Neutral Citation Number: [2025] CICA (Civ) 17

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

CICA CIVIL APPEAL No. 0014 of 2023
(formerly FSD 105 of 2014 (DDJ))

BETWEEN:

(1) ARNAGE HOLDINGS LTD

(2) BROOKLANDS HOLDINGS LTD

(3) EAST FARTHING HOLDINGS LTD

(4) MS KATIA RABELLO

(5) MR FERNANDO TOLEDO

Plaintiffs/Appellants

- and –

WALKERS (A FIRM)

Defendant/Respondent

Before: **The Hon Sir Richard Field, Justice of Appeal**
The Hon Sir Michael Birt, Justice of Appeal
The Rt Hon Sir Jack Beatson, Justice of Appeal

Appearances: **Mr Richard Eschwege KC instructed by Mr Stuart Diamond of Diamond Law for the First to Fourth Appellant**

Mr Mark Simpson KC and Sebastian Said instructed by Messrs Daniel Coelho and Zuhair Farouki of Appleby (Cayman) Ltd for the Respondent

Heard: **6-7 May 2025**

Draft circulated: **8 October 2025**

Judgment delivered: **31 October 2025**

JUDGMENT

Beatson JA:

I Overview

1. This appeal is against an Order dated 8 November 2022 ("the Dismissal Order") of Doyle J ("the judge"). It raises two questions. The first concerns the approach of a court and the evidence required when faced with an application to set aside or vary an order requiring a plaintiff to pay security for the defendant's costs on the ground that the order will stifle a genuine claim. The second is when, notwithstanding the principle of access to justice that people should have an unimpeded opportunity to pursue bona fide claims or defences in court, a claim should be dismissed before trial for non-payment of the security that has been ordered. Underlying these questions is that of the relationship in the context of security for costs of two principles: access to justice and finality in litigation.

2. The questions arise in the context of long running, fiercely fought and complex proceedings commenced on 4 February 2014 by five plaintiffs against Walkers, a major Cayman Islands law firm and the Respondent in this appeal (hereafter "the Defendant" or "the Respondent"). The claim, then valued at over US$400 million, is for breaches of trust and confidence owed by Walkers to the plaintiffs as their clients or former clients in accepting instructions in 2010 from Dr Afonso Braga, the Brazilian court-appointed trustee-in-bankruptcy for the estate of the Petroforte Group, a Brazilian petrochemical conglomerate, to act against the plaintiffs in proceedings in the Cayman Islands. The consequences that the plaintiffs maintain resulted from this are summarised at [25] below. The plaintiffs allege that the substantive issues in these proceedings are important not only to themselves but also to the regulation of the legal profession and the administration of justice in these Islands.

3. The appellants (hereafter "the Appellants" or "the Plaintiffs") before us are four of the five plaintiffs when proceedings were commenced. They represent the interests of the Rabello family, a prominent Brazilian family with substantial business assets and interests through a conglomerate

called the Rural Group, the principal company in which was Banco Rural. They are Arnage Holdings Ltd, Brooklands Holdings Ltd and East Farthing Holdings Ltd. ("EFHL"), three Cayman Islands companies, and Katia Rabello (hereafter "Ms Rabello"), the daughter of Sabino Rabello, the patriarch of the family. On his death in January 2005, she became the sole shareholder in Arnage and Brooklands and the President of Banco Rural's Administrative Council.

4. Fernando Toledo was the fifth plaintiff when proceedings were commenced. He is a trusted friend of the Rabello family and considered a *de facto* member of it.[1] Since May 2005 he has been the sole shareholder of EFHL. His claim against the Defendant was settled in September 2022, without admission of liability and was stayed on 8 November 2022. He is not an appellant, although he has been in charge of and responsible for the pursuit of the Appellants' claims in these proceedings, making decisions regarding strategy and settlement, and raising the funds to finance them.[2] As will be seen, his position remains relevant in relation to security for costs.

5. Walkers deny that Ms Rabello or Fernando Toledo had ever been their clients, claim that the breaches of duty to the companies did not cause the losses which had stemmed from dealings designed to defraud Petroforte's creditors, and raised defences of illegality and *ex turpi causa* to the claims.

6. The judge's Dismissal Order arises from his judgment delivered on 28 October 2022, hereafter referred to as "the Dismissal Judgment" or "the judgment below". Paragraph 1 of the judge's Dismissal Order dismissed the Appellants' application to set aside or vary an Order of this Court dated 4 October 2021 ("the Security Order") reflecting its judgment on 2 August 2021 ("the Security Judgment") requiring them to give security for the Defendant's costs in the sum of US$4.25 million. This Court's Security Judgment is summarised at [37] – [40] below. Paragraph 2 of the judge's Dismissal Order granted an application by the Respondent to dismiss the Appellants' claims for failure to comply with this Court's Security Order.

7. The application to set aside or vary the Security Order was made on the ground that the claims would otherwise be stifled because the Appellants had no means of financing the requirement of security themselves and despite wide-ranging efforts had not been able to obtain funding to provide such security from third parties.

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1 See Toledo 1, 24 March 2022 §51 and the Appellants' 2025 Skeleton §14.
2 Macaulay 19 §13; Appellants' 2025 Skeleton, §15.

8. The Respondent's application to dismiss the Appellants' claim was made on the grounds that this Court's Security Order was unambiguous; all avenues of appeal against it had been exhausted; the position of the Appellants was that they could not fund the security that had been ordered; and those who had funded the cost of the proceedings were not prepared to fund security for the Respondent's costs. Before the judge, the Respondent submitted that there had been no material change of circumstances since the Security Order, and that the evidence served by the Appellants in support of the submission that the claim would be stifled was inadequate.

9. In the 2021 hearing which resulted in the Security Order, the Appellants did not argue that their claim would be stifled if they were required to provide security for costs. They say this was because at that time they anticipated they would be able to obtain funding, but that since the decision of this Court it has become apparent that no such funding is to be found.

10. The Respondent maintains that the Appellants have advanced and withdrawn assertions of stifling on numerous occasions since proceedings were commenced in 2014 but ultimately elected not to pursue a stifling argument before this Court in 2021 or in their application for permission to appeal to the Privy Council in 2022. It submitted that neither the circumstances at the time of the hearing before the judge nor those at the time before the hearing in May 2025 of the appeal against his Dismissal Order justify setting aside or varying this Court's October 2021 Order requiring security for costs or the judge's order dismissing the Appellants' claims.

11. In considering when an order requiring security for costs should be set aside or varied or a claim dismissed before trial, it will be necessary first to consider when security for costs may be ordered and the basis on which it was ordered in the particular case. The relevant details are discussed in Section IX of this judgment. Here it suffices to set out the separate tests in this jurisdiction for such orders against corporate and individual plaintiffs and to provide an overview of the approach of the courts.

12. In the case of a company, section 74 of the Companies Act (2025 Revision) provides:

> *"Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if that person is satisfied that there is reason to believe that if the defendant is successful in that person's defence the assets of the company will be insufficient to pay that person's costs, may require*

> *sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

In the case of an individual, GCR Order 23 Rule 1 provides that if it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction then:

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

13. These provisions and the decisions in these Islands and in England and Wales give the court a wide discretion to ensure that justice is done in the case before it. The court must carry out a balancing exercise. The decisions show that "*before ordering security for costs in any case, the court should be sensitive and alert to the risk that by making such an order it may be denying the party concerned a right of access to the court; whether or not the person concerned has raised or can raise the money will always be a prime consideration*": *Paul Gregory Allen v Bloomsbury Publishing Ltd.* [2011] EWHC 770 (Ch) at [32] (iii) – (iv)] *per* Kitchin J, approved at [2011] EWCA Civ 943 at [7] *per* Lloyd LJ. See also *Goldtrail Travel Ltd v Onur Air Taşimcilik AŞ* [2017] 1 WLR 3014 at [12] *per* Lord Wilson applied by this court in *AHAB Company v SAAD Investments Co. Ltd* Civil Appeal 015/201 16 November 2018 and the English Court of Appeal in *Harbour Castle Ltd v David Wilson Homes Ltd.* [2019] EWCA Civ. 505 at [10] *per* David Richards LJ.

14. In *Keary Developments Ltd v Tarmac Construction Ltd.* [1995] 3 All ER 534 at 540 Peter Gibson LJ stated:

> "*On the one hand [the court] must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity…. But it will also be concerned not to be so reluctant to order*

security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company."

15. Leave to appeal against the judge's Dismissal Order was given by Birt JA on 26 September 2023 and the case was originally listed for 17 and 18 April 2024. It was adjourned on the first day of the hearing as a result of information in the Respondent's skeleton argument dated 11 April 2024 which the Court received very shortly before the hearing. That stated that on 8 April 2024 Dr Braga's BVI attorneys informed the Respondent that on 18 December 2023 Dr Braga and Ms Rabello and Securinvest Holdings SA ("Securinvest"), a Brazilian company in the Rural Group of which Arnage and Brooklands were the sole shareholders, had settled the dispute between them. The settlement (hereafter "the Settlement") provided for 50% of the substantial balance in the Petroforte Bankruptcy Estate from the sale of certain assets to be paid to Securinvest, but it was subject to the approval of the Sao Paulo Bankruptcy Court.

16. This Court considered that the information about the Settlement meant that whereas the Appellants' appeals were advanced on the basis of their lack of assets and the stifling of their claims, there was now a real but uncertain prospect of significant sums being returned to the Appellants enabling them to pay the security if the Sao Paulo Bankruptcy Court approved the Settlement. Taking account of that and of the importance of the principle of access to justice, it concluded that the best way of achieving practical justice in this case was not to proceed with the hearing but to adjourn it in the first instance to this Court's sitting session in November 2024.[3] In mid-September the court vacated that hearing at the request of the parties. The Sao Paulo Bankruptcy Court approved the Settlement on 16 December 2024 and the time for any appeals expired on 1 April 2025. By then the case had been re-listed for 6 and 7 May 2025.

17. The original questions in the appeal were whether the judge was right: (i) to refuse to set aside or vary the CICA's order that the Appellants provide security for costs, and (ii) to strike out their claims for failure to comply with the order in circumstances where they stated that they were unable to provide the security ordered.[4] In the light of the Settlement, the terms of which are summarised at [27] – [28] below, while the Appellants stated that the appeal should succeed on any of the

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3 This Court's written reasons are annexed to its Order adjourning the hearing dated 22 April 2024. They are summarised in [5] of its decision delivered on 14 June 2024 ordering the Appellants to pay the Respondent's costs between 8 and 17 April 2024 which were thrown away as a result of the adjournment on the indemnity basis.

4 The original grounds are summarised at [61] below.

original grounds,[5] they raised additional grounds of appeal. The principal ones are that there has been a material change of circumstances since the judge's Dismissal Order because of Securinvest's entitlement under the Settlement and, in the light of that:

(i) the jurisdiction to order Arnage and Brooklands to provide security for costs fell away and in any event it would not be just to require this in all the circumstances of the case;

(ii) in all the circumstances of the case it would not be just to order security against Ms Rabello which would be limited to the additional costs of enforcement in Brazil; and

(iii) the Settlement puts an end to the Respondent's *ex turpi causa*/illegality defence.[6]

18. As well as the five appeal bundles (totalling 2125 pages), the authorities' bundles that were before the court for the hearing that was adjourned, and the two bundles for the hearing before the judge, the material before us includes an updated core bundle, six supplemental bundles and a supplemental joint authorities' bundle. The supplemental bundles contained amended and additional grounds of appeal, a Respondent's Notice and Amended Respondent's Notice, some 2,500 pages of evidence on appeal filed since 19 March 2025 about the Settlement and other recent developments, and appeal documents, submissions and correspondence since the April 2024 hearing. There was also evidence about Brazilian bankruptcy law and the legal consequences under it of extending the effects of the bankruptcy of a company to a third party, and fourteen affidavits and witness statements sworn or made between 4 February 2014 and 17 December 2018. Additions were made to the printed and electronic versions of the bundle until shortly before the hearing and on its first day.

19. Before us, Messrs Richard Eschwege KC and Stuart Diamond appeared on behalf of the Appellants[7] and Messrs Mark Simpson KC, Sebastian Said, Daniel Coelho and Zuhair Farouki on behalf of the Respondent. We are grateful to Mr Eschwege and Mr Simpson for their efficiency in making their oral submissions, and to them and their teams for their written submissions.[8]

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5 Appellants' 2025 Skeleton, § 56.

6 The additional grounds are summarised at [62] below.

7 At the hearing on 17 April 2024 Mr Harry Matovu KC appeared on behalf of the Appellants.

8 The parties relied on the skeleton arguments prepared for the adjourned hearing in 2024 and supplemental skeleton arguments for the hearing in 2025. They are identified as respectively the Appellants' and Respondent's 2024 and 2025 skeletons. The Appellants also filed a Further Note dated 25 April 2025.

20. Sections II – VIII below summarise the background to the dispute; the litigation in Brazil and the Settlement; the earlier decisions of the Grand Court and this Court and the refusal of permission to appeal by the Privy Council; the judgment below; the original grounds of appeal and the additional grounds of appeal in the light of the Settlement; the evidence before the judge and the evidence on appeal that was not before him; and the rival submissions before this court. Section IX contains the discussion and conclusions on the questions before the court and section X lists the conclusions.

II The background

21. The background and details of the dispute between the parties are extensively set out in a number of earlier judgments of this court and of the Grand Court which were summarised by the judge. Matters relevant to security of costs in earlier hearings and those judgments provide the context for the applications decided by the judge which are the subject of this appeal. They are referred to at [31] – [43] below in some detail because of the fact-sensitivity of issues concerning security for costs, the shifting positions taken, and the particularly "granular" nature of the parties' submissions. Here, it suffices to give a general summary of the origin of the dispute and litigation and the decisions of the Brazilian courts.

22. The link between the Petroforte bankruptcy and these Islands arises through Securinvest because Arnage and Brooklands, which as stated at [3] and [15] above are Cayman Islands companies, are its sole shareholders. It was alleged by Dr Braga that the assets of Sobar SA, Petroforte's ethanol subsidiary (hereafter "Sobar") were fraudulently misappropriated and transferred to Securinvest as a result of a sham sale and leaseback agreement entered into by the owners and controllers of Petroforte and Securinvest and financed by Banco Rural.

23. Dr Braga sought to recover the shortfall in the bankrupt estate by proceedings in the Brazilian courts. In August 2007 he obtained an order from the Sao Paulo Bankruptcy Court which incorporated all Securinvest's assets into the Petroforte estate. In September 2008 that order was affirmed by the Tribunal de Justiça Supremo Tribunal Federal ("TJSP"). Securinvest then appealed to the Superior Tribunal de Justicia ("STJ") and Dr Braga sought to identify Securinvest's ultimate beneficial owner ("UBO"). During its appeal to the STJ, Securinvest correctly identified its owners as Arnage and Brooklands but untruthfully asserted that their shareholders were two Costa Rican companies and not anyone involved with the Rural Group or Petroforte. Dr Braga did not believe this and sought to explore the ownership of Arnage and Brooklands in the Cayman Islands. Walkers

accepted instructions to act for him in *ex parte Norwich Pharmacal* and *Bankers Trust* proceedings in these Islands and, on 27 May and 2 July 2010, the Grand Court ordered disclosure from the Cayman trust companies which held Arnage and Brooklands' corporate records. The disclosure revealed that Ms Rabello was Securinvest's UBO through Arnage and Brooklands. Dr Braga then used the material disclosed in proceedings in Brazil, the USA, the BVI and Belize.

24. The Plaintiffs claim that the *ex parte Norwich Pharmacal* and *Bankers Trust* applications to the Grand Court were made on an inappropriately wide basis and in breach of the duty of full and frank disclosure. As a result, the orders were not limited in scope solely to documents which demonstrated whether or not as a matter of Brazilian law Securinvest and Petroforte formed part of a common economic group. Their case is that, had the Grand Court been properly informed about the true position, the orders would not have been granted at all, or alternatively granted on a very limited basis and subject to strict limitations as to the confidentiality of the information obtained and the use that could be made of it.

25. The Plaintiffs claim that as a result of Walkers' decision to act for Dr Braga in the Cayman disclosure proceedings and the disclosure obtained, *inter alia*:

(a) In October 2010 the Brazilian Sao Paulo Bankruptcy Court extended the Petroforte bankruptcy to include Ms Rabello's personal assets, which resulted in her bankruptcy in Brazil.
(b) in August 2011 the STJ dismissed an appeal against the order incorporating all Securinvest's assets into the Petroforte bankruptcy estate and not just those which had been acquired from Sobar by the sale and leaseback transaction;
(c) in March 2012 the Brazilian Central Bank ("BCB") commenced administrative proceedings against Ms Rabello and Banco Rural and in March 2013 the BCB fined them R$250,000 each;
(d) the release of confidential information about the Rural Group led to a run on Banco Rural and its eventual collapse and liquidation in August 2013; and
(e) further losses in a number of jurisdictions stemmed directly or indirectly from the disclosure obtained by Dr Braga.

26. At the time of the Settlement there were live disputes in the Brazillian courts as to the inclusion of the Securinvest assets and the non-Sobar assets in the Petroforte bankruptcy. They included an appeal to the STJ by Securinvest and Ms Rabello seeking to reverse a TJSP decision granting Dr Braga's appeal against the October 2011 decision of the Sao Paulo Bankruptcy Court approving a Settlement proposal by Securinvest which would return Sobar to the Petroforte Bankruptcy estate

and release Ms Rabello and Securinvest's non-Sobar assets from it. They also included a 2016 claim by Securinvest and Ms Rabello ("the rescissory action") seeking to rescind the STJ's August 2011 decision; their second interlocutory appeal to the TJSP on 13 February 2015 against the STJ's decision that its August 2011 decision was final and unappealable; and actions to limit Securinvest's liabilities in relation to the Bankruptcy Estate's debts.

27. Dr Braga's submission dated 8 August 2024 in support of the Settlement described these as *"ongoing and exhausting disputes between the Bankruptcy Estate and Securinvest in higher courts"*. He stated that **"*a possible acceptance of any of these claims may result in the loss of all assets in favour of Securinvest, causing serious harm to the Bankruptcy Estate.*"** (emphasis in original) The Settlement brought those proceedings to an end. It provided that all lawsuits and pending appeals brought against the parties named in it, who included Securinvest, Arnage, Brooklands and Ms Rabello, and all incidental proceedings and investigations in relation to Securinvest and all persons named in it were to be closed.

28. The Settlement also revoked the extension of the Petroforte bankruptcy to include Securinvest and Ms Rabello who were restored to their full legal capacities. It provided that 50% of the sums held by the Bankruptcy Court Registry account for the Petroforte Estate which represented the proceeds of the sale of the Sobar plant and Hotel Nacional, and deposits representing partial collection of a debt and receivables relating to TV Omega, a broadcasting company, were to be returned or restored to Securinvest. R$40 million was to be paid to Dr Braga's law firm, OAR which assisted with asset recovery; R$30 million of which was to come from the Petroforte Bankruptcy Estate and R$10 million from the funds paid to Securinvest. In relation to the sum to be paid to OAR, Dr Braga's submission in support of the Settlement referred to in the last paragraph stated that *"... the work of OAR has been very effective and only with the evidence it obtained abroad was it possible to establish the connection between Securinvest and Petroforte, resulting in the confirmation of the extension of the bankruptcy of the latter to the former and to several other legal entities and individuals, such as Katia Rabello ..."* Seized assets which had not been realised by the Bankruptcy Estate, including properties owned by Sabino Rabello and Ms Rabello, and shares transferred by her to her niece Victoria in 2008 were to be released in favour of their owners. In the Settlement, Securinvest gave up a non-trivial proportion of its non-Sobar assets, Hotel Nacional and TV Omega: see Macaulay 20 at §§23-25 and Respondent's 2025 Skeleton §128.3 and Schedule 2. The evidence filed in support of the Appellants states that it is believed that some US $21.3 million will be returned to Securinvest: Frietas 1, §28.

29. At the time of the hearing in May 2025, funds in respect of the Settlement agreement were held by the Brazilian Court Registry in different accounts pending the Court's approval of applications for their consolidation into one account and then authorising their distribution. An email from Diamond Law to the Court at 7:05 am on 6 May 2025, the first day of the hearing, summarised the status of the applications on 5 May. On 19 March 2025 Dr Braga requested the bankruptcy judge to order the court clerk to notify the court registry bank of the court's request that it consolidate the accounts. But as at 9 April 2025 the order had not been issued. Mr Freitas stated that timing depended on the efforts of the judge and the court clerk and that if they acted with reasonable diligence he believed that there was a high probability that the funds would be distributed by the end of April or in May: Freitas 2, 9 April 2025, §9. The summary in Diamond Law's 6 May email included the dates of the requests by Dr Braga and Securinvest for consolidation of the relevant Court Registry bank accounts to enable the disbursement of what is due to Securinvest under it, support for those requests by the Public Prosecutor's office, and a request by OAR for the disbursement of fees in the amount of R$40 million. On the basis of the summary in it, the email stated that "*we expect Securinvest to receive payment by the end of May, but hopefully sooner*".

30. In the light of that and, absent any further update, on 25 September 2025, when this judgment was at an advanced stage of preparation, the Court wrote asking Diamond Law to confirm that the Settlement proceeds had indeed been distributed to Securinvest. Diamond Law's email response that day was that no payment had been released by the Brazilian Court. On 25 September Diamond Law also provided what it described as a detailed factual update. It stated that following a series of procedural delays:

    (a) On 29 August 2025, "*the new bankruptcy judge entered her Order approving Securinvest's petition for disbursement of the settlement proceeds, after requiring certification as to completion of the initial distribution to creditors by Dr Braga*".
    (b) The Order "*was included at the end of a summary of the history of the settlement agreement within a 107 page omnibus Order addressing 161 matters in the Petroforte bankruptcy proceeding*" of which "*the Securinvest settlement agreement was item #30*".
    (c) The translation of the bankruptcy judge's conclusions stated that the proper notifications were duly made, the deadlines for these had expired without any objections and an interlocutory appeal filed was not admitted. It also stated that:

        > *"Considering the foregoing and considering the bankruptcy trustee's favorable statement regarding the amount already determined, I hereby authorize the immediate release of R$112,652,182.99 (one hundred twelve million, six hundred fifty-two thousand, one hundred eighty-one reais and*

> *ninety-nine cents), to be paid, for the time being, without any additional charges, in favor of the company Securinvest. Any eventual balance in favor of Securinvest will be determined following the unification of accounts. The clerk is instructed to issue the corresponding Electronic Disbursement Order ("MLE").*"

(d) "*Securinvest expects to receive a substantial amount of interest once the relevant bank accounts are unified. After payment of the 8% fee owed to Securinvest's counsel, a net amount of R$103,640,007 is immediately payable to Securinvest*".

(e) On 9 September 2025, counsel for Securinvest met the Clerk of the Court, who stated that the electronic disbursement order (MLE) would be issued on or after 29 September 2025, following the expiration of the appeal periods established under the Brazilian Code of Civil Procedure.

(f) "*It is presently anticipated, therefore, that the payment may occur by mid-October 2025, subject to any actions by a third party, which is considered unlikely at this stage. Once the payment is received we shall inform the Court*".

The draft of this judgment was circulated to the parties on 8 October 2025 and on 23 October 2025 Diamond Law informed the Court that Securinvest received the proceeds of the Settlement agreement in its Miami bank account that day.

III These proceedings: 2014 - 2022

31. As stated, the Plaintiffs filed their claims on 4 February 2014. On 24 July 2014, Walkers filed applications for the claims to be struck out on the ground of abuse of process and illegality and applied for security for costs. Walkers stated that they would be "*facing a US$0.5 billion claim, brought by plaintiffs who have no financial risk in the litigation"*. On 18 September 2014, the Plaintiffs applied for summary judgment on liability with damages to be assessed. The allegation of abuse of process was tried by Smellie CJ between 27 April and 2 May 2016 and was dismissed in a judgment delivered on 10 August 2016.

32. Following a twelve-day hearing in May and December 2018, in a judgment delivered on 24 July 2019, Smellie CJ dismissed the Defendant's application to strike out the claims and ordered summary judgment in favour of the Plaintiffs "*on liability with loss/damages"* to be assessed. The defence of illegality was left to await resolution after all the facts were considered at trial. Smellie CJ's Order reflecting his decision and refusing leave to appeal is dated 19 February 2020 and was

filed on 6 March 2020. On 2 March 2020, the President of this Court gave the Defendant leave to appeal.

33. Security for costs had been addressed in skeleton arguments dated 24 February 2016 and 14 May 2018 (Plaintiffs)[9] and 14 May 2018 (Defendant), and in oral submissions on 20 December 2018, the last day of the hearing. It was, however, not dealt with in the July 2019 judgment, possibly as a result of a suggestion at the hearing.[10]

34. In support of its application for security, the Defendant relied on the Plaintiffs' failure to provide any evidence to show they were of substance and had enough assets to pay a future costs order despite it having shown what it described as a *prima facie* case that they would not be able to pay. The Plaintiffs' 2016 skeleton denied they would be unable to pay. In that and their 2018 skeleton they submitted that the application for security for costs be dismissed, essentially giving four reasons:

    (i) The strength of their claims, demonstrated *inter alia* by the admissions in the Amended Defence.
    (ii) The financial position of the First to Fourth Plaintiffs at that time was a direct result of the Defendant's conduct, and the Defendant should not be permitted to take advantage of any want of means brought about by its own conduct.
    (iii) The Defendant's motive in seeking security for costs was an improper attempt to oppress the Plaintiffs. The focus of this reason was the Defendant's motivation for the application and not its consequences for the Appellants.
    (iv) Ordering security would be premature in the light of the appeal then pending in the Brazilian STJ on the basis of a settlement proposal under which Ms Rabello would be discharged from bankruptcy and Securinvest would be released from the Petroforte Bankruptcy.

35. At the hearing, the Chief Justice put it to the Plaintiffs' counsel Mr Akiwumi that it was not disputed that there was no evidence in relation to the ability of the Plaintiffs to pay costs. Mr Akiwumi replied that the Plaintiffs did not challenge the manner in which the Defendant had put the case but stated that "*if there is a need to complete the evidential gap …*" he would be asking for the matter

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9 The first was signed by Anneliese Day QC and Anthony Akiwumi and the second by Ms Day QC. The judge summarised those in the Plaintiffs' 2016 skeleton at [17] of his judgment.

10 Transcript Day 12, p. 101 lines 7-13, where Mr Akiwumi suggested that the natural time for determining the application for security was after the substantive applications.

to be stood out to resolve that issue.[11] He also stated that the Plaintiffs had set out the reasons as to why the claim would be stifled in their written submissions and were content to rest on them.[12]

36. The Chief Justice's decision and reasons for refusing the application for security for costs are in a ruling delivered on 8 August 2020. His first reason at [48] was that in view of his order for summary judgment on liability:

> "*an order for security for costs against the Plaintiffs would be wrong in principle because the liability of the Defendant for more than minimal loss is now established*".

He also stated at [61] that the Defendant's breaches of duty may be regarded *prima facie,* as:

> "*having brought about any consequential financial distress the Plaintiffs may currently be subject to. It follows that any order for security against them in favour of the Defendant would be oppressive, wholly inappropriate and unjust*."

Substantially accepting the language in the Plaintiffs 2016 skeleton, at [71] he further stated:

> "*… even if the Defendant's assertion that the Plaintiffs' have insufficient assets to meet any future liability for costs is correct (<u>although denied by the Plaintiffs</u> …), the granting of security would stifle what are arguable, meritorious and genuine claims. This, in itself, would be wholly unjust.*" (emphasis added)

37. On 1 February 2021 this Court allowed Walkers' appeal against summary judgment but dismissed its appeal against the refusal to strike out the claim. Moses JA, with whom Rix and Martin JJA agreed, stated that the Chief Justice had conducted an impermissible mini-trial by becoming immersed in a lengthy process unsuited to summary resolution when what was required was consideration of the full facts and after full disclosure of documents at trial: see [21], [58], [155] and [178]. Issues such as whether a relationship of lawyer-client existed between Walkers and Ms Rabello and whether a duty was owed to the beneficial owners of the Plaintiff companies and the issues of causation were "*ripe for contest and challenge in the light of all the evidence and full disclosure*". Smellie CJ then recused himself, and in March 2021 the case was assigned to the judge.

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11 Transcript Day 12, pp 55 and 92 which also referred to "the evidential lacuna".
12 Transcript Day 12, pp 92, 99. Extracts from the Transcript are set out at [21] of the judgment below.

38. As to security for costs, before this Court the Plaintiffs confirmed that they did not allege that their claims would be stifled but relied *inter alia* on Smellie CJ's finding which Mr Chapman QC stated he sought to defend in terms of oppression.[13] It is not entirely clear whether this is a reference to oppression as the result of the Defendant's improper motive to stifle or by it seeking to rely on a want of means caused by its own wrongful conduct. On 2 August 2021 this Court allowed Walkers' appeal against Smellie CJ's refusal to order security. It regarded the first of the Chief Justice's reasons at [35] above as the primary one. It stated at [8] and [9] that the Chief Justice's views on security for costs could not survive the reversal of his order granting summary judgment on liability, and that if the result below was to be supported it had to be because a new discretion arose in this Court.

39. The Court's focus thereafter was on the consequences of the lack of explanation by the Plaintiffs, who appeared to be impecunious, as to how very expensive litigation had been supported over many years and would continue to be supported, or their sources of funds: see [18], [31], [51] and [52]. At [51] Rix JA, giving the judgment of the Court, stated that "*It is reasonably clear … that Ms Rabello is, or has at some time been, able to find the means, possibly through an international network of arrangements, to dispose of funds located in several jurisdictions in the world".* The Court considered that, whether a defendant caused or contributed to a plaintiff's impecuniosity is a possible factor in the exercise of the discretion but stated that, standing by itself, is unlikely to take things much forward. First, causation is often, and is in this case, bound up in the overall merits of the claim: see [25] and [33] – [34]. Secondly, it stated that it is clear from the authorities that parties should not attempt to go into the merits of their case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure, and that was not so in this case: see [32] – [34].

40. The Court concluded at [37] and [53] that the Defendant was in principle and in justice entitled to security for costs. In the case of Arnage and Brooklands, there was little other than their impecuniosity to put in the balance of justice. In the case of Ms Rabello, jurisdiction under Order 23 to order security against her was not founded on the risk of impecuniosity but *inter alia* on her being ordinarily resident outside the jurisdiction. While it is necessary to apply Order 23 in a way that does not discriminate against foreign personal plaintiffs, it would not be discriminatory for Ms Rabello to be liable alongside the corporate Plaintiffs. The Court stated at [51] that it appeared from her conduct of the case since her bankruptcy that Walkers would not merely find it especially difficult and expensive to pursue her through Brazilian enforcement proceedings but "*might suffer*

[13] Transcript 25 May 2021, pp. 72, 100 and 101, set out at [31] – [32] of the judgment below.

the real risk of it being impossible to seek a way through Ms Rabello's bankruptcy to obtain any successful enforcement at all". At [55] it stated that security of US$4.25 million should be given by the corporate Plaintiffs and Ms Rabello.

41. In their submissions on ancillary matters, the corporate Plaintiffs and Ms Rabello sought an extension of the 30 day period indicated by the court at [56] for the provision of security given developments since the judgment, and submitted that they should be given liberty to apply in the event of non-compliance with the Order. They also submitted that "*an order requiring security of US$4.25m or any further security to be posted while these other matters, including the latest demand for further security, are being addressed, will have the effect of stifling [their] claims"*. In their submissions, Walkers sought an order that the proceedings be subject to an automatic strike-out in the event of non-compliance; that is for an "unless order".

42. The Security Order provides that the corporate Plaintiffs and Ms Rabello "*are jointly and severally liable"* to give security for Walkers' costs in the sum of US$4.25 million within 45 days, that is by 18 November 2021. The Defendant's application for an "unless order" was refused. The Order stayed the proceedings save for any application for leave to appeal to the Privy Council and *"save also that there be liberty to apply concerning the consequences of the order*".

43. On 2 November 2021 this Court refused an application for leave to appeal to the Privy Council. An application to the Privy Council for permission to appeal made on 5 January 2022 was refused by the Privy Council on 19 July 2022. In their applications to this Court and to the Privy Council for leave to appeal, the Plaintiffs submitted that this Court erred in failing to consider that the Defendant's application for security was being pursued oppressively and with the improper motive of seeking to stifle the claim.[14]

44. On 28 July 2022, shortly after all avenues of appeal from this Court's October 2021 Security Order were exhausted, Walkers applied for the dismissal of the claims for non-payment of the security. On 5 September 2022 the corporate Plaintiffs and Ms Rabello applied to set aside or vary the CICA's order that they provide security for costs. The two applications were heard by the judge on 5 October 2022.

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[14] See paras 6(b) 8(1),20 and 21(3) of the application to the CICA and para 7(2)(a) of Annex B to the application to the Privy Council. The judge at [59] stated that the Plaintiff's Supplemental Note to the Privy Council dated 14 February 2022 did not take objection to the Defendant's Note of Objection to the Plaintiffs' application for leave dated 2 February 2022 which stated that the stifling argument was contrary to what the Plaintiffs accepted in the CICA and "*has now been abandoned*".

IV The evidence before the judge

45. Evidence in support of the application to set aside or vary the Order granting security was given by Robert B Macaulay, an attorney licenced by the State of Florida and a shareholder in the firm of Carlton Fields, who has been the Appellants' instructing attorney in these proceedings since 2014, and Ms Rabello. Mr Macaulay's 14th Affidavit and Ms Rabello's 1st one, both dated 5 September 2022, stated that Ms Rabello and Securinvest, the sole asset of her companies Arnage and Brooklands, are in bankruptcy in Brazil and that she had been unable to provide any material funding for the litigation. Their evidence is that she met her own costs with the help of family and friends, but that support did not and would not extend to the provision of security for the payment of the costs of the Defendant: Macaulay, 14, §27; Rabello, 1, §6. Ms Rabello also stated that she relied on the willingness of Carlton Fields, to defer payment of her own fees and on Mr Macaulay's efforts and those of Mr Toledo to try to find funding for the claim from other sources: Rabello, 1, §5. Mr Macaulay also stated that funding from the Rural Group ended in 2013 except for a sum of US$1,036,000 which was received in 2020 from a newly discovered US account of a dissolved Rural Group company about which he had learned from a Cayman attorney: Macaulay, 14, §26.

46. Mr Macaulay stated he was primarily responsible for assisting the Appellants in their efforts to obtain third-party funding and that his firm is not supporting the claims under a conditional fee arrangement or a damages-based agreement with the Appellants: Macaulay, 14, §§16 and 28-29. He stated that "*as is standard, discussions with third-party funders are governed by confidentiality restrictions, and subject to litigation privilege"*: Macaulay, 14, §30. Despite the significant challenges the Appellants encountered in their extensive attempts to finance the enormous costs of this action, before the CICA allowed the Defendant's appeal against the Chief Justice's summary judgment decision they believed there were reasonable prospects of obtaining third-party funding for their own costs: Macaulay, 14, §§18 and 29. The Appellants were able to meet a large proportion of their Cayman and UK counsel's fees with the assistance of financial support from family and friends, which in Mr Macaulay's concluding paragraph he said were loans: Macaulay, 14, §50. He, however, also stated that substantial balances are still owed to former counsel, and that Carlton Fields has deferred all payments of its attorneys' fees since January 2021 and has been running a substantial accounts receivable balance with the Appellants since 2016: Macaulay, 14, §§27-28. On 31 July 2022 that balance exceeded US$ 1,500,000 but Mr Macaulay gave no figure for the sums owed to former counsel.

47. Mr Macaulay's evidence is that since the CICA judgments and the Security Order and the Respondent's indication that it intended to seek more security the Appellants have been trying to obtain funding to provide security. Their attempts were made harder, but their efforts have been unsuccessful, and "*it is now apparent from [their] attempts to obtain funding that they are unable to provide security for the Defendant's costs"*: Macaulay, 14, §14 and see also §§30-31. Since the December 2018 hearing before the Chief Justice he had presented the opportunity to finance the claims to at least 28 litigation funding firms, private equity firms involved in litigation funding, wealthy individuals and corporate investors in Brazil, Texas, the United Kingdom, Australia and New York but those approached either declined or ceased responding to his emails: Macaulay, 14, §§45-48. Since this Court's judgment ordering security, in June 2022 he presented the case to two potential American investors, in July to a representative of a major Florida-based litigation funder, and in August to a Brazilian private equity fund and a retired Brazilian banker without success. He stated that, while none of the potential funders expressed concerns about the merits of the claims, "*several have expressed their scepticism as to the likelihood that the [Appellants] would receive a fair trial based on the procedural history, and especially the CICA Order requiring the [Appellants] to provide security of millions of dollars to the Defendant In a case in which they had previously been granted summary judgment with costs by the Chief Justice…".*

48. Evidence in support of the Defendant's application for the dismissal of the claims without trial was given in an affidavit sworn on 28 July 2022 by David Lewis-Hall a senior associate at Appleby (Cayman) Ltd. Mr Lewis-Hall stated that the Plaintiffs' claims had been stayed for over 8 months and a continuation of the stay would be highly prejudicial to the Defendant. Dismissing the claims for non-payment of the security would bring finality in substantial litigation *"which has already been running for 8 years in a context in which the Plaintiffs' position on their ability to provide security has previously changed without explanation".*

V The Evidence on Appeal

49. I have stated that a substantial body of evidence and supporting documents has been filed since the adjournment of the hearing in April 2024. The evidence deals with: (i) the implications of the Settlement, the net proceeds to Securinvest which are estimated to be US$ 21.3 million, for the Order requiring security for costs and dismissal of the claims, and the merits of those claims; (ii) the procedure in Brazil for the distribution of funds pursuant to the Settlement (on which see [29] above); and (iii) developments since the adjournment or matters which have since come to light which are relevant to the two questions that fall for decision.

50. The evidence on appeal is not relevant to whether the judge's decision and Order were correct, except in relation to considering whether it would have led him to set aside or vary the Security Order or to dismiss the Appellants claims if the matter had come before him after that evidence was filed. The material parts of it are dealt with in the discussion of the submissions of the parties and the conclusions in Section IX. Here only those who filed such evidence and the key points in it are identified.

Appellants' evidence on appeal

51. Mr Macaulay swore and filed four Affidavits, his 18th to 21st, dated 19 March, and 2, 9 and 25 April 2025. Mr Toledo swore two Affidavits, his 10th and 11th, dated 19 March and 2 April 2025. Ms Rabello swore her 2nd Affidavit on 2 April 2025. Mr Luciano de Almedia Freitas, a Brazilian attorney licensed by the District of Columbia Bar and the State of Florida as a Legal Consultant on Brazilian law and employed by Carlton Fields, swore two Affidavits dated 19 March and 9 April 2025. He dealt with the Settlement, the total funds it was estimated would be distributed to Securinvest under it, the procedure for such distribution, and with limitation. Mr Pedro Henrique Garzon Ribas, a Brazilian attorney and counsel for Ms Rabello in proceedings brought against her by her sister Nora and the estate of her mother, Jandyra Rabello swore three Affidavits, dated 2, 9 and 24 April 2025 dealing with the claim which he stated was baseless and statute barred. Mr Mauricio de Oliviera Campos Jr, a Brazilian attorney who represented Ms Rabello for over 20 years in several criminal matters, swore an Affidavit dated 2 April 2025.

Respondent's evidence on appeal

52. Mr Daniel Coelho, a Senior Associate at Appleby (Cayman) Ltd. swore five Affidavits, his 2nd to 6th, dated 19 and 21 March, and 2, 9 and 16 April 2025. Ms Fernanda Barroso Carneiro, a Managing Director of the Investigations, Diligence and Compliance Team at Kroll Associates Brasil Ltda filed two witness statements made on 2 and 16 April 2025 on ongoing tax enforcement and civil proceedings against Securinvest in Brazil. Mr Antonio Carrlos Monteiro Da Silva Filho, a Brazilian lawyer and founding partner in Monteiro da Silva SIA, gave expert evidence on Brazilian law in three witness statements made on 1, 9 and 16 April 2025. He dealt with whether Securinvest's extant or contingent liabilities when its assets entered into bankruptcy in 2007 would be statute barred, concluding in disagreement with Mr Freitas's evidence that they would not be and

explained what a rescissory action was. His second statement dealt with the legal routes available in Brazil to a creditor to challenge gratuitous dispositions by a debtor.

Key points in the evidence on appeal

53. The key points in the evidence on appeal are:

(i) Ms Rabello's transfer on 31 January 2025 of her UBO of Arnage and Brooklands, and thus of Securinvest to Mr Toledo, who as stated at [4] above, is treated as a *de facto* member of the Rabello family.

(ii) Securinvest's existing or contingent liabilities in tax enforcement and civil proceedings when it entered into bankruptcy in 2007; their amount, and whether they are now statute-barred.

(iii) Ms Rabello's currently pleaded contingent liability in connection with Banco Rural's liquidation and that arising under claims brought against her by her sister Nora and her mother's estate.

(iv) Costs which the Respondent claims Ms Rabello bore of defending the criminal and regulatory proceedings in Brazil, paying fines and pursuing the rescissory action in the STJ.

(v) The Appellants' access to and sale of some Securinvest assets between 2010 and 2013 after they had been incorporated in the Petroforte bankruptcy.

VI The judgment below

54. The judge set out the facts, the law and policy considerations relevant to (i) the grant of security for costs in the light of the weight given to access to justice and the desirability of deciding cases on their merits and the principle of finality in litigation, (ii) setting aside an interim or interlocutory order, and (iii) the consequences if an order for security for costs is not complied with. He did so at length, with extensive consideration of the authorities. He had earlier summarised the evidence before him and the parties' competing arguments.

55. The judge's conclusion that he should not exercise the discretion he had to set aside or vary the Security Order has three limbs. The first was that the Appellants were required to bring forward any case on stifling at first instance with proper evidence but failed to do so and had not run the stifling point before the Court of Appeal or their application to the Privy Council for leave to

appeal: see [148]. Their attempts before him "*to have a second bite of the cherry fall foul of the Henderson v Henderson line of authorities";* i.e. were an abuse of process: see [149]. The second was that the Appellants had to show that there was a material change of circumstances since this Court's Security Order but had not done so. The third was that, even if a material change of circumstances was not required, he was not satisfied that the Appellants had established that their claims would be stifled or that it was otherwise appropriate to set aside or vary the Order.

56. He stated at [150] that the Appellants *"needed to support the assertions"* in Mr Macaulay and Ms Rabello's Affidavits "*with evidence from those specific members of family and those specific friends who have funded*" and should have given "*chapter and verse corroborative evidence in support"*. At [153] – [154] he stated that no evidence "*whatsoever*" was provided by the "*family and friends*" who the evidence of Mr Macaulay and Ms Rabello stated funded the litigation to date but are not willing to provide security for the Defendant's costs. He also stated that no detail was given of how the case has been funded to date. He did not accept the Appellants' invitation to accept that evidence at face value because it "*is lacking in the required detail and there is no evidence from family and friends or the potential funders referred to"*. He stated that "*the evidence presented … is inadequate to persuade me to grant the [Plaintiffs] the relief they now seek"*.

57. The judge's overall conclusion at [156] states:

> "*There are no grounds justifying this court setting aside the Court of Appeal order. In the particular circumstances of this case, I do not think it unjust, unfair or disproportionate to dismiss the Relevant Plaintiffs' application. There should be no further adjournment to enable the Relevant Plaintiffs to put in proper evidence. They have had plenty of time to do that already. There should be no further adjournment to enable the Relevant Plaintiffs to put up the security ordered as long ago as October of last year. The interests of justice (of which finality is an important part) require me to dismiss the Relevant Plaintiffs' application.*"

58. As to the application that the claims be dismissed, the judge accepted at [162] that the case was important and there are serious issues to be tried but stated that the importance of finality in litigation should not be underestimated. He considered that it would be highly prejudicial to the defendant if the Security Order was set aside and the court allowed the Appellants what Mr Simpson KC described, in the judge's view justifiably, as a "free shot" against the Defendant, but

which the Appellants described as a "cheap shot". At [164] – [166] he gave four reasons for rejecting the Appellants' submission that it would be disproportionate to dismiss their claims immediately:

(i) The court would not be justified in providing the Appellants with further time to provide funds in belated compliance with the Security Order because on their own case no funds would be made available.

(ii) In the words of Smellie CJ in *Caribbean Islands Development Ltd. v First Caribbean International Bank* [2014] (2) CILR 220 at [52] "*An order dismissing an action already stayed for failure to comply with an order for security, will ordinarily be the appropriate order to make".* These proceedings were stayed by this Court's October 2021 Order and the 45 days given for paying the security had long passed.

(iii) The suggestion that it would be more proportionate to make an "unless order" than to dismiss the claims immediately would waste time and costs and put off the inevitable because the Appellants' own case was that they would not be coming up with the money.

(iv) It would also not be just or proportionate to adjourn and give Appellants who were well aware of the need to adduce full evidence yet further time to do so.

59. Since the judgment and Order under appeal the judge has delivered a number of other judgments in these proceedings. I mention only two. Following a hearing on 8 June 2023, on 16 June 2023 he rejected an application by the plaintiffs that he recuse himself from taking any further part in the proceedings because a fair minded observer would have concluded from his management of the case that there was a real possibility of bias if the case was not assigned to another judge. Following a hearing on 11 and 12 July 2023, on 27 July, in an Order dated 4 August 2023 he refused leave to appeal and granted Walkers' applications for disclosure by the plaintiffs of the identities of all those who have provided funding to them since 1 September 2011, the amount and terms of such funding, and the extent of each party's investments in the conduct of the action and interest in its outcome within 28 days. He also ordered an interim payment and that Mr Toledo should be jointly and severally liable with the Appellants for costs until 30 November 2021.

VII The Grounds of Appeal

60. Grounds of Appeal under four broad headings of "*failure to take all relevant factors into account in the exercise of discretion", "errors of law and/or misdirection", "wrongful rejection of uncontroverted evidence",* and *"the decision was plainly wrong"* were filed on 18 October 2023

("the Original Grounds"). Additional Grounds of Appeal ("the Additional Grounds"), based on the effect of the Settlement and its consequences rather than the judge's reasoning, were filed on 28 February 2025, pursuant to a direction of this Court.[15]

The Original Grounds

61. Paragraph 60 of the Appellants' 2024 skeleton argument states that the Original Grounds raise six issues, although it then lists seven the formulation of which, in some respects, differs from that in the Grounds of Appeal. The first four grounds allege that the judge erred in law and/or misdirected himself in relation to whether to set aside or vary the Security Order. The fifth and sixth are that the judge erred in deciding to dismiss the Appellants' claims. The seventh alleges errors in the exercise of his discretion in relation to setting aside or variation the Security Order and in relation to dismissing the claims. The seven grounds/issues allege the following errors or misdirections:

(1) narrowly construing the CICA's general liberty to apply in respect of the consequences of the security for costs order as not permitting the Order to be set aside or varied unless there was a material change in circumstances (Grounds, §§2.1-2.2);

(2) concluding that the Plaintiffs had not established on the evidence before the court that they were unable to provide funding for the provision of security for costs. By the hearing in October 2022 there was a material change in circumstances because "*if it had been doubted in May 2021 … that the [Appellants'] claims would be stifled if they were ordered to provide security, it was clear by the time of the hearing before the [judge] in October 2022 that their claims would probably be stifled, given their unsuccessful attempts in the interim to obtain funding for security*". (Grounds, §2.3);

(3) wrongfully dismissing the uncontroverted evidence of Mr Macaulay and Ms Rabello that friends, family and funders would not fund the provision of security for costs as "*totally inadequate"* and nothing more than *"generalised assertions"*. (Grounds, §§3.1-3.3);

(4) concluding, where the CICA had expressly granted all parties general liberty to apply in respect of the consequences of the Order, that a submission and evidence at the hearing before the judge that the Plaintiffs were (still) unable to fund a requirement for security in the sum ordered amounted to a *Henderson*-style abuse of process (Grounds, §2.4);

(5) concluding, on the authority of *Caribbean Islands Development Ltd. v First Caribbean International Bank* 2014 (2) CILR 220, that the claims should be dismissed even though there had been no history of non-compliance by the Plaintiffs and this Court had not imposed an

[15] These were amended on 19 March 2025 to recognise that until 1 April 2025 Brazilian government entities were able to appeal against the Sao Paolo Bankruptcy Court's approval of the Settlement.

"unless" order on them but had instead chosen to give the parties liberty to apply in respect of the consequences of the order for security for costs (Grounds, §§2.5-2.7).

(6) making a decision that was plainly wrong in dismissing the claims without a trial and without any evidence of persistent non-compliance in view of (a) the strength and substantiality of the claims on the merits (Grounds, §4.1(1)); (b) the finding of the former Chief Justice that the very substantial costs incurred by the Defendant were the result of the unreasonable and aggressive conduct of the Defendant (Grounds, §4.1(2)); (c) the specific refusal of the Court of Appeal of the Defendant's application for an unless order and the liberty instead given to all parties to apply in respect of the consequences of the Order (Grounds, §4.1(3)); and (d) the evidence that the Plaintiffs were not able to obtain funding for security for costs which was uncontroverted by witness or documentary evidence (Grounds, §4.1(1)(4)).

(7) failing to take all the factors relevant to the issues of proportionality, public policy and the overriding objective into account in the exercise of his discretion in relation to the applications to dismiss the claims and to set aside or vary the security for costs order in not seeking properly to evaluate the merits of the Plaintiffs' claims (Grounds, §§1.1 -1.4).

The Additional Grounds

62. The Additional Grounds of appeal, as amended, are:

(1) The approval of the Settlement by the Sao Paulo Bankruptcy Court means that as from 2 April 2025 there was a material change of circumstances since the Order of this Court requiring the payment of security for costs and the judge's Dismissal Order refusing to set aside or vary the Security Order and dismissing the Plaintiffs' claims without trial. In particular, by 2 April 2025 (a) Securinvest would have either had 50% of its assets returned to it or be entitled to have them returned, (b) Arnage and Brooklands the owners of the shares in Securinvest, would no longer be impecunious; and (c) Ms Rabello would no longer be a bankrupt and impecunious. (Additional Grounds, para 5.3)

(2) If the appeal succeeds on any of the original grounds and this Court exercises its discretion afresh: (a) there is no jurisdiction under section 74 of the Companies Act 2021 Revision for it to require the Arnage and Brooklands to provide security for costs, and (b) in any event it would not be just to do so in all the circumstances of the case. (Additional Grounds, para 5.4.1)

(3) Security against Ms Rabello would be limited to the additional costs of enforcement against her in Brazil but where the Court has no jurisdiction to grant security for costs against Arnage

and Brooklands, in all the circumstances of the case, it would not be just to order security against her. (Additional Grounds, para 5.4.2)

(4) In the circumstances in which Securinvest is entitled to the restoration of the assets listed at [28]] above, the Defendant/Respondent no longer has (and never did have) any proper basis to allege that the Appellants were involved in any attempted misappropriation of Petroforte's assets and to rely on that as part of a defence of illegality in disputing the Appellants' claims. (Additional Grounds, para 5.4.3)

(5) The change of circumstances and the reasons in (1) – (4) above invalidate paragraphs 1 and 2 of the judge's Order dismissing the Appellants' application to set aside and vary the Security Order and granting the Defendant's application to dismiss the claim and they should be set aside or varied. (Additional Grounds, paras 5.5 and 5.6)

VIII The Parties' Submissions

Appellants

63. Mr Eschwege submitted that the judge's decision not to set aside or vary the Security Order was wrong because of his findings that:

(1) A material change in the circumstances of the Appellants had to be established in order for that order to be set aside or varied.

(2) There had been no such material change of circumstances.

(3) The evidence of Mr Macaulay and Ms Rabello be rejected, although uncontroverted.

(4) In failing to bring forward any case on stifling the Appellants may have had before the Chief Justice at first instance, their later attempt to do so fell foul of the principle of abuse of process in the *Henderson v Henderson* (1843) 3 Hare 100 line of authorities.

64. As to the judge's decision to dismiss the Appellants' claims, Mr Eschwege submitted that the judge:

(1) misunderstood the relevant authority, *Caribbean Islands Development Ltd. v First Caribbean International Bank* 2014 (2) CILR 220, and

(2) did not, when making his decision, take into account all the relevant factors, including the merits of the claims and proportionality.

65. Mr Eschwege submitted that the Settlement constituted a material change of circumstances because:

(1) The jurisdiction to order Arnage and Brooklands to provide security fell away because section 74 of the Companies Act (2025 Revision) provides that the court may require a plaintiff company to provide security if it is satisfied that "*the assets of the company will be insufficient to pay [the defendant's] costs*": Appellants' 2025 Skeleton, §31.

(i) As the sole shareholders of Securinvest, Arnage and Brooklands would have sufficient funds to pay any adverse costs order using Securinvest's funds in Florida, where there would be no difficulty in enforcing a costs order. Mr Toledo is the sole shareholder and director of Arnage, Brooklands and Securinvest, and Ms Rabello has no right to or control of the companies' assets.

(ii) There is no reason to believe that the companies' assets will be insufficient to pay the Respondent's costs. The onus is on the Respondent to show that the assets of the companies will (not might) be insufficient to satisfy a costs order. Raising doubts is not sufficient: *Tianrui (International) Holding Co. v China Shanshui Cement Group*, FSD 161 of 2018, 22 May 2022 at [9] *per* Segal J. Moreover, in the light of *BTU Power Management v Hayat* [2011] (1) CILR 315 at [30] – [34] *per* Chadwick P, allegations about Mr Toledo cannot be used as evidence of reason to believe that Arnage and Brooklands would not be able to pay a costs order. Allegations about what Ms Rabello would do can also not be used.

(iii) Apart from the fact that section 74 does not contain a specific ground for security similar to that CPR r. 25.13(2)(g) (where a plaintiff has taken steps in relation to its assets which would make it difficult to enforce a costs order against it) it is not said that Arnage and Brooklands have already taken such steps.

(iv) Evidence in Coelho 4 §§44-45 that in 2011 Securinvest had liabilities of c US$64 million which are still extant is incorrect. The August 2007 Order extending the Petroforte Bankruptcy Estate to Securinvest and its assets under Article 50 of the Brazilian Civil Code was not a declaration that Securinvest was bankrupt and the 10 year limitation long-stop in Article 205 of the Brazilian Civil Code applied to it rather than it being suspended until Securinvest's assets were released from the Petroforte bankruptcy.

(2) The basis upon which it would be necessary or just for the court to order Ms Rabello to provide security also falls away:

(i) Ms Rabello was no longer in the Petroforte bankruptcy and, because Arnage and Brooklands would have the ability to pay any adverse costs order, and Mr Toldedo has the sole control of Arnage, Brooklands and Securinvest, their underlying assets cannot be dissipated by her. Moreover, a critical factor in security being ordered

against her was that while she was part of the Petroforte bankruptcy there was a real risk of it being impossible to enforce a costs order against her. The effect of the Settlement removed that factor.

(ii) There is a significant chance that any contingent liability by Ms Rabello arising out of the Banco Rural liquidation will be resolved, and the claim against her by Nora Rabello and the estate of Jandrya Rabello is currently suspended and is misconceived.

(iii) As to Ms Rabello's convictions and fines, the court is not in any sensible position to give credence or weight to these because all such matters are contested and/or are on appeal in Brazil. The allegations arising out of the management of Banco Rural are on appeal or ongoing, the Mensalao affair has no connection to Petroforte or Securinvest and is not relevant, and the Settlement's release of the assets Ms Rabello transferred to her niece Victoria Rabello is inconsistent with any proven fraud.

(iv) None of the grounds relied on by the Respondent for security from Ms Rabello would permit security to be required from an individual plaintiff resident in the Cayman Islands, and they should not be permitted to be required of an individual plaintiff resident elsewhere

(3) The Settlement puts an end to the Respondent's argument that the Appellants' claims are barred by the doctrine of illegality because the non-Sobar assets which were at the core of the Appellants' losses were not part of any fraud and a significant proportion of them are to be given back under the Settlement. Moreover, the Appellants' response to the Respondent's argument that the judgments which form the basis of the allegations of illegality have not been set aside is that the principle in *Hollington v Hewthorn* [1943] KB 587, which applies in these Islands, means that the opinions and findings of fact in Brazilian courts are not admissible as evidence of the truth of those opinions and facts.

Respondent

66. In his two skeleton arguments, the second reflecting Respondent's Notices dated 25 February and 6 March 2025, Mr Simpson submitted that the judge's decision was correct for the reasons he gave. It was an appropriate exercise of discretion on the basis of the facts before him. The Appellants' case on stifling before the judge "*was mere assertion and they had declined to disclose the source or sources of the funds with which they had paid millions of dollars of legal costs other than to say they had been paid by 'friends and family'*": Respondent's 2025 Skeleton §32.

67. Mr Simpson argued that evidence filed since the judge's decision makes it clearer that throughout the time Securinvest and Ms Rabello's visible assets were incorporated in the Petroforte bankruptcy estate, the Appellants have had access to significant funds with which they could have paid the security ordered. Alternatively, they could have provided funds to Arnage and Brooklands or a bank guarantee to those companies could have been financed by those funds or by a solvent Rabello company. He relied on the unwillingness of the Appellants to provide full and frank disclosure as to their ability to fund extremely expensive litigation and their sources of funding for a decade: Respondent's 2025 Skeleton §3. Citing [51] of this Court's August 2021 Security Judgment, a passage from which is set out at [39] above, Mr Simpson stated that there was extensive evidence that Ms Rabello was able to draw on funds from "*a network of undisclosed offshore entities"* and that this was a case where the Appellants *"have sought to engineer a situation where they can pursue very high value claims, lavishly funded from obscure sources, whilst facing no material adverse costs risk*".

68. Mr Simpson also submitted that the argument that until this Court's Security Judgment the Appellants hoped that they would be able to comply with the Order for security was not consistent with Mr Macaulay's evidence. It is, he maintained, clear from Mr Macaulay's 14th Affidavit that the Appellants never had any offer of funding, let alone funding for security, but despite that they disclaimed any reliance on stifling before this Court in May 2021.[16]

69. There is, he also argued, a real risk in the light of facts which the Appellants have not denied that Ms Rabello lacks probity and therefore a real risk that she will be prepared to act dishonestly to avoid enforcement. He relied on: (i) what he described as her conspiring in 2009 "*with Mr Macaulay to set up an elaborate sham Costa Rican ownership structure to deceive the STJ*"[17] when the STJ ordered Securinvest to disclose its UBO; (ii) at the same time as maintaining in these proceedings that she is the UBO of Securinvest, pursuing an appeal in Brazil in which she claimed not to be its UBO;[18] and (iii) six other matters listed in Schedule 1 to the Respondent's 2025 Supplemental Skeleton. They included criminal convictions for offences of dishonesty including fraudulent and reckless management of a financial institution for which she received sentences of

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16 Mr Macaulay 14, § 49 states that he is "*confident that some of the funders I have approached would look seriously at the opportunity to finance the claims if they could be assured that the Court no longer sought to burden them with a requirement to provide millions of dollars' worth of security to the Defendant for its costs"*.

17 Respondent's 2025 skeleton §18.

18 Second interlocutory appeal to TJSP dated 15 February 2015, addressed in Coelho 2 at §§40 – 47.

imprisonment. He also submitted that "*when the totality of the evidence now available is considered, in the light of how the Appellants are now putting their case, it is clear that the Appellants deliberately failed to disclose the existence of the unapproved Settlement agreement even to their own attorneys and Leading Counsel*".[19]

70. I turn to the Respondent's submissions in response to the issues identified in the Appellants' 2024 Skeleton summarised at [61] above. On issue (1), citing the summary of the authorities by Colman J in *Advent Capital pl v GN Ellinas Imports and Exports Ltd* [2005] EWHC 1242 (Comm), 1 CLC 1058 at [68] – [69] and [72], the Respondent submitted that it is well-established that an order cannot be varied unless there has been a material change of circumstances. The Appellants' submission that the liberty to apply in the Order made all the difference and as meaning that no change of circumstances is required in this case does not take account of the fact that the liberty to apply was not a liberty to apply for a review of whether the Order should have been made and reargue the application for security. It only gave liberty to apply as to the consequences of the order that was in fact made.

71. On issue (2) the key point was whether the Appellants had established that their circumstances in October 2022 were materially different from those in May 2021. The Appellants' formulation of the issue failed to recognise that they had expressly disclaimed any reliance on stifling before this Court in May 2021 and why, although mentioning it in their submissions on ancillary matters (see [41] above), they did not rely on it when seeking leave to appeal to the Privy Council. Moreover, on the basis of the Appellants' own evidence their attempts to obtain funding both before and after May 2021 were unsuccessful.

72. On issue (3) the judge did not err in concluding that the Appellants' evidence about how expensive litigation had been funded over many years was *"very limited"* and *"woefully inadequate*" in relying on *"generalised assertions"*. The authorities establish that respondents to an application for security must provide adequate evidence on a full, frank and clear basis to inform the court as to their means and that to establish a stifling argument must show not only that they do not have the means, but that no such funds would be made available.[20]

73. On issue (4), the abuse of process which the judge was concerned with was the tactical deployment of a stifling argument where there had been no material change in circumstances and the stifling

[19] Respondent's 2025 Skeleton, §34.
[20] Respondent's 2024 Skeleton, §55.

card had been kept up the party's sleeve to be deployed when all other arguments had failed. The judge did not say that it would be abusive for a person to apply to set aside an order requiring security on the basis of a material change of circumstances.

74. On issue (5), in circumstances in which the time limit for providing security had not been met and on the Appellants' own evidence there was no reasonable prospect of security being paid, the judge did not err in exercising his discretion to dismiss the claims.

75. On issue (6), as to Grounds, § 4.1(1), the judge had sufficient regard to the merits. This Court, in its judgment on security, stated the merits were not so clear-cut that it could be said that there was a high degree of probability of success or failure.[21] Moreover, the judge was not in a position to evaluate the merits properly in the light of the evidence that was put before him. As to Grounds, § 4.1(2), the Appellants did not allege or rely on unreasonable conduct by the Respondent before the judge, and the Chief Justice, whose views on the merits of the case and the right to summary justice, this Court said could not survive its appeal decision, did not in any event find that the slow progress of the claim and the substantial costs were the result of unreasonable conduct. Grounds, § 4.1 (2), (3) and (4) were repetitive of other grounds.

76. On issue (7), Grounds, §1, the Respondent relied on its response to Grounds, §4.1(1) summarised in the last paragraph.

77. The first of the Respondent's submissions on the effect of the Settlement and events and evidence filed since the adjourned hearing is that, as a matter of legal principle applied to the facts of this case, Securinvest's entitlement to some US$21.3 million under the Settlement and Arnage and Brooklands rendering them solvent is not a material change in the Appellants' circumstances subsequent to the judge's order which would have led him to set it aside or vary it or cause this Court to do so. This is because:

    (1) On the basis of the judge's finding on stifling, reinforced by the evidence which has become available since, the Appellants have always had the resources to put Arnage and Brooklands in the position they are now in (for example, by a solvent Rabello entity providing a bank guarantee to Arnage and Brooklands) but have chosen not to. The Respondent pointed to the payments for: (i) Ms Rabello's defences to the criminal proceedings brought against her; (ii) her US$750,000 fine imposed after her conviction in the Mensalao matter; and (iii) the costs of the rescissory action in the STJ. The Respondent

[21] Summarised at [39] above.

also relied on the transfers to Ms Rabello's niece Victoria in 2008 of companies worth BR $200 million (then US$83 million, now US$34 million) "for family reasons" and the access to and sale of Securinvest assets at a time those assets were incorporated in the Petroforte bankruptcy.

(2) Arnage and Brooklands' only assets are their shares in Securinvest, which have not been valued taking account of Securinvest's actual or potential liabilities, are not readily realisable, and might readily cease to be available in the ordinary course of trading by Securinvest.

(3) There is a real risk that Securinvest will not have the US$21.3 million when the time comes for enforcement, not least because Ms Rabello will instruct Mr Toledo to transfer it and he will comply, but also because of its liabilities and the possibility of the money ceasing to be available in the ordinary course of trading.

(4) Throughout the time that Ms Rabello's visible assets were incorporated in the Petroforte bankruptcy estate, the Appellants have had access to substantial assets which were not visible and would therefore not be available for enforcement. Such assets *inter alia* funded the payments referred to at (1) above. She was also able to transfer some Securinvest assets while they were incorporated into the Petrofortre bankruptcy. The release to her of assets from the bankruptcy is not a material change because, since she says she has given Securinvest irrevocably to Mr Toledo, she still has no visible assets.

(5) The argument that the Settlement puts an end to the Respondent's *ex turpi causa*/illegality defence is misconceived in particular because the judgments which formed its basis have not been set aside.

78. The second limb of the Respondent's submissions is headed "*Dismissal following an election"*. It is that, although the Appellants' own case is that Securinvest has, or will have, US $21.3 million in its Florida bank account available to meet any order for costs, they are not prepared to provide the security ordered. Instead, while paying lip-service in their 2025 skeleton argument to continuing to rely on their previous grounds of appeal, they have run an entirely new case. There is, they submit, no jurisdiction to order Arnage and Brooklands to provide security, and, in the circumstances, it is not necessary and would not be just to order Ms Rabello to do so. Mr Simpson submitted that the only possible reason for the Appellants' unwillingness is that they have no intention of ever paying the Respondent's costs.[22] In circumstances where the Appellants could at all times have paid the security ordered, the Dismissal Order should not be set aside or varied.

[22] Respondent's 2025 Skeleton, § 22.

IX. Discussion and Conclusions

79. It is convenient to start by considering the different wording of section 74 of the Companies Act 2025 Revision and GCR Order 23, set out at [12] above, which respectively empower a court to require corporate and individual plaintiffs to give security for the defendant's costs. In both there is a threshold jurisdictional question and, where that is satisfied, a second essentially discretionary question, whether it is just to order that security be provided.

80. Although section 74 differs from Order 23 and CPR r. 25.13(1)(a) in not expressly stating that security may be ordered where the court thinks it is "just" to do so, it is clear from the decisions that where the threshold conditions are met the court will only order security if it considers that to be just in the circumstances of the case. See the references to "discretion" and "the balance of justice" at [9] and [37] of this Court's Security Judgment given on 2 August 2021, and in the judgment of Rix JA, with whom Goldring P and Martin JA agreed, in *AHAB Company v SAAD Investments Co. Ltd.* Civil Appeal 015/201 16 November 2018. In *AHAB,* Rix JA, stated that the jurisdiction to award security for costs:

> *"is the exercise of a jurisdiction essentially in the interest of justice and which requires the Court to carefully consider and take into account all the matters which ultimately are going to be encapsulated in an exercise of what is the Court's ultimate discretion."*

81. In relation to section 74, the threshold question is that the court must be satisfied that there is reason to believe that the assets of the company will be insufficient to pay plaintiff's costs ordered against it. In this Court, Chadwick P in *BTU Power Management Company v Hayat* [2011] (1) CILR 315 stated:

> "*[2] … the onus is on the applicant for security to satisfy the judge that the statutory test has been met*", and
>
> *"[3] … the phrase "there is reason to believe" does not require the judge to be satisfied on the balance of probability. It is enough that he is satisfied that there is a real risk that the defendant's costs <u>will not be paid</u> if the defence is successful".* (emphasis added)

Five observations can be made. First, in *Jirehouse Capital v Beller* [2009] 1 WLR 751, Arden LJ at [26] identified the critical difference between a "reason to believe" requirement, such as that in

CPR r. 25.13(2)(c), and a requirement that it has been proved that the company will not be able to pay those costs as that in the former there is "*no need to reach a final conclusion as to what might probably happen*". It has been said that a "real risk" is one that is "*more than fanciful"*: *Holyoake v Candy* [2016] EWHC 3065 (Ch) at [67] and *PSJC Tatneft v Bogolyubov* [2019] EWHC 1400, [2019] Costs LR 977 at [9], although in *Tianrui (International) Holding Co. Ltd. v China Shanshui Cement Group* FSD 161 of 2018, 20 May 2022 at [9] Segal J preferred the word "real". Whichever words are used, there is a lower threshold for the exercise of the court's discretion to order security, although "*more is required than simply that there is doubt whether the company will pay*": *Jirehouse* at [24] and *Tianrui* at [9].

82. Secondly, one of the reasons for a "real risk" rather than a "likelihood" test is the need for a simple and clear test at an interlocutory stage where a judge would not be in a position to resolve disputed issues on what "necessarily and proportionately will be limited evidence": see *Bestford Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099, 2 CLR 714 *per* Gloster LJ at [79], and *Danilina v Chernukhin* [2018] EWCA Civ. 1802, [2019] 1 WLR 758 *per* Hamblen LJ at [48] and [58]. The "real risk" test also applies to applications under GCR Order 23 against individual plaintiffs who are non-resident, although, as discussed below, in their case the real risk relates to objectively justified substantial obstacles to enforcement or extra costs of enforcement rather than that their assets will be insufficient.

83. Thirdly, the fact that someone else had said that they would pay the plaintiff company's costs or would undertake to pay them does not take the matter outside the scope of section 74. This is seen from *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852 (Ch), [2004] 1 WLR 2917. Under the English CPR r 25.13(2)(c) one of the conditions permitting a court to require security for costs is that the claimant is resident out of the jurisdiction and "*is a company … and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so …".* *Longstaff* concerned the position of an offer of an undertaking by a company which was a wholly owned subsidiary of the plaintiff against whom an application for security was made. Park J stated at [22] that "*[a] case cannot be taken out of sub-paragraph (c) by saying that although the claimant company will be unable to pay the defendant's costs, some other person will".* At [25] he stated that the offer of an undertaking *"concedes that the conditions for ordering security"* to be given by the company for potential costs exist, i.e. that the threshold jurisdictional question is met.

84. Fourthly, provided that the "real risk" test is met, although a lack of probity by the owners or controllers of a company would be highly relevant", it is not a necessary requirement: *PJSC Tatneft*

v Bogolyubov [2019] EWHC 1400 (Comm), [2019] Costs LR 977 at [49] and see also *De Beer v Kanaar & Co.* [2001] EWCA Civ. 1318, [2003] 1 WLR 38 at [67] and [79] and *Pisante v Logothetis* [2020] EWHC 3332 (Comm) at [65]. In *PJSC Tatneft* Butcher J stated at [48] that the relevant assets in a case might "*readily cease to be available … for legitimate reasons*".[23] Those reasons include competing claims and the ordinary course of trading and, in fiercely fought litigation, a company or person taking "*a course of conduct which [it] was advised was open to it which diminished the assets which would be available to the defendants to enforce against".*

85. Fifthly, *BTU Power Management Company v Hayat* does not, as the Appellants submit, show that misconduct alleged against a company's owner cannot be used as evidence of reason to believe that the company will be unable to pay a costs order. All that Chadwick P said was that in that case the allegations (which Henderson J at first instance was unable to conclude even to the relatively low standard of "reason to believe" were true) did not establish misconduct by the company.

86. In relation to GCR Order 23, the court must decide whether in all the circumstances of the case it would be "just" to order security and must exercise its discretion on "objectively justified" grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned and in a non-discriminatory manner focussing on the obstacles to enforcement abroad: *Nasser v United Bank of Kuwait* [2001] EWCA Civ. 556, [2002] 1 WLR 1868 at [61] – [62] *per* Mance LJ; *Bestford* at [69], and Hamblen LJ's summary of the guidance in the authorities in *Danilina* at [51].

87. These decisions were examined and applied in this court's Security Judgment. This court stated at [45] that where the discrimination was on the grounds of residence rather than nationality the court *"did not have to find very weighty reasons to justify the discrimination".* Gloster LJ had stated in *Bestford* at [69] that the court:

> *"has to exercise the discretion on objectively rational grounds by reference to the difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic"* and that *"all that is required is some objectively justifiable rationale for the exercise of the jurisdiction."*

[23] A number of these cases, including *Tatneft* and *Pisante*, concerned removal of assets from states that are party to the Brussels, Lugano, or 2005 Hague Conventions, but the point that lack of probity is relevant but is not necessary applies more generally.

88. Orders for security should be tailored to reflect the nature and size of the particular risk in the case. In *Danilina* Hamblen LJ stated at [52(2)] that "*mere difficulty of enforcement in itself is not enough (save insofar as it results in extra costs and therefore an extra burden of enforcement)".* He identified the relevant risks as non-enforcement and/or additional burdens of enforcement in terms of cost and delay. Where, on the evidence, the risk of enforcement abroad is of an extra burden in terms of cost and delay, security will be limited to that as it was in *Nasser* and in *Gong v China Management Company Ltd.* [2011] (1) CILR 57.

89. Where there is a real risk of substantial obstacles to enforcement such that there is a real risk of non-enforcement, with one qualification, I accept Mr Simpson's submission on the basis of the authorities that "full security will be ordered against a non-resident individual". The qualification is that in *Danilina* Hamblen LJ, at [51(7)] and [64] – [65], said that "security *should usually be ordered by reference to the costs of the proceedings*" and at that while "*the starting point*" *"is that the defendant should have security for the entirety of the costs"* the quantum of security is a matter of discretion and discretionary factors such as delay or stifling may affect the amount of security ordered, if any.

90. I observe that, contrary to the Appellants' submission in §37 of their 2025 Skeleton that "*Walkers is not entitled to protection against the risk that Ms Rabello 'will not have assets to pay', nor the risk that any Brazilian court will not recognise/enforce any judgment against her for costs",* the risk of a lack of available assets against which an order could be enforced is a basis on which security can be ordered against an individual non-resident plaintiff. This Court's Security Judgment at [46] – [47] cited and followed two English cases in which this was done. In *De Beer v Kanaar & Co.* [2001] EWCA Civ. 1318, [2003] 1 WLR 38, full security was ordered against a Dutch national resident in United States with assets in the Netherlands and Switzerland. Although there was no reason that an order for costs might not be fully enforceable in Switzerland where the claimant had sufficient assets to satisfy any order for costs, the court stated that it had to take into account the ease with which assets held there could be moved. It concluded at [89] – [91] that the defendant was at risk of being unable to enforce an order for costs whether in part or at all due either to lack of available assets against which an order could be enforced or the unenforceability of such an order in Florida or both. Similarly, in *Bestford* where there was "*a real and serious risk that an order for costs might not be enforced in Georgia"* an order for full security for the prospective costs of an appeal was made: see [2016] EWCA Civ 1099 at [69] and [88].

91. I turn to setting aside or varying an order granting security for costs. It is common ground that by virtue of Court of Appeal Rules 12(3) and 12(6)(aa) and (j) the Security Order and the judge's orders not setting aside or varying that Order and dismissing the claims were interlocutory orders. This Court should not interfere with an interlocutory case management decision at first instance unless in Lord Neuberger PSC's words in *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 at [21]:

> "*it is shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or the decision was one which no reasonable tribunal could have reached.*"

92. It is also common ground that by virtue of GCR Rule 17 this Court has all the powers of the Grand Court and a discretion to set aside interlocutory orders on the ground that there has been a material change of circumstances. Both parties referred to *Hadmor Productions v Hamilton* [1983] AC 191 at 220D where Lord Diplock stated that an appellate court:

> "*may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.*"

Lord Diplock stated at 220E that in such cases the appellate court becomes entitled to exercise *"an original discretion of its own"*.

93. Where there is a material change of circumstances, in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 4278 (Comm) at [77] Christopher Clarke LJ stated, albeit in the context of whether the court had power to make a further order for security, that "*it is not necessary*

to show that the change was unforeseeable". What "*the court needs to consider [is] whether it would be just to make the order for security proposed*".

The original Grounds of Appeal

94. I do not consider that the judge erred in relation to issue (1) in the original grounds by stating that notwithstanding the liberty to apply in the security order the Appellants had the burden of showing a material change of circumstances. The liberty to apply was not to apply for a review of the order but in respect of the consequences of not complying with the order. If the court could set aside or vary an order in those terms where there was no change of circumstances whatsoever the result would in effect be an appeal against that order, a *de novo* review and reconsideration of it even where, as in this case, all avenues of appeal against the order had been exhausted.

95. In *Chanel Ltd v F.W Woolworth & Co. Ltd.* [1981] 1 WLR 485 at 492-3 Buckley LJ stated:

> "*Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably known, or found out about, in time for the first encounter*".

96. The Appellants submitted that in May 2021 when the application for security was being heard by this Court they could not have been aware that they would be unable to find funders willing to provide security. At that time they expected the Chief Justice's refusal of security would be upheld. When it was not, "*they were not certain that they would be unable to comply with the order, although they were clearly concerned about it*", but the subsequent enquiries, evidenced by Mr Macaulay "*put the matter beyond doubt*" by the time the case came the judge in October 2022. They maintain that they therefore fall within the last part of Buckley LJ's statement in *Chanel.* I reject the suggestion that they could not reasonably have known or found out about the position. The application for security was made in July 2014. Mr Macaulay's evidence is that the Appellants faced significant challenges in attempting to finance the costs of the action, and it appears that, save for the assistance from family and friends, all their attempts to obtain funding before and after this Court's decision on security were unsuccessful.

97. The Appellants' changing stance in relation to their ability to pay a costs order is striking. Before the Chief Justice they focused on the Respondent's motivation in seeking security for costs rather

than the consequences of an order for them. They did not run a stifling point before the Court of Appeal save in their submissions on ancillary matters after judgment.[24] They then did not run it in their application to the Privy Council for leave to appeal. The judge stated at [155] that in the light of the history of the proceedings and the position the Appellants have adopted from time to time on the stifling point he was "*extremely sceptical about [their] claims that they are unable to come up with funds to comply with"* the Security Order. The Respondent's 2024 Skeleton submitted that the application to set aside or vary the Security Order is an abuse of process because there had been no material change of circumstances and what had happened was a tactical deployment of a stifling argument which had been kept up the Appellants' sleeve to deploy when all other arguments failed. The question whether the judge erred in stating that the application was an abuse of process was identified in the Appellants' 2024 skeleton as issue (4) of the original grounds. The evidence put before the judge about the Appellants' unsuccessful efforts to find funding in order to comply with the Security Order was general and lacked detail. I consider below whether the judge was entitled to conclude that it did not suffice to justify a decision that the Order should be set aside or varied. However, absent cross-examination or contradictory evidence I do not consider that it and the statements in it can simply be dismissed as "mere assertion" and "woefully inadequate" so as to render the application itself an abuse of process. In the light of the "liberty to apply" provision in the Security Order and the new evidence put before the judge about the Appellants' unsuccessful efforts to find funding and the effect of the CICA's two decisions on their evaluation of the prospects of getting funding, I do not consider that by applying for the order to be set aside or varied they abused the process of the court.

98. Issues (2) and (3) raised by the original grounds are whether there was a material change of circumstances between this court's judgment and Security Order in 2021 and the hearing before the judge in October 2022, and whether the judge was wrong to dismiss what the Appellants describe as the uncontroverted evidence of Mr Macaulay and Ms Rabello. They can be taken together as both involve considering whether the judge was entitled to conclude on the evidence before him that the Appellants had not established that the Security Order would stifle the progression of their longstanding claims.

99. On issue (2) in the original grounds the Respondent's position is that the question is whether there was a material change in the Appellants' financial circumstances between those dates, and that what it was necessary for the Appellants to show was that, whereas they could comply with a costs order in 2021, they were not able to do so in 2022. They submitted that the Appellants were eliding

[24] See [38] and [41] above.

issues (2) and (3) and avoiding mention of the divergent positions they had taken on stifling, including relying on it in their post judgment submissions on ancillary matters in August and October 2021. The Appellants submitted that the relevant change is in their beliefs about the prospects of obtaining funding. In 2021, although concerned about the security judgment and order they hoped they would be able to comply with it. It was, however, clear by the time of the hearing before the judge in October 2022 that their claims would probably be stifled, given their unsuccessful attempts in the interim to obtain funding for security.

100. It is clear that a party maintaining that its claim would be stifled needs to establish this on the balance of probabilities: *Keary Developments v Tarmac* at 541; *Brimko* at [11] and *Goldtrail* at [15]. In *Goldtrail* Lord Wilson stated at [16] that for all practical purposes courts can proceed on the basis that security should not be imposed if "*it would probably stifle the proceedings*." The party would have to show that it does not have the resources to put up security for the defendant's costs or access to the resources of third parties which would enable it to provide such security and that realistically there are no third parties who can reasonably be expected to do so.

101. In *Al Koronky v Time Life* Eady J stated at [31] that there had to be "*full, frank, clear and unequivocal evidence before a court should conclude that a particular order will have the effect of stifling a claim*" but *The Anglo-Eastern Trust Ltd. v Kermanshahchi* [2002] EWCA Civ. 198 shows that flexibility can be shown where there is an explanation for a failure to mention something (in that case the transfer of the title to property to a spouse) and the person against whom the order is sought was not at fault for not adducing the evidence at first instance.

102. Lord Wilson in *Goldtrail* at [24] considered that the considerable forensic disadvantages that would be suffered by a litigant ordered to provide security were likely to lead the litigant "*to dispute its imposition tooth and nail*" and the court could "*expect to receive an emphatic refutation*". He stated that evidence resisting an application for security for costs on the ground that ordering security would stifle the claim should therefore "*not be taken at face value*". The court should, he said, "*judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms".* In *AHAB*, Rix JA stated that the effect of what Lord Wilson was saying was that "*one has to have a firm degree of realism and scepticism about such evidence".*

103. What in practice a person maintaining that his claim would be stifled needs to show is likely to be highly fact-sensitive, but with that caveat, the guidance provided in *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2011] EWCA Civ. 761 and *Gama Aviation (UK) Ltd. v Talerveras Petroleum Trading DMCC* [2019] EWCA Civ 119, [2019] Costs LR 497, two cases considered by the judge, is helpful. In *Dubai Islamic Bank* Tomlinson LJ stated at [30] that:

> "*where a party seeks to suggest that he is devoid of assets and yet is able to maintain an expensive lifestyle and to fund litigation on the basis of loans from his family or third parties it is incumbent on him … to provide details of the nature of those loans, the terms on which they are granted, and … some further detail of the efforts he has made to obtain further funds from the same sources".*

In *Gama Aviation* Males LJ stated at [62] that the evidence in that case fell far short of what is required because it consisted of nothing more than assertion of inability to make the payment. Although one witness referred to the company having "*looked into*" whether it would be possible to raise the money, and that it "*was expecting the money to come through"* the witness gave no detail of any efforts made. Males LJ concluded that the court had been provided with no material with which to assess "*the underlying realities of the company's financial position*" in the way stated by Lord Wilson in *Goldtrail* and at [63] that in effect the court was being asked to accept the defendant's case at face value which is precisely what Lord Wilson said that it should not do.

104. In *AHAB,* Rix JA, in a passage set out by the judge, before referring to the need for scepticism and realism, said that one has to have in mind that one might have to have some sympathy for the difficulty of someone facing an application to prove what is, as regards the position of a third party funder, a negative. That reflects the comments of Park J (with whom Brooke and Mance LJJ agreed) in *The Anglo-Eastern Trust Ltd. v Kermanshahchi* [2002] EWCA Civ. 198 at [55] and in *Brimko Holdings Ltd v Eastman Kodak Company* [2004] EWHC 1343 (Ch) at [11] – [12] and those of Roth J in *Ackerman v Ackerman* [2022] EWHC 2183 (Ch) at [15].

105. In *Brimko*, drawing attention to *Anglo-Eastern Trust*, Park J stated that where the question is whether security would be available from third parties the burden still rests on the person against whom security is sought but that:

> *"… the court should not press too far [that] proposition. It should be recalled that when the claimant has to establish that third parties do not exist from whom security can reasonably [be] expected and obtained, that is to place on the claimant the burden of proving a negative. That is always difficult to do, and the court should, in my judgment, evaluate the evidence with a degree of sympathy for the difficulty which a claimant faces."*

In *Ackerman* Roth J stated that while the burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others:

> "*the court should evaluate the evidence as regards third party funders with a recognition of the difficulty for the claimant in proving a negative."*

106. I turn to the evidential position in this case. I have stated that the evidence given by Mr Macaulay and Ms Rabello about the positions of the Appellants themselves was general. They have not given any details of the basis upon which "*friends and family*" provided financial assistance save for Mr Macaulay's *en passant* reference in his conclusion to them having "*lent money*" without any indication as to the terms upon which this was done. While, as Mr Macaulay stated, obligations of confidentiality and litigation privilege may have limited what could be said about discussions with commercial organisations and individuals involved in litigation funding, the same is not said about family and friends. Ms Rabello and Mr Macaulay could have said more about how the proceedings had been funded and the terms upon which they had done so without identifying the individual friends and family. In the evidence they filed in March and April 2025 for the adjourned hearing of this appeal they have said more regarding the extent of the costs of Ms Rabello's defences to the criminal proceedings and of bringing the rescissory action. But, as in the evidence before the judge, they have not stated where the funding came from, save that it was from friends and family.[25] All that is said in the evidence before the judge about any discussions with the friends and family about providing funds to comply with the Security Order is that the unidentified "friends and family" and "close friends" are not prepared to provide funds to enable security to be given.

107. I referred at [56] above to the judge's criticism of the absence of any evidence from any of the friends and family who had provided support. He stated at [150] that the Appellants *"needed to*

[25] See Macaulay 20 at §§ 29 and 31(c) and Rabello 2, at §§16-17.

support the assertions" in Mr Macaulay and Ms Rabello's Affidavits "*with evidence from those specific members of family and those specific friends who have funded*" and should have given "*chapter and verse corroborative evidence in support"* (emphasis added). Similarly, at [152] the judge's comment that "*no evidence whatsoever has been provided from the potential funders specified in Mr Macaulay's evidence"* suggests that such evidence is required from them. Absent documentary evidence supporting the position of a litigant arguing that his claim or defence would be stifled, his robust language requiring "*chapter and verse"* appears to require corroborative evidence from third-party funders and potential third-party funders who are under no obligation to provide it. The judge did refer in his summary of the law to Rix JA's observation in *AHAB* about the difficulty of someone facing an application for security for costs to prove what as regards third-party funders is a negative but there is force in Mr Eschwege's criticism that in his determination he left this difficulty out of account. [26]

108. In neither *Dubai Islamic Bank* nor *Gama Aviation* (see [102] above) was it said that there has to be such corroboration from such persons. However, without their evidence or other evidence supporting the submission that requiring security would stifle the claim or enabling it to be inferred that it would have this effect, the evidence supporting the stifling submission is open to being dismissed as "mere assertion" which, as Lord Wilson stated in *Goldtrail,* should not be accepted at face value.

109. *The Anglo-Eastern Trust Ltd. v Kermanshahchi* illustrates that such direct corroborative evidence is not always necessary. The evidence of a defendant/appellant required to pay £1 million into court or have his defence struck out was that he was unable to pay or provide security in that sum. He provided information about his assets and bank accounts and stated that his wife and sons who had supported him in the past were unable to help further, but (see [57]) there was no direct evidence from them or from his banks. After referring to the difficulty of proving a negative at [55], Park J, with whom Brooke and Mance LJJ agreed, concluded at [56] that the defendant did not have anything like £1 million. The appeal was allowed and an order requiring a much lower sum to be paid in was imposed.

110. In the present case, the evidence before the judge recorded the undisputed facts that at the time of the application Ms Rabello was bankrupt and the assets of Securinvest, Arnage and Brooklands' sole asset, had been taken into the Petroforte bankruptcy. The Appellants submitted that "*the underlying realities"* of the companies' position is that they were unable to provide security in the

[26] Transcript 6 May 2025, Day 1, pp 113-115 and 133-136.

sum required, and that as an undischarged bankrupt, their owner Ms Rabello was not in a position to fund the security and could not be expected to do so. They also submitted that, had there been any likelihood of the companies or Ms Rabello finding the US$4.5 million required they would surely have done so, rather than risking the dismissal of their valuable claims. They maintained as issue (3) of the original grounds that the evidence of Mr Macaulay and Ms Rabello was "*detailed and wholly uncontroverted*"[27] and should not have been dismissed by the judge in the way that he did. The general and vague references to assistance from friends and family cannot be described as detailed. It is also clear from the judgment and the Respondent's written submissions below that both credibility and adequacy were vigorously challenged. There is force in the Respondent's observation[28] that the Appellants' reliance on internal matters about which no particulars were given meant that it was not possible to put in competing evidence.

111. Mr Macaulay provided the court with the number of potential funders he said he had approached and the reasons of some of them for declining to do so. This is more information about the efforts to secure funding from third parties than appears to have been provided in *Gama Aviation.* But does that evidence and what was said about the position of the family and friends who had previously provided financial support together with Ms Rabello's bankruptcy and that the Petroforte bankruptcy was extended to include Securinvest's assets provide the court with material with which to assess "*the underlying realities*" of the financial position of those from whom security is sought or is it just "mere assertion"?

112. The key question was how the long and very expensive litigation had been funded. On that, all that was said was that friends and family had done so. Notwithstanding this absence of any further particulars, for two reasons I have not found the question of whether the judge misdirected himself in the exercise of his judicial discretion within the test in *BPP Holdings v Revenue and Customs Commissioners* an easy one. As well as suggesting that corroborative evidence from third parties is always required, the judge appeared to elide his consideration of the adequacy of the evidence with his conclusion, discussed at [97] above, that the Appellants' application was itself a *Henderson v Henderson* abuse of process. I have considered whether taking these two matters into account made no difference to the decision because absent them the judge would have been entitled to decide that the evidence before him was inadequate to show that the Appellants' claims would be stifled by the Security Order.

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27 Appellants' 2024 Skeleton, §56. See also §60(3).
28 Respondent's 2024 Skeleton, §27.

113. The underlying reality is that Ms Rabello and the other Appellants were able to conduct these proceedings and litigation in Brazil and other jurisdictions for many years although Ms Rabello was bankrupt and Arnage and Brooklands' only asset had been taken into the Petroforte bankruptcy. They have not explained how they have done so, save for the general and vague references to assistance from friends and family in the evidence before the judge. They have been able to pursue all stages of these proceedings including two appeals to this court, an application for leave to the Privy Council, and their application to the judge and the present appeal against his order represented by several senior English Leading Counsel and firms of Cayman lawyers.

114. I have concluded that, in the light of the evidence before him and the known circumstances of these proceedings, at the time of the hearing the judge was entitled to decide that the Appellants had not satisfied the onus of showing that the claim would be stifled. Corroboration by third parties or in documentary evidence, though valuable, is, however, not required. What is needed is a fact-sensitive analysis of all the evidence before the judge. But, while the judge's language was strong, did not reflect the difficulty of proving what is as regards third party funders a negative, and appeared to require corroborative evidence from such third-party funders and potential funders, in the particular circumstances of this case, overall, on the evidence before him, his decisions were within his discretionary area in an interlocutory matter. The issue was whether the Appellants had established at that time on the balance of probabilities that the claim would be stifled or, with Lord Wilson's "for all practical purposes" gloss, would probably be stifled. For the reasons given, I have concluded that at that time they had not.

115 I turn to issues (6) and (7), that in the absence of an "unless" order and a history of non-compliance the judge's decision was plainly wrong in dismissing the claim and that he failed to take account of all the factors relevant to the issues of proportionality or properly to evaluate the merits of the Appellants' claims.

116 An "unless" order had been made by consent in *Caribbean Islands Development* and Smellie CJ's statement that dismissal would ordinarily be appropriate for a case already stayed for failure to comply with an order for security should indeed be seen in that context. In the present case, this court had refused to make such an order when making the Security Order. The judge accepted that the case was important and that there are serious issues to be tried.

117 For first time non-compliance with an order, had there been a reasonable prospect that security would be provided, given the importance the Appellants say this case has for regulation of the legal

profession and the administration of justice in these Islands, as well as to them, dismissal might have been disproportionate. But the time limit for compliance with the order had expired in mid-November 2021, almost a year before the hearing before the judge, and the Appellants' own case before him was that there was no reasonable prospect of the security required being provided. Two of the three circumstances identified in *Speed Up Holdings Ltd. v Gough & Co (Handly) Ltd* [1986] FSR 330, 334 where the inherent jurisdiction to dismiss or strike out is or ought to be exercised were therefore present. There is clearly a strong public interest in ensuring that, where security is ordered, a failure to comply will ultimately result in the proceedings being dismissed. It is ultimately the only weapon the court has to ensure compliance with its order.

118 As to the merits, the Appellants' focus on what the Chief Justice had said underplayed this court's conclusions in its decision on summary judgment that they were not sufficiently clear-cut to be evaluated without a trial, and in its decision on security its statement that his views could not survive its overruling. I accept Mr Simpson's submission that on the evidence put before him the judge was not in a position to evaluate the merits of the claims.

119 For these reasons, I have concluded that, as matters stood at the time of the judge's decision in 2022, he did not err in his approach to dismissal; i.e. to issues (6) and (7). Accordingly, on the evidence before the judge, the judge's conclusions and paragraphs 1 and 2 of his Order would have been upheld.

120 I therefore turn to consider the effect of the Settlement and the circumstances at the time of the hearing in May 2025 on paragraphs 1 and 2 of the Dismissal Order. Those paragraphs respectively refused the Appellants' application to set aside or vary the Security Order and granted the Respondent's application to dismiss the Appellants' claims. As noted, the Respondent's position is that an application today to set aside or vary the judge's Order should not succeed.

The Additional Grounds of Appeal

121 The positions of the parties on the effect of the Settlement and the circumstances at the time of the hearing in May 2025 are summarised in Part VI, at [62] and [65] and [66] – [69] and [77] – [78] above. In a nutshell, the Appellants do not seek to have the Dismissal Order set aside on the ground that they will be able to and will provide the required security once Securinvest receives the proceeds of the Settlement. The Respondent maintains that even if the Appellants were offering to pay the security ordered this would not be a case in which the dismissal should be set aside because

it is clear that the Appellants could at all times and can now pay the security ordered, but deliberately chose not to and the judge was right to dismiss their claim.

122 I do not accept the Respondent's submission that the court can conclude that the recent evidence makes it clear that the Appellants have had access to sufficient funds throughout the time Securinvest's and Ms Rabello's visible assets were incorporated in the Petroforte estate. Much of the evidence is contested and in an appeal against an interlocutory order this court is not in a position to resolve those conflicts.

123 I also do not consider, as the Appellants submit, that the court can no longer be satisfied that the requirements in s 74 of the Companies Act for ordering Arnage and Brooklands to provide security are met. They are holding companies for shares in Securinvest, and do not trade. Section 74's threshold jurisdictional requirement is that, see [80] – [81] above, there is a "real" risk or "more than fanciful" risk that the assets of Arnage and Brooklands will be insufficient to pay a costs order. As stated in *Longstaff International Ltd v Baker & McKenzie* (on which see [83] above), albeit in the context of the slightly differently worded English CPR r 25.13, a case cannot be taken out of the scope of a statute enabling a company to be ordered to pay security by saying that although the company will be unable to pay the costs some other person will. In *Longstaff* that other person was a 100% subsidiary company of the company against whom security was sought, as Securinvest is of Arnage and Brooklands.

124 The question is whether the jurisdictional threshold is met in this case and whether a positive answer should no longer be given to the second and essentially discretionary question whether it is just to order that security be provided. It is submitted by the Appellants that neither requirement is satisfied because, as the Securinvest shares are no longer worthless, Arnage and Brooklands are no longer impecunious, and Mr Macaulay and Mr Toledo, who is now their UBO and sole director of them and of Securinvest, have stated that they will have sufficient funds to satisfy any adverse costs order. They also argue that now that Arnage and Brooklands will have funds and Ms Rabello is no longer bankrupt, it would not be just to make an order against her. I recognise that merely raising doubts that Arnage and Brooklands will have sufficient funds is not sufficient. But for the reasons I give below, I consider that the evidence, taken as a whole, and against the background of the Appellants' failure to disclose the sources of their funding over the last 11 years or the existence of the unapproved Settlement Agreement made in December 2023 means that there remains a "real risk" that the funds will no longer be there when the time comes for the Appellants to pay an

adverse costs order. Accordingly, not only is the jurisdictional threshold met, but it remains just to order that the companies and Ms Rabello provide such security.

125 I first note the absence of any explanation of the basis on which the Appellants considered they were able to use the US$1,036,000 received in 2020 for the costs of these proceedings, which, in his evidence before the judge (see [45] above) Mr Macaulay referred to as "*funding from the Rural Group" received from a newly discovered US account of a dissolved Rural Group company".* The Appellants have not responded to requests by the Respondent for the name of the offshore company, the identity of its UBO or for any correspondence relating to the receipt of the $US1,036,000.

126 I also note the changing descriptions of the unidentified source of the funds. After § 58 of Mr Coelho's second Affidavit stated that on the face of it, the US$1,036,000 belonged to the creditors of the Rural Group which had been in liquidation since 2013, Mr Macaulay stated in § 26 of his 19th Affidavit that the money *"came from the abandoned property company of an offshore [company] which involved affiliates of the Rural Group and had been dissolved in 2008 and was not involved in any bankruptcy proceedings.* In §31(e) of his 20th Affidavit, Mr Macaulay stated that since the offshore company *"was not owned by Banco Rural, no contact relating to the company was made to the liquidators of Banco Rural, who also liquidated the bank's subsidiaries"* and that he was unaware of any Rural Group liquidators apart from the Banco Rural liquidators. After Mr Coelho in §§13-14 of his 6th Affidavit claimed that §31(e) was misleading because Bahamian liquidators had liquidated Rural International Bank Ltd ("RIB"), a Bahamian company and a subsidiary of Banco Rural, and Mr Macaulay must have been aware of those liquidators because they brought a claim against him and Carlton Fields in 2016 which was settled after a mediation in 2017.[29] In §5 of his 21st Affidavit, Mr Macaulay stated he understood that the Bahamian liquidators "*were working in conjunction with the liquidators of Banco Rural".* He also stated in §7 that his statement as to the absence of any Rural Group liquidator other than those involved with Banco Rural and its subsidiaries was true, and that by Rural Group, he meant "*the Rabello family's business group, beyond Banco Rural and its subsidiaries*"; and in §6 that the

[29] The mediation and settlement dated 27 June 2017 followed motions by Carlton Fields for costs and other sanctions on the ground that RIB's claim that Carlton Fields breached duties owed to RIB lacked a legal or factual basis and was objectively frivolous, and RIB's liquidators should have known this. §6 of the settlement stated that the liquidators agreed to dismiss the lawsuit upon obtaining the sanction of the Supreme Court of The Bahamas and §8 that save in respect of any proceedings to enforce the settlement within §13, each party was responsible for its own attorneys' costs and expenses: see Exhibit RAB-6 to Macaulay, 21.

offshore company dissolved in 2008 *"was not a direct or indirect subsidiary of Banco Rural and was not involved in any bankruptcy or liquidation proceedings"*.

127 As to events since the adjournment in 2024, first, there is the fact of the transfer by Ms Rabello on 31 January 2025 of her ultimate beneficial ownership in Securinvest (and thus of Arnage and Brooklands) to Mr Toledo and the explanation given for it. The Appellants accept (see [4] above) that Mr Toledo is considered a *de facto* member of the Rabello family with a longstanding role regarding strategy in these proceedings. There is, however, no reference to the transfer in the affidavits filed by Mr Macaulay and Mr Toledo almost six weeks later, on 19 March 2025.[30] They refer only to Mr Toledo being the sole director of all three companies. I also note that Mr Macaulay stated (Macaulay, 18 §17) that there is no ground or any evidential basis for the Respondent's allegation that Securinvest's underlying assets can easily be dissipated by Ms Rabello and are highly likely to be prior to any costs order being enforced but he made no reference to the fact that almost six weeks earlier they had been transferred to Mr Toledo.

128 Are Arnage and Brooklands' 100% ownership of the shares in Securinvest and the funds to be paid to Securinvest as a result of the Settlement relevant to the exercise of the essentially discretionary matter whether it is just to order that security be provided by Arnage and Brooklands? In principle, I consider that that is relevant. The question then becomes whether there are real risks that the estimated US$21.3 million will not be paid into Securinvest's Florida bank account, or that, if it or another sum is so paid, despite their 100% ownership of Securinvest, it would not be available to Arnage and Brooklands to meet any costs order because of the contingent liabilities of Securinvest or Ms Rabello.

129 The evidence of Messrs Macaulay and Toledo and Ms Rabello is that what Securinvest is paid under the Settlement would be transferred by Mr Toledo to its Florida bank account: They referred to Mr Toledo having sole control of the disposition of the funds to be received by Securinvest under the Settlement and Mr Toledo and Ms Rabello confirm the contents of Mr Macaulay's 18th and 19th Affidavits so far as they are matters within their own knowledge: Rabello 2, §§5 6, ; Toledo 10, §§4, 8 and Toledo 11, §5. Mr Eschwege's submission is that any adverse costs order would either be paid or would be enforced in the Florida courts. But the evidence is not that the Settlement funds would be used to pay any adverse costs order. It is only that the transfer would be made; the funds would be adequate to satisfy such an order; Mr Toledo will have full control over the disposition of the funds to be received by Securinvest under the Settlement; and Ms Rabello will

30 Macaulay, 18 and Toledo, 10.

have no right to challenge that control. On 3 April 2025, Diamond Law was asked by Appleby (Cayman) what Mr Toledo intended to do with the US$21.3 million which Securinvest was said to be due to receive. Mr Macaulay's response was that "*Mr Toledo will use the Settlement Agreement funds in accordance with all applicable law*": Macaulay 20, §31(d).

130 The payment of Settlement funds from the Petroforte estate could, however, easily not be transferred from Brazil or could be transferred to a jurisdiction where there would be substantial obstacles to enforcing a costs order. This litigation has been fiercely fought over many years. I note that during it certain assets including Securinvest have been regarded as Rabello family assets, and I accept that Mr Toledo would so regard them. The last eighteen months have seen the non-disclosure of the unapproved Settlement agreement and the non-disclosure of Ms Rabello's transfer of her UBO of Securinvest (and thus of Arnage and Brooklands) to Mr Toledo in the affidavits filed on 19 March 2025. The disclosure by the Appellants at that stage was not full and frank. The later disclosure of the transfer to Mr Toledo by them and by Ms Rabello in their later responsive affidavits filed on 3 April 2025 was not timely and the delay was not explained.

131 The explanation given by Mr Macaulay for Ms Rabello transferring her UBO of Arnage and Brooklands, and thus of Securinvest, to Mr Toledo is that the transfer was necessary because Securinvest could not open a bank account with Ms Rabello as its UBO given the allegations and controversies surrounding her in Brazil: see Macaulay 19 at §12. Mr Macaulay also stated that no attempts were made to reactivate Securinvest bank account in Brazil which became dormant in 2013: Macaulay 20 at 31(a). Neither he nor the evidence of Mr Toledo and Ms Rabello have identified any external support for this in other evidence or documents although one would expect basic documents to be available. It is also not stated whether there had been discussions with Dr Braga or Ms Rabello's Brazilian lawyers as to whether the money could be paid to Securinvest's Brazilian or its United States lawyers to be passed on to her as its UBO. There is force in Mr Simpson's submission that no one gives away their entire net worth on the untested assumption that they cannot reopen a dormant bank account or open a new one and that the circumstances of Ms Rabello's transfer to Mr Toledo for no consideration suggest that she was trying to avoid her or Arnage and Brooklands having to give security for costs.

132 The Respondent's submission that Ms Rabello lacked probity is summarised at [69] above. The Respondent also does not accept that Mr Toledo always acts honestly, although there is no direct submission that he lacks probity. The Respondent's 2025 Skeleton refers at §102 to Mr Toledo's statement (Toledo 1, 24 March 2022 §51) that he is regarded as a *de facto* member of the Rabello

family and, from 1999, has been a member of the Rural Group's inner circle. Its Substituted Defence pleads that on that basis it is to be inferred that Mr Toledo was aware of and complicit in the fraud on Petroforte and Ms Rabello's lie to the STJ. While evidence of a lack of probity is relevant, it is not necessary. There are very serious findings against Ms Rabello by courts and regulatory bodies in Brazil, but I do not consider it necessary to rest my conclusions in this appeal on finding a lack of probity on her part. The pleaded suggestion about Mr Toledo would be a matter for trial if the case proceeds, but it is insufficient as a basis of an allegation of want of probity in an interlocutory appeal such as this.

133 As was stated by Henshaw J in *Pisante v Logothetis* [2020] EWHC 3332 (Comm) at [65] "… *the question is not whether a lack of probity has been shown but whether there is a real risk that the assets … may no longer be available if and when [the question] of enforcement arises".* Accordingly, leaving aside want of probity, in the light of the Appellants' approach to the litigation, I accept Mr Simpson's submission based on *Tatneft* discussed at [84] above that since the relevant assets in a case might "*readily cease to be available … for legitimate reasons*", there is a real risk that if the Appellants are advised of a course open to them, they will take it. Examples might include moving assets to another jurisdiction or possibly, on the facts of this case, using funds to pay the Appellants' outstanding fees to their legal teams at Carlton Fields and their various other counsel. Mr Macaulay's evidence is that by 9 April 2025 when his 20th Affidavit was filed the US$1.5 million July 2022 balance owed to Carlton Fields had grown substantially. No total figure for the Appellants' outstanding fees to that firm and other counsel was, however, given. The Appellants' total outstanding liabilities to their lawyers would have to be considered together with liabilities and contingent liabilities to others.

134 Accordingly, I turn to the Appellants' other existing and contingent liabilities. The evidence about the extent of Securinvest's existing and contingent liabilities in tax enforcement and civil proceedings and whether they are statute barred is disputed. On the basis of Securinvest's December 2011 balance sheet Mr Coelho (Coelho, 4 at §45) estimates its pre-bankruptcy debts total approximately US$64 million but the Appellants maintain that is incorrect. Ms Barroso estimates that the total claimed in tax enforcement proceedings is R$4 million, approximately US$700,000: Barroso 1, §8. She stated that the civil case was one brought by Hotel Nacional and others against Securinvest and Rural Leasing in 2005 concerning the rescission of a lease and sale of real estate. It was dismissed in 2011, but the plaintiffs appealed. As at the date of Ms Barroso's statement, the court records reveal that the case was ongoing and awaiting judgment of the plaintiffs' appeals: see Barroso 1, §§17-19.

135 On limitation, there is a significant conflict between Mr Freitas of Carlton Fields and Mr Ribas, Ms Rabello's lawyer in the proceedings brought by her sister Nora and her mother's estate and Mr da Silva, a partner in Monteiro da Silva SIA, who was instructed by the Respondent to provide an expert report. Mr Freitas and Mr Ribas supported the Appellants' position that the 10 year long-stop in Article 205 of the Brazilian Civil Code applies to Securinvest's contingent liabilities, so those claims are barred. Mr da Silva stated that to the extent that Securinvest and Ms Rabello had extant or contingent liabilities in 2007, the running of time under the 10 year maximum limitation period under the applicable Brazilian legislation would have been suspended when the Petroforte bankruptcy was extended to include their assets and would resume after its termination: Silva 1, §22.

136 Again, it is not possible for the court to resolve these disputes about the amount of Securinvest's pre-bankruptcy debts and whether the limitation period for them had expired. But I do not consider that one can at this interlocutory stage simply dismiss the the expert evidence of Mr da Silva as not meeting the test of identifying a "more than fanciful" or "real" risk. In my judgment, on the evidence there is a real risk that the limitation period has not expired and that the contingent liabilities may exceed the US$21.3 million that it is estimated Securinvest will receive under the Settlement.

137 I turn to Ms Rabello's two contingent liabilities. Ms Rabello's contingent liability in the claim against her by her sister and her mother's estate, for losses including the loss of their shareholding in Trapezio, Banco Rural's holding company, has not been quantified. The claim is also currently suspended and the Appellants say that it is "*baseless*" and statute-barred: Ribas 1 at §8. It has, however, not been struck out. But the Respondent did not submit that this claim posed a real risk of a significant liability. It accepted that on the basis of the evidence before the court and the information available, all it can assert is that that the claim poses a potential exposure. That, in my judgment does not satisfy the test.

138 Ms Rabello's other contingent liability is her pleaded contingent liability in respect of the Banco Rural liquidation. Mr Coelho stated that on the basis of the exchange rate in March 2025 that was approximately US$150 million in 2014 and US$220 million at the time of his second statement: Coelho 2, at §§13-14. Ms Rabello stated (Rabello 2, §8) that there is *"a significant chance"* that any contingent liability arising out of the liquidation of Banco Rural will be resolved *"as part of a broader agreement to be negotiated"*. To date, however, it has not been. It cannot be said that there

is no real risk that it will not be resolved. Accordingly, it poses a real risk of a significant liability in that litigation.

139 Ms Rabello's contingent liabilities are also relevant to her transfer of the UBO of Securinvest to Mr Toledo. This is because if any of them become actual, the relevant creditor could seek to set aside the transfer. The undisputed evidence of Mr da Silva in Silva 2 at §22 is that under Brazilian law:

> "*... if a person/company has a substantial pending legal claim against them and, in anticipation of potentially being unsuccessful in their defence, gratuitously transfers assets to a third party for no consideration, then if that person were unsuccessful in their defence, such a transfer would be liable to be challenged by way of the actio pauliana and it would be likely to be set aside.*"

In the light of the extent of Securinvest's pre-bankruptcy liabilities and Mr da Silva's expert evidence, I find that there is a real risk that the limitation period for those liabilities has not expired, and that, if it has not, there is a real risk that the transfer to Mr Toledo will be set aside and Securinvest's assets will be used to meet Ms Rabello's liabilities.

140 The fifth of the key points in the evidence on appeal identified at [53] above concerns the sale of some Securinvest assets between 2010 and 2013 after they had been incorporated in the Petroforte bankruptcy. Ms Barroso identifies the transfers in Annex 1 to her first statement dated 2 April 2025, stating that they were private sales made by Securinvest rather than sales by the bankruptcy trustees by judicial auction: Barroso 1 at §20 R's 2025 Skeleton §30. The Appellants' Further Note relied on this to show that Securinvest was not in bankruptcy. It is also not possible to resolve that issue in this appeal. It does, however, appear from the evidence that Securinvest was able to make private sales after its assets had been incorporated in the Petroforte bankruptcy and there is no explanation of how this was done and whether any of the proceeds (other than the US$1,036,000 discussed at [45] and [126]) were used for the costs of these proceedings.

141 As to the merits of the claim, the Appellants submitted that the information in Dr Braga's submission in support of the Settlement (see [27] and [28] above) was "*critical to the chain of events in Brazil*"[31] which caused harm to them and to the Respondent's causation defence. There is force in that submission. I, however, reject the submission that the Settlement puts an end to that

[31] 2025 Skeleton, §21.

defence or to the Respondent's *ex turpi* defence. The Chief Justice left the latter to await resolution after trial but stated in relation to causation that while the Plaintiffs had established some significant loss caused by the breaches of duty such that they were entitled to summary judgment for liability, the Defendant remained "*entitled, at the trial of quantum, to challenge the Plaintiffs' claims as they allege any particular causative link between the conduct of the Defendant and any particular head of liability"*. This Court, in its Summary Judgment appeal stated at [155] that "*the issues of causation were substantial and could not be dismissed without trial*". In its Security Judgment appeal it stated at [24] that "*the merits of this litigation are very much in the air*", and I consider that they remain so.

142 The discussion above has concerned paragraph 1 of the judge's Dismissal Order, refusing the Appellants' application to set aside or vary the Security Order. In the light of the history of these proceedings, the Appellants' approach to the litigation, Arnage and Brooklands status as holding companies, and Ms Rabello's and Securinvest's contingent liabilities, I have concluded that there is a real risk that the proceeds of the Settlement would not be available to meet any costs order against the Appellants. Accordingly, the change of circumstances after the Dismissal Order as a result of the Settlement would not have justified him in acceding to an application to set aside or vary paragraph 1 of the Order, and I do not consider that this Court should do so.

143 In paragraph 2 of his Dismissal Order the judge granted the Respondent's application to dismiss the Appellants' claims for failure to comply with the Security Order. He recognised the importance of the case, that there are serious issues to be tried, and that dismissing the claims without consideration of the merits may be considered a harsh result, but he also recognised the importance of finality in litigation. But in deciding that it would not be disproportionate to exercise the jurisdiction to dismiss the claims, he referred twice to the fact that the Appellants' own case before him was that no funds would be made available to enable them to comply with the Security Order and that they would not be coming up with the money. He considered that in the light of that any alternative order would only put off the inevitable.

144 I agree with the judge's recognition of the importance of the case and that there are serious issues to be tried, and his conclusion that as the Appellants' case was that they would not be coming up with the funds, any alternative order would only put off the inevitable. The important change in the financial circumstances of Securinvest and therefore of Arnage and Brooklands since the judge made the Dismissal Order as a result of the Settlement would have justified him in acceding to an application to set aside paragraph 2 of the Order dismissing the Appellants' claims for failing to

comply with the Security Order. I have concluded that, for the reasons given, this court in the exercise of its jurisdiction to exercise a new original discretion of its own should set aside that paragraph.

145 In the exercise of that discretion, I would allow the appeal against paragraph 2 of the judge's Order but would dismiss the appeal against paragraph 1 of his order which dismissed the Appellants' application to set aside or vary the Security Order. The Appellants thus remain jointly and severally liable to give security for the Respondent's costs in the sum of US$ 4.25 million ordered by this Court in its Order dated 4 October 2021. I would order that this sum be paid within six weeks of the delivery of this judgment and that, unless it is so paid within that period the Appellants' claims be dismissed for failing to comply with the Security Order, save also that there be liberty to apply in respect of the consequences of the Order if an unforeseen state of affairs occurs hereafter that can be reasonably argued to found a submission that the Appellants' claims ought not to be peremptorily dismissed.

146 Pursuant to an invitation in the draft judgment circulated on 8 October 2025, we have received written submissions on costs and also on other consequential matters and we will deal with them separately.

X Summary of conclusions

147 In summary, for the reasons given, my conclusions are:

(1) On all the evidence before the judge and the known circumstances of these proceedings at the time of the hearing, while the judge's language was strong, did not reflect the difficulty of proving what is as regards third party funders a negative, and appeared to require corroborative evidence from such third-party funders and potential funders, in the particular circumstances of this case, overall, on the evidence before him, his decisions were within his discretionary area in an interlocutory matter. Accordingly, for the reasons given at [110] – [114] above, he was entitled to conclude that the Appellants did not satisfy the onus of showing that the claim would be stifled.

(2) As matters stood at the time of the judge's decision in 2022, in particular that the time limit for compliance with the Security Order had expired almost a year before the hearing before the judge and the Appellants' own case before him was that there was no reasonable prospect of the security required being provided, in the light of the strong public interest in ensuring that,

where security is ordered, a failure to comply will ultimately result in the proceedings being dismissed, the judge did not err in deciding to dismiss the proceedings: see [117] – [119] above.

(3) The change of circumstances after the judge made the Dismissal Order as a result of the Settlement would have justified him in acceding to an application to set aside paragraph 2 of the Order dismissing the Appellants' claims for failure to comply with the Security Order and justify this court in the exercise of its jurisdiction to exercise a new original discretion of its own setting aside that paragraph and allowing the appeal against paragraph 2 of the Order: see [143] - [144] above.

(4) In the light of the history of these proceedings, the Appellants' approach to the litigation, Arnage and Brooklands status as holding companies, and Ms Rabello's and Securinvest's contingent liabilities, there is a real risk that the proceeds of the Settlement would not be available to meet any costs order against the Appellants: see [123] - [142] above.

(5) Accordingly, the change of circumstances after the judge made the Dismissal Order as a result of the Settlement would not have justified him in acceding to an application to set aside paragraph 1 of the Order.

(6) The Appellants thus remain jointly and severally liable to give security for the Respondent's costs in the sum of US$ 4.25 million ordered by this Court in its Order dated 4 October 2021. I would order that this sum be paid within six weeks of the delivery of this judgment and that, unless it is so paid within that period the Appellants claims be dismissed for failing to comply with the Security Order, save also that there be liberty to apply in respect of the consequences of the Order if an unforeseen state of affairs occurs hereafter that can be reasonably argued to found a submission that the Appellants' claims ought not to be peremptorily dismissed.

(7) We will deal with the written submissions on costs and the other consequential matters we have received separately.

BIRT JA:

148 I agree.

FIELD JA:

149 I also agree.