Neutral Citation Number: [2022] EWHC 305 (QB)

APPEAL REF: QA 2020 000204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

ON APPEAL FROM
An order made by HHJ Roberts
Sitting at the County Court at Central London
In Claim no F00CL733
On 8th October 2020

Date: 15 February 2022

Before :

MR JUSTICE RITCHIE

- -

Between :

SOHILA TAMIZ

Appellant/Defendant

- and -
ANTHONY OFFLEY [1]
THE GREEN BEE LTD [2]

Respondents/Claimants

(Louis Weston instructed by DAS Law Solicitors) for the Claimants
(Geoffrey Goldkorn solicitor advocate from Stokoe Partnership) for the Defendant

Hearing date: 7 February 2022

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

Mr Justice Ritchie:

Parties and other legal persons

[1] The Defendant occupies White Cottage, Flint Lane, Lenham, Maidstone, Kent, ME17 2EN (the Site).

[2] The 1st Claimant is a groundworker and owns a Mercedes Benz van.

[3] The 2nd Claimant company is the owner of a "Man" tipper truck and the 1st Claimant is a director of the company.

[4] The Defendant set up or is involved in some way with the following companies and Trusts registered or resident in Guernsey, Channel Islands.

Entity:	**Name used below:**
Olympia Homes Ltd	OHL
Weighbridge Trust Ltd	WTL
Bourse Trust Company Ltd	BTCL
Olympia Trust	OT

The appeal

[5] This is an appeal from a case management decision HHJ Roberts made at Central London County Court on 8th October 2020.

[6] Judge Roberts ordered (using his paragraph numbering but summarising his words) that:

> 2. The Defendant shall give security for the costs of losing the counterclaim in the sum of £25,000 by 29 October 2020.
> 3. Unless the security for costs was paid on time the counter claim would be struck out.
> 4. The Defendant shall pay the Claimant's costs of the application for security in the sum of £8,379 by 29 October 2020.

[7] By notice of appeal date stamped 26 October 2020 the Appellant seeks to overturn paragraphs (2) to (4) of the order.

[8] Permission to appeal was granted on the papers by Mr. Justice Stephen Stewart on 8 November 2021 and granted a stay of the original order and no such order on 12 November 2020.

[9] By a Respondent's notice dated 30 November 2021 a cross appeal was lodged which did little more than ask this court to uphold the decision for the reasons given by the

Judge together with the additional evidence asserted in the Appellant's grounds of appeal and application for a stay based on impecuniosity.

Bundles and evidence

[10] I had before me an appeal bundle and 3 bundles of authorities.

Appeals - CPR 52

[11] I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower court, unless the court rules otherwise or a practice direction makes different provision. The court will not hear oral evidence or new evidence which was not before the lower court and will allow the appeal if the lower court's decision was wrong, or unjust due to procedural or other irregularity.

[12] This appeal is restricted to the evidence before the lower court but I have allowed some additional pieces of evidence to be asserted orally during the hearing and allowed them into evidence under CPR rule 52.21(2) and the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA), namely that it was (1) not obtainable with reasonable diligence before the lower court, (2) would have an important influence on the result and (3) was apparently credible though not incontrovertible.

[13] Under CPR rule 52.20 this court has the power to affirm, set aside or vary the order; refer the claim or an issue for determination by the lower court; order a new trial or hearing etc.

Appeals against findings of fact

[14] I take into account the decision in *Grizzly Business v Stena Drilling* [2017] EWCA civ 94 at 39-40. Any challenges to findings of fact in the court below have to pass a high threshold test.

Appeals from case management decisions

[15] I take into account that appeals from case management decisions have a high threshold test, see *Royal & Sun v T & N* [2002] EWCA Civ 1964.

> "37. … We were reminded, properly, by counsel for T & N that these are appeals from case management decisions made in the exercise of his discretion by a Judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The Judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the Judge's decisions. It should not yield to the temptation to "second guess" the Judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a Judge who has applied the correct principles, and who has taken into account the matters which should be

> taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."

[16] In *Abdulle v Comm of the Police* [2015] EWCA Civ 1260, Lewison LJ ruled that:

> "26. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR
> 795 at [52] this court said:
>
> > "We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance Judges.""
>
> 27. The first instance Judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance Judges to grant relief against sanctions. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, [2014] 3 Costs LR 588 Davis LJ said at [63]:
>
> > "… the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted."
>
> 28. In my judgment the same approach applies to decisions by first instance Judges to strike out, or to decline to strike out, claims under CPR 3.4 (2) (c). In a case in which, as the Judge himself said, the balance was a "fine" one, an appeal court should respect the balance struck by the first instance Judge. As I have said I would have found that the balance tipped the other way; but that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the Judge's decision as perverse."

[17] In the judgment of Mrs. Justice Yip in *Razaq v Zafar* [2020] EWHC 1236 (QB) this principle was reaffirmed:

> "2. … the appeal proceeds in the usual way as a review of the decision below. It follows that this court can only intervene if it is demonstrated that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the court below.
> 3. As the Court of Appeal has reinforced on many occasions, an appellate court will not lightly interfere with case

> management decisions or the exercise of judicial discretion. Further, it has been said that it is vital that appellate courts uphold robust case management decisions by first instance Judges. See *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated at paragraph 68:
>
> > "The fact that different Judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable.""

Chronology

[18] At some stage in late 2018 the Claimant entered negotiations with the Defendant to carry out groundworks at the Site. The contract that they eventually entered into remains shrouded in mystery despite the case being pleaded out and despite the relevant application and appeal. What is clear, because it is agreed between the parties, is that the Defendant occupied the Site and was involved in the carrying out of building works to it and hired the 1st Claimant, who is a director of the second Claimant, to do some excavation and ground laying works at the Site.

[19] The 1st Claimant started work in January 2019 and carried out excavation works together with laying some hardcore at the Site. He brought his Mercedes van and his company's tipper truck onto the Site and there it stayed. However on the 6th of February 2019 the parties fell out and the Defendant terminated the 1st Claimant's work.

[20] The 1st Claimant attempted to recover his vehicles from the Site the next day but was not allowed to do so and was required by the Defendant to pay £4000 before he could recover the vehicles. He refused to pay.

[21] On the 11th of March 2019 the Claimants applied for delivery up orders for the two vehicles against the Defendant and at the hearing of those applications on the 1st of May 2019, Deputy District Judge Burn noted in the recitals to the order that the Defendant had agreed to delivery up of the vehicles and had agreed to pay costs of £4,931. The Judge also ordered the Claimants to file particulars of claim.

[22] By a Claim Form, a copy of which is undated in my bundle, the Claimants sought damages for unlawful detention of their vehicles and damage caused to the vehicles against the Defendant. In their Particulars of Claim dated the 18th of June 2019 the Claimants asserted that a building contract was made between the 1st Claimant and the Defendant for work at the Site. It was pleaded that the 1st Claimant brought the

Mercedes van and tipper truck to the Site for the work and that on the 6th of February 2019 the contract was terminated by the Defendant. It was pleaded that the Defendant failed to return the vehicles to the Claimants and required £4,000 to be paid to her or the vehicles would be retained. That sum was claimed because the Defendant asserted that the 1st Claimant had caused damage at the Site and for storage charges for the vehicles which the Defendant did not consent to storing on the Site.

[23] In the Defendant's defence and counterclaim, which was dated the 5th of October 2019, the Defendant admitted that the 1st Claimant was hired to do excavation works under a contract, however the Defendant pleaded that she entered the contract as an agent for OHL. The Defendant asserted that the 1st Claimant brought the two vehicles onto the Site without permission and that the contract was terminated because the 1st Claimant had executed the excavation works in the wrong location and too deep. Further he had left an 8-tonne digger, not owned by himself, in the quarry in a state such that others had to pull it out with heavy equipment. The Defendant counterclaimed for the loss and expense caused by the incorrect excavation and claimed storage charges for the two unauthorised vehicles. The Defendant asserted that due to the improper excavation carried out by the 1st Claimant she had been forced to move her whole house eastwards, change the whole drainage system by lowering it and that the remedial costs would be £59,083. The Defendant relied on a report by Charles Stimson dated 17th May 2019, a copy of which I have not seen.

[24] In the Claimants' reply and defence to the counterclaim, dated the 2nd of November 2019, the Defendant's agency assertion was denied and a request was made for the Defendant to provide the company registration number of OHL. The 1st Claimant asserted that he brought the van on Site so that he could live on Site whilst he was doing the works and did so with the Defendant's express agreement, and he asserted that he gave her four marble columns for free. The 1st Claimant asserted that a site manager called Adam McChesney told him what to do and he did it. The Claimants asserted that no foundations had been marked out and he had done what he was asked to do and denied negligence or breach of contract. In relation to the counterclaim the Claimants pleaded that any loss sustained would be the loss of the principal: OHL, not the agent, the Defendant.

[25] The Defendant served a Reply to the Defence to the Counterclaim. She asserted that the agreement to carry out the works was partly oral and partly written but did not plead the date or the express terms. The Defendant pleaded that various plans and drawings were sent to the 1st Claimant and relied on various case law.

[26] On the 27th of February 2020 the Claimants served part 18 requests on the Defendant which she did not answer and on the 27th of April 2020 the Claimants applied for security for costs against the Defendant in relation to the counterclaim, an unless order relating to the part 18 requests and also sought consolidation of this claim with F00CL732. In the grounds of the application for security for costs the Claimants

relied on the fact that the Defendant's principal was outside the UK and relied on a witness statement from Miss Rogers dated 27th April 2020. In that witness statement Miss Rogers recorded that the Claimants had asked for three years accounts of OHL but the Defendant had failed to provide any. Miss Rogers exhibited an email from the Defendant's solicitors to the Claimants in which they asserted that the Claimant herself had sterling £100,000 in her bank accounts in the UK and a "significant interest" in the outcome of the counterclaim. The Defendant admitted she was not a director or shareholder of OHL but asserted that OHL owed her more than half a million pounds. That email was in the appeal bundle.

[27] The Claimants' applications were listed for a hearing on the 8th of October 2020 and six days before that hearing an Amended Defence was drafted. I do not know when it was sent to the court and to the Claimants. On the same date: the 2nd of October 2020, part 18 responses were provided by the Defendant and on that day a witness statement was sworn by the Defendant.

[28] In the part 18 responses the Defendant asserted, in contradiction with her own served pleading, that OT was the beneficial owner of the land and was the principal in the Defendant's agency relationship.

[29] In addition in the part 18 responses the Defendant asserted that the £4,000 she had demanded as the payment required to release the two vehicles on or around the 7th of February 2019 demanded because the 1st Claimant had used the wrong type of aggregate on the driveway of the Site. This was a contradiction of her pleading case in her defence which was that the £4,000 demanded was to offset the damage and expense caused by the 1st Claimant as set out in the defence which made absolutely no mention of the 1st Claimant putting the wrong aggregate on the driveway.

[30] In the Defendant's witness statement she asserted she was the settlor of (the person who created) the OT, a trust set up in Guernsey for the benefit of herself and her family. She asserted it was a discretionary trust and that she was a discretionary beneficiary. She asserted that BTCL had recently taken over from WTL as the trustee of OT and that BTCL was the legal owner of the Site and held it on trust for OT. She also asserted that BTCL owned the shares in OHL. Finally, she asserted that she had UK based bank accounts and other assets in England worth more than £100,000 in her name and that she had paid the previous award of costs made by the court in this claim.

The evidence before the Judge

[31] The Judge had the pleadings and orders made in the claim, witness statements from Ms Rogers dated 27.4.2020 and from the Defendant dated 2/10/2020 together with various emails in attachments and the land registry entries for the Site and the company registration details for Olympia Homes Ltd (OHL) a company registered in Guernsey.

The judgment

[32] The Judge recited and considered CPR rules 25.12 and 25.13 and the cases put before him and mentioned in his judgment *Chuku v Chuku* [2017] EWHC 541; and *Bowstead* on Agency 21st Ed p 9012.

[33] The Judge's findings on the evidence were that the conditions for imposing an order for security for costs were made out under CPR r.25.13(f). That the Defendant was a nominal Claimant in the counterclaim; had no direct interest in the counterclaim; she hid her principal from the dealings she had with the 1st Claimant; disclosed no documents evidencing her agency and gave contradictory answers as to whom the actual principal authorising her agency was.

[34] The Judge also found there was reason to believe that the Defendant will be unable to pay the Claimants' costs were she to lose the counterclaim. He found that the Defendant disclosed no documents to support her contradictory assertions and that on her own case the legal and equitable ownership of White Cottage was held by another entity, not herself.

[35] So the Judge ordered the Defendant to pay security for costs up to the CCMC for the counterclaim.

The grounds of appeal

[36] The Defendant filed grounds of appeal which in summary were:

a. The Defendant was not a nominal Claimant for the counterclaim;
b. The Defendant was not duplicitous;
c. The Defendant had a significant interest in the counterclaim.
d. The Defendant had given sufficient evidence of ability to pay adverse costs order, so the Judge was wrong to find otherwise.

[37] In the notice of appeal the Defendant sought a stay of the Judge's order. She relied upon two new pieces of evidence. The first was an Internet print out from her son's online savings account (number 70740622) which had a balance of £60,706. Interestingly, under the grounds for her section 10 application for a stay, she asserted that "my only liquid assets are just over £60,000 in a savings account... in the name of my son Pedram". She also asserted that she had DAS legal expenses insurance. I assume this covers her legal costs of defending the claim. I do not know whether it covers the adverse costs and expense of her counterclaim. No such assertion has been made by her lawyers in the appeal.

[38] The Defendant asserted impecuniosity and founded this on the financial gap between the amount she would have to pay for security for costs, added to the amount she would need to pay her own solicitors for defending the claim (because her legal expenses insurance only covered 62% of her lawyers' fees), and her savings in her

son's account. No explanation was given for why she put her savings in her son's name.

Security for costs

[39] Security for costs has a long history. It started over 140 years ago but I shall start with *White v Butt* [1909] 1 K.B. 50 in which the Court of Appeal set out the principles and the law as it then stood. The facts concerned a claim by a trustee of a separation deed of 1880 between the Defendant and his wife and the trustees. The Defendant covenanted to pay the trustees £104 pa for the benefit of his wife for so long as he and his wife lived. The assignees of the Trustees sued the Defendant for non-payment and the Defendant applied for security for costs asserting that the trustees had no beneficial interest in the claim and were impecunious. The Judge made the order. On appeal Vaughan William LJ gave the lead judgment. He dismissed the appeal citing *Cowell v Taylor* [1885] 31 CH. D. 34*; Sykes v Sykes* [1869] L.R. 4 C.P. 645*; and Greener v E. Khan & Co* [1906] 2 K.B. 374, with approval. Vaughan Williams LJ stated that Collins M.R. in *Greener*:

> "…in dealing with the exceptions from the rule that poverty is no bar to a litigant, there said, after referring to a head of exception which has no relation to the present case:
>
> "There is also an exception introduced in order to prevent abuse" – that is abuse of the rule as to poverty being no bar to a litigant – "that, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit."

[40] The power to order security for costs was in the the Rules of Supreme Court at Order 23 rule 1 and is now in CPR rules 25.12 and 25.13. I note that Order 23 rule 1 was worded in the same way as CPR rule 25.13 (2) (f) which states 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.
>
> (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, …
>
> (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;
> …
> (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;"

[41] The first matter which I note is that although the Judge did not make a finding that CPR rule 25.13 (2) (a) applied, namely that the Claimant to the counterclaim was resident outside the jurisdiction and not resident in a Hague Convention State, there was no dispute between the parties at the appeal that the principals to the asserted agency agreements: OHL, OT and all of the companies listed at the top of this Judgment, being Guernsey companies or bodies, were not resident in England. Furthermore in the Supreme Court Practice at paragraph 25.13.8 it is recorded that the Channel Islands are not in The Hague Convention 2005. Therefore it was an agreed fact that had OHL or OT been bringing the counterclaim CPR rule 25.12.(2)(a) would have applied and this condition for a security for costs order would have been satisfied. But because the claim proceeds between the Claimants and the Defendant, not the Defendant's principal, this sub paragraph did not apply.

Case Law

[42] Before I launch into the more recent case law on security for costs I note as a general comment that security for costs is granted to Defendants to claims. Likewise it is granted to Defendants to counterclaims.

Two steps

[43] There are two steps to the process under CPR rule 25.13. The first, as set out in subparagraph 2, is that the party applying needs to make out one of the conditions. The second, if a condition is made out, is that the court must be satisfied having regard to all the circumstances of the case that it is just to make the order.

[44] There is quite a lot of case law on the exercise of the discretion and various principles have been developed.

The purpose of the Order

[45] I take into account that the purpose of an order for security for costs is to prevent injustice to the applicant of having to defend a claim brought against it by somebody who has potentially insufficient funds to satisfy an adverse costs order and has behaved in unacceptable ways to engineer that situation. For instance, evading the consequences of litigation, dissipating or hiding assets, acting as a penniless front man for others, residing abroad in a country that is not bound by the 2005 Hague Convention; raising concerns in the mind of the Defendant and the court as to the person's ability to satisfy adverse costs orders.

Stifling the claim

[46] Another principle that is applied restrains the court's exercise of its power to order security for costs. That restraint principle applies where such an order would stifle what appears to be a reasonably valid claim. The burden of proving the order would stifle the claim rests on the shoulders of the Claimant in the claim. See for instance *Lederer v Persons listed* [2019] EWHC 554, in which the Judge ruled that the court will expect a Claimant to provide full and frank evidence of the likely stifling. On this topic Mr. Justice Eady in *Al-Koronki v Time Life* [2005] EWHC 1688 at paragraph 31 stated:

> "it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approached the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not".

The disguised defence

[47] Another principle that needs to be considered in such applications is whether the counterclaim, on which the application for security for costs is based, is really the flipside of the original claim and hence whether the security for costs application is being used as a bludgeoning tool by the real Claimant rather than a shield by the real Defendant to the counterclaim.

[48] This was considered by Mr Justice Stuart Smith in *TC Developments v Investing* [2019] EWHC 1432. In summary, where a counterclaim is really just the Defendant's method of defending himself then security for costs is probably not the appropriate order to make. The counterclaim may arise out of the same transaction as the original claim but the court should look at the substance of the claim and counterclaim and if the claim and counterclaim raise issues and are going to be listed together anyway, so far as one can tell, that would militate against making an order for security. However a marked discrepancy in the size between the counterclaim and the original claim may

weigh in favour of the counterclaim being sufficiently different or weighty to justify the security for costs application by the Defendant thereto.

[49] I set out these background principles because although they were not set out in the Judgment below or argued before me, they help inform decisions on the narrower issue of whether condition (f): the nominal Claimant condition, was satisfied and on the decision in relation to the justice of making a security for costs order in this claim.

Nominal claimants

[50] Picking up the case law after *White v Butt,* in 1964 the Court of Appeal dealt with security for costs in *Semler v Murphy* [1968] Chancery 183. The facts were that in 1964 the plaintiff sued the Defendant for breach of contract in failing to purchase his hairdressing business and a lease. However, at around the same time when he issued the claim, he charged the fruits of the action to his brother. Between the asserted failure to purchase the hairdressing business in 1963 and the issue of proceedings in 1964 the Claimant had gotten himself into considerable debt and his brother had paid off the debt and taken a charge over all of his assets. In 1966, after the relevant claim was started, the Claimant was once again in financial difficulties partly due to his divorce and a receiving order was made against him. Eight days before the trial in 1967 the Defendant applied for a security for costs order under the old Rules of Supreme Court Order 23 rule 1. The Judge at first instance refused the order finding that the Claimant was not a nominal Claimant suing for the benefit of another person. On appeal the Court of Appeal overturned that ruling and found that the Claimant was purely nominal because he was suing for the benefit of some other person, namely his brother, who would take all of the proceeds were the claim to be successful. This would therefore mean that all of the Claimant's other creditors, for instance those with judgments arising from the divorce, would have to "whistle" for their money, per Lord Denning M.R. at page 192 paragraphs b-c. At page 191 Lord Denning said: -

> "a nominal plaintiff is a man who is a plaintiff in name but who in truth sues for the benefit of another."

[51] In *Envis v Thakker* [1995] WL 1083979, the Court of Appeal considered security for costs again. The Claimant was a builder who was engaged to carry out work for the Defendant in northwest London. In the summer of 1990, he issued a claim for over £100,000 which he alleged he was owed by the Defendant. A defence was served and a year later the Claimant went bankrupt. He entered a proposed voluntary arrangement with his creditors by which he promised to pursue his claim against Mr Thakkar and to pass the benefits of it onto his creditors. The Defendant applied for security for costs on the basis that the Claimant was suing on behalf of and for the benefit of others and hence was nominal.

[52] In his Judgment Lord Justice Kennedy referred back to *White v Butt* [1909] 1 KB 50 approving and confirming that a Claimant cannot in a court of first instance be called

on to give security for costs due to impecuniosity because the courts of Justice are open to everyone. However also confirming that an exception to that rule arose where the Claimant was a nominal Claimant or what Lord Justice Buckley in *White* called a "fictitious Claimant" and was without means, in which case security for costs would be ordered. Examples given were where the Claimant had assigned the benefit of the cause of action to somebody else or has no beneficial interest in the subject matter of the litigation. Kennedy LJ cited with approval the ruling of Lord Justice Buckley at page 55 in *White v Butt*:

> "there are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs."

Lord Justice Kennedy then summarised matters thus. What Lord Justice Buckley was:

> "seeking to do was to protect the rights of the impecunious plaintiff, and at the same time to protect Defendants from unscrupulous plaintiffs who might use the impecuniosity of others to protect themselves against a potential liability for costs." (My underlining).

[53] The term "nominal Claimant" was considered again in 2011 in *Allen v Bloomsbury* [2011] F.S.R 22. Mr Justice Kitchin was invited to make an order for security for costs against a Claimant who asserted that the estate of Adrian Jacobs, the author of *Willy the Wizard*, a book written in 1987 with modest sales, was entitled to damages for plagiarism against the author of *Harry Potter and the Goblet of Fire*, who is J. K. Rowling, who had substantial sales. The Defendant applied for the order for security for costs on the basis that the claim had very little prospect of success and on the basis that the Claimant was a mere nominal Claimant who would receive nothing from the proceedings.

[54] The original author of *Willy the Wizard*, Adrian Jacobs, had been made bankrupt before his death. The copyright in his book had vested in his trustee in bankruptcy and his son, Jonathan Jacobs, took an assignment from the trustee in bankruptcy of the copyright of the book. Four years later Jonathan Jacobs appointed the Claimant, Mr. Allen, as trustee of the estate and able to act on behalf of the estate in relation to the estate assets and Jonathan Jacobs also provided that Mr. Allen could proceed in relation to the copyright of *Willy the Wizard* with an indemnity from any personal liability for claims against him arising from his trusteeship of the estate. Further Jonathan Jacobs executed an assignment of the copyright in *Willy the Wizard* to the Claimant.

[55] There was evidence from a literary agent that very considerable sums had been paid to that agent to pursue the alleged copyright infringement which had been paid by Jonathan Jacobs not Mr Allen. In contrast Mr Allen filed a witness statement asserting

he was a property developer who had agreed to act as trustee and to conduct the litigation in the UK but he also asserted that the literary agent was acting on a success fee only basis.

[56] Mr Justice Kitchin granted security for costs ruling at paragraphs 37 to 40 that the Claimant was a "nominal" suing for the benefit of another. That Mr. Allen had no connection with the dispute and absolutely no final financial interest in the proceedings. He also found that Mr. Allen was unlikely to be able to satisfy adverse costs orders which would be substantial in the proceedings.

Analysis – applying the law to the judgment and the findings

[57] His Honour Judge Roberts found that the Defendant had no direct interest in the claim. He found that she had given three contradictory answers as to how she was acting. She had asserted that she was acting for OHL as an agent, but later in her part 18 response she had asserted she was acting for OT. She had never disclosed that she was acting as an agent when she entered the contract with the 1st Claimant. The Judge also found that it was difficult to see how she could herself recover any money were she successful in the counterclaim.

[58] I was informed that there is no dispute between the parties that an agent can enter a contract with a third party and claim on the contract himself despite making the contract as an agent for an undisclosed principal. So I take that matter no further.

[59] I consider that the Judge was justified in reaching those findings. In any event they were findings of fact and I must apply a high threshold to findings of fact before overturning them. The threshold was not reached in my judgment.

[60] On the evidence the Site was legally held by Weybridge Trust Limited who were registered at the Land Registry. No documents have been provided in relation to that company to show the shareholding or the ownership thereof. The Defendant's assertion that that company holds the Site on trust for Olympia Trust is nothing more than an assertion. I note that this was recorded on the Register of Title but no trust deed has been provided and no documentary evidence at all was provided in relation to either WTL or OT.

[61] At the appeal hearing, the Defendant's advocate disclosed that his instructions were that OHL was the legal owner of the Site before WTL and transferred the ownership to WTL in late 2018, just before the work was carried out by the 1st Claimant. No disclosure has been provided of the shareholdings in OHL or WTL but in any event the relevance of OHL is historic.

[62] In addition the Defendant asserted that, after the work was done by the 1st Claimant, WTL had passed the legal title to BTCL who had succeeded WTL not only as the

legal owner of the Site but also as trustee of OT. This transfer was not registered at the Land Registry. No evidence was provided about the shareholdings in BTCL.

[63] Whoever was and now is the equitable owner of the Site, it was and is not the Defendant on her own evidence. Further she was not the legal owner. So the proper beneficiary of the counterclaim brought in relation to the works at the Site pursuant to the pleading will not be the Defendant on the evidence which she put before the Judge.

[64] The Defendant's advocate relied heavily on the fact that the Defendant occupied the Site as proof of her interest in the outcome of the counterclaim. I must therefore ask: is simple possession enough to be an interest in the counterclaim? In submissions the Defendant accepted that she had no lease of the Site. She had already asserted that she held no equitable title and no legal title to the Site. The Defendant accepted that she was merely there at the discretion of the trustees of OT which could change overnight. It was accepted that she could be required to depart tomorrow. In addition there is no counterclaim for loss of use of the living accommodation at the Site by the Defendant.

[65] I have found no reason to overturn the finding that the Defendant is a nominal Defendant and the counterclaim is brought for the benefit of others having applied the tests set out in *White v Butt* and *Semler v Murphy*.

[66] I have considered the authority relied upon by the Defendant: *Chuku v Chuku* [2017] EWHC 541, a decision of Mr Justice Newey on security for costs. The Claimant was granted letters of administration for his father's estate and in his capacity as administrator brought proceedings against the Defendant. The Defendant denied that the Claimant had any interest in the property legally or beneficially. He also applied for security for costs pursuant to CPR rules 23.12 and 13. The Judge ordered security for costs and that order was overturned on appeal. Mr Justice Newey ruled that a trustee, executive or personal representative would not ordinarily be a nominal Claimant even if they were not a beneficiary under the will, because an administrator had a real role in the proceedings as trustee responsible for administering the estate. In addition Mr Justice Newey raised this consideration: that "typically" there had to be some element of "deliberate duplicity or window dressing" intended to operate to the detriment of the Defendant in the claim. The Defendant in particular relied on paragraph 26 of the Judgment.

[67] Whilst the ruling that window dressing or duplicity is *typical* in nominal Claimant cases it is not expressly a requirement of CPR rule 25.13. The second part of the test under that rule is to consider the justice of the case on all of the facts and in all of the circumstances. I have elucidated various principles that are to be applied to that discretion above. It seems to me that window dressing or duplicity fit into the principles so well summarised by Vaughan Williams LJ in *White v Butt* but are only one relevant factor and are not a sine qua non for an order. I Judge that the root of the

nominal Claimant exception to the general rule that all are entitled to bring proceedings before the courts to seek to right wrongs whether they be rich or poor is broader than duplicity or window dressing. The nominal Claimants exception was put in place to guard against unrecoverable costs orders made against Claimants who are "nominal" whether by their own or another's design or conduct. Such design or conduct may be clever, based on expensive professional advice creating complicated overseas trusts and companies as a means of avoiding tax, or duplicitous based on smoke and mirrors, or window dressing based on apparent wealth which hides a lack thereof, or many other factual situations. The heart of the test though, is the lack of any straight forwards interest in the claim by the front man or woman in whose name the action is issued and the reasonable fear that they will not be able to pay the adverse costs arising if the claim or counterclaim is lost.

[68] Were it to be necessary and were I to be wrong in my interpretation of *Chuku*, I would rule that where a counterclaiming Defendant so "window dressed" or arranged her tax affairs that all of her assets and bank accounts were and are held in an overseas trust through a complicated web of companies so as to minimise tax (I assume legally) or in her son's name, the side effect of that conduct is that by her own intentional actions the Defendant not only has no legal assets in England and Wales but also that she becomes a nominal counterclaiming Defendant. This counterclaim which she brings in relation to the Site is brought on behalf of the separate legal entities over which she claims no sufficient or complete control. It is the Defendant's own evidence that she has created trusts as the settlor in Guernsey, which are discretionary trusts, from which she submitted to me she cannot call for the assets and cannot control the assets. The assets are held by independent legal entities not available for her to access and use as her own to pay adverse costs orders.

Inability to pay costs orders

[69] The second issue that was raised on appeal related to impecuniosity or more specifically "there is reason to believe that the Defendant will be unable to pay the Claimants' costs if ordered to do so". The Judge so found.

[70] Again this is a finding of fact made by the Judge on the evidence before the Judge and there is a high threshold for such findings to be overturned on appeal. In this case I heard no adequate evidence to overturn the Judge's finding.

[71] The various disclosures and assertions made in relation to income, assets and bank accounts by the Defendant are contradictory internally. Firstly, the Defendant asserted that she was owed £500,000 by OHL, but despite the passage of many months between the start of the claim and the hearing she did not choose to put any evidence of that huge debt before the court or of part payment thereof.

[72] The Defendant in her witness statement asserted that she had bank accounts and other assets in England "in her own name" over £100,000. Yet when she filed her notice of

appeal she asserted she had no such assets and put forward evidence only that her son had a bank account with £60,000 in it held for her. When doing so she produced no evidence that her son held that account on trust for her nor any explanation of why he should be holding any accounts on trust for her. Her son filed no witness statement.

[73] In her notice of appeal she applied for a stay on the basis of impecuniosity. The Judge did not know of that assertion because at the time the Judge found that there was a potential inability to pay an adverse costs order the Defendant had not drafted her notice of appeal or application for stay, for obvious reasons. Instead, at the hearing before the Judge she asserted she was well off and could afford to pay any adverse costs order. It seems to me that the basis of the application for a stay supports the Judge's very finding on this issue which the Defendant now appeals.

[74] The Judge found the fact that the previous costs order had been paid by an unknown person did not assist the Defendant in proving that she herself had paid it. No evidence was put before him other than the bald assertion.

[75] A further telling defect in the Defendant's appeal is that she failed to put before the court of first instance the agency agreement under which she asserts she was operating. She therefore failed to put before the Judge the basis upon which she claims to have any authority to enter into contracts over the Site. If she had disclosed the details of an agency agreement it would, should or could have set out the scope of her authority whether financial or by topic. It would also set out who her principal was. Contrary to the Defendant's pleaded case that she was the agent of OHL, which has never been amended, her part 18 replies changed that assertion to her being the agent of OT. This remains a very unsatisfactory position. Most importantly it would have set out any indemnity which she was provided with against the costs of making claims and defending claims relating to her agreements made for her principal. That would of course have led into the territory of CPR 25.13(a) and in any event the Defendant eschewed that approach.

Conclusions

[76] For the reasons set out above I dismiss the appeal on all grounds including 2, 3 and 4 and the sub grounds therein. Ground 1 is an introduction.

[77] The stay of the Order of HHJ Roberts is lifted forthwith. The Order made consequent on this judgment will provide an extension of time for various payment made under the order of HHJ Roberts.

Costs

[78] I award the Claimants/Respondents their costs of the appeal against the Defendant/Appellant on the standard basis and have assessed them in the order consequent upon this judgment.
END