Neutral Citation Number: [2020] EWHC 3332 (Comm)

Case No: CL 2019 000320

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 04/12/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) VICTOR PISANTE
(2) SWINDON HOLDINGS & FINANCE LIMITED
(3) BCA SHIPPING INVESTMENT CORPORATION
(4) CASTOR NAVIGATION LIMITED — **Claimants**

- and -

(1) GEORGE LOGOTHETIS
(2) LOMAR CORPORATION LIMITED
(3) LOMAR SHIPMANAGEMENT LIMITED
(4) LIBRA HOLDINGS LIMITED — **Defendants**

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- -

Richard Power (instructed by **Debevoise & Plimpton LLP**) for the **Claimants**
David Allen QC and Luke Pearce (instructed by **Campbell Johnston Clark Limited**) for the **Defendants**

Hearing date: 13 November 2020
Further evidence and written submissions received 14, 20 and 21 November 2020

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. The Defendants apply for security for costs against the Claimants on the grounds that (a) the First Claimant ("***Mr Pisante***") is not resident in England and Wales or another relevant state and (b) the Second to Fourth Claimants are similarly non-resident and, further, are corporate bodies who, there is reason to believe, will be unable to pay the Defendants' costs if ordered to do so.

2. The Claimants contend that the Defendants' application for security for costs is misconceived, because the Claimants have available to them within Europe many multiples of the amount that would be required to meet any adverse costs order, and there is no reason to believe that the Claimants will be unable to pay the Defendants' costs if ordered to do so. They make the points that Mr Pisante is a wealthy individual with tens of millions of Euros of assets in Europe alone, and that the Second Claimant has more than US$25 million in investments available to it in an account in Switzerland. By contrast, the Defendants estimate that their costs will amount to only £1,305,602.

3. As set out further below, I have come to the conclusion that the court has jurisdiction to order security for costs vis a vis the Second to Fourth Defendants, and that it is appropriate to make such an order in the sum of £805,000.

(B) BACKGROUND TO THE APPLICATION

4. The underlying dispute between the parties is somewhat complex, and arises from certain investments they made in the shipping market, which did not perform well. The Claimants allege that they were fraudulently induced to enter into the transactions by the Defendants, and also make a smaller claim relating to an investment in Piraeus Bank. The total amount claimed is in excess of US$14 million. The claims are strongly contested by the Defendants. Neither party invited the court to consider the merits of the claims in the context of the present application. For present purposes, it is sufficient simply to note that the dispute centres on a joint venture through Netley Holdings Limited, a company owned as to 50% by the Third Claimant and 50% by the Third Defendant.

5. The Defendants first requested security from the Claimants on 3 December 2019, stating among other things that the Second to Fourth Claimants (respectively "***Swindon***", "***BCA***" and "***Castor***") were companies incorporated in jurisdictions where there is very little (if any) publicly available information about their assets. The Defendants' letter requested security, alternatively evidence as to the Second to Fourth Defendants' ability to satisfy a costs order, failing which the Defendants would apply for security.

6. The Claimants' response dated 17 December 2019 did not provide information as to their financial position, but took the position that the parties already had, from their business relationships, a good level of insight into one another's financial situations; and that having allowed the litigation to proceed for seven months the Defendants must be taken to have recognised that there was no real risk of the Claimants being unable to pay any costs ordered against them. The Claimants' response also stated that Mr Pisante was an EU national with assets in Greece who *"has held Swiss residency since 2010, and is willing to provide evidence of such"*.

7. However, after further correspondence the Claimants agreed in January 2020 to provide security for costs in the sum of £500,000 (against the Defendants' then estimated costs of about £930,000), without prejudice to the Defendants' right to apply for further security in due course if necessary.

8. On 3 August 2020, the Defendants wrote to the Claimants to request further security, or satisfactory evidence of the Claimants' ability to satisfy an adverse costs order, indicating that their costs to date were now in excess of £423,000 and their estimated costs in the region of £1,289,000.

9. The Claimants on 17 August 2019 declined to provide any further security on a voluntary basis, indicating that their position had not changed since their letter of 17 December 2019. The Claimants also took issue with the quantum of the claimed costs. No further information was provided about assets.

10. The Defendants on 24 August 2020 complained that, despite repeated requests, the Second to Fourth Claimants had not provided any evidence about their financial position. The Claimants responded on 4 September 2020 that they were willing to provide evidence of their ability to pay any adverse costs order, though this would require some time to compile.

11. On 20 October 2020 the Claimants provided a letter from Swindon's bank, Banque Pictet & Cie SA ("*Banque Pictet*"), dated 24 September 2020 declaring that the bank had known Swindon ("*incorporated on 20.05.2005*" and *"domiciled in the British Virgin Islands"*) since 3 September 1990 and that:

> "To date, it may be considered as trustworthy in the way of business, as having always fulfilled its commitments towards us and disposing of an amount in excess of GBP 5'000'000.- (five million British pounds), including available liquidities in excess of GBP 1'300'000.- (one million three hundreds British pounds).
>
> Further we confirm that over the last five years, the company had an average balance in excess of GBP 5'000'000.- (five million British pounds)."

12. The Defendants did not consider that this provided sufficient comfort, and issued the present application. They noted the apparent discrepancy between Swindon's date of incorporation and the length of the banking relationship, and interpreted the letter as indicating that Pictet currently held only £1,300,000 for Swindon. I was told, however, that the latter figure had been named merely on the basis that it reflected the amount of security the Defendants were seeking.

13. On 29 October 2020, in response to the application, the Claimants made an open offer to provide security for costs in the increased amount of £750,000, without prejudice to their position that the application for security should be dismissed. The following day (30 October 2020), the Claimants served their evidence in response. This included among other exhibits:

    i) a redacted copy of an Investment Management Report from Banque Pictet as at 22 October 2020 indicating an asset valuation of US$ 25,223,037 as at that date. All the details of the report (including the nature of the investments) were redacted, but Mr Pisante indicated in his witness statement that he was content for the court to be provided with an unredacted version if it wished to see one; and

    ii) a draft market value appraisal dated 26 April 2011 obtained by Mr Pisante in relation to a substantial house in Athens, said by Mr Pisante to be his main residence.

14. On 5 November 2020, the Defendants wrote to the Claimants rejecting the offer of £750,000, but offering to accept £900,000. In that letter, the Defendants set out a number of concerns and queries about the Claimants' evidence. The following day (6 November 2020), the Defendants served their evidence in reply.

15. On 10 November 2020, with the hearing three days away, the Claimants wrote to the Defendants rejecting the counter-offer, and serving further evidence (without the permission of the Defendants or the court). That evidence sought to address the concerns and queries the Defendants had set out.

16. In the light of the Claimants' further evidence, the Defendants on 11 November 2020 indicated to the Claimants that they were willing to accept the Claimants' offer of security in the sum of £750,000, on the basis that the costs of the application would be in the case, and subject to provision of a form of guarantee and security that was suitable and acceptable to the Defendants.

17. However, on 12 November 2020, the Claimants replied indicating that they were no longer willing to provide security of £750,000, and would be contesting the Defendants' application in full.

(C) BASIS OF THE APPLICATION

18. CPR 25.13(1) provides that:

> "(1) The court may make an order for security for costs under rule 25.12 if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (b) (i) one or more of the conditions in paragraph (2) applies…"

19. The conditions set out in CPR 25.13(2) include:

> *"(a) the claimant is*
>
> *(i) resident out of the jurisdiction; but*
>
> *(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982.*
>
> *…*
>
> *(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."*

20. For ease of reference, I refer to the States mentioned in CPR 25.13(2)(a)(ii) as "*Contracting*" States.

21. The Defendants submit that:

    i) condition (a) is satisfied in respect of each of the Claimants; and

    ii) condition (c) is satisfied in respect of the Second to Fourth Claimants;

    and that in all the circumstances of the case it is just to make an order for security for costs.

(D) MR PISANTE'S PLACES OF RESIDENCE

22. The question of a person's residence for the purposes of CPR 25.13(2)(a) is one of fact and degree. A person is resident in a place for these purposes if they habitually and normally reside lawfully in that place from choice, and for a settled purpose, apart from temporary or occasional absences, even if their permanent residence or 'real home' is elsewhere: see note 25.13.2 in the White Book citing *inter alia R v Barnet LBC, ex p Shah (Nilish)* [1983] 2 AC 309, 343G, 349. The Court of Appeal applied the *dicta* in *Shah* to a security application under the previous rules of court (RSC Order 23 rule 1) in *Parkinson v Myer Wolff & Manley* (23 April 1985, unrep., CA).

23. In *Ontulmus v Collett* [2014] EWHC 294 (QB), Tugendhat J said "*There is no dispute that a person may reside at more than one place and indeed in more than one jurisdiction"* (§ 14). On the facts before him, Tugendhat J said:

> "32. On this evidence I find that Mr Ontulmus certainly was resident in Germany for much of his life. I also find that it is unlikely that he ceased to reside in the Germany, albeit that he has spent more time in Turkey than in Germany. He resides in both countries. The sequence of his visits excludes the elements of chance and of occasion which might lead to the opposite conclusion. There is no dispute that he still owns a house in Furth where his family used to live with him. That is a strong connection with Germany, even though it appears to be on the market. His visits to Germany, for business and family purposes, have been voluntary, and are sufficient in the circumstances for me to find that he has retained his residency in Germany.
>
> 33. The address that Mr Ontulmus gave on the claim form is not a false address, in that I accept that it is an address at which a document sent to him will reach him. It may be incorrect in the sense that it may not be an address (as required by the CPR) where he resides or carries on business. I take that to be what was meant when his solicitors called it an "administrative" address. But I do not have to decide that point, because even if Mr Moore were right about it, that point alone would not suffice to make it just for me to make an order for security for costs.
>
> 34. I reject the submission that Mr Ontulmus has changed his address since the claim was commenced with a view to evading the consequences of the litigation. It would not be fair for me to reach so adverse a conclusion in circumstances where Mr Price had the opportunity of putting the allegation to Mr Ontulmus, but chose not to do so. I do find that Mr Ontulmus has been inconsistent and evasive in his statements about where in Germany he has been residing, and that does not reflect well upon him. But it is not necessary for the purposes of CPR r.25 for a claimant to prove that he has been residing a particular address.

> 35. In so far as Mr Ontulmus has been inconsistent and evasive, I think that what he has had in view may well be a concern not to disclose anything that might cast doubt on whether he has complied with the 180 day requirement under German law if he is to be entitled to retain his residence permit. But residence for 180 days is not a requirement of CPR r.25. And it would not be appropriate for this court to attempt to make findings as to whether Mr Ontulmus has complied with the requirements of a German residence permit, even if there were before the court the evidence of relevant German law (which is not the case)."

24. In the absence of any more specific authority, and bearing in mind the rationale of the rule, I consider that a person who splits his residence between a Contracting State and a non-Contracting State, but who habitually and normally lawfully chooses to spend a significant part (in the present case, over half) of his time living in the Contracting State, lawfully and for a settled purpose, is to be regarded as resident in the Contracting State for CPR 25.13(2)(a) purposes.

25. Turning to the details of the present case, as noted earlier the Claimants' response dated 17 December 2019 to the Defendant's request for security for costs stated that Mr Pisante was an EU national, with assets in Greece, who *"has held Swiss residency since 2010, and is willing to provide evidence of such"*.

26. The Defendants replied the following day contending that that information was inconsistent with the fact that the Claim Form states Mr Pisante's address as being an address in New York, and with § 1 of the Amended Particulars of Claim which states *"The First Claimant ("Mr Pisante") is an Italian national who lives in New York".* The Defendants invited the Claimants to provide evidence of Mr Pisante's Swiss residence.

27. The Claimants responded on 20 December 2019 confirming that *"Mr Pisante is a Swiss resident"*, and providing copies of Mr Pisante's Swiss residency permit and Swiss driving licence. The Claimants added that the addresses stated in the Claim Form and Particulars of Claim were correct, and that it was common and widely accepted that a person is capable of holding residency in more than one jurisdiction (citing the statement in *Ontulmus* § 14 quoted above).

28. The Defendants on 30 December 2019 objected that the evidence provided did not prove that Mr Pisante "*habitually and normally resides [in Switzerland] lawfully by choice and for a settled purpose, apart from temporary or occasional absences*" (citing *ex p Shah*). They said the evidence provided appeared to show that Mr Pisante was *entitled* to reside and drive in Switzerland, but the fact that Mr Pisante was not in fact ordinarily resident in Switzerland was supported by and consistent with the Claim Form and Particulars of Claim, in which he had confirmed that he "*lives*" in New York.

29. Shortly after this correspondence, the Claimants agreed to provide security for costs, so the correspondence did not proceed further. It is notable, however, that no suggestion was made at this stage that Mr Pisante was also resident in Greece.

30. On 25 June 2020 the Re-Amended Particulars of Claim were signed on the Claimants' behalf by their solicitors. Paragraph 1 was unchanged.

31. In his witness statements in opposition to the present application, Mr Pisante states:

> [First witness statement]
>
> "5. Though I am an Italian national, I was born and raised in Greece, and have been a Greek resident in the sense that I have lived there on a habitual basis for the majority of my life. My current passport, issued in 2014, also identifies me as being resident or domiciled in Greece.
>
> 6. My main residence is in Athens, Greece. That residence was purchased in 2011, and my family and I have always spent significant amounts of time there. My children started attending school in Athens in the Autumn of 2019 and my wife and children have, since then, been based throughout the year at that residence. I also maintain a vacation home in Antiparos, Greece, and have various business interests and real estate of substantial value within the country.
>
> 7. Due to my business commitments, and to the fact that I have a significant stakeholding on Chesapeake Asset Management, LLC ("**Chesapeake**"), a corporation based in New York, I spend a significant amount of time travelling to New York. In my capacity as a stakeholder in Chesapeake I have, since 2013, held an E2 Investor Visa for the United States. This entitles me and my family to live in the United States as non-resident aliens, which we have done on a non-continuous basis since 2012. I therefore have a home in New York, in which I and my family used to spend a significant part of the year. Until the fall of 2019, my children attended school in New York.
>
> 8. In 2019, at the time when this claim was issued and the Particulars of Claim were prepared, I was spending a significant amount of time in New York. In total in 2019, I spent 153 days in the United States. That is the reason why my New York address is included on the Claim Form and the Particulars of Claim. I spent the remainder of 2019 in Greece.
>
> 9. I have not yet spent any time on the United States since 2020, and have instead remained at my homes in Greece. This is due to a large extent to the Covid-19 pandemic, which has made international travel there extremely difficult. These are, however, only temporary circumstances, and I expect that, once travel is permitted again, I will return to splitting my time between Greece and New York.
>
> 10. As such, I still consider myself to be "living", in the broadest sense, in both locations. My formal residency,

> however, is and always has been in Greece. I am surprised by the fact that Mr Logothetis, the First Defendant and someone who was previously a friend of mine, would claim not to know of that fact, particularly as he has been a guest at my vacation home in Greece."

> [Second witness statement]
>
> "5. I have seen from Ms MacHardy's Second Witness Statement and from a letter received on 5 November 2020 that the Defendants still maintain some confusion about my ordinary residence. Though I have addressed this issue in some details in my First Witness Statement, I would like to clarify for the Court that I do consider myself to be ordinarily resident in Greece and have for my entire life. I have, over the last decade or so, spent just under half of the year living in New York and therefore maintain a home there.
>
> 6. It is very hard, in the light of the current situation, to estimate how much time I will spend in New York in the course of this year or next, due to travel being virtually impossible. This is also the case because my children's schooling only moved to Athens towards the end of last year. I anticipate that, once travel is normalised, I will return to spending portions of the year in New York (as I did previously). However, I firmly consider my main home and residence to be Greece."

32. I asked counsel for the Claimants how that evidence squared with the letters from the Claimants' solicitors referred to above, stating merely that Mr Pisante was a Swiss resident. Those letters were sent in the context of requests for security for costs, where the question of Mr Pisante's residence was very much in issue, and where Greek residence would have precluded a security for costs order against him. At the time the letters were written, in late December 2019, Mr Pisante had according to his witness statement spent more than half of the year in Greece and considered himself to be ordinarily resident in Greece.

33. Counsel told me that Mr Pisante had considered it sufficient to refer to his Swiss residence (Switzerland being a Lugano Convention State); that the First Defendant was already well aware of Mr Pisante's main residence in Athens and other residences in Greece; and that Mr Pisante did not feel that he ought to reveal too much to the Defendants – whom he was suing for fraud – about his assets. Counsel drew attention to the statement of the Claimants' solicitor (as part of the evidence in opposition to the Defendants' application) that:

> "Mr Pisante has held formal Swiss residency since 2016. This residency is, however, due to expire at the end of 2020. As such, the Claimants do not intend to rely on it in the context of

> the Application, other than to note that the Defendants have been aware of this fact since December 2019."

Mr Pisante's own witness statement similarly confirmed that:

> "I have held formal Swiss residency since 2016, which entitles me to reside in Switzerland … That residence is due to expire at the end of 2020.
>
> In around February of this year, due to taking the decision to move my children's schooling to Greece, I took steps to also move my formal tax residency there. This application was granted on 1 July 2020 … My understanding is that the relevant consideration in granting such applications is whether my "centre of vital interests" lies in Greece. For the reasons set out above, I consider that it does."

Counsel submitted that, bearing in mind that Mr Pisante's tax residence was being transitioned to Greece in this way, there was no question of the Claimants in the December 2019 correspondence having sought to hide Mr Pisante's residence in Greece. The failure to amend the Claimants' Particulars of Claim when last amended was an oversight, which was understandable given that Mr Pisante's place of residence is not a substantive issue in the case.

34. However, it seems to me inescapable that Mr Pisante through his solicitors was in the December 2019 correspondence choosing to refrain, for whatever reason, from making the obvious point that he was resident in Greece as well as New York. I am unconvinced by the suggestion that he considered it sufficient to refer to his Swiss residence. That was, as Mr Pisante and his solicitor put it in their witness statements, *"formal"* Swiss residence which entitled him to live in Switzerland. It did not provide an answer, or at least a clear answer, to the Defendants' request for security for costs because Mr Pisante was – as is now clear from his evidence – not in a position to say that he had actual habitual residence in Switzerland. On the contrary, his evidence is that he divides his time between Greece and the US. Thus, and by contrast, Greek residence would have provided a clear answer to the security application. The fact that Mr Pisante chose not to put it forward, referring instead to his formal (and soon to end) Swiss residence, in my view shows a lack of frankness. I return to this point later.

35. Nonetheless, having considered Mr Pisante's evidence including its exhibits as a whole, I do consider that he is resident in Greece. The contents of his witness statements on this point appear credible, and are consistent with the evidence of his having a very substantial family home in Athens.

36. On that basis, I conclude that the court has no power to make a security for costs order against Mr Pisante.

(E) POSITION OF THE SECOND TO FOURTH DEFENDANTS

37. It is common ground that the Second to Fourth Claimants are all resident out of the jurisdiction, and not resident in one of the States listed in CPR 25.13(2)(a)(ii).

Swindon and BCA are resident in the BVI, and Castor is resident in the Marshall Islands.

38. It follows that the court has the *prima facie* power to order security for costs against Swindon, BCA and Castor on this ground.

(1) Residence: the Nasser condition

39. The Court of Appeal explained in *Nasser v United Bank of Kuwait* [2002] 1 W.L.R. 1868 that where ground 25.13(2)(a) but no other ground is established, the court should not exercise its discretion to order security for costs unless it does so on grounds relating to obstacles to, or the burden of, enforcement of any subsequent order for costs in the context of the particular foreign claimant or country concerned. Mance LJ explained:

> "The rationale of the discretion to order security on that ground is that enforcement of an order for security for costs abroad may be more difficult or costly than elsewhere: cf Sir Jeffery Bowman's 1997 Review, paragraphs 33–37. The single legal market of the Brussels and Lugano Conventions means that "abroad" in this context now means not merely outside England or the United Kingdom but outside the jurisdictions of the states party to those Conventions." (§ 46); and
>
> "The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some—it may well be many—cases there are likely to be substantial obstacles to, or a substantial extra burden (e g, of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state (emphasis added)" (§ 62)

40. Mance LJ added the following comments about how these matters should be approached in practice:

> "63. It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under Part 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist, or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).
>
> 64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but

> complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases — particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920) — it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs. Even then, it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden."

41. The Claimants also cite *PJSC Tatneft v Bogolyubov & Ors* [2019] EWHC 1400 (Comm). Butcher J in that case cited *Nasser* and other authorities including:

    i) the conclusion in *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099 that it is not necessary in this context for the applicant to show that it is more likely than not that there will be substantial obstacles to enforcement: it is sufficient for the applicant to demonstrate that there is a real risk that it will not be in a position to enforce an order for costs; and

    ii) the guidance in *Danilina v Chernukhin* [2018] EWCA Civ 1802 § 51, which (most pertinently for the present case) includes the points that (a) a decision to order security requires objectively justified grounds relating to obstacles to, or the burden of, enforcement in the context of the particular foreign claimant or country concerned; (b) 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; (c) the order for security should generally be tailored to cater for the relevant risk; (d) where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings; and (e) where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement.

42. On the facts before him, Butcher J concluded that the *Nasser* condition was satisfied in circumstances where the majority of the claimant's assets were outside the Brussels/Lugano zone and only certain "*not fully transparent or fully explained*" shareholdings were available within it. Butcher J said:

> "44. … [Tatneft] argued that there has been no showing that it is a company which lacks probity. It said that it has paid previous costs orders against it in this case, and no evidence had been produced that it defaulted on its obligations. There

was accordingly no reason to consider that it would deal with the assets in the zone in such a way as to prevent enforcement. It relied on the decisions of *Leyvand v Barasch* (The Times, 23 March 2000), and *Naghshineh v Chaffe* [2003] EWHC 2107 (Ch). Tatneft referred, in particular, to the statement of Lightman J in the former that "*The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgment for costs unless there is reason to question the probity of the claimant*"; and that of Mr Crow, sitting as a Deputy High Court Judge, in the latter (at [14.7]) that: *"…the mere fact that a non-Convention resident's assets are readily transferable does not, of itself, constitute a ground for exercising the court's discretion to order security. However, it might well be a relevant factor if there are grounds for doubting the claimant's probity and/or for believing that he is willing (as opposed to merely being able) to frustrate the enforcement of a costs order by transporting assets out of reach.*"

…

46. I was not persuaded by [this argument].

47. … the question which I have to answer at this point, as it seems to me, remains whether there is a real risk that there will be substantial obstacles to enforcement by reason of Tatneft's residence and the location of most of its assets. If there is a real risk that the assets which it has identified within the zone will not be available or not available in sufficient amounts, and that, in consequence, enforcement will need to be attempted in Russia, then, given my conclusions as to the position in Russia, the test laid down in *Nasser* is satisfied.

48. I consider that there is a real risk that the assets within the zone will not be available, or not available in sufficient amounts, if and when there arises an issue of enforcement of a costs order. The shareholding arrangements within the Tatneft group are neither fully transparent, nor fully explained. The assets relied on are ones which might readily cease to be available, and this might happen for legitimate reasons. Moreover, this is very hard-fought litigation between parties which are on opposite sides not just of this case, but of wider issues. Looking at those realities I see no good reason to think that if there was a course of conduct which Tatneft was advised was open to it which diminished the assets which would be available to the Defendants to enforce against, that course would not be taken. Indeed, the way in which every point has been taken on this application tends to suggest it would be.

> 49. I do not regard either *Leyvand v Barasch* or *Naghshineh v Chaffe* as establishing any rule that, if a non-Convention resident has assets within the zone then, in the absence of a showing of lack of probity, security will not be ordered. Instead, it appears to me that the approach of Gross J in *Texuna International Ltd v Cairn Energy plc* [2004] EWHC 1102 (Comm) , especially at [27-28], is one which focuses on whether, despite there being evidence of assets in a jurisdiction where enforcement will not be subject to significant obstacles, there is a real risk of there nevertheless having to be attempts to enforce in a jurisdiction where there may be substantial obstacles. Gross J's assessment is not limited to whether such risk arises from steps taken by a claimant which lacks probity to move assets out of a jurisdiction where enforcement will not be subject to substantial obstacles, though obviously a lack of probity would be highly relevant."

(2) Residence: application to present case

43. The Claimants submit that whilst there might be additional expenses involved in enforcement in the BVI, where Swindon and BCA are incorporated (the Defendants' evidence being that the total costs involved in registering a foreign judgment in the BVI are likely to be US$15-20,000 plus disbursements), there is little or no evidence that these costs would be any greater than the costs of enforcing against a company resident within the Brussels/ Lugano zone.

44. In any event, the Claimants say, Mr Pisante and Swindon have assets worth many multiples of the security sought within Brussels and Lugano States which are amenable to enforcement. Moreover, the Claimants offer undertakings from Mr Pisante and Swindon each to accept joint and several liability for any costs order against any of the Claimants.

45. As to assets, the Claimants place particular emphasis on:

    i) Mr Pisante having a yacht worth €1,790,000 which is unencumbered and registered in the UK;

    ii) Mr Pisante's main residence in Athens, valued at more than €11 million; and

    iii) Swindon's investment portfolio with Banque Pictet referred to above, valued at around US$25 million.

    In addition, as noted later, BCA is said to have significant assets. It is not suggested that Castor has any assets. It is a special purpose vehicle which originally made a claim under a guarantee, which was settled. The Claimants say Castor will play no further role in the proceedings.

46. As a result of these assets and proffered undertakings, the Claimants submit that the Defendants will not need to pursue enforcement of any costs order in the BVI (or, for that matter, in the Marshall Islands where Castor is based), and that there is no real prospect that they will do so. They point out that the Defendants' own evidence is to

the effect that it is likely that no realisable assets exist in the BVI and that enforcement in the Marshall Islands will be futile. Accordingly, the burden of enforcement against the Claimants will in practice be no greater than the burden of enforcing against individuals or companies resident within the UK or a Brussels, Lugano or Hague Convention state. Moreover, even if the court were persuaded that the burden of enforcement against the Second to Fourth Claimants would be greater than if they were resident within a State falling within CPR 25.13(2)(a), that would only have the result that the Defendants would be entitled to security by reference to the extra cost of enforcement (see *Nasser*). Even on the Defendants' own evidence, that amounts to no more than tens of thousands of dollars (i.e. far less than the security already in place).

47. I now consider the assets on whose presence in a Convention State the Claimants rely.

(a) Real estate in Greece

48. Mr Pisante states that he has real estate assets located in Greece worth in the region of US$ 15 million. The only such asset of which details have been provided is a substantial house in Athens, which Mr Pisante describes as his main residence, which was valued in 2011 at €11.426 million and, Mr Pisante says, is free of any mortgages and encumbrances.

49. I would agree with the Claimants that it seems very unlikely that this house would, by the time any adverse costs award came to be enforced, have declined in value so far as not to cover the Defendants' estimated costs. However, I do not consider the possibility of enforcing a judgment against the house as a satisfactory basis on which to conclude that the *prima facie* obstacles to enforcement arising from the Second to Fourth Defendants places of residence do not arise or cease to be relevant.

50. The 2011 market appraisal (the final version of which was produced in evidence) refers to the property as being owned by Mr and Mrs Pisante and Ioulia Amarilio. Mr Pisante explains in his second witness statement that Ioulia Amarilio was his late mother, who passed away in 2011; that the valuation was obtained upon her death to facilitate his purchase of her share in the property; and that the property has since then been in his sole name. However, Mr Pisante does not provide any explanation as to how his wife ceased to have an interest in the property; nor does he provide any documentary evidence (such as land register entries or other property documentation) to demonstrate his sole interest. Further, it is part of Mr Pisante's case on this application that his children and wife live at the house.

51. In these circumstances, there must be real doubt about whether, and if so in what timescale, the house could in reality be the subject of enforcement action. In *Holyoake v Candy* [2016] EWHC 3065 (Ch) Nugee J said in the context of a condition (c) case:

> "63. There is also another aspect to it. 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 any high degree of promptness is within the wording of the rule: *Longstaff v Baker & McKenzie* [2004] 1 WLR 2917 at [17]. The same must apply if the question is whether a co-claimant is a good mark, as the principle is that security need not be ordered against a company that is unable to pay if someone else will. Whatever the value of Mr Holyoake's interest in the property, it is inevitably going to take some time to realise. I cannot conclude on the material before me that Mr Holyoake's ownership through the Irish companies of the property means that he will be able to meet an order for costs in favour of the Defendants within anything like the normal timescale; and to be fair to Mr Stewart he accepted that if that was Mr Holyoake's only asset he did not suggest that it would be enough to show he was a good mark." (§ 63)

52. Such considerations in my view apply *a fortiori* in a case such as the present one concerning a residence where there is evidence that family members occupy and (in the case of Mr Pisante's wife) have or have had an interest in the residence, and where the Claimants have produced no documentary evidence in support of Mr Pisante's statement that he now has sole ownership of the house. In these circumstances, there must be real doubt about whether the house could in practice be the subject of effective enforcement action, either at all or within a reasonable time.

53. Further, Mr Pisante does not provide details of any personal liabilities which he may have. The existence of assets, even if not specifically encumbered, does not allow conclusions to be drawn about Mr Pisante's *net* assets. That is significant as the Defendants would of course be unsecured creditors. In these circumstances, it would to my mind be wrong in any event simply to treat Mr Pisante's interest in the house as an asset against which the Defendants could potentially enforce a costs order.

54. In my view the considerations set out in §§ 50, 52 and 53 go beyond questions of mere additional cost and delay, and involve real risks that the Defendants would be unable to enforce a costs order against the Athens house at all.

(b) Yacht

55. Mr Pisante's evidence is that he is the owner of a Cypriot company, MOT Investments Ltd ("***MOT***"), which in turn owns a yacht insured to the value of €1,790,000, registered in Southampton and currently berthed in Athens. Mr Pisante states that there are no mortgages or other securities over the vessel. However, Mr Pisante does not explain whether and to what extent MOT has any liabilities which might affect the value of Mr Pisante's shareholding in the company. In addition, if and when the time came to enforce any adverse costs order, locating the yacht (even assuming it remained in MOT's ownership and that MOT remained in Mr Pisante's ownership) might well prove difficult. The point made above about Mr Pisante's net assets also applies again. Accordingly, I do not consider this asset to be one which obviates the *prima facie* enforcement difficulties arising from the Second to Fourth Claimants' places of residence.

(c) Other assets owned by Mr Pisante

56. Mr Pisante makes reference to other assets said to be owned by him (listing a controlling shareholding in a Cyprus-registered group of companies, the Bluehouse Group and an apartment in New York) but no details or documents have been provided. The point about Mr Pisante's net assets also applies.

(d) BCA shareholdings in ship-owning companies

57. Mr Pisante states that BCA's principal assets are 50% shareholdings in two ship-owning companies, Osprey Maritime Limited and Sirius Navigation Limited, which are registered in Gibraltar. He says the vessels owned by those companies are registered in Gibraltar, and the shareholdings in the companies are valued at approximately US$5 million. However, no documentary evidence is provided, nor any information about any liabilities BCA may have. The court is therefore unable to conclude that BCA has significant net assets.

(e) Swindon account with Banque Pictet

58. The unredacted copy of the Banque Pictet investment report, shared with the court and legal representatives on a confidential basis, confirms that the portfolio is indeed owned by Swindon. It does not provide details of the assets making up the portfolio. Entries in the section on quarterly and annual performance suggest that the portfolio is largely composed of securities, of some kind, and the asset allocation summary indicates that it consists entirely of assets in the "*alternative investments*" category, denominated as to roughly three quarters in US dollars and one quarter in Euros.

59. It is not possible to tell from the investment report the nature of the assets, whether they are subject to any kind of restrictions, or how diverse they are. The Claimants point out, however, that whilst maintaining an end of year balance of over US$19.7 million each year, Swindon has made cash withdrawals of between US$ 1.5 and US$9.7 million each year since 2013.

60. Mr Pisante states in his second witness statement that Swindon has no pledged assets or material liabilities, other than some relatively very modest uncalled capital commitments. However, he produces no accounting statements (audited or otherwise) of Swindon, or any other documentary evidence as to its financial position other than the Banque Pictet investment report itself.

61. The observations quoted above from *PJSC Tatneft v Bogolyubov* are pertinent in this context. The Claimants make the points that (a) unlike in *Tatneft*, Mr Pisante's and Swindon's assets in a Contracting State are fully transparent and explained, and (b) there is (and can be) no question as to the probity of Mr Pisante and Swindon, nor any reason to believe that funds will be moved out of the Brussels/Lugano zone in order to make enforcement of a costs order more difficult. They submit that any suggestion of a real risk that Mr Pisante, a Greek national who lives in Greece with his family and school age children, will sell up his family home in Athens (worth over €11 million) in order to attempt to avoid an adverse costs liability of around £750,000 (which could be satisfied in any event many times over from other assets in Europe) is absurd.

62. I am willing to accept the latter point, about selling the family home, but otherwise do not accept the Claimants' submissions on these matters.

63. First, I do not accept that there has been full transparency and explanation from the Claimants in relation to their assets and liabilities. As noted earlier, no information has been provided about any liabilities of Mr Pisante or BCA. In addition, the Claimants have provided no supporting documents on various matters where one would expect obvious basic documents to be available: namely, any accounting documents as to any of the Second to Fourth Claimants' liabilities (or lack thereof), as to Mr Pisante's alleged sole ownership of the house in Athens, or as to BCA's shareholdings or Mr Pisante's other assets (see §§ 50, 56, 57 and 60 above).

64. Secondly, I do not accept that significant reliance can be placed on the presence in a Contracting State of the house in Athens, for the reasons given under sub-heading (a) above.

65. Thirdly, there is no reason to believe the Swindon portfolio with Banque Pictet to be anything other than a highly liquid asset, which could with ease be moved to another bank or sold. As noted earlier, one of the points the Claimants make is that the account contains sufficient liquidity at least to have enabled Swindon to make the cash withdrawals referred to in § 59 above. I agree with Butcher J's conclusion in *Tatneft* that, when considering in the context of CPR 25.13(2)(a) the impact of assets in a Contracting State owned by a company resident in a non-Contracting State, the question is not whether a lack of probity has been shown, but whether there is a real risk that the assets in a Contracting State may no longer be available if and when an asset of enforcement arises.

66. Here, as in *Tatneft*, Swindon's portfolio might very well cease to be available for a variety of reasons, including legitimate reasons. It is arguably unnecessary to speculate as to what such reasons might arise, though several suggest themselves. One possibility, for example, is that Swindon might simply decide to move its assets to another financial institution for commonplace reasons such as seeking lower fees, higher returns or improved customer service

67. A second possibility would be a disruption in Swindon's banking relationships of the kind that has occurred with the joint venture company, Netley. In June 2020 the Defendants' bank (Joh. Berenberg, Gossler & Co. KG) terminated the accounts of Netley and its subsidiary, Batam Trader Shipping Limited (also a joint venture between Lomar and Swindon), apparently as a result of concerns about Swindon and Mr Pisante. Berenberg's explanation included the following:

> "Referring to our kind telcon this morning kindly be informed that we can not keep going forward the accounts of Netley Holdings Ltd. … and Batam Trader Shipping Limited ...
>
> One of the shareholders of both entities (stake: 50 %) is the BVI registered company Swindon Holding & Finance Ltd. which is ultimately owned by Mr. Victor Pisante via a complexe trust structure.

> However, there is a lot of adverse media linked to Swindon Holdings & Finance Ltd., the beneficial owner Victor Pisante and (former) Directors of this company. All of these information are publicly available – a short summary of the Offshore Leaks /World Compliance hit and adverse media hereunder:
>
> …
>
> Taking all this adverse media into account the bank has decided to not engage in any kind of business linked to Mr. Pisante, or better to say his investment companies.
>
> Thus, the accounts of Batam Trader Shipping Limited and Netley Holdings Ltd. need to be closed down."

68. The "*adverse media*" extract quoted in Berenberg's explanation cited data from the '*Panama Papers'*. The extract noted that Swindon was a shareholder of BCA, which was a former shareholder of Netley and whose registered agent was the law firm Mossack Fonseca. That was the law firm whose files formed the basis of the Panama Papers leak. The extract stated that Mr Pisante was himself mentioned in the "*Offshore Leaks database*", along with other directors of Swindon. Reference was made to a former director, Mr Urs Meisterhans, having been linked in media articles to cases of alleged fraud and money laundering. Reference was also made to an article mentioning the present case.

69. The Claimants point out that the references in the Panama Papers are explicable simply on the basis that BCA's registered agent was Mossack Fonseca, a matter that would have been known to the bank when the account was opened. Further, Mr Meisterhans only ever acted as a nominee director of Swindon, more than ten years ago, by virtue of his role at a Swiss corporate services provider.

70. I am not in a position to form an informed view as to what, if any, substance the concerns expressed by Berenberg may have. However, the episode illustrates the possibility that circumstances might arise in which the Claimants would find it necessary to move or replace banking relationships.

71. A third possible reason (again as in *Tatneft*) for moving the Swindon portfolio is that the parties to the present case are engaged in hard-fought litigation and, I was told, their relationship has deteriorated. That was also the reason given for the Claimants' initial reticence about revealing information about their assets. If a course of conduct were in due course open to Swindon by which it could render enforcement of an adverse costs order more difficult, there is in my view reason to think it would do so. Moreover, Mr Pisante's approach to the Defendants' requests for security has included a willingness to be less than frank about his residence (see § 34 above), and that factor in my view provides some further support for the view that there is a risk of Swindon taking such steps in future, should an adverse costs order be made or expected.

72. In any of these situations, involving the current Swindon portfolio being transferred away from Banque Pictet (whether innocently or not), the fact that Swindon is

incorporated in the BVI would then make enforcement of a costs order difficult. The problem would be one of both obstacles and costs. As to obstacles, the Defendants' evidence, which was not challenged (and in any event I accept), is that publicly available information on the assets of a BVI company is extremely limited and is ordinarily available only if the entity so elects. As a result, tracing assets in the BVI can prove to be particularly challenging. BVI companies are not generally required to maintain or file statutory accounts or meet any particular set of international accounting standards, and their financial records are not publicly searchable. I have already made the point that the Claimants' evidence on this application includes no documentation relating to Swindon's assets and liabilities other than the Banque Pictet investment report. Were the portfolio to be moved at some stage, the Defendants would be likely to face significant or insuperable hurdles in seeking to locate its new location or proceeds.

73. As to costs, the Defendants' evidence, which I also accept, is that:

> "Enforcement would also depend on the enforcement mechanism(s) adopted, the most common being charging orders, winding up petitions and/or the appointment of a receiver. For example, I am advised that it could cost an additional (a) US$8,500–US$12,500 to obtain a full/final charging order (assuming relevant property can be identified); and/or (b) US$15,000-US$20,000 to issue a winding-up petition (on the assumption that the application is unopposed), with a payment on account to the proposed liquidator in much the same sum. The prospects of recovery would depend on the existence and value of any realisable assets and, in the case of liquidation, on the costs and expenses of the liquidation, which rank in priority (and are unlikely to be less than US$30,000-US$50,000 and may extend into the hundreds of thousands)."

74. In all these circumstances, I consider that there is a real risk that suitable assets within a Convention State against which a costs order could be readily enforced would not be available if and when any such order were made; and that in those circumstances the *Nasser* condition is satisfied.

(3) Inability to pay

75. Given my conclusions in section (2) above, it is not in my view strictly necessary to consider the position under condition (c), viz the Second to Fourth Claimants' inability to pay the Defendants' costs. However, I do so briefly for completeness.

76. In this context, both sides relied on the Court of Appeal's decision in *SARPD Oil v Addax* [2016] EWCA Civ 120. The claimant in that case was a BVI company, but in applying for security the defendants relied only on condition (c) (judgment § 5). After referring to Sir Donald Nicholls V-C's decision in *In Re Unisoft Group Ltd (No. 2)* [1993] BCLC 532, the court said:

> "12. In *Jirehouse Capital v Beller* [2009] 1 WLR 751 it was argued that Sir Donald had not in fact rejected the "balance of

probabilities" as a test. But this court did not agree. Arden LJ (with whom Moore-Bick and Mummery LJJ agreed) said:–

> "I do not accept the argument … that the test of "reason to believe" must be elevated to a test of balance of probabilities simply because the matter to which the test relates is something which, as Sir Donald Nicholls V-C held, must be established and not simply identified as a possibility. That which has to be established is something that will occur only after the order for security is made. It can therefore only be a matter of evaluation. A person can have a reason to believe that a future event will occur."

> 13. It follows that it is not sufficient for the court or the defendant to be left in doubt about a claimant's ability to pay the defendant's costs if the claimant loses. Nor is it sufficient as the first instance judge in *Jirehouse* had done to paraphrase the wording of the rule by saying that there was a significant danger that the claimants would not be able to pay such costs. The court must simply have reason to believe that the claimant will not be able to pay them."

77. The court's reasoning when proceeding to apply this test included the following passages:

> "17. … 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. The judge said that the obvious explanation of the refusal was that Sarpd wanted, for the purposes of settlement negotiations, to leave Addax in doubt about whether it would recover its costs, even if it defeated the claim. But the thinking behind that is that it is permissible for Sarpd to give Addax reason to believe it will be unable to recover it costs but at the same time assert that there is no reason for the court so to believe. That is illogical and unacceptable.
>
> …
>
> 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.
>
> 20. There is some authority (to which the judge was not referred) in this court in relation to security for the costs of an appeal which is consistent with the practice. In *Mbasogo v Logo Ltd* [2006] EWCA Civ 608 Auld LJ pointed out that none of the respondent companies to the application before him *"notwithstanding the history of this matter and much rattle of accoutrements before the battle over the issues of costs and the need for security*" had sought to put forward any information as to their means. He said that the court's approach to the question whether there was "*reason to believe*" that the relevant party will be unable to pay the other side's costs fell below the level of balance of probabilities; he added
>
> > "And where it arises as a result of the party against whom an order is sought either providing unsatisfactory financial information as to his or its affairs, or as in this case none at all, it is not a big step for the court to take to conclude that there is reason for such belief.""

78. The Claimants submit that the Court of Appeal thus made clear that it is insufficient, in order to satisfy condition (c), for a defendant to show a risk: the defendant must persuade the court that there is 'reason to believe' that the claimant will have insufficient assets to satisfy a costs order, not merely that the claimant 'may be unable' to pay.

79. In principle that is in my view correct. Two points arise, however.

80. First, I do not regard *SARPD* as purporting to alter the approach to be taken in cases where condition (a) is also satisfied. It was not argued as a condition (a) case, although on the facts the defendant evidently could have placed reliance on condition (a) too. In my view, where condition (a) is satisfied, the starting point is that a power to require security arises, subject to the *Nasser* condition. If the claimant contends that the presence of assets in a Contracting State means that that *Nasser* condition is not satisfied, then the question for the court is whether or not those assets negate whatever demonstrable enforcement obstacles or costs would otherwise arise: and in that context, it is appropriate to ask (as Butcher J did in *Tatneft*) whether there is a real risk of those assets no longer being available if and when the defendants seek to enforce a costs order. That is the question I have addressed under heading (2) above.

81. Secondly, there can be reason to believe that a company will lack the means to pay, even in circumstances where some information about assets has been provided, particularly if the information provided about the claimant's financial affairs is unsatisfactory (see the passage from *Mbasogo* in § 77 above, quoted paragraph 20).

Moreover, I do not consider that the defendant is required in this context to demonstrate a lack of probity, or solid evidence of a risk of asset dissipation such as might justify a freezing order. Further, the considerations identified by Nugee J in *Holyoake* (§ 51 above) are again potentially relevant.

82. In the present case, the combination of (a) the Claimants' lack of frankness about Mr Pisante's country of residence, (b) their reluctance to come forward with information about assets other than gradually and belatedly, (c) the lack of documentary evidence even on obvious matters (see the summary in § 63 above), (d) the poor relations and apparent distrust between the parties, (e) the offshore locations of the Second to Fourth Claimants (and consequent lack of transparency) and (f) the ease with which it is likely that the Swindon portfolio with Banque Pictet could be moved, taken together, provide reason to believe that the Claimants would be unable to satisfy any adverse costs order. I therefore consider that condition (c) is also satisfied.

83. For completeness, I do not place weight on one further factor relied on by the Defendants. The Claimants have recently requested that the security which had previously been provided, namely a bank guarantee given by Eurobank Cyprus Ltd on behalf of Swindon, be replaced by a bank guarantee given by Alpha Bank on behalf of Castor. The Defendants submit that in circumstances where Castor is now essentially a nominal party to these proceedings (since the only claim it made has now been settled), and is therefore unlikely to be the party which is ultimately liable for costs, this was a surprising request and gives rise to an inference that Swindon and BCA are unable to provide security for costs themselves. However, Mr Pisante explains that he wished to replace the guarantee because Alpha Bank was able to offer more advantageous commercial terms than Eurobank. Counsel told me that it was Castor rather than Swindon which has a banking relationship with Alpha Bank, hence the proposed change of party. In these circumstances I do not consider that I could properly draw an inference that Swindon or BCA would be unable to provide security themselves.

(F) DISCRETION

84. I have already considered in section (E) above several of the points raised by the parties in the context of the exercise of the court's discretion, in particular the existence of assets in Contracting States.

85. The Claimants submit that the court should not exercise any power to order security, because it would not be just to do so in circumstances where:

i) Mr Pisante is resident within the Brussels/Lugano zone, and will be jointly and severally liable for costs should the Defendants obtain an adverse costs order; and the Defendants can if necessary enforce against his assets under the Brussels Regulation;

ii) there is no real prospect that any adverse costs order will go unsatisfied;

iii) any costs order against the Claimants would be fully enforceable within the Brussels/ Lugano zone;

iv) the claim is a *bona fide* claim with (at the very least) a reasonably good prospect of success (citing, for example, the Claimants' case regarding the representation made by Mr Logothetis that he/Lomar was contributing approximately US$40-45 million in equity to the joint venture); and

v) whilst the Claimants are able to put up security, that will be at a cost to them, as Mr Pisante will have to lock up funds by putting them in escrow in return for a bank guarantee, or by paying them into court.

86. As to these points:

i) I have accepted that Mr Pisante is resident in a Contracting State. There was some debate in the skeleton arguments about whether he would be jointly and severally liable for any costs order, but in principle his offer of an undertaking to accept joint and severally liability would address that point. However, for the reasons given earlier, I do not accept that the Defendants will, if necessary, be able to enforce against Mr Pisante's assets in a Contracting State.

ii) I do not accept that there is no real prospect of any adverse costs order going unsatisfied. For the reasons given in section (E) above, I consider there to be reason to believe that such an order would go unsatisfied if security is not ordered.

iii) Again for the reasons given earlier, I do not accept that any costs order against the Claimants would be fully enforceable within the Contracting States zone.

iv) For present purposes I am content to accept that the claim is a *bona fide* one with a reasonable prospect of success. As the Claimants accept, an application for security for costs should not be made the occasion for a detailed examination of the merits of the case, and parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure (see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All E.R. 1074). The existence of a *bona fide* claim with a reasonable prospect of success can therefore necessarily be no more than one factor to weigh in the balance.

v) I am content to assume that, as seems likely, there would be some cost involved in providing security at the levels sought by the Defendants.

87. Weighing up these considerations and the evidence as a whole, I conclude that it would be just to require the Claimants to provide security for costs and, further, that the amount of such security should be referable to the Defendants' total estimated costs rather than merely reflecting estimated additional enforcement costs.

(G) QUANTUM OF SECURITY

88. The relevant principles governing the quantification of an order for security for costs are summarised in note 25.12.7 in the White Book as including the following points:

i) The appropriate quantum is a matter for the court's discretion, the overall question being what is just in all the circumstances of the case. In approaching

the exercise, the court will not attempt to conduct an exercise similar to a detailed assessment, but will instead approach the evidence as to the amount of costs which will be incurred on a robust basis and applying a broad brush (see also *Excalibur Ventures v. Texas Keystone* [2012] EWHC 975 (QB) § 15).

ii) In some cases, the court may apply an overall percentage discount to a schedule of costs having regard to (a) the uncertainties of litigation, including the possibility of early settlement and (b) the fact that the costs estimate prepared for the application may well include some detailed items which the claimant could later successfully challenge on a detailed assessment between litigants. There is no hard and fast rule as to the percentage discount to apply. Each case has to be decided upon its own circumstances and it is not always appropriate to make any discount.

iii) In deciding the amount of security to award, the court may take into account the "balance of prejudice" as it is sometimes called: a comparison between the harm the applicant would suffer if too little security is given and the harm the claimant would suffer if the amount secured is too high. The balance usually favours the applicant: an under-secured applicant will be unable to recover the balance of the costs which is unsecured whereas, if the applicant is not subsequently awarded costs, or if too much security is given, the claimant may suffer only the cost of having to put up security, or the excess amount of security, as the case may be (see also *Excalibur* § 18).

iv) In the Commercial Court, an order for security for costs may in appropriate cases be made on terms that the applicant gives an undertaking to comply with any order that the court may make if the court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant (Commercial Court Guide, Appendix 10, § 5).

v) In determining the amount of security, the court must take into account the amount that the respondent is likely to be able to raise. The court should not normally make continuation of their claim dependent upon a condition which it is impossible for them to fulfil.

89. The Defendants submitted that if the Court is minded to apply a discount to the sum claimed, it should be a modest one and certainly no more than 30%, citing *RBS v Hicks* [2012] EWCA Civ 1664 § 18. Lewison LJ there said:

> "The claimants have asked for 85% of their costs. However, to my mind, that looks like an award on an indemnity basis. In my judgment, the 70%, for which Mr. Malek contends as his final fallback position, is more like an assessment for standard costs."

90. However, I agree with the Claimants that as that case concerned the costs of an appeal, the 70% figure used is not directly applicable to a first instance case such as the present one. The generally discrete nature of appeal costs may give less scope for argument than litigation costs in general. In *Stockers v IG Markets* [2012] EWCA

Civ 1706 the Court of Appeal noted that Steel J at first instance had ordered security for costs in a sum which represented 60% of the amount sought. That was of course merely one example of a security order. It is commonly said that recoveries on detailed assessments of costs frequently turn out in the region of 60-70% of claimed costs, but that too must at best be a rough rule of thumb.

91. The Defendants' estimated costs in the present case are £1,305,602, an estimate which is supported by a costs schedule exhibited by the Defendants' solicitor. I have taken the following specific points into consideration when reviewing the estimate.

i) I agree with the Defendants that, taking a very broad view, total estimated costs of £1.3 million are not a surprisingly high figure for proceedings of this nature and complexity, particularly given the seriousness of the allegations made in them (which include fraud), and the amounts claimed: the Re-Amended Particulars of Claim seek damages totalling *"at least US $13,740,944"*, together with a separate claim by Mr Pisante against the First Defendant for €500,000 pursuant to an oral agreement referred to as the "*Shares Agreement*".

ii) I note that the Claimants have not produced, for comparison purposes, a schedule of their own estimated costs. Although they were under no obligation to do so, a possible inference is that such a schedule would not have supported the criticisms they make of the Defendants' schedule (see Popplewell J's remarks in *Excalibur* at §§ 16-17).

iii) In considering the detailed comments the Claimants have made on the Defendants' schedule, I have to avoid the risk of double counting (a) an overall discount of the kind discussed above, reflecting a broad brush view of likely outcomes on detailed assessment, and (b) detailed objections which are themselves of the kind that might be raised on a detailed assessment and thus may well already be reflected in the discount.

iv) The Defendants' overall costs estimate has increased from about £930,000 in December 2019 to £1.3 million now. That includes a large increase in estimated disclosure costs from about £84,000 then to around £268,000 now. The evidence of the Defendants' solicitor is that the Defendants originally underestimated the scope of the task. They originally budgeted for a review of 50,000 documents, but having now conducted the searches they have located over 1.2 million documents, of which more than 300,000 will need to be reviewed. The solicitor adds that the costs of collating and reviewing disclosure documents will have been increased by lack of face to face interaction during the Covid-19 pandemic, and: *"In a large project team-based task, such as disclosure, the inability to work from a centralised hub and meet in person has undoubtedly caused some delay and costs increase to the overall disclosure process"*. Further, the Claimants' amendments to their Particulars of Claim, including a new allegation of fraud and the new Shares Agreement claim, have opened up additional issues for disclosure. I see considerable force in those points.

v) As to the costs of dealing with witnesses:

a) The Defendants' original schedule of costs assumed that they would call 2 witnesses, whereas they now assume that 5 witnesses will be called. However, the Defendants' Case Management Information Sheet, served in January 2020, made clear that the Defendants intended to call 4-5 witnesses, to which no objection was taken.

b) The Claimants suggest that it is disproportionate for the Defendants to budget for 50 hours of director time, at an hourly rate of £330, for the preparation of witness statements. However, I agree with the Defendants that, given the serious and sensitive nature of the allegations made in this case, it is reasonable for a director to be heavily involved in this process, and that the hourly rate is not unduly high.

c) The Defendants have increased their estimated costs of considering the Claimants' witness statements since their December 2019 estimate. However, the Claimants have since then significantly amended their pleadings in the respects noted above, which is bound to have increased the likely costs of witness statement review.

vi) The Defendants have clarified that the section in their schedule headed "*Preparation for Hearing*" relates to preparation for trial, and submit that the overall estimated costs of £72,500 for preparing for a 7 day trial are reasonable and proportionate.

vii) There have been increases to the Defendants' estimated costs of the trial itself since the Claimants' schedule of December 2019 and a later one provided in August 2020. The Defendants have explained that the main reason for this is that the original December 2019 schedule erroneously (and obviously) underestimated counsel's refresher fees as being £10,500. (I interpolate that it must indeed have been obvious that that figure could not cover refreshers for leading and junior counsel for a 6 or 7 day commercial trial.) This was corrected to £52,500 in the August 2020 schedule and £61,241 in the current schedule. The schedule dated August 2020 also erroneously assumed a 6 day trial, whereas the trial had in fact been fixed for 7 days.

92. I also bear in mind that the Shares Agreement claim is advanced only by Mr Pisante, against whom I have held the court has no power to order security for costs. That claim is small in comparison with the claims advanced by Swindon, and amounts to less than 4% by value of the total claim. On the other hand, as a claim based on an alleged oral agreement (which is denied), it is bound to require some witness evidence and likely disclosure, and thus might account for more than 4% of the estimated legal costs.

93. Weighing up all these factors, I see no justification for making any particularly heavy discount to the Defendants' estimated costs. I consider it appropriate to make a security order reflecting approximately two thirds of the estimated costs of £1,305,602, i.e. approximately £870,400, discounted by 7.5% to take account of the claim advanced by Mr Pisante alone, and thus to require security in the total sum of £805,000.

(H) FORM OF SECURITY

94. The existing security provided by the Claimants is in the form of a guarantee from Eurobank Cyprus Ltd, on behalf of Swindon. As noted earlier, the Claimants proposed that this be replaced by a guarantee from Alpha Bank, on behalf of Castor. The Defendants have indicated that they would be content with either form of security, so long as appropriate wording can be agreed; alternatively, they say the appropriate form of security would be a payment into court. It may be that the parties will now be able to resolve the form of an appropriate guarantee.

95. I shall hear argument on any matters arising on which the parties are unable to agree, including the question of whether the order for security should be made conditional on the Defendants providing an undertaking of the kind referred to in § 88.iv) above.