Neutral Citation Number: [2022] EWHC 1964 (Ch)

Case No: HC-2016-002106

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 27th July 2022

Before :

SIR ANTHONY MANN

- -

Between :

(1) LIBYAN INVESTMENT AUTHORITY
(2) LIA ADVISORY SERVICES (UK) LIMITED
(3) MAPLECROSS HOLDINGS INVESTMENT COMPANY LIMITED **Claimants**

- and -

(1) ROGER KING
(2) INTERNATIONAL GROUP LIMITED
(3) BEESON PROPERTY INVESTMENTS LIMITED
(4) STOKE PARK ESTATES
(5) CHARLES MERRY
(6) CONRAD STRATEGIC PARTNERS LIMITED **Defendants**

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Kate Holderness (instructed by **Hogan Lovells International LLP**) for the **Claimants**
Henry Warwick QC and **Rachel Tandy** (instructed by **Croft Solicitors**) for the **Defendants**

Hearing date: Thursday, 14th July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This is an application for security for costs made under CPR 25 by the defendants against the claimants. They have already been provided with voluntary security during the course of this action, though a large part of it has been used to pay substantial adverse costs of interlocutory proceedings already. The first amount of security was paid into court on around 27 March 2018 in the sum of £505,000. After the provision of that security there was a substantial battle in which the claimant supplied to amend their claim and the defendants applied to strike out the claim. The result of all that was that the strike-out application succeeded but the claim form itself was allowed to survive to give the claimants a further opportunity to amend further (they had already made, or sought to make, four previous amendments). In due course they proposed a further amended claim (which omitted one of the then defendants) and that claim (with some further subsequent amendments) is the claim which is now proceeding to trial in November.

2. The court ordered that £475,000 of the existing security be paid to the defendants on account of their costs to date (to be assessed on the indemnity basis), with the remaining £30,000 to be held as security for the remainder of the defendants' costs. Prior to a CMC on 17 March 2021, the claimants agreed to pay further security into court in the sum of £292,500; this was paid on or around 7 April 2021. Thus at the moment the total amount of security for costs that is available for the rest of the action is the sum of £322,500. The defendants now seek additional security to go to the end of the trial, and they seek (in round terms) a sum of £1.9m, based on a large proportion of sums agreed as a costs budget and of already incurred costs which have not been the subject of costs budgeting.

The parties

3. The first claimant ("LIA") is the sovereign wealth fund of the state of Libya. The second claimant ("UK") is an English registered company which is wholly owned by LIA, and the third claimant is a Guernsey registered company, again owned by LIA and which was intended to be the vehicle through which it participated in a joint venture involving the defendants or some of them. The joint venture was to involve the development of a hotel in Hertfordshire but that venture failed. The claim made is for a sum of over £12m based on fraudulent representations for which the defendants are said variously to be responsible. It is not necessary to go into the details of the claim more than that. The third claimant can be ignored for the purposes of this application because its presence in the action adds nothing to the claim for, or resistance to, security for costs, the debate about which focused on the positions of the first two claimants alone. If security is not to be awarded against the first two claimants then it is accepted it would not be awarded against the third claimant either; if it is awarded because of the position of one or both of the first two claimants, then the presence of the third claimant does not affect that conclusion. It is not to be treated as having any relevant assets.

4. The political and military turmoil in Libya in the last 10 years is a matter of public knowledge. As a result of factors arising out of that, at an earlier stage in this action there was a lack of clarity as to precisely who was entitled to give instructions in

relation to LIA and its assets. In order to overcome that difficulty for the purposes of this action, on 29 September 2017 this court appointed receivers and managers over, inter alia, this claim. On 18 December 2020 that receivership order was discharged and funds in the hands of the receivers paid out into the control of those controlling LIA. What those funds were, and where they went, is not known to the defendants and not disclosed by LIA.

5. On 26 February 2011, on the outbreak of the first Libyan civil war, an asset freeze regime was put in place. This regime was implemented across the European Union and in the United Kingdom. The sanction scheme is currently imposed by the Libya (Sanctions) (EU Exit) Regulations 2020. The freeze can be summarised as applying to assets which are or were (i) located outside Libya immediately before 17 September 2011; (ii) funds credited to a relevant account on or after 17 September 2011 in discharge of an obligation arising before LIA became a Designated Person; or (iii) any interest or other earnings on the funds referred to in (i) and (ii). It is an offence for any person to deal with such funds or resources with the requisite knowledge that they are doing so. I was told that funds can be dealt with the consent of the relevant department within the Treasury.

The relevant provisions of the CPR

6. CPR 25 provides as follows (so far as relevant to this application):

> "25.12(1) A defendant to any claim may apply under this section of this Part for security for his costs of the proceedings.
>
> 25.13(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 is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies,…
>
> (2) The conditions are –
>
> (a) the claimant is –
>
> (i) resident out of the jurisdiction; but
>
> (ii) not resident in a State bound by the 2005 Hague Convention…
>
> (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…"

7. Those stated conditions are threshold conditions, one of which has to be crossed before the court then considers discretionary matters. In the present case it is accepted that LIA and the third claimant fall within condition (a). UK is a UK

company, but there is a dispute as to whether or not "there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so", so there is a dispute whether that condition is fulfilled. In all cases it is disputed whether or not the court in its discretion ought to make the order.

8. It will be useful to start with the position of UK, because it was accepted that if UK was good for the costs, so that security should not be ordered against it, then the defendants would face a considerable "headwind" (as Mr Warwick put it) in saying that security should nonetheless be ordered because of the position of LIA. I shall therefore take the position of UK first, though as will appear there are some aspects of its position which interact with the position of LIA which I will consider second.

9. In what follows I shall assume, without deciding it at this stage, that the appropriate sum for security would be well in excess of £1m but less than £2m. That covers the range of possibilities advanced by the parties. What is required is therefore a very substantial sum. If I decide that security should be given I will consider the actual sum at the end of this judgment.

The application as against UK

10. The point in issue in relation to UK is whether or not there is reason to believe that UK will not be able to pay the defendants' costs if ordered to do so. On this point the authorities establish the following.

11. The test is reason to believe, not proof on a balance of probabilities. In *Sarpd Oil International v Addax Energy* 2016] 1 CLC 336 Sales LJ referred to *Unisoft Group (No 2) Ltd* [1993] BCLC 532 and said

> " 11. … The question argued was whether the court had to be satisfied on a balance of probabilities that the claimant, if it lost, would be unable to pay the defendant's costs. Sir Donald pointed out that the relevant phrase was "will be unable" not "may be unable". He nevertheless held that the court merely has to have "reason to believe" that the company will be unable to pay so that there could be no basis for saying that the court had to be satisfied on a balance of probabilities that the claimant would not be able to pay."

He went on to confirm that that position was affirmed in *Jirehouse Capital v Beller* [2009] 1 WLR 751. That is therefore the test that I will apply. I did not detect that Ms Holderness for the claimants contended otherwise.

12. So far as timing is concerned, the position was helpfully summarised by Briggs J in *Chemistree Homecare Ltd v Teva Pharmaceuticals Ltd* [2011] EWHC 2979 at para 3:

> "(3) Inability to pay means to pay when the costs full due for payment… This calls for an assessment of what the claimants may be expected to have available for payment at the due date or dates in the form of cash or other readily realisable assets…

> (4) In respect of a costs order made at the end of a two-week trial, where there is no possibility of summary assessment, the relevant due dates, as it seems to me, are (a) the payment date of any order made by the trial judge for payment on account, and (b) the date when an order for the balance is made upon completion of detailed assessment."

13. In the present case, and on the assumption that the claimants become liable for costs, there will have been a lengthy trial in order to get there. Accordingly there is no prospect that costs will be assessed, though every prospect a payment on account of costs will be ordered. Therefore the date which I have to consider in relation to UK is such date as an interim payment would fall due. The default position would be 14 days after the date of the order. In *Holyoake v Candy* [2016] 6 Costs LR 1157 Nugee J considered the date of payment and said:

> "It is established that in considering, for the purposes of CPR 25.13(2)(c) , whether there is reason to believe that a company claimant will be unable to pay the defendant's costs if ordered to do so, the relevant question is whether it would pay within the time ordered, that is usually 14 days or 28 days. A company that has illiquid assets and could pay in the end but is unable to pay with a high degree of promptness is within the wording of the rule: *Longstaff v Baker & McKenzie* [2004] one WLR 2917 at [17]"

It will probably be fairer in this case to assume the longer period, but the last sentence of Nugee J (about illiquidity) has to be borne in mind in the present case because of the nature of UK's assets, as will appear.

14. In the same case Nugee J had to consider the position where there was said to be one claimant which was said to be good for costs and another against whom security might be ordered.

> "57. The existence of a co-claimant against whom no security can be ordered is not a bar to the ordering of security, but is a factor to be taken into account in exercising the discretion… ; and if the co-claimant could be shown both to be liable for the same costs and a good mark for those costs, that is capable of being a good reason not to order security (see the decision of the Irish High Court in *Kimpton v Ferox* [2013] IEHC 577) Mr Stewart accepts that the onus of showing that Mr Holyoake is a good mark lies on the claimants."

15. In the present case the claimants say, so far as necessary, that whatever the position of LIA on its own would be, UK is capable of paying the costs (is a "good mark"). While challenging that characterisation, Mr Warwick QC for the defendants accepted that if it was a good mark then security would not be ordered, absent some compelling factor to the contrary (which he did not advance). Ms Holderness effectively accepted that there would be no basis for any costs order being other than one on which all claimants were jointly and severally liable; I am sure she is right about that.

16. It is not sufficient for a defendant to establish a claimant has passed the threshold test. Once that has happened the court has to be satisfied that, as a matter of discretion, it is just to make the order.

17. Those are the considerations which I have to bring to bear, and I turn now to the facts. The only real source of information about this company comes from its accounts; the claimants have not disclosed any further material evidence about it other than a desktop valuation of its principal asset.

18. UK does not seem to be a trading company. Its principal asset is a building in Mayfair – 11 Upper Brook Street ("the property"), which has mixed office and residential use. It is held on a long lease for 107 years. The rent has to be deduced from documents other than the lease (because the lease is not in evidence), but it seems it has a rent which is 10% of any commercial sub-tenancies or the rental value of any part actually occupied by UK – a curious formulation. Until the end of 2018 it was valued in the company's accounts at £7.7m. Then at the end of the year the directors decided to revalue it at £11m, and that is how it now appears in the accounts. Until shortly before the hearing of this application the defendants challenged the accuracy of that valuation, since it was unsupported by any real valuation evidence. The only supporting material the claimants had was a witness statement from the company's auditor, Mr Jonathan Isaacs, saying that as auditor he had to validate the reasonableness of the exercise by considering comparable rental yields and sale prices of similar properties. That seemed to me to be very weak support when proper valuation evidence should have been available from an appropriately qualified expert if that sort of point was to be taken, but shortly after 1st July 2022 the claimants produced a desktop valuation from Allsops valuing the property at £10,750,000. In the light of that late-produced valuation Mr Warwick no longer took any point on the stated value of the property in the accounts.

19. However, he did maintain his case that the accounts showed that there was reason to believe that UK could not pay the costs when due. He relied on what he said was cashflow insolvency – the company has no income, apparently; its net current asset position in the 2020 accounts (the latest available) was only £75,000 made up principally of unidentified debtors; the company was not trading; and UK was not even actually occupying the premises (if it had been it would have been liable to pay rent). The 2020 accounts say that the valuation of the company is on a going concern basis "due to the support of the 100% shareholder". He drew attention to the different formulation in the 2018 accounts:

> "These financial statements are prepared on the going concern basis. The directors have a reasonable expectation that the company will continue in operational existence for the foreseeable future. However, the directors are aware of certain material uncertainties which may cause doubt on the company's ability to continue as a going concern.
>
> The company is reliant on support from its 100% shareholder. While support has been provided both in the past and subsequent to the year end, and the Directors have no reason to believe support will be withdrawn, no confirmation that support will not be withdrawn has been forthcoming. If support is

> withdrawn the Company will not be able to continue as a going concern."

He contrasted this with the statement in the 2015 accounts which said that the controlling party (i.e. LIA) had given confirmation that it did not intend to withdraw funding within the next 12 months.

20. Furthermore, there was the revelation of a loan agreement between LIA and UK dated 16 May 2010 under which LIA lent £7.5m to buy the property plus another property, repayable no later than 31 May 2028. Interest was at LIBOR plus 0.5%, but there is no indication in the accounts that it was ever paid. The agreement provided that interest should be paid quarterly in arrears with effect from 1 April 2013. This is said to be an odd agreement because it was not signed by UK (or at least the copy produced is not signed).

21. All this was said to demonstrate that there was reason to believe that the costs would not be paid within the relevant time. The deemed obligation to pay the costs would require payment within a relatively short time after the judgement, and the illiquid nature of the company's only asset meant that the costs could not be paid at that time. It would take time to realise the necessary funds from the sale of the property; it could not realistically be done within the timeframe required by the likely order for payment on account. There was no other source from which the costs liability could be paid because the company had no other assets and apparently no income.

22. Ms Holderness said the accounts demonstrated that the costs could be paid. The property was worth vastly in excess of the likely payment on account and even though the company had a large debt to its parent that debt did not fall due for a number of years and was not likely to form a competing demand. When challenged with the delays inherent in a sale she said there were other ways in which the money might be raised, and furthermore the timetable would not necessarily be as tight as Mr Warwick said (14 or 28 days) because there would be the prior stage of circulation and handing down of a judgment, and then a period before which a consequentials hearing would take place and an order drawn. In that time such a valuable asset could if necessary be charged by way of bridging loan or otherwise, and a lender would be likely to lend against such handsome security. Cashflow insolvency is not the relevant test even if the company became cashflow insolvent. It was also likely that if necessary LIA would step in and provide the necessary funds if they were not raised elsewhere. In those circumstances the threshold test could not be satisfied. Furthermore, when it comes to discretion (which is the next stage in the reasoning) it would be wrong to order security. There will be lots of instances of claims brought by companies who would not absolutely immediately have the funds to meet a putative substantial interim costs order, and if it were right to make a security for costs order against UK in this case the same ought to have happened in a lot more cases where it has patently not happened. UK would have the support of a wealthy parent which would be liable for the costs anyway.

23. Subject to it being apparent that LIA would step in to support UK, I consider that the defendants have demonstrated that UK complies with the threshold test of there being reason to believe it would be unable to pay the costs of the action if required to do so. The key lies in the illiquid nature of its assets. For these purposes one is presupposing a very significant order for payment on account. The position of the company is such

that it would not be able to pay that sum without exploiting the property. There is no way a sale could take place within the likely timeframe of the obligation to make the payment on account. A sale of this property is likely to require careful marketing and a period of negotiations. That could not be achieved within the relevant timeframe.

24. Nor can the court be satisfied that alternative ways of raising the money would raise it in time. Ms Holderness suggested, without any evidential foundation, that money could be borrowed, but even borrowing is likely to take some time, and it is not immediately apparent, without evidence, that a lender would see this income-less and business-less company as being a desirable borrower, at least without evidence of support from elsewhere. That support would presumably have to come from LIA, but the accounts do not demonstrate that such support will occur. The historic accounts demonstrate the uncertainty of the directors as to future support, not its certainty, and the most recent accounts state the fact of current support without saying anything about commitments. Nor does the evidence served by the claimants provide clear indications of a commitment to support in this (or indeed any) way. I therefore consider that Ms Holderness' suggestions to overcome the liquidity problems of UK are speculation without evidence.

25. Thus far in the reasoning it has not been demonstrated that UK is a "good mark" for the costs.

26. Ms Holderness also relied on the likelihood of LIA stepping in to pay the costs because it was the parent and would be liable for the costs anyway. The force to be given to that suggestion depends on the same sort of considerations as arise in relation to the security application as against LIA. This is where the interaction between the positions of the claimants comes into play. If LIA would support UK by paying sums promptly to overcome delays in realising the property, then that would involve a finding that LIA could and would pay the costs anyway, which would defeat the whole application. Whether or not that finding should be made is something that falls for consideration in considering the question of whether it would be just to make an order against LIA, to which question I now turn.

27. I therefore leave a final decision in relation to UK, incorporating findings on discretion, until after I have considered the position of LIA.

The application as against LIA

28. The defendants have satisfied the threshold test. That was not disputed. Having passed that point the relevant approach appears in *Danilina v Chernukhin* [2018] EWCA Civ 1802, per Hamblen LJ:

> "51. Having regard to the guidance provided by these authorities the position may be summarised as follows:
>
> (1) For jurisdiction under CPR 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

> (2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR 25.13(1) if "it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order".
>
> (3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 ECHR – see *Bestfort* at [50]-[51].
>
> (4) This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned" – see *Nasser* at [61] and *Bestfort* at [51].
>
> (5) Such grounds exist where there is a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay – see *Bestfort* at [77].
>
> (6) The order for security should generally be tailored to cater for the relevant risk – see *Nasser* at [64].
>
> (7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings – see, for example, the orders in *De Beer* and *Bestfort.* …"

29. The defendants say that the current political and military situation in Libya is such that enforcement in Libya is plainly impractical. There are no reciprocal enforcement measures in place; there is intense fighting among factions; the government's writ does not necessarily run throughout the country; foreigners are not safe there and there is lack of consular access. It was not disputed that the situation there made enforcement in Libya non-viable. In those circumstances enforcement, if required, would have to look to assets outside Libya. I agree with and accept that assessment.

30. So far as those assets are concerned, Mr Warwick relied on what he described as LIA's lack of candour in relation to its assets. In *Sarpd* Sales LJ said:

> "17. We consider, with all due respect to the judge, that he was plainly wrong. If a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so there is, in our view, every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so….
>
> …
>
> 19. Mr Nolan may be right to say that CPR Part 1.3 does not require a respondent voluntarily to fill gaps in an applicant's evidence in order to assist an applicant to discharge a burden of

> proof. But even if deliberate reticence on the part of a respondent is not a breach of CPR Part 1.3 a court can and should take account of deliberate reticence as part of the overall picture. Any evaluation has to be made on the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it. If, therefore, there were to be a practice of the Commercial Court (as to which we cannot express a view from our own experience) that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, our view is that the practice is a sound one and, as Lewison LJ noted, it is an important point of practice which should either be upheld or rejected at appellate level. We would uphold it. "

31. I follow that useful guidance. In my view there has been a strange reticence on the part of LIA when it comes to providing any useful information about its assets, both as to what they are and where they are, on which I am prepared to find that there is sufficient doubt about the ability of LIA to pay adverse costs, and about the availability of assets for enforcement, to raise considerable uncertainties as to the enforceability of a costs order and the likelihood of a voluntary payment. The following points appear from the evidence.

32. LIA describes itself as the sovereign wealth fund of Libya. No-one seems to doubt that that is what it is. One might imagine from that that it is very wealthy with plenty of available assets to pay the costs. However, imagination is not enough. There has to be some evidential foundation for the belief, especially when a challenge is mounted as to those assets.

33. At this point one comes up against existence of the sanctions referred to above. It may be that LIA has assets outside Libya, but it may be that they are still caught by the sanctions. This point was put to LIA's solicitors in November 2021 (letter dated 18th November 2021). Its solicitors declined to meet the point other than to point out that substantial security had already been provided and to assert, without particulars, that its client was "a sovereign wealth fund with very substantial assets". The solicitors said:

> "Demonstrably, it can pay".

But they did not demonstrate that.

34. The extensive correspondence over the many months preceding the hearing of this application shows the defendants' solicitors asking for details of assets which would be available, assurances as to whether they would remain available and help on whether they were caught by sanctions or not. The only material response to these requests (apart from an offer of some more limited security, which was provided as identified in paragraph 2 above) was to point out the availability of the property and,

latterly, the provision of a bank statement as referred to below. I have already dealt with the lack of prompt availability of the property.

35. It is quite apparent that the defendants have been asking for some reassurance as to the existence and whereabouts of assets, and equally apparent that, apart from the two assets just referred to, it has not been provided. That provides the context for the evidence from LIA on this application. It relies on a witness statement from its solicitor Mr Ditchburn. That witness statement relies heavily on the existence of the property as being an asset available for costs, and produced the desktop valuation referred to above (thereby, temporarily at least, putting to bed an argument as to its value). It goes on to deal briefly with LIA's position. It points out that LIA is in effect an arm of the Libyan state and is managed by the Government of Libya, and goes on:

> "It is reputed to have assets judgement in the order of US$67bn and is not in the habit of defaulting on its obligations under court orders."

36. I find that a curious formulation in this context. What one would have expected Mr Ditchburn to have done is to have spoken to at least some significant assets, and not merely what is "reputed". I agree with Mr Warwick that this is a demonstration of lack of candour, or coyness, which supports an application for security. If it has so many assets then one would have expected Mr Ditchburn to be able to give at least some particulars of assets that would be available. In this context one has to bear in mind the freeze on assets. Mr Ditchburn acknowledges the existence of the freeze in paragraph 35 of his witness statement, and points out that it was only assets held outside Libya as at 17 September 2011 that are frozen. That is true, but he does not then go on to show which of the $67bn of assets fall into that category, with the exception of the property to which he has already referred and a bank account to which I shall come in a moment. Reliance on assets within Libya, which would not be frozen, is problematical for the reasons given above. Reliance on after-acquired assets outside Libya would be permissible, but with one exception those assets are not disclosed.

37. By the same token Mr Ditchburn says that LIA is "not in the habit" of not paying costs orders made against it. That is all he says on the point. Again, that is a curious formulation, and it is not supported by any details at all. That is all that is said. The expression manifests the same coyness or lack of candour to which I have referred.

38. In paragraph 36 Mr Ditchburn complains that the defendants have been pressing for "full disclosure of all details relating to the LIA's assets for the purposes of their Security Application." Mr Warwick says that is not accurate; they have never asked for full disclosure. In any event, full disclosure would obviously not be necessary. What would be appropriate would be some disclosure to demonstrate available assets. The only disclosure which Mr Ditchburn goes on to give, apart from the property with which he has already dealt, is moneys in a bank account. He produces a single page of a bank statement relating to an account held by LIA at ABC International Bank plc in London, showing a balance of over £7m in May of this year. He says that he is instructed that this comprises unfrozen funds – that particular fact is not challenged. What is challenged is the value of this single piece of paper, and in my view with justification. It is numbered in a way which does not enable one to form any

judgement as to how long the account might have been in existence. It shows two entries. The first is a balance brought forward as at 3 May 2022 of just over £7.2m. There are then some redacted entries and a closing balance as at 31 May 2022 of just over £7.1m. What this shows is that there was indeed at the beginning and end of May (but not necessarily during the whole of May) a sum of over £7m in that account. It is not shown what is there now; it does not show fluctuations on the account; it does not show that the account is one in which there was habitually a very significant sum of money, so as to lead one to believe that those sort of sums are likely to be there at the end of a trial. It is not known what the purpose of the account is; for all we know it may have simply been an account which received a large sum of money on a temporary basis. Having received this information, on 5 July 2022 solicitors to the defendants asked LIA's solicitors for their clients' undertaking to the court not to reduce the balance in this account below a sufficient sum to secure the amount in which security was sought (£1.9m). This was refused in a letter of 6 July 2022 on the footing that defendants had no right to ask for that. It is right that technically they had no right to ask for it but it was a sensible and legitimate request to meet an obvious problem, and the failure to give it leads to the inference that the relevant amount might not be there at the end of a trial.

39. In my view that is telling evidence in this context. LIA is an organisation which holds itself out as being reputable and with huge assets. However, some of those assets are frozen, and that presents a particular problem in the present circumstances. When challenged, the only liquid assets to which it refers are monies which happen to be in its account (or one of its accounts) at the end of May, with no further information about those monies at all. Its coyness in this respect is, in my view, highly relevant. Its reputation, on which it apparently relies, is far from a complete answer – see Butcher J in *PJSC Tatneft v Bogolubov* [2019] Costs LR 977 at paras 55 and 56. If it really does have substantial and readily available unfrozen assets, or an asset position which demonstrates that it will have readily available unfrozen assets, when (if) it comes to the payment of costs, one would have expected it to have done better than the disclosure provided.

40. In my view all that does raise, and does not allay, serious questions as to the ability of LIA to pay a substantial costs order. I discount the existence of the bank balance referred to above for the reasons given. This conclusion affects the likelihood of there being funds to discharge LIA's obligation to pay costs; it also affects the likelihood of its supporting UK's liability.

41. All this material leads me to the view that LIA should provide security for costs unless the existence of the property is a sufficient demonstration of assets to meet the point. I have already decided that that property is inadequate for that purpose so far as UK is concerned, and that conclusion should be carried over to LIA's position. The existence of this property does not support the case against ordering security for LIA.

Delay

42. The claimants take a point on delay, saying that this application should have been made earlier. It is said that this application is made only a few months before the trial (in November), and almost 6 months after the costs budgets (on which the present application is based in terms of amount) were approved. The application

should have been made much earlier, when it became apparent that no more security would be provided voluntarily. Reliance is placed on *Re Bennet Invest Ltd* [2015] EWHC 1582 (Ch) at para 28:

> "Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where the delay has deprived the claimant of the time to collect the security, or lead the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs… The question of delay must be assessed at [the] moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. This is because as the Court of Appeal said in *Prince Radu of Hohenzollern v Houston* [2006] EWCA Civ 1575 … the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgement without a trial. "

43. The first point to be made in this case is that if there was delay then the claimants do not seem to claim to have been prejudiced by it. Their evidence does not identify it; nor did Ms Holderness's skeleton argument. Her oral submissions refer to a lost opportunity of being able to decide to withdraw rather than provide security, which may be true as a matter of strict theory (assuming delay for these purposes) but there is not the slightest suggestion that the claimants would even have thought about that, let alone done it. To suppose they might have taken that course is entirely fanciful on the facts of this case. The claimants have fought this case tenaciously through a contested strike-out which resulted in significant costs liabilities and a need to re-plead the case. They obviously attribute real value to it and their evidence, while unparticularised as to assets (see above), does not give the impression that they could not afford it. Ms Holderness expressly disclaimed any other prejudice in having to find the money if her clients have to, and did not aver any other form of prejudice from any delay in applying for security.

44. That materially weakens any delay point, though by itself is not fatal. I should consider whether there has in fact been culpable delay. It would seem from Ms Holderness's skeleton that the claimants would say that the application should have been made last November when it became apparent that voluntary security would no longer be provided.

45. On 18 November 2021 the defendants' solicitors wrote asking for further security in the light of the costs budget recently provided. On 23 November the claimants' solicitors wrote refusing to give security. One of the points that they made was to

point out that security had previously been paid based on a previous cost budget. The letter went on:

> "Your clients accepted this proposal. At no time did your client suggest, and nor could they have done given the contents of their February 2021 Precedent H, that this payment was inadequate to cover the phases in question. Whilst our clients' position remains fully reserved as to whether your clients are entitled to security for their costs, it would follow that the appropriate point in time, if any, for your clients to raise the issue of further security (and our clients' position is expressly reserved in relation to the same) would be **at the conclusion of the disclosure phase** and to cover the next following phases of work.
>
> …
>
> **We also consider it premature** to seek security at this stage for the costs of preparing witness evidence, given that these are not currently due to be exchanged for over four months and even that is subject to any further order that the court may give at the Disclosure Guidance Hearing on 30 November 2021." (my emphasis)

The letter went on to take issue with whether security should be provided on a number of bases.

46. In the light of that stance it is a little strange for the claimants to complain that the defendants did not apply last November or for a period thereafter. On 30 November 2021 there was a Disclosure Guidance and Costs Management hearing at which the defendants' budgeted costs up to trial were agreed or approved. I was told, without demur, that thereafter disclosure took place. It is not clear whether the process had entirely finished when the defendants' solicitors wrote a further letter on 18 February 2022 seeking security for the costs to trial. The letter invited the voluntary provision of security, and also invited a response if the claimants were to say that further security should not be provided. No response was provided to that letter and a response was chased on 18 March 2022 in a letter which indicated that if an agreement was not forthcoming by 23 March then an application would be issued returnable on 29 April 2022 when there was already a Master's appointment in the diary. A response came on 23 March 2022 refusing security and arguing why it should not be given. There was then a sequence of correspondence in which each side sought to persuade the other without any material success. The application was then issued.

47. In the light of that it is impossible to see how there was any culpable delay in issuing the application. The claimants themselves said that the application should await the end of the disclosure process, and said an application in November was "premature". The defendants returned to the matter at or about the end of the disclosure process, and there was thereafter an understandable process of trying to achieve agreement without a court application. The application was made when it became apparent that

there was going to be no agreement. I do not regard the proximity of the trial as being of any significance in this context.

48. There is in fact no relevant delay in relation to all this, and that factor, together with no indication of any prejudice, means that there is nothing in this point.

Conclusion

49. I consider it just to order security for costs in this case. UK is not a "good mark" for the costs, for the reasons given above, and LIA's disclosed asset position (which is basically a non-disclosed asset position) means that there are sufficient doubts about its ability to pay costs and about enforcement of any costs order that would be ordered against it. The property does not support LIA's position, just as it does not sufficiently support UK's position. By the same token, LIA and its assets do not sufficiently clearly support UK's position. Overall, and ignoring for these purposes the third claimant, the combined disclosed assets are surprisingly small for such an allegedly large fund as LIA, and I consider that the defendants have made out their case of vulnerability to a costs order not being paid. In my discretion I view it as just that security be given.

50. So far as the amount is concerned, the defendants seek the sum of £1,917,615. That is based on a calculation involving 70% of incurred costs and 70% of other unbudgeted costs relating to an application concerning redactions. To that is added 90% of further budgeted costs, based on the approved budgets to trial. That gives a total of just over £2.2m, from which sums already held as security (£322,500) are to be deducted, leaving the sum stated in the first sentence of this paragraph. Mr Warwick submitted that the sum was sensibly aligned with the claimants' own budgeted costs to trial and was not disproportionate. It is sensible to take 70% of unbudgeted costs, and the budgeted costs were a fortiori a reasonable estimate of the likely costs to the end of the trial and were likely to represent the likely recovery of those costs, so taking 90% of those costs was sensible.

51. Ms Holderness adopted a different approach. She submitted that the costs order should be limited to an amount which represents a proportion of the defendants' future costs only, from the date of the application; those future costs totalled approximately £1.4m. I think that was intended to reflect her delay point, which I have decided against her. She did not really otherwise engage on the figures.

52. I find that there is no reason why the figure should not be based on the costs figures (incurred and future) relied on by Mr Warwick. I consider that there is no reason to limit the basic costs (before any discount) to future costs; there has been no delay to justify that approach and no other reason capable of doing so. Having come to that conclusion I find that the appropriate figure for security, to reflect likely recoveries, is £1.9m (engaging in a little rounding down). The nature of the security was not debated. In the past the claimants have voluntarily paid cash into court. No other technique has been proposed in this case and I shall therefore so order, but if the claimants have other realistic proposals which cannot be agreed then I shall allow the point to be revisited at the consequentials hearing. It is important that hearing take place before the end of term so that that matter, and any other outstanding consequential matters, can be promptly agreed or determined by me.