IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Case No. HQ15X05379

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 19 February 2019

Before:

MR JUSTICE WARBY

B E T W E E N :

JAMES STUNT — Claimant/Respondent

- and -

ASSOCIATED NEWSPAPERS LIMITED — Defendant/Applicant

MR T. HIGGINSON (instructed by Carters Solicitors) appeared on behalf of the Claimant/Respondent.

MR A. WHITE QC and MR B. SILVERSTONE (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendant/Applicant.

J U D G M E N T

MR JUSTICE WARBY:

1 The defendant applies for an order pursuant to CPR 25.12 and 25.13 that the claimant should provide security for the defendant's costs of the claim. The sum sought is £700,000.

The claim in summary

2 It was over three years ago, in January 2016, that the claimant, ("Mr Stunt"), began this claim against the defendant newspaper publisher ("Associated" or "the defendant"), seeking damages and injunctions in respect of what is alleged to have been misuse of private information, breaches of duty under the Data Protection Act 1998 (DPA) and harassment contrary to the Protection from Harassment Act 1997. Mr Stunt is a well-known businessman with a high public profile, not least because of his status as the ex-husband of Petra Ecclestone, daughter of the former Formula One leader, Bernie Ecclestone. The claim relates to the defendant's conduct in investigating stories about the claimant, some of them published and others unpublished, and to the contents of fifty-two published stories.

3 The claim has not progressed swiftly. A defence was not filed until October 2017 and a Reply in January 2018. The case has yet to come before the Court for a Costs and Case Management hearing. Its progress has been slowed down considerably whilst the parties litigated a point of law, namely whether the court was obliged to stay the data protection claim because it is brought in respect of data processing undertaken only for the purposes of journalism, with a view to the publication of information about the claimant which the defendant has not previously published. That was the contention of the defendant, relying on s 32(4) of the DPA. Its application for a stay was upheld by Popplewell J, rejecting the claimant's argument that such an interpretation was incompatible with the Directive and the Charter: [2017] EWHC 695 (QB) [2017] 1 WLR 3985. Mr Stunt appealed. The Court of

Appeal concluded, by a majority, that s 32(4) could and should receive a narrower interpretation which the majority considered compatible with the Convention and Charter. But one member dissented and so the question of compatibility has been referred to the CJEU for a preliminary ruling: [2018] EWCA Civ 1780 [2018] 1 WLR 6060. The reference was made on 10 October 2018 and the matter is currently pending before the CJEU. In the meantime, the DPA claim – but not the rest of the case – is stayed.

4 The present application was filed on 23 November 2018, supported at that time by a witness statement of Nicola Cain (her second), a solicitor representing Associated. Her witness statement was also dated 23 November. In reply, Mr Stunt made a witness statement dated 9 January 2019. A further witness statement from Ms Cain, her third, was made last Thursday and served that day, or the following day, at most two clear days before the hearing. A statement in response (Mr Stunt's second) was served last night and first seen by me this morning. This is all rather unsatisfactory because in order for matters to proceed smoothly evidence should be filed in good time before a hearing, failure to do so making preparation far harder, but nobody has sought an adjournment, so I have proceeded with the hearing of the application.

Principles

5 CPR 25.12 is the provision under which security for costs may be ordered. Rule 25.13 sets out the conditions and it reads as follows:

> "(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 –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;

(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;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

(Rule 3.4 allows the court to strike out a statement of case and Part 24 for it to give summary judgment)."

6 When filed, the application notice relied on r 25.13(2)(d). As presented to me, however, the application relies only on sub-rules (e) and (g). I have given the wording of the entire rule in order to provide the context.

7 As is obvious from the structure of the rule, the court's approach in such a case must be in two stages. The first question is whether one or more of the conditions in para (2) applies. If not, the Court has no power to make an order. If at least one condition is satisfied, the court has a discretion to make an order. It has been held that para 2 "should generally be given a broader rather than a narrower instruction", see *Aoun v Bahri* [2002] 2 All ER 182 [18] (Moore-Bick J). Often, the main focus will be very much on whether an order would be just in all the circumstances. A decision on that issue calls for a balancing of the injustice to the claimant if an order were made against the injustice to the defendant if one were refused: see *Spy Academy Limited v Sakar International Plc* [2009] EWCA Civ 985 [14], where the court identified factors that might be relevant in striking this balance.

A preliminary point

8 Mr Higginson raises a preliminary point, observing that in June 2018 Associated made an application for security for its costs of Mr Stunt's appeal, which he says was based upon "similar and, in parts, identical grounds". It is suggested that the present application may represent an abuse of the court's process or that, at least, it should not be entertained in accordance with the well-known principle exemplified by *Chanel v FW Woolworth & Co.* [1981] 1 WLR 695.

9 Mr Higginson relies also on what was said by Nugee J in *Holyoake v Candy* [2016] EWHC 3065 (Ch), when an application for security was made after a previous application had been dropped. It was argued that this amounted to an abuse of process. The judge proceeded to hear and to grant the application for security, having concluded that it was not on the facts an abuse of process because, in short, it relied on material that had not been available at the time of the original application. The position here is similar when it comes to the evidence in relation to dealings with assets that is relied on in relation to sub-rule (g). In any event, the present case, it seems to me, is clearly to be distinguished from *Holyoake* on the basis that the application for security was different in form and was drawn in quite different circumstances from those that pertained in the present case.

10 The application which Associated made to the Court of Appeal was for security for the costs of the appeal. It was based solely on points about the claimant's address and not based on any allegations about dealings with assets. True it is that some of the evidence relating to that application was in very similar terms to some of the evidence before me today, but that is not, in itself, evidence which establishes an abuse of process. Moreover, the circumstances in which that application was dropped do not, in my judgment, indicate that the present application is in any way an abuse.

11 The test for abuse in this context cannot be any more limited or restrictive than the test contained in *Johnson v Gore Wood & Co.* [2000] UKHL 65 for the re-litigation of substantive issues. The test established in that case was that the court should form a "broad merits-based judgment", taking account of all the private and public interests at stake. Here, my judgment is that the present application is not an abuse, nor one that I should for any other reason refuse to entertain or dismiss because of the previous application which was not pursued.

12 That application was prompted by the disappearance, or *quasi*-disappearance, from the scene of the claimant's then solicitors, Lee & Thompson, shortly before the appeal was due for hearing. The application was dropped when new solicitors, Benson Ingram Law LLP, gave notice of acting in relation to the appeal. All of this happened very much in the run-up to the hearing, and, upon being asked by the Court of Appeal whether it wished to press on with the application, Associated gave notice that it did not. It wrote to the Court on 15 June in the following terms:

> "Our client was and remains of the view that its application is justified and has been necessitated by the appellant's conduct in this matter. Nevertheless, our client does not consider it would be a proportionate use of the court's time, nor that of the parties, for paragraph 1(c) of its application seeking security for the costs of the appeal to be pursued, provided that it is not to be the subject of any adverse costs order as a consequence."

That, in the context of a procedural muddle, not of the defendant's making, in the immediate run-up to a substantial appeal is, in my judgment, an acceptable explanation. It is not an agreement or an acknowledgement, expressed or implied, that the application should not have succeeded on its merits. I turn, therefore, to the substance of the application.

Threshold requirements

13 It will be convenient to start by addressing separately the two threshold requirements relied on by the defendant, starting with sub-rule (e).

Rule 25.12(2)(e)

14 CPR 16.2 provides for the matters that must be set out in a claim form. They include:

> "… such other matters as may be set out in a practice direction."

See r.16.2(1)(d). Practice Direction 16, para.2.2, provides:

> "The claim form must include an address at which the claimant resides or carries on business. This paragraph applies even though the claimant's address for service is the business address of his solicitor."

15 When the claim form in this case was issued it said this:

> "Claimant(s) name(s) and address(es) including postcode:
> James Arthur Stunt,
> c/o Olswang LLP,
> 90 High Holborn,
> London WC1V 6XX."

That is the office address of Mr Stunt's then solicitors. The claim form, therefore, did not contain any residential or business address for Mr Stunt himself. It contained no residential address at all. Associated maintains that this involves two separate breaches of Part 16 and its Practice Direction, namely a failure to give "his address" and for provision of "an incorrect address".

16 Mr Higginson, on behalf of Mr Stunt, submits that the rule is not satisfied because Associated and its lawyers have known perfectly well throughout where the claimant lives and where he carries on business. They have written to him at those addresses. His home or business address cannot, in any case, have been a relevant factor for the vast majority of the litigation as for that vast majority Mr Stunt has had lawyers on the record who could be served and could deal with matters accordingly. Mr Higginson, in his written argument, pointed to the heading of the relevant paragraph in the notes to the rule, which refers to "withholding the correct address". The submission is that it is absurd to suggest that that is what has happened here.

17 That is a semantic argument, which I do not accept. The notes cannot govern the meaning of the rule, which is clear in its terms. I am not at all sure that it is fair to say that the defendant's lawyers have known the right addresses throughout given the state of the evidence about what the residential address was. In any event, the requirement of the rule is not that the opponent's lawyers should know the right addresses but that they should be stated in the claim form. On a proper analysis, I believe that Mr Higginson's real argument is not that the rule was complied with but rather that there has been nothing but a technical breach, of which Associated is making far too much of a meal. I shall have to consider that issue when it comes to discretion, but the fact remains – and in reality it is undeniable – that when it was issued the claim form did not include any residential or business address of Mr Stunt. That is a contravention of Part 16 and its Practice Direction.

18 In the circumstances, I am not sure that it matters whether the inclusion of Olswang's address represented an "incorrect address" for the purposes of sub-rule (e), but I am inclined to think that it did. The address given was explicitly given as "the claimant's … address", which it was not.

19 In *Aoun v Bahri* Moore-Bick J thought that the relevant time for the purposes of this rule is the time of issue of the claim form. On that analysis, there was a breach at the time of issue and, since the claim form was not until January of this year amended to incorporate any residential or business address of Mr Stunt, there has been a continuing breach for a period of years.

Rule 25.13(2)(g): steps in relation to assets

20 I turn to sub-rule (g). It is common ground that the applicant must show two things if this provision is to be relied on: (i) that the claimant has taken steps in relation to his assets; and (ii) that those steps would make it difficult to enforce an order for costs against him.

21 It is to be observed that this is not a provision which, on its face, is concerned with proof of risk. The applicant is required to satisfy the court that steps have, in fact, been taken and that those steps would (not might) make it difficult to enforce a costs order. The authorities make clear that that is an objective test. They also make clear that the second requirement is concerned with the effect of steps taken by a claimant in relation to his assets and not dependent on motive: see *Aoun* at [25]-[26] and *Harris v Wallis* [2006] EWHC 630 (Ch) [22].

The case for Associated

22 The case for Associated is that Mr Stunt has taken a series of steps, each of which would tend to make it difficult to enforce an order for costs against him. Alternatively, some of them are such steps, and all of them should be considered in the context of discretion. Six

matters loom particularly large in the argument and evidence for Associated. The first four appear to relate, or to relate primarily, to Mr Stunt's personal finances.

(1) The first, which was the only matter relied on at the time of Ms Cain's second witness statement of 23 November 2018, is this: On 28 and 29 August 2018 the Crown Prosecution Service sought, and HHJ Munro QC, sitting at the Central Criminal Court, granted an asset freezing order against Mr Stunt, who was described in the order as "the Alleged Offender", and a number of others, including his main company, Stunt & Company Limited, and another company named Copperbeech. The order prohibited Mr Stunt and others, until further order, from removing any of certain assets, including all of Mr Stunt's assets, from the jurisdiction and from disposing of, dealing with or diminishing the value of his assets here or elsewhere with certain specified exceptions.

(2) Secondly, on 18 September 2018 a legal firm called Laurus Law Limited brought bankruptcy proceedings against Mr Stunt following his failure to satisfied a default judgment for some £247,210, which the lawyers had obtained on 18 July 2018, and therefore before the Restraint Order, in respect of work said to have been done for him in family law matters.

(3) Thirdly, on 5 October 2018 Mr Stunt was sued in the Commercial Court by CMC Spreadbet Plc, which was seeking to recover an alleged debt of just over £1 million. The particulars of claim in that action are in evidence before me. They include assertions about events in the period running up to 5 October 2018. The pleaded case for CMC is that on a number of occasions Mr Stunt and/or a Mr Tulloch had stated that the monies due and owing would be paid but they remained outstanding. There were said to have been communications from Mr Tulloch in March and May and July 2018, in the course of which Mr Tulloch repeatedly promised that the debt would shortly be repaid. He had

referred to assets which Mr Stunt was "liquidating" and others against which he was securing loans. He gave an example, in an email dated 11 May 2018, in these terms:

> "Loan secured against Dumfries House art portfolio (c70m secured against c. £225m portfolio) ...".

There were references also to the expected liquidation of a £650,000 wine portfolio expected in early July, and to the realisation of capital from JS LA Art, a sum of £359 million was mentioned and it was said that sales in excess of £2 million had been already achieved with funds "to hit in June".

(4) Fourthly, Associated rely on a series of changes of solicitor, which Mr White describes as "unconventional", in the course of which at least one firm had made clear in terms that it was not in funds and had then come off the record. Besides Olswang, Mr Stunt has been represented by Lee & Thompson, who came off the record shortly before the hearing of Mr Stunt's appeal, as I have mentioned. And then by Benson Ingram Law LLP, also mentioned above, who came on the record from 19 June until about 3 October 2018. It was at that latter point that they indicated that they were not in funds. Since then Carters Solicitors have been on the record and remain on the record in relation to these first instance proceedings, but there is no firm on the record in the Court of Appeal where matters remain stayed in respect of the Data Protection Act claim.

Then there are some Corporate matters.

(5) On 15 November 2018 winding up proceedings were started against Stunt & Co. in respect of a rental obligation of some £20,000. That seems since to have been paid but a

company previously owned by Bernie Ecclestone has asked to be substituted as the petitioning creditor, alleging a debt of £89,000.

(6) Sixthly, Associated point to the creation of charges over property owned by Copperbeech in favour of two bridging loan companies. Four charges are said to have been registered against 1A South Eaton Place, which the claimant's evidence states to be his residential address. The charges were in favour of Aura Finance Limited and West One Loan Limited. Four charges have also been registered against another property, at 61 Eaton Mews West, London SW1, in favour of Aura.

23 In the light of Mr Stunt's most recent statement, Mr White adds a further matter to the list, relying on Mr Stunt's evidence that Stunt & Co. is not currently trading. That, Mr White submits, is a step taken by Mr Stunt in relation to assets which makes it harder to enforce an order for costs.

24 The asset Freezing Order, which is in evidence, appears to be a restraint order made pursuant to s 41 of the Proceeds of Crime Act 2002. I do not have any of the evidence that was placed before HHJ Munro in support of the application. But reviewing the evidence that I do have, including the statements of Mr Stunt, it would appear that the likely basis for this order is the condition specified in s 40(2) of the POCA, namely that a criminal investigation has been started with regard to an offence and there are reasonable grounds to suspect that the alleged offender (in this case Mr Stunt) has benefited from his criminal conduct.

25 I should add something about the claim by CMC Spreadbet. The claim in the Commercial Court was issued sometime after the Restraint Order was imposed and at that time, on the face of the Restraint Order, Mr Stunt could not have paid the alleged debt without breaching

the Order. Similar observations may apply to some of the other matters. But the allegations made in support of the claim, to which I have already referred, indicated previous failures to pay which could not be explained or excused on that basis.

26 The overarching submission of Mr White, based on the strands of evidence that I have summarised, is that these steps – as he describes them – individually and cumulatively evince an intention on the part of Mr Stunt to avoid paying his debts as they fall due with what is called "a pattern of ongoing disposal and encumbrance of his assets and insolvency and restraint order proceedings".

The case for Mr Stunt

27 Often, a claimant responds to an application for security for costs by complaining that if granted the order would stifle a genuine claim because the claimant is unable to meet the order for security. That, however, is not a ground of opposition relied on here. On the contrary, in his first witness statement Mr Stunt states as follows:

> "I do not wish in any way to brag, but I am considerably wealthy … Suffice to say for present purposes that I am and will remain well able to satisfy any adverse order for costs made against me in these proceedings at any stage."

28 It is fair to say, and Mr White has candidly acknowledged, that the evidence in this respect is not entirely satisfactory because that statement, which appears at para 11 of the first statement, is properly to be read in the context of an earlier passage, which refers to and deals with the Restraint Order. In para 9 of his first statement Mr Stunt says this:

> "I have been completely strangled by the effects of the restraint order. I have barely been able to run my normal life. I have certainly not been able to run my business affairs."

29 Nonetheless, Mr Stunt contends that the true position is this: all his lawyers have been paid and there is nothing now outstanding; and the other measures relied on that have been taken against him are being, or may be, challenged. There does not appear to be any fundamental dispute about the accuracy of the defendant's evidence of fact about those matters, so far as that evidence goes. But Mr Stunt responds, for instance, that the costs claim by the former solicitors is fundamentally disputed; and I have been told today, in the course of submissions by Mr Higginson, that an application has now been made and heard to set aside the default judgment, with a reserved judgment on that application currently awaited. There are apparently also proceedings pending to challenge, under s 70 of the Solicitors Act, the bills.

30 As to the Restraint Order, the unchallenged evidence is that the restraint order remains in place. Mr Stunt does say that his lawyers are preparing to challenge it. That said, the order was made some six months ago and Mr Stunt gives no detail of what it is being done, when it might result in an application to the Court, or what the application might be. In his first witness statement he says:

> "My lawyers are looking at whether or not its ambit should be restricted so as to free up any excess over and above a proper maximum sum."

But very little else is said, and it is notable that as long ago as 17 September 2018 Mr Stunt's then lawyers, Benson Ingram, were saying that:

> "An application is in the offing to address the restraint and … those acting have every confidence that the restraint shall be lifted in part or in whole."

On 9 September 2018, Benson Ingram indicated that they understood that "documentation has been lodged and that issues regarding applications will be considered within the next 24 hours." It is entirely obscure to what they were making reference then, although it does appear that some variations have been made, the details of which are not before the court.

31 Mr Stunt's most recent evidence addresses the various aspects of the latest evidence against him, which greatly expands the material relied on in support of the application under sub-rule (g) and it adds one important matter, to which I should specifically refer. In para 6(c) of his second witness statement Mr Stunt refers to the defendant's reliance on the £70 million encumbrance of his art collection, of which he says that:

> "Any such encumbrance becomes irrelevant in the context of the Dumfries House collection."

He goes on to say that this is a body of assets comprising a collection of very valuable artworks, currently on loan to Dumfries House, which is entirely owned by him save for one piece in which he has a half-share. He says the collection is completely unencumbered and he refers to insurance valuations contained in documents that he exhibits, which amount to about £217 million.

32 Mr Higginson's argument, in response to this aspect of the security for costs application, as it has developed, is three-fold. First, he submits that the evidence relied on does not have

anything to do with steps taken in any way by *Mr Stunt*. It is all to do with steps taken *by others*. That submission, made in writing, has rather faded in the course of the oral submissions. Secondly, Mr Higginson submits that, looking at the entirety of the evidence now before the court, the second limb of sub-rule (g) is not satisfied. To determine the position the Court must look at the costs at stake in the context of the claimant's overall asset position, and at the steps taken. In this case there are many assets which are extremely valuable, and the Court could not conclude, or should not conclude, that any of the measures described in the defendant's evidence represents steps which make it more difficult to enforce a costs order. Mr Higginson relies in this context on the passages in Mr Stunt's witness statement and exhibit to which I have referred. He contrasts this with the position in *Aoun*, where the claimant was taking steps to sell a property and the Court concluded that the circumstances justified an order. Thirdly, Mr Higginson argues that the making of the restraint order had the effect of freezing Mr Stunt's assets. It is difficult to comprehend, he submits, how a freezing of those assets could make it harder to enforce an order for costs if one was ever made. Far from being at any risk of dissipation, the assets are currently being preserved.

Discussion and conclusions

33 Reviewing the position in relation to sub-rule (g), I find it convenient to look first at the matters other than the Restraint Order and then to pay some attention to the significance of that aspect of the matter.

34 I had initially thought that some of the material relied on by the defendant failed to show, to the necessary standard, that Mr Stunt had "taken steps with" his assets, either because the dealings relied on were not shown to be dealings with his assets, as opposed to the assets of

a company in which he has an interest, or because the dealings were not shown at this stage to be by Mr Stunt as opposed to some other individual or company, or both. That seemed to me potentially to be the position in relation to:

i. the various charges created over the assets of Copperbeech; and

ii. the winding up petition relating to Stunt & Co.

35 However, the application has, in the event, been argued on the basis that the corporate assets are, for present purposes, to be treated as assets of Mr Stunt personally and that the steps taken with regard to them are to be treated as steps taken by him. That is consistent with two paragraphs of the Restraint Order which provide, in that context, that the assets of Stunt & Co. and of Copperbeech are to be treated as the personal assets of Mr Stunt. There is also this point, as Mr White submits: Mr Stunt's shares in the two companies, in which he has a majority of at least seventy-five per cent in each case, are an asset of his and steps taken to diminish their value would count as steps within sub-rule (g).

36 In any event, it seems to me that, on analysis, there is really no room for dispute that *some* at least of the matters relied on amount to or involve steps being taken by Mr Stunt in relation to *his* assets. There is a convenient list of the matters relied on in para 67 of the defendant's skeleton argument and, as things appear at the moment, the encumbrance of the art collection with a loan of £70 million may well be a dealing with the personal assets of Mr Stunt. That would appear to be consistent with his own evidence. The liquidation of the wine portfolio would appear equally to be a dealing with his own personal assets, and sales of parts of his art collection would also appear to be personal dealings. The failure to pay what appears at the moment to be a debt of some £247,000 to Laurus, resulting in the presentation of a bankruptcy petition, would appear to be dealings with his own assets. So too would the following, at para 67(i) of the skeleton argument:

> "He incurred losses of £1,002,103.67 while using the CMC spread betting platform and failed to pay the resulting outstanding debt [in that sum] to CMC, despite repeated assurances over about 12 months that the sums owed would be paid."

37 There are, in addition, the matters of his alleged failure to pay fees owed to Benson Ingram and to Lee & Thompson. It seems to me that, on the material before me at present, I am justified in drawing the inference that the termination of those retainers was due to a failure to pay sums demanded when they fell due.

38 More complex, perhaps, is the question of whether the steps identified and relied on by the defendant make it difficult to enforce a costs order.

39 In fairness to Mr Stunt, I should refer to what he says about this in his witness statements. In relation to the bankruptcy petition, he explains that his lawyers are contesting that on the basis that it was improperly commenced since it was based on a judgment that was irregular and that he had commenced proceedings to attack very substantially the basis for the claim. That is to be read in conjunction with what Mr Higginson has told me today.

40 In relation to the Restraint Order, he says - in addition to the passages that I have already read - that the proceedings in relation to that were brought by the Crown Prosecution Service "in the context of an investigation into certain financial matters to do with various companies and individuals including me" which has been going on for more than two years without his being charged with any offence.

41 In relation to the claim brought by CMC Spreadbet, there is a brief reference in Mr Stunt's first witness statement which says that his lawyers are in negotiations with that firm in relation to that claim. Generally, it is Mr Stunt's position that there is nothing in the true position that should lead to an inference or conclusion that his conduct has made it more difficult to enforce a costs order. He maintains that the various proceedings brought against him lack a proper foundation, and that none of this detail affords evidence to support the application for security.

42 I cannot finally resolve any of these disputes, of course, but I think I must approach the matter on the basis that a realistic view should be taken of the probabilities as they appear from the evidence now before the court. I can bear in mind how limited the evidence is from Mr Stunt's side. He is the person with knowledge of his asset position and the various dealings that are relied on, but he has put forward - even making due allowance for the late service of the most recent evidence - very little of what he knows or, at least, very little by way of detail to corroborate his account of things.

43 Of course, if a person cashes in an asset such as an art collection or a wine portfolio, or part of it, it does not follow that his net worth decreases. It is not necessarily a dissipation of assets to sell a capital item and draw revenue from it. Such behaviour could be no more than a reconfiguration of an overall investment portfolio. There may be good strategic reasons for changing the direction of an investment strategy. That, however, is not Mr Stunt's evidence and if that is not the explanation then it has to be asked why a person would take such steps on such a scale in the face of claims of the kind that I have described. The most obvious answer, on the face of the evidence before me, is to realise ready cash to meet debts as they fall due, which cannot otherwise be met. The evidence is that there have been sales, indeed a programme of planned sales of capital assets, in order to meet current revenue spending or

liabilities incurred as a result of current revenue spending. There is evidence that over years Mr Stunt has enjoyed a lavish and high-spending lifestyle. On the face of it, this looks like distress selling by a man under pressure to satisfy his creditors, who is unable to satisfy his debts from his readily available means. As Mr White points out, there is as yet no explanation of what has become of the funds raised by these sales.

44 There are steps taken, therefore, which seem to me likely to make enforcement harder. I do not think I can, on the present evidence, accept the broad assertions of Mr Stunt or Mr Higginson that the debts for which he has been sued are non-existen,t or somehow made up. It seems to me that there are steps which he has taken which are likely to dissipate his assets in a number of the ways relied on by the defendant. I refer to the matters that I have already listed. Those are steps which would make it more difficult to enforce a costs order, regardless of the motivation behind them.

45 For those reasons, I conclude that two of the threshold conditions set by the rule are satisfied. That brings me to the issue of discretion.

Discretion

46 The question is whether an order is just in all the circumstances. A number of factors seem to deserve particular consideration.

47 Let me deal first with the requirement for a residential business address. In my judgment, this is, as Mr White submits, more than merely technical. I am not sure Mr Higginson is right to say that this is important only for the purposes of service. If that were so, the wording of the Practice Direction might be different. I suspect that enforcement is one

aspect of the importance of CPR 16 and its requirements. That said, the importance of an address for service is illustrated by events in this litigation when, in the lead up to the Court of Appeal hearing, it was impossible to contact and serve the claimant. Further, although correspondence has been shown to me in which the defendant's solicitors wrote to Mr Stunt at addresses which he says are his business and residential addresses, there were no replies, which leaves the court in some doubt as to whether those communications got through. Mr White also points to inconsistencies in the evidence filed by Mr Stunt about his residence. I would not put great weight on those, but it is the case that his first witness statement gave an account of his business and residential address position which was inconsistent with his second statement. All this said, I do not believe that I would have granted an order for security as a matter of discretion on the basis of this sub-rule.

48 The position is different when it comes to sub-rule (g). The sequence of events to which I have referred indicates to me that, subject to questions that may arise in relation to the Restraint Order, not only is the threshold condition satisfied but there would also be weighty factors in favour of an order for security for costs.

49 The evidence as to the movement and application of Mr Stunt's funds on which the defendant relies is scarcely disputed and very largely unexplained. There is no dispute, for example, that he ran up the debts relied on by CMC Spreadbet. There is no evidential explanation of why it is that he did not pay that debt when it was due, but instead set out on a programme of large-scale asset realisation. Nor is there any evidential explanation of why that programme had not succeeded in its objective by the time, in late August 2018, when the Restraint Order was imposed, setting strict limits on what Mr Stunt could do with his assets.

50 I am not attracted by Mr Higginson's submission that the onus lies on the applicant for an order of this kind to provide evidence of the respondent's overall asset position and show that the unencumbered or available net assets would be insufficient to satisfy a costs order. There must, of course, be an evidential burden on the applicant to show that the threshold condition is satisfied, and a persuasive burden in relation to the issue of discretion. But it is Mr Stunt who is in by far the best position to provide evidence of his overall assets and his net asset position. If he wished to maintain that he has, subject always to the Restraint Order, a net worth of many times the quantum of the legal costs at stake, it was for him to do this and, in my judgment, to condescend to some detail in the process. He has not done that. I do not regard the recent evidence as to the value of a part of Mr Stunt's art collection to be a satisfactory basis for determining this application in his favour. It is evidence that relates to one aspect of his assets only and, if one thing is clear on the evidence now before the Court, it is that Mr Stunt's financial affairs are complex.

51 I therefore reach what seems to me to be the most important question on this application in the end, namely whether there is good reason to make such order and (in particular) whether it would be just to do so having regard to the Restraint Order, by which the entirety of Mr Stunt's assets is currently frozen at the instigation of the Crown Prosecution Service.

52 The existence of that order seemed to me, before this hearing began, to pose a number of potential obstacles to Associated's application. The form of order sought by the application is this:

> "1. The Claimant shall provide security for the Defendant's costs of the claim by paying the sum of £700,000 into the Court Funds Office within 14 days of the date of this Order.

2. All further proceedings be stayed until security is given in accordance with paragraph 1 above.

3. Unless security is given in accordance with paragraph 1 above, the claim will be struck out and there will be judgment for the Defendant without further Order, with the Defendant's costs of and occasioned by the claim to be paid by the Claimant and subject to detailed assessment if not agreed."

53 That raises the question of how the proposed order for security and the Restraint Order could co-exist. This is an aspect of the matter that was not addressed in the skeleton arguments or the written evidence, beyond the submission of Mr Higginson to which I have already referred. But whilst preparing for this hearing, I was able to ascertain that, as one would suppose, the Proceeds of Crime legislation makes provision for situations such as the present where, putting it broadly, a question arises of whether assets which are the subject of a restraint order should be paid over to or made available to secure the claims of an otherwise unsecured third party or, I should add, a situation such as I conceive the present to be.

54 The relevant provisions of the 2002 Act, for this purpose, are contained in ss 58 and 69, both of which were considered by the Court of Appeal Criminal Division in *Director of the Serious Fraud Office v Lexi Holdings Plc (in Administration)* [2008] EWCA (Crim) 1443, [2009] QB 376 ("*Lexi Holdings*"). Section 69 provides, so far as relevant as follows:

"(1) This section applies to –

(a) the powers conferred on a court by sections 41 to 59 …

(2) The powers –

(a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;

(b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;

(c) must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant;

…"

55 In *Lexi Holdings* the facts were, in summary, these. A restraint order was made under s 41 of the Act, against a number of individuals. Later, Lexi brought proceedings against a number of defendants, including the individuals subject to the order, claiming that it had been the victim of a substantial fraud committed by them and that the individual known as "M" had known that various payments had been made in breach of trust. There was a claim for money had and received. Judgment in default was entered against M for failure to comply with disclosure orders, whereupon Lexi applied to the Crown Court to vary the restraint order so as to permit M to comply with the judgment, both on the basis that it had a proprietary claim and as a *bona fide* judgment creditor. The judge granted the order and varied the restraint order to allow the judgment to be enforced. He held that the statutory policy in place before the 2002 Act had not significantly changed, so that the court had the power to sanction the payment of a third-party unsecured creditor.

56 An appeal by the Director of the SFO was allowed. At para [88] the Court of Appeal, Criminal Division, said this:

> "We conclude … that the natural meaning of section 69(2)(c) gains support from the statutory framework in which it is to be found. The intention of the legislature that restraint orders should be made and subsequently be maintained without regard to debts owed to third-party unsecured creditors is evident and sufficiently clear without the need to have recourse to Hansard. … The statutory provisions have changed significantly since the pre-2002 Act legislation … Unless there is no conflict with the object of satisfying any confiscation order that has been or may be made, a restraint order should not be varied so as to allow for the payment of a debt to an unsecured creditor."

57 The court also referred to s 58 of the Act, which is, so far as relevant, in these terms:

> "(5) If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit.
>
> (6) Before exercising any power conferred by subsection (5), the court must give an opportunity to be heard to—
>
> (a) the applicant for the restraint order, and
>
> (b) any receiver appointed in respect of the property under section 48 or 50."

58 The Court said this in a postscript, at para [93]:

> "Those provisions require any court in which proceedings are pending in respect of any property, in respect of which a restraint order has been made or applied for, to give an opportunity to be heard to the applicant for the restraint order (i.e. the Crown in some manifestation) … and to do so before it decides whether or not to stay the proceedings or to allow them to continue."

The court observed that the judges dealing with the proceedings in that case had not had their attention drawn to s 58, as should have happened.

59 When I raised these points with counsel at the start of the hearing, it was because I conceived that there could be a conflict between the order for which the defendant was arguing and the terms of the Restraint Order, in the light of the legal principles which I have just sought to summarise. Mr White's response, for the defendant, was to submit that the court should proceed to hear and determine the application. He said that there is no application for a variation of the Restraint Order and he submitted that the proceedings are not proceedings within s 58(5), because they are not aimed at property which is the subject of the Restraint Order. He went on to submit that if security was ordered it could be satisfied from funds not covered by the order. Mr White referred to the general principle, perhaps best expressed in the old case of *Yorke Motors Ltd v Edwards* [1982] 1 WLR 444, [1982] 1 All ER 1024, that where a claimant/respondent to a security for costs application contends that the order sought would stifle a claim, the onus lies on the claimant to show not only that

he or it does not have the necessary resources available but also that funds cannot be obtained from relatives, friends or other sources that may be available to the respondent.

60 Mr Higginson's response was also to invite me to proceed to determine the application on its merits. At the conclusion of his argument, when I returned to the topic, he made clear that his client was not maintaining that his claims in this action would be stifled by the order sought. He did, however, invite me to "take account" of the Restraint Order and to proceed on the assumption that the Court, in the restraint proceedings, would decline to make a variation to allow for the funds required by a security order to be made available.

61 That seems to me to be a slightly unsatisfactory half-way position. I do proceed on the assumption referred to by Mr Higginson, because that appears to be the clear position in law; but so far as the factual position is concerned, I propose to proceed on the basis that (i) neither side has raised the prospect of an application to vary the Restraint Order, and none is current; (ii) neither side has asserted that the security sought, if ordered, should or could only be obtained from assets which are subject to the restraint order; (iii) the evidence does not contain any claim that Mr Stunt would be unable by reason of the Restraint Order to meet an order for security in the sum sought, rather the contrary; nor (iv) does the written evidence contain material satisfying the criteria set down in *Yorke Motors v Edwards*.

62 So far as Mr Higginson's arguments are concerned, he did – as I have indicated - seek to make a virtue of the order in relation to discretion, arguing that the fact that Mr Stunt is prohibited from dissipating his assets, bar the modest sums he is allowed to spend by virtue of the exceptions to the order, means that the defendant is secured. But that is only part of the picture, so it seems to me. There is, on the other hand, a sense in which the existence of the Restraint Order provides a reason in favour of exercising my discretion to grant an order

for security. The fact that such an order, freezing the entirety of Mr Stunt's assets, was made in the first instance, and has remained in place for nearly six months in its original terms - subject to a modest variation - is an indication that a court has been satisfied that such a measure is appropriate, to secure assets which may in due course be the subject of a confiscation order under the Proceeds of Crime Act 2002.

63 I pause to emphasise that in saying that I am in no way adjudicating on the true position between the Crown and Mr Stunt. What I have said is merely an observation about the inferences that can be drawn from the evidence that is now before me.

64 The fact that even now there is no evidence before the court to establish what, if any, steps are indeed in preparation for any and, if so, what variation of the Restraint Order, lends some support to the view that the making of a confiscation order in some substantial sum is a real possibility. I can say no more. If there were a confiscation order affecting the entirety of the assets which are the subject of the current Restraint Order, then the existence of the Restraint Order at present would be no comfort to the defendant. The freezing of the assets, however substantial they might be, would not make them available to satisfy an order for costs in favour of the defendant.

65 In all those circumstances, I have reached the conclusion that I should make an order, in appropriate terms, requiring Mr Stunt to provide security for the defendant's costs of these proceedings.

66 The order will be so framed as to make it quite plain, on its face, that it is wholly without prejudice to the Restraint Order and in no way intended to affect or impinge upon the assets which are the subject of that order, or to authorise any application to vary that order so as to enable the release of funds to satisfy the requirements of the order for security. The order

will need to contain a suitable timescale, to permit the necessary funds to be raised from what must be other sources.

Amount

67 No submissions have yet been made in relation to the amount of the security ordered. As Mr White has said, that has not been a focus of any submissions so far. I will, however, hear brief submissions, if so desired, on what the quantum should be.

LATER - AFTER SUBMISSIONS

68 An order is made in the sum of £460,000, without prejudice to a further application at a later stage. This is to cover the defendant's incurred costs and a substantial sum in respect of the costs of further steps in the action, which looking broadly, looks like it should be sufficient to cover proceedings up to the Costs and Case Management Conference.

LATER

69 I have to assess the costs which I have ordered to be paid by the claimant. The total claim is, exclusive of VAT, £33 short of £45,000. Just shy of half of that is accounted for by Counsels' fees, and most of the rest is accounted for by work done on the documents which runs to £17,734. The hourly rates of the solicitors are all firmly within the guidelines. I do, however, with some trepidation, suggest that not quite so much time needs to have been spent on the evidence as was in fact devoted, and I do think there is some force in Mr Higginson's submission that the total for Counsels' fees is somewhat on the heavy side.

70 In all the circumstances, I consider that £36,000 is an appropriate figure to award on a summary assessment.

CERTIFICATE

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