Ref. CL-2016-000508

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Neutral Citation Number: [2018] EWHC 1149 (Comm)

Rolls Building
Royal Courts of Justice

Before

MR ANDREW HENSHAW QC
(sitting as a deputy judge of the High Court)

DELECLASS SHIPPING COMPANY LIMITED & ANOR (Claimants)

- v -

INGOSSTRAKH INSURANCE COMPANY LIMITED (Defendant)

MR M STIGGELBOUT appeared on behalf of the Claimants

MR A CARRUTH appeared on behalf of the Defendant

JUDGMENT
9th MARCH 2018, 10.28-11.58
(AS APPROVED)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

MR HENSHAW QC:

1. This judgment relates to two applications for security for costs. The context, which I will elaborate slightly, is a claim under an insurance policy issued by the defendant for loss suffered after a vessel owned by the first claimant became a constructive total loss following a collision in the Kiel Canal in 2013. The claimants' claim is for approximately US $3 million on a valued policy basis, but the defendant denies this and says what matters is actual value immediately before the loss, put by the claimants at US $1.54 million and by the defendant at US $725,000.

2. The defendant applied by notice dated 29th August 2017 for an order that the first claimant and/or the second claimant give security for the defendant's costs by means of a payment into court in the sum of £467,210 on the ground that they would not be able to satisfy a costs order in the defendant's favour were the claimants to fail at trial. The defendant also applied for the same security from the then third party to the proceedings, Liebermann & Partners Limited. At the hearing before me on Friday the 2nd March 2018 the defendant adjusted the amount of security to reflect the full amount of its costs budget, as revised by the court. The budget was for £503,000 (including incurred costs) after reduction to the amounts the court was willing to approve. The future costs are now in the order of £430,000.

3. The claimants have also applied for an order that the defendant give them security for their costs. That application is not based on impecuniosity but the facts that the defendant is a Russian company with no assets in the jurisdiction against which the claimants could enforce an order and that enforcement in Russia would be costly.

Background to the applications

4. The proceedings have taken a somewhat unusual course. The background is in outline as follows. M/v Siderfly was a St Vincent and the Grenadines flagged general cargo vessel of which the first claimant was the registered owner. The first claimant is a St Vincent and the Grenadines company. It is owned in equal shares by Mrs Maria Williams, who has provided a witness statement, and her husband, Dennis Williams. Mrs Williams has for many years been active in the marine market and has at various times had interests in other vessels. The vessel was insured under the defendant's marine policy dated 1st February 2013, which covered the vessel for named perils during the policy period. The first claimant was an original party to the policy. The second claimant, a Cyprus company and the vessel's commercial manager at certain times, was added by addendum with effect from 1st May 2013. It is common ground that the vessel became a constructive total loss after a collision/sinking incident in the Kiel Canal on 28th October 2013.

5. The claimants claimed under the policy. However, the defendant pleads that on the 9th December 2013 the defendant was contacted by Liebermann & Partners Co Limited, who claimed to be the party entitled to receive any insurance proceeds under the policy by virtue of two assignments, namely: (i) an assignment dated 19th of June 2003 from the first claimant to Deleclass Shipping Company Limited of the Republic of the Marshall Islands (whom I shall call "Deleclass MI"); and (ii) an assignment dated 21st May 2010 from Deleclass MI to Liebermann. The defendant says notice of assignment of the first claimant's interest in the insurance policy to

Deleclass MI and of that company's subsequent assignment to Liebermann was given to the defendant on 21st June 2014.

6. The alleged assignment from the first claimant to Deleclass MI is said in the defendant's Rejoinder to have been in connection with a loan made by Deleclass MI to the first claimant in 2003 to finance the purchase of the vessel, along with a mortgage of the vessel to secure the debt. The basis for the alleged further assignment from Deleclass MI to Liebermann in 2010 is unclear. None of the parties before me was able to say exactly who Liebermann are. The claimants' counsel told me that the company was only incorporated in May 2010, in the same month as the purported assignment to them of all Deleclass MI's rights under the alleged loan to the first claimant, the mortgage and the 2003 assignment. He also makes the point that the alleged mortgage contains no notarised signatures, as would, the claimant says, be required under St Vincent and the Grenadines law, and was never registered, as might be expected to have occurred had the transaction been genuine.

7. The claimants' case is that Liebermann's claim forms part of an attempt by Mrs Williams' former husband, a Mr Sergey Golob, in conjunction with a Mr Alexander Krasnenkov, to defraud Mrs Williams. The claimants' case is that the documents presented by Liebermann are not authentic and/or were signed without authority.

8. The claimants' Reply pleads, among other things, that the claimants had no knowledge of the purported assignments, loan or mortgage, save that: (a) they had been alleged in prior correspondence; and (b) shortly after 10th June 2010, Mrs Williams, the first claimant's managing director, received a copy of a letter dated 10th June 2010 addressed to the vessel's technical managers enclosing copies of the purported documents. The claimants put the defendant to proof of these documents, including the documents themselves, their authenticity and veracity, the dates of creation, the individuals who signed them and with what authority, and the consideration provided. The claimants also deny that Mr Golob had authority to sign agreements on behalf of Deleclass MI at the relevant time, not having then been a director of that company. The claimants say there exists - and existed - no, or no valid, loan from Deleclass MI to the first claimant and that the monies the first claimant used to purchase the vessel were not advanced to the first claimant by way of loan but by way of capital investment in the first claimant.

9. This underlying dispute has already been the subject of litigation in the Netherlands, where an appeal court had seen forensic expert evidence provided by the claimants that the documents produced by Liebermann were not authentic but concluded that the matter could not be determined without a trial on the merits.

10. Returning to the UK, it appears the defendant took the position that, faced with competing claims, it would not pay out the policy proceeds without an agreement or court order.

11. The claimants commenced proceedings in August 2016, and, in its original Defence of February 2017, an Amended Defence of the same month and a Re-amended Defence of April 2017, the defendants non-admitted the claimants' entitlement to claim under the policy and said that if Liebermann established that it was the party

entitled to any policy proceeds then the defendant would contend that he claimants were not so entitled.

12. At the same time as filing its original defence, the defendant commenced an additional claim against Liebermann passing on the claimants' denials of Liebermann's claim. Liebermann responded with a defence and counterclaim. It alleged that it was entitled to the policy proceeds by reason of the assignments and that the vessel's purchase was financed by a loan from Deleclass MI to the claimant secured by a mortgage. The claimants denied this, saying the purchase was financed by way of capital investment in the first claimant by Mr Krasnenkov, Mr Golob and a Mr Kronsov.

13. The claimant made a Part 18 request for further information in relation to Liebermann's case on 27th June 2017 to which Liebermann failed to respond. Its lawyers, Elias Law Limited, came off the record on 4th July 2017. The defendant applied for an order that, unless Liebermann served its response to the claimants' Part 18 request, Liebermann's Defence and Counterclaim be struck out. Mr Justice Teare made that order on 10th November 2017. Liebermann continued to fail to respond. On 8th December 2017, Patricia Robertson QC, sitting as a deputy High Court judge, gave judgment against Liebermann, dismissing its counterclaim, and ordered it to pay the defendant £66,778 by way of costs.

14. One might have thought that with the competing claim disposed of the matter would be straightforward. However, on the same day that Liebermann's counterclaim was struck out the defendant served a Rejoinder in the main action in which it positively advanced the case Liebermann had advanced based on the alleged assignments of the right to policy proceeds and relying in several places on assertions Mr Krasnenkov is said to have made in separate proceedings in St Vincent and the Grenadines. That was shortly followed by the defendant's Re-re-amended Defence of 20th December 2017 in which the existing plea I have referred to - conditional upon Liebermann establishing its claim - was replaced by an unqualified assertion that the claimant was not entitled to receive any insurance proceeds under the policy for the reasons given by Liebermann.

15. The defendant therefore appears now to be advancing a positive case based on the Liebermann allegations in circumstances where: (i) Liebermann had failed to provide the further information ordered, leading to its claim being struck out; (ii) none of the current parties to this case has the original of the alleged assignment documents, although counsel for the defendant informed me that Liebermann's former solicitors, Elias Law, say they have them; and (iii) the defendant does not appear from its case management information sheet to have any evidence at present from any witness who would support its adopted case.

16. It is certainly tempting to regard the defendant's abrupt change of tack as an opportunistic attempt to avoid paying out to anyone, despite the casualty and policy coverage being admitted, although as I indicate later I do not consider it possible to reach any definitive view about the ultimate merits of the case.

17. I turn now to the security applications, first the defendant's application against the claimants.

The law

18. CPR 25.12 provides that: "A defendant to any claim may apply under this Section… for security for his costs of the proceedings". CPR 25.13 provides:

> "(1) The court may make an order for security for costs… 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…"

19. CPR 25.13(2)(c) sets out one of those conditions, which is that "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". It is common ground that this condition is satisfied in the present case in relation to the claimants.

20. It is generally accepted that the factors relevant to the exercise of the discretion to order security for costs are those set out by Lord Denning in *Sir Lindsay Parkinson & Co Limited v Triplan Limited* [1973] QB 609, in particular:

(i) whether the claimant's claim is bona fide and not a sham;

(ii) whether the claimant has a reasonably good prospect of success;

(iii) whether there is an admission by the defendant;

(iv) whether there is a substantial payment or an open offer of a substantial amount;

(v) whether the application for security is being used oppressively (e.g. so as to stifle a genuine claim);

(vi) whether the claimant's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work; and

(vii) whether the application for security is made at a late stage of the proceedings.

21. The decision of His Honour Judge Peter Coulson QC in *Newman v Wenden Properties Ltd* [2007] EWHC 336 (TCC) conveniently sets out certain further factors relevant when it is said that a security order would stifle a genuine claim as follows:

> "(a) Where an order for security… might result in oppression, in that the claimant company would be forced to abandon a claim which has a reasonable prospect of success, the court is entitled to refuse to make that order, notwithstanding that the claimant company, if unsuccessful, would be unable to pay the defendant's costs (see

Aquilla Design (GRB) Products Ltd v Cornhill Insurance plc [1988] BCLC, 134, Court of Appeal);

"(b) 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 (see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 2 All E R, 535, Court of Appeal);

"(c) In all but the most unusual cases, the burden lies on the claimant company to show that, apart from the question of whether the company's own means are sufficient to meet an order for the security, there will be no prospect of funds being available and forthcoming from any outside source (see *Kufaan Publishing Ltd v Al-Warrack Bookshop Ltd*, March 1st, 2000, Court of Appeal (unreported))."

22. In *Pearson v Naydler* [1977] 1 WLR 899, Megarry V-C said at pages 906 to 907:

"It seems plain enough that the inability of the plaintiff company to pay the defendants' costs is a matter which not only opens the jurisdiction but also provides a substantial factor in the decision whether to exercise it. It is inherent in the whole concept of the section that the court is to have power to order the company to do what it is likely to find difficulty in doing, namely… to provide security for the costs which, *ex hypothesi*, it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company…

"As against that, the court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged…"

23. The Supreme Court in *Goldtrail Travel Limited (in liquidation) v Onur Air Taşimacilik AŞ* [2017] 1 WLR 3014; [2017] UKSC 57 considered whether an order requiring as a condition of appeal that a sum be paid into court should be made. The court indicated at paragraph 14 that similar considerations apply to security for costs, where Lord Wilson said:

"But a party's participation in proceedings can be as much stifled by an order for security for costs as by an order for payment into court of the sum claimed or awarded. So it is without further reference to that distinction that one may proceed to address the circumstances in which an order can be [made] to stifle the continuation by an appellant of an appeal."

24. On the subject of stifling of claims, the court said at paragraphs 17 and 18:

> "[17] It is clear that, even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not stifle its appeal if it can raise the required sum. As Brandon LJ said in the Court of Appeal in the *Yorke Motors* case…'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need'.
>
> "[18] … When, in response to the claim of a corporate appellant that a condition would stifle its appeal, the respondent suggests that the appellant can raise money from its controlling shareholder, the court needs to be cautious. The shareholder's distinct legal personality (which has always to be respected save where he has sought to abuse the distinction: *Prest v Prest* [2013] UKSC 34, [2013] 2 AC 415, 487, para 34) must remain in the forefront of its analysis. The question should never be: 'Can the shareholder raise the money?' The question should always be: 'Can the company raise the money?'"

25. Similarly, Lord Wilson said at the end of paragraph 23 that the criterion is: "Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?" Lord Wilson continued at paragraph 24:

> "The criterion is simple. Its application is likely to be far from simple. The considerable forensic disadvantage suffered by an appellant which is required, as a condition of the appeal, to pay the judgment sum (or even just part of it) into court is likely to lead the company to dispute its imposition tooth and nail. The company may even have resolved that, were the condition to be imposed, it would, even if able to satisfy it, prefer to breach it and to suffer the dismissal of the appeal than to satisfy it and to continue the appeal. In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of… funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with [the] owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

26. As to the relevance of the merits of the case to a security application, in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420, page 923, Sir Nicolas Browne-Wilkinson said:

> "Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high

> probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."

27. The Commercial Court Guide at appendix 10, paragraph 4, says:

> "Investigation of the merits of the case on an application for security is strongly discouraged. It is usually only in those cases where it can be shown without detailed investigation of evidence or law that the claim is certain or almost certain to succeed or fail will the merits be taken into consideration."

28. Finally, as regards the question of whether the claimants' want of means has been brought about by any conduct of the defendant, such as delay in payment, both parties referred to the case of *Fernhill Mining Ltd v Kier Construction Ltd* [2000] App LR 01/27. In that case, at paragraph 49, the court held the claimant to have a high chance of success on the merits. The court said at paragraph 50:

> "As regards the next point, that is to say the fact that the present position of the claimants is due, as clearly it is, to the conduct of the defendants in withdrawing from the contract, again it seems to me that the judge was wrong, as he did in effect, to overlook that factor. It seems to me that it is certainly relevant and related to the first factor, provide very strong grounds for weighing the balance in favour of the claimants in this case."

29. The defendant initially submitted that this factor applies only where either: (a) the claimant can show it has a strong case on the merits; or (b) the defendant has caused the claimant's impecuniosity in some way unrelated to the subject matter of the case. However, I do not read paragraph 50 of *Fernhill* as saying that this factor is necessarily contingent on proof of a strong case on the merits, and it was not expressed that way in the *Sir Lindsay Parkinson* list of factors which is commonly accepted as setting out the applicable criteria. Indeed, such an approach would make the factor virtually redundant because it would only apply either in the very unusual circumstances where some extraneous action by the defendant had caused the claimant impecuniosity or where the claimant could show a very clear case on the merits: which, given the modern approach of disregarding the merits save in very clear cases, would be unusual. In my view, this factor remains relevant where the claimant has an arguable case on the merits and the evidence demonstrates a causal link between the defendant's alleged non-payment and the claimant's impecuniosity.

30. In *Spy Academy Limited v Sakar International Inc* [2009] EWCA Civ 985, the Court of Appeal was dealing with a case in which Sir Simon Tuckey said at paragraph 5:

> "It is not one about which one can say at this stage that one or other of the parties is bound to win. But I agree with Rix LJ [who had granted permission] that the claim is a perfectly bona fide claim with a perfectly reasonable prospect of success…"

31. Sir Simon Tuckey listed at paragraph 14 the factors to be taken into account, and at paragraph 15 said:

> "I have already dealt with the merits of the claim in this case. It seems to me, in the circumstances, that the claimant can say here that its want of means has been brought about by the conduct of the defendant, since it is a company formed for the sole purpose of this transaction, which failed to generate revenue because of the defendant's breaches of contract."

32. Mr Justice Vos addressed this issue at paragraphs 28 to 31 of *Mastermailer Stationery Ltd v Sandison & Ors* [2011] EWHC 4304 (Ch). He held there that the Master at first instance had been wrong to approach the matter as if the claim would be unsuccessful. Mr Justice Vos said:

> "He [Lord Denning in *Sir Lindsay Parkinson*] did not suggest that the matter must be viewed on the basis that either the conduct must be unconnected with the subject matter of the dispute or that it must be looked at on the basis that the claim would be unsuccessful. It seems to me that the true factor to consider is whether the conduct alleged has (if it is proved) in fact brought about or contributed to the insolvency of the claimant company. It would be rather ridiculous to assume that the claim was unsuccessful and therefore that there was no conduct that could improperly have brought about the insolvency of the claimant company because, if that were assumed, the factor would never be relevant to a claim for security for costs."

33. Mr Justice Vos went on to find support for that view in a dictum from Bowen LJ in *Farrer v Lacy* (1885) 28 Ch D 482 at 485 and the dictum of Sir Simon Tuckey in *Spy Academy* at paragraph 15 to which I have already referred.

34. In the case before him, Vos J went on to find that it was hard to judge precisely how Mastermailer's trading position would have been affected had some or all of the claim monies not been taken in the way alleged; it was difficult to put the clock back and rewrite the financial position since the company had raised substantial funds from its shareholders subsequently. He continued:

> "While I am quite certain that the defendant's conduct, if proved, could be said to have worsened the company's financial position, and could even be said in some measure to have brought about a greater measure of impecuniosity than would otherwise have been the case, this… is only one factor to be drawn in the balance when one comes to consider whether security should be granted."

35. The defendant also draws attention to a passage at paragraph 41 of that judgment, where Vos J stated:

> "But it seems to me that the presumption in the rules is that security will be ordered and that the balancing exercise and the factors that have to be weighed on both sides are questions of balancing justice to the parties."

36. I would not accept that there is a presumption either way. It seems to me that the tenor of the authorities as a whole is that the court has to exercise its discretion looking at the matter overall, although it is true to say that, as indicated in *Pearson v Naydler*, a claimant's inability to pay an order for costs is a substantial factor in favour of a grant of security.

37. It seems to me, therefore, that the correct approach on this particular issue is first to ask whether the claimants' claim is bona fide and arguable, since if it is not then the argument that the defendant's conduct caused the claimants impecuniosity should carry little weight. Provided the claim is arguable then the question is whether, if it is correct, it indicates that the defendant's conduct caused the claimants impecuniosity. If the answer to that is "Yes" then this is a factor relevant to the overall discretion.

38. As to its potential significance, the claimants refer to the statement of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* at page 540 to the effect that the court should be concerned not to allow security to be used as an instrument of oppression "particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity". However, this factor may not be decisive in itself, otherwise, as the defendant points out, a great many security applications would founder on this point. It is a matter to be weighed in the balance along with others.

Merits

39. Despite the strictures set out in the cases I have mentioned, both parties sought to persuade me that I should view the merits as being in their favour for the purposes of the security application. The claimants say the factors I have already noted regarding the apparent absence of evidence in support of Liebermann's case and other detailed points on the documents show the claimants have a very strong case. For example, Mrs Williams' investment of €840,000 to obtain her interest in the first claimant was, they say, inconsistent with the notion that the first claimant required a loan from Deleclass MI in order to purchase the vessel.

40. I am willing to accept that the claimants have an arguable prima facie case in circumstances where policy cover and casualty are both admitted, albeit there is a dispute over quantum, including whether it was a valued policy or not, and as to the actual value of the vessel. I am not able at this preliminary stage to say the claimants clearly have a very strong case.

41. Similarly, the defendant sought to suggest that the claimants' case was likely to fail based on the existence of the purported assignment from the first claimant to Deleclass MI, of which notice had been given to the defendant, and the fact that the Dutch appeal court had not been persuaded to rule on a preliminary basis that the documents were forged. In the context of an injunction claim the Dutch court said, according to the translation provided:

> "For the rest, it is true that also on appeal it has become insufficiently plausible that the loan agreement, the first preferred mortgage and the assignment agreement are forged or at any rate invalid and the claim based on them illusory. In connection with the alleged irregularities and coincidences Liebermann always gave illuminating explanations

> that do not appear implausible in advance. Their correctness can be investigated in more detail in an action on the substance of the case. This also applies especially to the authenticity of the filed documents contested by Deleclass, the validity of their signatures, the capacity of straw man contested by Liebermann and the lack of clarity that exists according to Deleclass in respect of the question whether and to whom the money allegedly loaned to DSCL has been transferred. This action for an interim injunction does not permit such an investigation. For now it is important that Liebermann has made sufficiently plausible the correctness of its position and thereby the soundness of its claim as justification for the pre-judgment arrest meanwhile removed."

42. Bearing in mind that that was a judgment at an interim stage, and the other factors I have referred to, I am not persuaded that these matters come close to establishing that the claimants' case is likely to fail at trial.

Stifling

43. The claimants' solicitor, Mr Theophani, in his fifth witness statement said:

> "It is common ground between all parties that the vessel became at least a constructive total loss and she was sold for scrapping in February 2014, thus the sole purpose of the first claimant's business vis ownership of the vessel came to an end. The second claimant was the commercial manager of the vessel and accordingly has similarly lost its business purpose. Both claimant companies are accordingly now not trading and their asset and liability position show that they could not provide security in the sums sought - or even close to it - if ordered to do so. The claimants are already struggling to fund this litigation and options for further funding are extremely limited."

44. In that regard I refer to the first witness statement of Maria Williams. Mrs Williams says in her first witness statement that she is a director of the first claimant and a shareholder in both claimants. She says "If an order for security were made it is likely it would result in the claimants being unable to pursue their claim against the defendant and it would be impossible for the claimants to obtain the sums sought by the defendant", which at that stage was £467,000 plus any costs in the then Part 20 defendant's Precedent H budget. She adds, "The claimants are already struggling to fund their costs of the litigation and have done so to date by relying on a loan", the limit of which was soon to be reached.

45. Mrs Williams says that numerous individuals whom she believes to be behind or involved with the Part 20 defendant (Liebermann) were significantly responsible for the collapse of the EMI Shipping business into which she had put almost everything she owned. She added that she was subjected to harassment and arrest brought about by her ex-husband, Mr Golob, whom she understood to be indebted to, and therefore assisting, Mr Krasnenkov.

46. Mrs Williams explains that she has been involved in maritime and related business for about 25 years as a charterer, broker and commercial manager. She had been a director and 50 per cent shareholder of the first claimant since about June 2006,

when she replaced her ex-husband as a director. She had been a director and 50 per cent shareholder of the second claimant from 2010 to 2014 and then became a one per cent shareholder and ceased to be a director. She says she has continued to be involved in the maritime industry after the loss of the vessel and that her current involvement, since about the end of 2013, is entirely with Amberseas Maritime Limited and Amberseas Logistics Limited, related companies based in Winchester, of which she and her present husband Mr Dennis Williams are the shareholders and directors. Amberseas manages a vessel called 'Amber Trader' for Canober Management Limited.

47. Mrs Williams says that since the loss of the vessel and her sale for scrapping in February 2014 the sole purpose of the first claimant's business, which was ownership of the vessel, has come to an end and that the company is no longer trading or doing business. Similarly, she says the second claimant, as commercial manager of the vessel, lost its business following the vessel's loss and that that company does not manage other vessels and currently is not trading or doing business.

48. Mrs Williams explains that the first claimant has no bank accounts, assets or cash - it was simply a ship-owning company - and that all commercial operations were carried out by the second claimant. She says the first claimant never had a bank account and did not prepare balance sheets or profit and loss statements. The second claimant, she says, is no longer trading and its outgoings have primarily been for legal fees and auditing to keep the company open. She indicates that the profit and loss account for the second claimant in 2016 shows a loss of approximately £28,000, mostly due to legal fees for the proceedings, and that the profit and loss account for 2017 shows a loss of £108,000 so far. She exhibits those statements. Mrs Williams says the second claimant's bank account transactions, which she exhibits, resulted in only a €411 balance as of September 2017.

49. She goes on to say that, by reason of these matters, obtaining funding is very difficult. "Funding the litigation to date has already been difficult, but the claimants have managed to do so as set out below…" She says: "The prospects of obtaining any further substantial funds, let alone of the order of the £500,000+ security sought by the defendants, are very low indeed".

50. Mrs Williams explains the funding of the litigation in the following way. She says she personally paid £5,000 to the claimants' original solicitors, MFB Solicitors, being Mr Theophani's previous law firm before he moved to Clyde & Co LLP, and that a further approximately £21,000 was paid by the second claimant from its own funds of which about £1,000 was paid to MFB and £20,000 was paid to the present solicitors, Clyde & Co. She says that thereafter a further £65,000 has been paid to Clyde & Co with externally sourced funds, the ultimate source of which is Canober Management, the company whose vessel Amberseas manages. Canober agreed a short-term loan of up to €100,000 (approximately £88,000 at today's exchange rate) to the second claimant.

51. Mrs Williams says the reason Canober was willing to provide that level of funding to date was that she and her husband, through Amberseas, manage a vessel for them and "they are confident in what we do, trust us, and were willing to help the claimants to the extent they could", and it was understood that it was a claim for insurance that should have been straightforward with the return of funds on

completion. She says Canober Management is unwilling to provide further funding and has refused to do so due to its own investment plans and that, in addition, Canober has no security for its loan. Mrs Williams states that Canober's own financial difficulties make further substantial funding for them unrealistic and certainly impossible in the sums sought by the defendant.

52. She goes on to explain her and her husband's own financial position, saying that they have no way of funding the litigation personally beyond small amounts as they have only a low income and pay themselves dividends based on the performance of the Amberseas companies, which has taken a large hit this year (2017) due to difficulties in the maritime and logistics sectors. She attaches a profit and loss account for Amberseas Maritime for the year to date showing a small profit of about £17,000, a profit and loss account for Amberseas Logistics showing a loss of around £12,000, Amberseas Maritime's un-audited financial statements for the year ended December 2016 showing a post-tax profit of about £8,000 and Amberseas Logistics' un-audited financial statements for the same year end showing a post-tax profit of just under £40,000.

53. Mrs Williams goes on to explain that she receives a net salary of £1,000 per month from Amberseas Maritime and a net salary of £200 per month from Amberseas Logistics and that Mr Williams receives net salaries in the same amounts. She says their only other income is via dividends from the Amberseas businesses and that the dividend Amberseas Maritime paid for the year ending 30 December 2016 was £1,200 and that paid by Amberseas Logistics was £46,000.

54. Mrs Williams says she and her husband have no savings accounts but only two current accounts, one of which is a joint account. She adds the following:

> "Although Dennis and I own a flat outright which is worth approximately GB £450,000 to £500,000, this is our home and sole residence, which we have worked hard for over many years, and it has no connection to the claimants' businesses. It is not something which we can afford to risk in this litigation as we have nowhere else to live. Additionally, the above is only an estimate of the value of the property and not accessible as cash.
>
> "Dennis and I also each have pension pots currently worth about GB £60,000 and GB £80,000 respectively (I have lost the password for accessing my account, but it is exactly the same as Dennis's but with GB £20,000 more). Dennis also has what was a company scheme valued at about GB £350,000. However, these are our pensions for our retirement which have no connection to the claimants' businesses and which we cannot afford to risk in this litigation. They are also amounts which we cannot access as cash.
>
> "Dennis and I have annual living expenses of approximately GB £40,000…"

55. Mrs Williams says that, thus, she and her husband and the Amberseas businesses do not have the funds to provide security for costs anywhere near the sums sought. She adds that they will struggle even to find the funds for the claimants' own legal costs going forward should the Part 20 defendant remain party to the proceedings. She

states: "We will find it incredibly difficult to find even those substantial further sums but will do the best we can in meeting sums due to Clyde & Co LLP as they fall due. It would simply be impossible for the claimants to find a further sum of the order of GB £500,000, as is apparently sought by the defendant, particularly if any substantial amount is required in short order".

56. Finally on this point, Mrs Williams states that none of the other directors or shareholders of the claimants would be willing to provide funding in this matter and that, "as will be evident from the claimants' reply, Mr Krasnenkov has attempted to defraud the claimants and me, and is involved with the Part 20 defendant, so there is no prospect of his providing funds".

57. That witness statement was served at the end of September 2017. The only specific response in the defendant's evidence came in the fifth witness statement of Mr Horne, served in October 2017, where he indicated that it seemed to him that most of the points made in Mr Theophani's statement would be matters for submissions and that the purpose of Mr Horne's statement was to point out what he described as "certain factual inaccuracies" in that witness statement and Mrs Williams' first statement.

58. Mr Horne goes on to say that, according to data from Companies House, Mr Williams is also an active director of a property management company called Wykeham House Management Company Limited and makes the point that no information had been provided about his remuneration from that company. That turned out to be a bad point because, as Mr Theophani explains in his sixth witness statement served on 8th February 2018, Wykeham House Management Company is merely a resident management company which deals with the maintenance of the communal parts of the leasehold property which Mr Williams owns and which is his sole residence, and Mr Williams receives no remuneration at all for his directorship in that company.

59. The defendant's skeleton argument for the hearing made the bare assertion that the claimants' evidence was neither full nor frank but provided no further details as to the defendant's case. The defendant then proceeded at the hearing to put forward 16 matters which it said demonstrated that the claimants had not been full and frank. Counsel for the claimants complained that this had been an ambush, to which the defendant responded that it was not because the onus was on the claimants to make full and frank disclosure of the position at the outset. Whilst the onus is on the claimant to make out its case of stifling on the evidence, I find it hard to see any good reason for a tactic of withholding objections until the last possible moment, with the result that the claimant is not only unable to provide any evidence in response but unable even to take proper instructions (save to the extent that counsel is able to take instructions during the hearing itself).

60. The first three of the defendant's points were general points. First, the defendant deduced from the claimants' statement of costs that Mrs Williams' witness statement had been drafted by counsel. The defendant did not allege, however, that that indicated that it was not her genuine evidence, nor would there have been any basis in my view on which to make any such allegation.

61. Secondly, the defendant pointed out that the claimants' case management information sheet, in answer to the question as to whether an interpreter would be

required for any witness at trial, states: "Possibly - Ms Maria Williams". Mrs Williams is Russian in origin. Her witness statement makes no reference to her understanding of English or to having had the benefit of a translation. The defendant said this cast into serious question whether it was her evidence. I do not accept that point. Nothing in the contents of the witness statement gives me reason to doubt that it is Mrs Williams' own evidence. It does not follow from a possible need for an interpreter when giving viva voce evidence in trial conditions that she is unable to read or write English so as to be able to prepare the witness statement.

62. The defendant's third point was that the exhibits to Mrs Williams' witness statement contain numerous redactions. Mrs Williams had explained in her witness statement that because of fears of harassment by her former husband and associates, she and her present husband had serious concerns that some of the details in the redacted documents might be used to harm or intimidate them, and in particular they did not wish the individuals behind the Part 20 defendant (Liebermann) to obtain their address details. She indicated that she was willing for a non-redacted dossier of the relevant documents to be made available to the court only. The defendant pointed out that the exhibit had nonetheless given her full business address in two places and pointed to the substantial number of redactions. I enquired whether this matter had been raised in correspondence between the parties and was told that it had not. When I enquired why that was the case, the defendant was unable to provide an answer.

63. It seems to me that this is a clear example of an objection which, if it were to be pursued, should have been raised in advance in order to provide the claimant an opportunity to respond - for example, by explaining the reasons in more detail or agreeing some form of confidentiality ring. I also note that the defendant did not take up Mrs Williams on her offer to provide an un-redacted copy to the court. In these circumstances the defendant's point does not assist it.

64. I turn to the defendant's specific points. The first and second were that only recent financial and bank statements had been provided for the claimants dating from 2016 and/or 2017. On the basis that the issue as regards stifling principally concerns the claimants' current assets and/or income, it is not clear why earlier statements would be obviously relevant. If the defendant did consider earlier statements might be relevant, it has had since Mrs Williams served her statement at the end of September to explain why and to request them, but I saw no evidence of it having done so.

65. Thirdly, the defendant noted that Mrs Williams' exhibit at page 609 contained a page of bank statement items heavily redacted but showing certain large payments. However, that was a statement from 2012, when the claimants had an operating vessel.

66. The defendant made the further point that it would be useful to know where the earnings from the vessel had gone. It seems to me that that, too, is a point which ought to have been raised at an earlier stage. It was incumbent upon Mrs Williams to set out the claimants' current assets and sources of funding available to them to provide any security ordered. It is far less obvious that that requires an account of all income and expenditure arising from a vessel which was lost five years ago. In circumstances where this objection has been held back for a period of several months to a time at which the claimants cannot adduce further evidence - and too late even for full instructions to be taken - I am not willing to draw the inference that the claimants have not been full and frank or that they must have undisclosed assets

available to them from which they could make a payment by way of security for costs.

67. The fourth point arose from transactions relating to Mrs Williams' participation with Mr Golob and Mr Krasnenkov in two other vessels, EMI Leader and EMI Proud, in 2007. The defendant initially suggested that the claimants had pleaded that Mrs Williams had been paid €840,000 in connection with these but later accepted, I believe, that it was the other way around: Mrs Williams said she paid that amount for her participation in the first claimant, with Messrs Golob and Krasnenkov apparently wishing to raise the money in order to fund their participation in EMI Leader and EMI Proud.

68. Fifthly, Mrs Williams explained in her statement that from February to July 2017 £65,000 had been paid to the claimants' solicitors, Clyde & Co LLP, pursuant to a short term loan of up to approximately £88,000 from Canober. That would suggest that only about £23,000 remains to be drawn down on that loan. The defendant argues that the claimants' cost budget shows that about £90,000 has been incurred on the claimants' side since Mrs Williams' witness statement of September 2017, implying that further sources of funding must have been found. Looking at the matter more closely, Mrs Williams' witness statement in paragraphs 35 to 37 states that sums totalling about £92,000 had been paid to the claimants' solicitors by September 2017. The total incurred costs in the claimants' Precedent H budget are about £159,000. The difference between those figures is thus about £67,000.

69. However, I do not think it possible, first of all, to infer that when Mrs Williams provided her statement in September she must have been aware of any additional sources of funding. In addition, the defendant's point assumes that Clyde & Co has in fact had its fees paid. However, the claimants' counsel was able to say on instructions during the hearing, this point having been taken by the defendant at the last minute as I have explained, that something of the order of £30,000 to £40,000 of their fees currently remain unpaid.

70. The difference of £67,000 between the payments made to September 2017 and the currently incurred figure may therefore be accounted for by further draw-downs under the informal Amberseas facility and monies still owed to Clyde & Co. Mrs Williams' evidence in her September witness statement was that the claimants were already struggling to fund their own costs of the litigation, had done so to date by relying on the loan, and would find it incredibly difficult to find funds for their own future costs. That seems to me consistent with Clyde & Co still being owed a significant sum by way of outstanding fees.

71. The defendant invited me to take account of the fact that the claimants must, based on their costs schedules, have spent about another £20,000 on the CMC and security applications. However, I have no information about whether those costs have been billed yet or, therefore, whether or not they form part of the very approximate outstanding fees figure which the claimants' counsel provided to me on instructions. Particularly in circumstances where detailed points of this nature have been raised without prior notice, I am not prepared - and consider it would be clearly unfair - to assume against the claimants either: (i) that they indicate any lack of frankness in the claimants' evidence, or (ii) that the claimants must therefore have access to further funding sources which could be tapped in order to put up substantial sums by way of security.

72. The same considerations apply in my judgment to the defendant's point that a small part of the claimants' existing legal costs payments (around £6,000) was paid to the previous law firm where Mr Theophani used to work and may not be included in the current cost budgets. Whether those costs would appear under the heading "pre-action costs" or the rubric "statement of case" in the costs budget seems to me to be speculation.

73. Reference was also made in submissions to an earlier costs schedule exhibited to Mr Theophani's fifth witness statement of September 2017 showing incurred costs of about £69,000. The claimants' counsel told me on instructions that that schedule had in fact been prepared some months earlier - in April 2017. It seems to me that this schedule is unlikely to be critical in circumstances where the court has evidence of the amounts actually paid up to 2017 and the amounts incurred to date.

74. In all the circumstances, I do not think it would be right to draw the inference that the claimants have a substantial undisclosed source of funds from which they could provide security for the defendant's costs.

75. Sixthly, the defendant made the point that Mrs Williams' second witness statement rectified an omission in her first statement, namely that fees totalling €105,000 had been paid in the previous litigation in the Netherlands, together with a subsequent arrest in France. The defendant asks where that money came from. Counsel for the claimants pointed out that that expenditure was incurred in 2010, prior to the Dutch appeal court decision in 2012, and was therefore during the period when the claimants had an operational vessel prior to its sinking in 2013.

76. Seventhly, the defendant said no evidence has been provided of the claimant asking Mr Krasnenkov, who remains a shareholder in the first claimant, to contribute to the funding of the litigation. That is plainly an unrealistic suggestion in circumstances where it appears Mr Krasnenkov's interests are in direct conflict to those of the claimant. Indeed, counsel for the claimant informed me that on the 28th February this year the defendant indicated that it was seeking to ascertain whether Mr Krasnenkov would give evidence on the defendant's behalf. It seems absurd to suggest there is any possibility that he would be willing to put up security on the claimants' behalf.

77. Eighthly, the defendant makes the point that no evidence was provided of approaches to banks or other financial institutions to seek funding. The evidence in Mrs Williams' first statement was that both claimant companies lack the ability to secure any loans and that since the Amberseas companies are relatively small, struggling this year in particular, they would struggle to borrow substantial sums. She added:

> "Additionally, the Amberseas businesses are run for Dennis's and my living, so the Amberseas businesses are not simply a source of spare funds. Dennis has told me, and I agree, that we cannot afford to risk that business, thus there is no viable option of Amberseas taking on further debt. In any event it is very difficult for us to take loans from any institution in the UK as I am a Russian citizen and Dennis and I lived abroad for several years, both being factors which adversely affect our credit ratings, and, as we are directors/business owners

reliant on dividends, our ages also make it difficult for us to borrow given that I am 56 and Dennis is 54."

78. Whilst I would accept the point that the claimant shareholders' ages and Mrs Williams' Russian citizenship would not necessarily prevent them from raising money, viewing the evidence as a whole there is, in my view, no obvious basis upon which any attractive borrowing proposition could be put forward to a bank or other financial institution to fund this litigation or to provide security.

79. Ninthly, Mr and Mrs Williams live in a flat worth, she estimates, about £450,000 to £500,000 and have pension assets, as I have already indicated. The defendant makes the point that these are substantial assets which could be mortgaged to a bank to secure a loan. However, first of all, in the absence of substantial income it seems unlikely that a bank would be willing to lend solely against the security, and so in practice it would probably be necessary to sell or realise the assets. Unsurprisingly, Mr and Mrs Williams are not willing to sell their home or to try to exit from and realise their pensions. Applying the test laid down by the Supreme Court in *Goldtrail Travel*, I am not able to conclude that the shareholders in the claimant companies would in fact sell those assets in order to provide security.

80. Tenthly, it was said to be surprising that the claimants, or at least their shareholders, had no savings given that they had significant assets in the past. Those included Mrs Williams' former participation in the EMI Shipping business. She said in her witness statement that that business had collapsed, but the defendant pointed out at the hearing that no further details had been provided. It seems to me that it would be unfair now to draw an adverse inference on that matter given that it was referred to in the witness statement, was historic and was a matter on which it was open to the defendant to press the claimants for more information had it seen fit. More generally, any historic assets Mrs Williams may have had may have been invested in purchasing her stake in the first claimant, and hence in the vessel, and it would be wrong in my view to draw an adverse inference on this point.

81. Eleventh, the defendant said the exhibits show bank accounts in the name of Mrs Williams and in the joint names of Mr and Mrs Williams. The defendant says it would be fanciful to suggest that Mr Williams could have no current account in his own name. I disagree. It is not in the least uncommon for married couples to hold only joint current accounts.

82. Twelfth, the point was made that the exhibited bank accounts show virtually no money and the question arises as to what has happened to the monthly income which Mrs Williams explained she and her husband receive from the two Amberseas companies. Mrs Williams also states in her witness statement, however, that they have annual living expenses of approximately £40,000. The claimants' counsel, again on instructions, told me that in February 2018 Mr and Mrs Williams decided not to pay themselves salary from the Amberseas company due to a shortage of funds.

83. The thirteenth point was that the Amberseas Logistics P&L account shows directors' pension contributions of about £130,000 in total over the two years 2015 and 2016. This was said to be inconsistent with Mrs Williams' evidence that she and Mr Williams have pension pots of £60,000 and £80,000 respectively, together with Mr Williams' former company scheme, valued at about £350,000. However, the

defendant did not point to any specific reason why the Amberseas contributions may not have been to that former company scheme, and I do not accept there to be an inconsistency.

84. Taking all these points in the round, I have come to the conclusion that the claimants have demonstrated that: (i) they have limited assets available to them; (ii) they have had difficulty in obtaining funding even for their own costs of the litigation, some of which appear to be still outstanding; (iii) there is no real prospect of the claimants being able to obtain funds from either Mr and Mrs Williams or from Mr Krasnenkov or from any outside source to provide security; (iv) an order for security would probably stifle the claim; and (v) the claimants are not unfairly using their impecuniosity to put pressure on the defendant.

Claimants' impecuniosity caused by defendant

85. Mrs Williams' evidence was that the first claimant was a one-ship company with no other business. I do not understand that to be contested. When the vessel was lost, its only asset and income source were lost with it. The insurance policy proceeds are, thus, its only potential asset. The evidence indicates that the same is true of the second claimant, in that the loss of the vessel in fact meant the loss of its whole business.

86. Policy coverage and loss are common ground. I have already indicated that, in my view, the claimants have an arguable prima facie case. Even leaving aside the valued policy argument, the vessel was worth about $1.5 million on the claimants' case and $725,000 on the defendant's case. Had indemnity been provided under the policy, the first claimant would be less impecunious by that amount, plus the sums it has had to incur in costs vis-à-vis the defendant in this litigation to date.

87. The force of this factor is reduced to a degree by the lack of specific evidence about the claimants' pre-existing financial position, although, bearing in mind this was a one-ship operation, it seems likely that non-payment of the insurance claim has materially contributed to the claimants' lack of means.

Insistence on commencement of proceedings

88. The claimants make the point that the defendant required the claimants to sue, relying on an e-mail in September 2015 where the defendant said it would not indemnify the claimants except against a tripartite or unappealable judgment of the English High Court.

89. The defendant says there were competing claims which it faced, and that it could not strictly interplead because quantum was in dispute, so it was not unreasonable for it to require the claimants either to reach an agreement in effect with Liebermann or to obtain a court judgment.

90. In those circumstances, I am not able to say that it was unreasonable for the defendant to take that position. The position now is somewhat different in that, having disposed of the competing claim, the defendant has now chosen to adopt that claim wholesale in an apparent bid to avoid having to pay out at all in respect of the loss, and the adopting of that claim is likely to be a major contributor to the costs of the litigation. To my mind, this reduces the force of any argument that the claimants

are unfairly using their impecuniosity as a means of putting pressure on the defendant.

Counterclaim by defendant

91. The claimants argue that the assignment allegations are in substance a separate set of allegations from those in the claim against the defendant; they were pleaded by a third party and the defendant has chosen to adopt them against the claimants for its own tactical reasons. The claimants say the position is closely analogous to the situation where a defendant launches a counterclaim with an independent vitality of its own.

92. I am unable to accept the submission in those terms. As between the claimants and the defendant, the assignment allegation is put forward purely as a defence. The defendant denies that the claimants have title to sue. It would be wrong, in my view, to equate this to a counterclaim situation.

Overall conclusion on security

93. Viewing the matter in the round, I have to balance the injustice to claimants in preventing the pursuit of a claim as against the injustice to a defendant who runs the risk of the claim failing and finding itself unable to recover its costs. In the *Mastermailer* case, Vos J quoted at paragraph 36 the statement of Peter Gibson LJ in *Keary* at page 540, saying:

> "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 [a] more prosperous company."

94. In the present case, viewing the matter in the round and taking account as part of the overall circumstances of my conclusion that an order for security would be likely to stifle the claim, I do not consider it would be just to make an order for security for costs. I therefore dismiss the defendant's application.

The claimants' application against the defendant

95. The claimants seek their security of the costs of dealing with the assignment allegations of Liebermann, as now deployed by the defendant, which they say generate new issues and the bulk of the estimated costs of the proceedings. The claimants say the defendant has effectively put forward its own claim against the claimants by adopting the struck-out standalone assignment claim pleaded by the former part 20 defendant and that that is enough to make each of the claimants "a defendant to any claim" within the meaning of CPR 25.12. The claimants say

that, as the notes in the *White Book* at 25.12.4 indicate, the word "claim" under this rule is not defined and is not confined to a claim for substantive relief. They say it ought to govern a case like the present one, where the defendant has adopted every part of Liebermann's counterclaim save for the substantive relief that Liebermann had sought.

96. I am unable to accept these submissions because I do not consider that the court has jurisdiction to order security against the claimant here. CPR 25.12 says that security can be granted to a defendant to any claim. The note at 25.12.3 says the following:

> "A marginal note to the rule confirms that it also covers application by persons served with 'part 20 claims', i.e. counterclaims and other additional claims. Thus, a claimant may apply for security for costs of a counterclaim against the defendant who brought that counterclaim and, similarly, a third party may apply for security for costs of the third party proceedings against the defendant who commenced those proceedings…"

97. Note 25.12.4 says this:

> "Rule 2.3(1) defines 'defendant' as a person against whom a claim is made. The word 'claim' is not defined. When used as a noun in other rules it usually refers to the whole of the case in question (see, for example, r.8.1 and r.26.2) or to a separate cause of action raised in proceedings (see, for example, r.7.3). It therefore appears that, under r.25.12, as under the pre-CPR provision… a claimant is not entitled to apply for security for costs solely in respect of some interim application initiated by the defendant…"

98. When Liebermann were a party to the proceedings, they were advancing a claim. However, the defendant relies on the same matters against the claimants purely as a defence. It does not seek any relief against the claimants arising from it other than, as any defendant does, an order dismissing the claim. The fact that a third party could - and did - advance essentially the same facts as part of a claim does not, in my view, mean that the defendant, by adopting them as a defence, is thereby placing itself in the position of a claimant vis-à-vis the claimants such as to bring into play the power to order security for costs.

99. The claimants had made an alternative argument for security against the defendant based on CPR 3.1(3). However, the claimants did not pursue that argument at the hearing, I suspect rightly. I therefore dismiss the claimants' application.

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