the less a declaration should be made that their detention had been unlawful in the circumstances of the case. It does not seem to me that that approach would have been appropriate, even if the court had enjoyed jurisdiction.

For the reasons I have given, in my judgment the attempts by the applicants to claim that the arraignment was, in effect, a nullity, with a result that they should now be admitted to bail pending their trial on 9 July 1995, fails, and the applications should be dismissed.

KAY J. I agree. I would only add this, that judges dealing with matters in the Crown Court, pursuant to the new practice rules relating to plea and directions hearings (see *Practice Note* [1994] 4 All ER 671, [1994] 1 WLR 1551), clearly should have regard to the intention of Parliament that trials should be started as soon as possible and within the periods prescribed by the custody time limits. The whole objective of the practice rules is to ensure speedy trials and that clearly is a matter that the judge dealing with such a directions hearing ought to have in the forefront of his mind in determining when the trial should start.

Applications dismissed. The court refused leave to appeal to the House of Lords but certified, under s 1(2) of the Administration of Justice Act 1960, that the following point of law of general public importance was involved in the decision: does the High Court have jurisdiction to quash the arraignment of a defendant in the Crown Court or is an arraignment a matter 'relating to trial on indictment' within s 29(3) of the Supreme Court Act 1981?

Dilys Tausz Barrister.

Keary Developments Ltd v Tarmac Construction Ltd and another

COURT OF APPEAL, CIVIL DIVISION
BUTLER-SLOSS AND PETER GIBSON LJJ
13 APRIL 1994

Costs – Security for costs – Company – Limited company as plaintiff – Company likely to be unable to pay defendant's costs if successful in his defence – Discretion of court whether or not to order security – Exercise of discretion – Circumstances to be taken into account – Stifling of plaintiff's claim – Conduct of litigation – Amount to be ordered – Companies Act 1985, s 726(1).

In exercising its discretion under s 726(1)[a] of the Companies Act 1985 to order a plaintiff company in an action to make a payment of security for the defendant's costs where it appears that the company may be unable to pay such costs if the defendant is successful in his defence the court will have regard to all the circumstances of the case. The court will not be prevented from ordering security simply on the ground that it would deter the plaintiff from pursuing its claim. Instead, the court must balance the injustice to the plaintiff if prevented from

a Section 726(1) is set out at p 536 *e*, post

pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success but without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure. Account should also be taken of the conduct of the litigation, including any open offer or payment into court, any changes of stance by the parties and the lateness of the application, if appropriate. The court will not refuse to order security on the ground that it would unfairly stifle a valid claim unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, it is probable that the claim would be stifled. In this regard it is for the plaintiff company to satisfy the court that it would be prevented by an order for security from continuing the litigation. In considering the amount of security that might be ordered the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount (see p 539 *h j*, p 540 *a d* to *j* and p 544 *g*, post).

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 and *Okotcha v Voest Intertrading GmbH* [1993] BCLC 474 applied.

Notes

For provision of security for costs by a company, see 7(1) *Halsbury's Laws* (4th edn reissue) para 1024, and 37 *Halsbury's Laws* (4th edn) para 301, and for cases on the subject, see 10(1) *Digest* (2nd reissue) 43–49, *6774–6816*.

For the Companies Act 1985, s 726, see 8 *Halsbury's Statutes* (4th edn) (1991 reissue) 591.

Cases referred to in judgments

Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482, CA.

Flender Werft AG v Aegean Maritime Ltd [1990] 2 Lloyd's Rep 27.

Kloeckner & Co AG v Gatoil Overseas Inc [1990] CA Transcript 250; *affd* (1990) Times, 9 April, [1990] CA Transcript 294.

Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474, CA.

Parkinson (Sir Lindsay) & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609, [1973] 2 WLR 632, QBD and CA.

Pearson v Naydler [1977] 3 All ER 531, [1977] 1 WLR 899.

Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074, [1987] 1 WLR 420.

Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726, CA.

Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263, CA.

Yorke (M V) Motors (a firm) v Edwards [1982] 1 All ER 1024, [1982] 1 WLR 444, HL.

Interlocutory appeal

By notice of appeal dated 22 July 1993 the defendants, Tarmac Construction Ltd and Postworth Ltd (trading as NCS), appealed with leave from the order of Mr Recorder Humphrey Lloyd QC hearing official referees' business on 2 July 1993, whereby he dismissed the defendants' application for security for costs from the plaintiff, Keary Developments Ltd, in its action claiming the sum of approximately £600,000 from the defendants pursuant to a joint venture agreement.

The grounds of appeal were, inter alia, that Mr Recorder Lloyd had erred in holding that there had not been a material change in circumstances since the defendants' previous applications for security for costs refused on 22 May 1992 by Mr Recorder Tackaberry QC and on 23 June 1992 by Mr Recorder Butcher QC, and, further, in concluding that an order for security for costs would stifle the plaintiff's claim. The facts are set out in the judgment of Peter Gibson LJ.

Frederick Philpott (instructed by *Howell & Co*, Birmingham) for the plaintiff.
Daniel Serota QC (instructed by *Wragge & Co*, Birmingham) for the defendants.

PETER GIBSON LJ (giving the first judgment at the invitation of Butler-Sloss LJ). In *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] CA Transcript 250 Bingham LJ, sitting as a single Lord Justice on an appeal from the Registrar of Civil Appeals who had ordered security for costs under RSC Ord 59, r 10(5), pointed out that the system of justice which prevails in this country is founded on the premise that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation, or the bulk of those costs, and unsuccessful litigants pay them. He said that that being the fundamental approach, it was not surprising that the question arose: what should be done if it appeared that a defendant, if successful, would not be able to enforce an order for costs in his favour against the plaintiff? The answer, though not a comprehensive one, was, he said, to be found in Ord 23, r 1 and s 726(1) of the Companies Act 1985, to which might be added a reference to CCR Ord 13, r 8.

Section 726(1) provides:

> 'Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.'

The plaintiff, Keary Developments Ltd, was incorporated in 1990 and is a £100 company. It is not in dispute that there is reason to believe, by credible testimony, that the plaintiff will be unable to pay the costs of the defendants, Tarmac Construction Ltd (Tarmac) and its associated company, Postworth Ltd (trading as NCS), if they are successful in defending this action. But Mr Recorder Lloyd QC, hearing official referees' business on 2 July 1993, refused the defendants' application for security for costs. From that decision the defendants, with the judge's leave, now appeal.

The dispute between the parties arises out of a joint venture agreement made orally in 1990 between the plaintiff and Tarmac or NCS. Tarmac was the main contractor to the Department of Transport for the widening of a stretch of the M40 motorway. Under the agreement the plaintiff was to do certain work and provide certain services. But by its writ and statement of claim, served on 18 December 1991, the plaintiff claimed that it was owed over £600,000 by the defendants under the agreement. The statement of claim stated that certain fees up to a maximum of £30,000 were to be paid to the plaintiff for the services of Mr Patrick Keary senior, that its costs were to be reimbursed by the defendants, and that it would be entitled to half the profits, being the difference between its costs and the defendants' net tender allowances. The defendants paid £25,000 into court and served a defence on 31 January 1992. In that defence they did not admit

that there was an agreement such as had been alleged, but if there was, it was pleaded that it was one whereunder the plaintiff was entitled to only one quarter of the profits. The defendants said that they had paid certain sums to the plaintiff. We are told that the sums paid are about £1·2m. The defendants counterclaimed for repayment of sums in an unquantified amount to which they say the plaintiff was not entitled.

In March 1992 the defendants first applied for security for costs. At that time their solicitor estimated that the costs, excluding the costs of the counterclaim, would amount to £41,000, being costs for a four-day preliminary issue on whether there was a contract and an eight-day trial. Mr Patrick Keary junior, who, with his brother, is a director and an equal shareholder of the plaintiff company, swore an affidavit asserting that the application was one to stifle the plaintiff's genuine claim, accusing the defendants of economic blackmail, and said: 'Any security for costs may force the plaintiff to abandon an otherwise reasonable successful claim.' He also claimed that the defendants on 12 August 1992 (subsequently corrected to 12 August 1991) had offered Mr Keary senior £50,000 immediately and a sum in excess of £500,000 conditionally in settlement of the plaintiff's claim. Mr Keary senior confirmed this in a subsequent affidavit of his own, but the two representatives of the defendants who were said to have made the offer, in affidavits of their own, whilst confirming there was a meeting on 12 August 1991 to attempt to settle the claim, said that it was a without prejudice meeting at which no offers of settlement were made.

The application came before Mr Recorder Tackaberry QC on 22 May 1992. He noted that Tarmac had paid £25,000 into court and that £41,000 was the defendants' estimate of their costs. He considered that if security was ordered, it would only be in a sum between £2,000 and £11,000, because he considered that either the full amount paid into court or two-thirds thereof should be set off against the sum claimed by way of security. He considered it surprising that the defendants should be attempting to obtain such a small sum by way of security in the context of what he called 'such a substantial bona fide claim'. He thought there was 'a very real possibility' that an order for £11,000 would stifle the claim, although he accepted that that was not the most likely result. But he pointed out that if a substantial sum was owed by the defendants to the plaintiff, that would have had a very real weakening effect on the plaintiff. Accordingly, he dismissed the application with costs. I have to say that I have considerable difficulty with parts of the recorder's reasoning, but there was no appeal against that decision. Shortly afterwards, when witness statements had been produced by the plaintiff which the defendants claimed cast doubt on the bona fides of the plaintiff's claim, a further application for security was made. On 23 June 1992 Mr Recorder Butcher QC dismissed the application with costs, there being, in his opinion, no material change in the circumstances since the hearing before Mr Recorder Tackaberry. He also made an order by consent on the preliminary issue. It was agreed that there was a contract between the parties which contained as express terms that the plaintiff was to be paid up to £60,000 for the services of Mr Keary senior, that the plaintiff was to be reimbursed its actual costs, and that any profit arising out of the services provided by the joint venture would be divided 50/50 between the plaintiff and the defendants.

On 6 October 1992 the statement of claim was amended, inter alia, to claim that the plaintiff was to be paid up to £60,000 for the services of Mr Keary senior. On 13 November 1992, on the defendants' application, the plaintiff was ordered by Mr Recorder Havery QC to give further discovery and to pay four-fifths of the

defendants' costs of the application. The defendants' solicitor estimates those costs to amount to some £3,500 plus VAT. Even before the application to Mr Recorder Havery, the plaintiff had been allowed access to documents which showed that the defendants had received bonuses from the Department of Transport.

On 30 November 1992 the trial commenced before Mr Recorder Humphrey Lloyd QC. There was then an adjournment for the plaintiff to produce the cheques supporting the expenses for which it had claimed reimbursement from the defendants. At the same time, a representative of a company to which the plaintiff claimed to have made payments as part of its expenses, Macbulk Ltd, produced on subpoena documents relating to such payments. On 7 December 1992 the trial recommenced, but the plaintiff opened the case on a basis different from that pleaded. On 9 December 1992 leave was given for the amended statement of claim to be further amended. Mr Philpott, appearing for the plaintiff, accepts that it was a drastic reamendment. By the reamended statement of claim the plaintiff claimed it was entitled under the agreement to one half of the profits, calculated not, as originally pleaded, by reference to the defendants' net tender allowances but by reference to payments made to Tarmac by the Department of Transport. The trial was further adjourned in consequence of this change in the pleading and the plaintiff was ordered to pay the defendants' costs of the adjournment. The defendants' solicitor estimates that those costs, less the costs that the defendants were ordered to pay the plaintiff on the two applications for security for costs, amount to over £50,000 plus VAT.

Further, it is common ground that whereas prior to the reamendment the trial was estimated to last 20 days, it is now likely to last 30 days when it recommences in January 1995. The defendants consequently made a third application for security for costs. It was supported by an affidavit by the defendants' solicitor, Mr Piggott, on 21 March 1993 in which he gives evidence of the costs incurred and of the costs likely to be incurred at the trial. Billed costs plus counsel's fees already incurred and disbursements total over £115,000 plus VAT. That sum includes the £50,000 and VAT to which I have already referred. Future costs are estimated to amount to between £170,000 and £225,000 plus VAT. Again, these are costs which exclude the costs of the counterclaim.

Mr Piggott gave evidence of a number of matters which he claimed cast doubt on the bona fides of part of the plaintiff's claim. Thus he said that the cheques produced by the plaintiff and the documents produced by Macbulk do not support the expenses claimed by the plaintiffs. He produced documents which suggest that vehicle hire charges claimed by the plaintiff are of doubtful validity. Forensic evidence is also produced by him, and that questions the authenticity of certain invoices said to have been sent to the plaintiff in respect of expenses incurred by it. Mr Piggott also referred to evidence that two other companies associated with Mr Keary senior had collapsed after claims made by those companies against another major contractor, McAlpines, failed. In an affidavit in reply the plaintiff's solicitor, Mr Willimott, said that the plaintiff's claim was now even more substantial than it had been before Mr Recorder Tackaberry and that 'it would be grossly unfair on the plaintiffs if such a claim were stifled now'. In a further affidavit on 29 June 1993 Mr Piggott drew attention to the fact that 'no evidence of the plaintiff's inability to raise funds for security has been provided', but no further evidence was put in by the plaintiff.

On 2 July 1993 the Official Referee dismissed the application. He acknowledged that matters had arisen which gave rise to considerable doubt and

suspicion about certain aspects of the plaintiff's claim, although he said he could not judge the strength of those matters. He further accepted that there was a substantial difference in the overall financial state of the action from that which existed at the time of the hearing by Mr Recorder Tackaberry. He said there was a change of circumstances, but it was far from clear that there was a significant change. He stated that there was quite clearly a substantial bona fide issue to be tried between the parties, and in essence that was 'exactly the same situation that there was when the matter came before Mr Recorder Tackaberry'.

He then turned to what he regarded as an essential matter in the case, viz that if an order for security for costs was made in a proper sum then the effect would be to kill the action. He said, looking at the evidence before him, that he took the view that so far as that question was concerned, the natural and proper inference for him to draw, having regard to 'the nature of the plaintiff company and its directors', was that the probability was that a substantial order for security would stifle the claim. He said he was entitled to draw that inference even in the absence of direct evidence from the plaintiff. Finally, he took account of the lateness of the application.

Mr Serota QC, for the defendants, attacks the decision of the Official Referee. He submits that the Official Referee misdirected himself in holding that there had been no material change in circumstances since the first application; in concluding without adequate evidence that an order for security would stifle the plaintiff's claim; in proceeding on the footing that if it stifled the claim, that left the Official Referee with no discretion save to refuse the application; in not considering whether security, other than in a substantial sum, should be ordered; and finally in treating the lateness of the application as a relevant consideration against the making of an order in the particular circumstances.

Mr Philpott supports the decision reached by the Official Referee. He points out that the Official Referee, exercising his discretion, took into account the substantial increase in costs since the first application for security, the extensive amendments to the claim with their potential financial consequences, the allegedly suspicious elements of the claim, and the lateness of the application. He submits that the Official Referee properly directed himself on the law. He rightly submitted that unless it could be shown that the Official Referee misdirected himself on the law, or took into account considerations which he should not have taken into account, or omitted to take into account considerations which he should have taken into account, or that he was plainly wrong, this court is not entitled to interfere with the exercise of discretion. He submits that the judge's decision therefore ought to be affirmed.

The relevant principles are, in my judgment, the following.

1. As was established by this court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff

company that would find difficulty in providing security (see *Pearson v Naydler* [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the 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 impecuniosity (see *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. In 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 (see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a 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 (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263). 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 resources 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 peculiarly 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 (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27). In that case

Saville J applied by way of analogy the approach adopted in another context, that of payment into court as a condition of leave to defend. In *M V Yorke Motors (a firm) v Edwards* [1982] 1 All ER 1024 at 1028, [1982] 1 WLR 444 at 449, 450 Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

> 'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.'

In *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] CA Transcript 250 Bingham LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the *Farrer* case, that is to say that there was a probability that the defendant wrongly caused the plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> 'In my judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the *Farrer* principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach adopted in *MV Yorke Motors (a firm) v Edwards* Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the *Yorke Motors* case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else.'

Bingham LJ's comment was: 'I cannot fault the general approach of the registrar.' When the matter went to the full court ((1990) Times, 9 April) this court could see no possible grounds upon which an appeal against Bingham LJ's decision could succeed.

That case related to the power to order security under RSC Ord 59, r 10(5), which is not the present case. But, in my judgment, the same approach should be adopted on applications under s 726(1). In the *Okotcha* case this court was not satisfied on the evidence that a plaintiff ordered to give security was unable to raise the money needed. This court plainly, therefore, adopted the same approach as that indicated in the cases of *Flender Werft*, *Yorke Motors* and *Kloeckner*. Reference was made to the *Trident* case and Bingham LJ referred to Nourse LJ's remark that an inference could be drawn even in the absence of direct evidence that the claim of the plaintiff would be stifled. He said ([1993] BCLC 474 at 478):

> 'I am inclined to think that that decision itself illustrates more than anything else the different patterns of fact which come before the court in the course of applications such as this.'

He was therefore distinguishing the *Trident* case on its facts.

In the *Trident* case Nourse LJ commented that the basis of an application for security was that there was reason to believe that the company would be unable to pay the costs of the defendant, if successful, in his defence (see [1990] BCLC 263 at 266). After referring to what Megarry V-C had said in *Pearson v Naydler* to

the effect that s 726 relates to companies which are likely to find difficulty in meeting orders for security for costs, Nourse LJ said: a

> 'It would be pointless to insist on the company putting in evidence in order effectively to admit that which the defendant effectively asserts.'

With all respect to him, it seems to me that there are two quite separate questions which are relevant. One is whether the condition for the application of s 726 is b satisfied. That requires the court to look ahead to the conclusion of the case to see whether the plaintiff would be able to meet an order for costs. On that the defendant, accepting the applicability of the section, need put in no evidence. The other question which is relevant, given that an application for security is made at a stage when the trial will not have occurred, is whether the plaintiff c company will be prevented from pursuing its litigation if an order for security is made against it. On this, evidence from the defendant may be needed. The considerations affecting those two questions seem to me to be rather different. For example, a backer might well be prepared to put up money to assist a company to pursue a case when the trial has not yet occurred, but the same backer would be extremely unlikely to put up money after the trial has been d unsuccessfully concluded against the company.

However, as I have already indicated, the *Trident* case establishes that in certain circumstances it will be proper to draw inferences, even without direct evidence, that a company would probably be prevented from pursuing its claim by an order for security. But, in my judgment, such a case is likely to be a far rarer e one than those cases in which the court will require evidence from the plaintiff to make good any assertion that the claim would probably be stifled by an order for security for costs.

7. The lateness of the application for security is a circumstance which can properly be taken into account (see *The Supreme Court Practice 1993* vol 1, para 23/1–3/28). But what weight, if any, this factor should have and in which direction f it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet g be incurred.

Guiding myself by those principles I ask whether the Official Referee did err in law. In my judgment, he did so in the following respects.

(1) He treated the position as being, in essence, exactly the same as it was before Mr Recorder Tackaberry, and in so doing he conflated two different h questions: (i) Has there been a significant change in circumstances? (ii) Is there a bona fide issue to be tried between the parties?

For my part, I am prepared to accept that despite the matters to which I have already referred from the evidence of Mr Piggott, and which plainly cast at least serious doubt on part of the plaintiff's claim to expenses and hence to the share j of profits which it claims, there remains a bona fide issue to be tried between the parties. The profits which it is agreed should be shared are not defined in the reamended statement of claim. Nor indeed were they defined in the agreed order made by Mr Recorder Butcher. It is impossible to assess how that issue will result, although of course it is of relevance that the plaintiff's claim, until the amendment and the reamendment, put in rather different form the terms of the

relevant joint venture agreement. But to this extent the position on the existence of a bona fide issue may be said not to have changed.

In my judgment, in other significant respects the position has plainly changed materially, that is to say in a way that can properly affect the exercise of discretion. The drastic reamendment of the statement of claim has resulted in the following major changes.

First, there is the length of the trial, estimated to be eight days at the time of the first application, and now estimated at 30 days. Consequently, the defendants' likely costs have increased dramatically from the £41,000 originally estimated so that the total costs are now estimated by the defendants to exceed £300,000. It will be recalled that Mr Recorder Tackaberry considered it important to compare the payment in with the likely costs, and that the smallness of the sum of £2,000 or £11,000, which he considered could have been the appropriate amount to be ordered (if any order were made), was a significant factor in the exercise of his discretion. For my part, I doubt whether the payment in is relevant to this issue, although plainly it has some bearing on whether there is a bona fide issue to be tried and on the plaintiff's prospects of success.

Secondly, a net sum of costs amounting to £50,000 plus VAT is the sum estimated to be that which the plaintiff will have to pay the defendants in any event as a result of costs orders already made.

Third, there is the new evidence that other companies associated with Mr Keary senior have gone into liquidation after making claims against a major contractor when those claims failed. There is at least a risk that the pattern may be repeated.

In my judgment, therefore, the Official Referee was wrong not to find changes of significance occurring since the first application.

(2) The Official Referee does not appear from his judgment to have carried out a balancing excercise. He did not weigh the injustice to the defendants if no order for security was made. Once he found that there had been no significant change in circumstances he proceeded to consider the question of whether the plaintiff's claim would be stifled by an order for security and the lateness of the application, but nothing further.

(3) The Official Referee correctly referred to the *Flender Werft* case and acknowledged that there was no direct evidence from the plaintiff but nevertheless held that the probability was that a substantial order for security would stifle the claim, having regard to the nature of the plaintiff company and its directors.

It is not apparent on what evidence this inference was based. The Official Referee, in fact, says that he was entitled to draw the inference even in the absence of direct evidence from the plaintiff. But I do not understand how he could say, for example, that he had regard to the nature of the directors of the company, when all that he knew was that the directors were two sons of Mr Keary senior. There was no evidence of their means, apart from the fact that they were the owners of a house which was being let to the plaintiff at an annual rate of £36,000 pa, that house being mortgaged to a bank for £200,000. There were no accounts of the plaintiff later than the accounts for the period ended 31 May 1991, the directors of the plaintiff being in flagrant breach of their statutory duties in this regard. There is no evidence of who is financing the current litigation, nor how it is being financed. From the figures of the defendants' costs that I have already given, this litigation is extremely expensive. The only evidence that is put in was that to which I have already drawn attention, that an order for security

'may' stifle the claim. In my judgment, this is plainly insufficient and inadequate evidence on which to reach the conclusion that a substantial order for security would stifle the claim. As the plaintiff failed to discharge the onus on it of putting in evidence to satisfy the court on this point, the Official Referee was wrong to take it into account.

(4) It appears that the Official Referee considered only whether a substantial order for security would stifle the claim. He did not consider whether a lesser sum than a substantial sum would stifle the claim, or could otherwise be ordered by way of security without preventing this litigation going ahead.

(5) The Official Referee misdirected himself, in my view, in taking into account as a factor against the defendants the fact that the application was late, when that was caused by the plaintiff, and in treating it as a material consideration in not ordering security. It was proper for him to look at the lateness of the application, and to take note of the substantial costs that had already been incurred on both sides. But he should have paid attention to the fact that an even larger sum by way of costs was yet to be incurred. He should have exercised his discretion in relation to an order for security bearing that in mind, as well as the fact that he held the defendants to be blameless. As he says, they had had the lateness forced upon them by the course the action had taken.

As I am satisfied, therefore, that the Official Referee did err in law, it follows that this court has to exercise its own discretion. Having regard to all the circumstances, including the way the litigation has proceeded, the payment in, the changes in stance adopted by both sides, the lateness of the application (including the fact that substantial costs have been incurred by the plaintiff before an order for security has been made) in consequence on the reamendment to the statement of claim and the estimate of future costs, and having regard to the defendants' request that security be ordered in the sum of £200,000, for my part I would make an order for security but in a sum considerably reduced from that requested. It seems to me that the appropriate sum would be £100,000.

I would allow the appeal and direct that the proceedings be stayed until such sum is provided by way of security by the plaintiff.

BUTLER-SLOSS LJ. I entirely agree with the judgment of Peter Gibson LJ, and with the order which he has proposed. Consequently the appeal will be allowed; the proceedings will be stayed pending security for costs in the sum of £100,000 being deposited with the court.

Appeal allowed. Leave to appeal to the House of Lords refused.

25 July 1994. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Slynn of Hadley and Lord Woolf) refused leave to appeal.

Paul Magrath Esq Barrister.