Neutral Citation Number: [2019] EWHC 1432 (TCC)

Case No: HT-2018-000322

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2019

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

(1) TC DEVELOPMENTS (SOUTH EAST) LTD	**Claimant**
(2) BUJ ARCHITECTS LLP	
- and -	
INVESTIN QUAY HOUSE LIMITED	**Defendant**

- -
- -

James McCreath (instructed by **IBB Solicitors**) for the **Claimants**
Nicole Langlois (instructed through the **Direct Public Access Scheme**) for the **Defendant**

Hearing dates: 24th May 2019

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE STUART-SMITH

Before Mr Justice Stuart-Smith :

1. This is the Claimants' application for security for costs in relation to the Defendant's counterclaim.

The Factual Background

2. The First Claimant ["TCD"] is a company providing project management and coordination services in respect of property developments. The second Claimant ["BUJ"] is a firm of architects. The Defendant is a corporation that is incorporated and resident in Jersey and is not resident in a Brussels Contracting State, a State bound by the Lugano convention or a Regulation State as defined in s. 1(3) of the Civil Jurisdiction and Judgments Act 1982.

3. The Defendant purchased an office block in Docklands called "Quay House" in about February 2014 for just under £11 million + VAT. In January 2017 it entered into a contract in writing with TCD to undertake project management and co-ordination work relating to preparing, submitting and progressing a planning application for the re-development of the Quay House site. In September 2017 it entered into a contract in writing with BUJ as architects to assist with preparing and then submitting the contemplated planning application. In the event, and before any planning permission had been obtained, the Defendant sold Quay House in July 2018 for £26 million plus VAT. It did not tell the Claimants of its intention to sell Quay House either in advance or when it did so.

4. When the Claimants discovered that the Defendant had sold Quay House, they entered into correspondence about their fees. On 10 October 2018 the Defendant's then solicitors wrote an open letter which asserted that the Claimants had given bad advice about the development. Referring to the Defendant and its shareholders interchangeably, the solicitors wrote:

> "Having now expended and wasted considerable sums on projects recommended by your clients and others, our clients no longer wish to pursue or test the viability of our client company. Frankly they are depressed at the thought of spending and wasting more money on the company.
>
> They have therefore decided, with some reluctance, to allow the company to be placed into liquidation.
>
> That puts your clients in a position whereby they either prove or attempt to prove as creditors in the liquidation of our client company, which in any event, we can assure you and your clients that they will not receive a single penny in the pound as our client's shareholder will be financing the liquidation in full and will not be recovering a single penny in the pound. Our client takes no pleasure in this position, but it is what it is and without putting too finer [sic] point on it very substantially due to your clients."

5. In the light of this letter, the Claimants sought and obtained a freezing injunction which remains in force. The information provided by Mr Whale, a director of the Defendant, in the course of the freezing injunction proceedings is to the effect that the great majority of the purchase price received by the Defendant on the sale of Quay House was disbursed swiftly. £2.8 million went to redeem a charge in favour of a financial institution; just short of £23 million went to repay unsecured director's loans (the director being the Defendant's sole shareholder); and some other sums went to discharge other third party creditors, including the expenses of sale. In consequence of these disposals, although the Freezing Injunction requires the Defendant not to remove from England & Wales or to dispose of assets worldwide up to £1,200,000, the information provided by Mr Whale and by the Defendant subsequently is that the only remaining asset of the Defendant is cash to the value of some £91,000, which is held by banks in Jersey. As the in terrorem letter of 10 October 2018 from the Defendant's solicitors correctly points out, if the Defendant were placed in liquidation, that sum of £91,000 would be available for distribution amongst all creditors. There is no information about what other creditors there may be, secured or otherwise. What appears clear on current information is that the Defendant has such limited assets substantially because it promptly discharged not merely the secured charge and immediate expenses of the sale but also the unsecured director's loan owed to its sole shareholder.

6. The Claimants' claims are for fees pursuant to the agreements in writing that each entered into with the Defendant. TCD claims £150,000 plus VAT pursuant to an express term of its agreement that provides for payment of fees in that sum if the Defendant sold the site more than 12 months after the conclusion of its agreement with TCD and before the obtaining of planning permission, which is what happened. BUJ's agreement provided for payment of fees if the Defendant terminated its agreement in a prescribed manner. In fact, the Defendant never formally terminated its agreement, so BUJ claims on alternative bases that (a) the Defendant should have done so when it decided not to pursue an application for planning permission, or that (b) the Defendant acted in breach of contract in failing to pursue planning permission, or that (c) BUJ is entitled to a payment on a Quantum Meruit ["QM"] basis. BUJ claims £295,000 +VAT, alternatively £750,000 + VAT.

7. The Defence acknowledges the existence of the express term of TCD's agreement and that the contractual conditions for payment of £150,000 are satisfied. It also admits the legal possibility of BUJ becoming entitled to be paid on a QM basis but alleges that BUJ's services were worthless and otherwise denies the Claimants' claims.

8. The main factual basis for the Defendant's denial of the Claimants' claims is two-fold:

    i) The Defendant alleges that the Claimants failed to act with due care and skill or in accordance with their contractual obligations because the scheme that they proposed had a net to gross ratio that was "uncommercial". It appears that the Claimants' scheme provided a ratio of c. 64.99%, it being the Defendant's pleaded case that it should have been 70% or more;

    ii) The Defendant alleges that the Claimants failed to alert it to the existence of a strip of land which was going to be necessary for demolition works and which could not be used without obtaining the consent of an adjoining owner.

On the back of these two factual allegations the Defendant pleads that the reason no application for planning permission was made was that the scheme being proposed by the Claimants was uncommercial and required third party consent to enable demolition. The Defendant alleges against each Claimant that its contract should not be construed as allowing the Claimant in question to benefit from its own breach of contract, or there should be an implied term to that effect.

9. The Defendant alleges that these breaches by the Claimants have caused it to suffer loss and damage particularised as follows:

> "29.1 The Defendant lost the chance timeously to obtain the consent of the third party owner to the demolition works.
>
> 29.2 Alternatively, the Defendant lost the chance to avoid incurring the costs of and incidental to the preparation of the BUJ Scheme by abandoning its plan to obtain planning permission at an early stage and selling the Site either without planning permission or an a "subject to planning" basis.
>
> 29.3 The Defendant has lost the chance to obtain a development scheme which materially added to the open market value of the Site. A development scheme which achieved a net to gross value of 70% or more would have made the Site more attractive to prospective purchasers even if planning permission had not been obtained. In any event, on the Defendant's primary case the problem concerning the third party could have been overcome and planning permission could and would have been obtained.
>
> 29.4 Alternatively the Defendant lost the chance to avoid incurring the costs of and incidental to the preparation of the BUJ Scheme by abandoning its plan to obtain planning permission and selling the Site either without planning permission or an a "subject to planning" basis."

10. The Defence continues at [30] as follows:

> "The Defendant's losses will be the subject of expert evidence and will depend upon the nature of the scheme which could and should have been provided, the prospects of obtaining third party consent, the prospects of obtaining planning permission and questions of valuation. These losses are likely to be very substantially greater than the combined value of the claims made by TCD and BUJ. The loss and damage flowing from the loss of the chance to abandon the plan to obtain planning permission is likely to exceed the combined value of the claims made by TCD and BUJ, depending upon the date when that decision would have been taken."

11. The Defence concludes with the plea that "[t]he Defendant will seek to set off in diminution or extinction of the claims brought by TCD and BUJ its Counterclaim as set out below."

12. The Counterclaim is shortly pleaded. It repeats the Defence; alleges that "by reason of the breaches of contractual and tortious duty on the parts of TCD and BUJ the Defendant has suffered loss and damage as set out in its Defence"; states a claim for interest; and then Counterclaims damages and interest.

13. Two points should be noted. First, no attempt is made to place a value on the Counterclaim. The Claimants' evidence mentioned a figure; but on further enquiry it appears that the evidence relates to the contents of without prejudice discussions and that the substance of the discussion (including the mentioned figure) is disputed. I therefore place no weight upon it. There is no evidence from the Defendant about the anticipated value of its counterclaim. The only information is therefore the assertion in the Defence that the Defendant's losses will be the subject of expert evidence and are likely to be "very substantially greater than the combined value of the claims made by the Claimants". Second, the Counterclaim pleads no facts in addition to those already pleaded in the Defence, including the defence of set-off. Thus, at least as a matter of form, the Defendant has pleaded all facts that underpin any counterclaim as facts forming part of the Defence.

14. The Claimants have served a detailed Reply and Defence to Counterclaim which takes issue with the factual basis of the Defendant's proposed set-off and counterclaim. In summary, the Claimants do not accept the assertion of lack of commerciality or that they were obliged to achieve a higher net to gross ratio than was incorporated in their work; and they plead chapter and verse to contradict the Defendant's case that it was not aware of the existence of a potential ransom strip. I do not set out the facts and matters pleaded by the Claimants and remind myself that (other than in exceptional circumstances which do not apply) the apparent strengths and weaknesses of the parties' positions should not influence the outcome of an application for security for costs.

15. The Claimants' application is supported by a witness statement from their solicitor. He exhibits a draft Precedent H Form which is said to reflect the costs of litigating the issues raised by the set off and counterclaim only. He anticipates that the Claimants' combined costs to the exchange of experts reports is something over £500,000 and, on the basis of a 10 day trial, that the Claimants' costs of defending the counterclaim overall will be in the region of £900,000. There is no separate Precedent H showing the Claimants' estimate of the cost of litigating only their respective fee claims and what they consider to be costs properly attributable to the Defendant's defence of that claim. No costs budgeting has yet been undertaken. That being so, I will only note that some of the figures included in the Precedent H are so large that they tend, in the absence of cogent explanation, to cast doubt on the validity of the whole exercise.

The Applicable Principles

16. The principles are very well known and do not require to be repeated in great detail in this judgment.

17. The relevant provisions of CPR r 25.13 are:

> "**Conditions to be satisfied**
>
> 25.13
>
> (1) The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b)
>
> (i) one or more of the conditions in paragraph (2) applies, or
>
> (ii) ….
>
> (2) The conditions are –
>
> (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 [7];
>
> (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;
>
> …"

Jurisdiction

18. It is common ground that the criteria for the gateways at CPR r. 25(13)(2)(a)(i) and (ii) are satisfied. The separate criterion established by CPR r. 25(13)(2)(c) is also satisfied: the information about the current financial situation of the Defendant shows that there is reason to believe that it will be unable to pay the Claimant's costs of the Counterclaim. I therefore have a discretion to order security for costs which is to be exercised on established principles.

19. In exercising that discretion "it must be borne in mind that the design of the rules is to protect a defendant (or a claimant placed in a similar position by a counterclaim) who is forced into litigation at the election of someone else against adverse costs consequences of that litigation": see *Autoweld Systems Ltd v Kito Enterprises Ltd* [2010] EWCA Civ 1469 at [59] per Black LJ, which reflects the starting point under the rules, namely that "a defendant to any claim may apply … for security for his costs of the proceedings": CPR 25.12(1).

20. It is common ground that, where CPR r. 25(13)(2)(a)(i) and (ii) are relied on, the Defendant's non-residence alone is a necessary pre-requisite to the exercise of the Court's discretion but is not of itself a sufficient reason for making an order for security. There is an additional distinction that applies to claims for security where the relevant gateway is provided by CPR 25.13(2)(a) on the one hand or CPR 25.13(2)(c) on the other: see *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868. *Nasser* concerned the exercise of the Court's discretion founded solely on the foreign status of the party against whom security was ordered so that the relevant gateway was provided by CPR r. 25.13(2)(a): CPR r. 25.13(2)(c) was not applicable. The Court of Appeal held that the basis for the power to award security in such a case was potential difficulty in enforcement abroad and that "if the discretion to order security is to be exercised it should be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned." By contrast, "insolvent or impecunious companies present a different situation … since the power under CPR r. 25.13(2)(c) applies to companies wherever incorporated and resident and is not discriminatory": see [61] per Mance LJ.

21. Where, as here, a party relies upon CPR 25.13(2)(b) and seeks security against a counterclaiming and impecunious defendant company which relies upon its counterclaim as a defence by way of set-off, the relevant principles can be derived from a clear line of authority that can be traced back to *Neck v Taylor* [1893] 1 QB 560, 562 per Lord Esher. More recent statements of the principles are to be found in *BJ Crabtree (insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43, 52-53 per Bingham LJ and *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, 311-313 per Dillon LJ, and 317c-h per Bingham LJ.

22. The following propositions are well-established:

    i) An order for costs against a counterclaiming defendant should not ordinarily be made if all the defendant is doing, in substance, is to defend himself: *Hutchison* at 317d;

    ii) The question may be expressed as "is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own": *Hutchison* ibid. An alternative way of expressing the same principle is to ask "whether in the particular case the counterclaim is a cross-action or operates as a defence, that is to say merely operates as a defence": *Hutchison* at 313a per Dillon LJ, with whom Bingham LJ agreed;

    iii) An order for security against a counterclaiming defendant is not precluded because the counterclaim arises out of the same transaction as the claim: *Hutchison* at 311h, 317f;

    iv) The Court should look at the substantial position of the parties and not the form as appearing from the pleadings or otherwise: *Hutchison* at 317e. Thus, for example, the fact that the Defendant in the present case has pleaded all material facts in the Defence and then adopted a short form of Counterclaim is not determinative or even of any real influence if the reality is that it has gone beyond merely defending itself and has launched a cross-claim with an independent vitality of its own;

v) It is clearly a relevant consideration that if the claimant had not issued proceedings the defendant would have done, because in such a case it may be almost a matter of chance whether a party happens to be the Claimant or the Defendant; and if the proper inference is that the defendants would have sued anyway, that fortifies the inference that the counterclaim has an independent vitality of its own and is not a mere matter of defence: *Hutchison* at 317g-h. If, however, the proper conclusion is that the claim by the claimant and the cross-claim by the defendant raise essentially the same issues and are going to be litigated anyway so far as one can tell, that would militate against making an order for security: *Crabtree* at 54, per Bingham LJ;

vi) It is not conclusive that the Counterclaim overtops the claim, though this may be a relevant consideration and a marked discrepancy in size between the amount claimed in the action and the very much greater amount claimed by the cross-claim will be a relevant factor: *Hutchison* at 314h, 317f-g.

23. For completeness, I record that it is no part of the Defendant's case that its counterclaim would be stifled if an order for security for costs were to be made. That being so, it is not necessary to refer to the principles that become relevant when potential stifling is raised by the subject of an application for costs save to note that (a) if the issue were to have been raised the burden lay on the Defendant to prove the relevant facts on the balance of probabilities; and (b) when the issue is raised, the relevant question is whether the party raising it has established on the balance of probabilities that no funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition: see *Goldtrail Travel Ltd v Onur Air AS* [2017] UKSC 57 at [15], [18], [21].

The Present Application

24. The two real issues in the present application are:

i) Whether the ease of enforcing any judgment in Jersey removes any justification for making an order for security for costs;

ii) Whether what the Defendant has pleaded by way of set-off and counterclaim is in reality a "mere defence" or whether the Defendant's counterclaim can be said to be a cross-action or to have "independent vitality" of its own.

Enforcement in Jersey

25. The Defendant has exhibited a letter of advice from its Jersey lawyers, which in turn exhibits the Judgments (Reciprocal Enforcement)(Jersey) Law 1960 and the Judgments (Reciprocal Enforcement)(Jersey) Act 1973. In outline, the combined effect of the 1960 Law and the 1973 Act is that if the Claimants obtain a final money judgment against the Defendant which remains unsatisfied and is capable of being enforced in England, they may apply to the Royal Court at any time after the date of judgment to have the judgment registered. If the judgment is registered it then has the same force and effect as a judgment originally given in the Royal Court and entered on the date of registration. That includes the power of the Royal Court to order execution in respect of the judgment. There is no evidence about the operation of the powers of execution in Jersey, but it is not suggested that they differ markedly or are

inferior to the powers of the Court in England or Wales. In order to obtain registration, the Claimants would need to make an application supported by an affidavit and exhibiting a sealed copy of the foreign judgment. They would need to specify the amount of the judgment debt that remained outstanding.

26. The Jersey lawyers give as their opinion that "if a judgment for a sum of money is obtained against [the Defendant] in the TCC, it is likely to be recognised in Jersey." No reason has been identified either in evidence or submissions why it should not be.

27. On this evidence it appears that the only disadvantage to the Claimants in seeking to enforce in Jersey any judgment they may obtain in England is limited to the procedural inconvenience of having to apply in Jersey for registration with the delay that entails. The Defendant submits that the Court would not be objectively justified in making an order pursuant to the gateway provided by CPR r. 25.12(a) as there is no material or sufficient difficulty in enforcing in Jersey any judgment that the Claimants obtain in these proceedings in England. The Claimants, while not formally abandoning their reliance on this gateway, made no substantive submissions in opposition to the Defendant's submissions.

28. In the absence of sustained submissions or any contradicting evidence from the Claimants on the point, I am not satisfied that there would be any material difficulty in the way of enforcement in Jersey that would justify an order for security for costs pursuant to the gateway provided by CPR r. 25.12(a). I can accept that administrative or procedural difficulties or delay could in principle justify an award of security; but there is no evidence of any significant obstacles to registration or of any likelihood of material procedural delay in this case. The administrative inconvenience of having to submit an affidavit and other relatively straightforward steps seems to me to fall short of the difficulties in enforcement contemplated by CPR r. 25.12(a) by a significant margin.

"Mere defence" or "independent vitality"?

29. Ms Langlois for the Defendant submits that there is complete overlap between the factual enquiry required for its defence of set-off and its proposed counterclaim. She submits that its counterclaim does not raise any substantial factual inquiries which are not also the subject of its defence. She points out that the Claimants' Reply and Defence to Counterclaim broadly mirror the manner in which it has pleaded the set-off and counterclaim. She submits that the form of the pleadings reflects the reality of the position.

30. In submissions the Defendant characterises its defence to TCD's claim as being that "TCD has no entitlement to payment of fees … because Investin's decision to sell Quay House without planning permission was attributable to the negligence of TCD." It says TCD should not be entitled to profit from its own breach either as a matter of the proper construction of the contract or by virtue of an implied term. It submits that it has a broadly similar defence to BUJ's claim and adds that BUJ's claim cannot succeed because its services were "worthless". In this way it seeks to tie its criticisms of the Claimants' conduct to its defence to the claims so that the facts alleged and matters claimed by way of counterclaim should be regarded as "mere defences".

31. For the Claimants, Mr McCreath submits that the reality is quite different. He illustrates his point by inviting the court to consider the position if the Defendant had sued first and the Claimants had counterclaimed for their fees: it would then be obvious that the fees claim and the counterclaim have independent vitality and that the Defendant's claim could not properly be seen as a mere rebuttal of the Claimants' fees claims. He supports this by pointing to the pleaded assertion that the Defendant's losses "are likely to be very substantially greater than the combined value of the claims made by [the Claimants]", which is the only open indication of the quantum of the Counterclaim. If that pleading is to be taken as genuine and advanced in good faith, it supports the inference that the counterclaim would have been brought in any event by the Defendant and that it is a mere procedural accident that the Claimants got in first with their fees claim. There is no evidence from the Defendant to rebut that inference. Conversely, if the pleading were a puff and the counterclaim were to be insubstantial or (worse) a tactical device to frustrate the Claimants' claims by forcing them to incur substantial costs in defending a worthless counterclaim brought by an impecunious company, it would be unjust for the Court to facilitate that outcome by not ordering security.

32. The high point of the Defendant's submission is that the Counterclaim and set-off arise from the same transactions as the Claimants' claims; and that the Counterclaim is pleaded by reference to the facts already pleaded in the Defence. The first of these points is in principle not determinative; the second is a matter of form, which is only relevant to the extent that it reflects the substantial position.

33. Adopting the language of Dillon LJ in *Hutchison*, the Defendant's counterclaim appears to me to be in substance a cross-action. As such, it operates as a defence if and to the extent that it is appropriate to be treated as a set-off. When asking whether it is a mere defence or is a claim that has an independent vitality of its own, two features seem to me to be particularly influential. First, the quantum of the claim is asserted by the Defendant to be "very substantially greater" than the Claimants' claims. This is of itself a relevant feature; and, even in the absence of any attempted quantification, it supports the inference that the Counterclaim would have been worth pursuing whether or not the Claimants had made their claims for fees. The Defendant could easily have provided rebutting or clarifying evidence, both about the quantum of its claim (even in outline) and about whether it would have pursued its counterclaim if not provoked by the need to defend itself against the Claimants' fee claims. It has chosen not to do so. There is, in my judgment, force in the submission that (a) if the Counterclaim is taken at face value (albeit unquantified) it is a mere procedural accident that the Claimants issued first; and (b) if the Counterclaim is insubstantial that would support the Claimants' claim for security against an impecunious corporate defendant that is trying to avoid the litigation by putting up a spurious claim by way of set-off.

34. Second, the independent vitality of the Counterclaim becomes clear when one analyses what is involved in the Claimants' claims and the Counterclaim respectively. The Claimants' claims are conceptually straightforward and, with one exception, require very limited factual enquiry. The relevant term of TCD's agreement is agreed, as is the fact that the triggering event has occurred. BUJ's two primary claims are both dependent upon questions of contractual interpretation, including whether the Defendant was entitled to avoid payment of fees to BUJ by selling Quay House

without the benefit of planning permission and without formally terminating BUJ's retainer. These issues require very limited factual investigation or analysis. Only BUJ's quantum meruit claim, which is pleaded as a second alternative, could require any investigation of the quality of BUJ's work. By contrast, for the Defendant to establish the Counterclaim and set-off requires much more detailed factual investigation into the terms of the Claimants' retainers and obligations, what instructions were given that may be relevant to the alleged lack of commerciality of the Claimants' work, whether the Defendant was aware of the status of the ransom strip, and whether the Claimants were negligent or acted in breach of the terms of their retainers in any of the respects alleged against them. It is obvious that such a claim will require both factual and expert opinion evidence and that such evidence may need to be extensive.

35. The fact that a Defendant's set-off or Counterclaim raises matters that would not have to be investigated in the context of a claimant's claim is not of itself unusual or determinative, any more than the fact that the Counterclaim overtops the claim. However, when one looks at the substance of this action and asks the question whether the Defendant in this case is simply defending itself or is going beyond mere self-defence and launching a cross-claim with an independent vitality of its own, the combination of the factual scope of the Counterclaim and the asserted very substantial overtopping of the Claimants' claims lead me to the conclusion that the Defendant has gone well beyond mere defence. Using slightly different language, the proper inference (in the absence of any evidence to the contrary) is that if the Claimants had not issued proceedings the Defendant would have done, so that it is almost a matter of chance that the Defendant is not the Claimant in these proceedings. I accept the Claimants' submission that, if the roles had been reversed and the Defendant had issued first, a claim for security would have been unanswerable.

36. For these reasons I conclude that this is an appropriate case in which to order security for costs.

Quantum

37. By the end of the hearing the parties were agreed that, if an order for security were to be made, the Court should order security to be provided in tranches rather than requiring the Defendant to provide security for the remainder of the proceedings now. I agree, not least because I am not satisfied that I have reliable evidence about the likely quantum of the costs attributable to the Counterclaim. That should become less of a problem once cost budgeting has been undertaken at the CCMC that will now follow.

38. As I have already said, I do not at present feel able to rely upon the figures in the draft Precedent H form submitted by the Claimants. However, in the light of my knowledge of the case derived from this application, the explanation that was given during the hearing of what has been involved thus far in reacting to the Counterclaim, and the court's experience of typical (and atypical) levels of costs in the early stages of contested litigation such as this, I consider that an order for security at this stage in the sum of £40,000 is proportionate and reasonable to cover the costs likely to have been incurred and to be incurred up to and including the CCMC. A further tranche will be determined at the CCMC, at which my present assessment may be revisited in

the light of any further relevant information. The Judge at the CCMC will determine the period and stages of the litigation to be covered by the next tranche.

39. For these reasons I order that:

i) Security be provided in staged tranches;

ii) Security for costs incurred to date and to be incurred up and including the CCMC be given in the sum of £40,000, to be given by 4 pm on [the date 10 days after the date of this judgment];

iii) The quantum of further security will be determined at the CCMC;

iv) The parties are to take steps to fix a CCMC through the normal channels as soon as may reasonably be achieved, unless that has been done already;

v) The Defendant is to pay the Claimants' costs of and occasioned by the application for security, to be assessed at the CCMC if not agreed.

40. I thank Counsel for their submissions, which were notably clear, concise and persuasive on both sides.