A

Chancery Division

# *Longstaff International Ltd *v* Baker & McKenzie

## [2004] EWHC 1852 (Ch)

2004 June 10; 16 Park J

B

*Costs — Security for costs — Foreign claimant — Claimant company incorporated outside United Kingdom — Defendant seeking order for security for costs — Claimant's subsidiary company offering undertaking to meet any costs order — Whether reason to believe claimant unable to pay defendant's costs if ordered to do so — Whether security to be ordered — CPR r 25.13(2)*

C

The claimant, a company incorporated in the British Virgin Islands and managed in Jersey, brought proceedings against the defendant for the repayment of professional fees. The defendant applied for an order for security for costs under CPR r 25.12[1] on the grounds that the conditions in either sub-paragraph (a) or sub-paragraph (c) of rule 25.13(2) had been met since the claimant was resident out of the jurisdiction and there was reason to believe that the claimant would be unable to pay the defendant's costs if ordered to do so, notwithstanding that the claimant's subsidiary in England had offered an undertaking to meet any order for costs made against the claimant.

D

On the application—

*Held*, allowing the application, that although the claimant company was resident out of the jurisdiction and so came within CPR r 25.13(2)(a), it was not significantly more difficult for the defendant to enforce a costs order against the claimant by reason of that fact and therefore not appropriate to order security for costs on that basis; that, however, the condition in rule 25.13(2)(c) had been met since there was reason to believe that the claimant would be unable to pay the defendant's costs if ordered to do so, and the fact that someone else had given an undertaking to pay the defendant's costs did not take the matter outside sub-paragraph (c) but rather conceded that the condition had been met; that, given that the offered undertaking was in reality an offer of security, by making or procuring the offer the claimant was tacitly conceding that it was just to order security in some form; and that, accordingly, the claimant would be ordered to provide security for the defendant's costs (post, paras 14–16, 20, 22–26, 31).

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F

*Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, CA applied.

The following cases are referred to in the judgment:

*Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 WLR 1868; [2002] 1 All ER 401, CA

G

*Thistle Hotels Ltd v Gamma Four* [2004] EWHC 322 (Ch)

*Unisoft Group Ltd (No 2), In re* [1993] BCLC 532

No additional cases were cited in argument.

The following cases, although not cited, were referred to in the skeleton arguments:

*Bilbie v Lumley* (1802) 2 East 469

H

*Harrison v Tew* [1990] 2 AC 523; [1990] 2 WLR 210; [1990] 1 All ER 321, HL(E)

*Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, CA

*Kufaan Publishing Ltd v Al-Warrak Publishing Ltd* (unreported) 1 March 2000, CA

*Park, In re; Cole v Park* (1889) 41 Ch D 326, Stirling J and CA

[1] CPR r 25.13(2): see post, para 10.

*Parkinson (Sir Lindsay) & Co Ltd v Triplan Ltd* [1973] QB 609; [1973] 2 WLR 632; [1973] 2 All ER 273, CA
*Turner & Co v O Palomo SA* [2000] 1 WLR 37; [1999] 4 All ER 353, CA

**APPLICATION**

On 18 May 2004 the defendant, Baker & McKenzie, issued an application for security for costs against the claimant company, Longstaff International Ltd, inter alia, on the ground that the conditions for such an order to be made under CPR r 25.13(2)(a) and/or (c) had been met: in that (i) the claimant company was outside the jurisdiction; (ii) the company was itself unable to pay any costs if ordered to do so and was without financial assistance from others; and (iii) it was just for such an order to be made.

The facts are stated in the judgment.

*Nicholas Bacon* for the defendant
*Peter de Verneuil Smith* for the claimant.

*Cur adv vult*

16 June. **PARK J** delivered the following judgment.

*Overview*

**1** This is my judgment on an opposed application for security for costs. The applicant is Baker & McKenzie, a well known firm of solicitors. A claim in the Chancery Division has been commenced against Baker & McKenzie by Longstaff International Ltd ("Longstaff"). Longstaff is a company incorporated in the British Virgin Islands and managed in Jersey. As I will explain as this judgment progresses, Longstaff has a substantial asset value, but as matters now stand it has very little liquidity.

**2** Baker & McKenzie have applied for security for costs, relying partly on the non-resident status of Longstaff, and partly (indeed I would say principally) on Longstaff's lack of liquidity. I am going to make an order for security for costs. At present only a modest amount of security is requested, and I will direct that the full amount of it should be provided. But if the main case progresses, I expect that Baker & McKenzie will make further applications for increased amounts of security as further stages in the proceedings are reached. Those further applications will have to be dealt with as they arise, if, of course, they are not the subject matter of agreement.

*The nature of Longstaff's action*

**3** Longstaff's action against Baker & McKenzie claims repayment of about £750,000 of professional fees which Longstaff has already paid. Longstaff says that it paid the fees as a result of mistakes, and it argues that it is entitled to recover them, or at least part of them. A few years ago Baker & McKenzie were instructed by Longstaff on several related matters, some involving litigation with other parties, some not. Baker & McKenzie submitted invoices for its fees to Longstaff, and in the first instance Longstaff paid them, apparently without complaint. However, Longstaff is complaining and disputing them now. The present case is not the only proceeding in which Longstaff is challenging fees charged by Baker & McKenzie, but it is the only one to which I need refer in this judgment.

A **4** Longstaff pleads that it suffered from two mistakes when it paid the fees. (a) It mistakenly believed that the fees were a reasonable charge for the services previously provided by Baker & McKenzie; (b) it mistakenly believed that it was obliged to pay them in full. It now says that it has discovered its mistakes. It says that the fees were unreasonable and seriously inflated. It contends that it is entitled to have the excessive element in them repaid.

B **5** Baker & McKenzie of course dispute Longstaff's allegation that the fees were unreasonable and excessive. They also contend that in any case Longstaff's claim is misconceived in law. I can imagine that it will also be said on behalf of Baker & McKenzie that Longstaff made no mistakes of any sort when it paid the fees.

**6** It is no part of my role on this application to form a view, even a C provisional one, about the merits of Longstaff's case. I do not think that I have previously encountered an argument quite of the kind which Longstaff is advancing, but I proceed on the footing that the argument could well succeed. Applications for security for costs can, in some circumstances, be affected by the court taking a very pessimistic view of the merits of the claim. My decision in this case is not affected by anything of that sort.

D *Longstaff, its assets and liabilities*

**7** I need to describe the existing legal structure of which Longstaff is a part. (1) As I have already said, Longstaff is a British Virgin Islands company, managed and controlled in Jersey. (2) Longstaff is owned by the trustee of a Jersey settlement. Two of the beneficiaries are Mr Geoffrey Simon and his brother, Mr Leo Simon. Mr Geoffrey Simon lives mainly in E this country; Mr Leo Simon lives in the United States. (3) I believe that the director or directors of Longstaff are an officer or officers of the Jersey company which is the trustee of the settlement which owns the shares. However, I can, I think, realistically assume that the directors look for guidance to the Simon brothers. I have the impression that the principal role is taken by Mr Geoffrey Simon, rather than by his brother Mr Leo Simon. However, it would not make any difference if that impression is not correct. F (4) Longstaff's major asset is a 100% shareholding in an English company, Redwell Ltd. (5) I give some more detailed information about Longstaff at sub-paragraph (9) below. (6) Turning to Redwell, its directors are Mr Geoffrey Simon and Mr Leo Simon. (7) Redwell's major asset is a property site in the Isle of Dogs. I believe that there are some buildings on the site and that they are currently let. However, the value of the site lies in G its development potential. Its value as a development site has been estimated at £12m. Baker & McKenzie do not dispute that figure. (8) I now give some more detailed information about Redwell. (a) It appears from the valuation that its Isle of Dogs site is incapable of development before 2005. I imagine that, if development started then, it would be some time longer before the potential value of the site could start to be realised. (b) Redwell owes £4m to H the Bank of Scotland. The borrowing is charged on the Isle of Dogs property. (c) Redwell has some current assets and liabilities, with the liabilities substantially exceeding the assets. The net current liabilities at 14 May this year were just over £500,000. (d) Redwell currently makes quite substantial losses, consisting essentially of the excess of interest paid or payable over the modest rental income yielded by the current buildings on

the site. Losses or profits in the last three complete accounting years to 30 September 2001, 2002 and 2003 were a loss of £161,421, a profit of £47,293 and a loss of £187,858. In the eight months to May 2004, Redwell appears to have had a loss of over £700,000. (e) Overall, I can say of Redwell that it owns a significantly valuable asset, but at present it is substantially illiquid and is incurring quite large losses. (9) I now return to Longstaff and give some more detailed information about that company. (a) At May this year it had cash at the bank of £104,025, but it had current liabilities of £986,430. Thus it had net current liabilities of £882,405. (b) It owes £1·7m to the Bank of Scotland. That debt, like the debt of £4m owed to the bank by Longstaff's subsidiary Redwell, is charged on the Isle of Dogs site. (c) Longstaff also owes almost £950,000 to Mr Geoffrey Simon and Mr Leo Simon. (d) Overall, one can say much the same about Longstaff as about Redwell: it owns a valuable asset (consisting in its case of the shares in Redwell, whereas in Redwell's case the asset consists of the Isle of Dogs site), but at present it is substantially illiquid. It must be losing money because it has no significant source of income to pay interest on the bank debt. I believe that Longstaff is kept going by loans from Mr Geoffrey and Mr Leo Simon. (10) Pro forma balance sheets have been prepared for Redwell and its parent company, Longstaff, at 14 May 2004. Taking the Isle of Dogs property at its valuation of £12m (as opposed to its historic book value of £3,165,483), Redwell's shareholders' funds are valued at just below £7·5m. Longstaff's shareholders' funds are valued at just over £4m. The positive values derive almost entirely (directly in the case of Redwell and indirectly in the case of Longstaff) from the Isle of Dogs property.

*Redwell's offered undertaking*

8 In opposition to Baker & McKenzie's application for security for costs, Mr Geoffrey Simon made a witness statement on 4 June 2004. On behalf of Redwell's board he wrote: "I confirm that Redwell undertakes to meet any liability for the defendant's costs which Longstaff fails to meet." He referred to an e-mail of the same date to Longstaff's solicitors, which I will also quote:

> "Dear Phillip
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> "On behalf of the board of directors of Redwell I confirm that Redwell will undertake to meet in full any order for costs arising out of a liability of Longstaff to Baker & McKenzie in these proceedings and that Redwell will not seek to argue that any costs ordered against Longstaff should not be met by Redwell. Also I confirm that the board of Redwell have agreed in principle to raise, should the need arise, £500,000 to pay to Baker & McKenzie moneys made up of alleged outstanding legal fees and further sums to meet alleged legal costs of Baker & McKenzie in this and other proceedings between Redwell, Longstaff and Baker & McKenzie.
>
> "Yours sincerely
>
> "Geoffrey."

9 It was confirmed in oral argument that the undertaking is offered to the court. I may misunderstand, but I do not think that it is offered directly to Baker & McKenzie. The offer plays an important part in Mr de Verneuil Smith's submissions on behalf of Longstaff and I will return to it later.

*Security for costs: the law*

10 CPR r 25.12 permits a defendant to any claim to apply for security for his costs of the proceedings. The critical rule is rule 25.13, of which I will quote the relevant parts:

> "(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) an enactment permits the court to require security for costs.
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> "(2) The conditions are—(a) the claimant is—(i) resident out of the jurisdiction . . . (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 . . ."

11 I mention also section 726(1) of the Companies Act 1985, which also empowers the court to make an order for security for costs against a claimant company. There is in practice no difference between applications for security for costs under CPR r 25.12 and applications under section 726. For the most part I will refer only to the CPR.

12 I should mention in connection with the law that many disputed applications for security for costs turn on what is sometimes called the "stifling" argument. That is the argument that, if an order for security for costs could not be met and an order for it to be provided would have the effect of stifling a genuine claim, the order ought not to be made. The present case does not involve a stifling argument. Longstaff does not argue that, if I order security, its claim will be stifled. What Longstaff does argue is, in essence, that it ought not to be required to provide security because its asset strength is such that Baker & McKenzie will be able to obtain payment of their costs if they win the action; and therefore Baker & McKenzie do not need security.

*Analysis and discussion*

13 Baker & McKenzie need to establish that two conditions are satisfied. Taking them from the Civil Procedure Rules and expressing them in reverse order, they are, first, that one or more of the specific conditions in sub-paragraphs (a) to (g) of rule 25.13(2) is or are present; second, that it is just to make an order for security.

14 On the face of it two of the specific conditions in rule 25.13(2) are or may be relevant. The first of them is condition (a): "The claimant is resident out of the jurisdiction." That condition is plainly satisfied, but Mr Bacon (who appeared for Baker & McKenzie) rightly did not place much reliance on it. The reason lies in the general approach of the Court of Appeal in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868. At the risk of over-simplifying a highly sophisticated judgment of Mance LJ, I believe that the approach is that an order for security for costs should not be made in reliance on condition (a) unless the non-resident status of the claimant would in practice make it difficult or expensive for a defendant (like Baker & McKenzie) to enforce an order for costs made in his favour in an English court. In this case, however, Longstaff's main asset is situated in this country. That asset is shares in Redwell. (It is not the Isle of Dogs property,

which is not Longstaff's asset: it is Redwell's asset.) Thus, the asset strength of Longstaff itself is represented by an English asset. Further, the evidence suggests that enforcement in the British Virgin Islands of a costs order made against Longstaff in the English courts would not be appreciably more difficult than enforcement of such an order in England against a company incorporated in England.

**15** I am not saying that it will be easy for Baker & McKenzie to enforce a costs order against Longstaff. It may or may not be easy. What I am saying is that for Baker & McKenzie to enforce a costs order against Longstaff is not made significantly more difficult by reason of the circumstance that Longstaff is not an English company managed in this country, but is rather a British Virgin Islands company managed in Jersey.

**16** For those reasons, although Longstaff is resident out of the jurisdiction and therefore comes within rule 25.13(2)(a), I would not on that account order it to provide security for costs.

**17** I move therefore to rule 25.13(2)(c). Mr Bacon says that that condition applies, and I agree. An important point on the sub-paragraph is that it (or the equivalent wording in section 726 of the Companies Act 1985) will be satisfied if, upon the trial going against Longstaff and that company being ordered to pay Baker & McKenzie's costs within the normal sort of timescale (usually 14 days) Longstaff could not, by reason of illiquidity, pay them. Longstaff, I imagine, could pay in the end, but the nature of its asset position is such that it could not pay with any high degree of promptness. Longstaff, in my judgment, could not say that rule 25.13(2)(c) does not apply to it because eventually it would be able to realise its asset (being the shares in Redwell). There is no suggestion that those shares could be realised at short notice.

**18** In this connection I refer particularly to the decision of Sir Donald Nicholls V-C in *In re Unisoft Group Ltd (No 2)* [1993] BCLC 532, 534. His Lordship said: "the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met?" On the facts Sir Donald Nicholls V-C's answer to the question was no. Therefore security was ordered. Of course the facts of that case could differ relevantly from the facts of this case, but on the whole it appears to me that they do not. I quote two other passages from the judgment which, I suggest, indicate that there is an underlying affinity between the circumstances of that case and the circumstances of the present case. The two passages which I will quote are at p 535:

> "There is an overall surplus of net assets of £2,146,441. The fixed assets consist almost exclusively of property, held for investment and development."
>
> "On the basis of this financial information, in my view if the petition fails SHL will be unable to pay a substantial costs bill as it falls due. SHL has no cash, and substantially its only current asset is not readily realisable. So SHL would have to obtain a loan. It is possible that its bank would be prepared to make an advance for this purpose. That is possible. It is also possible that money might be coming from another source, for example its controlling shareholder. However, there is no evidence before me on these points. There is no letter from the bank. Nor, on the figures I have summarised, is it at all obvious that a loan of a

six-figure sum would be forthcoming when sought. As matters now stand, therefore, SHL will be unable, on the evidence before me, to meet a significant costs order if one is made next May."

I repeat that there are of course detailed differences between the facts of the present case and the facts identified by Sir Donald Nicholls V-C in that case. Nevertheless there are obvious similarities also.

**19** I mention that further support for the proposition which I have stated can be found in the judgment of Miss Sonia Proudman QC, sitting as a High Court judge, in *Thistle Hotels Ltd v Gamma Four* [2004] EWHC 322 (Ch). Miss Proudman said:

> "I do not accept that a net asset balance is determinative of the question whether a company can pay a costs liability when it falls due. That issue involves consideration of the nature and liquidity of the assets."

She went on to refer in that connection to the judgment of Sir Donald Nicholls V-C in *In re Unisoft Group Ltd (No 2)* [1993] BCLC 532 to which I have already alluded.

**20** Indeed, moving on from the authorities, Mr de Verneuil Smith concedes that, if I look at Longstaff alone, it comes within sub-paragraph (c): there is reason to believe that Longstaff on its own would be unable to pay Baker & McKenzie's costs if ordered to do so. Its current liabilities far exceed its current assets and its major fixed asset, the shareholding in Redwell, though valuable and important, is illiquid.

**21** Mr de Verneuil Smith says that Redwell's offered undertaking that it, Redwell, will pay any costs ordered to be paid to Baker & McKenzie by Longstaff, makes all the difference. I cannot agree. There are three separate points which I wish to make in that connection and then I will develop some more general observations.

**22** First, CPR r 25.13(2)(c) applies if there is reason to believe that "it" will be unable to pay the defendant's costs if ordered to do so. "It" is the claimant company, and in this case it is Longstaff. A case cannot be taken out of sub-paragraph (c) by saying that, although the claimant company will be unable to pay the defendant's costs, some other person will. (I mention that section 726(1) of the Companies Act 1985 is the same in this respect, except that the wording is "the company" rather than "it".)

**23** Second, the reason why Longstaff will not be able to pay Baker & McKenzie's costs is because Longstaff, though having a positive net asset value, is illiquid, and it seems to me that the same is true of Redwell. Redwell is currently making large losses, and its current liabilities far exceed its current assets. In the circumstances it is not obvious that the offer from Redwell improves or alleviates the problem which, without Redwell's undertaking, would be conceded to exist and to bring Longstaff within sub-paragraph (c).

**24** Third, even if Redwell had large liquid assets, the offer of its undertaking would not, in my judgment, mean that the case was taken out of rule 25.13(2)(c). Rather the offer of the undertaking concedes that the conditions for ordering security for Longstaff's potential costs liability do exist. Longstaff is, in reality, offering security in the form of an undertaking

to the court from its subsidiary Redwell. Mr de Verneuil Smith does not see it in that way, but I have to say that I do.

**25** For those reasons I consider that the conditions in sub-paragraph (c) are met. That is, however, not the end of the case. There are two other questions to consider.

**26** The first is whether I think it just to make an order for security. The answer is that I do. Indeed, given that the offered undertaking is (as I believe) in reality an offer of security, it seems to me that Longstaff, by making the offer, or by procuring the offer from Redwell, tacitly concedes that it is just that some form of security should be ordered.

**27** The second other question is: what form should the security take? In that connection I should note in passing rule 25.12(3), which provides, so far as relevant: "Where the court makes an order for security for costs, it will . . . (b) direct—(i) the manner in which . . . the security must be given." More specifically in the present context the question is whether the court should be satisfied with the security which has been offered. That is, should I regard Redwell's undertaking to pay the costs if they are awarded against Longstaff as acceptable? In my judgment the answer is no. The undertaking is a personal undertaking of Redwell via its directors. It is not backed by a payment into court or by any other form of cash deposit, nor is it secured in any other way. Mr de Verneuil Smith says that Redwell will, in practice, be able to borrow from a bank if it needs to. In support of that he refers to two letters, one from the company's accountant and another from a property consultant. The writers of the letters state their opinion that Redwell will be able to borrow the money if it needs to. They are probably right, given the high value of the Isle of Dogs site, but I do not see why Baker & McKenzie should be exposed to the element of uncertainty. Any bank loan would have to be negotiated and arranged after a costs order had been made against Longstaff, and it appears that it would fall to Mr Geoffrey Simon and Mr Leo Simon, the directors of Redwell, to do the negotiating and arranging. They are hostile to Baker & McKenzie already, and will probably be more so if Longstaff has just lost a contested case between itself and Baker & McKenzie.

**28** In the circumstances Baker & McKenzie cannot, in my judgment, be expected to regard Redwell's personal undertaking to the court as acceptable security for its costs, and I do not regard it as acceptable either.

**29** I point out that there is no evidence from Redwell's bank that it will be prepared to make a loan to Redwell if one is needed to pay a costs order in favour of Baker & McKenzie. Still less is there any offer of security in the form of a bank guarantee. If a bank guarantee had been offered I would, of course, have listened to submissions on behalf of Baker & McKenzie as to whether a bank guarantee would suffice as security, but it is likely that I would have accepted it. In the course of the hearing the question of a bank guarantee arose, and I withdrew from court for a time to give the parties an opportunity for discussion. When I returned to court no progress had been made.

**30** When it is said by Mr de Verneuil Smith that, if Longstaff is ordered to pay Baker & McKenzie's costs, Redwell will be able to borrow the money from the bank, my reaction is that, if that would be true at that future time, Redwell could and should have procured an offer of a bank guarantee now. Baker & McKenzie ought to be able to look for its security to the bank and

not to an unsecured undertaking of a company managed by the human beings who are essentially its adversaries in this case. If it is said that the bank may be unwilling to offer a guarantee at this stage, that would only confirm my view that the wholly unsecured undertaking which Redwell has offered is unacceptable.

*Conclusion*

**31** For the foregoing reasons I will order Longstaff to provide security for Baker & McKenzie's costs. There has been no dispute to the modest amount of security which Baker & McKenzie request now. Therefore the amount of security which I will order will be the amount requested. That does not, of course, mean that the court will necessarily make future orders for further security in whatever other amounts Baker & McKenzie may request. It is, I think, predictable that Baker & McKenzie will or may make further requests, but the extent to which such requests will be acceded to will depend on how the matter appears to the court at that time.

**32** As to the form of the security which I will order now, I will hear any submissions which counsel wish to make, but I have in mind something along the following lines. The security should be provided either by a payment into court, or by a bank guarantee reasonably acceptable to Baker & McKenzie, or in such other form as Baker & McKenzie may accept, with liberty to apply as to the reasonable acceptability of any bank guarantee or other form of security which may be offered. Failing the provision of security, Longstaff's claim will be dismissed.

*Order accordingly.*

*Solicitors: McClure Naismith; Baker & McKenzie.*

Reported by Sarah Addenbrooke, Barrister