

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO: BVIHC (COM) 2019/0179

IN THE MATTER OF SPORTS PROPERTIES INTERNATIONAL LTD

BETWEEN:

JEAN-LOUS ROBERT WALTER DANIS

Claimant

and

[1] PETER MAXWELL DICKSON

[2] SPORTS PROPERTIES INTERNATIONAL LTD

Defendants

Appearances:

Mr. John McCarroll SC with him Ms. Sarah Thompson of Harney Westwood and Riegels for the claimant

Mr. Richard Morgan QC with him Mr. Jerry Samuel and Ms. Jane Fedotova of Conyers Dill and Pearman for the first defendant

No appearance for the second defendant

2020: May 13
May 25

JUDGMENT

- [1] **JACK, J [Ag.]**: There are two cross-applications before me. The first is an application filed 2nd April 2020 by the first defendant (“Mr. Dickson”) for security for costs in the sum of \$1.8 million and for an order that the claimant (“Mr. Danis”) do disclose all his assets anywhere in the world exceeding a value of \$10,000. The second is an application filed 24th April 2020 by Mr. Danis

seeking security for costs against Mr. Dickson. This second application is listed solely to determine a preliminary issue, whether there is any jurisdiction to order security for costs against a defendant who has not made any formal counterclaim.

The background facts

- [2] Mr. Danis is a former First Vice President of the American Express International Banking Corporation currently based in the Bahamas. He is married to Zorana Danis ("Mrs. Danis"), although they separated in 2008. Mr. Dickson is an accountant and businessman based in Bermuda. In 1990 he and his business partner set up a company named Guardian Management Company Ltd ("Guardian") in Bermuda to provide corporate, financial and accountancy service to high net worth clients. The second defendant ("SPIL") was incorporated in 1987 in this Territory as Seeland Road Investments Ltd with bearer shares. It changed its name to Sports Properties International Ltd on 24th September 1993. According to the Amended Defence, in around 1990 Guardian acquired the beneficial ownership of it. Mr. Dickson says beneficial ownership of SPIL passed to him from Guardian in September 1993, when he changed its name.
- [3] It is common ground that in 1993 the two men met. What then ensued is hotly disputed. Mr. Danis' case is that he approached Mr. Dickson with a view to using Guardian's corporate services and that Mr. Dickson agreed to hold the shares in SPIL as his (Mr. Danis') nominee. Mr. Dickson's case is that Mr. Danis approached him about a venture involving letting sports venues, but nothing came of it in 1993. SPIL remained dormant, save that there was at least a plan for Mr. Danis' father to receive 5 per cent of the shares for an investment of \$10,000. (Whether the plan was carried out, or any investment actually made is unclear.) In 2000 SPIL obtained a contract with the Confederación Sudamericana de Fútbol ("the CSF"), which gave marketing rights in respect of the Copa Libertadores de América, a major South American football (soccer) tournament. The main rights were held by Internal Soccer Marketing Inc ("ISM"), but they were not in a position to exploit these rights. In May 2000 a new BVI company, Libertad Properties Ltd ("LPL") was incorporated and became a wholly owned subsidiary of SPIL.
- [4] Mr. Danis' case is that he obtained the opportunity to acquire the CSF contract through his wife. He gave the contract to SPIL on the basis that he was its beneficial owner. Mr. Dickson's case is that Mr. Danis asked him whether he (Mr. Dickson) would be interested in acquiring the rights

under the CSF contract. Mr. Danis said that he (Mr. Danis) had attracted a sponsor, but that there was still a commercial risk attaching to the contract. Mr. Dickson's case is that Mr. Danis would be rewarded for his work in finding sponsors, although no concrete remuneration was agreed at that stage. It is common ground that on 17th March 2000 CSF, ISM and SPIL entered a contract whereby SPIL was given the marketing rights from 2001 to 2007. These rights were assigned to LPL in 2002. The CSF contract was subsequently renewed.

- [5] It is also common ground that from 2002 onwards Mr. Danis acquired works of art on SPIL's behalf. Again, the parties' contentions are diametrically opposed. Mr. Danis says the works were acquired for himself and he used SPIL as his vehicle because it was his company. Mr. Dickson says that the art was an investment. Mr. Danis merely advised on what works of art to purchase. He (Mr. Dickson) was the ultimate beneficial owner of the art works.
- [6] In 2008 the bearer shares in SPIL were reissued as nominative registered shares in the name of SHR Corporate Services Ltd ("SHR"), a professional service provider. From about this time, SPIL started to deposit monies with a BVI company, called Luchmacher SA ("LSA"). It is common ground that this was meant to be Mr. Danis' company. It is also common ground that the monies entrusted to LSA were (with Mr. Dickson's knowledge and consent) invested by a Swiss gentleman called Caillat ("Mr. Caillat"). It is also common ground that Mr. Caillat was a fraudster who embezzled much of the money invested with him. There was a criminal investigation in Switzerland by the Swiss authorities. Mr. Danis was interviewed in the course of the investigation.
- [7] In April 2012 Mr. Danis was appointed as an additional director of SPIL. He was also appointed as a signatory to the company's bank accounts. Relations between Mr. Danis and Mr. Dickson deteriorated. Whether this was from 2015 or somewhat later is a matter which may need investigating at trial. Around this time too, relations with CSF deteriorated. LPL subsequently commenced litigation in Paraguay in relation to this.
- [8] On 28th October 2019 Mr. Dickson (unbeknownst to Mr. Danis) instructed SHR to transfer the shares in SPIL into his name. The transfer was registered on 6th November 2019. On 4th December 2019 Mr. Danis issued a stop notice in respect of the shares.

Procedural history

- [9] On 17th December 2019, I granted Mr. Danis an *ex parte* injunction against both Mr. Dickson and SPIL. This restrained them from transferring or registering the transfer of the shares in SPIL and from SPIL making any transfers of assets. (The order was much more detailed, but I do not need to set it out in full.) The same day I gave permission to serve the proceedings out of the jurisdiction on Mr. Dickson in Bermuda.
- [10] The claim form was issued on 31st December 2019. (No point is taken on the late issuance.) Against Mr. Dickson it sought a declaration that he held the shares beneficially for Mr. Danis, an order that he transfer the shares to Mr. Danis and an account of monies received from SPIL. Against SPIL, it sought rectification of the share register.
- [11] The return date on the injunction was 14th January 2020. On that date, Mr. McCarroll SC and Ms Thompson appeared for Mr. Danis. Mr. Morgan QC, Mr. Samuel and Ms. Fedotova appeared for Mr. Dickson. Because SPIL was effectively deadlocked, it did not appear. I continued the injunction against SPIL. Mr. Dickson gave undertakings in the same form as the injunction granted on 17th December 2019. These undertakings were expressed to be given “until trial or further order”. The order contained a recital that Mr. Dickson “reserv[ed] his right to seek to challenge service and the jurisdiction of the Court.” In fact, no application to set aside the grant of permission to serve out of the jurisdiction has been made.
- [12] Mr. Morgan QC told me on the hearing of the current applications that Mr. Dickson had made a deliberate decision not to challenge the jurisdiction. Indeed he said:¹ “[M]y client has taken a pragmatic approach that it’s quicker and easier to go to a trial, than have peripheral skirmishes on matters that don’t matter.” I took this to refer as well to the question of full and frank disclosure. Mr. Dickson’s wish appeared to be for the matter to come to trial as soon as possible and he did not wish to trouble the Court with such interlocutory matters.

Mr. Danis’ cross-application for security for costs

- [13] It is convenient to deal with the cross-application for security for costs first. Pursuant to my directions this was argued before me solely on the jurisdictional ground with the substantive merits

¹ Transcript, 13th May 2020 at p 144.

to be determined later, if appropriate. The jurisdictional question is: Does the Court have the power under CPR Part 24 to make an order that a defendant provide security for costs, where the defendant has (at least ostensibly) made no counterclaim? CPR Part 24, so far as material, provides:

“Scope of this Part

24.1 This Part deals with the power of the court to require a claimant to give security for the costs of the defendant.

Application for order for security for costs

24.2(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceedings.

(2) Where practicable such an application must be made at a case management conference or pre-trial review.

(3) An application for security for costs must be supported by evidence on affidavit.

(4) The amount and nature of the security shall be such as the court thinks fit.

Conditions to be satisfied

24.3 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 —

...

(g) the claimant is ordinarily resident out of the jurisdiction.

Security for costs against counter-claiming defendant

24.4 Rules 24.2 and 24.3 apply where a defendant makes a counterclaim as if references in those rules —

(a) to a claimant — were references to a defendant making a counterclaim;

(b) to a defendant — were references to a claimant defending a counterclaim.”

[14] Mr. McCarroll SC in his skeleton argument submits as follows:

“2.3 The defendant states that according to the strict wording of the rule as it has not made a counterclaim or sought relief from the court that the claimant’s application cannot succeed.

2.4 The claimant’s case in this regard is that the court must look to the substance and not the form of the document headed ‘Defence’ and that when that exercise is undertaken it will be seen that in substance (but not in form) the defendant is in fact making a

counterclaim. He is setting out a lengthy case full of positive averments and he is in essence asking the court to hold that he is the owner of the shares. The fact that the word 'Counterclaim' does not appear on the document and the fact that he does not expressly seek relief are not determinative. What matters is what in substance the document contains.

2.5 It is the claimant's case that the omission of a formal and express counterclaim was a deliberate and strategic omission to enable the defendant to try to gain an advantage in the litigation even though the case essentially requires the court to decide which party is the beneficial owner of the shares."

- [15] Mr. McCarroll SC submitted that the Court had an inherent power to make an order for security for costs. I accept that proposition, but the power is subject to the provisions of the CPR (and in relation to companies any provision of the relevant companies legislation). As Lord Scott, giving the advice of the Privy Council on appeal from the Cayman Islands, said in **GFN SA and others v The Liquidators of Bancredit Cayman Ltd (in Official Liquidation)**:²

"It seems to their Lordships clear from the case law dealing with security for costs issues that the court has an inherent jurisdiction to make security for costs orders but that the exercise of that jurisdiction is subject to what has become the settled practice of the court. For example, the rule that an order for security for costs will not be made against a defendant was part of that settled practice. The rule that such an order will not be made against an impecunious plaintiff was also part of that settled practice but was varied by statute in the case of impecunious corporate plaintiffs..."

- [16] Thus, in my judgment Mr. McCarroll SC can only get an order for security for costs, if he can bring himself within CPR Part 24. This he seeks to do by saying that in substance Mr. Dickson is counterclaiming, so that security can be ordered under CPR 24.4.
- [17] The cases on substance over form are, however, concerned with *applications to the Court* which, although not formally counterclaims are nonetheless seeking substantive final relief (as opposed to merely interlocutory orders) against the other side. In **GFN** itself, the applicant was seeking to challenge the rejection of a proof of debt by the liquidators. That was held to be in substance a claim in respect of which security for costs might be ordered. Lord Scott gave the following as examples of applications where the applicant might be ordered to provide security for costs.

² [2009] UKPC 39, [2010] 3 LRC 496, [2010] BPIR 344, [2010] Bus LR 587 at para [9].

“22. ...If a defendant in proceedings commenced by originating summons were to make, by ordinary summons, a claim for relief that constituted, in effect, a counterclaim, and that was not... a mere formulation of its defence, their Lordships would regard as mere pedantry the proposition that a security for costs application could not be entertained because the ordinary summons was not a form of originating process.

23. Consider also the nature of committal applications made by a party to an action on account of an alleged breach of an undertaking to the court or of an interlocutory injunction. Such a committal application could be made by interlocutory application and the hearing of the application would normally be regarded as an interlocutory proceeding (see **Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV (No 2)**³). It makes no sense for the ability of an alleged contemnor to obtain security for costs of the committal application to depend upon whether the application were made by interlocutory application in an existing action or by the commencement of a new action. In either case the nature of the application would be in substance the same. In the former case the applicant for the committal order, whether plaintiff or defendant in the existing action, would be in the position of plaintiff in the committal application and, therefore, a potential object of a security for costs application...

24. Another possible example of the necessity of having regard to substance rather than form might arise in the case of an application to set aside a compromise of an action on the ground of misrepresentation or concealment of material facts. Such an application would usually be made in a new action and there could be no question but that the new action would constitute ‘proceedings’ for the purposes [of the relevant provisions]. But, if the original action were technically still on foot, the application to set aside the compromise could be made by interlocutory motion in the still existing action (see **Gilbert v Endean**⁴ and the remark of Jessel MR⁵ that the object of the motion was to decide ‘a substantial question between the parties’). In such a case the applicant would be in the position of a plaintiff and the respondent in the position of a defendant whatever their respective rôles in the existing action. The ability of the court to entertain an application by the respondent for security for costs of the applicant’s application to set aside the compromise could surely not be denied on the ground that the application was not in form an originating process and so did not constitute ‘proceedings’ for [the relevant statutory] purposes.”

[18] In all of these examples, there is some relief being claimed by the person against whom security for costs is sought. In the current case, Mr. Dickson is merely defending himself. He seeks no relief, save that, if he wins the action, he will no doubt ask for costs and possibly an inquiry into damages under the cross-undertaking given by Mr. Danis.

³ [1988] Ch.422 per Nicholls LJ at p 444

⁴ [1878] 9 Ch D 259.

⁵ At p 266.

[19] Mr. McCarroll SC complains that Mr. Dickson has put up a detailed case with — adding to the opprobrium — lots of “positive averments”. With all due respect, this brings to mind the French adage:

“Ce chien est très méchant. Si l’on l’attaque, il se défend.”

[20] In my judgment, both in form and in substance Mr. Dickson is merely defending himself against the claim brought by Mr. Danis. Mr. McCarroll SC submits that in reality Mr. Dickson is seeking a determination that he is the beneficial owner of the shares in SPIL. I disagree. Mr. Dickson is the registered holder of the shares. He has the legal ownership of them. He does not need to establish anything about the beneficial ownership of them. It is for Mr. Danis to establish that he (Mr. Danis) is the beneficial owner. Mr. Dickson does not need to prove anything; the fact that he makes a positive case does not transform him into a counterclaimant.

[21] In my judgment, the Court has no power under CPR 24.4 to order that Mr. Dickson provide security for costs. Accordingly, I dismiss Mr. Danis’ application for security for costs against Mr. Dickson.

The law on security for costs

[22] Much of the law relating to security for costs is conveniently set out in the judgment of my brother Wallbank J in **Ieremeieva and another v Estera Corporate Services (BVI) Ltd and others**,⁶ who held:

“[18] In **Hualon Corporation (M) SDH BHD v Marty Ltd**⁷ this Court adopted as relevant to the exercise of its discretion under CPR 24.3 the guidance set out in the English Court of Appeal case of **Keary Developments Ltd v Tarmac Construction Ltd**,⁸ which is as follows:

‘1. As was established by this court in **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd**⁹ the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason

⁶ BVIHCM 2017/0118 (delivered 4th April 2019).

⁷ BVIHC (COM) 2014/0090 (delivered 20th January 2016), at para [18] *per* Farara J (Ag).

⁸ [1995] 3 All ER 534, at pp 539h-540j.

⁹ [1973] QB 609.

for not ordering security: see **Okotcha v Voest Alpine**¹⁰. By making the exercise of discretion under section 726(1) [of the **Business Companies Act 2004**¹¹] conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (**Pearson v Naydler**¹²).

3. The court must carry out a balancing exercise. 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 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 (**Farrer v Lacy Hartland & Co**¹³). 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 (**Pearson v Naydler** *supra* at p 906).

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success (**Porzelack KG v Porzelack (UK) Ltd**¹⁴). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see **Roburn Construction Ltd. v William Irwin (South) & Co Ltd**¹⁵).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (**Trident International v Manchester**

¹⁰ [1993] BCLC 474 at p 479 *per* Bingham LJ with whom Steyn LJ agreed.

¹¹ No 16 of 2004, Laws of the Virgin Islands.

¹² [1977] 1 WLR 899 at p 906 *per* Sir Robert Megarry V-C.

¹³ (1885) 28 Ch. D. 482 at p 485 *per* Bowen LJ.

¹⁴ [1987] 1 WLR 420 at p 423 *per* Sir Nicolas Browne-Wilkinson V-C.

¹⁵ [1991] BCC 726.

Ship Canal¹⁶). In the **Trident** case there was evidence to show that the company was no longer trading, that there had been evidence that it had previously received support from another company, which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the Judge in that case did not think, on the evidence, that that company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the Court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons.”

[19] Where ground (g) is invoked, this Court has expressed the view (*per* Bannister J, in **Wang Zhongyong v Union Zone Management Ltd**¹⁷) that

‘...the underlying risk against which an order for security is made in such circumstances is that enforcement in the jurisdiction where the non-resident claimant is to be found (or, perhaps, where his assets are to be found) will be so problematic that the only just course is to protect the defendant by making an order for payment of security for the costs of the proceedings in question.’

[20] In the English Court of Appeal it has been held that the relevant question for these purposes is not whether there are likely to be substantial obstacles to (or an additional burden of) enforcement, but whether there is a real risk that there would be: **Bestfort Developments LLP v Ras Al Khaimah Investment Authority**.¹⁸

‘In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that “on objectively justified grounds relating to obstacles to or the burden of enforcement” there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be “a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden” but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test was one of “likelihood”, which involved demonstrating that it was “more likely than not” (i.e. an over 50% likelihood), or “likely on the balance of probabilities”, that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents...’

¹⁶ [1990] BCLC 263.

¹⁷ Claim No. BVIHC (Com) 0126 of 2011 (delivered 21st March 2013) at para [11].

¹⁸ [2016] EWCA Civ 1099 at para [77] (Gloster LJ).

[21] Moreover, once that risk is established, it is not appropriate for the court to discount the security ordered to reflect the fact that the risk is not high on the scale of probabilities: **Chernukhin v Danilina**.¹⁹ In that case, the principles applicable to the corresponding English rule were stated as follows:

(1) For jurisdiction under CPR 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR 25.13(1) if “it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.”

(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 [of the European Convention on Human Rights] – see **Bestfort** at [50]-[51].

(4) This requires “objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned” – see **Nasser**²⁰ at [61] and **Bestfort** at [51].

(5) Such grounds exist where there is a real risk of “obstacles to enforcement” or of an additional burden in terms of cost or delay – see **Bestfort** at [77].

(6) The order for security should generally be tailored to cater for the relevant risk – see **Nasser** at [64].

(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings – see, for example, the orders in **De Beer** and **Bestfort**.

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement – see, for example, the order in **Nasser**.”

[23] To that overview of the authorities, I would only add a further passage from Bannister J’s judgment in **Wang Zhongyong**, where he identifies that a relevant feature is this:

¹⁹ [2018] EWCA Civ 1802 at para [64].

²⁰ **Nasser v Bank of Kuwait** [2001] EWCA Civ 556, [2002] 1 WLR 1868.

“16. Finally, the defendants... set up the first defendant company in this jurisdiction and they and the defendants enjoyed and enjoy the advantages and benefits which that brings. The appropriate forum — indeed, the only forum — for a dispute of the sort with which these proceedings are concerned is the BVI. For the defendants to contend that the claimants cannot litigate that dispute in the only available forum for its resolution without providing security for all the defendants’ costs seems to me, in all the circumstances, nothing more than a cynical manoeuvre. Absent [special circumstances], persons who seek resolution of disputes involving BVI incorporated companies should be able to bring their cases here without the fear that they will be met with an order that they first pay into Court the entirety of the defendants’ costs of the proceedings. Each case turns on its own particular facts, but as a matter of general principle I am not afraid to say that the Courts of the BVI will need to be given compellingly persuasive reasons why in cases of this sort security for costs should be ordered on the grounds only that the claimant is ordinarily resident out of the jurisdiction.”

[24] The claim there was for unfair prejudice (and therefore one over which the BVI have exclusive jurisdiction), but Bannister J’s reference to the “resolution of disputes involving BVI incorporated companies” is broader than that. How broad, I shall discuss when reaching my view on whether security should be ordered.

[25] The only ground under which security for costs is sought against Mr. Danis is CPR 24.3(g). It is common ground that Mr. Danis currently lives in the Bahamas, so that there is jurisdiction to order that he provide security for costs. In determining whether to order him to give security, I have to consider all the considerations outlined in **Ieremeieva**. However, the following matters were particularly relied upon by both sides: (a) the strengths and weaknesses of Mr. Danis’ case against Mr. Dickson; (b) the ease of enforcement against persons resident in the Bahamas and whether it was relevant to Mr. Danis’ situation; (c) whether this is a “BVI company case” within Bannister J’s formulation in **Wang Zhongyong**; and (d) whether Mr. Danis had shown he was good for any costs order.

(a) The strengths and weaknesses of the parties’ cases

[26] As to (a), I am very mindful of the **Porzelack** point. On an application of this sort, the Court “should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.” In particular, it is not appropriate to carry out some form of mini-trial with minute examination of the evidence. Instead, the Court has to wield a broader brush and

see whether the evidence points all one way. If the evidence is more evenly balanced, then that is a factor (but only one factor) against ordering that security be given.

[27] Mr. Morgan QC in my judgment attempted to carry out a mini-trial. He took me on an extremely painstaking view of the documentation which, he said, supported Mr. Dickson's case. The degree of detail can be seen from his treatment of a document dated 3rd August 2016 which Mr. Danis gave to the Swiss prosecution authorities to show his background in football. In it,²¹ Mr. Danis said in the English translation: "PMD [Mr. Dickson] is a shareholder of SPIL, in which I have an economic interest resulting from my father's initial investment." Mr. Morgan said that this was in fact a poor translation. The original read: "PMD est actionnaire de SPIL, dans laquelle j'ai un intérêt économique résultant de la mise de fonds initiale de mon père." In other words, Mr. Dickson was not just a shareholder: he was the *only* shareholder. In my judgment this approach to the evidence might be appropriate at trial, but not on an application for security for costs.

[28] It is, however, right to say that there are a large number of documents which do support Mr. Dickson's case that he is the beneficial owner of SPIL. I can only refer to a small selection. In late 2015, Mr. Dickson sent a detailed letter to Conyers, his current legal representatives. He was seeking to instruct Conyers on behalf of SPIL and LPL in relation to an investigation which the United States Department of Justice ("the DoJ") was carrying out into alleged corruption by CSF in the Copa Libertadores. (Mrs. Danis eventually pleaded guilty to some charges brought by the DoJ.) In the letter he said he was the beneficial owner of those two companies. That letter was copied to Mr. Danis. He clearly read it with care, because he corrected a couple of minor points in it. He did not challenge Mr. Dickson's assertion of ownership.²² In an email of 7th December 2015 from Mr. Danis to Mr. Dickson about the DoJ charges, he says the indictment of Mrs. Danis "couches your company, you and me as 'ISM affiliates' — which we are not."²³

[29] In 2008 and 2009 there were letters providing variously for SPIL to pay Mr. Danis a 5 per cent commission on business he brought in; for SPIL to invest monies with Luthmacher SA (the ill-fated investment with Mr. Caillat); and for conversion of the 5 per cent of shares held by Mr. Danis' father

²¹ Bundle G1/41/596 (English translation) and 575 (French original). Mr. Morgan QC's submissions are at page 85 of the transcript of 13th May 2020.

²² Bundle J/2/221 (letter) and 219 (email).

²³ Bundle J/2/210.

into a share of profits in the Copa Libertadores with a promissory note being given for \$7.5 million.²⁴ Further in the year ending 31st December 2015, SPIL paid Mr. Dickson a dividend of \$2 million and in 2016 of \$11.2 million.²⁵ Mr. Danis would have had sight of these accounts. None of this is readily consistent with Mr. Danis being the beneficial owner of SPIL.

[30] There are also many communications between Mr. Danis and Mr. Dickson about the art collection being acquired for SPIL. On their face, these show Mr. Danis taking instructions from Mr. Dickson on purchases and seeking Mr. Dickson's agreement on matters of storage, including taking a lease of premises in New York.²⁶ Again, none of that would have been necessary if Mr. Danis was the ultimate beneficial owner of the art collection.

[31] If these documents all stood on their own, then they would show that Mr. Dickson has a strong case. However, they do not stand alone. Of particular importance are two "pledge letters" of 2nd June 2005 and 31st October 2007 signed by Mr. Dickson.²⁷ These are homemade documents, apparently drafted by Mr. Danis, but printed on Mr. Dickson's personal stationary. They are not completely identical, but the material sections are and read:

"Dear Jean-Louis,

This letter confirms my pledge to you to remit and transfer all outstanding shares of [SPIL] to you or the party that you shall designate upon the occurrence of the following event(s):

- a) Automatically upon my death, insanity, or permanent disability;
- b) Your written request addressed to me to that effect;
- c) The contemplated dissolution of the Company;
- d) The contemplated distribution of assets of the Company.

Upon the transfer [of] such shares, you, or such party that you shall designate, shall become, and be reported, as the beneficial owner of the Company."

[32] The 2007 letter has a hand-written note: "Extension: I hereby extend the validity of this letter of instruction and transfer to December 31, 2019. Executed May 8, 2017."

²⁴ Bundle J/2/69, 73 and 86.

²⁵ Bundle J/2/349.

²⁶ For example, Bundle J/2/57 and 61.

²⁷ Bundle G1/40/70 and 71.

- [33] On their face, these letters support Mr. Danis' case that he is the beneficial owner of SPIL. Mr. Dickson accepts the genuineness of the letters, but he says they were intended as a front. He (Mr. Dickson) was involved in unrelated litigation and was anxious to ensure that his assets were placed outside the reach of his potential creditors. It was in that context that he signed the pledge letters, which were not intended to have legal effect as between him and Mr. Danis. I cannot possibly determine this issue on this application, but on any view Mr. Dickson's case on this does not reflect well on his commercial morality.
- [34] Mr. Danis also makes a more general point about the start of the relationship between the two men. Mr. Dickson was joint owner of Guardian. He was providing corporate and fiduciary services. The only purpose of Mr. Danis' initial approach would, he says, have been to obtain such services from Mr. Dickson or Guardian. Later, when the CSF opportunity arose, there was no reason for him to give all the benefit of the contract to Mr. Dickson. Mr. Danis had already found a sponsor. Cash-flow was likely to be tight, at least in the initial season. However so far as it appears from the evidence to date, Mr. Dickson was not putting himself at any financial risk. He was not providing guarantees of SPIL's liabilities or injecting substantial capital sums. It is not obvious why Mr. Danis would give Mr. Dickson this business opportunity at very little cost to Mr. Dickson, particularly when the rewards which Mr. Danis might expect were so ill-defined.
- [35] Before standing back and expressing my views on the relevant strength and weakness of the opposing cases, I should mention two factual matters on which I have placed no reliance on this application.
- [36] First, Mr. McCarroll SC sought to rely on adverse comments made by Nugee J in the English Chancery Division about Mr. Dickson in a case called **Sir Owen Glenn KNZM ONZM and another v Eric John Watson (personally and as the trustee of the Richmond Trust) and others**.²⁸ Mr. Dickson was not a party to that action, but he had been the sole director of a company called Kea Investments Ltd, which was a party. The judge's comments are these:

446. ...[Counsel] submitted that Mr Dickson did not exercise his powers [as director] for a proper purpose because there was no need to enter into the July agreements in July 2012 at all: there was no imminent transaction, and there was a strong reason not to enter into

²⁸ [2018] EWHC 2016 (Ch) at para 443ff.

the agreements at a time when the underlying rights contemplated by schedule 2 had not yet been agreed. Her submission was that the real reason for going ahead with the July agreements was the desire to get money out of the trust and into Spartan before Sir Owen could take any steps to prevent it, and that that could not be a proper purpose. There is I think considerable force in that submission: see Mr Leahy's evidence in relation to the Los Angeles meetings on 10 and 11 July that they wanted to "*get the capital safe*"....

447. But so far as I can see this case is not pleaded."

- [37] Mr. Morgan QC objected to the admissibility of this judgment under section 90 of the **Evidence Act 2006**.²⁹ In the course of the hearing I gave an oral judgment in which I held that it was admissible on an interlocutory hearing and at trial might be cited as going to Mr. Dickson's credit. Nonetheless, I also indicated that the weight which might be attached to it in determining the application for security for costs might be very little. In my judgment, the observations of Nugee J go only to credit. There is no basis for saying that the facts of **Glenn** are admissible as similar fact evidence. On an interlocutory application, it will only be in an unusual case, that a judge has to assess credibility. That is a matter for live evidence at trial. Accordingly I disregard **Glenn** in deciding the current application.
- [38] Second, I have not taken account of the picture printed on Mr. Dickson's personal correspondence. With hindsight, and in the light of Mr. Danis' allegations, his choice of drawing is from a forensic point of view unfortunate, but I attach no weight to the drawing of a one-eyed eighteen century pirate with skull and cross-bones embroidered on his hat.
- [39] Standing back and looking at the evidence adduced at this stage on each side's behalf, I cannot say that the merits are obviously in favour of either Mr. Danis or Mr. Dickson. This is a case which will depend on the evidence of which of the two men the Court prefers. One or other (or potentially both) are not telling the truth. The documentary evidence does not in my judgment permit even a preliminary view on that key question.
- [40] There is another basis for reaching the same view. It will be recalled that I granted Mr. Danis an *ex parte* injunction against Mr. Dickson. On the return date, Mr. Dickson gave undertakings until trial or further order. Now it is well established that a party in order to obtain a freezing order must

²⁹ No 15 of 2006, Laws of the Virgin Islands.

show a “good arguable case”. Further a party making an application *ex parte* owes a duty to the Court of full and frank disclosure. By giving undertakings on the return day, in my judgment Mr. Dickson was accepting (even if only for forensic purposes) that Mr. Danis had established a good arguable case within the meaning of the caselaw and that there had been no material non-disclosure on the *ex parte* hearing. By making such concessions, Mr. Dickson in my judgment was conceding that Mr. Danis had a case (albeit one which may have had a less than 50 per cent chance of succeeding) of sufficient strength to justify an injunction.

- [41] Likewise, he could have, but did not, challenge the disclosure given by Mr. Danis on the *ex parte* application. In general, the question whether a party has or has not complied with a duty of full and frank disclosure on some different occasion will not be relevant to whether security for costs should be ordered. I accept that there may be rare cases where a sufficiently serious breach of such a duty shows that the party in breach is a slippery individual who is not to be trusted. In the current case (even assuming Mr. Dickson can take the point after giving the undertakings), the criticism of the disclosure on the *ex parte* application is not that the thrust of Mr. Dickson’s case was not placed before the Court, but rather that the full (allegedly crushing) force of Mr. Dickson’s case (including all the documentation which I have summarised above) was not expressly referred to before the Court. Even if Mr. Dickson were right that more disclosure should have been made, this is not a case where the failure to disclose was in my judgment so egregious that strong inferences should be drawn against Mr. Danis in relation to security for costs.

(b) The ease of enforcement against persons resident in the Bahamas

- [42] There is mutual recognition of judgments between this Territory and the Bahamas, so that in principle a costs judgment given after trial can be enforced there. Mr. Morgan QC submits, however, that Mr. Danis has not shown what assets he holds. Mr. Danis’ residence in the Bahamas appears to be held by a company, the ultimate beneficial owner of which is unclear. Further, Mr. Danis, as an international businessman, can move his residence elsewhere.
- [43] Mr. Danis has produced a letter from his bank which shows that he has US\$5 million standing to his credit. This, he says, shows that he is a man of substance. Mr. Morgan QC points out (and I accept) that the money could have been borrowed and in any event might well disappear if any substantial costs order was made against Mr. Danis. Mr. Danis has not voluntarily produced any

information as to his assets, apart from the \$5 million. I note, however, that, when the injunction was continued on undertakings, Mr. Dickson did not ask that Mr. Danis fortify his cross-undertaking in damages by providing security.

- [44] Standing back, it is not in dispute that a BVI costs order will be recognised in the Bahamas. It is true that Mr. Danis has not made any disclosure of his assets. On the other hand, he is not obliged to do so. He appears to be a wealthy man. There is no reason to suppose that the procedures in the Bahamas for the enforcement of judgment debts will be ineffective. Mr. Dickson has in my judgment failed to show “objectively justified grounds relating to obstacles to or the burden of enforcement”. Accordingly, I attach little weight to this consideration.

(c) A BVI company case

- [45] In **Wang Zhongyong**, Bannister J indicated that a defendant’s choice of this Territory for establishing a company was a material factor. It would be an exceptional case where security for costs would be ordered where a case was all about BVI company law. By exceptional case, I do not use that description of “exceptional” as a jurisdictional threshold to be overcome. I merely mean that cases where security will be ordered are likely to be rare.
- [46] In the current case, the claim for rectification of the register of shareholders is one which can only be brought in this jurisdiction. That is undoubtedly a factor which has to be taken into account. However, it is not in my judgment as significant a feature as the situation of the claimants bringing an unfair prejudice petition in **Wang Zhongyong**. The real battle in the current case is who owns the shares in the company beneficially. That is an issue external to the company, whereas an unfair prejudice application is a matter of the internal governance of a company.
- [47] Unlike in **Wang Zhongyong** it would have been perfectly possible for Mr. Danis to have sued Mr. Dickson in Bermuda, where Mr. Dickson lives. If he had obtained a declaration from the Bermudan courts that he was the beneficial owner of SPIL, I have little doubt that that would have been recognised by the Courts of this Territory. It was not *necessary* for Mr. Danis to sue in the BVI. Nonetheless in my judgment, this case is fundamentally about a BVI company. From 1999 (or 1993), when the two men started to do business together, the vehicle used for this mutual business was this BVI company, SPIL. The position of SPIL is central to the dispute. There may be many

cases where it is purely happenchance that a BVI company is pulled into a dispute. This, however, is not one. From the outset the two men agreed that their business together was to be conducted through one, and only one, BVI company. The natural venue for two men — one living in the Bahamas, the other in Bermuda — to litigate about the terms of the business which they conducted through the BVI company is the BVI.

- [48] In my judgment, this case falls within what I will describe as Bannister J's general guidance (it is not a rule) that "persons who seek resolution of disputes involving BVI incorporated companies should be able to bring their cases here without the fear that they will be met with an order [for security for costs]." It is not an absolute principle. Each case has to be considered on its own facts. But it is a material, and indeed will often be a very material, factor.

(d) Whether Mr. Danis is good for any costs order

- [49] The main point made by Mr. Morgan QC is that Mr. Danis has not disclosed details of his assets, so that it is impossible to assess whether a costs order would be enforceable. There is something paradoxical about this submission. If Mr. Danis was impecunious, then that would be a material consideration *against* ordering that he give security for costs. It is well established that a man should not be turned away from the judgment seat on the grounds of his poverty. Security for costs will not be ordered against an individual in a sum which the individual cannot raise. (It is potentially otherwise as regards impecunious companies: see above.) However, the fact that a man *is able* to provide security for costs, is not in my judgment *just of itself* a reason for ordering that he do so.

- [50] If this were otherwise a case in which security for costs should be ordered, I would order that security be provided in the full sum sought of \$1.8 million. Since he has shown he had \$5 million in bank account, there would be no difficulty his complying with such an order. However, I first need to stand back and weigh all the factors for and against ordering that security for costs be provided.

Conclusion on ordering security for costs

- [51] I therefore look whether in my discretion this is a case where I should order security for costs. An important factor is that each side has a properly arguable case. The merits are not overwhelmingly one way or the other. Another important factor is that this is a case about a BVI company. True it

is that Mr. Danis could have sued Mr. Dickson in Bermuda, but the BVI are a natural venue for the case. Although the arguments for suing in this Territory are not as overwhelming as they were in **Wang Zhongyong**, they are nonetheless a good reason for not ordering security. As to enforcement, a BVI judgment is readily enforceable in the Bahamas. Mr. Danis appears to be wealthy man. Of course in any case there is a risk that an apparently wealthy man will conceal his assets, but any risk of dissipation is in my judgment speculative.

- [52] In my judgment, all these considerations point in one direction. The first two factors in the previous paragraph are of particular weight. In the exercise of my discretion, I refuse to order that Mr. Danis provide security for costs.

The application for disclosure

- [53] I turn then to the last part of Mr. Dickson's application, the application for an order that Mr. Danis disclose his world-wide assets insofar as their value exceeds \$10,000. The way this is put by Mr. Morgan QC is that Mr. Danis has given a cross-undertaking in damages as part of the injunction granted, first *ex parte* and then *inter partes* by agreement. Since, if Mr. Danis loses his claim, he may be called upon to honour his undertaking, it may be necessary for Mr. Dickson in due course to seek a freezing order against him.

- [54] CPR 17.1(1)(e) provides that the Court may grant an interim remedy of:

“an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;”

- [55] Thus the Court has the power to grant such an order. In the current case, however, Mr. Dickson has consented to a continuation of the *ex parte* order obtained by Mr. Danis. If he was worried about Mr. Danis' willingness or ability to honour his cross-undertaking in damages, he could have sought an order that Mr. Danis fortify his undertaking by providing security. His failure to do that is in my judgment a very material consideration on the current application. In the absence of any change of circumstances (and none is suggested), Mr. Dickson is in my judgment bound by his decision not to seek any such relief on the continuation of the injunction.

[56] Even if I were wrong in that conclusion, however, there is a problem in seeing what losses Mr. Dickson would suffer. If, for example, Mr. Danis ran off with the art collection, the claim under the cross-undertaking would be SPIL's claim, not Mr. Dickson's. In general a shareholder cannot claim losses suffered by a company, even where the company is wholly owned by that shareholder. It would be allowing damages for a reflective loss. Mr. Morgan QC cited no authority which would permit a shareholder, such as Mr. Dickson, to recover such losses under a cross-undertaking given to him (as opposed to the company). In my judgment there is no legal basis for such a claim by Mr. Dickson.

[57] For both these reasons, therefore, I refuse this application for disclosure of assets.

Conclusion

[58] Accordingly, I refuse both limbs of the first defendant's application on their merits. I dismiss the claimant's application for want of a power to make the order sought.

Justice Adrian Jack (Ag)
Judge of the Commercial Division

By the Court

Registrar