HC07C02432/HC07C02428

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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice,
Strand
London WC2A 2LL

Friday, 5th December, 2008

BEFORE:

SIR DONALD RATTEE

BETWEEN:

OVLAS TRADING SA

Claimant

-v-

STRAND LONDON LIMITED & OTHERS

Defendants

And

(1) GOLFRATE AFRICA LIMITED
(2) GOLFRATE HOLDINGS ANGOLA LIMITADA
(3) OVLAS TRADING SA

Claimants

-v-

(1) MR AZIZ
(2) MR NOAK

Defendants

MR D LIGHTMAN appeared on behalf of the Claimant.
MR T WEISSELBERG appeared on behalf of the Defendants.

APPROVED JUDGMENT

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JUDGMENT

SIR DONALD RATTEE:

1. There are two actions before me on this application, both of which are going to be tried together, as I understand it, at a date fixed towards the end of April 2009. In the first action the claimant is a company called Ovlas Trading SA, which is a company registered in the British Virgin Islands ("Ovlas"). The defendants are three in number, namely Strand London Limited ("Strand"), a company incorporated in the Isle of Man, and two individuals, Mr Aziz and Mr Noak. In the second action there are three claimants: firstly, Golfrate Africa Limited ("GAL"), a company incorporated in the Isle of Man; secondly, Golfrate Holdings Angola Limitada ("GHAL"), a company incorporated in Angola; thirdly, Ovlas. The defendants in that action are Mr Aziz and Mr Noak.

2. On 13th June 2005 Ovlas agreed to buy and Strand agreed to sell the entire issued share capital of GAL in accordance with the terms of a share sale and purchase agreement which had been entered into between Ovlas and Strand. The consideration for the sale of the shares was US$22 million. Ovlas, in making the purchase, intended to obtain control of GHAL. Strand was a holding company wholly owned by a body called the Aziz Continuation Trust. It was introduced into the corporate structure to hold all the issued shares of GAL and to effect the sale of GAL to Ovlas. Under the terms of the share sale agreement, of the total consideration to be paid by Ovlas for the shares in GAL the sum of US$1 million was placed in escrow in a retention account. That sum was intended to provide Ovlas with a fund out of which monies could be paid in the event that certain limited contractual warranties which had been given by Strand concerning the completion balance sheet of GHAL for the purpose of the share sale agreement proved to be incorrect. On 11th July 2005 Ovlas gave notice to Strand that it did not accept the accuracy of the figures in the completion balance sheet. As a result of that, the parties entered into an expert determination in accordance with the provisions of the share sale agreement, and on 11th October 2006 Mr Phillip Haberman of Ernst & Young gave his determination as to the manner in which the sum held in the retention account should be distributed. He found that the sum of US$727,362 should be payable to Ovlas out of that account. That money has remained in the escrow account in this country and Ovlas has agreed that it can be available to the defendants to the actions as security for any costs awarded against Ovlas. That agreement by Ovlas was given by it as part of a deal whereby Strand agreed that the share of the $1 million retention account which would otherwise be left to be distributed to Strand should not be so distributed for the time being but should also remain available in the escrow account and so be available to meet any order in favour of the claimants.

3. On 26th November 2007 claim forms and particulars of claim in the two actions before me were served. In the first action Ovlas seeks damages for alleged fraudulent misrepresentations in relation to the sale of the shares in GAL by Strand to Ovlas. In the second action Ovlas, GAL and GHAL seek compensation for alleged breaches of fiduciary duty in relation to the affairs of

GHAL by Mr Aziz and Mr Noak. On 17th March of this year a case management conference in relation to both actions took place. On 31st July the defendants served an application for security for costs, which is now before me.

4. The application for security was made under the provisions of CPR rule 25. Rule 25.12 makes provision for a defendant to any claim to make an application for security pursuant to that rule. The particularly relevant part of the CPR rule for the purposes of this judgment is rule 25.13, of which I should quote the relevant parts:

   > (1) The court may make an order for security for costs under rule 25.12 if –
   > (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
   > (b) (i) one or more of the conditions in paragraph (2) applies, or
   > (ii) an enactment permits the court to require security for costs.
   >
   > (2) The conditions are –
   > (a) the claimant is –
   > (i) resident out of the jurisdiction…;
   > (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so…"

5. Condition (a) in rule 25.13(2) is satisfied in the present case, because all the claimants in the case of both actions are resident out of the jurisdiction. This does not mean that an order should necessarily be made for security in favour of the defendants, but gives the court a discretion to make such an order if satisfied that, having regard to all the circumstances of the case, it is just to do so.

6. I was referred to a decision of the Court of Appeal in Nasser v The United Bank of Kuwait [2002] 1 WLR 1868 and, in particular, to a passage in the judgment of Mance LJ (as he then was) at paragraph 62 of the report. There Mance LJ said:

   > "The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some—it may well be many—cases there are likely to be substantial obstacles to, or a substantial extra burden (e g, of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state. In so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as *do* exist abroad or (ii) as a practical matter, to make it more likely that the claimant would take advantage of any

> available opportunity to avoid or hinder such enforcement abroad.
>
> 63. It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).
>
> 64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases—particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920)—it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden."

7. In fact, the British Virgin Islands are a country such as referred to by Mance LJ which has introduced legislation equivalent to Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 or Part 2 of the Administration of Justice Act 1920. Condition (c) in 25.13(2) will also be satisfied in relation to each of the claimants if there is reason to believe that the claimant concerned will be unable to pay the defendant's costs if ordered to do so.

8. On this condition I was referred to a decision of Park J in Longstaff International Limited v Baker & McKenzie [2004] 1 WLR 2917 and, in particular, to a passage of his judgment starting at paragraph 17 of the report:

> "I move therefore to rule 25.13(2)(c). Mr Bacon says that that condition applies, and I agree. An important point on the sub-

paragraph is that it (or the equivalent wording in section 726 of the Companies Act 1985) will be satisfied if, upon the trial going against Longstaff and that company being ordered to pay Baker & McKenzie's costs within the normal sort of timescale (usually 14 days) Longstaff could not, by reason of illiquidity, pay them. Longstaff, I imagine, could pay in the end, but the nature of its asset position is such that it could not pay with any high degree of promptness. Longstaff, in my judgment, could not say that rule 25.13(2)(c) does not apply to it because eventually it would be able to realise its asset (being the shares in Redwell). There is no suggestion that those shares could be realised at short notice.

18. In this connection I refer particularly to the decision of Sir Donald Nicholls V-C in *In re Unisoft Group Ltd (No 2)* [1993] BCLC 532, 534. His Lordship said: "the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met?" On the facts Sir Donald Nicholls V-C's answer to the question was no. Therefore security was ordered. Of course the facts of that case could differ relevantly from the facts of this case, but on the whole it appears to me that they do not. I quote two other passages from the judgment which, I suggest, indicate that there is an underlying affinity between the circumstances of that case and the circumstances of the present case. The two passages which I will quote are at p 535:

'There is an overall surplus of net assets of £2,146,441. The fixed assets consist almost exclusively of property, held for investment and development.'

'On the basis of this financial information, in my view if the petition fails SHL will be unable to pay a substantial costs bill as it falls due. SHL has no cash, and substantially its only current asset is not readily realisable. So SHL would have to obtain a loan. It is possible that its bank would be prepared to make an advance for this purpose. That is possible. It is also possible that money might be coming from another source, for example its controlling shareholder. However, there is no evidence before me on these points. There is no letter from the bank. Nor, on the figures I have summarised, is it at all obvious that a loan of a six-figure sum would be forthcoming when sought. As matters now stand, therefore, SHL will be unable, on the evidence before me, to meet a significant costs order if one is made next May.'"

9. In this context I was also referred to <u>Jirehouse Capital v Beller</u> [2008] EWCA Civ 908, in which Arden LJ also referred to the judgment of Sir Donald Nicholls VC in the <u>Unisoft</u> case, which was referred to by Park J in the passage I have just read from <u>Longstaff</u>. At paragraph 23 of the judgment in <u>Jirehouse Capital</u> Arden LJ said:

The relevant passage in the judgment of Sir Donald Nicholls VC

in *Unisoft* was as follows:

‘Before me there was a dispute between the parties on the proper interpretation of s 726(1) [of the Companies Act 1985] and, in particular, of the effect of the words 'if it appears by credible testimony that there is reason to believe'. Mr Potts QC, for the respondents to the petition, submitted that the question is not whether the court is satisfied on the balance of probabilities that if the plaintiff loses it will definitely be unable to pay the costs of the defendants; the test is whether there is reason to believe, being a belief derived from credible evidence, that the company will be unable to pay if it loses. If there is such evidence, the threshold requirement is satisfied even though there may be contrary evidence from the plaintiff company.

I start consideration of the subsection by noting that the phrase 'the company will be unable to pay the defendant's costs if successful in his defence', is clear and unequivocal. The phrase is 'will be unable', not 'may be unable'. 'Inability to pay' in this context I take to mean inability to pay the costs as and when they fall due for payment. Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met. The court will draw appropriate inferences and here, as elsewhere, it will not let common sense fly out of the window.

The phrase 'the company will be unable to pay' is preceded by the words 'if it appears by credible testimony that there is reason to believe'. I do not think this latter phrase has the effect of watering down the words which follow. The court, on the basis of credible testimony, must have 'reason to believe', that is, to accept, 'that the company will be unable to pay'. If this were not so, and the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. It cannot, surely, suffice that the applicant's accountant, for example, who is a credible witness, puts forward a case of inability to pay. If there is conflicting evidence the court must have regard to that also. The court must reach a conclusion on the basis of the totality of the evidence placed before it, giving such weight to the various matters deposed to as is appropriate in the circumstances. The matter on which, in the end, the court is required to reach a conclusion is whether the company will be unable to pay.’”

Then at paragraph 24 Arden LJ, having cited that passage from Sir Donald

Nicholls' judgment, continued thus:

> "In my judgment, Mr Driscoll is correct in his submission that the Vice Chancellor was primarily concerned with answering the submission by counsel that if there was evidence which could be described as credible testimony that the company would not be able to pay the costs if ordered to do so, the threshold requirement in s 726 was satisfied even though there might be contrary evidence from the company. The answer given by the Vice-Chancellor contains a number of points. First, as the Vice-Chancellor makes clear, the phrase "the company will be unable to pay" requires more than simply that there is doubt whether the company will pay. Otherwise the second limb would have to say "the company may be unable to pay the costs". Secondly, the Vice-Chancellor holds that the court must have regard to conflicting evidence. The court must reach its conclusion as to whether the conditions in the statute are satisfied by reference to the totality of the evidence."

That, of course, was a passage (as was Sir Donald Nicholls' judgment) directed to section 726 of the Companies Act, but in relation to the proper construction of the words "the company will be unable to pay" it seems to me to be as valid equally in relation to an application under CPR 25.13.

10. Finally on the principles applicable to an exercise of the court's discretion under CPR 25.13 I was referred to Keary Developments Limited v Tarmac Construction Limited [1995] 3 All ER 534. At page 540D Peter Gibson LJ said:

> "In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it 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 (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). 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 acknowledgement not so much of the prospects of success but of the nuisance value of a claim."

So there Peter Gibson LJ was considering further matters which a court has to take into account in exercising the discretion conferred on it by CPR 25.12 and 25.13.

11. Such then is the applicable law to which I was referred in the course of the hearing. Further facts relevant in the light of the law are as follows.
    1. Ovlas' only asset is all the issued shares in GAL.
    2. GAL's only asset is its 100% interest in GHAL. The available financial

statements regarding GHAL show it as owing a debt of more than US$28 million to GAL, though for some reason this loan is not reflected in GAL's accounts. The accounting records of GAL and GHAL are unsatisfactory in various respects. We have no audited account for GHAL. Apparently there is no legal requirement in Angolan law for such accounts. However, on the evidence before me GHAL is a thriving Angolan company in the business of the sale of imported food and other consumer products which has had distribution contracts with such companies as Nestlé and Kraft. It appears from unaudited financial statements relating to GHAL that it had as at 30th September 2008 net assets of more than $54 million and an average monthly profit after tax of some $1.3 million in the 9 months ending 30th September 2008. I accept that these figures must be treated with some caution, but on the evidence before me it appears that GHAL is a very substantial company.

3. It has come to the knowledge of the claimants very recently that although Ovlas bought GAL from Strand on the common understanding that GAL carried 100% ownership of GHAL, the legal ownership of shares (or "quotas" as they are known in Angolan law) in GHAL has never been transferred to GAL but is currently registered in a company called Manorbridge Limited, another Isle of Man company, whose shareholders and directors are the same as the shareholders and directors of Strand. The defendants have made it clear that, not surprisingly, none of them claims any beneficial interest in GHAL, but Strand has failed to take the necessary steps to vest legal ownership of GHAL in GAL, which it is clearly bound to do pursuant to the sale agreement between it and Ovlas. Much, in my judgment, to the defendants' discredit, they sought to rely before me on this defect in GAL's title caused by Strand as a reason which would make enforcement of the costs order against the claimants more difficult and, therefore, favour security for costs. I find this a cynical attempt by the defendants to take advantage of the wrong of at least one of their number which casts some doubt, in my judgment, on the bona fides of the defendants in making this application. Otherwise, I ignore this defect in GAL's title, for it is in the power of the defendants as a group to rectify the position at their will.

4. Enforcement of a costs order against Ovlas in the British Virgin Islands would, subject to the question of liquidity, be a relatively simple matter, as indeed would enforcement against GAL in the Isle of Man. Enforcement against GHAL in Angola would be much more problematic, involving a delay, according to evidence I have read, of between one and five years as well as significant expenses of perhaps $77,000.

5. On 22nd November 2007 the defendants made an open offer to the claimants which I should read. It is in a letter from Mishcon De Reya, who were then the solicitors for the defendants, addressed to Peters & Peters, who were then solicitors for the claimants. It says this, and I read it in full:

> "It appears to us that the commercial basis of your clients' position rests on their dissatisfaction with the business they purchased through the Sale and Purchase Agreement in June 2005 ('the SPA') and relates largely to 'losses' they claim to have suffered as a result. Of course, the agreement which they concluded was freely negotiated on the basis of legal advice. For the reasons that we have already stated, our clients deny your clients' claims but are prepared to adopt a commercial approach

in seeking to address your clients' dissatisfaction. Against this background, and subject to contract, our clients repeat their open offer to repurchase the shares that were sold to your clients and to take back the business. To do this, they are prepared to pay your clients the original purchase price together with an additional premium. Our clients' offer is as follows:

1. They will pay the original purchase price, subject to an adjustment consequent upon the decision of Mr Haberman and further adjusted to take appropriate account of changes from the original balance sheet position when the sale was concluded;

2. In addition, they will pay a further sum to reflect your clients' tangible investments in the business since the conclusion of the SPA.

3. The appropriate adjustments to the original price referred to in paragraph 1 and the additional payment referred to in paragraph 2 will be determined by an expert accountant to be nominated by your clients. Our clients' only requirement is that the expert should be a partner of at least ten years standing at any one of the five leading global accountancy practices. The costs of the expert determination will be shared between our respective clients.

4. In addition to the above, our clients will make a further payment to your clients, by way of an additional premium for the repurchase of the shares, in an amount of $2.5 million.

5. Any agreement concluded between our clients to reflect this offer will be in full and final settlement of all of your clients' claims arising out of or related to the subject matter of their dispute with our clients.

Our clients are willing and able rapidly to conclude a commercial settlement along the lines set out above. They are ready to place the funds required to conclude such an agreement in our client account immediately.

We look forward to your response as soon as possible."

That offer was repeated on 17th July 2008 in a letter from Olswang, the present solicitors of the defendants, to the claimants' solicitors in these terms:

"We refer to Mishcon De Reya's letter to you dated 22nd November 2007 ('the Offer'), a copy of which we enclose for your ease of reference.

The Offer was made by our clients on an open basis, subject to contract, to repurchase the shares that were sold to your client and take back the business, on clear terms which included a

considerable premium to the price that was paid by your client for GAL and GHAL.

Given the magnitude of the loss which your clients are claiming to have suffered as a result of Ovlas' acquisition of GAL and GHAL, we are surprised that, on reviewing the correspondence files provided to us by Mischcon De Reya, we have not been able to locate any response to that letter. Please now respond to it and, if your clients are not willing to accept the offer set out in that letter, please explain why that is the case."

The offer was not accepted. It makes clear that as recently as 17th July 2008 the defendants thought that GHAL was of considerable value.
6. As late as the course of the hearing before me, the claimants introduced a witness statement by one Chandra Secaran, the finance controller of GHAL, exhibiting a copy of a letter from the Lebanon and Gulf Bank SAL (which Chandra Secaran says is the claimants' bank) in the following terms. It is addressed to Ovlas and says this:

"We confirm that we would be prepared to make at your request an immediate advance of maximum GBP 1 million (one million Sterling Pounds) on 7 days notice, to Ovlas Trading SA or Golfrate Africa Limited.

This undertaking remains valid until 01/12/2009 and will be considered null and void after this date."

It is signed on behalf of the Lebanon Gulf Bank SAL. Understandably, counsel for the defendants objected to the late production of this evidence which gave the defendants no opportunity to test it. However, it seemed to me right to admit the evidence, even at that late stage, but to consider it with the caveat that it is untested evidence.

12. Against that background of law and fact, the defendants seek security of a further £880,000 to cover costs up to and including the forthcoming three week trial due to take place in April 2009, excluding counsel's and experts' fees. Mr Beazley, on behalf of the defendants, makes the application under CPR 25.13 on the basis that both conditions (a) and (c) in 25.13(2) are satisfied. He submits that this is a classic case for security for costs. I will deal, first, with condition (a), namely that all of the claimants are resident out of this jurisdiction and are not resident in either a Brussels or Lugano contracting state. Clearly that condition is satisfied. Mr Beazley submits that I should exercise the resultant discretion in have in favour of security in the light of the principles stated by the Court of Appeal in the Nasser case, because although enforcement against Ovlas in the British Virgin Islands or GAL in the Isle of Man would be comparatively straightforward were there any available liquid assets in those countries, there are not such assets, and the only possible source of liquidity would be in GHAL in Angola. So ultimately, submitted Mr Beazley, the defendants would have to resort to Angola, where enforcement would be time consuming and expensive. Against the suggestion that there could be enforcement against Ovlas or GAL in the British Virgin

Islands or the Isle of Man consisting of charging orders or orders for sale of shares in either of those companies, Mr Beazley relies on the absence of any evidence that such a sale would be practicable, since there is no evidence that there would be any market in the shares concerned in either country. To the suggestion that to avoid any such sale Ovlas or GAL would take steps to procure GHAL to make money available by paying a dividend or repaying part of the apparent loan by GHAL to GAL, Mr Beazley seeks to rely on hearsay evidence that this might not be possible because of Angolan exchange control regulations. I attach no real significance to this last point, since there is no evidence of the nature of any such exchange control restrictions to justify a conclusion that they would prevent payments by GHAL to its parent company.

13. As for condition (c) in CPR 25.13(2), Mr Beazley submits that that test is satisfied because each of the claimants is a company as to which there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so within the time (usually 14 days) required by the order, which is the relevant test as explained by Park J in Longstaff and Sir Donald Nicholls in Unisoft. In support of this submission, Mr Beazley relies, of course, on the same argument as to illiquidity as I have summarised in relation to condition (a). Thus again, says Mr Beazley, the court has a discretion to award security which it should exercise so as to do justice to the defendants.

14. Mr Beazley further submitted that, in considering the defendants' case for security, I should place no reliance on GHAL's financial statements. As I have already said, I consider I should take account of them, but bearing in mind that there are no audited accounts available and there are clearly some unsatisfactory features in the detail of the unaudited statements, it is clearly right that I have to be cautious in how much weight I attach certainly to the detail of those statements.

15. I should mention at this point that Mr Beazley put forward one argument which I can deal with shortly. The submission was that the claimants had already conceded that this is an appropriate case for security for costs by agreeing to the retention monies in the escrow account which I mentioned earlier in this judgment being available for the purpose of providing such security. I find this argument misconceived. As I have said, the claimants agreed to this as part of a deal with Strand. That agreement no more amounted to a concession that the defendants' case for security for costs was good than Strand's agreement to leave its share of the retention monies in escrow amounted to a concession that the claimants' case against it was good, at least in part. Mr Marshall, for the claimants, accepted, of course, that condition (a) in CPR 25.13(2) is satisfied, but not that condition (c) is. He submitted that in the light of the authorities to which I referred, and especially the Jirehouse Capital case, the evidence before me does not amount to reason to believe that any of the claimants will be unable to pay costs in the event of their being ordered in favour of the defendants. In particular, Mr Marshall relies on the late evidence (to which I have referred) of the availability of a loan to Ovlas or GAL. That loan would make £1 million available to one or other of the two companies to satisfy any order for costs against all the claimants. Undertakings have also been offered by Ovlas, but not accepted by the

defendants, to pay any costs awarded against any claimant and by GAL not to dispose of its shares in GHAL.

16. Next, Mr Marshall says that, as in the Keary Development case, I must take account of the open offer (to which I referred) as a recognition by the defendants that the defendants clearly consider that the claimants' claims have a real chance of success as well as a clear indication that GHAL has substantial value. Mr Marshall sought to show me that on the present evidence at least a comparatively small part of the claimants' claims was clearly bound to succeed. I do not think it appropriate for me to form a view on that for the purpose of this application. It is not, in my judgment, right for the court to examine the merits of a small part of a much larger claim of the nature of those made in the present case on paper evidence when there has to be a trial in any event (in the absence of settlement) of all the serious claims that have been made of fraudulent wrongdoing against the defendants.

17. On the exercise of the court's discretion under CPR 25.13(1) Mr Marshall submits that it is not just to make an order for security. He says that, on the evidence as a whole, there is no real reason to doubt that, if costs are awarded to the defendants, they will be able to recover promptly from one or other of the claimants the costs so ordered. Insofar as there is extra cost in doing so because of the foreign residence of the claimants, there is $720,000-odd available to meet such costs.

18. Finally, Mr Marshall relied on delay on the part of the defendants in making this application for security. He referred me to volume 2 of the White Book page 383 paragraph 2A181 (which is part of the Admiralty & Commercial Courts Guide) where it is said that:

> "First applications for security for costs should not be made later than at the case management conference and in any event any application should not be left until close to the trial date. Delay to the prejudice of the other party or the administration of justice will probably cause the application to fail, as will any use of the application to harass the other party."

In the present case, of course, as Mr Marshall points out, the application for security for costs was made well after the holding of the case management conference, the case management conference having taken place on 17th March and the application for security not being served until 31st July. I do not myself attach any significant weight to that point on the facts of the present case. I do not think that the delay can be said to have caused any injustice.

19. However, on the whole I accept the other submissions of Mr Marshall. I am not satisfied that there is reason to believe that any of the claimants will be unable to pay the defendants' costs, if ordered to do so, so as to satisfy condition (c) in CPR 25.13(2). In doing the best I can in the exercise of the discretion I have by virtue of the unquestioned satisfaction of condition (a), I am not satisfied that, having regard to all the circumstances of this case and

particularly those that I have mentioned in the course of this judgment, it is just to order security, and I shall dismiss the application.