Neutral Citation Number: [2023] EWHC 1263 (Comm)

Case No: CL-2021-000595

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2023

Before:

Peter MacDonald Eggers KC
(sitting as a Deputy Judge of the High Court)

- -

Between:

EXPLOSIVE LEARNING SOLUTIONS LIMITED

Claimant

- and -

LANDMARC SUPPORT SERVICES LIMITED

Defendant

- -

Lloyd Maynard (instructed by **RWK Goodman LLP**) for the **Claimant**
David Lascelles and Blathnaid Breslin (instructed by **Weightmans LLP**) for the **Defendant**

Hearing date: 3rd May 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 26th May 2023.

Peter MacDonald Eggers KC:

Introduction

1. The Defendant applies for security for costs in these proceedings instituted by the Claimant in respect of its claims under a contract between them. The Defendant counterclaims under the same contract. There is a very substantial overlap in respect of the facts underlying each of the claim and counterclaim.

2. The Defendant's application for security for costs is made pursuant to CPR rule 25.12 and CPR rules 25.13(1)(a) and (2)(c).

Facts

3. The Claimant provides independent learning and development services to UK and international businesses, with expertise in delivering services to military forces. The Claimant has been trading for 18 years and is wholly owned by Mr James Convery and Mrs Catherine Convery and has 27 employees. The Claimant has four principal areas of trade: provision of security clearances for companies, leadership, educational and specialist military training courses, consultancy services on matters of specialist military expertise, and end point assessment of certain OfQal approved standards in apprenticeships.

4. The Defendant manages the facilities for the training estate of the UK military.

5. The United Arab Emirates armed forces ("GHQ") wished to implement a Military Qualifications Framework ("MQF") and embed the UAE's National Qualifications Framework into the UAE Armed Forces (together the "Project"). This would allow the UAE's military personnel to obtain civilian qualifications during their regular military careers. GHQ contracted the task of establishing the Project to Rabdan Academy based in Abu Dhabi.

6. On 10th June 2018, Rabdan Academy and Landmarc Gulf (a company in the same group as the Defendant) entered into a contract for the establishment of the MQF Project (the "Prime Contract").

7. On the same day, the Defendant entered into a sub-contract ("the Sub-Contract") with the Claimant (as the sub-consultant). The Sub-Contract was a three-year contract. It provided for quarterly payments to be made to the Claimant for "*Services*" including "*Deliverables*" set out in annexures to the Sub-Contract, which were related to delivery of the Project. The Claimant received an advance payment at the start of the Sub-Contract and, subject to the terms of the Sub-Contract, was thereafter to receive quarterly payments upon submission of invoices.

8. During the Sub-Contract, the Claimant submitted invoices for its work done in September 2018, and January, April, June, September, and December 2019. The Defendant paid the September 2018 invoice in full but has not paid the other invoices in full or at all.

9. The Defendant alleges that, during the Sub-Contract, the Rabdan Academy made several complaints to Landmarc Gulf about the quality of the Deliverables provided

by the Claimant to the Defendant under the Sub-Contract, and that the Academy refused to pay and threatened the imposition of penalties in respect of the same. The Rabdan Academy ultimately instructed the removal of the Claimant as sub-consultant.

10. On 17th December 2019, the Defendant provided one month's Notice of Termination of the Sub-Contract in accordance with its express right to terminate "*without cause at any time*".

11. In this action, commenced in October 2021, the Claimant claims approximately £3.5 million of alleged unpaid fees under the Sub-Contract. The Claimant alleges that it provided the Services under the Sub-Contract and is entitled to be paid in full for the unpaid invoices. The Claimant also contends that it is entitled to a retention of 10% of certain fees upon successful completion of the Project, as it was prevented from completing the Project by the Defendant's termination.

12. The Defendant contends that the sums invoiced are not payable because (i) the Claimant was not entitled to payment unless it duly provided the relevant services, which it did not; (ii) the Claimant was required when submitting invoices to provide signed certificates of completion to confirm that the services had been provided, which it did not; (iii) specific provisions of the Sub-Contract entitled the Defendant to withhold payment and deduct from sums that might otherwise be due to the Claimant; (iv) the Defendant exercised its "Step-In" rights under the Sub-Contract and the Claimant was not entitled to any fees in respect of the Services removed from the scope of the Sub-Contract.

13. The Defendant also brings a counterclaim for £2 million, claiming (i) an indemnity against losses suffered by the Defendant and Landmarc Gulf as a result of the Claimant's deficient services in breach of contract and the Defendant's exercise of its "Step-In" rights under the Sub-Contract, (ii) 10% of the Fees otherwise payable, due to the Claimant's failure to comply with the timeframes specified in the Sub-Contract, and/or (iii) damages for breach of the Sub-Contract.

The Court's jurisdiction to make an order for security for costs

14. The Defendant's application for security for costs is made pursuant to CPR rule 25.12 and CPR rule 25.13(1)(a) and (2)(c). CPR rule 25.13 provides that:

> "*(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 …*
>
> *(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 …*"

15. The Court's jurisdiction on this ground depends on the Defendant establishing that there is reason to believe that the Claimant (a company) will be unable to pay the Defendant's costs if ordered to do so.

16. The parties were not in dispute, at least not substantially, as to the principles underlying this ground of jurisdiction to order security for costs.

17. First, the basis of the jurisdiction being that there is a "*reason to believe*" that the Claimant will be unable to comply with a costs order, if made, signifies that the Defendant does not have to prove that there is a likelihood or probability that the Claimant will be unable to pay (*Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 WLR 751, para. 26-35). That said, the Defendant must establish that there is reason to believe that the Claimant will not be able to pay the ordered costs. Furthermore, there must be justification for the reason for that belief and evidence for that justification. It is not sufficient if there is no more than a doubt that the Claimant is able to pay or if it is established that the Claimant might be unable to pay (*Phaestos Ltd v Ho* [2012] EWHC 662 (TCC), para. 71; *Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 17).

18. Second, the burden of proof rests on the Defendant applicant for security for costs. The Court's inquiry is not to be addressed as to the Claimant's current inability to pay a costs order (unless the costs order is imminent), but an order requiring costs to be made at some future time, often after the trial of the action (*Guest Supplies Intl Limited v South Place Hotel Limited* [2020] EWHC 3307 (QB), para. 65). If, however, the Defendant establishes legitimate concerns about the Claimant's financial position, and if the Claimant provides no evidence to override those concerns, the Court may be justified in concluding that the Claimant will be unable to pay the costs order which might be made. The Court therefore will take into account the totality of the evidence, including the absence of relevant evidence from the Claimant (considering that the Claimant is in most cases in the best position to provide such evidence) and the lack of any adequate explanation for any discrepancies between accounting documents (*Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 17; *Guest Supplies Intl Limited v South Place Hotel Limited* [2020] EWHC 3307 (QB), para. 95). However, the Court will not ordinarily assess the merits of the Claimant's claim in deciding whether to grant security for costs (*Keary Developments Ltd v Tarmac Constructions Ltd* [1995] 3 All ER 534, 540; Commercial Court Guide at Appendix 10, para. 4).

19. Third, if it is established that there is reason to believe that the Claimant will be unable to pay the Defendant's costs, if ordered to do so, the Court may make an order for security for costs only if it is also satisfied that it is just to make an order for security for costs (CPR rule 25.13(1)(a)). However, it has been said that once it is established that there is reason to believe that the Claimant will not be able to comply with a future costs order, it will ordinarily be just to grant security for costs (*World Challenge Expeditions Limited v Zurich Insurance Plc* [2022] EWHC 1365 (Comm), para. 10). This is because the jurisdiction is founded on inability to pay and so such an inability must have been envisaged as entitling a defendant in many cases to an order for security and, further, the interests of justice are generally best served if successful litigants recoup much of their costs and unsuccessful litigants pay those costs (*Keary Developments Ltd v Tarmac Constructions Ltd* [1995] 3 All ER 534, 536, 539-540).

20. Fourth, if the Court is satisfied that it has jurisdiction to grant an order for security for costs, the Court still has a broad discretion to determine whether or not it will make such an order, to be exercised in accordance with the overriding objective. Of course, there may be circumstances where such an order, even if there is reason to believe that the Claimant will not pay a costs order in favour of the Defendant and it is just to order security for costs, will not be appropriate.

21. Where, as in the present case, the Defendant applying for an order for security for costs in respect of its defence of the Claimant's claim is advancing a counterclaim and that counterclaim is based wholly or in a very substantial part on the same facts or substantially the same facts as the Claimant's own claim, additional considerations arise in respect of the application for security for costs. In such cases, what may be described as the default principle is that the Court will not order security for costs against the Claimant. The principle was summarised by Moore-Bick, LJ in *Anglo Irish Asset Finance Plc v Flood* [2011] EWCA Civ 799, at para. 20:

> "*If the claim and counterclaim raise the same issues it may well be a matter of chance which party is the claimant and which a counterclaiming defendant and in such a case it will not usually be just to make an order for security for costs in favour of the defendant, although the court must always have regard to the particular circumstances of the case*."

22. The rationale for this principle is that the sanction for not complying with the security for costs order is that if security were ordered and not provided, the claim might well be dismissed (Commercial Court Guide, Appendix 10, para. 6; *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, para. 19) but the same underlying factual issues would still be litigated in the trial of the counterclaim (*BJ Crabtree (Insulations) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43; *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, para. 18; *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm), para. 67; *Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 29).

23. That said, the fact that there is a claim and counterclaim arising out of the same or substantially the same facts and matters does not, of itself, mean that the defendant must be denied security for costs (*Jones v Environcom Ltd* [2009] EWHC 16 (Comm); [2010] Lloyd's Rep IR 190, para. 17-27). For example, if it is established that the Defendant would not have advanced its counterclaim had the Claimant not instituted proceedings, that well may be a relevant consideration in granting security for costs (*Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWCA Civ 1469, para. 58-60). If, however, both parties - the Claimant and the Defendant - were intending to advance a claim and it was only a matter of chance of who instituted proceedings first, the Court might in those circumstances refuse to order security for costs, or it might order that both parties should provide security for costs, assuming that it had jurisdiction to do so (*The Silver Fir* [1980] 1 Lloyd's Law Reports 371; *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Law Rep 603).

24. Insofar as any unfairness arising from this state of affairs might exist, if such unfairness can be neutralised, that may sweep aside any concerns entertained by the Court in allowing the application for security for costs. Thus, in *Dumrul v Standard*

Chartered Bank [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, Hamblen, J said at para. 19:

> "*If security is not put up the likely outcome is dismissal of the claim. If the Bank wishes to obtain security it should make it clear now what its position would be in that eventuality. If it was prepared to undertake to consent to the dismissal of the counterclaim in the event of the Claimant's claims being dismissed for failure to put up security then the difficulty raised by the Crabtree principle would be avoided. However, unless an undertaking is given to that effect, I do not consider that it would be appropriate to exercise my discretion to order security*."

Inability to pay

25. The factual question to be determined on this application is whether the Defendant has established that there is reason to believe that the Claimant will be unable to comply with a costs order at the conclusion of this action. For this purpose, the parties were agreed that the relevant date of any costs order, which might be made in favour of the Defendant, ought to be January 2025.

26. Mr David Lascelles, who appeared on behalf of the Defendant with Ms Blathnaid Breslin, submitted that there was reason to believe that the Claimant would be unable to meet a costs award in favour of the Defendant at the end of the trial.

    (1) The Claimant accepted that the Claimant "*has recently experienced financial difficulty*" (the first witness statement of Mr James Convery, para. 53).

    (2) Whether the Claimant will be able to comply with such a costs order turns primarily on projections as to the Claimant's future financial performance, based on credible evidence to that effect.

    (3) The evidence of Mr Mark Fairhurst FCA MAE, an independent forensic accounting consultant, adduced by the Defendant, is that it is "*highly unlikely*" that the Claimant will be in a position to meet an order for costs made in favour of the Defendant:

        (a) The financial information indicates that as at 30th September 2022 the Claimant had net assets of £1.96 million and cash reserves of £506,000. However, of the net assets, £1.43 million represented a debt owed by the Defendant. If the Defendant succeeds in defending the Claimant's claim against it, the net assets would be reduced by £1.15 million (after corporation tax relief) (Mr Fairhurst's report, para. 2.3-2.4). Of the balance of £810,000, £312,000 related to fixed assets.

        (b) The Claimant's net assets and its projections take no account of the Defendant's counterclaim of £1.97 million. If that counterclaim succeeds, the Claimant would have a net deficit of between £1.21 million and £1.92 million. On either scenario, the Claimant would be heavily insolvent.

(c) Mr Fairhurst's best estimate is that the Claimant's future trading and its financial position as at January 2025 would result in cash of between negative £251,000 and positive £454,000 and shareholder funds of between £1.20 million and £1.91 million. These estimates are based on the assumption that the Claimant's continuity of turnover and profits are consistent with those indicated in the management accounts for the six months trading to 30th September 2022 or the assumption of continuity of turnover and profits consistent with those for the 12 months trading to 31st March 2022.

(d) The Claimant relies on a forecast prepared by Mr Brian Coombs, a consultant to the Claimant. If the forecast provided by Mr Coombs were otherwise accepted as establishing net assets of £2.49 million as at 31st March 2024, if the Claimant lost the claim and the counterclaim then it would have a net deficit of £630,000. In such a scenario it would also therefore be heavily insolvent.

(4) The underlying financial information available does not support the Claimant's financial forecasts:

(a) The evidence relied upon by the Claimant comprises: (a) a Dun & Bradstreet credit report; (b) assertions as to current and potential contracts; (c) an alleged "*cash flow*" forecast to 31st March 2024 provided by Mr Convery in December 2022 which purports to show that the Claimant will have estimated cash of £1.87 million in March 2024; (d) a brief summary provided by Mr Coombs in December 2022 of the Claimant's alleged projected profit and loss account and balance sheet as at 31st March 2023 and 31st March 2024; (e) assertions in the second witness statement of Mr Convery that Mr Coombs' forecast to 31st March 2024 was wrong in that it significantly understated turnover, profits and net assets.

(b) The Dun & Bradstreet report shows that the maximum credit they would recommend extending to the Claimant is £112,500. Dun & Bradstreet plainly will not have accounted for this litigation.

(c) Aside from its accounts, the Claimant has provided no underlying evidence in support of its current and potential contracts and their value. It has merely asserted the alleged position.

(d) The cash flow forecast identifies only claimed anticipated cash receipts and makes no reference to outgoings. It cannot be relied upon to show the Claimant's end cash position.

(e) The forecast provided by Mr Coombs provides only summary figures. There are no accompanying workings or supporting schedules which explain or justify the summary figures or explain the assumptions applied. There is no proper explanation of, or reconciliation to, financial and other information upon which the forecasts are based. Not only is it impossible to reconcile the figures to Mr Convery's pipeline of work or his cash flow projections, but there are "*stark*" and

"*significant*" inconsistencies between the respective figures (Mr Fairhurst's report, at para. 2.16-2.17 and 2.21). It is notable that, according to its most recent accounts to 31st March 2023, the Claimant has recorded materially lower turnover, profits and net assets than Mr Coombs had projected back in December 2022.

(f) Mr Coombs's forecast takes no account of the Claimant's own budgeted legal expenditure and the prospect of the Claimant being unsuccessful in the current action on the Claimant's financial position.

(5) Mr Convery on behalf of the Claimant claims to project turnover of £3.5 million, profit before tax of £664,000 (19% margin) and net working capital of £2.21 million for the period to 31st March 2024, each of which are a material increase over Mr Coombs' estimates. These projections are to be contrasted with the Claimant's most recent actual performance of turnover of £2.38 million, profit before tax of £367,000 (a 12.6% margin) and net assets of £1.98 million for the period to 31st March 2023. Furthermore, Mr Convery's projections are provided without any details of how they are calculated and do not explain why they differ from Mr Coombs's estimate. These projections do not extend to the period from 31st March 2024 to January 2025 and do not take account of the prospect of the Claimant being unsuccessful in the current action on the Claimant's financial position.

27. Mr Lloyd Maynard, who appeared on behalf of the Claimant, submitted that the Defendant's evidence fails to overcome the burden of showing there is a reason to believe that the Claimant **will be unable** to pay the Defendant's costs if ordered to do so. At its highest, the Defendant's evidence demonstrates that there is reason to believe C **may be unable** to pay its costs:

(1) As at 31st March 2023, the Claimant's turnover was £2,379,270 and an operating profit of £365,894 (Mr Convery's second witness statement, para. 12). Mr Convery outlined the Claimant's future revenue by reference to existing and future contracts (Mr Convery's second witness statement, para. 13).

(2) The Defendant's case is based upon two core propositions. First, the Claimant does not presently have sufficient funds to make an interim payment towards the Defendant's costs of approximately £1.13 million in January 2025. Second, the Claimant will not generate sufficient funds to make that payment between now and January 2025.

(3) In response to the first of these propositions, the Claimant accepts that it does not currently have £1.13 million of cash (it has £600,000 in a dedicated account, built up from £385,000 in December 2022). However, lack of funds at the time of the application is not reason, of itself, to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so in the future.

(4) In response to the second proposition, both the Claimant and Mr Fairhurst, the Defendant's expert, agree that the Claimant's ability to pay the Defendant's

costs if ordered to do so will depend in large part upon the Claimant's trading, revenue and profit between 30th September 2022 and January 2025.

(5) The question is who is best placed to predict the future of the Claimant's revenue: is it Mr Convery, the director/shareholder who has run the business for more than 15 years, or is it Mr Fairhurst, who has no relevant professional experience to offer concerning the Claimant's revenue streams, and no detailed knowledge of the Claimant's attempts to win business?

(6) Mr Coombs has forecast sales to be £2,440,000 generating a profit after tax of £327,000 and an increase in net working capital from £1,655,000 at the end of September 2022 to £1,747,000.

(7) All that Mr Fairhurst can do is extrapolate from the Claimant's trading past and he fails to give any credit for maintaining its revenue through the COVID19 pandemic in 2020-2021, which is akin to an increase in revenue, given that the Claimant was severely hampered by its inability to deliver training courses and consultancy services on a face-to-face basis for that period.

(8) Mr Fairhurst appears to simply write-off the Claimant's improved six-month performance to 30th September 2022 as a temporary aberration.

(9) By contrast, Mr Convery offers an informed view that the Claimant's revenue can be expected to grow and dramatically so in the coming years. The big driver of new revenue has been the Claimant's new work stream in End Point Assessments, which accounted for only £6,520 of revenue in the year to 31st March 2022 and £65,676 in the year to 31st March 2023.

(10) Between January and April 2023, the Claimant has won and started to deliver on contracts of £1.126 million in value and is currently bidding on further high-value EPA work from the UK Ministry of Defence. The Claimant's consultancy work is also over-performing against forecasts in Mr Convery's first witness statement. The Claimant's consultancy work on Project D was approximately £196,000 in its cashflow forecast and it has proven to be worth £385,000. The Claimant's work with KPMG's Learning 2020 programme was forecast at £60,000 in the year to 30th March 2024 and it has already proven to be worth £227,000. The Claimant is in negotiations for a new contract valued at approximately £220,000 that was not included in its forecasts at all.

(11) Mr Fairhurst applied aggressive deductions for "*unprovided legal costs*", but the Claimant and its shareholder-directors are responsible owners of the Claimant. They are not obliged to simply spend the amounts in the costs budget if they do not have the funds to do so. Such expense can be mitigated by compromises with the Defendant on issues that reduce the scope of dispute or adjustments to its legal team to reduce costs. A costs budget sets a limit, not a compelled target.

28. In my judgment, there is reason to believe that the Claimant, being a company, will be unable to pay the Defendant's costs if ordered to do so for the reasons submitted on

behalf of the Defendant. In particular, the following reasons are, to my mind, significant.

29. First, as acknowledged by the Claimant, it currently has cash reserves of no more than £600,000. In circumstances where the application for security for costs is in an amount of more than £1 million, the Claimant will be unable to draw on its cash reserves to comply with an order for costs in favour of the Defendant, unless it could be established that its financial position will substantially improve by January 2025.

30. Second, the Claimant's accounts as at 30th September 2022 reveal that it has net assets of £1.96 million, but a very substantial proportion of such net assets is the amount allegedly owed by the Defendant to the Claimant. If the Defendant succeeds in its defence of the Claimant's claim, that debt said to be owing to the Claimant would no longer count as an asset. This would result in a reduction of the Claimant's net assets - after allowance of corporation tax relief - to £810,000, of which £312,000 represent fixed assets. Accordingly, unless the Claimant's asset position would improve by January 2025 - when an order for costs might be made at the conclusion of the action - there is reason to believe that the Claimant could not meet a costs order made in favour of the Defendant, certainly in an amount of more than £800,000 and perhaps in an amount of more than £500,000.

31. Third, the Claimant's position is exacerbated if account is taken of the Defendant's counterclaim in the sum of £1.97 million. If account is taken of this counterclaim, on the assumption that it may well be allowed if the Claimant fails in its claims, the Claimant's inability to pay a costs order would be further considerably reduced.

32. Fourth, there is no compelling evidence that the Claimant's financial position will substantially improve between 30th September 2022 and January 2025. The Claimant relies on a forecast prepared by Mr Coombs, but there is little information which I could rely on to verify that forecast. The "*cash flow*" summary provided by Mr Convery is not a cash flow in substance at all in that it omits any actual or projected outgoings. The future revenue anticipated or estimated by Mr Convery is not adequately explained or justified. Further, these projections do not extend to the period from 31st March 2024 to January 2025.

33. I should add that, although I have concluded that there is reason to believe that the Claimant will be unable to pay a costs order in favour of the Defendant made in January 2025, I have not concluded that it is likely or probable that the Claimant would be unable to comply with such a costs order. There is, in my judgment, reason to believe that the Claimant would not be able to comply with such an order, because I considered the analysis of the financial position by Mr Fairhurst to be sure-footed and persuasive and because, although I took account of Mr Convery's statement as to future revenue with respect to existing and anticipated contracts, the information and detail underlying such statements of financial performance were insufficient to counter Mr Fairhurst's analysis.

34. I have also considered the submission that the Claimant has continued to operate its business successfully even during the challenges provided by the COVID-19 pandemic. That does speak to the viability of the Claimant's business, but regrettably it provides insufficient evidence on its own as to whether the Claimant will be in a position to satisfy a costs order in January 2025.

Is it just to make an order for security for costs?

35. Mr David Lascelles on behalf of the Defendant submitted that it would clearly be just to make an order securing the Defendant's costs of defending the Claimant's claim for the following reasons.

    (1) Without such security, the Defendant has no proper protection in respect of the substantial costs which it is incurring in this action; even if it wins it will likely be very substantially out of pocket.

    (2) Without such security, the Claimant will be relieved of the usual burden of bringing commercial litigation.

    (3) The Claimant argues that it would be unfair to order security because the Defendant is "*a much larger financial entity*" and is using the security for costs application to "*oppress*" the Claimant (see Mr Convery's first witness statement, para. 8 and 62). This submission is flawed, because (a) the Claimant does not provide any evidence that its claim would be stifled; (b) the fact that the Defendant is more financially secure does not undermine the reasons for making an order; (c) the Defendant should not be put to the cost of litigation when there is reason to believe that the Claimant will be unable to pay the Defendant's costs if the claim fails: otherwise the claim "*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*" (*Keary Developments Ltd v Tarmac Constructions Ltd* [1995] 3 All ER 534, 540).

    (4) The Claimant takes issue with the security for costs application being issued in the run up to the case management conference when there were substantial other tasks at hand. However, the application was made three weeks before the original listing of the case management conference back in November 2022. Further, it was the Claimant that failed to engage with the Defendant's pre-application correspondence for almost 4 months after the Defendant first requested security. The Claimant's own evidence is that it has been preparing to have to meet a security for costs award since December 2020 (Mr Convery's first witness statement, para. 60).

    (5) The Claimant refers to the factual overlap between the Defendant's defence and counterclaim, but the Defendant has offered a *Dumrul* undertaking (para. 72 of the fourth witness statement of Mr Andrew Roberts of Weightmans LLP on behalf of the Defendant). The Claimant appears to argue that the majority of the costs of these proceedings will be incurred in respect of the Defendant's counterclaim, not the defence, and that the Defendant should therefore only be awarded security in respect of one third of its costs. However, this overlooks the fact that the Claimant's sub-standard performance is central to the Defendant's defence. The fact that there is overlap between the Defendant's defence and counterclaim does not prevent the Defendant from being secured in respect of those common costs.

    (6) The Defendant accepts that email accounts were automatically deleted by Microsoft following the departure of certain employees. This was unintended

and affected one of the four custodians proposed by the Defendant (Ms Angelika Hamilton, its Quality and Business Support Manager). A significant volume of Ms Hamilton's emails and her other documents will still be available in any event, as explained by Mr Roberts in his fourth witness statement, para. 53.2.3.

36. Mr Maynard on behalf of the Claimant submitted that to provide the Defendant with security for its costs would be to provide the Defendant with the comfort of security for its own costs of its claim that it is voluntarily pursuing.

(1) The Defendant's counterclaim is inseparable from its defence and seeks debt and/or damages of £1.97 million. In the circumstances, it would be unjust for the Court to order the Claimant to secure the Defendant's costs (*BJ Crabtree (Insulations) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43). In *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, Hamblen J summarised the *Crabtree* principle as follows (at para. 5, 22): "*As a general rule, the Court will not exercise its discretion under CPR Part 25 to make an order for security of the costs of a claim if the same issues arise on the claim and counterclaim and the costs incurred in defending that claim would also be incurred in prosecuting the counterclaim* …" (*Anglo Irish Asset Finance Plc v Flood* [2011] EWCA Civ 799, para. 20).

(2) The *Crabtree* principle is not an invariable rule. If, on a proper evaluation of the statements of case, the defence to the claim and the counterclaim raise the same issues, that is likely to be a very significant, and in many cases probably a determinative, factor in determining whether a security for costs order would be just (*Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 29). The position here is directly analogous with that in *Plymouth (Notte Street) Ltd v Mears Ltd* [2019] EWHC 2185 (TCC), para. 30, 35. The Claimant has issued invoices to the Defendant which remain unpaid; the Claimant's claim generates no complex issue of fact, and only one minor point of construction, relating to whether the Claimant is entitled to a 10% contractual retention. It is impossible to separate out the Defendant's defence costs from its counterclaim costs and the Defendant has made no attempt to do so. The entirety of the Defendant's costs is equally, if not preferably, to be regarded as deployed to earn its reward in its counterclaim.

(3) At a time when it clearly contemplated litigation with the Claimant, the Defendant allowed the email account of Ms Angelika Hamilton, its Quality and Business Support Manager, to be destroyed. Ms Hamilton was the key cog in the iterative feedback cycle for deliverables. There would likely have been many emails she sent to and received from Rabdan Academy and other stakeholders relevant to the quality of the Claimant's deliverables. The Claimant would not have been a party to any of those emails. A trial judge can have regard to the failure to preserve documents when considering evidence (*Provimi France SAA v Stour Bay Company Ltd* [2022] EWHC 218 (Comm), para. 33-34). The Court should take into account the Defendant's failure to preserve key evidence when considering whether it would be just to grant the security for costs application.

(4) The Sub-Contract was a large and important contract for the Claimant. The sums the Claimant received under the Sub-Contract amounted to 53.9% of its total sales for the financial years ending 31st March 2019 and 31st March 2020. The Sub-Contract was highly profitable. The Claimant has an arguable claim that it is owed approximately £3.4 million of unpaid fees. The lack of receipt of those funds has negatively impacted upon the Claimant's present financial position. Any inability to pay on the part of the Claimant is the result of the Defendant's own conduct.

(5) The impact of the Defendant's conduct is especially severe given that the Claimant is a small business, relies upon winning multiple short-term contracts to generate revenue, and deployed resources alongside the Defendant over a four-year period in an attempt to land the Sub-Contract and the Prime Contract, for very modest pay in return.

37. Once it is established, as it is in this case, that there is reason to believe that the Claimant will be unable to comply with a costs order made in favour of the Defendant, it is ordinarily just to order security for costs. This is because the Defendant would otherwise be required to defend the proceedings and incur substantial costs in doing so without any assurance that it will be able to recover its reasonable costs from the Claimant should the claim not succeed.

38. I have considered the Claimant's submission that an order for security for costs would be oppressive. There is no doubt that the dispute between the Claimant and the Defendant may be a substantial factor which has resulted in the Claimant's inability to pay any costs order, but that is a common factor attending litigation such as this. I do not see that that consideration on its own is critically relevant to the question whether it is just to make the order for security for costs. I do not understand that the Claimant argued that an order for security for costs would stifle the claim; there was no evidence of an inability to raise funds for the purposes of providing security from other sources to justify such an argument.

39. The substantial factor militating against such an order is the fact that the Defendant has its own counterclaim against the Claimant based on facts which substantially overlap with the facts on which the Claimant relies in support of its claim against the Defendant. I am not convinced that the Defendant would have pursued its counterclaim had the Claimant not instituted these proceedings, given that in December 2019 the Defendant issued a notice to terminate the Sub-Contract and the Claimant instituted the current action in October 2021 and it was only in response to the claim that the Defendant advanced its counterclaim. That said, I have not reviewed the entirety of the pre-action correspondence and so I am unable to reach any conclusions in this regard.

40. In any case, the Defendant has given an undertaking that, in the event of the dismissal of the Claimant's claims as a result of it failing to provide security for costs in accordance with an order to that effect, the Defendant will consent to the stay or the dismissal of the counterclaim. With the benefit of the undertaking, any reservation I had about concluding that it was just to order security for costs is assuaged.

The Court's discretion

41. The Claimant submitted that the Court should not in any event exercise its discretion in granting security for costs because the Claimant is a highly principled business committed to paying any adverse costs that may be awarded against it and the Claimant has begun to ring-fence some of its profits as a reserve fund to meet any costs order, with a current balance of approximately £600,000 (Mr Convery's first witness statement, para. 59-60; Mr Convery's second witness statement, para. 17). Further, on 26th April 2023, the Claimant offered to post security in the sum of £449,000.

42. Having concluded that there is reason to believe that the Claimant will be unable to comply with any costs order made in favour of the Defendant and that it is just to make such an order, I am not convinced that the building up of a strategic reserve to meet such a costs order and an offer to provide security, in sums which are unlikely to meet the full extent of a costs order are sufficient reasons to deny the Defendant security. In this respect, I have in mind that the interests of justice would ordinarily require a successful defendant being able to recover the costs incurred in defending a claim brought by a Claimant especially where there is reason to believe that the Claimant will be unable to meet such a costs order.

Conclusion

43. For the reasons explained above, in my judgment, the Defendant is entitled to an order for security for costs.

44. I will decide upon the form and amount of such security upon receiving further submissions from counsel.