

EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2023/0055

BETWEEN:

FDQ

Claimant/Respondent

and

TAX

Defendant/Applicant

Appearances:

Mr. Paul Chaisty, KC, with him Mr. Mark Forte, Dr. Jane Fedotova and Ms. Allana-J Joseph for the Claimant/Respondent

Mr. Allan Wood, KC, with him Mr. Jermaine Case and Ms. Kerri-Anne Mayne for the Defendant/Applicant

2023: May 11;
June 12, 13.

JUDGMENT

[1] **Wallbank, J. (Ag.):** This judgment concerns an application filed by TAX seeking an order for security for its costs of defending an appeal from an arbitration award in its favour (the 'Award'), as well as security in respect of a financial sum TAX was awarded in the Award (the 'Security Application').

1. Introduction

[2] The application was heard on 12th June 2023 and the Court delivered its decision on 13th June 2023, with reasons to follow. These are those reasons. The application was dismissed with costs to the Respondent, FDQ, to be assessed if not agreed within 21 days.

1.1 Background

- [3] TAX was the claimant in an arbitration against FDQ, in respect of a dispute arising from an agreement between them for the use of space (the 'Premises') for the establishment of a clinic by FDQ.
- [4] It is important to note that FDQ is a company incorporated in this jurisdiction ('BVI'). FDQ's evidence is that it was established to act as a special purpose vehicle for the proposed clinic.¹ TAX does not admit this but does not lead positive evidence to contradict this either.
- [5] The project did not work out. TAX had a claim for unpaid license fees against FDQ. FDQ, on the other hand, blamed TAX for the project's failure and looked to TAX for significant damages for breach and/or repudiation of contract and other financial relief.
- [6] TAX and FDQ referred their disputes to arbitration, with the Tribunal comprised of a sole Arbitrator. The Arbitrator rendered the Tribunal's Award on 21st February 2023.
- [7] The Tribunal found for TAX and against FDQ. The Tribunal awarded TAX a certain sum of money (the 'Award Sum'), US\$170,479.34, to be paid by FDQ.
- [8] FDQ indicated its intention to appeal the Award. It claims that it has grounds to appeal as of right, on grounds of alleged serious irregularity and/or grounds of conflict with public policy. FDQ also applied for the Court's permission to appeal on points of law ('the Leave Application').
- [9] On 19th April 2023, TAX filed the Security Application, pursuant to Schedule 2 of the Arbitration Act,² (the 'Act'), failing which any appeal would stand dismissed.
- [10] The Security Application was supported by a Second Affidavit of AB. The Security Application was initially for an order that FDQ pay into court the sum of US\$200,000, representing its estimated legal costs (the 'Initial Estimate'), and the Award Sum of US\$170,479.34.
- [11] FDQ filed a First Affidavit of CD on 3rd May 2023 opposing the Security Application and offering, in the alternative to dismissal of the Security Application, its materials

¹ First Affidavit of CD at paragraph 11.

² Revised Edition, 2020, Act 13 of 2013 amended by Act 6 of 2015.

and equipment that have remained located in the Premises, albeit that this includes damaged equipment ('Movables').

- [12] On 12th May 2023, TAX filed a fourth Affidavit of AB in reply to the First Affidavit of CD with an indication that the Initial Estimate had been revised upwards to a range of US\$477,410.00 to US\$517,410.00 (the 'Revised Estimates'). The reasons for the Revised Estimates are set out at paragraphs 20-23 of the Fourth Affidavit of AB.
- [13] FDQ filed a further affidavit of CD in reply on 30th May 2023. In response, TAX filed an affidavit of EF on 6th June 2023 setting out in further detail the reasons for the Revised Estimates. An Amended Notice of Application was filed by TAX on 6th June 2023.

1.1 The Grounds for the Security Application

- [14] The grounds for the Security Application were stated thus:

“(v) As reflected in its financial statements, the Claimant is impecunious and has been financed by third parties who are not party to the Application against whom TAX can have recourse for the payment of any costs of the Application or the sum payable pursuant to the Award.

(vi) In the circumstances, if security is not ordered as sought it is unlikely that TAX will be able to recover its costs incurred in these proceedings or the sum ordered to be paid by the Award at all or without further delays and possible enforcement action.”

- [15] The only ground, thus, for both limbs of TAX's Security Application was the alleged impecuniosity of FDQ.

2. TAX's contentions

2.1 TAX's understanding of legal principles

- [16] TAX proffered the following legal bases for its Security Application. Nothing in this segment setting out TAX's contentions is to be taken as a finding or statement of law or fact. Such findings are exclusively contained in the '**Discussion**' segment below.

- [17] Pursuant to paragraph 7(4)(a) of Schedule 2 of the Act the Court may order the Claimant to give security for the costs of an application or appeal. If such an order is not complied with, the Court may direct that the application or appeal is to be dismissed pursuant to paragraph 7(4)(b) of Schedule 2 of the Act.
- [18] The Court may also order that the Award Sum is to be paid into the Court or otherwise secured pending the determination of the application or appeal and to direct that the application or appeal is dismissed if the order is not complied with, both pursuant to paragraphs 7(6)(a) and (b) of Schedule 2 of the Act, respectively.
- [19] Recognising the cross-border nature of arbitration proceedings, the only statutory limitation that has been placed upon the Court's power to order security for costs is set out in paragraph 7(5) of Schedule 2 of the Act, which is that the power ought not to be exercised only on the ground that the appellant is a body corporate incorporated outside the Virgin Islands or whose central management or control is exercised outside of the Virgin Islands. The Security Application is not being advanced on any of those grounds. There is therefore no statutory restraint upon the Court's wide discretion in this case to grant the security for costs on the basis that FDQ is impecunious and has no readily realisable assets to offer as security.
- [20] Section 104 of the Act provides that an application, request or appeal to the Court under the Act shall be made in accordance with the Civil Procedure Rules, 2000 ('CPR'). It has been held that the Court has a discretion to order security for costs under CPR 24.3 where it considers that it is just to do so: **Bitech Downstream Limited v Rinex Capital Limited et al.**³ and security can also be ordered under CPR 26.1(2) being the general case management powers, which includes the power to make any order to manage the case and further the overriding objective: **Halliwel Assets Inc et al v Hornbeam Corporation.**⁴
- [21] The amount and nature of the security to be awarded must be such as the Court thinks fit: CPR 24.2(4).
- [22] However, the form of security must be appropriate and readily realisable. It is submitted that a lien over FDQ's personal property is not appropriate security for reasons that are hereafter set out.

³ BVIHCV2002/0233 (unreported, delivered 28th November 2003).

⁴ BVIHCM2014/0105 and 0134 (unreported, delivered 22nd April 2016).

[23] Further the provisions of the Act conferring statutory power to make orders for security are similar to the United Kingdom Arbitration Act 1996, section 70 (6) and 4 (7), and given that similarity, the authorities applying the United Kingdom Act are relied upon by TAX as persuasive guidance for this Court.

2.2 General considerations for exercising discretion to award security for costs

[24] In **Progas Energy Ltd & Ors v Pakistan**,⁵ Pickens J confirmed at paragraph [19] that the relevant principle which governs the decision by a court whether to order security for costs is whether it is just to do so in accordance with the overriding objectives of CPR Part 1 of the United Kingdom, which is almost identical to the provisions of CPR 1. CPR 1.1(2) provides that:

“Dealing justly with the case includes –

- (a) ensuring, so far as practicable, that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) the financial positions of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

[25] TAX submits that the proper approach to the Security Application is as set out in **Progas** and accordingly that in the circumstances of this case it is just for the Court to order security for TAX’s costs.

[26] TAX contends that the key question on an application for security for costs is whether a party bringing a challenge to the Award has ‘sufficient assets and whether those assets are available to meet any order for costs’: **Progas** at paragraph [20].

[27] TAX contends that FDQ does not have any assets which are available for purposes of execution.

⁵ [2018] EWHC 209 (Comm).

2.3 Whether FDQ has assets which are readily available to meet an order for costs.

[28] The purpose of security for costs is to enable a defendant to readily recover costs subsequently awarded to it without delay or other difficulty as Picken J explained in **Progas** at paragraph [37], relying on the English High Court decision of Popplewell J in **Monde Petroleum SA v WesternZargos Ltd**,⁶ in stating:

“... I bear in mind in this regard that the purpose of the security for costs jurisdiction is clear: it is to enable a defendant to recover costs subsequently awarded to it without delay or other difficulty. This is the point made by Popplewell J in *Monde Petroleum SA v WesternZargos Ltd* [2015] EWHC 67 (Comm); [2015] 1 CLC 49 at [61], as follows: ‘It is conventional to order security to be given either by payment into court or by the provision of a guarantee from a first class London bank. That practice recognises that the security should be in a form which enables the defendant to recover a costs award made in its favour at the trial from funds which are readily available, such that there is little risk of delay or default in enforcement. Although security may be ordered in an alternative form, that form should be such as to fulfil the same function, so as to allow simple and swift enforcement of a costs order from a creditworthy source. In practice any such alternative form of security must be such as can properly be regarded in these respects as at least equal to, if not better than, security by payment into court or provision of a first class London bank guarantee...’”

[29] In **AP (UK) Ltd v West Midlands Fire and Civil Defence Authority**⁷ it was held that in a commercial action security should be given in the form of a payment into court, a bank guarantee or a solicitors’ undertaking and it was held that a charge on real property would not provide adequate security. In making that determination, Longmore JA noted as follows:

“13. I turn to the first appeal and deal, first, with the question of principle, namely whether it is appropriate for the claimants to be committed to give security for costs by granting a charge or charges on its real property. The suggestion comes as something of a surprise since, for myself, I have never come across such a suggestion in a commercial or mercantile action. The reason for that must be that in a normal case if real property is sufficiently valuable to stand as security there will be no difficulty in the claimants procuring a bank guarantee for the purpose of security for costs by, if appropriate, granting a charge to the bank. So, one asks, is there any explanation why the bank will not provide a guarantee against one or more charges on the claimants’ property in this case? The answer to that question is no, there is not...”

14. Mr. Burnett QC, who appeared for the claimants below and the Appellant here, asserted the existence of a principle that if security is adequate it is not for the court or for the defendants to say that it should be in any particular form. For that purpose he

⁶ [2015] EWHC 67 (Comm).

⁷ [2001] EWCA Civ 1917.

relies on *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198, [1984] 1 WLR 1334 and, in particular, on the headnote in the All England report of that case and the judgment of Jonathan Parker LJ at p 1337, of the latter report, in the following terms: 'The process of giving security is one which arises constantly. Very often very large sums may be involved in actions which take place in the Commercial Court or, indeed, other courts. So long as the opposite party can be adequately protected, it is right and proper that the security should be given in a way which is the least disadvantageous to the party giving that security. It may take many forms. Bank guarantee and payment into court are but two of them. Frequently security is considered wholly adequate when it is provided merely by a London solicitor's undertaking. So long as it is adequate, then the form of it is a matter which is immaterial. Day after day orders will be found when the initial order of the court is that security be given within so many days in a particular amount to the satisfaction of the court. The person giving the security will then have an opportunity to say how he wishes to give it; and, as long as it is adequate to protect the opposite party, it is not his concern whether it should be in one form rather than another.'

15. In my judgment, the reliance on the dicta of Parker LJ by Mr Burnett is misplaced on the facts of this case. The options canvassed by Parker LJ as being alternative to payment of the money into court were, first, a solicitor's undertaking and, secondly, a bank guarantee. Those methods of compliance with the order of the court are both simple and straightforward if enforcement becomes necessary. There is no suggestion by the Lord Justice of a charge on real property with all the risks that would follow from enforcement of that charge and a forced sale. It is noteworthy that Sir John Donaldson MR did not express himself as broadly as Parker LJ and that the issue in the actual case before the Court of Appeal was whether an order for security for costs having been made, it could be complied with by providing a bank guarantee. Not surprisingly, with respect, the court concluded that a bank guarantee would be satisfactory...

17. For myself, I would say more broadly that if no bank will lend on the security of proposed real property that will mean the proposed security is inadequate unless there is a reason to explain why the defendants should be required to accept security by way of charge on a property when no bank is prepared to do just that. Here, there is no such reason offered and there is none.

18. I would therefore dismiss the first appeal on the basis that without an explanation why money or a guarantee cannot be raised by the claimants from their bank by charging their property to the bank, it is impossible to conclude that the security offered by the claimants was adequate security for costs."

[30] As in **West Midlands**, the Claimant here offers no evidence as to any effort to raise security by a bank loan on the Movables over which it proposes to give a lien and offers no explanation as to why a bank guarantee cannot be obtained given the value that it attributes to its property.

[31] TAX submits that in lieu of a payment into Court, a bank guarantee or an undertaking from FDQ's solicitors would be appropriate security for the costs in this matter. TAX's legal practitioners Messrs. GHP wrote to FDQ's legal practitioners Messrs. Conyers Dill & Pearman ('Conyers') on 3rd April 2023 requesting security. No suggestion was made by Conyers that it was willing to provide security by way of an undertaking to pay TAX's legal costs if it succeeds on the

Appeal. Conyers' letter in response dated 11th April 2023 stated that the concern that FDQ was unable to discharge its debts and liabilities was misconceived.

Yet the position now taken is that all that FDQ can offer is a lien.

2.4 Whether lien over medical equipment is appropriate security

- [32] In the present case, FDQ has offered security by way of a lien over its furniture, medical equipment and miscellaneous building materials and tools left on the hospital premises which it states is worth in excess of US\$ and contends that a lien over them would be appropriate security to meet the Defendant's costs. TAX has rejected the offer of the lien.
- [33] TAX says it is not clear what is meant by a lien over the Movables. Usually, a lien simply means a right to hold the property but confers no right to a power of sale.
- [34] The further problem advanced by TAX is that FDQ's property remains on the Defendant's premises in breach of the Award which required FDQ to remove same by 30th April 2023. The offer of a lien is therefore viewed by TAX as simply an attempt by FDQ to continue in wrongful occupation of the Premises under the guise of giving security and thereby to tie up the Premises for FDQ to enjoy rent free occupation while it pursues proceedings to challenge the award. This is not a tenable or reasonable offer of security, and TAX is not aware of any authority which permits a Court to grant security in such a form to in effect allow FDQ to store its property on the Defendant's premises rent free and further delaying TAX in regaining possession of the Premises for its use in accordance with the Award. Such an order would have the effect of staying the Award.
- [35] Further, it is anticipated that FDQ will also use the lien as the basis for a contention that TAX has an obligation to safeguard the Claimant's property in circumstances where it has already, in its evidence, alluded or suggested that some items are missing or were not seen at the last inspection.
- [36] The proposal for a lien is wholly unreasonable and the Defendant rejects any obligation to safeguard the Claimant's items of equipment wrongly remaining in the Premises in breach of the Arbitrator's order that the Premises should be vacated by 30th April 2023.
- [37] Further, in circumstances where the Claimant pays nothing for its use of the Premises to store its property, the evidence which has been filed in respect of the application for security uncontestably supports that the Claimant is insolvent. The profit and loss account that was filed in the course of the arbitration proceedings and which has been exhibited to AB's Second

Affidavit shows that the Claimant has a deficit of US\$ as of April 2022 and a balance in its bank account. In CD's First Affidavit at paragraphs 10-12, it is deponed that the Claimant is a special purpose vehicle which is financed by its shareholders and by an affiliated LM third party company called GHI. CD also depones that the Claimant took out a loan with a bank called JK which was repaid (paragraph 12). He offers no explanation as to who repaid that loan and when the Claimant's latest balance sheet, stated to be as at 2nd May 2023, exhibited by CD, reflects that there is still due to JK a sum of US\$. That debt remains the same as stated in earlier balance sheets as at 31st December 2021 and 22nd April 2022, while there is due to GHI the sum of US\$, bringing the total of FDQ's liabilities to US\$. It is further to be observed that of the assets which is stated to be of a value of US\$ in FDQ's aforesaid May 2nd, 2023 balance sheet, the sum of US\$ is the value reflected as the cost of services, labour and materials put into building out the licenced premises and which have no realizable value in reality for the reason that the Award requires the Claimant to restore the premises to its original shell state. Other items being furniture, medical equipment and computer server are depreciating items, being second hand equipment, some of which FDQ maintains is damaged and which will not be readily realizable and is unlikely to have the value on resale which is attributed to it by FDQ. What is also interesting to note is that the balance sheet reflects medical equipment in the sum of US\$ but the inventory exhibited by CD lists medical equipment with a lower value of US\$, which includes equipment located outside this jurisdiction in the LM. The inventory does not list FDQ's and which appears in a list of a medical equipment exhibited by CD in the arbitration proceedings. These have inexplicably been left out of the inventory presented to resist the security application without accounting for their whereabouts.

- [38] In the case of **West Midlands**, where the Court of Appeal overturned an order giving security by way of a charge over real property, it was held that in a commercial or mercantile action security should be given by payment into Court, a bank guarantee or solicitors undertaking. It was observed that if indeed the property offered as security has the value attributed to it by the claimant, then it should be able to obtain a loan from the bank to enable it to provide security in the form of a payment into court or a bank guarantee, and, if no bank would lend on the property then it simply means that the security is inadequate unless there was a reason to

explain why the defendant should be required to accept security by way of charge when no bank is prepared to do so.

- [39] As in **West Midlands**, FDQ offers no evidence as to any effort actually made to raise security by a bank loan on the items over which it proposes to give a lien and offers no evidence any bank has refused a loan or guarantee given the value that it says is there in the form of its property. FDQ's balance sheet shows that it was able to raise a loan.

2.5 TAX's revised estimate of costs

- [40] CD' Second Affidavit, while challenging the reasonableness of the Revised Estimates, states that the fee estimate for its own attorneys to conduct the intended appeal amounts to US\$237,500. As to the amount sought as security for costs, it is customary for the Courts to consider the matter making its own broad assessment of the estimate and to fix the appropriate figure: see for example **Progas** at paragraph [45] and **Bitech**.⁸ The Court can apply a discount if thought appropriate.
- [41] TAX submits that while the Revised Estimates are high, they are not excessive given the complexity of this matter and the volume of documents inclusive of transcripts which will add to the work entailed in preparation for the hearing. It is to be noted that the preliminary applications have already generated bundles running in excess of 1,700 pages and this is simply on the preliminary Leave Application and the Security Application.

2.6 The cause of FDQ's impecuniosity

- [42] FDQ contends that security should not be granted because it maintains that TAX is the cause of FDQ's impecuniosity (see paragraphs 20-22 of the Second Affidavit of CD). Similar arguments were made and expressly rejected in the **Progas** case at paragraph [25] on the basis that unless the award which is subject to challenge is disturbed, the award stands and it is not open to the applicant to go behind the award. In this case, the Tribunal found at paragraph 405(v) of the Award that '...the Respondent [FDQ] through its own fault and not that of the Claimant [TAX], was not able to complete and operate the clinic' and at paragraph 405(viii) the Tribunal accepted that based on the evidence a case was not been made out by FDQ warranting an award of damages for loss of opportunity and in respect of a fifteen-year term. As Picken J held in **Progas** at paragraph [25] that:

⁸ Without citing a paragraph. It is unclear which paragraph(s) is/are being relied upon by TAX here as that case does not in terms address such matters.

“...it is not open to the Claimants to seek to go behind the Awards. Even if that were not the position, however, still the problem as far as the Claimants are concerned is that the court is in no position to assume in their favour that they are right in what they have to say about the cause of their present financial predicament being the actions of the Defendant. If any assumption falls to be made, it is that the Tribunal’s rejection of the Claimants’ case was justified, and so that that case is not well-founded, but, even if that assumption is not made, I struggle to see why the opposite assumption (in favour of the Claimants) should be made.”

- [43] Accordingly, TAX invites the Court to reject any submission by FDQ that its current impecunious state was caused by TAX as there is no basis to maintain that position.

2.7 The merits of FDQ’s challenge of the Award

- [44] It is also customary for the Court to consider the merits of the claim challenging the Award. It is to be noted that the Appeal essentially seeks to re-litigate FDQ’s counterclaims that were presented in the Arbitration which the Arbitrator rejected. It seeks to do so on the basis that the Arbitrator failed to take into account or disregarded evidence in favour of the Claimant’s case and therefore her findings were unreasonable. This is simply not a sustainable ground to challenge an Award.

- [45] Section 45 (3) of the Act provides that:

“When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it shall give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings.”

- [46] In addition, the parties also agreed that the 2020 IBA Rules on the Taking of Evidence in International Commercial Arbitration (the ‘IBA Rules’) ‘may be referred to by the Arbitral Tribunal as a general guideline in these arbitration proceedings’: *per* Procedural Order 1 paragraph 5 of B97. The IBA Rules Art. 9 (1) provides that: ‘The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.’

- [47] Accordingly, by the provisions of the Act and the IBA Rules that were agreed as the guidelines governing the arbitration proceedings, the weight to be given to the evidence was a matter entirely for the Arbitrator and cannot now be reviewed by the Court.

- [48] The parties made extensive submissions to the Arbitrator as to the findings to be made on the evidence and the inferences including adverse inferences to be drawn therefrom and the Arbitrator’s decision ought not be thereafter reopened by way of Court proceedings on the basis of allegations or irregularity or error of law: See **Demco Investments & Commercial**

SAv SE Banken Forsakring Holding Aktiebolag⁹ and in particular at paragraphs 21 to 25, 35 to 48; also **A v B**¹⁰ at paragraphs [24] – [29], applying the judgment of Steyn LJ in **Geogas S.A. v Trammo Gas Ltd. (The ‘Balears’)**¹¹ and the then Judge Peter Coulson QC in **Benaim (UK) Ltd. v Davies Middleton & Davies Ltd.**¹² rejecting the submission that an award could be challenged on the basis that the evidence did not support the arbitrator’s findings of fact (the **Edwards v Bairstow** approach¹³).

- [49] The **Edwards v Bairstow** approach, being in essence the challenge to the Award that has been advanced on behalf of FDQ, is not applicable in reviewing an arbitral award and the Tribunal’s findings of fact cannot be circumvented by alleging that the findings constitute a serious irregularity or by challenging the Arbitrator’s treatment of the evidence as FDQ seeks to do.
- [50] Apart from relitigating the arguments made in the Arbitration which the Arbitrator rejected, the other grounds of challenge on serious irregularity are that the Arbitrator made late disclosure that one of TAX’s witnesses was her cousin. Following the disclosure, it was open to FDQ to challenge the Arbitrator and request her to recuse herself. Rather than doing so, at the commencement of the hearing on the first day, FDQ consented to the Arbitrator proceeding with the hearing.
- [51] In accordance with section 24 of the Act, upon the Arbitrator’s disclosure FDQ had 15 days to challenge the Arbitrator and it would have been able to maintain its challenge by way of subsequent Court proceedings even if the Arbitrator had declined to recuse herself.
- [52] It is not permissible now to challenge the Arbitrator, having consented to her proceeding to hear the matter. FDQ is plainly now trying to take every and any objection because it is displeased with the award.
- [53] A similar point can be made as to late disclosure of documents and the correction of redacted minutes that occurred during the Arbitration. On FDQ’s application, that was dealt with by the Arbitrator by procedural order dated 8th August 2022 prior to resuming the taking of evidence. The Arbitrator required an affidavit to be filed by TAX and by agreement of both parties the engineering experts for the respective parties were granted leave to file

⁹ [2005] 2 Lloyd’s Rep 650.

¹⁰ [2018] EWHC 2310 (Comm).

¹¹ [1993] 1 Lloyd’s Rep 215 at 232.

¹² [2005] EWHC 1370.

¹³ Deriving from the English House of Lords case of **Edwards v Bairstow** [1956] AC 14.

supplemental reports addressing the maintenance documents and PAHO report that had been disclosed and thereafter both experts were cross-examined on their reports and most pertinently by the Award at paragraph [165] the Arbitrator rejected MSBVI's contentions that the Premises were not fit for purpose.

[54] It was for FDQ to establish that the Licence for the Premises contained an express or implied warranty of fitness and that in breach of that term, the base building systems on the Premises were unfit for purpose. The Award quite clearly found against FDQ on every point in that regard and referred to the PAHO report that expressly stated the Hospital was a well-appointed facility at paragraph [164] and the Arbitrator found on the totality of the evidence that each of the base building systems were fit for the purpose. This was a finding of fact and the challenge has no merit.

[55] FDQ also contends that the Defendant's failure to call some persons as witnesses made the proceedings an irregularity. This is not a sensible argument. The proceedings were not inquisitorial, and in the nature of any adversarial proceedings it is for each party to determine what witnesses will be called to make their case. There is no property in a witness. Indeed, FDQ called TAX's former Managing Director Mrs. NOP as one of its witnesses. If there were any other persons who FDQ wished to obtain evidence from, they were at liberty to do so, and the Arbitrator had the power to assist in compelling the taking of such evidence including in accordance with the IBA Rules.

[56] In all the circumstances TAX submitted that the challenge to the award is flimsy and without merit and an order for security for its costs is justified.

2.8 Whether the Security Application will stifle the Appeal

[57] FDQ also contends that the award of security will stifle its appeal. This is the usual argument in response to such applications. However, on the evidence it is clear that FDQ's own legal fees are being met. On this issue, **Progas** cited the judgment of Gibson LJ in **Keary Developments Ltd v Tarmac Construction Ltd**¹⁴ in that regard at paragraph [27]: the court must carry out a balancing exercise.

[58] On the one hand it 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

¹⁴ [1995] 3 ALL ER 534.

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.

- [59] TAX submits that any balancing exercise should favour TAX for the matters already set out. The Claimant has offered no evidence of making any effort to raise security by approaching a bank for a loan or a guarantee on the security of the property which it says is of sufficient value to provide security. The Claimant's own legal costs are being funded and significant costs have already been incurred in litigating the arbitration. Further, none of the persons or entities involved in funding the Claimant to date have given evidence of their means or evidence of inability (as opposed to unwillingness) to provide security if the Claimant is ordered to do so. Some of the Claimant's medical equipment of substantial value is held overseas and has been excluded from the exhibited inventory.

2.9 The Application for Security for the Award Sum

- [60] As to the application for security of the award, **Progas** sets out the principle that this power should be exercised on some evidence that the challenge to the award is flimsy and that the challenge in some way diminishes the claimant's ability to honour the award such as where there is a risk of dissipation of the assets.
- [61] It is certainly submitted by TAX that the challenge is flimsy and the fact that valuable medical equipment is held abroad, out of the reach of the Court's process and some of which, valued at US\$, have not been accounted for and left off the inventory produced by FDQ, supports that there is a risk of dissipation of assets abroad and certainly that the delay caused by the proceedings to challenge the award will diminish TAX's ability to have recourse to the property located out of the Court's jurisdiction. FDQ has displayed no willingness to honour the award, which is not simply a money award for payment of licence fees owed to 31st January 2020 but also an order that it remove its property and restore the Premises to the original state.

3. DISCUSSION

3.1 Security for Costs

[62] In relation to security for costs, learned Counsel for FDQ, Mr. Chaisty, KC, has persuaded me that there was a fundamental error of legal principle in the analysis proffered by learned Counsel for TAX.

[63] In a nutshell, the fundamental error is that where a claimant or appellant is a person resident within this jurisdiction, that person's impecuniosity is not a sufficient ground upon which the Court can order that person to provide security for costs of defending the claim or appeal, and in this context, a person includes a legal person such as a company. I will explain this fundamental error further now.

[64] Learned Counsel for TAX started their analysis from a correct starting point, namely, that the Court derives its power to order security for the costs of an appeal from an arbitration award from statute, namely paragraph 7(4) of Schedule 2 of the Act. This provides:

“4. The court may,

(a) order the applicant or appellant to give security for the costs of the application or appeal, and

(b) if the order is not complied with, direct that the application or appeal is to be dismissed.”

[65] Learned Counsel for TAX were also correct that the only **statutory** limitation that has been placed upon the Court's power to order security for costs is set out in paragraph 7(5) of Schedule 2 of the Act. This provides:

“5) The power to order security for costs must not be exercised only on the ground that the applicant or appellant is:

(a) a natural person who is ordinarily resident outside the Virgin Islands,
(b) a body corporate

(i) incorporated under the law of a place outside the Virgin Islands, or
(ii) the central management and control of which is exercised outside the Virgin Islands, or

(c) an association:

(i) formed under the law of a place outside the Virgin Islands, or

(ii) the central management and control of which is exercised outside the Virgin Islands.”

- [66] Learned Counsel for TAX acknowledged that TAX’s security for costs application was not being advanced on any of these grounds.
- [67] Learned Counsel for TAX also correctly identified that Section 104 of the Act provides that an application, request or appeal to the Court under the Act shall be made in accordance with the CPR. That is to say, it is the procedural rules contained in the CPR that the Court has to follow in determining a security for costs application.
- [68] That much is also the approach applicable in England and Wales: **Konkola Copper Mines PLC v U & M Mining Zambia Ltd** at paragraph 24.¹⁵
- [69] Learned Counsel for TAX also correctly identified that under the CPR, the Court is expressly empowered to exercise a discretion to order security for costs under CPR 24.3 but that the Court can also order security for costs under its general case management powers under CPR 26.1(2).
- [70] Where learned Counsel for TAX fell into error concerned the circumstances in which the Court can order security for costs under these CPR provisions.
- [71] CPR 24.1 provides:
- “This Part deals with the power of the court to require a claimant to give security for the costs of the defendant.”
- [72] CPR 24.3 provides:
- “The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that
- (a) some person other than the claimant has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover;
- (b) the claimant
- (i) failed to give his or her address in the claim form;

¹⁵ [2014] EWHC 2146 (Comm) (Eder J.).

- (ii) gave an incorrect address in the claim form; or
- (iii) has changed his or her address since the claim was commenced; with a view to evading the consequences of the litigation;
- (c) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;
- (d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
- (e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
- (f) the claimant is an external company; or
- (g) the claimant is ordinarily resident out of the jurisdiction.”

[73] It is important to note that these provisions are different from the equivalent in the English Civil Procedure Rules ('English CPR'), in their Part 25. A key difference is that under the English CPR Part 25.13(2)(c) a specific ground upon which the English court can order security is where the claimant or appellant is a company and there is reason to believe that it will be unable to pay the defendant's and/or respondent's costs if ordered to do so;¹⁶ which is to say, where a company, resident within the jurisdiction, appears to be impecunious. **Our CPR do not include a similar provision.**

[74] In all fairness to learned Counsel for TAX, they do not maintain an argument that our CPR should be interpreted to include the same power. They however seek to reach the same result by a different route.

[75] They interpret our CPR 24.3 as meaning that the Court has a discretion to order security for costs under that Part 'where it considers that it is just to do so'. To support this submission, they cite a judgment of the BVI High Court: **Bitech Downstream Limited v Rinex Capital Limited et al.**¹⁷ relying in particular upon paragraph [16], in which the learned Judge, Justice d'Auvergne, stated:

¹⁶ Konkola [2014] EWHC 2146 (Comm) at paragraphs 24 and 25 (Eder J.).

¹⁷ BVIHCV2002/0233 (unreported, delivered 28th November 2003).

“CPR 24.3 empowers the court to make an order for security for costs if it is satisfied having regard to all the circumstances of the case that it is just to make such an order. Not solely because one or more of the conditions noted in 24.3(a) to (g) applies.”

- [76] **Bitech** was a case where the claimant was a company which was **not** ordinarily resident in the BVI. In **Bitech**, CPR 24.3(g) was obviously engaged. The point Justice d’Auvergne was making was that CPR24.3 involves a two-part test: (1) the court has to consider whether it is just to order security for costs having regard to all the circumstances of the case; **AND** (2) whether one or more of the conditions noted in 24.3(a) to (g) apply; it is not enough for an applicant simply to satisfy one or more of the conditions in 24.3(a) to (g). As such, this statement of the law by Justice d’Auvergne was entirely unorthodox and merely summaries what CPR 24.3 provides.
- [77] Learned Counsel for TAX take this short paragraph to mean that the court can disregard the conditions in CPR 24.3(a) to (g) and simply consider an application for security for costs having regard all the circumstances of the case.
- [78] In my respectful judgment I cannot accept this submission, for the following reasons.
- [79] First, it is not open to a court to interpret a statute or Rule in such as way as to re-write their provisions, or simply to ignore parts of it. Even if Justice d’Auvergne did this (which she did not), this Court would be entirely within its rights (and indeed obliged) not to follow such a manifestly incorrect approach.
- [80] Secondly, **Bitech** concerned a claimant company that was ordinarily resident **outside of the jurisdiction**. It was not at all concerned with a claimant company ordinarily resident **within the jurisdiction**, like FDQ. This is an important distinction, because learned Counsel for TAX rely upon **Bitech** to support a proposition that where a company is ordinarily resident **within the jurisdiction** the Court can simply order security for costs if the justice of the case would be served thereby. **Bitech** does not speak to such a situation. It is not an authority that supports such a proposition.
- [81] Learned Counsel for TAX had a further, alternative, position. This was that the Court can order security for costs to be provided (even by a company ordinarily resident within the

jurisdiction) under its general case management powers in CPR 26.1(2). It is uncontroversial that these powers are extremely wide. These include the power, under CPR 26.1(2)(w), to:

“take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.”

[82] Learned Counsel for TAX prayed in aid the decision of this Court in **Halliwell Assets Inc et al v Hornbeam Corporation**.¹⁸ It is correct that in that case this Court considered that its general case management powers could be used to order security for costs to do justice in a particular situation. But, as Mr. Chaisty, KC, for FDQ, pointed out, the litigant which was there the target for a security for costs application was not **a claimant** (or by extension an appellant), but an **interested party**. Not being a claimant (or by extension an appellant), CPR 24 could not apply, because CPR 24.1 makes it clear that CPR 24 applies in the case of **a claimant**. For that reason, the Court had regard to and applied its general case management powers.

[83] **Halliwell** thus dealt with a different situation. FDQ is in the position of a claimant, not an interested party. **Halliwell** is not authority for a proposition that the Court can simply determine an application for security for costs under its case management powers. As Mr. Chaisty, KC, submitted, such an approach would render CPR 24 otiose. Such a surprising result cannot be correct.

[84] As Mr. Chaisty, KC, contended for FDQ, the only provision under the CPR that applies in respect of a claimant or, by extension, an appellant, is CPR 24, and it is only if one or more of the conditions noted in CPR 24.3(a) to (g) are met that the Court can exercise a discretion to award security for costs.

[85] As Mr. Chaisty, KC, submitted, impecuniosity is not one of the conditions noted in CPR 24.3.

[86] A moment's reflection shows that this is not some accidental oversight on the part of those who drafted the Rules. If it were correct that an impecunious person in the position of a claimant or appellant who is ordinarily resident within the jurisdiction of the BVI courts could, on that ground

¹⁸ BVIHCM2014/0105 and 0134 (unreported, delivered 22nd April 2016).

alone, be ordered to pay security for costs, this would deny access to justice to poor persons (companies included). The indigent would be easily to be driven from the judgment seat. This only needs to be stated to highlight the repugnant import of such a proposition. In England and Wales, the Rule-makers produced an exception in respect of this where companies are concerned, by their Part 25.13(2)(c). That too is understandable, to mitigate abuse of the corporate form. Our CPR, as it stands, does not make such an exception.

[87] TAX does not rely upon any of the conditions noted in CPR 24.3. That being so, and as Mr. Chaisty, KC, argued, the only Part of the CPR that might be invoked for ordering security for costs, being CPR 24, is not engaged. The Court does not get to the point of being able to exercise a discretion to order security for costs.

[88] Consequently, TAX's application for security for costs fails *in limine*, i.e., before TAX's application for security for costs crosses the threshold into that area where the Court can exercise its discretion.

[89] As a result, the Court does not even get to consider the manner in which it should exercise its discretion. That means that cases such as **Progas Energy Ltd & Ors v Pakistan**,¹⁹ upon which learned Counsel for TAX places heavy reliance, do not come into consideration.

Progas was an English High Court case in which there was no issue that the court had power to order security. The claimants were ordinarily resident outside the jurisdiction (a factor learned Counsel for TAX appears to have overlooked). The claimants there relied upon third party funding, thus being apparently of insufficient own means. The question solely concerned whether the court should exercise its discretion and if so, on precisely what basis. **Progas** has no application here.

[90] In light of the fact that the source of the Court's powers to order security for costs of an appeal from an arbitration award is statutory (as explained above), and that Section 104 of the Act points to the CPR for the procedural requirements applicable to such an application, in my respectful judgment it appears to me not to be open to TAX to invoke the Court's inherent jurisdiction as a way of side-stepping the exacting requirements of the CPR.

¹⁹ [2018] EWHC 209

[91] The security for costs application must, in my most respectful submission, therefore, be dismissed.

3.1.1 Costs of the Security for costs application

[92] The security for costs part of the Security Application was misconceived. In such circumstances, it is appropriate that costs should follow the event, as the Court ordered. In our court system, under our CPR, an unsuccessful applicant is at risk of an adverse costs order, and it is the general rule that the unsuccessful party 'must' be ordered to pay the costs of the successful party, under CPR 64.6(1). The general rule is a starting point, to which exceptions can of course be applied, where appropriate. In this case there was no reason why, as learned Senior Counsel for TAX, Mr. Allan Wood, KC, attempted to submit, the costs of the security for costs application should be reserved to the hearing of an appeal, as being a more just costs order. The fact of the matter is that FDQ was put to the trouble and expense of having to defend itself from an application which, if FDQ did not oppose it, would have had far-reaching consequences financially and in relation to its access to justice. That application was legally flawed. It would be wrong to keep FDQ out of pocket any longer than is necessary for the legal costs it had to incur to ensure that justice is upheld.

3.1.2 Security for Costs – *obiter dicta*

[93] The following comments in relation to the security for costs application are necessarily *obiter*.

3.1.2.1 Security for costs by way of charge over movable property

[94] The parties argued over whether the Court could or should order security to be provided by way of a lien over goods, namely the Movables belonging to FDQ which remain at the Premises.

[95] Learned Counsel for TAX argued against this proposition. I have summarised their arguments above. As noted there, they rely upon the cases of **AP (UK) Ltd v West Midlands Fire and Civil Defence Authority**²⁰ (that in a commercial action security should be given in the

²⁰ [2001] EWCA Civ 1917.

form of a payment into court, or bank guarantee, or legal practitioner's undertaking, or by way of a charge over real property) and **Monde Petroleum SA v WesternZargos Ltd**²¹ (security should be in a form which enables the defendant to recover a costs award from funds which are readily available, such that there is little risk of delay or default in enforcement). TAX sought to make much of the fact that FDQ has not come to this Court offering a bank guarantee secured against the goods it left behind at the Premises.

- [96] Mr. Chaisty, KC, for FDQ on the other hand, cited the English High Court case of **Saurympar v Fishman Brand Stone**²² for the proposition that the court could and should (if the Court was against him issues of jurisdiction and any discretionary factors that the Court might accept as weighing in favour of granting security) order security by way of a lien. He referred to the following passage at paragraph 44 of this decision:

“In my judgment, it would be open to the court in its discretion to accept security in the form of a charge over property if satisfied that the property provided adequate security and that it would not be just to require the claimant to sell the property in order to pursue the claim ... it is plainly likely to be highly material that unless permitted to provide security in that form the claimant may be prevented from pursuing the claim.”

- [97] I resolve this disagreement by finding that it is indeed open, in theory, to the Court to order security to be provided by way of a lien or charge over movable property, that is to say, to allow a defendant or respondent to an appeal to retain possession of, or some other right over, a claimant's or appellant's goods with the eventuality of a court ordered sale to apply in the event of default of payment of a costs award. The cases cited by learned Counsel for TAX do not exclude that possibility.

- [98] Whether the Court should in this case, in practice (as opposed to in theory) make such an order is another matter.

- [99] **AP (UK) Ltd v West Midlands Fire and Civil Defence Authority** is an English Court of Appeal case. The panel was a strong one, consisting of Lords Justices Ward, Jonathan Parker and Longmore. Longmore LJ rendered the court's judgment.

²¹ [2015] EWHC 67 (Comm).

²² [2022] EWHC 752 at paragraph [44] (Deputy Master Teverson).

- [100] Whilst decisions of the English Court of Appeal are not binding on this Court, they are persuasive. What that means in practice is that this Court generally follows such decisions unless there is a reasonable reason not to do so.
- [101] In that case, the type of security being considered was by way of charge over real property, i.e. immovable property. Whilst the English Court of Appeal did not rule out that security in that form could in principle be ordered, questions for the court's consideration include (1) whether such security is adequate to protect the opposite party²³ and (2) the extent to which it would be both simple and straightforward to enforce the security if that becomes necessary.²⁴
- [102] The English Court of Appeal went on to opine that 'if no bank will lend on the security of the proposed real property that will mean the proposed security is inadequate unless there is a reason to explain why the defendants should be required to accept security by way of a charge on a property when no bank is prepared to do just that'.²⁵
- [103] **Saurympar v Fishman Brand Stone**, on the other hand, was a decision of a Deputy Master of the English High Court. Thus, in terms of juridical hierarchy, it is also not binding upon this Court and carries somewhat less weight in terms of persuasiveness than a decision of the English Court of Appeal (without in any way suggesting that a Deputy Master of the English High Court is of a lesser competence than Judges or Lords Justices of Appeal). **Saurympar** was also a case where the court was concerned with an eventual charge over immovable, not movable, property. The court came down in favour of rejecting security by way of a charge and ordered security to be provided in a 'conventional form'.²⁶
- [104] One of the key factors that the court took into account was that '[i]t is not clear that either or any of the charges being offered fall into the category of readily realisable assets'.²⁷ It proceeded on the basis that security should be 'readily realisable'.²⁸

²³ See e.g. paragraphs 14 and 17.

²⁴ See e.g. paragraph 15.

²⁵ At paragraph 17.

²⁶ See paragraphs 54, 57.

²⁷ See paragraph 50.

²⁸ See paragraph 54.

[105] Now it is true that what fed into the court's conclusion in this regard was the fact that where a company has illiquid assets and 'could pay in the end but is unable to pay with any high degree of promptness' such a company would come within the condition in the English CPR 25.13(2)(c) that 'there is reason to believe it will be unable to pay the Defendant's costs if ordered to do so' (i.e. that part of the English CPR that our CPR do not share).²⁹ But the principle that security should be in a readily realisable form still holds good without that context, because it is no more than another way of saying that security should be in a form that is simple and straightforward to enforce, as the English Court of Appeal opined in **AP (UK) Ltd v West Midlands Fire and Civil Defence Authority**.³⁰

[106] Against this background of principle, I approach this issue between the parties by observing that the property over which FDQ proposes a lien or charge comprises an eclectic mix of items, ranging from construction materials such as unused PVC plumbing pipes, bends, couples etc., as well as toilet units, doors, floor covering materials and countertops, to clinic equipment such as a and equipment (some of which is apparently not in good working order), electrical appliances and television equipment, and other fittings, accoutrements and paraphernalia associated with a medical clinic. Inventories taken over time have shown discrepancies, in that some of the Movable appear to have gone missing. Things that have allegedly gone missing include fire alarm equipment and power tools, to which FDQ attribute a five-figure sum in value, as well as IT equipment apparently taken upon FDQ's instructions by QR,³¹ who has since allegedly disappeared along with that equipment. FDQ's evidence (CD's First Affidavit at paragraph 21) puts the value of the remaining Movable at US\$ as at 19th April 2023, although CD concedes that FDQ have not obtained an independent expert valuation. TAX responded by way of the Fourth Affidavit of AB, in which, at paragraph 14, she in essence simply asserts that TAX have no use of the things left by FDQ and that there is no market for them. She also said that some of the medical equipment was damaged, and some was located overseas. CD responded with a Second Affidavit, in which he pointed out³² that the allegations of damage concern the medical equipment, worth, he says, some US\$, but that still leaves some US\$worth of other items. He also observes that whilst there had

²⁹ See paragraphs 34 and 35.

³⁰ At paragraph 15 (Longmore LJ).

³¹ At the Fourth Affidavit of Dr. Samuel, paragraph 16.

³² At paragraph 8.

been no other clinics in the BVI when the project was started in 2016, there are now three clinics with practices, such that there could be a market for the items.

[107] There is no evidence that any bank would be so much as interested in even considering issuing a bank guarantee secured on such a collection. Indeed, it would be surprising if a bank was to do so.

[108] A moment's reflection should show that some form of lien or charge over this collection of Movables would not be readily realisable. I am prepared to accept that TAX's view of the resaleability of the items is overly pessimistic. It appears that for TAX the very idea of trying to sell these goods is too much. That is understandable. It is not in the business of liquidating stock. But the BVI is well endowed with a considerable number of professional liquidators, who could take on the task of doing so. That, however, would inevitably entail additional cost, such as liquidator's fees and/or commissions, storage and transport costs, advertisement costs and probably other expenses – all of which would have to be deducted from the already relatively low value of the totality of the goods. I say relatively low value, in that there are obviously economies of scale that determine the viability of any liquidation, and even at the figures postulated by FDQ, such a liquidation would be considered a low value liquidation in relation to typical commercial liquidations conducted by BVI licensed insolvency professionals that this Court deals with on a day-to-day basis.

[109] FDQ itself does not say that sale of its Movables is readily realisable, but to the extent that it would maintain that it is, it would be appropriate for FDQ to have the burden of doing so. **Saurympar** stands as authority (if such were required as it is a rather obvious proposition) that security could be ordered to be provided in stages.³³ Such an order could be made to afford FDQ an opportunity to effect sale of its items at the Premises. It is, though, not clear how long this would take and in considering whether to make such an order the Court would have to carry out the balancing exercise between both sides' interests predicated by the Overriding Objective of the CPR.

³³ See paragraph 55.

[110] For these reasons, I would not think it appropriate to order security in the form of a lien or charge over these Movables, although I accept that in theory and in principle the law does not exclude ordering security in such a form.

3.1.2.2 Security for costs – impecuniosity

[111] I turn now, in this *obiter* part of the Judgment, to the question of impecuniosity.

[112] It appears to be uncontroversial that FDQ has a negative balance sheet. TAX observes that FDQ's liabilities stand at almost US\$, with a balance sheet negative deficit of US\$. At the hearing before me, neither party placed any store by the fact that FDQ technically has an asset of at least some value in the shape of its claim against TAX, and more specifically at this point, FDQ's appeal.

[113] Both sides approached impecuniosity as a relative concept. Apart from any authorities on the point (which I was not taken to), this appears to me to be correct. Working from first principles, the Court has to determine a security for costs application in accordance with the CPR, and thus also in accordance with the Overriding Objective of dealing with cases justly. The immediate question which arises is whether the claimant appears, at the particular point in the proceedings at which a security for costs application is brought, to have sufficient readily realisable assets with which to discharge a future adverse costs order. A claimant who appears unable to do so, for the purposes of, and within the ordinary timeframe of, the proceedings before the court, can be described as impecunious. If the claimant or appellant has sufficient assets but which cannot be liquidated within a reasonable timeframe, this would be no good to anyone.

[114] On this score, it remains an open question on the evidence how long it would take to realise money from the Movables. As such, FDQ would have difficulty satisfying the Court on a balance of probabilities that it is pecunious.

[115] In the debate before this Court over whether FDQ is or is not impecunious, there featured a heated contest over TAX's costs estimates. The point was that if TAX's costs estimates are lower than the value of FDQ's Movables, then, relative to that, FDQ would

not be impecunious (leaving aside, of course, the question whether the Movables are readily realisable).

[116] TAX's original costs estimate for the appeal was US\$200,000. Shortly after indicating that TAX would not be filing further evidence in support of its security for costs application, TAX filed further evidence (AB's Fourth Affidavit) increasing its estimate to a range of US\$477,410.00 to US\$517,410.00.

[117] FDQ protested at this, going so far as to suggest that TAX opportunistically did so to hike its cost estimate into an orbit beyond the value of FDQ's Movables in order to engineer a conclusion that FDQ is impecunious relative thereto. FDQ's own cost estimate of the appeal had been US\$237,500, i.e., slightly higher than, but within the same range as, TAX's original estimate.

[118] Whilst learned Counsel for FDQ reined back on suggestions that TAX and its Counsel had been indulging in a cynical manoeuvre by increasing their estimates, learned Counsel for FDQ put his case thus:

"The figure now claimed in respect of costs has jumped from \$200,000 to \$477,000 to 517,000, an increase of around 2.5 times. It is said by AB such sums are "**enormous**". It is true, they are enormous and cannot be justified. It is for TAX to choose what to agree to pay its legal team and it can choose to agree to pay enormous sums if it feels that that is the proper course to take, but what it cannot do is expect to simply try and pass that on to FDQ. On 18 May 2023 TAX in response to a request provided some limited breakdown of the costs figure. Counsel's fees in respect of the leave application and security amount to \$75,250 and for the three-day appeal amount to \$200,000 to \$220,000. The fees of GHP [TAX's BVI local legal practitioners] for the three-day appeal amount to \$120,000 to \$140,000. That amounts in total to \$360,000 for a three-day appeal, disregarding the other work included within the other costs. If one steps back and considers that figure it would mean that someone charging at, say, \$1000 an hour would spend approximately 10 weeks full time on that appeal, at \$750 an hour it would be three months. The sums are far too high, and no explanation has been provided for the massive increase."

[119] Learned Counsel for FDQ urged that the Court should be guided by *dicta* in the English High Court (Commercial Court) the case of **OCM Singapore v Gulf Petrochem**.³⁴

"It is common ground that in arriving at a figure for security, the court is bound to attempt to arrive at a figure which is thought likely would be awarded by way of costs following a

³⁴ [2021] EWHC 2447 at paragraph [30] (HHJ Pelling QC).

detailed standard assessment exercise. That in turn requires me to have regard to the degree to which costs are reasonable and proportionate in all the circumstances.”

- [120] I accept these points made on behalf of FDQ. Each side’s initial, and apparently quite independent, assessment of a costs estimate in the region of US\$200,000 is likely to be more reasonable and proportionate. One would, in the ordinary course, expect lawyers practicing in the same jurisdiction, in the same Division of the Court, in the same matter, the work in relation to which is well defined (i.e., here it concerns an appeal from an arbitration award, and both sides already have a good idea as to what the issues and arguments will be), traversing broadly the same authorities, to come to a broadly similar estimate. I do not say the revised estimate provided by TAX is indefensible. I do not presume to understand why TAX thought a much higher costs estimate should be put forward, despite their earlier position that they would not be filing further evidence. If I were of a mind to order FDQ security for costs, I would have ordered it in a sum no higher than FDQ’s own estimated costs figure, as a fair figure.

3.1.2.3 Security for costs – stifling

- [121] FDQ also advanced an argument that an order for security for costs would stifle the appeal, which FDQ is entitled to pursue (in certain respects) as of right. The factual issue of stifling is a more nuanced debate. Apart from the rather difficult question of principle whether a party who has a right to appeal should have conditions imposed upon him/it which could cut down his/its ability to pursue such an appeal, and if so, to what extent, it warrants observation that FDQ seems content to fund a conventionally resourced legal team (headed a United Kingdom-based commercial King’s Counsel, with day-to-day conduct of the matter undertaken by one of the BVI’s premier commercial law firms). At the same time, FDQ’s position is that it was established as a special purpose vehicle for the clinic project in question, and it has been prevented from completing and running the intended clinic, it says, by TAX (although the arbitration Tribunal disagreed with that perspective and decided that FDQ’s failure to do so was its own fault), and thus it has no revenue other than loans from shareholders and external financing, entailing a significant deficit.
- [122] It is not difficult to see that whatever might have been the reasons for the project’s failure, if FDQ were to be required to find an additional US\$200,000 or higher, on top of its own projected legal fees, FDQ and its backers/principals might well decide to drop their appeal and walk away from the matter.

[123] In this regard, one should not shy away from the fact that even if the appeal succeeds, the outcome might be that the dispute could be referred back to arbitration, before a differently constituted Tribunal, and it is possible that the entire trial would have to be conducted again. The trial phase of the arbitration itself took some 18 days. In addition to the necessarily huge legal fees that this would entail, arbitrators, unlike Judges, are not paid for out of the public purse. So, the parties to a re-run of the arbitration would also have to foresee significant fees for the arbitrator(s). The potential up-side for FDQ would of course be the potential of being awarded a sum in the mid to high eight figures. Whether having to find an additional US\$200,000 or so in funds to run the appeal would operate to deter FDQ and its backers/principals from proceeding is unclear. In paragraph 22 of CD' second affidavit, he says that 'not a single reasonable investor would thr[ow] good money after bad' and '[i]f the Court grants an order for security in any form other than in the form of a security over the assets of FDQ, FDQ will not be able to comply with such an order and the Appeal will be stifled'. But this does not address whether or not FDQ's shareholders and/or financial backers would be prepared to pay more than they are already doing to pursue the appeal. Where that would take the Court is that the Court would not be persuaded by FDQ that on a balance of probabilities, on the state of the evidence, an order for security for costs would be likely to stifle an appeal.

[124] However, these considerations are all academic. As I have explained above, no security for costs order is appropriate here, because TAX has not been able to bring this matter within the ambit of CPR 24 so as to trigger the Court's powers of discretion.

3.2 Application for security for the appeal

[125] I now leave the *obiter* segment of this Judgment and turn to TAX's application for security of the appeal. TAX applied for security in respect of the award in the amount of US\$170,479.34. TAX relied upon the same ground as for its security for costs application, i.e., FDQ's alleged impecuniosity.

3.2.1 TAX's case on security for the appeal.

- [126] TAX's position began from a proposition which was uncontroversial between the parties, namely that the provisions of the BVI Arbitration Act conferring statutory power to make orders for security are similar to the UK Arbitration Act (1996) section 70 (6) and (7) and given that similarity, the authorities applying the UK Act provide persuasive guidance for the Court.
- [127] Beyond this, TAX submitted that the case of **Progas**³⁵ sets out the principle that the power to order security in respect of an arbitration award should be exercised on some evidence that the challenge to the award is flimsy and that the challenge in some way diminishes the claimant's ability to honour the award such as where there is a risk of dissipation of the assets.
- [128] Summarising the test in this way, learned Counsel for TAX went on to submit that FDQ's challenge to the arbitration award is flimsy and the fact that FDQ holds valuable medical equipment abroad, out of the reach of the Court's process and some of which, valued at about US\$, have not been accounted for and left off the most recent inventory produced by the Claimant, supports that there is a risk of dissipation of assets abroad and certainly that the delay caused by the proceedings to challenge the award will diminish the Claimant's ability to have recourse to the property located out of the Court's jurisdiction.
- [129] TAX contended further that the Claimant has displayed no willingness to honour the award, which is not simply a money award for payment of licence fees owed to 31st January 2020 but also an order that it remove its property and restore the Premises to the original state. All these reasons, submitted learned Counsel for TAX, should persuade the Court to order security for the award.

3.2.2 FDQ's case on security for the appeal.

- [130] FDQ disagreed. Mr. Chaisty, KC, contended that learned Counsel for TAX had understated the legal test for finding a risk of dissipation. FDQ's position is that the test is whether there is solid evidence supporting dissipation, to the same standard as is required to

³⁵ [2018] EWHC 209 (Comm) at paragraphs 47 to 59 (Picken J.).

warrant the making of a freezing order. FDQ submits that the evidence proffered by TAX does not meet the required standard.

[131] FDQ did not take issue with TAX's submission that the challenge to the award was 'flimsy'. That was proper, because at the time when the security for costs application was heard, FDQ's application for permission to appeal on issues of law had not yet completed its hearing. Because TAX had not yet at that point been heard in opposition to FDQ's leave application, it was entirely correct on the part of FDQ to say nothing about 'flimsiness', leaving this for the Court further to decide.

[132] It also warrants observation that I handed down the result of the security for costs and the security application before hearing TAX's response to FDQ's leave application. I can categorically state that whether or not the challenge to the award was, in the Court's necessarily premature view, 'flimsy', formed no part of my decision to dismiss both applications.

[133] In relation to the security application, Mr. Chaisty, KC, explained FDQ's position, overall, as follows:

"17. In respect of security of the award, FDQ is pursuing an appeal as of right and awaits this Court's determination of its leave application.

18. The principles addressed in *Russell on Arbitration*³⁶ should be applied in respect of the award aspect of the application:

"Where no leave is required ... and the application is made as of right, the court is likely to apply a two-stage test. First, the applicant will need to show as a threshold requirement that the challenge under s.67 is flimsy or otherwise lacks substance."

(see also *A v. B* [2010] EWHC 3302 at [32] and *Konkola* at [37-49])

"Secondly, if the threshold requirement is satisfied the applicant will have to satisfy the court that the challenge under s.67 will prejudice its ability to enforce the award. This will often entail the applicant demonstrating some risk of dissipation of assets."

(see *A v. B* at [44-50])

"An application under s.70(7) cannot be used as a means of putting the winning party in the arbitration in a better position than he would otherwise have been in, for example, by requiring the losing party (or its backers/third party funders) to put up funds which the winner can then take if the appeal fails but to which the winner would not otherwise have had easy access."

and [8-166]:

“An order under Section 70(7) is likely to be very rare, as if the court has decided to grant permission to appeal under s.69 it is unlikely to be compatible with that to at the same time require the applicant to provide security for the award. In very limited cases, security for the award may be considered if there is a suggestion that the s.69 application is being used as a delaying tactic whilst assets are diverted.”

(A v. B [57]62])

19. There is no suggestion here of such a delaying tactic being used. FDQ of course awaits the decision on the leave application on the law. In any event, the principles referenced above should apply equally where there is an appeal pursued as of right, based on serious irregularity.

20. The application for security in respect of the award should be dismissed. There is no justification in putting TAX in any better position in respect of the enforcement of the award simply because an appeal is being pursued.”

[134] Then, in oral submissions, learned Counsel for FDQ took the Court to **Progas**. In relation to a risk of dissipation of assets, at paragraph 54 of **Progas**, the English High Court observed (with reference to a quotation from the English High Court (Commercial Court) case of **Erdenet Mining Corp LLC v ICBC Standard Bank plc**³⁷ that:

“In order to show that the ability to enforce the award has been prejudiced or the ability of the applicant to honour it has been diminished, it is therefore effectively necessary to satisfy a similar requirement to that of a freezing injunction, namely the risk of dissipation of assets between the time of the section 67 application and its final disposal.”

3.2.3 Further considerations on security for an award

[135] At paragraph 65 of the judgment in **Progas** the English High Court considered the quality of evidence required to establish a risk of dissipation. It asked itself whether ‘the evidence which had been assembled by the Defendant would be sufficient to merit the making of a freezing order’. In the same paragraph it went on to consider whether the evidence before it amounted to ‘solid evidence’ of dissipation. It noted in **Progas** that in **Erdenet** the evidence there showed that there had been a sale of a 49% shareholding in the claimant company at about the time of

³⁷ [2017] EWHC 1090 (Comm) at paragraph [12] (Sir Jeremy Cooke).

the awards in question, which the court in **Progas** described as ‘solid evidence supporting dissipation’.

- [136] In this jurisdiction, it is well settled that the same requirement applies. A convenient statement of the law can be found in the Court of Appeal decision in **Liberty Club Limited (Trading as La Source) v Grenada Technical and Allied Workers Union** at paragraphs [6] to [7]:³⁸

“[6] I will deal with dissipation of assets first before considering adequacy of damages. An applicant for a freezing order must demonstrate that there is a real risk of dissipation of assets. A fundamental principle in relation to freezing orders is that such orders are not granted in order to provide security for a claim. By procuring an order that assets are frozen, an applicant is not put in a better position than any other creditor. The mere fact that a defendant’s creditworthiness is doubtful does not justify the making of a freezing order. (*Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532, para. 36 per Walker J.)

[7] The purpose of a freezing order is to stop the enjoined defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for its claim. (*Z Ltd. v A-Z* [1982] QB 558 at pp. 571 and 585 (per Lord Denning MR and Kerr LJ); *JSC BTA Bank v Mukhtar Ablyazov* [2013] EWCA Civ 928, para. 34.) The principles relating to the risk of dissipation are summarized in the judgment of Flaux J in *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* at paragraph 49: ([2008] EWHC 1615; [2008] 2 Lloyd’s Rep 602.)

“The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient “risk of dissipation” is that a claimant will satisfy that burden if it can show that: (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of its assets other than in the ordinary course of business... or (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes:...” (See para. 23 of *Cosmotrade S.A. v Kairos Shipping Ltd. & Ors.* [2013] EWHC 1904)”

- [137] Two further points arise. At paragraph 54 in **Progas**, the English court observed that when considering whether the challenge to an award in some way prejudices the ability of the defendant to enforce the award or diminishes the claimant’s ability to honour the award (i.e. the second limb of the test for the exercise of the power to order security for an award), ‘simple delay in enforcement does not amount to the prejudicing of the winner’s ability to enforce the award’. Moreover, in the same paragraph, the English court observed:

³⁸ GDAHCVAP2013/0010 (unreported, delivered 23rd May 2014) (Baptiste JA).

“Whilst the courts have not limited this aspect to the issue of dissipation of assets, that appears to be the only basis upon which any court has so far proceeded.”

[138] The decision in **Progas** was rendered in 2018, but no authority was brought to this Court’s attention showing that another basis has been applied.

[139] Collating these principles, we can conclude that in order to find a risk of dissipation, the Court must receive

- (1) solid evidence;
- (2) of a real risk;
- (3) that an award will go unsatisfied
 - a. in the sense that, unless security is ordered and given
 - b. the defendant will dissipate or dispose of its assets
 - c. other than in the ordinary course of business
 - d. or
 - e. the defendant’s assets are likely to be dealt with in such a way as to make enforcement of an award more difficult
 - f. unless those dealings can be justified for normal and proper business purposes.

[140] Mr. Chaisty, KC, submitted that TAX’s evidence did not even come close to amounting to solid evidence of a ‘risk of dissipation’ in the sense of that concept intended by the authorities.

3.2.4 Discussion on security for the Award

[141] The first affidavit utilised by TAX in support of its application for security (the Second Affidavit of AB dated 18th April 2023) contains no evidence of any risk of dissipation. It merely observes the following:

- (1) FDQ did not comply with its contractual license fee payment obligations;
- (2) FDQ has a negative profit and loss account in relation to the period 1st January 2017 through to 22nd April 2022 showing a net negative income of US\$;
- (3) FDQ was funded by a third party which is not a party to these proceedings and against whom TAX will have no recourse for the payment of any costs;

- (4) FDQ's assets within the jurisdiction are still housed at the Premises, and FDQ has notified TAX that it intends to collect this equipment, albeit TAX considers those assets to have no significant value in any event;
- (5) TAX is not aware that FDQ holds any other assets outside the jurisdiction which, in any event, would practically be out of reach if such assets needed to be brought into account in satisfaction of the Award or any order for costs;
- (6) As far as TAX is aware, the Claimant has not operated at all since March 2020 and certainly has not operated from the Premises since then. FDQ has no guaranteed stream of income which the Defendant can access for the payment of costs or the Award sum if the Leave Application or the Appeal is unsuccessful.

[142] These do not amount to evidence of any risk of dissipation. A claimant or appellant's lack of financial means, or even insolvency, does not equate to a risk of dissipation. As is plain from the authorities, a risk of dissipation does not mean a risk of not getting paid; it means a risk that a judgment or award debtor will take steps calculated to frustrate enforcement or render it more difficult. There is no principle which says that a judgment or award creditor is entitled, without more, to security for payment of the judgment or award debt. The law and the courts do not protect a party from the consequences of its choice to engage in business dealings with a counterparty that might be insufficiently substantial to honour its obligations. As Mr. Chaisty, KC, pointed out, that is the risk TAX takes when it enters the commercial arena by embarking on a commercial venture such as it did with FDQ.- TAX is not entitled to preferential treatment from the law or the courts in this regard, even though it might be Q that ultimately suffer the consequences of commercial or legal miscalculation. Like any other commercial venturer, TAX who enters the commercial arena can have commercial protections incorporated into the contractual arrangements it chooses to enter into with commercial counterparts. If TAX, or its professional advisers, miss a point in that regard, or the protection included proves insufficient, it is not the task of the courts – or an arbitral tribunal – to supply the omission.

[143] TAX's ensuing affidavit, the Fourth Affidavit of AB dated 12th May 2023 fared no better. It contained no evidence whatsoever that FDQ might dissipate assets or dispose of, or deal with, assets in such a way as to make enforcement of an award more difficult other than in the ordinary course of business or for normal and proper business purposes.

[144] Not having brought any evidence itself of a risk of dissipation, TAX turned its attentions to FDQ's own supplied information and sought to extrapolate a case for a risk of dissipation from this. TAX's learned Counsel averted to three points:

- (1) TAX argued that the value of FDQ's assets stated in its balance sheet of 2nd May 2023 was overstated by US\$, as the latter was given as the cost of services, labour and materials put into the construction of the Premises, in circumstances where the reward requires FDQ to return the Premises to its original shell state.
- (2) TAX identifies an apparent discrepancy between the value of medical equipment given in the said balance sheet of US\$ and a lesser value of US\$ shown in an inventory exhibited by CD.
- (3) That inventory 'inexplicably' (to use TAX's learned Counsel's term) does not include two items of specific medical equipment, namely a ' ' and a ' ', which CD had included in an inventory exhibited by him in the arbitration proceedings, without accounting for their whereabouts.

[145] These reasons, taken separately or together, do not amount to any evidence, let alone solid evidence, of a risk of dissipation. Quite how an (arguable) overstatement of asset value in a balance sheet translates into a risk of FDQ dissipating, disposing of assets in a manner that might frustrate enforcement or render it more difficult is, I confess, not something I understand. Equally, pointing out that the medical equipment listed out by FDQ appears to omit items previously disclosed, whether by identifying such items as missing or by observing their reduced collective value, does not **of itself** (i.e., without context) take the matter into the domain of evidencing a risk of dissipation; there could be several explanations for these apparent discrepancies, which are not addressed in evidence. Moreover, it cannot be assumed that any disposal of these movable items (if there was any such disposal, which is also not addressed in evidence) was effected otherwise than in the ordinary course of the company's business or for a normal and proper business purpose; FDQ was not subject to a freezing order and, like any other such person, could in principle dispose of its available assets (if it indeed did so) for any legitimate purpose. Ultimately, TAX's learned Counsel's adverting to these matters, without an exchange of evidence to cast light on the background and possible reasons for these differences, amounts to no more than hopeful speculation. That is not enough to amount to 'solid evidence' of a risk of dissipation.

[146] We are, however, not left with entirely nothing. The Second Affidavit of AB discloses TAX's purpose in applying for security. AB attests at paragraph 20:

"TAX desires that if the Application is refused and it ultimately succeeds on any appeal it will immediately be put into the sums ordered by the Award and its costs for the Application and any appeal without further delay."

[147] Such a desire is readily understandable, but giving effect to it runs directly contrary to the principle that an application for security cannot be used simply as a means of putting the winning party in an arbitration in a better position than he would otherwise have been in.³⁹

[148] I agree with Mr. Chaisty, KC, that TAX does not come close to adducing solid evidence of a risk of dissipation. Thus, quite apart from the issue of whether FDQ's challenge to the award is 'flimsy', which it is not necessary for me to address, TAX does not succeed in satisfying the second limb of the legal test for the grant of security. I am not persuaded that there is any other ground on which the second limb might be satisfied and TAX did not develop its contention in this regard.

[149] In such circumstances, the application for security fails.

3.2.5 Costs of security for Award application

[150] TAX fell into two fundamental errors in respect of the part of its application which sought security for the Award Sum: (i) understating the evidential test for establishing a risk of dissipation; and (ii) adducing no evidence that came close to satisfying the test as correctly stated. TAX did no more than to speculate that dissipation might have occurred. That is not sufficient, upon the correct test. In such circumstances, the fair and just costs order is that TAX should bear FDQ's costs of defending the security application.

3.3 Disposition

[151] The net result is that TAX's application for security for costs and for security in respect of the Award Sum failed, with the costs thereof being awarded to FDQ. Such costs were ordered to be assessed if not agreed within 21 days.

³⁹ Per Sutton, Gill and Gearing: Russell on Arbitration (24th edn., Sweet & Maxwell 2015) 8-081.

[152] I take this opportunity to thank both sides' learned Counsel for their assistance to the Court in respect of this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar