IN THE COURT OF APPEAL **CL-AP 2/2018**

THE TURKS AND AND CAICIOS ISLANDS **(On appeal from CL-44/2017)**

BETWEEN

ALEXANDER VIK **APPELLANT**

and

(1) SHANE CROOKS
(2) MALCOLM COHEN
(3) SEBASTIAN HOLDINGS INC
(acting by Shane Crooks and Malcolm Cohen as joint receivers)

RESPONDENTS

AND

CL-AP 3/2018

(on appeal from CL-44/2017)

BETWEEN:

(1) SAREK HOLDINGS LTD. **First Defendant/First Appellant**
(2) PER JOHANSSON **Third Defendant/Second Appellant**

And

(1) SEBASTIAN HOLDINGS INC. **(acting by Shane Crooks and Malcolm Cohen as joint receivers)**
(2) SHANE CROOKS; and
(3) MALCOLM COHEN
(Joint receivers of the First Respondent)

Plaintiff/Respondents

BEFORE:

The Hon. Mr Justice Sir Elliott Motley, JA President
The Hon. Mr Justice Neville Adderley, JA
The Hon. Mr Justice Roger Hamel-Smith, JA

APPEARANCES:
Mr Tim Penny Q C, Mr Tony Gruchot with him for the Applicants/Respondents

Mr Duncan Mathews Q C, Mr Tony Beswetherick and Ms Deborah John-Woodruffe with him for the Appellant

Reasons for Judgment

Adderley, JA.

[1]. On 26 September we dismissed the application of the Respondents for a stay of the costs orders made against them on 29th August 2018 and perfected on 6 September 2018 and the other on15th March 2019. We promised to give our reasons and now do so.

[2]. The costs orders were consequent upon a successful appeal by the Appellant from the Order of the Supreme Court which had given permission to the Respondents to serve the Appellant outside the jurisdiction without first seeking recognition in this jurisdiction in accordance with the terms imposed by the Commercial Court of England ("The Commercial Court") in rendering a judgment in favour of Deutsche Bank Group AG ("DBAG") against Sebastian Holdings Ltd ("SHI") in the sum of US$243 million ("the Judgment Sum").

[3]. SHI has not paid any part of the Judgment Sum which as at 9 October 2018 stood at about US$337 million with interest and is now proportionately more.

[4]. The commercial court also ordered costs against the Appellant to be assessed if not agreed and ordered that a payment on account of those costs in the sum of £32 million be paid by the Appellant on behalf of SHI. Those costs on account have been paid by the Respondent.

The Background

[5]. The Appellant was ordered to pay the non-party cost because SHI, a Turks and Caicos Islands ("TCI") special purpose vehicle was found to be the personal investment vehicle of the appellant, a wealthy resident of Monaco, and he was found to be its controlling mind.

[6]. Prior to 2008 SHI entered into trading relationships with DBAG which led to increasing liability.

[7]. In the English proceedings SHI is said by the Appellant to have no assets but in its application to appeal in the English proceedings the Court of Appeal made the observation that after 2008 the Appellant caused SHI to transfer its valuable assets in an amount of US$896 million to third parties with the intention of making SHI judgment proof. The Respondents point out that at paragraph [9] of the Judgment setting the conditions for the Appellant to appeal, the court of Appeal summarized the position as follows:

> *"…the judge nonetheless made an unequivocal finding that on and after October 2008, when Mr Vik had a clear idea that SHI's trading liabilities ran to many hundreds of millions of dollars, he caused US$896m of funds and assets to be transferred from SHI either to himself or to companies closely associated with him or with his family. In particular, very substantial sums were transferred to C M Beatrice, Inc. (Beatrice"), and to VBI Corporation (VBI"). The judge found that Mr Vik procured these transfers for no bone fide commercial reasons, and that he did so with a view to depleting SHI's assets and making it more difficult for DBAG to seek recovery of the amounts owed to it by SHI. The judge concluded at paragraph 1461:*
>
> > *"I therefore find that all these funds are available to SHI (some US$896 million) prior to transfer and that, moreover, Mr Vik could, at a moment's notice, produce the transfer of those funds back to SHI should he have chosen to do so. There was no good bone fide commercial reason for the transfers."*

[8]. As part of its effort to enforce the Judgment Sum against SHI, DBAG applied for and obtained an Order in the English commercial court on 17 February 2017 for the appointment of joint Receivers of SHI in England. The Receivers are Mr Crooks and Mr Cohen the second and third Respondents. They were appointed as joint receivers of SHI's rights and powers in or respect to SHI's interest in certain funds which we call the "Reiten Interests". They have an estimated value in excess of €45 million. The Receivers were empowered to commence action on SHI's behalf in jurisdictions outside England after first procuring recognition in those jurisdictions, and If SHI is successful in its claim in its entirety.

The Application

[9]. This was not the usual application for stay of a judgment pending determination of an appeal. This was an appeal for stay of the costs ordered to be paid. Different principles apply. The respondents say that if they are successful in gaining recognition in the TCI of their appointment as receivers in the English court, they intend to sue in this jurisdiction. The claims concern the transfer of SHI's interest in the Reiten LPs which were transferred to Sarek Holdings Ltd. They claim that the assets were transferred by Mr Vik on 9th October 2008 in breach of statutory duty with assistance of Mr Johansson and Otto Inc. (another company incorporated in the TCI. Should that action be successful the quantum of the costs now claimed will be insignificant compared to the claim and costs which will be recoverable against the Appellant. The writ was issued before ("TCI1") but its issue by the Respondent was ruled ultra vires by this court because recognition had not first been obtained in accordance with the terms of the English receivership Order.

[10]. They are now in the process of seeking the recognition and issuing the writs again.

[11]. The Respondents are of the view based on the findings in the English proceedings that there is a real likelihood that the ordered costs when paid by them would be dissipated by the Appellant before the determination of the Action and they say that they are not aware of any other assets within the jurisdiction owned by the Appellant against which they would be able to recover those costs or to pursue their costs if the action was successful. This would frustrate the recovery of their costs or at the very least make recovery of the costs more difficult.

[12]. They claim that there is no prejudice to the appellant if such a stay were to be granted. They made certain proposals and the Appellant certain counter proposals as an alternative to staying payment of the costs but the parties have been unable to agree.

[13]. The court must therefore consider the principles upon which a stay of costs is granted and apply the law to the facts of this case.

[14]. The application is made under **Order 45 r 11** or alternatively under Order **47 r 1** of the RSC 2000 or Order **CPR 83.7(4)** of the Civil Procedure rules of England and Wales

[15]. The amended Notice of Motion dated 17 September 2019 reads as follows:

> *"1. Upon the Respondents having paid into escrow to be held by Graham Thompson the sum of US$300,000.00 plus such additional sum (if any) which they are otherwise liable to pay as a result of taxation of the Appellants' costs of the within appeals and the action below, then pursuant to Order 45, r11 and /or Order 4, r1 of the Rules of the supreme court 2000 ("'the RSC') or r.83.7(4) of the Civil Procedure Rules of England and Wales ('the CPR'),* ***there be a stay of execution until further Order of the court*** *of the payment obligations in paragraph 4 of each of the Orders of this Honourable Court of Appeal dated 6 September 2018 ('the Appeal Orders' whereby it was ordered that the Respondents do pay the Appellant's costs of the actions here and below, such costs to be taxed if not agreed; and (2) paragraph 2 of the Order of this Honourable Court of Appeal made on 15 March 2019 and dated July 2019('the Joinder Order')."*

THE LAW

Jurisdiction

[16]. This Court's jurisdiction derives from section 4 of the Court of Appeal Ordinance which gives it jurisdiction, subject to its provisions, to hear and determine appeals from any judgment or order of the Supreme Court, and in so doing have all the powers authority and jurisdiction of the Supreme Court. The only proviso is that no judgment or order of the Supreme Court shall be altered or reversed in any case in which the court is satisfied that the effect of the judgment or order is to effect substantial justice between the parties.

[17]. Its jurisdiction further derives from sections 3(1) and (3) of the Supreme Court Ordinance.

[18]. Section 3(1), subject to the jurisdiction being exercised in accordance with any rules made under the Ordinance, vests in the Supreme Court the same jurisdiction vested in the High Court of Justice in England and in the Divisional Court of the High Court of Justice as constituted by the Supreme Court of Judicature Act 1925, and any replacement of that Act.

[19]. Section 3(3) provides that in cases where no provision is made by the Ordinance or any law or any rules, the practice and procedure in similar matters in the High Court of Justice of England shall apply so far as local circumstances permit and subject to any directions the Court may give in any particular case in any matter of practice and procedure upon it by such Ordinances or any law is conferred with the jurisdiction conferred upon the High Court of Justice of England and Wales , and in matters of practice and procedure for which no provision is made by such Ordinances or other law the practice and procedure in similar matters in the High Court of England and Wales can be imported.

[20]. Section 22 of the Court of Appeal Ordinance like section 3(3) provides a gap provision that in the event that no special provision is contained in the Court of Appeal Ordinance, or in any other law, or Rules of Court then in exercising its jurisdiction in relation to civil appeals it shall do so as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal. This has been judicially interpreted in **Flamingo Crossing Ltd v Misick & Stanbrook,** Appeal No. CL-AP 14/09, 29th July 2010 to mean in appropriate cases the TCI Court can import the jurisdiction of the English Court of Appeal, but not of the Supreme Court which, in England, is separate from the Supreme Court.

THE ARGUMENTS

The Abuse Principle.

[21]. The Appellant argues that it is an abuse of the process of the court for the respondents to seek recognition again before first paying the costs ordered by the court to be paid in the first failed application. The principle was established as far back as **Morton v Palmer** (1882) 9 QBD 89. It has been expressed in modern times by Briggs J , as he then was, in **Wahab v Khan** [2011] EWHC where he stated at 19:

> *"…the potential for abuse lies in the unfairness of putting the defendant to the expense of fresh proceedings while his costs of the previous proceedings remain unpaid: see Investment Invoice Financing Ltd v Limehouse Board Mills Ltd [2006] 1 WLR 985, at paragraphs 34-37, per Moore-Bick LJ. It has been recognized since the nineteenth century that the normal response of the court to*

such a case is to stay the second claim until the costs ordered in the first claim has been paid. The jurisdiction to stay is discretionary, and depends upon consideration of all the circumstances…"

[22]. The Respondents argue that the costs ordered have not been taxed and since the amount of costs have not been quantified the costs are not yet payable. They rely on **Thames Investment and Securities Plc v Benjamin and others** [1984] 3 All ER 393

[23]. We accept the statement of Gouldiing J in **Thames** that when costs are ordered to be paid "to be taxed if not agreed" that is an order for taxation and, after taxation, payment forthwith. That was the nature of the orders in this case.

[24]. In **Rowland v Gulfpac** [1997] Lexis Citation 1390, which was a case considering a stay on two cost orders, Rix J (as he then was) stated a view which we share:

"…a costs order that costs be taxed and paid forthwith is in the nature of things closely analogous to a claim based on a bill of exchange, in respect of which Bingham LJ said [1]that, according to ordinary principles, it would follow that rarely, if ever, would an application for a stay succeed. This is because it is of the very nature of an order that costs be paid forthwith that, at the time of making that order, the court has to give consideration to the fairness of the various orders as to costs which may be made and has chosen in its discretion to make an order which gave priority to the immediate payment of the costs in question. It is an order which says, in effect, that those costs shall be paid forthwith irrespective of the fact that the pare of those costs might ultimately succeed on the merits of his litigation..."

[25]. In **Thames** the reasoning given by Goulding J, which the court accepts as sound, is that if the costs are not taxed so that they have not yet been ascertained, then before proceeding with the second identical action an amount as estimated by the court should be paid into court or otherwise secured to the satisfaction of the plaintiff. This was in fact the order which he made in **Thames**. Nothing has been drawn to our attention which has invalidated that approach.

[26]. Therefore the argument contained in paragraph 43 of the Respondents arguments dated 16th September 2019 that the proposed new proceedings ("TCI2") cannot

[1] Burnett v Francis Industries PLc [1987] 1 WLR 802

realistically be an abuse of the process of the Court particularly given that there is no current liability on the Plaintiff's part to make any payment to the defendant [because taxation has not taken place] does not appear to be supported by the authority relied on and is not accepted.

[27]. However, we agree with the submission of Mr. Penny QC that the abuse principle is not relevant to the Stay motion, and that it is a matter for the TCI Court in the intended action whether the bringing of the new proceedings constitutes an abuse of process, and if so, whether the claim in that action should be stayed or struck out.

Dar Al Arkan Real Estate and another v Al Refai

[28]. The Respondents rely heavily on **Dar Al Arkan Real Estate and another v Al Refai** [2015] EWHC 1793 (Comm). This was a case involving a costs order arising upon a discontinuance of a claim.

[29]. In **Dar Al Arkan** the second claimant had obtained judgment against the defendant Mr Refai in two civil cases in the Bahrain Chamber for Dispute resolution, and therefore sought to set off those judgment debts against the discontinuance costs. They applied for a stay pending the determination of the action to enforce the Bahrain judgments ("enforcement action") which they had brought in the Commercial Court. They accepted that should a stay be granted they should pay into court an appropriate sum by way of security.

[30]. The application was made under CPR 83.7(4) which is identical in wording to its predecessor RSC Ord 47 r1, "…if the court is satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order…".

[31]. Andrew Smith J granted the stay. His reasons were set out in paragraph 29 as follows:

> *"The most important considerations seem to me (i) the real risk that otherwise they will not be able to enforce the Bahraini judgments;(ii) that there is a least a real chance that the court will hold that they are enforceable here (iii) the absence of evidence that Mr Al Refai will suffer significant prejudice if enforcement is stayed, and (iv) the relationship between the this litigation and the Bahrain judgments."*

[32]. Although he accepted that it was a relevant consideration that the order was for costs, it did not feature in his reasons summarized at paragraph 29. In **Parotti v Watson** [2001] EWCA Civ 506 the Court of Appeal was of the opinion that the fact that the order was a costs order was fundamental in refusing a stay, because, as correctly stated by Aldous LJ, cost orders are recompense for costs to be paid or which have been paid.

[33]. There are distinguishing features between the **Dar Al Arkan** and this case, including:

(i) Although he accepted that it is a relevant consideration to take into account against the application that the order was for costs it does not feature in the reasons summarized at paragraph 29. In **Parotti** the Court of Appeal was of the opinion that the fact that it was a costs order was fundamental in deciding whether or not to grant a stay.

(ii) The two Baharian Judgments had been obtained, although there were triable issues as to defences which would be canvased at the recognition hearing. In this case there is only an intended action in this jurisdiction, and that action is a substantially new action not simply a summary judgment based on the judgment obtained in England.

[34]. The court will therefore relegate **Dar Al Arkan** to its own facts and will not rely on it except for the general principles and how one judge applied them to the facts of the case before him**.**

THE RULES RELIED UPON

Order 45 r 11

[35]. Order 45 r 11, provides**:**

> *"..a party against whom a judgment has been given or order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks fit."*

[36]. It is common ground that it is imported into the court of Appeal rules by virtue of section 4 of the Court of Appeal Ordinance which provides that the Court of Appeal shall have all the powers, authority, and jurisdiction of the Supreme Court. The rule refers to matters which have taken place after the date of the Order in respect of

which a stay of execution is sought. In **London Permanent Benefit Building Society v De Baer** [1969] 1 Ch 321 Plowman J at page 334 explained the import of Order 45 r 11 under which the application was made:

> *"It is implicit in the rule that matters referred to are matters which would or might have prevented the order being made, or would or might have led to a stay of execution if they had already occurred at the date of the order".*

[37]. Therefore the Respondents must point to matters which, had they occurred before the Court of Appeal Order, could have prevented the costs Order being made, or entitled them to a stay of execution.

[38]. This Court decided that the Receivers had acted "ultra vires" by purporting to commence an action without first seeking and obtaining recognition from the T&C Court, allowed the appeal of the Appellant, and dismissed TCI1. The order for costs was made against SHI purportedly acting by the receivers on 29 August 2018 the date of the judgment. The non-party costs order adding the receivers as joint debtors was made on 15 March 2019.

[39]. The defendants sought to rely on the following matters which arose after that date of the judgment as follows:

(1) A decision was taken by the Receivers to start again in the TCI and on 12 October 2018 issued a Summons ("the Recognition Summons") seeking recognition in the T&C of the appointment of the Receivers and their powers to issue proceedings in the TCI which included the reissue of TCI1 as the intended proceedings.

(2) The Recognition Summons has been served on the TCI-respondents, and Serek has filed evidence in opposition. Permission has been obtained from the Supreme Court to serve the recognition summons outside the jurisdiction on Mr Vik, Mr Johansson, and others. Service was effected on Mr Vik in Monaco on 6 August 2019 and service has been accepted on behalf of Reiten GPS by their Jersey clients on 13 August 2019. An unsuccessful attempt has been made to serve Mr Johansson in Aspen, Colorodo.

(3) The Respondents have paid to their Attorneys, Graham Thompson & Co the sum of US$300,000 in escrow to be adjusted upward to cover their costs liability to abide the order of the court in the Recognition Summons and the intended action. Accordingly there has not yet been a hearing on the Recognition summons.

[40]. While it is possible that if a recognition summons had been issued prior to commencing TCI1 the costs order might not have been made, it certainly does not follow that a costs order would not have been made by virtue of that fact alone, or by virtue of the fact alone that they decided to do so. Nor would those facts have entitled the Defendants to a stay. In any event in our judgment the matters referred to in Order 45 r 11 cannot include matters which the Respondents knew or ought to have known should have occurred prior to the action which led to the order for costs (namely the issue of TCI1 action) and it was within their control to make it happen.. The Respondents evidently knew that by the express terms of their appointment as Receivers in England they had to first apply for recognition or obtain the agreement of the intended defendants in the foreign jurisdiction before commencing an action in the foreign jurisdiction. That pre-condition was expressed in the English Order, and they complied with that requirement in Jersey before commencing an action there. Yet, in TCI they proceeded with reckless abandon. Accordingly the Respondents ought to have issued a recognition summons prior to commencing the action. It was this failure which led to the need to consider and issue a recognition summons after the date of Court of Appeal costs order Although said in the context of setting aside an order based on a claim of a change in circumstances, in my judgment the Deputy Judge was right and the principle is applicable to this case when she said in **JSC Bank (a company incorporated in Russia) v Shurikhin and others** [2019] EWCH 1407 (Comm) at paragraph 160:

> *"..Where, however, a party simply chooses not to comply and then, later on, chooses to comply, it is likely (absent exceptional facts) to be an abuse of process for them to seek to rely on their own belated decision to comply as a material change justifying the reopening of their unsuccessful application for relief from sanction.."*

[41]. In these circumstances it is clearly an abuse of process, and it would not be fair to the Appellant to exercise our discretion to grant a stay under Order 45 r 11. In relation to the Receivers these actions were clearly before the date of the 15 March 2019 Order. For the above reasons we therefore exercised our discretion to refuse a stay under that head.

Order 47 r 1

[42]. Order 47 r 1 reads as follows:

"POWER TO STAY EXECUTION BY WRIT OF SEIZURE AND SALE

1.(1) Where a judgment is given or order made for the payment by any person of money, and the court is satisfied, on an application made at the time of the judgment or order, or any time thereafter, by the judgment debtor or other party liable to execution-

(a) That there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b) That the applicant is unable from any cause to pay the money,

then, notwithstanding anything in rule 2 or 3, the court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the court thinks fit.

[43]. The equivalent rule, CPR 83.7(4) of England provides:

"Writs of control and warrants-power to stay execution or grant other relief…

"83.7-(1) At the time that a judgment is given or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or warrant may apply to the court for a stay of execution**....**

...

(4) If the court is satisfied that-

(a) There are special circumstances which render it inexpedient to enforce the judgment or order; …

Then, notwithstanding anything in paragraph (5) or (6), the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit.

[44]. In **Michael Wilson & Partners v Sinclair** [2017] EWCA Civ 55 Lord Justice McCombe with whom Lord Justice Briggs, as he then was agreed at paragraph 17, was of the opinion that CPR. 83.7(4) was the former RSC 47 r 1 (the current law in the Turks and Caicos) and in that form the rule only enabled the grant of a stay of execution by writ of *fi fa* and not execution by any other means. Although it was obiter they traced the provenance of the rule to reach that conclusion.

[45]. The wording of the English rule 87.3(4) is indeed different from the TCI RSC 47r1 whereby the court may "stay the execution of the judgment or order by writ of seizure and sale" (emphasis added), and the former omits the words "by writ of seizure and sale". The rule as now exists in the TCI is recited in full and verbatim at paragraph 17 of **Michael Wilson & Partners.** One is therefore inclined to accept the interpretation of the English Court of Appeal that under RSC 47 r1 the court has power to stay execution of the judgment only by writ of seizure or sale. If this is correct the application for a stay under RSC 47 r1 is premature as this can only take place when the debt has been quantified.

[46]. However, the Respondents relied on several cases where the Order was construed as bestowing a wider discretion in relation to judgments.

[47]. In **Canada Enterprises Corporation Ltd v Macnab Distilleries** [1987] 1 WLR 813 the Court of Appeal did not treat Order 47r1 as so limited in an application before it on that same Order in relation to a stay of a judgment for costs. In **Burnet v Francis Industries plc** [1987] 1WLR 802 the applicants sought a stay of execution of summary judgment in the sum of £49,500 obtained against them where an associated party had a cross-claim. On the facts the court decided not to exercise its discretion, but applied the **Canadian Enterprises** decision, and agreed that Order 47r1 provided a wide discretion to grant such a stay if the circumstances justified. A similar statement of principle applying **Burnett** and **Canadian Enterprises** was made by Rix, J in **Rowland v Gulfpac Ltd (No 2)** [1997] Lexis Citation 1990 relating to two costs orders, although the application for a stay was refused on the facts.

[48]. Since the applications before them were under this very rule, without any other authorities having been drawn to our attention, we prefer to follow the ratio of Caines LJ in **Canadian Enterprises,** Ralph Gibson and Bingham L JJ in **Burnet,** and Rix J in **Gulfpac** which on their face favour the interpretation of a wider discretion.

[49]. The Respondents submitted that in exercising its discretion the court should have regard to the factors recommended by Lord Woolf in **Burnet,** as clarified in **Rowland** and **Dar** which using their summary is as follows:

(1) The nature of the claim
(2) If the cross-claim is not that of the judgment debtor but that of a closely connected party, the nature of their association
(3) The relationship (if any) between the claim giving rise to the judgment and the cross-claim
(4) The strength of the cross claim
(5) The size of the cross-claim
(6) The likely delay before the cross-claim is determined
(7) The prejudice to the judgment creditor if the stay is refused
(8) The risk of prejudice to the party making the cross-claim if a stay is refused.

[50]. In **Burnet** Lord Justice Woolf cautioned that the list was not exhaustive, and the significance among themselves will vary on the facts of the particular case. Also how one judge arrived at his conclusion is not necessarily binding on another judge who may or may not take that approach. Within that context the observations are made under the heads listed.

NATURE OF THE CLAIM

[51]. It is a claim for costs in favour of the Appellant based on a costs judgment which has not been satisfied. As stated in **Burnet** there will seldom be, for example, a stay of a dishonoured bill of exchange. Rarely, if ever, would an application for a stay succeed in such circumstances. There is authority that an Order for costs to be taxed if not agreed is similar (see the authorities referred to earlier). In **Burnet** itself which was an application under CPR 83.7(4) Bingham LJ described an order for a stay of costs as "unusual" and said at p.811C that the requirement of special circumstances is strictly insisted upon Costs have not yet been taxed.

IF THE CROSS-CLAIM IS NOT THAT OF THE JUDGMENT DEBTOR BUT THAT OF A CLOSELY CONNECTED PARTY, THE NATURE OF THEIR ASSOCIATION

[52]. Since the costs judgment is in favour of the Appellant against the Respondents, and the intended action is by the Respondents against the appellant and others it could be viewed as akin to a cross claim, apart from the fact that it is a costs judgment.

THE RELATIONSHIP (IF ANY) BETWEEN THE CLAIM GIVING RISE TO THE JUDGMENT AND THE CROSS-CLAIM

[53]. Because the judgment was obtained as a result of procedural failure there is likely to be no similar arguments between claim giving rise to the judgment and the cross-claim except on the argument for recognition. The arguments in the obtaining the costs judgment will be different from the arguments of the cross-claim, which will be concerned with issues of breach of statutory duty and the like.

THE STRENGTH OF THE CROSS CLAIM

[54]. Based on the judgments emanating from the actions in the English Commercial Court, and this Supreme Court's indication in that regard, the respondents have at least an arguable case in the intended action which claims, among other things, that the assets of SHI were transferred by Mr Vik out of the company in breach of statutory duty with assistance of Mr Johansson and Otto Inc.(another company incorporated in the TCI. The strength will depend on the view the trial judge takes after full argument in the intended action on issue estoppel in relation to the findings in the English cases. I will not usurp the function of the trial judge.

THE SIZE OF THE CROSS-CLAIM

[55]. According to the Respondents if entirely successful SHI cross claim is in excess of €45 million of which half would be 'secured' by the Reiten Interests and the funds held in the Reiten GPs in Jersey. It would therefore significantly exceed the costs judgment. The Respondents drew to the attention of the court that this does not mean that they will know the nature , location and value of any of the assets against which they could enforce their judgment, and asked the court to firmly reject any suggestion by the Appellant that the receivers will find it a straightforward matter to enforce any

judgment against the Appellant's assets; and that there is a real risk that they will face serious opposition to the enforcement of any judgment that they obtain on their claim in the TCI2.

[56]. Mr Matthews QC went to some length to demonstrate that there was no evidential basis for the contention that the Appellant would obstruct enforcement. He did this by seeking to demonstrate that due to the rule in **Hollington and Newton** (recently affirmed in **Rogers v Hoyle** [2015] QB) which states that findings of fact in civil proceedings are inadmissible in other civil proceedings, no issue estoppel could arise between the Receivers/SHI on one hand and Mr Vik. Accordingly, the receivers cannot rely on factual findings in the English court judgment as evidence in the TCI proceedings, especially since the English court judgment was appealed, although unsuccessfully.

[57]. He further pointed out that as to the fear of dissipation Mr Vik has paid every pound in costs ordered against him personally including six costs orders totalling £37,329,250. Mr Perry QC pointed out that part of this was to put himself in a more favourable position to launch his appeal in England.

[58]. Mr Matthews QC relied on **Burnet** where the court refused to grant a stay on the basis that the costs creditor was unlikely to dissipate those assets or remove them from the jurisdiction or do anything other than to continue to employ them in an ordinary way. In this case the Costs Creditors proposed that the monies be paid directly into their attorney's account and used only to defray costs relating to the intended action. This they say would be a fair outcome irrespective of the fact that DBAG has indemnified the Receivers for the costs under the Court of Appeal Order, and Mr Vik has further cost liability to DBAG in the English proceedings. The Respondents say it would be fairer to hold the $300,000 in escrow in their lawyer's account to be topped up, if necessary, to the amount found due on taxation.

[59]. The Respondents' arguments might hold more sway if this was an application for a freezing order or an application for security for costs. But it is not. What they appear

to be seeking by their argument is security for their judgment and costs, which incidentally in the latter case would amount to the unusual application for security for the cost of the plaintiffs in the intended action. While on their face they may be good arguments in the case of a freezing order, this is not the correct jurisdiction in which that can be decided because the tests and requirements are different and have not been required or satisfied.

[60]. Furthermore, as opined by Lord Wolff this head will rarely be decisive.

THE LIKELY DELAY BEFORE THE CROSS-CLAIM IS DETERMINED

[61]. The Respondents admit that there would be delay but states it has been caused by the Appellant. The matters complained of were, in my judgment, all matters where the Appellant for whatever reason, exercised rights to which he was entitled, and cannot be blamed for the delay.

[62]. Up to January 2020 the Recognition Summons had not yet been heard. Indeed all the parties had not yet been served, and there is already opposition by Serek to it. Consequently the intended action has not been filed as yet. The delay is likely to be years. This is prejudicial to the Appellant and clearly does not support the case for a stay.

THE PREJUDICE TO THE JUDGMENT CREDITOR IF THE STAY IS REFUSED

[63]. The Respondents submit that no conceivable prejudice could be caused to the appellant if a stay is granted. On the strength of comments made in the English Commercial Court, and on the evidence submitted in this application on his behalf Mr Vik is man of considerable means. However, as pointed out by Lord Justice Aldous in Perotti at [11]:

> *"…it must be remembered that an order that a party should pay costs is an order requiring the paying party to pay the reasonable costs <u>paid or payable</u> by the other party. The receiving party does not make a profit .."(emphasis added).*

Costs are the fruits of his judgment, and In the absence of a freezing order the receiving party should not be prohibited from recouping and using his own money.

Outside the context in which the paying party has given an undertaking in damages, on its face a stay of costs is prejudicial and unfair.

THE RISK OF PREJUDICE TO THE PARTY MAKING THE CROSS-CLAIM IF A STAY IS REFUSED.

[64]. The Respondents state correctly that if the Receivers are required to make payment of costs to the Appellants forthwith upon taxation being concluded those sums will not be available for setting off against the unsecured part of any judgment or order against the appellant. This is self-evidently true. This is indeed prejudicial to the respondents and is always the case when a stay is not granted. However, this factor is only one of the factors which the court must take into account and one that carries less weight that the first factor and must be seen within the context of all the other factors. We are not persuaded that its importance when compared with the other factors discussed tips the scale in favour of a stay.

[65]. As to the circularity of liability argument that SHI/Receiver owe Vik $300,000 costs, on taxation Vik may owe DBAG £53.5 million in costs in the English proceedings, and DBAG may owe SHI/Receivers $300,000 on an indemnity, the analysis only has to be mentioned to appreciate how *de minimis* the costs in this action are in the whole scheme of liabilities for the Respondent. In our judgment it is not a point that can be decisive in this case.

[66]. We allowed the re-amendment of the Notice applied for at the beginning of the hearing, and therefore had we granted a stay, it would have applied to the Receivers as well. We did not discuss the arguments on delay, but in our judgment the delay by the Respondents was not a factor that weighed against their application.

CONCLUSION

[67]. Having carefully reviewed the submissions and authorities, we exercised or discretion to refuse the grant of a stay. We had regard to all the circumstances for the reasons discussed, including but not limited to the fact that as stated by the Court of Appeal in the authorities mentioned, the fact that it is a costs order is fundamental, and although each factor was a line item a greater weight was placed on that fact

within the context of the other categories. This is not to say that the other factors were not given their proportional weight. Furthermore, the Appellant has in fact paid all six costs orders made against him so far in the aggregate amount of £37,329,250 and it would be unfair to speculate that he would not do so in this case of $750,000 or thereabouts.

[68]. The Respondents' submission that it would be inconceivable that if a freezing injunction were granted the Court would permit Mr Vik to use the $300,000 for his legal fees is instructive. This is not a freezing injunction. The Respondents chose not apply for one and cannot expect to receive the benefits of one through the back door. Had they applied for an injunction they would have had to satisfy the requirements of such an application including, among other things, agreeing to give an undertaking in damages with the possibility, as a company claiming to have no assets, having to fortify the same. Nor was there an application for security for costs which in any event is usually not granted to an intended plaintiff.

[69]. However, the Appellant was prepared to give an undertaking that the costs will not be removed from the jurisdiction and will be used only to defray legal fees in the intended action including the Recognition application. This is what they had offered to do and it is something that the court would encourage.

[70]. Costs of this application shall be paid by the Defendants, such costs to be taxed if not agreed.

Hon. K. Neville Adderley, JA

I agree

Hon. Sir Elliott Mottley, P,

Hon. Roger Hamel-Smith, JA