Status: Positive or Neutral Judicial Treatment

Sinclair Investment Holdings SA v Carlton Ellington Cushnie, SCI Sacaleca, Guillaume Leong-Son, Marrlist Limited, Assets International Management Limited, Asset Nominees Limited

Case No: HC03C04463

High Court of Justice Chancery Division

12 February 2004

Neutral Citation No: 2004 EWHC 218 (Ch)

2004 WL 229245

Before : The Honourable Mr Justice Mann

Date: 12th February 2004, Hearing dates : 29th January and 3rd February 2004

Representation

Lord Daniel Brennan Q.C., Simon Colton (instructed by Pitmans) for the Claimant.

Michael Briggs Q.C., Mr Richard Walford (instructed by Peters& Peters) for the First, Second and Fourth Defendants.

APPROVED JUDGMENT

Mr Justice Mann :

The Nature of the Applications

1. There are, in effect, two applications before me in this matter, both made by the First Defendant, Mr Carlton Cushnie. The first is in substance an application the effect of which is to seek fortification of a cross-undertaking in damages as will appear when I set out the background to this matter. Mr Cushnie has given an undertaking not to dispose of one of his assets pending trial of this action. The Claimant has given the usual cross-undertaking in damages and Mr Cushnie says that the evidence as to the means of, or available to the Claimant is such that the cross undertaking should be fortified by some appropriate form of financial support. The second application is an application by Mr Cushnie and the Second and Fourth Respondents for security for costs.

Background

2. Some of the events which are relevant to this action have given rise to a criminal prosecution in respect of which Mr Cushnie is currently standing trial. In order not to risk any interference with that trial by means of inadvertent publicity, and since the submissions before me dealt to some extent with the merits of the case against Mr Cushnie and not merely technical matters, at the outset of this hearing I acceded to an application that the hearing should be held in private. In the light of that concurrent criminal trial, and because I believe that this judgment can do justice to the applications without a lot of detail, there are areas of this judgment in respect of which I do not indulge in great detail.

3. On 9th April 1997, the Claimant ("Sinclair"), a BVI incorporated company, entered into an agreement with Trading Partners Limited ("TPL) under which Sinclair invested a sum of £2.35 million for the purpose of its being applied in certain transactions. The agreement provided that, pending the

application of the money, it should be held on trust for Sinclair. The claims made in this action arise because it is said that instead of either holding the money on trust or applying it in the anticipated transactions, it was in fact misapplied by being mixed with the funds of another company, Versailles Trade Finance Limited and thereafter further misapplied. The events are said to have been part of the activities of the latter company's parent company Versailles Group Plc ("Plc") a Stock Exchange Listed Company.

4. Mr Cushnie was the Chairman and Chief Executive officer of the Plc. He was also the 99% majority shareholder of Marrlist Limited ("Marrlist") and English company which in turn was a majority shareholder of Plc. He was obviously deeply involved in the affairs of the Versailles Group; his involvement in the events which are the subject of this action is in dispute.

5. The nature of the claim against Mr Cushnie is set out in Particulars of Claim which have been served. Putting it shortly, it is alleged that Mr Cushnie owes TPL, VTFL and Sinclair fiduciary duties in respect of which he was in breach by applying, or permitting the application of, the money that Sinclair had paid to TPL. There are then claims that he participated in a breach of trust and allowed the Sinclair monies to be applied in "cross-firing" involving other companies said to be controlled by him. In addition it is said that he made an illegitimate profit through this sort of activity in so far as he held shares in Plc, some of which he sold at a profit in November 1999, shortly before the receivership of Plc in January 2004. An account of those profits is sought. There are knowing receipt and knowing assistance claims and claims that Mr Cushnie conspired with others, including a Mr Clough who was another director of TPL. It is not necessary for me to set out any further details of the claims at this stage.

6. A defence has not yet been served in these proceedings, and judging by some of the submissions made to me by Mr Briggs Q.C. on behalf of Mr Cushnie it is not planned that it will be served for some time. The full scope of the dispute between the parties is therefore not known, which will become relevant as appears below. However, it is right to observe that at the beginning of the current criminal trial an Agreed Statement was read into the court record, and it was common ground before me that I could treat it as accurately summarised as follows (taken from the skeleton argument of the Claimant):

> "(1) The annual accounts of VTF and VGPLC between 1992 and 1999 contained figures for 'turnover' and 'debtors' which were falsely inflated: para 17.
>
> (2) The turnover figures were falsely inflated by showing monies paid to and received from companies associated with VGPLC as if they were genuine trading payments and receipts: para 20(a).
>
> (3) The 'associated companies' referred to in para 20(a) included at least Palmerston, VTL, TPL, Discgift, Superhandy and Artagent: para 23. The Prosecution alleges, but Mr Cushnie denies, that Marrlist and HBL (Henri and Bernard Leong Son) were also associated companies.
>
> (4) From the commencement of trading of VTF, wealthy individuals known as 'Traders' provided monies by way of loans / investments which were intended to be pooled and used to finance specific transactions of a nature similar or identical to the business of VTF: para 29.
>
> (5) The turnover of VTL was inflated by, among other things, showing monies paid to and received from other companies associated with VGPLC as if they were genuine trading payments and receipts: para 34.
>
> (6) The 'associated companies' referred to in para 34 included at least Palmerston, VTF, Discgift, Superhandy and Artagent: para 36. The Prosecution alleges, but Mr Cushnie denies, that Marrlist was also an associated company.

(7) The turnover and debtors of TPL, contained in accounts produced to auditors for the years ending February 1997 and February 1998, were fictitiously inflated (see para 43).

(8) Between 1995 and 1999, the share price of VGPLC increased. Marrlist owned 53% of the shares at 8 December 1999."

7. In a witness statement provided in these proceedings by Mr Oliver, Mr Cushnie's solicitor, it is explained on behalf of Mr Cushnie that he views himself as a victim of a fraud committed by Mr Clough, who was the Versailles Group's former Finance Director. He says that "the question of whether Clough acted alone or otherwise is the central issue in the criminal trial." In his submissions to me on behalf of Mr Cushnie, Mr Briggs said that the question of honesty was likely to be the central issue in these proceedings. Other than this, Mr Cushnie's defence can only be imagined.

8. According to the evidence, the initial advice given to Sinclair was to await the outcome of the criminal proceedings before launching its own civil proceedings. However, that position apparently changed when some evidence came to hand which Sinclair considered demonstrated that Mr Cushnie intended to put his assets, or some of them, beyond the reach of creditors. Mr Cushnie is effectively the owner of a substantial property near St Tropez in France, called L'Ecossaise. It is in fact held by an entity known as SCI Sacaleca, which is the Second Defendant in this action. In June 2001, which was one month before Mr Cushnie was charged with the offences which are the subject of the current criminal prosecution, Mr Cushnie executed a document known as an Acte de Cession, the effect of which is to transfer Mr Cushnie's 99 shares in SCI Sacaleca to his sister who is to hold them "on behalf of the Zi-Ver-Tel Trust" but subject to two conditions. The first is that proceedings should be commenced against Mr Cushnie prior to 1st January 2005 for an amount exceeding £100,000.00 damages if the action is linked to the liquidation of the Versailles Group or is based on actions performed by Mr Cushnie or a failure to perform actions for the period between 1st January 1990 and the 2nd December 2000. The second condition is one relating to a transfer which is not relevant for these purposes. If the condition is fulfilled and the property is transferred, then the transferee is to pay 50 million francs by means of a promissory note signed by the trustee on behalf of the trust. Mr Cushnie admits this document and has put forward the explanation that it is, or is part of, some sort of arrangement to save some sort of inheritance tax. Sinclair has obtained some evidence from a French lawyer to the effect that this explanation makes no sense as far as she is concerned. That evidence has not been met by Mr Cushnie although he may say that he has not really had time to do so. Be that as it may, it seems to me for present purposes that that explanation given by him is highly unconvincing.

9. Not surprisingly, Sinclair thought that that document demonstrated an intention to dissipate assets, and on 22nd December 2003 they issued a claim form seeking their relief. On the same day they made an application for a freezing order which was granted by Blackburne J. The order was a worldwide freezing order limited to £5m, and it makes specific reference to L'Ecossaise. The application was made without notice. The order apparently came to Mr Cushnie's attention on 29th December when he was in the United States. He flew back immediately and the next day, on 30th December, he made an application to discharge the order, offering an undertaking in respect of L'Ecossaise by itself. That undertaking was accepted by the Court pending a full inter parties hearing, and the rest of Mr Cushnie's property was released from the freezing order. The full return date for the matter was 15th January 2004 at which the issues were threefold: whether the freezing order should be general or confined to L'Ecossaise, whether the cross-undertaking should be fortified by appropriate security, and an application by Mr Cushnie for security for costs. All those matters were adjourned to a date to be fixed, which is the hearing before me, save that shortly before this hearing the first issue went because Sinclair accepted the undertaking limited to L'Ecossaise. I was also originally to determine how the costs of 30th December should fall since Blackburne J (the Judge on this occasion) reserved them to the Judge hearing the present applications; but that issue is no longer before me since the parties have agreed those costs should be costs in the case.

The State and Status of Sinclair

10. This is an important point for both applications. The evidence shows the following picture. Sinclair is a BVI company. It has no assets other than the claim that it makes in this action. In order to be able to provide the funds that it provided to TPL it borrowed those monies from something called First Hemisphere Corporation ("FHC"). I say "something" because Mr Cushnie has been unable to ascertain the status of that person or body (if indeed it is a body corporate), and so far Sinclair has not provided any explanation in that respect. All that is apparently known, is that it is owned by something called the Condor Trust. Sinclair itself is owned by another Trust known as the Falcon Trust that is thought to be an Irish discretionary trust. Again, virtually nothing is known about those two trusts, although they are believed by Mr Cushnie to be for the benefit of a family called the Hill family. A Mr Hill is described as an "advisor" of Sinclair.

11. FHC has backed the cross-undertaking in damages given by Sinclair, but has provided no evidence of its means despite various challenges by Mr Cushnie's lawyers. Similarly, no evidence is available of the assets of the two trusts that I have just referred to. The picture is therefore of a Claimant that has no tangible assets, that is very arguably insolvent, whose shareholder is in effect unknown and, so far as FHC can be described as a financial backer, whose financial backer is of completely unknown solvency.

The Application for Fortification of the Cross-undertaking

12. Mr Briggs' submissions on the fortification application start with what was said by Laddie J in Staines -v- Walsh [2003] EWHC 1486 at paragraph 35:

> "When a party applies for a freezing order, one of the requirements is that he must address the issue of the cross-undertaking in damages and his ability to service that cross-undertaking. For that reason, save in the most exceptional cases, the Claimant must put in a statement indicating his wealth or at least indicating that he has sufficient adequately to cover the cross-undertaking …".

He acknowledges, of course, that a cross-undertaking has been given in this case, and that it has been backed by the additional cross-undertaking of FHC. However, he says (and rightly) that there is absolutely no evidence of the value of that cross-undertaking — indeed, he says there is a "deafening silence" as to the assets of FHC. That is unusual. In the light of that, and in the light of the consequential uncertainty as to whether or not either Sinclair or FHC will be good for any loss that might be caused should it turn out that the freezing order should not have been granted, it is right that this court should require that fortification be given, failing which the freezing order should be discharged, or more appropriately, Mr Cushnie should be relieved from his undertaking in relation to L'Ecossaise.

13. Until the hearing before me there was no evidence specifically addressing the question of what loss might be caused to Mr Cushnie by virtue of the freezing order made and undertakings given. Of course, that is entirely understandable in relation to the original grant of the freezing order since Mr Cushnie was not represented. It is also understandable in relation to the hearing on 30th December, since that was arranged hastily. It will be remembered that on that occasion, the worldwide freezing order was discharged and replaced by the limited undertaking relating to L'Ecossaise. An order for fortification was sought by Mr Cushnie, and while he originally proposed some form of security in the amount of £500,000.00 it was reduced to £150,000.00 pending the return date. This was not, as I understand it, on the basis of any specific calculations or assessment. There was no ruling on the point at that time. At the hearing before me Mr Cushnie put in some evidence on the point. Since the form and content of that evidence is in my view important, I will have to summarise it.

14. On 16th January 2000 his solicitor, Mr Oliver, signed a witness statement which dealt with this. He says that L'Ecossaise stands as security for a loan owed by Mr Cushnie to Leong-Son Associates, as a result of which 7.7 million euros is currently secured on the property. The value of the property has increased significantly over the past two or three years and it is said to be now worth not less than 16 million euros. Up until now Mr Cushnie has not sought to use the equity in the property for any project, but that position has now changed. Since mid 2003 Mr Cushnie has been working on a project to invest in the acquisition of a spa and health facility centre in the South of France. This requires him to inject substantial equity and "Mr Cushnie has been engaged in advanced negotiations to facilitate the investment". The opportunity to use the equity in L'Ecossaise for this purpose has arisen as a result in the recent increase in its value. Mr Cushnie is recorded as having told Mr Oliver

that he has no other free assets of sufficient value able to be used as security for the business opportunity, which is described as being “commercially highly sensitive and confidential”. The witness statement promises that a business plan for the project, redacted by a member of Mr Oliver's firm, would be available at the hearing. Mr Oliver records that Mr Cushnie told him that if he were not able to make this investment then he would lose a return of between 500,000 and 750,000 euros over the next year.

15. At the hearing before me a redacted version of what is described as a business plan was indeed produced and with it was produced the email to which it was attached when sent to Mr Cushnie on 14th November 2003, subsequently forwarded to Mr Oliver's firm on “28th January 2005 20:11”. I assume that the error in the year is because the computer from which it was sent had its clock set wrongly, but that the day and month was correct, so that it was sent in the evening before the opening of the application before me. That email contained copies of two further emails. The earlier of the two was (assuming that the dates on those emails are correct) 14th November 2003 at 10.41 am when someone called Alexandra, acting on behalf of someone whose name has been redacted, sent the business plan to someone else whose name has also been redacted. Later that day, at 4.32 pm, someone (presumably the recipient of the earlier email) forwarded the plan to carl@marrlist.com. It reads (so far as material):

> “Hi Carl,
>
> Thought I would send the business plan from the doctor to you in English. Not that I had any doubt on your ability to read and understand French …
>
> Regards
>
> Jamie”

16. The business plan contains six pages of fairly large type in landscape mode. It has been redacted so that the project cannot be identified — indeed it is almost impossible to identify the nature of the project. It sets out some fairly bald figures for revenue from three elements of the project with some breakdowns, and it has some limited information as to projected salaries. Page 3 is headed “Proposal of Participation of Group”, and I take it that it is designed to show in general terms who is contributing what to the project. However, it is not possible to be entirely confident about that because it is so heavily redacted that its full thrust is not readily apparent, and I also suspect that it assumes other knowledge on the part of the reader. Crucially, it contains no indication as to what Mr Cushnie's contribution, if any, is to be, or indeed that he is to contribute. I shall return to the significance of this. Suffice it to say that for the present, in the light of this evidence, Mr Briggs now seeks fortification in the sum of euros 750,000.00 and he indicated that since the loss was a continuing loss further fortification might become appropriate in the future.

17. Lord Brennan Q.C., who appeared for Sinclair opposed that application. I think that his submissions can be fairly described under three heads. First, he said that it was clear from the evidence that his client had a very strong case against Mr Cushnie and that was an important factor in the exercise of my discretion on the topic. Second, the onus of establishing a real risk of damage was on Mr Cushnie, and he had failed to discharge it. Third, even if on the evidence, there was a material risk of loss, fortification should not be ordered because, on the facts of this case, it would stifle a strong case or otherwise be too oppressive.

Fortification — My Findings

18. I start my findings by dealing with the first and third of Lord Brennans points in order to get them out of the way. The Bundles before me contained a certain amount of evidence designed to show that Sinclair had a very strong case. Much of it relied on a description of the evidence given by prosecuting counsel at the recent opening of the criminal prosecution of Mr Cushnie, but there was other evidence too. Having considered all that evidence, I find that while there is clearly an arguable case against Mr Cushnie it cannot at this stage be determined to be of such strength as to add any significant amount of weight to Lord Brennan's side of the scales. Mr Briggs accepted that there was an arguable case, but said that I should find no more than that at this stage. He also pointed out (with some justification to my eyes) that there might be some legal flaws in the way in which the case was pleaded, but I need to say nothing more about those. In Porzelack KG -v- Porzelack (UK) Limited

[1987] 1 WLR 420, in the context of an application for security for costs, Sir Nicholas Browne-Wilkinson V.C. said:

> "This is the second occasion recently in which I have had a major hearing on security for costs and on which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing on the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time."

While those remarks were made in a different context (although in the application before me the security for costs context arises as well as the fortification context) I consider that they apply to an application of this sort, at least in the present circumstances. The evidence at the moment is basically all one way because Mr Cushnie has not put in evidence dealing with the merits of the claim. It is to be anticipated that if he were to do so it would be extensive. The court would then be faced with the sort of enquiry which Sir Nicholas Browne-Wilkinson was not prepared to have. In the circumstances, and bearing in mind my conclusions as to Lord Brennan's third point, I do not give any real weight to what is said to be the strong nature of the case against Mr Cushnie.

19. Lord Brennan's third point was, as originally expounded, that the claim (or presumably for these purposes the freezing order claim) would be "stifled" were I to order fortification. From the use of this word (which was Lord Brennan's) one would have thought that the point was that any requirement for fortification could not be met, so the freezing order (or undertaking) would have to go if fortification was required to sustain it. However, Lord Brennan modified this submission to one of mere oppression, so that he was saying that it would be in all the circumstances (including a proper view of the merits of the claim) oppressive to require Sinclair to try to provide fortification: it was not clear where it would or could come from.

20. In relation to this point I have in mind, and apply, the principles set out by the Court of Appeal in another security for costs case namely Keary Developments Limited -v- Tarmac Construction Limited [1995] 3 All ER 534. At page 551 Peter Gibson L.J. said:

> "The court will probably be concerned not to allow power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the Plaintiff's impecuniosities …
>
> Considering all the circumstances the court will have regard to the Plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure …
>
> Before the court refuses to order security on the ground that it would unfairly stifle the valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence … in the Trident case there was evidence to show that the company was no longer trading and that it had previously received support from another company which was a creditor of the Plaintiff company and therefore had an interest in the Plaintiff's claim continuing; but the Judge in that case did not think on the evidence that the company could be relied upon to provide further assistance to the Plaintiff, and that was a finding which, this court held, could not be challenged on appeal.
>
> However, the court should consider not only whether the Plaintiff company can provide security out of its own sources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be particularly within the knowledge of the Plaintiff company, it is for the Plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation."

21. In this case there is no evidence at all that an order to fortify the undertaking would stifle any aspect of this case. While it is clear that Sinclair itself has no funds (indeed that is the basis of Mr Briggs' application for security for costs) it is also quite clear from the evidence that I have seen that it

has received backing from others. FHC has joined in the undertaking, but has declined to give evidence of its own means, or even its status. Either it or Sinclair's shareholders are supporting it in these proceedings, and there is evidence that Sinclair has taken steps in other jurisdictions (the United States and the BVI) and that backing has been provided there. Sinclair has not begun to fulfil the burden which Peter Gibson L.J. refers to in Keary. By the same token, there is no evidence as to the extent, if any, to which the provision of fortification would cause any difficulty, let alone oppression, to those who are backing Sinclair. Had there been evidence then it might have been appropriate to go back and reconsider the strength of the merits of the claim, but in the absence of such evidence I do not need to do so. I am therefore prepared to consider this application on the footing that fortification could and would be provided without undue difficulty, if required by me.

22. That, however, does not determine the issue. The point of a cross-undertaking in damages is to provide a means of compensation for loss if it occurs in relation to the injunction or undertaking to which it relates. To that extent the court has, if necessary, to form a view as to the kind and degree of loss that may result in deciding whether a cross-undertaking has sufficient value (with or without fortification). In re DPR Futures Limited [1989] 1 W LR 778 Millett J had to consider the extent and nature of the cross-undertaking to be given by liquidators. In that context he said this at page 786:

> "In my judgment a liquidator cannot be criticised for refusing to risk his personal assets by giving an unlimited cross-undertaking. It is right to require him to give an undertaking of an amount commensurate with the size of the company's assets and should take the risk that he may not be authorised by the court to have recourse to them to meet his liability. If the value of such an undertaking is considered insufficient in any particular case he should be required to fortify it by obtaining a bond or indemnity from a substantial creditor, but in either case of a fixed amount. **The court cannot avoid the need to make an intelligent estimate of the likely amount of any loss which may result from the grant of the injunction**. There is nothing unusual in this. It is so in every case where the balance of convenience has to be considered. A Plaintiff's resources are not infinite. But any such estimate can be reviewed from time to time and further fortification required if necessary. If fortification cannot be obtained this will affect the balance of convenience between granting or refusing the injunction. But the court cannot abdicate the responsibility for deciding where the balance of convenience lies." (my emphasis)

23. In Bhimji -v- Chatwani [1992] BCLC 387 Knox J was faced with an application for fortification of a cross-undertaking. In that case, having considered a passage from DPR Futures, he considered the state of the evidence as to the loss which might result from a general freezing order (i.e. an order covering all the Defendant's assets, and not confined to one particular asset). Whilst indicating that he was not convinced that there would be no loss, he remained wholly unconvinced that "the Defendants have shown a likelihood of any loss which remotely approaches the half million pounds to one million pounds which was put forward in argument when asked what the figure was that was being sought as a proper bracket for the appropriate figure" (page 403). That was one of the two foundation stones for his decision not to order fortification (the other being doubts about the insolvency of the Plaintiff companies in any event).

24. I have already identified the evidence in this case which indicates that the cross-undertaking is of very uncertain value, but that does not automatically mean that fortification is required. In the light of the authorities just cited, it is both appropriate and necessary for me to consider the extent to which a risk of loss has been shown. In many cases the fact that there is a risk of loss will be obvious merely from the general situation, and while it may not be possible to put anything like a precise figure on the loss, the court, will if necessary, do what it can on the evidence before it to reach an appropriate figure. The courts are well accustomed to assessing the appropriate value to be given to things whose valuation is difficult. It some cases it will be possible to make a more precise or confident assessment than in others. The mere absence of particularised evidence does not mean that there is no evidence of a risk of loss. Mr Briggs submitted that what he had to show was a risk of loss; any more refined questions of causation and likelihood would be appropriate for the enquiry (if any) should the cross-undertaking be called upon. I agree with that as a general approach. By and large it would be unnecessary and inappropriate for a court to go into a detailed and prolonged assessment of difficult questions on causation on applications for interim relief, not least because it might become entirely academic.

25. However, that leaves open the question of the threshold which has to be crossed by a Respondent in establishing that there is a sufficient risk of loss. If it is not sufficiently apparent there is a sufficient risk of loss, then while that is no reason for not extracting a cross-undertaking, it would be a reason for not requiring fortification. It seems to me to be impossible to specify any formula for or definition of that level of risk. All that can be said is that the court must be satisfied that there is a sufficient level of risk to require fortification in all the circumstances. That will be a question of judgment in every case where it arises (though there will be large numbers in which it will not have to be the subject of any particularly anxious enquiry).

26. I turn therefore to consider the facts of this particular case. The first thing to note is that this is no longer a case of a general freezing order. Such orders may often be instances of cases in which it is not possible to predict with any certainty what loss will be caused, but in which it is sufficiently clear that there is a general risk of loss such as to justify the court ensuring that the cross-undertaking has real value or requiring fortification. The present case is one in which the undertaking is now confined to a single property. One would expect it to be easier for an individual to specify what loss, if any, will be suffered from a restraint in dealing with a single property where that property is not the sort of thing that one would necessarily expect an imminent disposal of in the first place. Prima facie, a man who is restrained from disposing of his ordinary dwelling house (which, incidentally, is not the case before me) pending a trial would not be expected to suffer any particular loss thereby. If he wished to allege that loss will or might be caused, one would expect some sort of evidence to that effect. Similarly, in the present case, since what is being restrained is the disposal of a house which Mr Cushnie has held for several years, one would expect some positive evidence of how that restraint is capable of causing loss.

27. That is the purpose of the evidence put in via Mr Oliver and the business plan, referred to above. Mr Briggs says that that evidence is evidence of potential loss. It may be that it is not full, complete or even utterly convincing, but nevertheless it is some evidence and it is sufficient to raise a risk of loss so that the fortification should be required. If it were to turn out, for example, that the project does not go ahead, but that Mr Cushnie did indeed have other ways of raising the monies that he says it is necessary for him to put in, then that would emerge at any subsequent enquiry as to liability on the cross-undertaking. It is not necessary to go into those matters in-depth at this stage. Lord Brennan for his part relies on the timing and quality of the evidence — putting the matter shortly, he relies on its late emergence, the misdating of the email from Mr Cushnie to his solicitors and the quality of the evidence overall.

28. On this issue I accept Lord Brennan's overall submission that the evidence is not sufficient to require fortification in all the circumstances. I bear in mind that Mr Cushnie has had to deal with these proceedings as a matter of urgency, particularly in their early stages, and against a background in which his efforts and attention are probably understandably focused on the criminal trial. However, even making allowance for those factors, the timing of the emergence of this feature presents certain other difficulties. Mr Oliver's evidence stated that Mr Cushnie was in a state of negotiations which was “advanced” and which had been going on since mid 2003. In those circumstances, the transmission of a business plan which I think it is fair to describe as thin as recently as November is a little surprising. It is based on this business plan and the figures resulting from it that Mr Cushnie apparently says he will have a yield of between 500,000 and 750,000 euros over the next year. If that is right, and if it is right that he has no other way of raising his capital injection (whatever it may be) other than by using L'Ecossaise, then it is a little odd that, at the same time as that property was offered via an undertaking on 30th December, the request for fortification was lowered to £150,000.00. One would have thought that Mr Cushnie would have had this project, and the need for deployment of L'Ecossaise to achieve it, in mind at that point of time and that some reference might have been made to it, albeit that the figure of £150,000 was propounded in circumstances in which it was known that there would be a further hearing on the point shortly and before there could be any question of its being frozen having any effect on the project. Its intended deployment did not emerge in evidence until Mr Oliver's statement of 16th January. However, even at that time the business plan was apparently not in his hands. It only arrived in his office the evening before the commencement of the hearing before me. If this was such a major business opportunity which was imperilled one might have thought that Mr Oliver would have been put in possession of this information and documentation at an earlier stage, even allowing for the understandable distractions of the criminal trial.[1]

29. Then there is the quality of the evidence itself. Of course, where the loss being identified is a loss arising out of an inability to enter into a project which is currently still on the drawing board the loss will always have something of a speculative air about it. It can only be based on projections and

assumptions. I make due allowances for that. However, even making those allowances it seems to me that the evidence adduced by Mr Cushnie is extremely thin. I have already described the general contents of the redacted business plan itself. It seems to me to describe a potentially significant project, but otherwise it is really rather thin on detail and the assumptions on which it is based. It contains no details from which one can ascertain timing (thereby casting serious doubt on Mr Cushnie's assertion that he will suffer considerable losses “over the next year”) and contains no real cash-flow forecast. I accept that it is describing a project, and I accept that it has some other details one would expect of a business plan in relation to a project, but as a business plan designed to corroborate the assertion that the project is sufficiently close to present a real prospect of real returns to Mr Cushnie of the order that he states it is, I am afraid, very thin, even allowing for the redaction of allegedly commercially sensitive material.

30. There is one further striking absence from the business plan and from the evidence put in on behalf of Mr Cushnie, and that is what his participation is to be. In terms of participation, the business plan contains some percentages which may or may not relate to percentages of equity to be injected by the participants — it is impossible to tell because the identities of the relevant parties, and perhaps other relevant material, have been redacted. In addition to that uncertainty, it is not clear which, if any, part of those contributions (if that is what they are) is to be attributable to Mr Cushnie because one cannot identify the contributors. Nor is it possible to work out what the whole is of which the relevant matters are percentages, so one cannot work out (and Mr Cushnie has not divulged) how much (if any) he would wish, or be required, to inject.

31. There is one further area of uncertainty. There is a bald assertion in Mr Oliver's witness statement that “[Mr Cushnie] has no other free assets of sufficient value available to be used as security for this business opportunity”. I know little or nothing positive about the wealth of Mr Cushnie, but I am not prepared in the circumstances of this case to accept that bald assertion without further particularisation. The evidence shows that on any footing Mr Cushnie has held substantial assets. He sold a valuable house to satisfy a claim of receivers appointed over the affairs of the Versailles Group, so that house is not available to him. Its value, however, demonstrates that at least at one stage Mr Cushnie was a man of significant wealth. In November 1999 his company (Marrlist Limited) sold shares in the Versailles Group for £28.9 million. Again, there is therefore evidence that considerable funds went through his hands. Bearing in mind the totality of the evidence in this case, I am not prepared to accept at face value the bald assertion made by Mr Oliver on behalf of Mr Cushnie. Some further particularisation of his assets (or lack of them) would be required to bolster that assertion. That is not to say that he has to prove it to the hilt, or that an extensive investigation is required for these purposes; it is just that the assertion does not carry the weight in this case that it might have carried in another. In this context it is also relevant to consider how his apparent intention to use the property as security for the proposed business venture stands with the terms of the Acte de Cession which I have already mentioned. If the property was to pass to the Zi-Ver-Tel trust, how was it then to stand as security? This particular interaction was not investigated at all before me, and in truth it could not be investigated on the basis of the very limited information available.

32. In the circumstances I find that Mr Cushnie has not demonstrated a sufficient level of risk of potential loss as a result of his undertaking in respect of L'Ecossaise, and for that reason I decline to order the fortification sought.

Security for Costs

33. The application for security for costs in this matter is made on two bases. They were presented in Mr Briggs' skeleton argument as being separate although in his argument he said in fact that they were all part of the overall application. The two bases are first that Sinclair is an insolvent company, and what is more outside the jurisdiction; the second is the jurisdiction under CPR 3.1 (5):

> “The court may order a party to pay a sum of money in the court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol”.

34. It will be convenient to dispose of the second of those first. The application in this respect was based on what Mr Cushnie alleges were a number of failures to comply with the normal practice and procedure when obtaining without notice relief. The shortcomings were (putting the matter shortly) as

follows:

i) The order permitted Mr Cushnie to spend funds on “this claim”, but according to its terms, prevented him from spending money on his criminal prosecution. Since Sinclair knew about the prosecution this was a significant failure. It was not drawn to the attention of the Judge.

ii) A “leave of the court” proviso was inserted into the usual permission permitting dealings in the ordinary course of business without being drawn to the Judge's attention.

iii) A modification about serving the document as soon as practicable was inserted without drawing it to the Judge's attention.

iv) There was no cross-undertaking in damages in favour of the third parties served with the order. This was not disclosed to the Judge.

v) There was a failure to serve promptly.

vi) An application to continue the injunction was not served properly.

vii) A skeleton argument was not served in support of the without notice application.

viii) A note of the without notice hearing was not provided sufficiently promptly and without a request.

ix) There was no undertaking to file an application notice and pay a fee.

x) A service copy of the claim form sent to Sacaleca was a mere photocopy, was not sent to Sacaleca's registered office and did not carry the original seal of the court.

35. I will not lengthen this judgment by making findings as to the accuracy of those complaints, and their significance where they are accurate. Suffice it to say that where those complaints are justified as a matter of fact, they do not in my view even begin to get close to what would be required to invoke the jurisdiction under CPR 3.1 (5)Some of them were accidents, some perhaps more serious than others, and of course a claimant seeking without notice relief must be scrupulous in compliance with the rules. However, the shortcomings, such as they were, in this case while regrettable (and where appropriate they have been apologised for) are not sinister and in my view were clearly not sufficient to found a separate application for security for costs. When I indicated to Mr Briggs that I did not find this part of his case very convincing, he did not press the point, although he did not formally abandon it. One of the points made by Lord Brennan is that, on the evidence, Mr Cushnie has demonstrated a clear strategy of seeking to oppress opponents in litigation by making applications and running up costs. I refer to this below. Whilst making no finding that that was the reason behind basing the application for security on these factors, I would nevertheless observe that the approach to this issue might be thought to demonstrate such a tendency. I give by way of example the complaint that a skeleton argument was not produced on the making of the without notice application to Blackburne J. One would have thought that that was a matter for the Judge at the time. If it was serious in those circumstances he would doubtless have declined relief, or taken some other step. The fact that he made an order without a skeleton argument ought to be seen to be an end to that particular matter.

36. I therefore turn to the application for security for costs made on the more familiar basis of the insolvency of the Claimant, coupled in this case with the fact that it is incorporated outside the jurisdiction and outside any of the states referred to in CPR 25.13(2)(a)(ii). In this context various authorities were cited to me establishing the principles which have now become well known. I do not think that there was much dispute as to the applicable principles in this case; the dispute was as to

how they should be applied.

37. The principles that I have to bear in mind, and that I do bear in mind, are as follows:

i) Whether the claim is bona fide — Sir Lindsey Parkinson and Co Limited -v- Triplan Limited [1973] QB 609.

ii) Whether there is a reasonably good prospect of success (Parkinson); but an extensive debate on the merits is usually inappropriate (Porzelack).

iii) The rationale behind the jurisdiction is that a Defendant should have security if there is reason to believe that there will be real difficulty in enforcing a costs order, either because of the insolvency of the Claimant or because of the jurisdiction or whereabouts of the Claimant, or both (see, for example, De Bry -v- Fitzgerald [1990] 1 WLR 552).

iv) Whether the application for security is being used oppressively or so as to try to stifle a genuine claim (Parkinson).

v) Whether the Claimant's lack of means have been brought about by any conduct of the Defendants (Parkinson).

vi) Where it seems that the Claimant could not satisfy any requirement for security itself, it may be appropriate to consider whether it could raise the security from its shareholders or from other backers or interested persons (*Keary*).

38. Before going on to consider the application of those principles, I should mention at this stage the amount of security which Mr Cushnie seeks. The sum is £154,125.00 which is said to be a sum sufficient to get Mr Cushnie down to close of pleadings. Some of those costs are the costs already incurred in respect of prior hearings in this matter and of this hearing. There are then the following headings and amounts:

Consideration of Particulars of Claim -	£12,975.00
Preparation of Defence and Request for further Information -	£26,650.00
Consideration of Reply -	£11,425.00
Request for Further Information -	£10,100.00
Application for Disclosure -	£13,900.00
Application for Disclosure Against Non-Parties -	£12,400.00

39. At first sight it looks as though some of those elements take the matter beyond close of pleadings. However, Mr Briggs told me that the disclosure applications (aimed at both parties and non-parties) were anticipated to be required before Mr Cushnie pleads his Defence, as is the Request for Further information. He indicated that the view was taken that those steps were necessary in order that Mr Cushnie could plead the full defence required by the CPR. That is how one arrives at what is on any footing a very large bill to get proceedings as far as close of pleadings only.

40. Against that background I turn to consider the question of whether security should be ordered in this case and if so how much. In arriving at my conclusion I have considered all the submissions made to me, and the general evidential picture, and in particular the following points:

i) There is no doubt that, on the evidence, were this action to fail, and were Sinclair required to pay costs to Mr Cushnie, it would not be able to do so. Unless Sinclair were put in funds by

someone else, the funds would simply not exist. There is, to that extent, risk to Mr Cushnie.

ii) There is a suggestion in this case that FHC would, or might, stand behind Sinclair in this respect, as it has so far stood behind Sinclair in the matter of a cross-undertaking in damages. However, even if that were to become crystal clear, there is absolutely no indication as to the extent to which FHC has assets which could be made available for that purpose. Sinclair could have put in evidence about that but it has not done so.

iii) Lord Brennan has urged upon me in this context, as in the context of the fortification application, the strength of Sinclair's claim. I do not think that the state of the evidence enables me to conclude that its claim is so strong that that is a significant factor in the balancing exercise. It obviously has a good arguable case, but, at least until something more is known of Mr Cushnie's defence, it is not in my view safe to say more than that. The picture is not yet clear enough, if indeed it ever will be short of the trial.

iv) Lord Brennan also urged on me that I should take into account the reason that Sinclair has no money is because it has been deprived of its money by the activities of Mr Cushnie. To determine that would be to determine the central issue in the case. What it might be possible to say is that Sinclair's money has been lost as a result of the activities of one or more persons or bodies with whom Mr Cushnie has previously been associated, but that does not seem to me to be a particularly strong factor weighing against the making of an order for security for costs.

v) Lord Brennan again urged on me that to make an order for security for costs would stifle the claim. However, in this context, as in the context of fortification, he was not using the word “stifle” in its usual sense. He did not suggest, and could not on the evidence suggest, that there was a risk for stifling in the sense that Sinclair could not find the money and neither could anyone else on its behalf, so that an order for security would lead to the action being stayed and ultimately dismissed as a matter of inevitability. The evidence does not even begin to suggest that there is a risk of that. Lord Brennan in fact indicated that by “stifle” he meant that it would be oppressive and unfair to require Sinclair to go off and try to raise the money from someone else in all the circumstances. In the circumstances of this case, I do not think that he has demonstrated that that would necessarily be particularly unfair, particularly in the light of the next point.

vi) If this were a case in which I was otherwise minded to order security for costs, I think it is a case in which I would consider it to be fair and appropriate to require Sinclair to look to its backers. Although, as I have already pointed out earlier in this judgment, there is a paucity of detail as to who is really behind Sinclair, and who is behind FHC, and what assets there may be lurking in the background, it is clear to me that Sinclair is an entity that only operates by virtue of backing from elsewhere. In other words, it seems at the moment to be a vehicle for others. Those others are, or include FHC, the trusts I have referred to or the beneficiaries under those trusts. It is not clear which of those is correct. But it is clear that FHC injected the money which Sinclair passed onto TPL, and it is also clear that FHC is backing Sinclair in this action and in other steps it has taken elsewhere. While those other parties are legally entitled to be coy about their involvement and their assets, that coyness gets in the way of any submission that Sinclair might otherwise wish to make about whether it is fair in the circumstances to require them to provide security in order to back their vehicle.

vii) Lord Brennan then invited me to reject the application on the footing that the jurisdiction to award security for costs was being invoked oppressively. In this respect he relied on two principal strands of evidence. The first was some evidence of the conduct of Marrlist Limited in the winding up of TPL in the BVI, and the second was a statement said to have been made by Mr Cushnie to a Mr Brian Smith, the former Vice Chairman of Plc, in which Mr Cushnie had told him (Mr Smith) that if Mr Hill attempted to make claims against Mr Cushnie he (Mr Cushnie) would make sure that Mr Hill was “buried in costs”. Lord Brennan relied on the fact

that although that piece of evidence had appeared in a witness statement of a Mr Hemmings signed on 20th January 2004, it had not been denied by or on behalf of Mr Cushnie. That is true as a matter of fact; Mr Briggs told me, on instruction, that his clients did in fact deny it.

viii) The allegation about the BVI winding up of TPL requires a little further explanation. On 3rd May 2000 Sinclair, and another person who entered into a similar sort of transaction with TPL, petitioned to wind up TPL in the BVI. There then followed a series of applications and hearings in which the protagonists were in effect the petitioners on one hand and Marrlist Limited on the other. Marrlist Limited had locus as a creditor of the company. There were serious disputes as to who should be a liquidator, and other disputes too. I have been provided with an account of those proceedings and the various applications by a Mr Martin Kenney who was closely involved in those proceedings. Sinclair seeks to characterise Marrlist's activities (which it says are attributable to Mr Cushnie's tactics) as being a cynical attempt to run up costs so as to ensure that there were insufficient funds in the liquidation of TPL to allow the liquidators to carry out any meaningful investigations and pursue claims. There was an allegation of forgery, which was ultimately abandoned; this too was relied on by Lord Brennan as demonstrating the abusive nature of the activities of Marrlist Limited. Mr Briggs said that the overall tactic was entirely reasonable, namely to try to make sure that such funds as were available were distributed to creditors (including Marrlist) and not wasted in the pursuit of what may or may not turn out to be good claims. This is one of those detailed disputes which it is not easy to resolve on an interim application such as this. However, I do not think I have to. It is sufficient for my purposes to say that the pattern of applications, and the frequency with which Marrlist was required to pay the cost of those applications, is consistent with the tactic described by those acting for Sinclair and with the tactic described in the disputed statement said to have been made to Mr Smith, and there is a case for saying that that has happened. What that means is that I must be particularly astute in this case not to allow applications for security for costs to be part of some litigation tactic going beyond the proper purpose for which jurisdiction is to be deployed.

ix) I think that there are perhaps other grounds for suspecting that that might be at least part of the basis of the application in this case. It is made very early in the proceedings. Like Dillon L.J. in De Bry -v Fitzgerald (at page 559) I was struck by the amount of security being sought before a Defence has been filed. It is even more striking when one sees the steps in the action (or some of them) for whose costs security is sought. It is unusual to seek disclosure of documents before the Defence; and it is similarly unusual to seek third party disclosure before the defence. A lot of money seems to be required for “Consideration of Reply”. Mr Cushnie's advisors apparently contemplate considering a request for further information twice. The evidence does not disclose why it is that pre-defence disclosure should be necessary, though Mr Briggs sought to enlighten me in the course of his submissions. I mean no disrespect to him when I say that I found his short explanations unconvincing. I am not, of course, saying that it could not be appropriate in this case to seek pre-defence disclosure, and if such an application is thought to be necessary in due course it will doubtless be made. However, the strong impression I have from the timing of the application and the amounts and items claimed is that there has been a certain amount of over-egging of the pudding, which is likely to be for tactical grounds. That impression is not dispelled by what I have found in relation to the application for security for costs based on non-compliance with practice in relation to the obtaining of the without notice order, and indeed from the paucity of evidence of loss on the fortification issue.

41. Bearing all those factors in mind, the conclusion to which I have come is that security for costs should not be ordered at this stage. I say nothing about the appropriateness of an order in the future. However, at the moment I think it is premature. As I have already observed, it is made before any Defence is filed. In De Bry -v- Fitzgerald Dillon L.J. said:

> “The more usual course might have been to order security, if security was to be ordered at all, in a relatively small sum in the first place, leaving the defendants to come back for further security as the matter progressed.”

Mr Briggs has pointed out that that course would be open to me, and I have considered whether it would be right to adopt it. However, I consider that it would not. I think that the application smacks of tactical manoeuvring at a time when the issues in the action are not yet clear in the sense that they do not appear in detail from statements of case. I do not think a proper picture of the merits of this application can be obtained until Mr Cushnie has gone into print and indicated what his Defence is. While I am sceptical that that will give a sufficiently strong picture of the merits of the claim to enable that to come seriously into play as a compelling factor against granting security, it cannot be ruled out. I think a better informed judgment can be made at that stage if an application is made then. Mr Briggs indicated in argument that his client was alive to the need, under the CPR regime, to plead a Defence fully so that the issues were as clear as possible. No doubt his client will want to achieve that, and I am confident that it is achievable. As a result of that the shape of this action will be much clearer for any future tribunal that considers an application such as the one before me.

42. In the circumstances, therefore, I refuse Mr Cushnie's application of the First, Second and Fourth Defendants for security for costs.

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1. When the judgment was despatched in draft for corrections by counsel and solicitors, it was suggested in one note by Mr Walford, junior counsel for the relevant respondents, that in fact the business plan was in Mr Oliver's hands shortly before 16th January. I do not think that this was the picture that emerged from the evidence (it was certainly not my impression of how the point developed), but be that as it may it is right that I should record that even if my impression of when the plan reached Mr Oliver is wrong, and it was with him by 16th January, that would make no difference to the conclusions reached in this judgment.