Geneva Trust Company (GTC) SA (formerly k/a Rawlinson & Hunter Trustees SA) v Robert Tchenguiz

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
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Text

[2019] JRC 110A

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between
Geneva Trust Company (GTC) SA (formerly k/a Rawlinson & Hunter Trustees SA)
Representor
and
Robert Tchenguiz
First Respondent

and

Fort Trustees Limited

Second Respondent

and

Balchan Management Limited
Third Respondent

and

Elizabeth (“Lisa”) Tchenguiz-Imerman
Fourth Respondent

Advocate C.J. Swart **for Geneva Trustees SA (formerly known as Rawlinson & Hunter Trustees SA)**

Advocate P. D. James **for Robert Tchenguiz, Fort Trustees Limited, and Balchan Management Limited**

Authorities

Investec Trust (Guernsey) Ltd Bayeux Trustees Ltd v Glenalla Properties & Ors [2018] UKPC 7

Rawlinson & Hunter Trustees SA & Fort Trustees Ltd & Balchan Management Ltd [2018] JRC 131

Libyan Investment Authority v Societe Generale SA [2015] EWHC 550

Café de Lecq v Rossborough (Insurance Brokers) Limited [2011] JLR 031

Ultaframe (UK) Limited v Eurocell Building Plastics Limited [2006] EWHC 90069 (costs).

Pearce v Treasurer of the States [2016] JRC 100

A.E. Smith & Sons Limited v L'Eau Des Iles (Jersey) Limited [1999] JLR 319

LUFC Limited v Admatch [2009] JLR 186

Orange Capital (Proprietary) Limited & Ors v Standard Bank Jersey Limited & Ors [2013] JRC 221A.

Young & Ors v Haden & Ors [2016] JRC 089D

Holmes v Lingard & Anor [2015] JRC 172

Practice Direction RC17/06

Practice Direction RC17/08

Security for costs.

THE MASTER:

Introduction

1 This judgment contains my decision in respect of an application for security for costs brought by Mr Robert Tchenguiz ("the first respondent"). There was also a second summons issued before me alleging that the representor was in breach of paragraph 1 of the Act of Court dated 11 th January, 2018, issued by the Royal Court. However, I referred this issue to the Royal Court because the order made was for delivery of trust documents against the representor as former trustee. It was only therefore the Royal Court that could deal whether or not there had been compliance with that order.

2 The current dispute deals with whether or not the first respondent agreed to indemnify the representor for liabilities incurred by the representor as trustee of a trust which I refer to in this judgment as "TDT" by a deed of indemnity said by the representor to have been executed and dated by or for The first respondent on 14 th April, 2014. The deed related to various proceedings in Guernsey. The most significant of those proceedings was between *Investec Trust (Guernsey) Limited and Bayeux Trustees Limited* (together, "Investec") as plaintiffs against *Glenalla Properties Limited* and other defendants. The representor was the fifth defendant to those proceedings. Those proceedings were appealed to the Privy Council as reported at ([2018] UKPC 7. For the purposes of this judgment it is simply necessary to note that the appeals brought by the representor (and the second and third respondents as successor trustees) were unsuccessful resulting in both facing a significant costs liability to Investec estimated to be in the region of £25 million.

3 Otherwise the position was described in a judgment of Commissioner Clyde-Smith reported at *Rawlinson & Hunter Trustees SA & Fort Trustees Ltd & Balchan Management Ltd* [2018] JRC 131 at paragraphs 3 to 5 as follows:-

> ***"3. By way of background, R & H was trustee of eleven trusts associated with D and his family. They are all discretionary settlements governed by Jersey law. The relationship between R & H and D broke down in 2017, and difficulties have been encountered over the terms upon which R & H should retire as trustee of all of the trusts involved in favour of Fort and Balchan, two Guernsey based and regulated trust companies*** .
>
> ***4. A particular problem relates to the potential personal liability of R & H to adverse costs orders in proceedings in which it is a party as trustee. R & H is the named litigant or involved as trustee in litigation in Guernsey and the United Kingdom. There are a number of court cases which Advocate Swart said each involved multi-million pound claims and extensive costs exposure*** .

> ***5. There are two sets of proceedings which are of particular concern to R & H, namely the Guernsey proceedings that have recently culminated in the decision of the Privy Council in*** *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* [2018] UKPC 7 ***where costs orders are anticipated shortly, and proceedings in England yet to come to trial in which R & H, as trustee and D are plaintiffs against Grant Thornton and the liquidators of the same BVI companies involved in the Guernsey proceedings. At stake in the Guernsey proceedings are adverse costs orders, potentially we were told of some £25 million. The costs of the defendants alone in the English proceedings are estimated we were told at some £32 million against some £23m paid into court. The implications of potential personal adverse costs orders are understandably of the utmost concern to R & H. To the extent that R & H may be found to have a personal liability to any part of these costs, it relies upon indemnities given by D at whose request it says it agreed to participate as a party, the authenticity of one of which D is now challenging."***

4 In its particulars of claim filed subsequent to the judgment of Commissioner Clyde-Smith, the representor alleges that the deed of indemnity was executed either by the first respondent or by his personal assistant on his behalf.

5 To the extent that the first respondent did not in fact sign the deed it is further pleaded as an alternative that the first respondent was bound by the deed and was estopped from denying that he was bound by it.

6 In response the first respondent denies that he ever executed the deed. The allegation of an estoppel is also denied. I observe that why the first respondent denies the estoppel is not clear either from his pleading or the evidence filed in support of the present application.

7 In support of its application for security for costs, the first respondent relied upon the eleventh, thirteenth and fourteenth affidavits sworn by Ms Nicole Martin on 1 st March, 2019, 18 th March, 2019 and 29 th April, 2019. Ms Martin describes herself as "Head of the Legal Team at R20 Advisory Limited, (the "Advisory Company" which provides services to the trustees in various trusts related to the first respondent") and is qualified as an Australian barrister.

8 The representor relied upon the second affidavit of Richard Hillier sworn on 17 th April, 2019, and his third affidavit sworn on 17 th April, 2019.

9 In respect of the latter affidavit, initially the representor attempted to supply this to me on a confidential basis. The argument advanced was that the affidavit should be kept confidential on the basis of some form of confidentiality club. However, I was not persuaded by the authorities cited to me because using such clubs either appears to relate to anti-trust

or intellectual property disputes to protect commercial confidences or where there is a risk to life or limb (see *Libyan Investment Authority v Societe Generale SA* [2015] EWHC 550) as follows:-

> ***"25 Confidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences.*** However, the court will also depart from its usual procedural rules where it is necessary to do so in order to protect against a risk to life or limb. Indeed, the court may be required, pursuant to the positive obligation upon the United Kingdom under Article 2 ECHR, to take reasonable steps to avoid a risk to life."

10 The present case is not an intellectual property dispute; nor is there any evidence or allegation of a risk to life or limb. I was not therefore persuaded that it was appropriate for me to receive an affidavit from the representor which would not be shown to the first respondent. However, I did make express orders making it clear that the third affidavit of Richard Hillier and the accompanying accounts could only be used for the purposes of the present application and for no other purpose. This order extended to Collas Crill, Kathryn Purkis, Ms Martin and R20 Advisory Limited.

11 Subsequent to the hearing an issue arose as to whether or not the contents of accounts supplied had been discussed by the first respondent or employees of R20 Advisory Limited with a former director of the parent company of the representor. I therefore made an order requiring an affidavit to be filed explaining the nature of any such discussions. This was because in making an express order of confidentiality, I also made it clear that any breach of my order would be a contempt of court and would be referred to the Royal Court. This was to emphasis the seriousness of the confidentiality obligations attaching to the financial information provided by the representor.

Advocate James' contentions

12 In his oral submissions Advocate James for the first respondent emphasised the following. In relation to the summons I had referred to the Royal Court, to the extent that the summons covered the indemnity issue, he reserved the right to come back before me to make a further specific discovery application.

13 In relation to the application for security for costs, the focus of Advocate James' oral submissions was that a corporate plaintiff could be ordered to pay security; if that corporate plaintiff could not pay, it was just to order security to be provided. This was clear from *Café de Lecq v Rossborough (Insurance Brokers) Limited* [2011] JLR 031. The core issue was therefore the ability of the representor to meet any adverse costs order. What the court had to carry out was a balancing exercise between a successful defendant not being paid and the impact of ordering security and whether a claim would be stifled.

14 To take into account any inability to pay, any such inability had to be due to the conduct of a defendant. Advocate James suggested that to rule otherwise would lead to plaintiff companies structuring their affairs in such a way in order to avoid having to provide security for costs.

15 He was critical of statements made by the representor (e.g. paragraph 68 of Richard Hillier's second affidavit) that the representor had every intention of meeting any or adverse costs order. An intention to pay was not the same thing as an ability to pay. It was a company's ability to pay that was the relevant factor for the court.

16 It was also important to remember that the dispute under the indemnity was in respect of third party cost liabilities i.e. Investec/Bayeux the successful parties before the Privy Council and costs of third parties, principally legal advisers. The disputed indemnity did not cover any unpaid fees due from the first respondent.

17 In respect of any allegation of stifling, the onus was on the representor to demonstrate that the required threshold was met. By reference to the accounts of the representor, the first respondent argued that the inability to pay was not due to any of the complaints made by the representor but because the representor was run on a hand to mouth basis.

18 The position of the parent company was irrelevant because the shareholder was not obliged to pay any adverse costs order. It was clear from the accounts that the representor could not meet any such costs order because its limited income was exceeded by costs charged.

19 Statements that the representor had been in business since 1982 could not be relied upon as the entity that had been in business was Rawlinson and Hunter who were now no longer connected to the representor or its parent.

20 Looking at the accounts in more detail it was clear from 2017 and 2018 there had been losses. What the accounts also suggested was a handful of clients only. There could not be twenty-two employees because there were no salaries recorded in the accounts.

21 What had led to the present application was the first respondent discovering that Rawlinson and Hunter had disposed of their interest in the representor and its parent. Previously the first respondent had had an erroneous but genuine perception that the representor and its parent were owned by Rawlinson and Hunter when in fact it only held a minority shareholding. The first respondent and the other respondents believed that any adverse costs orders would be met due to the involvement of Rawlinson and Hunter. It was because their interest ceased that the application was brought.

22 While in the first respondent's skeleton and affidavit evidence, an argument was also

raised that it would be difficult to enforce costs orders in Switzerland, by the time the matter came before me this alternative contention was not pursued further because it was accepted by Swiss advisers retained by both parties that a mechanism existed for a costs order issued in Jersey to be enforced in Switzerland. In my judgment, based on the material produced to me Advocate James was right not to pursue this alternative ground further.

23 In relation to liability for adverse costs orders, or for fees due to advisers, there was more than sufficient in the trust to meet such liabilities and therefore there was no exposure under any indemnity that did exist.

24 In respect of the taxation of the representor's costs following the decision of Commissioner Clyde-Smith, this was proceeding through the taxation process to an oral taxation. Again there was no evidence that the taxation proceedings were stifling the ability of the representor to put up security.

25 In relation to the allegation that the first respondent was looking to besmirch the reputation of the representor and its parent, there was no evidence of this allegation which was unparticularised. Advocate James was critical of the lack of emails and the lack of evidence that any statements alleged had impacted the representor or its parent financially.

26 In relation to the timing of the application, the application was not so late that it was going to cause any trial to be adjourned. Rather the lateness was due to the withdrawal of Rawlinson and Hunter and consequent uncertainty as to who may be interested in the representor and its parent.

27 In relation to the quantum of the security sought, the first respondent's cost to date were in the region of £350,000; the approach of the first respondent was to suggest that the likely future costs to be incurred would be a similar figure and therefore to seek the sum of £750,000 as security. What was required was expert handwriting evidence, evidence on English Law because of the estoppel argument and otherwise a trial which would last around a week.

28 In relation to Collas Crill's fees, principally Advocate James was involved in as the partner in charge supported by one senior fee earner and then a more junior fee earner and English counsel.

29 In relation to R20 Advisory Limited, the rationale for their involvement was that if R20 did not carry out legal work, it would be carried out by Collas Crill therefore increasing the amount of Collas Crill's costs.

Advocate Swart's contentions

30 Advocate Swart's submissions in summary firstly suggested that his client should not be required to put up security. Secondly, if an order for security was appropriate, all that should be ordered is the cost of enforcement in Switzerland. Thirdly if more than the cost of enforcement was required, only a reasonable sum should be ordered. What was within the means of the representor and its parent would be around £50,000 and so this was a reasonable sum. Finally, he argued that the security sought in the sum of £750,000 would stifle the proceedings.

31 He also reminded me by way of background, that the first respondent had always been involved in the disputes including the present dispute. The underlying issue was about indemnification and release of his client by the first respondent in respect of proceedings brought for the first respondent's benefit and with his knowledge and approval. However, there was a long way to go to resolve all the disputes because the present parties had now fallen out. His client had not received any comfort that there was no exposure for his client in the future for third party liabilities and that its own fees would be paid. It still faced a liability to Investec and Bayeux who were not parties to the settlement agreement referred to by Advocate James for the first respondent. There was also a dispute between the joint receivers of the assets of the TDT and the first respondent about how to realise assets of the TDT in order to pay creditors.

32 What the representor believed led to present application was not any change of name of the representor but was due to the compromise of proceedings brought against Grant Thornton and Kaupthing Bank and others in England by the trustees of the TDT and another trust for the benefit of the first respondent. The representor was one of the parties to the English proceedings and the compromise. The representor therefore also wanted to understand the effect of this settlement and what exposure it might face as a consequence.

33 In relation to the status of the representor, its position was that nothing had changed. The representor was a subsidiary of a Swiss company formerly known as Rawlinson and Hunter S.A. Its financial position had not altered. Rather the main Rawlinson and Hunter partnership had ceased to hold a minority shareholding of 10% in the parent company. The parent, by reference to its profit and loss account, had spent some 300,000 Swiss Francs on rebranding which was a significant investment for the future. The parent company therefore intended to continue to support the representor.

34 Advocate Swart in response to a question put by me during the hearing further confirmed that, following an adjournment to take instructions, the parent company irrevocably undertook to the Court and the first respondent to meet any adverse costs order made against the representor.

35 The profit and loss account of the parent company also showed provisions for bad debts of CHF 1,469,113.46 for the year ending 31 st December, 2017, and CHF 337,485.29 for 31 st December, 2018. I was informed that these bad debts provisions related solely to unpaid fees the representor claimed were owed by the first respondent. Further costs had also

been incurred by the parent company in dealing with claims against the representor by third party creditors of the TDT. Advocate Swart therefore argued that the profitability of the parent company had been affected by the actions of the first respondent.

36 The accounts of the parent in the notes also contained a provision for legal fees which referred to the dispute between the representor and the first respondent leading to a provision for legal costs in the sum of CHF 250,000.

37 In relation to the first respondent's submission that there were sufficient assets in the TDT to meet third party liabilities, this contrasted with objections to the proof of debt filed by the representor recorded in a letter dated 23 rd April, 2019, from Babbe, Guernsey Advocates for the current trustees where objection was taken to the proof of debt insofar as it covered legal costs due to third parties, administration and other fees said to be owed to the representor and legal costs incurred by the representor in relation to the TDT.

38 The representor was a defendant in proceedings in the United Kingdom against both the current trustees (the second and third respondents) and the representor. Each had separate representation and there was no cooperation between the parties. This led to more legal costs being incurred.

39 The representor was still party to the Guernsey proceedings dealing with how the assets of the TDT were to be dealt with.

40 In respect of fees claimed by Herbert Smith Freehills there was an argument about whether or not the balance of the fees represented personal advice to the representor. The second and third respondents had agreed to use their best endeavours to resolve this dispute. The representor's view was that they had not done so.

41 There were therefore ongoing issues where the representor faced a liability which justified the present proceedings.

42 What the first respondent was trying to do was to stifle the claim. This could be seen clearly from paragraph 23 of the fourteenth affidavit of Nicole Martin.

43 The claim was not a bad one as there had been no attempt to strike it out.

44 The first respondent was also not engaging in any attempts to resolve matters.

45 The fact that the representor was not a Jersey company was not a basis to order security. What was required was a balancing exercise.

46 In relation to the amount of fees claimed, for future costs what was required was an estimate and none had been provided. It was not acceptable simply to double the amount incurred to date. The representor's skeleton had suggested a schedule would be provided but this had not occurred.

47 In relation to costs incurred with Collas Crill, based on an assessment by a costs draftsman based in London (Practico Limited) an appropriate figure for past security was in the region of £50,000.

48 In respect of R20 Advisory Limited, this was the first respondent attempting to profit from litigation which was not permitted. Advocate Swart challenged the basis of R20 to recover costs as follows:

(i) There was no evidence that the first respondent had incurred these costs;

(ii) This was a subsidiary of another trust providing the benefit to a beneficiary i.e. the first respondent;

(iii) This was not even an analogous to the cost of in-house lawyers which possibly could be recovered as long as there was no duplication (see *Ultaframe (UK) Limited v Eurocell Building Plastics Limited* [2006] EWHC 90069 (costs)).

(iv) R20 Advisory Limited was also not a law firm.

(v) The total hours claimed were 648 hours over a 5 month period which it was contended was disproportionate, even if it could be justified. Of this figure 410 hours related to discovery when only 280 provided documents were listed.

49 In evaluating security, I was also invited to consider whether the overall costs incurred met the proportionality requirement applying *Pearce v Treasurer of the States* [2016] JRC 100 and subsequent decisions.

Advocate James' submissions in reply

50 In reply Advocate James emphasized that the overarching concern remained, namely that the representor was a company without means and unable to pay any adverse costs order.

51 The guarantee from the parent company was not reliable because the accounts produced were only in draft and the first respondent was not prepared to take the risk that any undertaking would not be met.

52 The risk of potential ongoing exposure to third parties was irrelevant to cash flow. The

difficulties the court and the first respondent faced about understanding the financial position of the representor and its parent were all down to the representor. The information provided was limited.

53 The burden remained on the representor to persuade the court that impecuniosity was caused by the first respondent. While the first respondent was not alleging that the court had been misled, there was a lack of clarity in the position of the representor which meant that security was required.

54 In relation to Herbert Smith Freehills' fees, the first respondent's position was that he was using his best endeavours but wanted to see the advice that was chargeable to the trust fund. The position of the representor was that any advice it received was private even if paid for out of the trust fund. The court was unable to decide these matters which was why security was required.

55 In relation to R20, the fundamental issue was that R20 had carried out work which otherwise Collas Crill would have carried out and where security could clearly had been requested. The work was justified and to ignore the value of the work carried out by R20 would mean that the representor would gain a windfall.

56 In respect of future costs, the amounts covered by the indemnity in round figures were claims for costs of £25,000,000 from Investec and Bayeux and further third party claims of around £5,000,000. These justified spending significant costs on the issues raised by the particulars of claim and the pleadings in response.

57 In terms of future costs, Collas Crill, since provision of the schedule of costs exhibited to Ms Martin's eleventh affidavit had incurred a further £82,000 plus £20,000 for counsel including in relation to the present application.

58 In terms of future cost these were likely to amount to £75,000 and £25,000 for preparation of expert evidence and specific discovery applications, a further £100,000 for trial and trial preparation as well as further £50,000 for counsel's involvement (Kathryn Purkis). The likely future costs were therefore in the region of £350,000 plus work carried out by R20. The figure asked for was therefore justified.

Decision

59 In respect of the applicable legal principles concerning whether or not the representor as a company should provide security for costs, the starting point in respect of an application for security for costs against a plaintiff company is paragraph 42 of the judgment of Commissioner Clyde-Smith in *Café de Lecq v Rossborough Insurance Brokers Limited* [2011] JLR 031 which provides as follows:-

> ***"42 As is clear from the above, we have with respect reached different conclusions to those of the Master on the principles to be applied in this application for security for costs.*** Our conclusions are as follows:
>
> > ***(i) There is no presumption or principle that Jersey-resident corporate plaintiffs are not required to provide security for costs or that security for costs orders will only be made against Jersey-resident corporate plaintiffs in exceptional circumstances*** .
> >
> > ***(ii) The principles to be applied when considering an application for security for costs against a corporate plaintiff are those set out in A.E. Smith (9)*** .
> >
> > ***(iii) The court is concerned with the effect of such an order upon the corporate plaintiff, not upon its directors, beneficial owners or other backers*** .
> >
> > ***(iv) The possibility that the successful defendant may be able to apply for a costs order against a third party in the event that the assets of the unsuccessful corporate plaintiff are insufficient to meet its costs should not be taken into account."***

60 The relevant principles referred to at paragraph 42 (ii) were those set out in *A.E. Smith & Sons Limited v L'Eau Des Iles (Jersey) Limited* [1999] JLR 319 at pages 322 to 323 as follows:

> ***"The principles of law relevant in considering whether an order for security for costs should be made by the courts of England and Wales were 10 well-summarized by Peter Gibson, L.J. in*** (*Keary Devs.* Ltd. v. Tarmac Constr. Ltd. (2) [1995] 3 All E.R. at 539–542). ***For the purposes of the present application I am content to treat that statement of principles as generally suitable for adoption in Jersey law, while reserving for future consideration some of the details of this statement which may need some reconsideration in the different circumstances in Jersey.*** That statement is too long to be quoted fully here, and I summarize the principles as follows:
>
> > ***(a) The court has a complete discretion whether to order security*** .
> >
> > ***(b) That the plaintiff company will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security*** .
> >
> > ***(c) The court must balance, on the one hand, the injustice to the plaintiff company if prevented from pursuing a genuine claim by an order for security, and, on the other hand, the injustice to the***

defendant if no security is ordered, the plaintiff's claim fails and the defendant is unable to recover its costs from the plaintiff. So the court will seek not to allow the power to order security to be used oppressively by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the circumstances underlying the claim and/or the failure to meet the claim may have been the cause or a material cause of the plaintiff company being ***indigent.*** The court will also seek not to be so reluctant to order security that the impecunious plaintiff company can be enabled to use its inability to pay costs as a means of putting unfair pressure on the more prosperous defendant company .

(d) The court will broadly take into account the prospects of success in the action, and the conduct of the action so far. I mention here that it is common ground that the present application is to be decided without dealing with the merits of the cases put forward by either of the parties to the action .

(e) The court has a discretion to order security of any amount, and need not order substantial security .

(f) If the plaintiff company alleges that the effect of an order for security would be unfairly to stifle its genuine claim, the court must be satisfied that, in all the circumstances, the claim probably would be stifled. The test is one of probability, not possibility .

(g) The stage of the action at which security is sought is one aspect of the conduct of the action which the court will take into account."

61 In the present application, the ground relied upon by the first respondent was that it was clear from the accounts of the representor that the representor was not in a position to meet any adverse costs order and therefore security for costs should be provided. In relation to the financial position of the representor, it is clear from its accounts that it has no assets to meet liabilities. In addition, its expenditure matches, if not exceeds, its income. This is not surprising because while the representor acts as trustee, the income and expenditure of the Geneva Trust Group is primarily recorded in the accounts of the parent company. The representor is therefore operated in a way that any income it receives is transferred to its parent by way of intergroup charges. I make no criticism in expressing this view because it is not an uncommon operating model for subsidiaries of any financial services group for a subsidiary to be operated in such a way that any profit is made by the parent rather than at any subsidiary level.

62 As far as the parent company is concerned, it has offered an irrevocable undertaking and, by reference to the accounts provided, it has a reasonably healthy profit margin; it also has

a positive balance sheet in that its assets exceed its liability by an amount significantly in excess of the amount sought of £750,000. It also holds cash and cash equivalents which would enable it to meet the undertaking given.

63 The parent company's financial position would also be improved if fees it says are due and where provision has been made in the accounts for 2017 and 2018 were paid. The parent company also appears to have made a significant investment in rebranding to continue to operate as Geneva Trust following Rawlinson and Hunter disposing of its minority stake. The parent company moreover appears to have made a provision of CHF250,000 for legal costs in respect of ongoing disputes between the representor and the first respondent. Both the investment and rebranding and the provision of legal costs in respect of disputes between the representor and the first respondent indicate that the parent company's business is of substance and that it intends to stand by the undertaking given.

64 However, although the parent company is of substance, an order to require the parent company to put up the entire amount of security sought by the first respondent would have an impact because the Geneva Trust Group is not a large financial services business. An order for security of £750,000 would clearly have a very significant impact on the parent company. In my judgment an order to provide such security would therefore probably stifle the present proceedings because the amount sought would be too great to allow the parent company to continue as a viable entity and so to support the representor by providing security. In particular it would prevent the parent making any profit for a significant period of time.

65 In reaching this conclusion, I do not however have to be satisfied that any difficulty that a plaintiff company might face in meeting an order of security was due to the conduct of a defendant and in particular a defendant not paying fees. There is nothing in the L'Eau des Iles judgment which suggests that any stifling or indeed difficulties in payment, has to be due to the conduct of the defendant. Rather the approach is to look at the evidence showing the financial position of any plaintiff company. I accept there is a risk that plaintiff companies could attempt to structure their affairs in a way to attempt to avoid providing security. However, that may have other ramifications. In this jurisdiction for any regulated entity to try to operate in such a manner would be likely to place it in breach of the relevant regulatory requirements to retain an appropriate net asset position. Such accounts might also be inconsistent with statements made by an entity about the substance of their business whether from a marketing perspective or as part of assurances given to other financial institutions. If there were question marks about the reliability or accuracy of a plaintiff company's accounts which were not answered or were not answered in a manner that was satisfactory, this would also be a relevant factor for the court to take into account in deciding how to exercise its discretion.

66 In the present case, given the level of provision for bad debts said to be owed by the first respondent and the provision for legal fees in relation to disputes with the first respondent, I am satisfied that the present dispute has had a financial impact on the representor's parent company because if a substantial part of the outstanding fees presently characterised as

bad debts were paid, this would improve the financial position of the parent company significantly.

67 The above conclusion on stifling however does not mean that the parent company cannot afford to put up some security. Advocate Swart candidly accepted that the parent company could afford to put up the sum of £50,000 by way of security and in my view based on the accounts provided was right to do so.

68 One aspect of the discretion vested in me in considering what amount of security might be required is the impact of any particular figure on a company if security is ordered. In *LUFC Limited v Admatch* [2009] JLR 186 at paragraph 21 Sumption J.A. observed as follows:

> ***"The provision of cash security by the usual method of paying it into court has implications for his cash-flow which are likely to be significant, even if they are not ruinous.*** It ties up funds which would otherwise have been used in his business or deposited at interest. If the security is not funded from cash balances, it will cause him to incur borrowing or guarantee charges."

69 I regard these words as apposite to the present case. While the amount sought of £750,000 would probably stifle the present litigation, the more I accede to the first respondent request, the more challenging it will be for the representor and its parent company to put up such security. This is another matter I have to weigh in the balance, both in deciding whether to order security and, if so, for how much. The larger the figure, if I am persuaded it is right to order security, the greater the impact will be on the representor and its parent as this dispute has had an impact as noted above.

70 I also have to take into account the fact that the accounts provided for the parent are draft accounts. The observations set out above are therefore based on the figures provided to me but they have not been approved by the directors. Nor have the figures been audited. The parent company may not therefore be as financially viable as the picture painted by the representor suggests. This increases the risk of the first respondent not being paid by the parent company and its assurances that it will pay not being honoured in the future.

71 The representor could also have provided more analysis of the impact of non-payment of fees by the first respondent on the financial position of the representor and its parent company. No cash flow or similar analysis was produced to me to explain the long-term effect of the non-payment of fees said to be due from the first respondent. The accounts produced were also only snap shots at the end of each financial year. A more detailed analysis of the impact of putting up different levels of security on the financial position of the representor and its parent could have been produced.

72 In *Orange Capital (Proprietary) Limited & Ors v Standard Bank Jersey Limited & Ors* [2013] JRC 221A at paragraph 23, I took into account the lack of financial information in

deciding that the plaintiff should be required to put up security. In *Young & Ors v Haden & Ors* [2016] JRC 089D the limited financial information provided by the defendant companies was also a factor I took into account deciding to require those companies to provide security for costs of their counterclaim. In both cases I had received assurances that any adverse costs orders would be met but that was not sufficient to persuade me to order security.

73 In the present case, there were similar assurances in the representor's skeleton and evidence filed to those offered in *Orange Capital* and in *Young v Haden*. Such assurances are of limited value for companies with limited assets or profitability because they do not meet the fundamental rationale of why security may be required from impecunious companies which is to avoid successful defendants not being able to recover a proportion of costs orders made in their favour.

74 In *Holmes v Lingard & Anor* [2015] JRC 172 at paragraph 30, I indicated that a lack of candour about a party's financial position was also relevant to whether or not to order security because a lack of candour may well increase the need to order security to be provided. Advocate James, while not suggesting that there was a lack of candour on the part of the representor and its parent, did argue that a lack of clarity by analogy was also relevant to the decision whether or not to order security. I agree with him that a lack of clarity is relevant to whether or not to order security and I have explored above my concerns about the representor's financial position and that of its parent and that further evidence could have been provided.

75 In light of the first respondent's criticisms of the evidence provided by the respondent during the course of the hearing, an irrevocable undertaking was offered. The representor has now therefore gone further than the companies in my earlier decisions which is a factor in its favour. However, neither the representor nor its parent company is obliged to keep level of reserves to meet their liabilities as referred to above. Nor was any evidence adduced to me about whether or not any undertaking given was enforceable in Switzerland. These matters again have to be taken into account in the overall exercise of the discretion vested in me, because I have to weigh in the balance the quality and strength of the undertaking offered.

76 I also observe at this stage that in relation to how I should exercise the discretion vested in me, that I have not taken into account any issues concerning enforcement of any adverse costs order in Switzerland because, as noted above, it was accepted in oral argument by Advocate James that a method for enforcement did exist in Switzerland. In my judgment he was right to make that concession and I would not have been prepared to order security on this ground.

77 In relation to the merits of the dispute, L'Eau des Iles requires me to consider the prospects of success. Ms Martin in her fourteenth affidavit in particular at paragraph 22 sought to persuade me that the representor had no answer to the positive case advanced by the first

respondent.

78 However, I was not able to reach any view on the merits. Firstly, in relation to the issue of execution of the deed, no witness statements or any expert evidence relied upon by the first respondent was produced to me. I do not therefore know what the first respondent says about the circumstances in which he or his secretary came to execute the deed. I do also not know what her evidence is about the execution, whether she still works for the first respondent and why she felt, if this is what occurred, able to sign a deed on behalf of the first respondent. I also have not seen any emails internal to the first respondent in relation to the execution of the deed (or evidence that there are no such emails as the case may be).

79 In relation to the fact that the indemnity is governed by English Law, while Ms Martin suggested that the lack of formal requirements for execution under English Law cannot be cured by estoppel, there is no pleaded case from the first respondent beyond a bare denial of the claim in estoppel. Nothing is set out to explain the effect of any estoppel in the first respondent's answer; nor was any legal opinion produced to me. I cannot therefore express a view on the merits simply by reference to a bare assertion not supported by evidence from an English Lawyer that it is not possible in English Law for the representor to rely on an estoppel.

80 Likewise I do not know when the representor executed the deed of indemnity and, if it was executed later the relevance of this.

81 In respect of the suggestion by Ms Martin at paragraph 22 d of her fourteenth affidavit that “no competent professional could ever have advised The first respondent to sign the disputed indemnity”, because it led to the first respondent accepting significant personal liability for costs and the principal debt, it was not clear to me whether the suggestion was a comment based on hindsight or whether Ms Martin was talking about matters she was actually involved in. This lack of clarity is another reason why I was unable to form a view of the merits.

82 Ms Martin also suggested in her fourteenth affidavit that in any event there were no losses which would require a payment under any indemnity if it could be enforced against the first respondent because there were more than adequate assets within the TDT structure. There are two problems with this analysis.

83 Firstly, the representor remains legally liable to meet the adverse costs of Investec and Bayeux and faces claims to meet costs of Stephenson Harwood and Herbert Smith Freehills. The fact that the most practical route might be for any such liabilities, if established, to be paid out of assets of the TDT, under the administration of Guernsey's Royal Court, does not make the indemnity worthless or something that might not be called upon for so long as a liability exists.

84 Secondly, insofar as the representor has sought to file a proof of debt in the proceedings in Guernsey dealing with payment of liabilities out of the assets of the TDT, by a letter dated 23 rd April, 2019, from Babbé LLP on behalf of the first to third respondents to ABT acting for the joint receivers, They objected to the proof of the debt filed including in respect of liabilities to Stephenson Harwood and Herbert Smith Freehills. The amount of costs claimed by Investec and Bayeux is also far from agreed. There is putting it at its lowest a potential inconsistency with the approach taken in Jersey where the picture painted was of no further liability arising because the assets of TDT were sufficient to meet any adverse liabilities with objections being taken in Guernsey to assets being used for that purpose. There is also clearly a dispute in Guernsey about whether, and if so what assets, should be sold with there being real disagreement between the joint receivers and the first to third respondents on what approach should be taken.

85 By reference to the material provided to me, as I indicated both before the hearing started and during the hearing, I am still not able to express a view on the merits to enable me to take any such view into account in deciding whether or not to order security for costs. The matter is arguable on both sides. Nothing produced from either party has persuaded me one way or the other that either party's case is such that I should take into account that case in deciding whether or not to order security.

86 In respect of this part of judgment, it is also right to refer to paragraph 23 of Ms Martin's fourteenth affidavit which states as follows:

> *“These merits points are of central importance to the argument that an order for security would stifle the claim.* For all the reasons I give, it seems to me the court would do all sides a favour if it did just that. I was particularly gobsmacked by the concluding reduction ad absurdum in Mr Hillier's paragraph 65: “Ms Martin's case is in essence: because Mr Tchenguiz believes that he is not bound by the Deed of Indemnity GTC should not pursue its enforcement.”

87 In relation to this paragraph, firstly, it suggests that the motive for bringing the application for security for costs was to try to stifle the claim. That is entirely inappropriate in respect of a claim that is at least arguable as noted above. Secondly, paragraph 23 is comment (and entirely inappropriate comment) which should not find its way into any affidavit. Such an approach does not assist the court in deciding whether to order security. Affidavits should be restricted to matters of evidence only not comment or submission as it has been made clear on many occasions by many courts both in this jurisdiction and elsewhere.

88 I now turn to consider the quantum of security sought. I do so because the amount of security sought and how that amount is justified is relevant to the overall decision. This is because in exercising my discretion I have to take into account the impact of an order for security.

89 However, there is a lack of clarity from the first respondent in respect of the amount of

security sought. In overall terms, the amount suggested of £750,000 was arrived at by taking the costs incurred of Collas Crill and R20 Advisory Limited to-date and then doubling that figure. The context of the suggestion was that discovery had been produced and witness statements exchanged but there was still expert evidence on English Law and handwriting evidence to be exchanged as well as preparations for trial.

90 However, there are a number of problems with the quantification of the security sought by the first respondent which means that I am not satisfied that the amount suggested of £750,000 is justified.

91 Firstly, starting with Collas Crill's costs to-date, the schedule of costs provided set out a total figure of £95,753.50. Advocate James accepted this schedule contained actual charge out rates and the schedule had not been limited to a Factor ‘B’ mark-up. He further accepted that the appropriate mark-up was 50%; on this basis, the total figure for fees amounted to £75,000.

92 In relation to the criticism of these costs that six fee earners were involved the role of three was limited. Advocate James further explained that initially he was assisted by Mr Boxall of counsel but the matter had then been delegated to a more junior associate Courtney Clelland and there was little duplication between the two. He therefore argued that what had occurred was a proportionate approach to the issues in the case. I accept this explanation.

93 On a taxation the past costs of Collas Crill are likely to be reduced and I consider that a figure of £50,000 is an appropriate estimate of what might happen. After the hearing, Dickinson Gleeson for the representor made further criticism of the costs claimed for Collas Crill and suggested a much lower figure of £21,000 based on an overall blended rate. I do not agree with the approach suggested; nor is it appropriate to apply a significant discount due to the number of fee earners involved because the vast majority of the work carried out was carried out by three fee earners only including Advocate James.

94 In respect of Collas Crill's future costs, no schedule of costs was provided. Ordinarily when seeking security for costs a party should provide a schedule of estimated future costs for each of the main tasks to be carried out. A lack of such a schedule or insufficient information will not assist the party seeking security being able to satisfy the court that it is appropriate to provide the security sought.

95 The sort of detail to be provided should be that required in order to provide any cost budget in compliance with the Practice Direction RC17/06. It would not have been difficult to have produced such an estimate of future costs. What I am therefore left with is to use my own experience. I therefore consider that any trial will take no more than a week, and an opinion from English counsel on the English Law of estoppel is required (as long as the answer is amended to plead the English Law relied upon).

96 The suggestion that a further £100,000 would be incurred in dealing with specific discovery applications and preparing expert evidence and correspondence with the other side and the client is not a suggestion that I regard as justified. No specific discovery application was described or identified. The issues in this case are also relatively straightforward, even if the amount that might be claimed under any indemnity is significant. In addition, the likely recoverable costs for trial are no more than £5,000 per day based on an hourly rate of an advocate of £350 totalling £25,000 for one week. A similar figure for trial preparation of £25,000 is not inappropriate. In my judgment for counsel's opinion on estoppel the sum of £10,000 is a proportionate figure. Otherwise no more than £15,000 of costs is justified for help in preparing expert evidence and correspondence with the other side, with £25,000 for trial preparation and £25,000 for the trial. This leads to a maximum figure for future costs of £65,000 for Collas Crill plus £10,000 for counsel's fees.

97 In relation to R20 Advisory Limited the position is more complex. Firstly, R20 Advisory Limited is a company ultimately owned by TDAT. Its principal activity is described in its accounts as *"providing group management and financial services"*. It is not therefore a law firm.

98 I accept that R20 employs lawyers. However, what those lawyers appear to be doing is providing assistance to the first respondent as a beneficiary. No evidence was produced to me to show that the first respondent was in any way obliged to pay for the cost or is incurring the cost of any such assistance being provided.

99 Secondly, the claim under the indemnity is in respect of the TDT. Yet R20 Advisory Limited is owned by a different trust i.e. TDAT. Any support given therefore has been given to the first respondent by a company owned by TDAT in respect of a dispute relating to TDT. I have referred to this because this situation is different from in-house legal costs incurred to handle a dispute by reference to the *Ultraframe* decision of Master Campbell. An in-house lawyer can recover costs for carrying out a task that otherwise would be carried out by an external lawyer as long as there is no duplication because this involves the company that employs the lawyer incurring the cost of doing so rather than expending money with third parties. The company is therefore using its resources for its own benefit i.e. carrying out a task through an employed lawyer rather than through a third party legal adviser.

100 For the purposes of this application I am not persuaded that the position of in-house lawyers employed by a company can be applied to a company owned by a trust where services are provided to a beneficiary. The services are not being provided for the benefit of the company or trustee, but rather for the benefit of a third party i.e. the first respondent as a beneficiary. They may well also be gratuitous services. Such services are provided to beneficiaries for many reasons including convenience and lifestyle choices especially for wealthy families and so is not analogous to a company. In this case the position is more complicated because the services provided to the beneficiary are not in respect of the trust that owns R20 but for another trust. The fact that Collas Crill could have carried out work is not an answer to extending the *Ultraframe* approach for in-house lawyers to advisory

services provided to beneficiaries of trusts and the differences between a company and a trust referred to above.

101 There are also other problems with the position of R20. Firstly, Ms Martin gives instructions on behalf of the first respondent to Collas Crill. Yet, in the costs claimed no distinction is drawn between carrying out steps that a law firm could otherwise carry out and giving instructions. Insofar as Ms Martin and anyone else from R20 Advisory Limited were speaking for the first respondent, this is the equivalent to trying to reclaim the cost of the first respondent himself providing such instructions which is not recoverable.

102 Secondly, some 410 hours is claimed in respect of discovery as noted at paragraph 4.7 of the analysis by Practico Limited. Yet, 281 documents were produced. Again I am not persuaded that the amount of time is justified even if the costs are recoverable in principle. I do not understand how 410 hours could have been carried out to produce 281 documents. To the extent that the lawyers concerned have been reviewing documents stored on electronic devices this is an inefficient use of time and is contrary to the approach expected for electronic documentation to be gathered and reviewed set out in Practice Direction RC17/08 on E-Discovery.

103 Thirdly, what is claimed is a charge out rate equivalent to that used by City of London lawyers. By analogy with *LUFC Limited v Admatch* 2009 JLR 186 at paragraph 29, I am concerned that the charging of these rates is to allow the R20 Advisory Limited and TDAT to make money out of litigation. The approach also does not address other issues touched upon in *LUFC Limited v Admatch* at paragraph 29 namely whether or not the transaction is an arm's length one and whether the costs claimed will be paid or are to create an accounting entry to justify a claim for costs. At best what is recoverable are the costs of employing such lawyers not any profit element.

104 All these matters mean that I am not satisfied that it is appropriate to make any orders for security for costs by reference to the work carried out by R20 Advisory Limited. If I was satisfied and it was appropriate to make any order for security, it would only be by reference to the actual cost incurred of employing individuals and I would also have to be satisfied that any task carried out had not been carried out by Collas Crill. I will therefore only consider whether I should order security for costs for Collas Crill's fees which on a taxed basis should not exceed £150,000 i.e. £75,000 for past costs and £75,000 for future cost as set out above. If I were to order full security, in my judgment the appropriate figure would be £100,000 based on costs incurred and to be incurred of £150,000. The reduction to £100,000 would be on the basis that not of all the costs incurred would be recoverable on a taxation.

105 In the exercise of the discretion vested in me, both *A E Smith & Sons Limited -v- L'Eau des Iles (Jersey) Limited* and *Café de Lecq* recognise that I can order any amount of security as a matter of discretion having regard to all the factors in *A.E. Smith & Sons Limited -v- L'Eau des Iles (Jersey) Limited* set out above.

106 However, an undertaking has been given to this court on an irrevocable basis by the parent company of the representor to meet any adverse costs orders made against the representor. This is a promise which would be enforceable in this jurisdiction and if the parent company had been resident in this jurisdiction as a regulated entity, that would be sufficient not to require security for costs. The issue is whether this undertaking is sufficient to address why security may be required namely" protecting ***the interest of a defendant in being able to enforce a judgment for his costs if he succeeds."*** (*Leeds v Admatch* paragraph 19)

107 However, the accounts of the parent company which I have referred to above are in draft and are unaudited. The financial position of the parent could therefore be different from the accounts produced. Even if accurate, they are only a snapshot and could alter significantly in the future. In addition, no evidence was produced to me as to whether or not the undertaking offered can be enforced in Switzerland. I have therefore reached the view that some security is justified to support the undertaking to address the difficulties I have described in respect of the parent company's accounts and concerns about whether or not the undertaking can be enforced outside this jurisdiction.

108 In deciding on the appropriate amount of security to award, I have also taken into account that in my view neither party has taken a proportionate approach to this litigation. The issues are not complicated as summarised above. Rather, what exists on both sides is internecine warfare and a total lack of trust. This increases the costs being incurred significantly and in a disproportionate manner. Although the costs liability to Investec and Bayeux is significant, and is known, this should not prevent ultimately an orderly retirement and resolution of issues between the representor as a former trustee and D. Indeed, I encourage both parties in the strongest possible terms to attempt to mediate their differences rather than to continue the current approach which leads to excessive costs being incurred. If current approaches do not alter on both sides, this is the sort of case when it comes to dealing with costs following any trial that the Royal Court is likely to limit any recoverable costs applying the approach in *Pearce v Treasurer of the States* and subsequent cases where the principle has been applied. I am entitled to take into account the likelihood of this occurring in deciding what security to order.

109 Having regard to all the above matters and the principles as to whether or not security should be ordered, I consider that the representor should be required with the support of its parent company to pay into court security for costs in the sum of £50,000 to support the undertaking offered. This is a meaningful sum not a nominal amount to support the undertaking given and, had the parties taken a proportionate approach to the dispute, is a figure that I estimate is appropriate to represent costs that should have been or will have to be incurred.

110 Finally, in my judgment, having regard to the parent company's financial position I do not consider that a sum of this magnitude will probably stifle the representor's claim even if

provision of security of this sum will have some financial impact.