Neutral Citation Number: [2021] EWCA Civ 565

Case No: A3/2020/1300

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Stuart Isaacs QC sitting as a Deputy Judge of the High Court
[2020] EWHC 1657 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 April 2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE NUGEE
and
LORD JUSTICE BIRSS

- -

Between :

INFINITY DISTRIBUTION LTD (in administration)	**Claimant and Respondent**
- and -	
THE KHAN PARTNERSHIP LLP	**Defendant and Appellant**

- -
- -

Mr Dan Stacey (instructed directly) for **the Appellant**
Mr Albert Sampson (instructed by **CANDEY**) for **the Respondent**

Hearing date: 11 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 20 April 2021

Lord Justice Nugee:

Introduction

1. This second appeal raises a question on the form of security for costs to be provided where the Court is satisfied that it is an appropriate case to order security.

2. In the present case the Claimant company, Infinity Distribution Ltd, (**"Infinity"**) successfully argued before Deputy Master Arkush that it should provide security for costs in the form of extending its existing "after the event" or ATE policy to include a deed of indemnity. The effect of this would be that if it were successful at trial, the very substantial extra premium might be recoverable from the Defendant, The Khan Partnership LLP (**"TKP"**).

3. On appeal by TKP, this decision was upheld by Mr Stuart Isaacs QC sitting as a Deputy Judge of the High Court. The essential ground on which he did so was that the potential recoverability of the premium was irrelevant to the question whether the deed of indemnity was a suitable form of security.

4. Permission for a second appeal was granted to TKP by Rose LJ. Its Grounds of Appeal effectively amount to a single ground, namely that Mr Isaacs was wrong to regard the recoverability of the premium as irrelevant.

5. In my judgment this ground of appeal is made out. I would allow the appeal and order Infinity to provide security by payment into court.

Background

6. TKP is a firm of solicitors. Infinity is a company that has been in administration since 2009, but was formerly a wholesale supplier of mobile telephones. Such trades are notoriously susceptible to being used as a means of committing VAT fraud, and in 2006 HMRC notified Infinity that it was commencing an investigation into Infinity's affairs. Infinity retained TKP to assist it in relation to the investigation.

7. The dispute is as to the terms of TKP's retainer. The details are unimportant for present purposes, but can be summarised as follows. In 2007 HMRC denied Infinity a repayment of input VAT for a particular quarter. Infinity, represented by TKP, appealed to the VAT & Duties Tribunal. Its appeal succeeded due to HMRC's failure to comply with an unless order, and certain monies became payable to Infinity by way of repayment of input VAT. The amount payable included a sum of nearly £840,000 by way of interest. The payment was paid into TKP's client account. TKP retained out of this money the sums which it claimed to be due to it under its retainer. That included a sum of £293,500 plus VAT (totalling £337,525) which TKP transferred to itself in December 2008 and claims to have been due as an agreed fee, calculated at 35% of the interest repaid. Infinity denies that there was any such agreement. From the pleadings this issue appears to turn mainly on the content of a telephone conversation in October 2008.

The proceedings

8. Infinity went into administration in September 2009. It issued the Claim Form in July 2014. In November 2014 it obtained an ATE policy in the sum of £180,000, and gave

notification of the insurance to TKP. No indication of the amount of the premium was given to TKP at the time. The claim has not progressed swiftly. It took until June 2016 before a question of the extension of time for service of the Claim Form was finally resolved, and it was not until 3 May 2018 that a Costs and Case Management Conference (**"CCMC"**) was held. At the CCMC directions were given for trial to take place between May and October 2019 with an estimate of 6 days, and in July 2018 it was fixed for June 2019.

9. Shortly before the CCMC TKP wrote to Infinity's solicitors requesting their proposals for providing security on the grounds that the latest Progress Report from the Joint Administrators demonstrated that Infinity was unarguably insolvent. They indicated that their incurred costs were in excess of £225,000. At the CCMC costs budgets for the parties up to trial were approved by the Court (insofar as not agreed). We were told that the total costs budget for Infinity (incurred and budgeted) was about £300,000; that for TKP was over £500,000. On 18 May 2018 TKP wrote again asking for security in a sum of over £500,000. Further correspondence ensued, but it did little to resolve matters. Infinity's position was that it would agree to increase the level of cover under its ATE policy from £180,000 to £360,000; that it had made enquiries for the provision of a deed of indemnity by its insurers, which would be provided "in due course"; and that it would expect to recover any additional premium from TKP should it be successful at trial. There was no indication in that correspondence what the level of such a premium might be.

Hearing before Chief Master Marsh

10. On 3 October 2018 TKP issued an application for security in the sum of £500,000. The application was heard by Chief Master Marsh on 11 December 2018 and he delivered an unreserved judgment that day. At [9] he said that the first and most significant issue was the level of security to be provided, it not being in doubt that Gateway C applied, nor disputed that it was just to provide security. (The reference to Gateway C is to CPR r 25.13(2)(c) which provides that one of the circumstances in which security may be ordered is if the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.) At [10] to [23] he proceeded to consider the issue of the level of security, concluding that £350,000 would be appropriate.

11. At [24] he briefly considered the only other issue that arose, which was the method of providing security. He said that if Infinity was able to provide a deed of indemnity in satisfactory form, that "is something the court will accept, but it is contingent upon the source of the indemnity being sufficiently secure and the form of the deed being one which is reasonable." He would therefore give Infinity a short period until 19 December 2018 to provide the deed in final draft form; TKP should then have an opportunity either to accept it or not; and if TKP rejected it for reasons that it thought appropriate there should be a further short oral hearing to determine whether the security was adequate. If the Court concluded that the security by way of the deed was not adequate, the default position would be that the sum of £350,000 would have to be paid into court.

12. By his Order dated 11 December 2018 he therefore ordered, so far as material, as follows:

> "1. The Claimant give security for the Defendant's costs of these proceedings in the sum of £350,000 by providing a proposed Deed of Indemnity to the Claimant by 4pm on 19 December 2018. (Such proposed Deed of Indemnity must be in a form that Ironshore Europe Limited is unequivocally prepared to execute within 2 working days of acceptance by the Defendant.)
>
> 2. If no proposed Deed of Indemnity is provided by the date set out in paragraph 1 above the Claimant shall give security for the Defendant's costs of these proceedings in the sum of £350,000 by paying the sum of £350,000 into court by 31 December 2018, failing which all further proceedings be stayed until further order.
>
> 3. If a proposed Deed of Indemnity is provided but is not acceptable to the Defendant, all further proceedings be stayed pending further order."

He reserved the costs and the Order also provided for a further 30 minute hearing to deal with costs which would be increased to 1 hour "if the proposed Deed of Indemnity is not acceptable to the Defendant".

Hearing before Deputy Master Arkush

13. Infinity's solicitors duly produced to TKP a proposed form of deed of indemnity that its funders Ironshore would be willing to enter into. Further lengthy correspondence ensued by the end of which it had become clear that the original premium charged to Infinity by Ironshore was £120,000 for £180,000 of ATE cover; that Ironshore was willing to provide the deed of indemnity in the sum of £350,000 but only if the ATE cover was itself increased to the same sum, it being standard practice in the insurance market that the insurer would not provide such a deed for an amount higher than the insured amount; that Ironshore had quoted a single overall price of £315,000 (ie an additional £195,000 to the original £120,000 premium) for the increase in ATE cover and provision of the deed of indemnity; and that Infinity's position was that it would seek to recover the entirety of that sum if it were successful at trial. TKP's position was that this potential exposure to having to pay £315,000 in addition to Infinity's ordinary costs meant that the deed of indemnity was not a suitable form of security.

14. The issue was raised at a further CMC held before Deputy Master Arkush (**"the Deputy Master"**) on 22 May 2019. He gave an unreserved judgment that day. At [9] he described the question as a difficult decision of principle that might be more appropriately decided at a higher level. At [13] he said he had not found it a straightforward question, but he had reached the conclusion that although it might be disadvantageous to TKP it was not unjust that they receive their security at a potential cost at the end of the day. At [17] he expressed his conclusion that the deed of indemnity was acceptable as security. It provided adequate cover, and the objections put forward would not militate against it being accepted by the Court as adequate security.

15. His Order dated 22 May 2019 therefore provided that the deed of indemnity "is adequate and acceptable security" for TKP's costs pursuant to Chief Master Marsh's Order. He granted permission to appeal this aspect of his Order. The Order also contained further directions, including re-listing the trial for a window between June and October 2020.

Hearing before Mr Stuart Isaacs QC

16. TKP appealed the Deputy Master's Order. The appeal was heard by Mr Stuart Isaacs QC sitting as a Deputy Judge of the High Court (**"the Deputy Judge"**) on 24 June 2020. He handed down a reserved judgment on 26 June 2020 ([2020] EWHC 1657 (Ch)).

17. At [13] he referred to the submission of Mr Albert Sampson, who appeared as he did before us for Infinity, that the purpose of security was to protect the defendant against the risk of being unable to enforce a costs order in his favour; and at [14] to a further submission that it was a general principle that security should be provided in the way least onerous to the provider. He then expressed his conclusion at [15] as follows:

> "I accept that those are the principles which should apply in the present case. Applying them, I consider that the master was correct not to have taken into account the amount and potential recoverability of the premium from TKP. The relevant questions for the court were whether the deed of indemnity would in fact give TKP real or adequate security for its costs and whether making the order would prevent [Infinity] from pursuing its claim. The answer to the first question was yes and the answer to the second was no. TKP's potential liability for the premium for the deed of indemnity was not relevant to those questions. In my judgment, the master's order was correct."

18. By his Order dated 26 June 2020 he therefore dismissed the appeal. He also directed that the trial be vacated and relisted in June to November 2021.

Grounds of Appeal

19. TKP was granted permission to appeal by Rose LJ on 21 October 2020. The Grounds of Appeal, although elaborated over a number of paragraphs, raise in effect one point which is that the Deputy Judge and Deputy Master erred in treating the amount and potential recoverability of the premium as irrelevant; it was relevant because the Court had to take into account all the circumstances of the case in deciding what was just between the parties; and had it been taken into account they ought to have concluded that it was not acceptable security and ordered payment into court instead.

20. Infinity served a Respondent's Notice seeking to uphold the Deputy Judge's decision on alternative grounds. I give the details below.

Recoverability of the premium

21. Before coming to the principles applicable to the ordering of security for costs, I should explain the position as to the recoverability of the premium. I can set out Infinity's position by adopting almost verbatim the clear and helpful written submissions of Mr Albert Sampson, as follows:

    (1) s. 29 of the Access to Justice Act 1999 (**"AJA 1999"**) provided for the recoverability of ATE premiums as follows:

    > **29 Recovery of insurance premiums by way of costs**
    >
    > Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in

> those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.

(2) This provision came into force on 1 April 2000 but was repealed, subject to transitional and saving provisions, by s. 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (**"LASPO 2012"**).

(3) s. 46(1) LASPO 2102 amended the Courts and Legal Services Act 1990 (**"CLSA 1990"**) by inserting a new s. 58C. s. 58C(1) CLSA 1990 provides as follows:

> A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

(The remainder of s. 58C contains a power to make regulations permitting an exception in the case of certain policies in connection with clinical negligence proceedings.)

(4) s. 46(2) LASPO 2012 amended AJA 1999 by omitting s. 29.

(5) s. 46(3) LASPO 2012 provided that:

> The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force.

(6) The commencement of s. 46 LASPO 2012 was dealt with by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013, SI 2013/77 (**"the Commencement (No 5) Order"**). By art 2(1)(c) and art 3(c) s. 46 was brought into force on 19 January 2013 for the purpose of making regulations, and on 1 April 2013 otherwise. By art 4 however these provisions were subject to a saving provision under which they did not apply to proceedings of a specified character. This included proceedings brought by or on behalf of those who were insolvent, namely those brought by a liquidator, trustee in bankruptcy, administrator, company in winding up or (by art 4(f)) a company in administration.

(7) That was the state of the law in 2014 when Infinity brought these proceedings and took out its ATE policy. Since it was a company in administration, the effect of art 4(f)[1] of the Commencement (No 5) Order is that s. 46 LASPO 2012 did not apply, and s. 29 AJA 1999 therefore continued to apply.

(8) A further commencement order was made in relation to s. 46 LASPO 2012 in

[1] Mr Sampson in fact suggested that it was art 4(d) (proceedings brought by a person acting in the capacity of an administrator) that applied; I think it was actually art 4(f) as the claim was brought in the name of Infinity rather than that of the administrators, but this does not make any difference to the analysis.

2016, namely the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 12) Order 2016, SI 2016/345 (**"the Commencement (No 12) Order"**). By art 2 this brought s. 46 into force on 6 April 2016 in relation to proceedings brought by or on behalf of those who were insolvent, including by art 2(d) proceedings brought by a company in administration.

(9) Because of the terms of s. 46(3) LASPO 2012 however the Commencement (No 12) Order had no effect on Infinity's right to recover the premium under its ATE policy, which had been taken out before the amendment made on 6 April 2016.

(10) In *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 (***"Plevin"***) the Supreme Court held that where an ATE policy was taken out before the amendments made by s. 46 LASPO 2012 were brought into force, and "topped-up" after they had been, the whole of the premium could be recovered: see per Lord Sumption JSC at [16], [20]-[23].

22. On the basis of this analysis, Infinity's position is that if it extends the ATE to £350,000 and takes out the deed of indemnity, the whole of the premium of £315,000 will be recoverable if it obtains a costs order in its favour at trial.

23. Mr Dan Stacey, who appeared for TKP, accepted before us that on the basis of *Plevin* it was strongly arguable that Infinity would be able to recover at least some of the premium, but said that he had an argument that this would not apply to the cost attributable to the deed of indemnity (as opposed to the increase in the ATE cover).

24. We were not addressed on the question who is right on this point, nor asked to resolve it, and I do not propose to express any views one way or the other, beyond saying that I can see the arguments on both sides. I proceed therefore on the assumption that there is a real prospect, although not a certainty, that in the event of Infinity succeeding at trial it would be able to recover from TKP the entirety of the extra premium of £195,000 as well as the original premium of £120,000. That would of course be in addition to its own litigation costs.

25. If however Infinity were not permitted to provide security by way of deed of indemnity, it would have to do so by paying money into court – neither party put forward any third method of providing security. If it did that, it is very doubtful if it could recover any of the cost of providing security from TKP: see *Rowe v Ingenious Media Holdings plc* [2021] EWCA Civ 29 (***"Rowe"***) at [45]-[52] per Popplewell LJ where he confirms that, subject to certain limited exceptions, the costs to a claimant of funding its litigation costs, including the costs of putting up security, cannot be recovered from the defendant and lie where they fall. Unless Infinity decided to extend the ATE cover for its own purposes, it is likely therefore that Infinity would be able to recover from TKP, in addition to its own costs, no more than the original ATE premium of £120,000.

The Court's power to order security

26. The procedure in relation to security for costs is governed by section II of CPR Part 25. The relevant rules are CPR r 25.12 and r 25.13 which, so far as material, read as

follows:

25.12 Security for costs

(1) A defendant to any claim may apply under this section of this Part for security for his costs of the proceedings.

(Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this section of this part to apply to Part 20 claims).

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it will—

(a) determine the amount of security; and

(b) direct—

(i) the manner in which; and

(ii) the time within which

the security must be given.

25.13 Conditions to be satisfied

(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.

(2) The conditions are—

…

(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.

27. In the present case, as already referred to, it was common ground before Chief Master Marsh that the condition in r 25.13(2)(c) was satisfied, and that it was just to make an order. The remaining issues were those under r 25.12(3), namely (a) the amount of security and (b) the manner in which the security was to be given. Chief Master Marsh determined the amount of security. He did not finally determine the manner in which security was to be given, which was left for the parties to agree, or for the Court to resolve if they could not agree.

28. Although it was not his main point, Mr Sampson suggested in the course of his submissions that Chief Master Marsh had decided that a deed of indemnity was acceptable in principle, and that the only matter left to be resolved by the Deputy

Master was whether the deed that Infinity proposed to enter into was sufficiently robust to be an acceptable form of security. I do not think that is right. It is true that the Chief Master said in his judgment (see paragraph 11 above) that if the deed was in satisfactory form that is something the Court would accept, and specifically referred to the source of the indemnity being sufficiently secure and the form of the deed being reasonable; and I think it is reasonably clear from that that he did not then have in mind the possibility that TKP might object to such a deed on the grounds that a very substantial extra premium might be recoverable as costs by Infinity. Mr Stacey indeed confirmed to us that that was not something discussed before the Chief Master. At that stage, although Infinity's solicitors had made it clear that they expected to be able to recover the premium in the event of Infinity being awarded its costs, no indication of the size of the premium had been provided. But the Chief Master was clearly not purporting finally to decide the manner in which security should be given, and when in his Order he provided that there should be a further hearing if the deed were not "acceptable" to TKP, I do not think he was limiting the grounds on which TKP could object to the proposed deed. I consider that it was therefore open to TKP when the matter came back before the Deputy Master to object to the deed on the grounds that the premium was very substantial and potentially recoverable from TKP. Moreover the Deputy Master made it clear in the course of the hearing before him that he would rather decide the point on its merits, which he proceeded to do.

29. Before coming to the authorities, I make some points on the wording of the rules. There are a number of matters the Court needs to consider when making an order for security. The Court must be satisfied under r 25.13(1)(b) that one of the conditions in r 25.13(2) applies (or that there is a relevant statutory power). This is a pre-condition or gateway. The Court must be satisfied under r 25.13(1)(a) that it is just to make such an order. This is what may be called the overall question. There are also various details that it must settle if it is to make an order: the amount of security (r 25.12(3)(a)); the manner in which it is to be provided (r 25.12(3)(b)(i)); and the time within which it must be provided (r 25.12(3)(b)(ii)).

30. The preconditions or gateways in r 25.13(2) are not questions for the Court's discretion: they are matters of fact on which the Court needs to be satisfied, such as where the claimant is resident, whether there is reason to believe that the claimant company will be unable to pay the defendant's costs if ordered to do so, whether the claimant has changed his address with a view to evading the consequences of the litigation, and so on. But once the case has passed through one of the gateways, the other matters are all matters for the Court's discretion.

31. By r 25.13(1)(a) the Court is expressly required to have regard to "all the circumstances of the case" when deciding to make an order for security. There is a question on the wording of the rules whether this requirement expressly applies only to the issue whether it is a suitable case for making an order in principle, or whether it also applies to what I have called the details – the amount of security, and the manner and time in which it is to be provided. I think the answer is probably the latter, although I do not think that anything turns on it. The reason I take this view is because the overall question under r 25.13(1)(a) is whether it is "just to make such an order"; "such an order" is a reference back to the words "an order for security for costs under rule 25.12" in r 25.13(1); and an order for security for costs under r 25.12 will not only provide that security be given but also in what amount, by what means,

and by when it is to be provided. It follows in my view that when r 25.13(1)(a) requires the Court to have regard to all the circumstances of the case in deciding whether it is just to make such an order, this encompasses all the aspects of the order that it is suggested it should make, including the manner in which security is to be provided.

32. But as I have said I do not think anything turns on this. Even if the requirement in r 25.13(1)(a) does not in terms apply to the matters of detail, the Court still has a discretion to exercise as to these matters, and it is trite law that in exercising a discretion the Court should take account of all relevant matters and leave out of account irrelevant matters. Whether as a matter of the express terms of r 25.13(1)(a), or simply as a matter of the obligation of the Court when exercising any discretionary power, the Court should therefore have regard to all the relevant circumstances.

33. Moreover when exercising any power given to it under the rules, the Court is obliged by CPR r 1.2(a) to seek to give effect to the overriding objective. The overriding objective by CPR r 1.1(1) is that of enabling the Court to deal with cases justly and at proportionate cost, and by CPR r 1.1(2) that includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with the case in ways which are proportionate to the amount of money involved, and ensuring that it is dealt with fairly.

34. Given that these are the matters that the Court is obliged to have regard to, it is at first sight a surprising proposition that when considering the manner in which security was to be provided in the present case the Court should leave out of account the amount and potential recoverability of the premium as matters of no relevance. Any discretionary decision is likely to have advantages or disadvantages, or pros and cons, for one or other party or for both. The task of the Court generally requires it to weigh up the respective pros and cons and strike a fair balance between the interests of the parties. I do not mean to suggest that this is always the only consideration, as the Court may have to take account of other matters, such as the need to allocate to the case no more than an appropriate share of the Court's resources, and the desirability of enforcing compliance with rules and orders (see CPR r 1.1(2)(e) and (f)); but in most cases where the Court is exercising a discretionary power under the rules, this balancing of the pros and cons is likely to be the primary consideration.

35. At the time that security is ordered, it is necessarily unknown whether the claim will succeed or not (and the authorities make it clear that the Court should not, save in clear cases, attempt to form a view of the merits when deciding the question of security). So the Court has to address the question on the basis that the claim might succeed or might fail. Admittedly the very purpose of ordering security is to protect the defendant against the risk of non-payment by the claimant if the claim fails; but I do not see why that means that the financial consequences for the parties if the claim succeeds are to be left out of account as irrelevant. One would have thought that striking a fair balance between the parties required taking account both of what would happen if the claim failed and of what would happen if it succeeded.

36. In the present case the relevant issue for the Deputy Master was the manner in which security was to be provided. The only candidates put forward by the parties were either the proposed deed of indemnity or a payment into court. Which of these was ordered would potentially make a very substantial difference to TKP if it lost at trial:

see paragraphs 24 and 25 above, which show that the potential cost to TKP of losing might well be an extra £195,000 if security were provided by way of deed of indemnity. That is a significant extra disadvantage to TKP, especially when compared with the amount in issue on the substantive claim, namely £337,525 and interest.

37. In those circumstances I would have thought it manifest that this was a material and relevant consideration when the Court was considering the manner in which security was to be ordered. That does not mean that such a consideration would always or necessarily be decisive, as what is fair and just depends on the potential consequences for the claimant as well as the defendant; but to suggest that for TKP to face an additional £195,000 liability as the price of losing the claim was something of no relevance seems to me to only have to be stated to be seen to be a most surprising proposition. It is not a view that I would adopt unless the authorities compelled us to.

The authorities

38. The next question therefore is whether there is anything in the authorities which requires this heavy potential cost to TKP to be left out of account. I consider below those that were relied on before us, but I will say straightaway that I do not find anything in them which compels us to reach this conclusion, or that is even of any real assistance on the point.

39. Indeed the present case to my mind is a good illustration of the limits on the proper use that can be made of decided cases. The well-known principles are that authorities are only authority for what they decide; that judgments are always to be read in the context of the issues of the case in question; and that great caution is required before taking the words of a judgment out of context and seeking to apply them to other cases raising quite different issues. In answer to a question from the Court, Mr Sampson confirmed that in none of the cases put before us did it make any difference to the defendant, if he lost at trial, how the security had been provided – the defendant's only interest was to see that the security was robust enough to ensure that he was paid if he won. It is not therefore surprising that none of them addresses the question whether the effect on the defendant if he lost is a relevant consideration, something that simply did not arise in those cases. To seek to extract from them some principle which governs or even affects the present case is to my mind a fruitless endeavour.

40. I should nevertheless consider the cases we were referred to. The earliest is *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 (***"Sir Lindsay Parkinson"***). This established that even where the defendant showed that there was reason to believe that the plaintiff company would be unable to pay the defendant's costs, the Court had a discretion whether to order security or not, to be exercised in all the circumstances of the case: see at 626A-D per Lord Denning MR, 627D-F per Cairns LJ, and 628H-629A per Lawton LJ. Nothing was said about the manner of providing security, which was not in issue in the case.

41. Next was *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 1 WLR 1334 (***"Rosengrens"***). This was not in fact a case of security for costs, but a case in which the Master had given summary judgment under RSC Ord 14 but stayed execution on terms that the defendant brought money into court, and the question was whether the

defendant could provide a bank guarantee instead. The decision was that where it made no difference to the plaintiff, there was no reason why the defendant should not do so. Sir John Donaldson MR said at 1335G that security can be provided in a large number of different ways; at 1335H that the Court was not concerned to disadvantage the defendant to any greater extent than necessary to do justice to the plaintiff; and again at 1336H that it was not the function of the Court to disadvantage the defendants while giving no legitimate advantage to the plaintiff, adding at 1337A:

> "…it matters not whether the plaintiffs are secured in one way rather than another. If it would be easier for the defendants or if for any reason they prefer to provide security by a bank guarantee rather than by cash, I can see absolutely no reason in principle why they should not do so."

Parker LJ agreed, saying at 1337C:

> "So long as the opposite party can be adequately protected, it is right and proper that the security should be given in a way which is least disadvantageous to the party giving that security.
>
> …So long as it is adequate, then the form of it is a matter which is immaterial…
>
> Day after day orders will be found when the initial order of the court is that security be given within so many days in a particular amount to the satisfaction of the court. The person giving the security will then have an opportunity to say how he wishes to give it; and, as long as it is adequate to protect the opposite party, it is not his concern whether it should be in one form or another."

But all of that was said in a case where there was no suggestion that it would make any difference to the plaintiffs whether security was provided in one form or another. The only reason the plaintiffs wanted the defendant to make a payment into court was to make life difficult for the defendant. That was not a legitimate reason (see per Sir John Donaldson MR at 1336H). I do not think this decision, or anything said in it, sheds any real light on the question what the Court should do where it does potentially make a difference to the party intended to be benefited by the security as to how it is provided; if anything, the judgments tend to suggest that the answer would or might have been different if the form of security had made a material difference to the plaintiff.

42. *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 AER 534 (***"Keary"***) was another decision of this Court where there was reason to believe that the plaintiff company would be unable to pay the costs of the defendant if it lost. At 539h Peter Gibson LJ set out the relevant principles. These included that the Court has a complete discretion whether to order security and that it would act in the light of all the circumstances, and (at 540a) the following:

> "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…"

Mr Sampson placed some reliance on that, suggesting that there were only two questions: first, the Court will consider whether the proffered security offers adequate protection to the defendant if he loses; second, if it does, the Court will consider any

potential prejudice to the claimant. But Peter Gibson LJ's statement of principle was directed at whether security should be ordered at all, not at how it should be provided, something which was not in issue in that case.

43. *Fernhill Mining Ltd v Kier Construction Ltd* [2000] CP Rep 69 (***"Fernhill"***) was a similar case. On the facts this Court held that it was not an appropriate case for security to be given. At [52] Evans LJ said:

> "The purpose of the rule regarding security for costs and section 726 and the exercise of the Court's discretion, in my view, is to avoid any injustice to a defendant who is sued by an impecunious claimant, such as would arise if the claim were to fail. It is also necessary to avoid, at the other extreme, injustice to a claimant who has a meritorious claim and who may be prevented from bringing the claim if he is required to provide advance security for the defendant's costs. Even if he is not prevented, such an order may place a major hurdle in the path which he must follow if he is to obtain justice. It is necessary to bear both these extremes in mind and it is also necessary, so far as possible, to avoid a situation where the Court has to form a view on the merits of the case, in order to decide whether or not to order security for costs. The overall requirement in the exercise of the Court's discretion is that the result should be a just one."

I would not disagree with anything in that statement of principle, and I agree in particular that the overall requirement is that the result should be a just one. Again however the issue before the Court was whether security should be ordered at all, not about how it should be provided. I find it of no real assistance on the present question.

44. The next relevant case is *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 658 (***"Versloot"***). The question was whether the claimant should be permitted to vary an order for security for costs by providing an indemnity. Christopher Clarke J held that it should. At [10] he said this:

> "The essential question for the court in deciding on what form of security is acceptable is whether what is proposed does indeed provide real security. This it may do if it amounts to a promise which would in all likelihood be honoured, given by an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given by a truly creditworthy entity."

But there is no suggestion in that case that the premium payable for the indemnity might be recoverable from the defendant, and so far as appears from the report, it made no difference to the defendant what form of security was provided so long as it was offered from a creditworthy entity.

45. The final case to which we were referred on this aspect of the case was *Recovery Partners GB Ltd v Rukhadze* [2018] EWHC 95 (Comm) (***"Recovery Partners"***). This was another case where the claimant applied to change the form of security, in this case from a solicitor's undertaking, which had already been given, to an ATE policy and deed of indemnity. At [17] Mr Nicholas Vineall QC, sitting as a Deputy Judge of the High Court, said:

> "On an application for security for costs the court has a wide discretion not only as to whether, and in what sum, such security should be provided, but also as to the means by which it should be provided. Mr Weisselberg QC for the Claimants

> submitted, by analogy with the case of *Rosengrens v Safe Deposit Ltd* [1984] 1 WLR 1334 (which was a case of security pending an appeal) that if, on an application for security, two different forms of security would provide equal protection to the Defendant, the Court should, all else being equal, order the form which is least onerous to the Claimant. I accept that submission."

In the event, Mr Vineall refused the application, saying (at [44]) that although the new security proffered was in a form which would be adequate to meet a security for costs application, it was not objectively as attractive as a London solicitor's undertaking backed by cash, and no strong reason was given for changing the existing arrangements to something less attractive. Again there is no suggestion that the premium for the ATE policy and deed of indemnity would be recoverable from the defendant. Mr Sampson placed reliance on the statement that the Court should order the form of security which is least onerous to the claimant, but that was of course qualified by the words "all else being equal". I agree with Mr Stacey that in the present case all else is not equal because one form of security imposes a very significant extra potential disadvantage on TKP and the other does not.

46. Having reviewed the authorities to which we were referred, I remain of the view that they do not require the Court to treat the potential recoverability of the extra premium from TKP as irrelevant, or even begin to suggest that it should. Some of them (*Sir Lindsay Parkinson, Keary, Fernhill*) were not concerned with the question of the manner in which security should be provided at all; the others (*Rosengrens, Versloot, Recovery Partners*) were concerned with the form of security but in each of those cases it was not suggested that it made any difference to the receiving party how the security was provided so long as it was robust enough.

47. In the present case it does make a very substantial potential difference to TKP how the security is provided. For the reasons I have already given above, this seems to me plainly a relevant consideration which affects the question of how security should be provided, and whether the overall result is a just one.

Arguments for Infinity

48. I can deal with the arguments put forward by Mr Sampson for upholding the Deputy Judge's judgment quite briefly. He said that the purpose of ordering security was to protect the defendant should it succeed at trial. I agree. He said (see *Keary*) that the Court should carry out a balancing exercise between the injustice caused to the claimant if it is hindered in pursuing a proper claim and the injustice to the defendant if it is unable to recover its costs. I agree that these are relevant considerations that need to be balanced against each other. He then said that it is not a purpose of a security for costs application to minimise a defendant's adverse costs liability and that this is accordingly not a relevant consideration. Here I disagree. Of course the *purpose* of ordering security is not to reduce the defendant's potential liability for the claimant's costs. But I consider that it simply does not follow that when considering how security is to be provided the *effect* on the defendant's potential liability is of no relevance.

49. Mr Sampson said that there were only two relevant issues. The first was whether the proposed security was adequate (in the sense explained in *Versloot*). If satisfied that it was – and here it was – the Court should then consider the possible prejudice to the

claimant. I agree that these are relevant considerations. But I do not see that they are the only relevant ones.

50. Mr Sampson said that it was the practice of the Court to order security in the manner least onerous to the person providing it (*Recovery Partners*), but I have already said that that was only the case "all else being equal" which here it is not.

51. Mr Sampson said that there was a safeguard for TKP in that costs would be subject to detailed assessment, which would enable it to challenge the premium as unreasonable. But this does not seem to me to be an answer: if the choice is between the deed of indemnity which might impose a liability for the increase in premium on TKP, and payment into court which would not, the former method of providing security still substantially disadvantages TKP even if the actual quantum is subject to assessment. Moreover I accept Mr Stacey's submission that it is no easy task for a defendant to challenge the reasonableness of a premium: see the detailed consideration of what is required in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220, including at 56(iv) the fact that challenges to the reasonableness of a premium will generally only be capable of being resolved by expert evidence.

52. In my judgment none of the arguments advanced by Mr Sampson is sufficient to justify the conclusion that the potential recoverability of the premium from TKP is to be regarded as irrelevant when considering what form of security is to be ordered. I consider that TKP's ground of appeal is made out and that the Deputy Judge was wrong when he said at [15] of his judgment that the (only) relevant questions were whether the deed of indemnity would give TKP real or adequate security and whether making the order would prevent Infinity from pursuing the claim, and that TKP's potential liability for the premium was irrelevant.

53. Subject to the points raised by the Respondent's Notice, I would therefore allow the appeal.

Respondent's Notice – statutory funding regime

54. Infinity by its Respondent's Notice seeks to uphold the Deputy Judge's decision in effect on two alternative grounds. The first is something referred to by the Deputy Master, namely that TKP's potential liability for the premium arises from the funding regime provided for by statute, and that to take it into account as a relevant factor would therefore be inconsistent with that regime.

55. What the Deputy Master said (at [14]) was that the effect of the funding regime applicable to this case was that a party may face exposure to the successful party's costs including the costs of legal expenses insurance; and (at [16]) that:

> "It seems to me that the disadvantage incurred to TKP, if such it is, of facing a larger costs exposure has come about, in reality, by the funding regime which permits it rather than by operation of the security for costs regime which is designed to [i]nsure TKP against finding that its costs are irrecoverable and that objective is met by the security for costs application which, in this case, has succeeded after argument before the Chief Master."

56. Mr Sampson sought to uphold this aspect of his decision. He said that it was contrary to the policy behind the costs regime found in the present case (by a combination of

s. 29 AJA 1999, and the deliberate exception, by art 4 of the Commencement (No 5) Order, of claims by companies in insolvency from the operation of s. 46 LASPO 2012) to take into account the recoverability of the premium.

57. I do not accept this argument. It is true that it is the particular funding regime applicable to the present case which means that TKP is potentially facing a claim for the premium if security is ordered by way of the deed of indemnity. That, as Mr Stacey said, is the very fact which gives rise to the question whether such a deed should be ordered or not. But I do not see that the Court, by having regard to that consequence when deciding how security should be provided, is somehow cutting across or undermining the policy enacted by Parliament. Parliament can no doubt be said to have accepted, at any rate until 2016, that enabling insolvent companies to recover the cost of ATE policies was a price worth paying for them to have access to justice. But the statutory provisions say nothing in terms about the provision of security for costs, and I do not think it can be said to be implicit in the statutory scheme that insolvent companies should be able to provide security for costs in one way rather than another. With all respect to the Deputy Master, it is not in my view a helpful characterisation of the issue to say that TKP's potential liability has come about by operation of the funding regime rather than by operation of the security for costs regime: it has come about because of the combination of the applicable funding regime and the choice of one particular form of security over another. The Court cannot, and does not seek to, do anything about the funding regime; but it does have a discretion to exercise as to how security is to be provided. Taking into account (among other matters) the consequences for the parties that flow from the statutory funding regime seems to me the very essence of the correct approach, not an impermissible exercise. I reject this ground for upholding the Deputy Judge's decision.

Re-exercising the discretion

58. Mr Sampson's other ground for upholding the decision of both lower Courts is that if we conclude that they erred in principle it is common ground that we should exercise the discretion ourselves, and in doing so we should uphold the order providing for security by means of the deed of indemnity.

59. I will say straightaway that I am not persuaded that we should. I consider that in the exercise of our discretion we should order security by way of payment into court. The substantial extra premium that is potentially recoverable from TKP seems to me a factor of considerable weight. This Court recently gave detailed consideration in *Rowe* to the question whether a defendant applying for security should be required to give a cross-undertaking to the claimant for the costs of providing it. At first instance I had tried to keep the position open by requiring a cross-undertaking but not deciding at that stage what it would cover or whether it should be enforced at all. That was however held to be wrong in principle. Although the funding regime applicable to that case differed, the Court's decision is firmly based on the principle that in general defendants should not be required to meet the costs to claimants of providing security.

60. Consistent with that, it seems to me that where, as here, the choice is between a form of security which imposes a substantial potential extra cost on TKP and one which does not, that constitutes a good reason for the Court to favour the latter unless there is evidence that it would make it difficult or impossible for Infinity to pursue its claim

if it were required to make a payment into court. But there is no such evidence.

61. It has never been suggested that an order for payment into court would make it impossible for Infinity to pursue the claim, or, as it is commonly said, would "stifle" the claim. That was expressly disavowed by Mr Wigley, who then appeared for Infinity, before the Chief Master: he said that payment into court would obviously cause Infinity to suffer more prejudice than it would do through provision of a deed of indemnity, but added:

> "That is not to say that evidence [has been] put forward in relation to stifling, because it has not. I am not making that submission. There is a distinction to be made. I can still make the submission [that] it will be more onerous for my client to make a payment into court than to secure a deed of indemnity."

62. Mr Sampson confirmed that that remained Infinity's position before us. He submitted that a balancing exercise had to be carried out not only in a case where the provision of security would stifle a claim, but also where it would constitute a major hurdle to the claimant (see *Fernhill* at [52] per Evans LJ, cited at paragraph 43 above), and that it was self-evident that it would be onerous or difficult for Infinity, an insolvent company with no apparent assets other than potential claims, to make or procure a payment into court.

63. I accept that the Court in seeking to make a decision that is just overall should take account not only of the disadvantage to TKP if security is ordered by way of deed of indemnity, but also of the disadvantage to Infinity if it is ordered by way of payment into court. I also accept that it is evident that it would be easier for Infinity to provide the deed of indemnity. If the ATE policy actually required the premium to be paid upfront, then it is not at all obvious that paying £350,000 into court to abide the event would be more onerous than parting with £315,000 (or even £195,000) absolutely. But in common with many other such policies, Infinity's ATE policy does not require payment of the premium upfront. Instead it provides that Infinity only has to pay "the Deposit Premium" within 14 days of issue of the policy, the balance not being paid until 20 working days after a "Positive Outcome" (the recovery of money from the defendant). The Deposit Premium is in fact nil, so the entire premium is deferred. Moreover because of the definition of a "Positive Outcome" payment of the premium is contingent on Infinity succeeding at trial. Or in other words, as it is sometimes said, the premium is itself insured.

64. The practical effect is that Infinity does not have to find any money now, and never will unless it succeeds at trial (or settles favourably before trial). In those circumstances I am not surprised that it would rather provide the deed of indemnity than have to find £350,000 in cash now, and I accept that the latter would be more onerous for it.

65. But apart from submissions to that effect, we have no evidence as to how difficult it would be, or what cost might be involved, or indeed how it would go about doing it. The mere fact that Infinity itself is insolvent tells us nothing about the prospects of the money being raised. Evidence from Mr Khan of TKP before the Chief Master was that Infinity has one secured creditor, a company incorporated in the UAE called African Pearl. African Pearl is said to be owned and managed for the benefit of the family of Mr Thakor, the individual behind Infinity, and to be owed a sum in excess

of £14m by Infinity. It follows that it is almost certainly African Pearl who stands to benefit from success in the claim by Infinity (assuming it benefits anybody other than the administrators themselves), and it is not unreasonable to suppose that if the claim is a good one, it is in the interests of African Pearl (and/or of Mr Thakor and his family) to fund any payment into court. But there is no evidence at all of their willingness or ability to do so.

66. In *Keary* at 540j, when considering the question of stifling, Peter Gibson LJ said that the Court should consider not only whether the plaintiff company could 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 also *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] UKSC 57 at [15]-[18] per Lord Wilson JSC which is to the same effect. Although those statements were made in the context of whether the claimant could continue at all, there is no reason why the same should not apply to the question whether an order for provision of security by payment into court would cause difficulties for the claimant. It is for the claimant to adduce the requisite evidence. In the present case it has not done so.

67. It follows that we have no solid evidence of disadvantage to Infinity in being required to make a payment into court to set against the substantial disadvantage to TKP of security being provided by way of deed of indemnity. In those circumstances security should in my view be provided by requiring Infinity to make a payment into court.

68. I can deal briefly with the reasons advanced by Mr Sampson why the Court should instead uphold the order requiring provision of the deed of indemnity. First, he said that the deed of indemnity would give real and adequate security to TKP. I agree but that is not the issue. Indeed if the deed of indemnity did not provide adequate security, there would be no difficulty as the deed would not be an acceptable method of providing security and payment into court would be ordered without more.

69. Second, he said that requiring Infinity to make a payment into court would impose a burden on Infinity and be more onerous than providing the deed. I have already addressed this.

70. Third, he said that little weight should be given to the size and potential recoverability of the premium as there was no evidence that it was unreasonably high; Infinity's solicitors and brokers believed that it was at a commercial rate; if it were unreasonably high it could be reduced on assessment; and the funding regime permitted its recovery. None of that addresses the point that this is a cost, whatever its size, which is potentially imposed on TKP if security is provided by deed, but not if money is paid into court.

71. Fourth, he said that Infinity was at risk of TKP's costs, which were budgeted at a higher figure than Infinity's own. That is so, but I do not see how it affects the present question.

72. Fifth, he said that the application for security was made late. But that seems to me to

be something that goes more to whether security should be ordered at all than to the form of security. In the present case it was accepted throughout that it was a suitable case for security to be given. Mr Sampson said that requiring Infinity to raise funds at this stage to make a payment into court would be manifestly unjust. But that depends on how difficult it would be for it to do so, which I have already said is something that there is no evidence on.

73. Sixth and finally, he referred to some other points already covered above (the scope of the hearing before the Deputy Master, the statement in *Recovery Partners* that other things being equal security should be ordered in the least onerous way, and the fact that Infinity is a company in administration with no assets). It is unnecessary to say anything more about any of these.

74. None of the points advanced by Mr Sampson in my judgment constitutes a good reason to exercise the discretion by ordering security to be given by way of the deed of indemnity. I would therefore uphold the appeal and direct security to be given by payment into court. I would invite submissions from the parties as to the time within which that should be done.

Lord Justice Birss:

75. I agree.

Lord Justice Moylan:

76. I also agree.