), for an order that if it is required to give security for the costs of the Plaintiffs, the First Plaintiff and /or the Third Plaintiff give counter security to it for its costs.

2. I heard these application on 5 June 2023 and at the end of the hearing informed the parties of my decisions. I decided that:

   (a). D2's application to strike out the claims made against it (and the related parts of the statement of claim) be granted subject to the condition that D2 give an

undertaking to the Court on terms to be agreed by the parties or as ordered by the Court that it will not commence proceedings against the Plaintiffs or seek to hold the Plaintiffs liable in relation to the claims and matters notified by them to the Plaintiffs and covered by the negative declarations in the Plaintiffs' statement of claim.

(b). the Plaintiffs' application for security for costs against D1 be dismissed.

(c). the Plaintiffs' application for an order that D2 remain a party to the proceedings even though its strike out application had succeeded for the purpose of costs be dismissed.

(d). the Plaintiffs' application for an order that D2 remain a party to the proceedings even though its strike out application had succeeded for the purpose of giving discovery in accordance with GCR O.24 also be dismissed.

3. I also made various costs orders.

4. I now briefly explain my reasons for these decisions.

5. These proceedings involve an application for negative declarations by the Plaintiffs. The Plaintiffs are three former directors of D1. D1 is a company incorporated in this jurisdiction which was incorporated to explore a manganese mining opportunity in Burkina Faso. D1 borrowed sums exceeding US$40 million from D2 which remain unpaid. D2 was granted security over the shares in D1 and has appointed receivers over those shares. The receivers appointed themselves as directors of D1 and removed the Plaintiffs. The receivers (acting as directors of D1) have identified various payments by and out of D1 (when the Plaintiffs were directors) which they consider were not made in the interests of and for the benefit of D1 and which have resulted, they say, in D1 suffering loss and being unable to pay D2. D1 and D2 issued letters before action in England setting out the claims they made and inviting a response from the Plaintiffs. D1 referred to claims for breach of the Plaintiffs' duties as

directors of D1. D2 referred to claims alleging that funds advanced by D2 to D1 were subject to a *Quistclose* trust and that the Plaintiffs had knowingly assisted in a breach of that trust. The Plaintiffs concluded that proceedings were inevitable and that it would be preferable and more appropriate for litigation to be conducted in this jurisdiction and so issued a writ and subsequently filed a statement of claim setting out their application for negative declarations. The Plaintiffs seek orders, *inter alia*, that they are not liable to D1 for breach of duty or to D2 for knowingly assisting in a breach of trust. D1 has filed a defence and counterclaim. In its counterclaim D1 asserts that the Plaintiffs did act in breach of their fiduciary duties and their duties of skill and care and claims damages and/or equitable compensation and an account. D2 however indicated, *inter alia*, by way of a letter from its Cayman attorneys Travers Thorp Alberga dated 2 September 2022 that it had concluded that it did not need to commence proceedings against the Plaintiffs, did not intend to issue a counterclaim and was prepared to give undertakings to the Court in suitable terms that it would not do so.

6. In the Strike-Out Application, D2 seeks to strike out or stay the Plaintiffs' application for negative declarations against it. D2 says that there is now no utility in the Plaintiffs' claim for negative declarations against it. This is because D2 has, as I have explained, made it clear that it does not intend to pursue a claim against the Plaintiffs and has offered to give an appropriate undertaking to the Court to that effect. D2 argues that there is therefore no live issue between the Plaintiffs and D2 which justifies the continuation of proceedings (with the consequential expense and need to allocate and commit Court time and resources) and that it would be an abuse of process for the Plaintiffs to do so. I agree. There is no useful purpose to be served by the continuation of the Plaintiffs' claims for negative declarations against D2 (see *Malaysia Venture Capital Management Berhad v ECM Straits Fund I, LP and others* (Parker J, unreported, 20 December 2022)). It would be inconsistent with the overriding object to permit the Plaintiffs to do so. There is insufficient at stake to justify the commitment and allocation of Court resources and time (see *Jameel v Dow Jones & Co Inc* [2005] QB 946). The Plaintiffs' claims against D2 for negative declarations should be struck out subject to the condition that D2 shall give an undertaking not to pursue

the claims it has asserted against the Plaintiffs on terms to be agreed by the parties or in the absence of agreement as ordered by the Court.

7. In the Plaintiffs' Application, the Plaintiffs apply for an order for security for costs against D1:

(a). the Plaintiffs claim in support of their application under section 74 of the Companies Act, that D1 is hopelessly insolvent holding only US$700,000 of cash and its claims in these proceedings while being liable to D2 for over US$100m. The Plaintiffs submit that in all the circumstances D1 should be required to give security for their costs. They relied on various authorities including the decision of Malone CJ in *Bodden v Dettling & Sparks* [1990-91 CILR 220]

(b). in support of their application under GCR O.23, r.1(1)(b), the Plaintiffs argue that D1 is acting in a nominal capacity. It is, they say, no doubt being funded by D2 and since D2 is the largest creditor of D1 by far (with only very small sums being potentially owed to other creditors), D1 is acting for the benefit of D2 rather than itself. The Plaintiffs relied on *Semler v Murphy* [1968] 1 Ch. 183 in which Lord Denning held that a nominal plaintiff was a man who is plaintiff in name only but who in truth sues for the benefit of another. In that case, the plaintiff had at the time he started the action charged the whole fruits of the action to his brother who alone could benefit from it, and an order for security was made. Here, it is said, since D2 is in substance D1's only creditor, all the recoveries under the counterclaim would go to it. D2 is the real party in interest.

(c). in response to both applications D1 submits that it is well established that the Court will not order a party who has filed a counterclaim (A) to give security for the costs of the party (B) who has filed and is the plaintiff in the underlying claim and the defendant to the counterclaim where the issues raised in the counterclaim are the same or substantially the same as those raised in the main claim. To do so would permit A to obtain security for the costs of its own claim. D1 relied on *Anglo Irish*

Asset Finance Plc v Flood [2011] EWCA Civ 799 and *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2003] EWHC 1177 (Ch) and on the judgment of Mr Adrian Beltrami QC sitting as a judge of the High Court in *Abbotswood Shipping v Air Pacific Limited* [2019] EWHC 1641 (Comm). In that case the learned judge held (at [34]) that where the same issues arise on the claim as on the counterclaim this is a strong point against an order for security although it is not by itself determinative, and the Court must have regard to any countervailing factors peculiar to the case before it. Mr Beltrami QC considered whether or not it was relevant to the security for costs analysis that the composition of the action was just a chance in that it could equally well have been the case that the counterclaiming defendant had brought the claim and the claimant the counterclaim. He concluded as follows (my underlining):

> *"31. .... But I do not consider that my judgment should be affected by such hypothesising. The real analysis, as I see it, turns on the pleading. If in fact there is a sufficient overlap on claim and counterclaim, such that the overall action would look very similar if it had been brought by the defendant instead of the claimant, then it can properly be said that the actual format is a matter of chance, or perhaps more accurately happenstance, without the need to speculate as to what might or might not have happened in different circumstances.*
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> *33. There is also a further point which I regard as significant. At [31] of her witness statement, Ms Eyre says the following … "… the counterclaim and the claim are, in fact on basis of the pleadings in the statements of case, two sides of the same coin and impossible to disentangle. There will only be one fact finding exercise. Indeed, this claim could easily have proceeded with Fiji Airways as the claimant seeking recovery of its Security Deposits. The only reason Fiji Airways is the Defendant is because the Claimant sought a negative declaration." This analysis was advanced to explain and justify the basis upon which the Defendant had arrived at its appropriate figure for the security application (with a discount of 20% against its total bill) but it reflected a more telling truth as to the applicable issues. Mr Thompson sought to distance himself from the statement, on the basis that it was not "evidence", and he may be right in the strict sense of the word, but it nonetheless reflects the analysis of the pleadings undertaken on behalf of the Defendant and advanced in support of its application. It is consistent with my own views.*
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> *34. In my judgment, accordingly, this is a case where the same issues arise on the claim as on the counterclaim. There may or may not be some issues on*

> *the outer perimeters of the claim which are not strictly necessary for determination in the counterclaim. I am not presently convinced that there are any such issues (and none was identified with any clarity). But, if there are, this does not affect the broad analysis. In line with the cases I have referred to, I consider this to be a strong pointer against an order for security. However, it is not by itself determinative, and I must have regard to any countervailing factors peculiar to the case. I have already identified above those factors which were relied upon by Mr Thompson. None of them strikes me as especially unusual or significant; indeed, they are likely to be present in most cases where an application is made for security. Taken in the round, I am not satisfied that this is a case in which it would be just to order security for costs against the Claimant and I do not do so."*

(d). D1 submits that in this case the same issues arise on its counterclaim and on the Plaintiffs' claims in their statement of claim. There will only be one fact finding exercise and the fact that the Plaintiffs' claims take the form of applications for negative injunctions do not affect the analysis. There are no other (sufficient) factors that justify an order for security for costs and in all the circumstances this is not an appropriate case in which to make an order for security. The Plaintiffs chose to bring a claim in this jurisdiction for their own purposes and took the initiative, without first responding to the letters before action sent on behalf of D1 and D2 and without waiting for them to decide whether to proceed. The Plaintiffs must take the procedural consequences of their action and it would not be appropriate to order D1 to provide security for the Plaintiffs' own claim.

(e). the Plaintiffs argue that the authorities show that the Court must assess the question of whether the party against whom the claim for security is made is in substance the plaintiff in the proceedings. They say that they are to be treated in substance as the defendants in these proceedings which are defensive in nature. The proceedings relate to and seek negative declarations arising out of the claims asserted by D1 (and previously D2). The Plaintiffs relied in particular on *Mapleson v Masini* (1879) 5 QBD 144. In that case in an action for breach of contract against the defendant, a person residing abroad, he, by his defence, denied the breaches, and also made a counterclaim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim. It was held that the defendant should not be ordered to give security for plaintiff's costs occasioned by the counterclaim. Field J said this:

> *"It seems that Masini, the defendant, resides abroad, and on this ground the order was made that he should give security for the costs occasioned by his counter-claim. Now if he had been in the position of an ordinary defendant in an action for breach of contract there would have been no foundation whatever for the order. But it was urged that he was in the position of an actor in the proceedings, and that this was shewn by the fact that the damages claimed in his counter-claim are different from those claimed in the plaintiff's claim. I think it must be conceded that the mere position of the party on the record is not material on an application like the present one, such as for example, in interpleader proceedings, where the claimant is made a defendant. The substantial position of the parties must always be looked at. [Referring to Winterfied v Bradnum] Now did it make any difference that the defendant did not merely defend himself, but asked for something which had no connection with the claim? I thought not, but my view was not assented to by the Court of Appeal, which held that the defendant being an actor or plaintiff in respect of his counter-claim was not entitled to ask the plaintiff for security for costs. If that case was in all respects similar to the present, we must of course be bound by it. But I think there are broad distinctions between the two cases. One is that the counter-claim arose out of a different transaction from that in respect of which the plaintiff was suing, whereas in the present case the plaintiff's and defendant's cases rest respectively upon the same circumstances, the contention merely being which version of those circumstances is the correct one. This being the case, I do not think the defendant ought to have been called upon to give security."*

(f). the Plaintiffs submitted that in the circumstances it would be just that D1, as the real claimant, be required to give security.

(g). in my view the Plaintiffs' application for security for costs against D1 should be dismissed. I accept that the fact that the Plaintiffs are claimants (seeking negative declarations) and that D1's counterclaim raises the same issues and relates to the same facts does not of itself prevent the Court from making an order for security against D1, since the Court has a wide discretion (both under section 74 of the Companies Act and GCR O.23, r.1(1)(b)) to award security where the relevant statutory or rule-based conditions or gateways are satisfied. Underlying all applications for security there is a discretion in the Court to do what is fair and just in all the circumstances, so that the Court should not confine its analysis to whether the claim and counterclaim turned on the same issues of fact because that would ignore the overriding discretion which the Court has. However, such an overlap is an important factor and pointer to an order for security being inappropriate. There

is such an overlap in this case. Furthermore, and importantly, in this case the Plaintiffs have chosen to be the claimants and to commence proceedings in this jurisdiction in order to obtain certain advantages which they clearly consider to be material. They could have waited for D1 (and D2) to commence proceedings in England (or elsewhere), when they would have been the defendants and entitled to seek security for costs against D1. But they chose not to do so. I accept that the relief they seek is defensive but having chosen to initiate the proceedings in order to select the forum for the litigation I do not consider that they can fairly say that they are in truth the unwilling respondents to D1's claims who should be protected from the financial risks as to costs flowing from litigation against them. In all the circumstance, an order for security for costs against D1 is not appropriate.

8. The Plaintiffs originally applied in the Plaintiffs' Application for an order that D2 meet any future adverse costs order against D1 even if D2 succeeded in having the claims against it struck out. The Plaintiffs' Application sought an order that D2 "*is liable to meet any adverse costs awarded against [D1] in these proceedings*." At the hearing, the Plaintiffs changed their approach. For the purpose of the hearing, the Plaintiffs filed a draft order (the ***Draft Order***) seeking an order that D1 "*shall remain a party to the Proceedings for the purposes of … costs."* Accordingly, they do not seek an order that D2 will be liable (in the event of an adverse costs order against D1) but instead an order that D2 will be a party to the proceedings so as to be subject to the costs jurisdiction of the Court.

9. The Plaintiffs argue that D2 has funded and will continue to fund D1's counterclaim and will benefit from any recoveries made by D1 (for the reasons explained above). D1 is conducting the proceedings for the benefit of D2 and is in effect controlled by D2 since the current directors of D1 are the receivers appointed by D2 over the shares in D1. D2, the Plaintiffs say, is seeking impermissibly to manipulate an impecunious limited liability company (D1) and to extricate itself from the proceedings to shield itself against an adverse costs liability. D2 should remain subject to the Court's jurisdiction to award costs and for that purpose should remain a party to the proceedings.

10. D2 objected to the last-minute change to the relief sought by the Plaintiffs but in any event argued that it would be inappropriate to make the order sought by the Plaintiffs. D2 argue that the Plaintiffs are in substance seeking relief that can only properly be based on an application for a non-party (or third party) costs order against D2 and that it would be premature and inappropriate to grant any such relief at this stage. D2 submits that save in exceptional or unusual circumstances where the facts justify an earlier order, a non-party costs order is only made at the conclusion of the proceedings in the event that D1 loses the case and costs are awarded to the Plaintiffs. D2 says that it would be wrong for the Court to prejudge and determine any issues at this stage relating to a possible non-party costs order. D2 has not had an opportunity to file responsive evidence (since it was unaware of the Plaintiffs' changed approach) and there is no need to make the order sought since the Plaintiffs will suffer no prejudice (and have not adduced any evidence of such prejudice) if the order is not made. The Plaintiffs will retain the right to seek a non-party costs order against D2 and to seek to hold D2 liable for the costs of the proceedings if the Plaintiffs succeed and can show that they are right that D2 has been funding and in effect conducting D1's defence of and counterclaim in the proceedings for its own benefit.

11. I agree with D2. It is unclear to me precisely what the effect would be of making the order that the Plaintiffs now seek and how their position would be improved. As I understood it they were not now seeking an order that would confirm that D2 was liable to pay an order for costs awarded against D1 but merely a procedural order that would constitute D2 a continuing party to the proceedings so that the Plaintiffs could subsequently make an application seeking an order for costs. If they had it mind that the order they seek would mean that D2, despite having succeeded in having the claims against it struck out, would be liable to costs as a party rather than as a non-party, that would undermine and be inconsistent with the order I have made striking out those claims and would be wholly inappropriate. If they had it in mind that D2 would remain a party so that it could subsequently be subject to an application for an order that it be liable for the costs payable by D1, that would be unnecessary. The Plaintiffs will retain the ability to make an application for a non-party costs order against D2 at the relevant time. They have not adduced evidence of any prejudice in having to wait or the need for any early relief. I can

see that there may well be at least an arguable case that in view of its position as the secured creditor who appointed the receivers over the shares in D1 (but not the assets of D1) and as the party that is likely to have to fund and in practice to benefit from the counterclaim in the proceedings D2 should be liable for any costs award against D1. But a decision on that issue will need to wait until there is a proper application for an order based on proper evidence made at the proper time.

12. Finally, as I have noted, in the Draft Order the Plaintiffs now seek an order that D2 "*shall remain a party to the Proceedings for the purposes of … giving discovery in accordance with Order 24 of the Grand Court Rules.*" They had originally sought an order that D2 be ordered to provide discovery even if D2 succeeded in striking out the claims against it.

13. The Plaintiffs claimed that D2 would have relevant documents in its possession custody or power that were unlikely to be held by D1 and which should be produced on discovery to allow their claim to be fairly and properly determined. D2, which was already subject to an order to give discovery, should not be permitted to evade its discovery obligations. The Court had the power to order that D2 remain a party for the purpose of giving discovery either as a condition to granting D2's strike out application or pursuant to GCR O.15, r.6(2)(b)(i) (relating to the Court's power to add parties where it was necessary to ensure that all matters in dispute may be effectually and completely determined).

14. D2 submitted that there was no jurisdiction for the Court to strike out a claim subject to conditions and that O.15, r.6(2)(b)(i) was wholly inappropriate in the circumstances. The Plaintiffs were in effecting impermissibly seeking a third-party discovery order or relief which had the effect of circumventing the rule in this jurisdiction that there is no general power to make orders against third parties for discovery. There are of course the particular powers arising under separate jurisdictions such as under the *Norwich Pharmacal* jurisdiction but the Plaintiffs had not made such an application.

15. Once again, I agree with D2. It seems to me wrong to strike out the claims made against D2 and then to order that it be required to give discovery in the remaining proceedings

against D1. As I have held, D2 is entitled to an order striking out the claims against it. Once it ceases to be a party to the proceedings, there can be no basis on which it can be required to give discovery in the capacity of a defendant and party to the proceedings. I agree with D2 that the Court cannot strike out the claims against D2 subject to conditions and that the jurisdiction to add parties under O.15, r.6(2)(b)(i) cannot be used to justify the relief sought by the Plaintiffs in this case. There is no basis for an order to be made against D2 for discovery in relation to the Plaintiffs' continuing claims against D1. The Plaintiffs will need to rely on D1's discovery obligations. I must say that, as D2 submitted during the hearing, it seems likely that many of the documents that the Plaintiffs referred to as being held by D2 are likely also to be in the possession custody or power of the Plaintiffs or D1 or not relevant to the issues in dispute.

16. In these circumstances, D1's application for counter security for costs does not need to be considered.

17. Submissions were made on various other issues (for example as to the evidence required to support the applications for security for costs) which, in view of the decisions I have made, also do not need to be considered or dealt with.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
12 June 2023