Neutral Citation Number: [2018] EWCA Civ 1802

Case Nos: A3/2018/0350 & A3/2018/0348

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES (QBD)
COMMERCIAL COURT
Mrs Justice Cockerill
[2018] EWHC 39 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2018

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE HAMBLEN
and
SIR STEPHEN RICHARDS

- -

Between :

(1) Vladimir Anatolevich Chernukhin **(2) Navigator Equities Limited**	**First & Second Appellants**
- and -	
(3) Vadim Kargin	**Third Appellant**
- and -	
Lolita Vladimirovna Danilina	**Respondent**

Jonathan Crow QC and James Weale (instructed by **Clifford Chance**) for the **First and Second Appellants**
Iain Pester (instructed by **PCB Litigation**) for the **Third Appellant**
David Foxton QC and Tom Ford (instructed by **Byrne & Partners**) for the **Respondent**

Hearing date : 17 July 2018

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Approved Judgment

Lord Justice Hamblen:

Introduction

1. This is an unusual appeal in that it concerns the quantum of security for costs ordered.

2. The appellants, in whose favour security was ordered, challenge quantum on a number of grounds, including an issue of principle, namely whether, once it is found that there is a real risk of non-enforcement of a judgment against a claimant resident in a non-Convention jurisdiction, it is appropriate to grade that risk and to discount the costs to be secured accordingly.

The factual and procedural background

3. The Claimant/Respondent, Mrs Danilina, is a Russian national, resident in Moscow. For a number of years, commencing in the early 1990s, she was in a relationship with the First Defendant/Appellant, Mr Chernukhin. He is also a Russian national but has lived in England since 2004.

4. The Second Defendant/Appellant, Navigator Equities Limited ("Navigator"), is a company registered in the British Virgin Islands.

5. The Third Defendant/Appellant, Mr Kargin, is resident in Riga, Latvia.

6. Mrs Danilina's claims arise out of two matters.

7. The first claim ("the TGM Claim") is made against all three defendants. It concerns her claim that she is the owner of Navigator, which in turn held a 50% interest in a Cypriot company, Navio Holdings Limited ("Navio"). Navio was a joint venture vehicle for the development of a valuable real estate site in central Moscow held by a former state-owned textiles factory, Trekhgornaya Manufaktura OJSC ("TGM"). The other party to the joint venture, holding the remaining 50% interest in Navio, is a Cypriot company, Filatona Trading Limited ("Filatona"). Filatona's owner is Mr Oleg Deripaska, a Russian national who has been involved in other litigation in this country. In support of her claim Mrs Danilina relies on a Shareholders Agreement dated 31 May 2005 ("the SHA") which was entered into by Mr Deripaska, Filatona, Navio, and Mr Kargin on behalf of Navigator, which provided that Mrs Danilina was a party to the SHA and the beneficial owner of Navigator. It is Mr Chernukhin's case that he is and always has been Mr Deripaska's joint venture partner and the beneficial owner of Navigator.

8. The second claim ("the Family Claim") is made against Mr Chernukhin only. It is alleged that, in or around 2007 she and Mr Chernukhin orally agreed that assets accumulated during the course of their relationship and regarded as family assets would be divided as agreed between them. It is Mrs Danilina's case that she and Mr Chernukhin agreed that he would implement this agreement ("the 2007 Agreement") and that he constituted himself as her agent and/or trustee. Mrs Danilina contends that she understood and was led to believe that Mr Chernukhin was at least partly performing the 2007 Agreement through the creation of a trust which was in fact set up and of which she was and remains a beneficiary ("the Sanderson Trust"). It is Mrs Danilina's case that Mr Chernukhin breached the 2007 Agreement and/or is in breach of trust and/or his fiduciary duties, including through failing to (at least) fully

implement the 2007 Agreement and/or through his subsequent dealings with the assets and dealings in relation to the Sanderson Trust.

9. Before these proceedings were issued, by a request for arbitration dated 3 November 2015, Mr Chernukhin and Navigator commenced an arbitration against Mr Deripaska and Mr Deripaska's holding vehicle, Filatona. The primary relief sought in the arbitration was an order that Mr Deripaska and/or Filatona purchase Navigator's shareholding in Navio, on the grounds of the other shareholder's unfairly prejudicial conduct. Mr Chernukhin contended that Mr Deripaska authorised and initiated a forcible takeover of the joint venture business premises on 14 December 2010 by a large group of armed men, since when Mr Deripaska has had exclusive access to and control over the business. The claim was for substantially in excess of $100 million.

10. At the outset of the arbitration, Mr Deripaska raised a jurisdictional dispute. He contended that his joint venture in relation to TGM was with Mrs Danilina rather than Mr Chernukhin. He relied on the SHA and the fact that it named Mrs Danilina and not Mr Chernukhin as the shareholder of Navigator. Mr Deripaska accordingly contended that Mr Chernukhin had no standing to commence the arbitration, because it was the SHA itself which contained the relevant arbitration provision. The arbitral tribunal, J. William Rowley QC, Christopher Symonds QC (presiding) and Michael Brindle QC ("the Tribunal"), ordered that the issues as to whether Mr Chernukhin was the beneficial owner of Navigator and whether Mr Chernukhin was a party to the SHA should be determined at a preliminary hearing. In addition to extensive written and oral submissions on behalf of the parties, the Tribunal heard oral evidence from a number of witnesses on behalf of both Mr Chernukhin and Mr Deripaska over the course of three days, including from Mr Kargin, who was a witness for Mr Chernukhin. Mrs Danilina was not a party to the arbitration and was not called as a witness by either side. Mrs Danilina has stated in a witness statement for the present proceedings that the reason she did not intervene in the arbitration was because she "… did not have the financial resources to intervene in it and did not think it necessary for me to do so".

11. By its Partial Final Award dated 16 November 2016 ("the First Award"), the Tribunal rejected Mr Deripaska's case. The Tribunal concluded that:

> "All these matters, put together, give the lie to the case that Mr Deripaska has put before us. We have no hesitation in rejecting that case. We are satisfied that Mr Chernukhin was and is the legal and beneficial owner of Navigator. We are also satisfied that he agreed with Ms Danilina that she would put her name to the SHA as his agent or front. We are quite satisfied that this was known by Mr Deripaska who had the initial discussions about the venture with Mr Chernukhin. … It follows that Mr Chernukhin was a disclosed principal. In reaching these conclusions we are satisfied that the Claimants have satisfied the burden of proof, which, as we have said, was on them."

12. Following the making of the Partial Final Award, on 14 December 2016, Mr Deripaska and Filatona began proceedings in the Commercial Court, pursuant to section 67 of the Arbitration Act 1996, seeking to challenge the First Award ("the section 67 proceedings").

13. Shortly after the initiation of the section 67 proceedings, Mr Deripaska entered into two agreements with Mrs Danilina, both dated 23 December 2016, namely an Interest

Purchase Option and Assignment of Rights Agreement (the "Option Agreement") and a Loan Agreement (the "Loan Agreement").

14. Under the Option Agreement Mrs Danilina has a "put", and Mr Deripaska a "call" option in relation to Mrs Danilina's interest in Navigator (on the assumption that she will succeed in establishing such an interest) of up to US$12 million. In addition, Mr Deripaska agreed to pay Mrs Danilina US$2 million (in quarterly instalments of US$500,000) in consideration *inter alia* for Mrs Danilina: (i) producing evidence in support of Mr Deripaska's case; (ii) not cooperating with the Defendants; and (iii) instituting proceedings against the Defendants for the purpose of establishing that Mrs Danilina was and is the beneficial owner of Navigator.

15. Under the Loan Agreement, Mr Deripaska agreed to finance Mrs Danilina's claim with up to US$3 million, subject to Mr Deripaska agreeing upon the identity of Mrs Danilina's lawyers and being "kept informed" of progress and strategy.

16. It is the appellants' case that the Option Agreement and the Loan Agreement represent an improper arrangement whereby Mr Deripaska seeks to frustrate the arbitration.

17. Mrs Danilina commenced the present proceedings on 22 February 2017. She began her claim by applying for an injunction against Mr Chernukhin and Navigator to restrain them from further pursuing the underlying arbitration, which was proceeding to a substantive hearing in March 2017. This followed a number of unsuccessful adjournment applications made by Mr Deripaska. The injunction application was ultimately resolved through the proffering of certain, more limited, undertakings which did not require any stay of the arbitration.

18. The further hearing in the arbitration took place between 20 and 31 March 2017, with closing submissions on 6 June 2017.

19. In its second partial final award dated 20 July 2017 (the "Second Award"), the Tribunal ordered Filatona and/or Mr Deripaska to purchase Navigator's shares in Navio at a price of US$95,181,285. The Tribunal found that "there is an overwhelming case of oppression which we find has been made out" and also that Mr Deripaska was "prepared to go to considerable lengths to influence individuals and the evidence they might give before us and/or to affect the outcome of the Arbitration."

20. On 19 June 2017 it was ordered that the present proceedings should be listed with the section 67 proceedings, with a case management conference ("CMC") to be held on 7 July 2017. At the CMC on 7 July 2017, Teare J ordered that the section 67 proceedings and the present proceedings be case managed and tried together.

21. In advance of the July CMC, both Mr Chernukhin and Navigator on the one hand, and Mr Kargin on the other, issued applications for security for costs.

22. The applications involved evidence from Russian lawyers relating to the issues of whether that the Defendants would face a real risk of being unable to enforce any order of the English court in Russia and of the costs of seeking enforcement. Mr Kargin adduced two reports from Kulkov Kolotilov and Partners. Mr Chernukhin and Navigator relied on two reports from Clifford Chance Moscow. Mrs Danilina relied on two legal reports which had been provided to her by Mr Deripaska's Russian lawyers, Egorov Puginsky Afanasiev and Partners.

23. In the event, there was insufficient time to hear the applications for security for costs on 7 July 2017. The applications were therefore relisted, to be heard on 8 December 2017.

24. On 6 December 2017, there was a second CMC which dealt with further directions for disclosure, the time for serving witness statements, and extending the length of the trial by one week, from three weeks to four.

25. On 8 December 2017, Cockerill J ("the judge") heard the security for costs applications at a half day hearing. Judgment was reserved and was handed down on 24 January 2018.

The judge's decision

26. The security for costs application was made on two grounds: (i) Mrs. Danilina was resident in a non-Convention state (CPR 25.13(2)(a)); and (ii) Mrs. Danilina was acting as a nominal claimant and there was reason to believe that she would be unable to pay the Defendants' costs (CPR 25.13(2)(f)).

27. A non-Convention state means a state which is not a Brussels Contracting State or a State bound by the Lugano Convention or the 2005 Hague Convention or a Regulation State (as defined in section 1(4) of the Civil Jurisdiction and Judgments Act 1982) – see CPR 25.13(2)(a)(ii).

28. In relation to the application under CPR 25.13(2)(a) the judge noted that the rule must be exercised in a non-discriminatory fashion and that this meant establishing a real risk of difficulties or burdens of enforcement which would not be encountered in a Convention state – see *Nasser v United Bank of Kuwait* [2002] 1 W.L.R. 1868.

29. Having regard to *Nasser*, the judge considered that where there is a real risk that enforcement would take longer or cost more than enforcement in a Convention state, security will generally be ordered to cover that risk only. If, however, there is a real risk of non-enforcement then the court may order security to cover the full likely recoverable amount of costs to date and then later to trial.

30. In relation to additional costs the judge found as follows at [65]:

> "…In my judgment the evidence demonstrates the following things. First, enforcement will cost more, even if matters proceed quite straightforwardly, owing (at least) to the need to prove reciprocity and potentially the need to ensure service of all relevant parties. Secondly not all of those costs will be recoverable. Those are risks which would (subject to discretionary factors) indicate an order relating to costs uplift and partial costs irrecoverability. This would, perhaps, be in the region indicated by CC Moscow, in the low six figures."

31. In relation to the risk of non-enforcement the judge identified the following risk factors at [66]:

> "i) Risk of refusal for non-reciprocity (low but possible);
>
> ii) Risk of refusal for public policy or other procedural grounds (not high, but demonstrated on the authorities);

> iii) Disputes about enforcement resulting in further delay/expense/legal proceedings (not high but demonstrated on the authorities);
>
> iv) Further delay, cost and expense in the execution phase of the proceedings owing to the opacity of the position as to Mrs Danilina's assets and the potential need to take proceedings in multiple jurisdictions (likelihood and financial extent difficult to judge)."

32. Her overall conclusion at [67] was that there was a real risk of "a complete failure of enforcement", although it was not "at the high end of probability".

33. She then asked herself the question at [70]:

> "What therefore is the appropriate course in a case where there is (just) real risk of non-enforcement established, but the greater probability is that obstacles will not lead to a complete inability to enforce, but to still further cost, delay and difficulty?"

34. Her answer at [71] was that "one here combines the position as part of a sliding scale with the various discretionary factors (to the extent relevant)."

35. Having concluded at [72] that there is not "much in the way of significant discretionary factors to take into account in either direction", she then applied a "sliding scale" to the costs claimed. She did this by extrapolating from the figures claimed (which were up to the CMC) to an (unstated) total costs figure up to trial and then discounting (in an unspecified amount or percentage) from that total figure, to arrive at the appropriate sum for security. This approach is summarised at [78]-[79] as follows:

> "78. Turning to quantum, the amount sought by the First and Second Defendants is £820,786.32 which is the estimated amount of costs up to and including the CMC. They are clear that there is intent to supplement this going forward. The amount sought by the Third Defendant is £104,741.28 which represents costs up to and including the security for costs hearing, with an intent to supplement this in future.
>
> 79. Bearing in mind the risks which I have identified and considered above, their gravity and potential quantum and the likely extent of costs in this case, based on the figures to date, I will make orders for security for costs in the amount of £700,000 and £90,000 in favour of the First and Second Defendants and the Third Defendants respectively."

36. In relation to the application under CPR 25.13(2)(f), the judge concluded that Mrs Danilina was not a "nominal claimant" as she has "a significant interest in the outcome of the action" [90].

37. In regard to the TGM Claim the judge found as follows at [91]:

> "91. There may be, indeed there plainly are, issues as to whether Mr Deripaska is the primary moving force behind this litigation, but that is to some extent a logically distinct

> question. The question for me is the interest of Mrs Danilina in the outcome. On this, I accept the Claimant's submissions that it cannot be said she has no real interest in it. Indeed the Option Agreement, whatever else one may say about it, shows a specific quantifiable interest in the outcome of the proceedings. That amount is not certain to be paid, it is an interest which can only bear fruit in the event she succeeds in the proceedings. Thus Mrs Danilina has an interest in the outcome. Further, at least in theory, Mrs Danilina has a separate claim in damages relating to the difference between the Option Agreement price and the value of her shares. While the claim has been submitted to be bad, I do not understand it to be contended that it is demurrable. She therefore has that second interest in the TGM proceedings."

38. The judge noted that the Family Claim provided her with a further interest in relation to her claims against Mr Chernukhin and Navigator.

39. Her decision under CPR 25.13(2)(f) is appealed by Mr Kargin, but not by Mr Chernukhin and Navigator.

The grounds of appeal

40. The grounds of appeal advanced by all the appellants may be summarised as follows:

(1) The judge erred in law by concluding that, notwithstanding that there was a real risk of non-enforcement in Russia, the level of security should be reduced by the application of a "sliding scale" of risk.
(2) The judge erred in ordering security for costs by reference to the entire costs of the action when the application was advanced by reference only to costs up to the CMC and/or by extrapolating, without any proper evidential basis, the total costs from the costs figures up to the CMC and/or in failing to identify the extrapolated total costs figure or the discount made.
(3) The judge failed to have appropriate regard to the following discretionary factors which militated in favour of an order for full security:
    (i) The claim had been instigated and was driven by Mr Deripaska pursuant to an improper agreement made with Mrs Danilina.
    (ii) Mrs Danilina had demonstrated a want of probity in making false and/or misleading statements in relation to her assets.
    (iii) Mrs Danilina's claims are palpably weak.

41. In addition, Mr Kargin appeals on the ground that the judge erred in law in holding that Mrs Danilina was not "acting as a nominal claimant" for the purposes of CPR 25.13(2)(f).

Ground 1 – Whether the judge erred in law by concluding that, notwithstanding that there was a real risk of non-enforcement in Russia, the level of security should be reduced by the application of a "sliding scale" of risk.

42. This requires consideration of three Court of Appeal decisions concerning CPR 25.13(2)(a), namely the *Nasser* case, *De Beer v Kanaar & Co* [2003] 1 WLR 38 and *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099.

43. *Nasser* concerned security for costs of an appeal by a United States resident against a decision to strike out her claim for want of prosecution.

44. In giving the lead judgment of the court Mance LJ held *inter alia* as follows:

(1) The discretion conferred under CPR r. 25.13(1) and (2)(a) to order security for costs on the condition that the claimant is resident out of the jurisdiction must be exercised in a non-discriminatory manner in the light of Articles 6 and 14 ECHR – [58].

(2) The discretion should therefore be exercised "on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned" – [61].

(3) The court should consider tailoring the order for security to the particular circumstances – [64].

(4) There was no evidence of any real obstacle or difficulty in enforcing in the United States. There would, however, be some additional costs of enforcement and delay in enforcement in the United States as compared to in the United Kingdom or a Brussels/Lugano Convention state – [65]-[66].

(5) The risk against which the defendants were entitled to protection was the extra burden in terms of cost and delay and security should be tailored to reflect the nature and size of that risk. This was assessed as being £5,000 (as against total anticipated costs of £10,000) and an order for security in that sum was made.

45. *Nasser* was considered and applied by the Court of Appeal in *De Beer*. That case concerned an application for security for costs made against a Dutch national resident in the United States with assets in the Netherlands and Switzerland. The first defendant, Kanaar & Co, successfully appealed against the refusal of their application on the grounds that the claimant had sufficient assets in Switzerland to satisfy any order for costs.

46. The judgment of the court was given by Jonathan Parker LJ who held that, whilst the court was content to proceed on the footing that there was no reason that an order for costs might not be fully enforceable in Switzerland, it also had to take into account the ease with which assets held there could be moved – [90]. As to enforcement in the United States, on the evidence it held that there was "to put it at its lowest, a risk that an order for costs…may be difficult or even impossible to enforce in Florida" – [84]. This led to the following conclusion:

> "90 In all the circumstances, we conclude that Kanaar is at risk of being unable to enforce an order for costs against Mr de Beer, whether in part or at all, due either to lack of available assets against which such an order could be enforced, or to the unenforceability of such an order in Florida, or both."

47. In the light of that conclusion the court ordered security in the amount of £130,000, being a reasonable estimate of the first defendant's costs up to the end of trial.

48. *Nasser, De Beer* and a number of other cases were considered in the recent Court of Appeal decision in *Bestfort.* The relevant issue in *Bestfort* was whether the evidential threshold for the grant of an order for security under CPR 25.13(2)(a) was (i) a likelihood or (ii) a real risk of substantial obstacles to enforcement. The court held that it was the latter. In reaching that conclusion Gloster LJ, who gave the leading judgment of the court, emphasised the following:

> (1) The principles and approach to the "threshold" test should be simple and clear – [48].
>
> (2) The discretion conferred under CPR. 25.13(1)(a) is very widely expressed – [70].
>
> (3) At an interlocutory stage a judge will not be in a position to resolve disputed issues on the evidence and a "hard-line, inflexible test in relation to an evidential standard based on 'likelihood'" was therefore inappropriate – [79].
>
> (4) The *Nasser* decision does not support an approach based on likelihood as opposed to real risk – [76].

49. The court's conclusion is set out at [77] in the following terms:

> "77. In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively justified grounds relating to obstacles to or the burden of enforcement' there is a *real risk* that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden' but whether the evidence is sufficient in any particular case to satisfy the judge that there is a *real risk* of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test was one of 'likelihood', which involved demonstrating that it was 'more likely than not' (i.e. an over 50% likelihood), or 'likely on the balance of probabilities', that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents…"

50. In the light of that conclusion, and the court's finding that the evidence showed a real and serious risk that an order for costs might not be enforced in the relevant non-Convention state, Georgia, the court ordered security by reference to the full costs claimed – see [87]-[88].

51. Having regard to the guidance provided by these authorities the position may be summarised as follows:

(1) For jurisdiction under CPR 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR 25.13(1) if "it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order".

(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 ECHR – see *Bestfort* at [50]-[51].

(4) This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned" – see *Nasser* at [61] and *Bestfort* at [51].

(5) Such grounds exist where there is a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay – see *Bestfort* at [77].

(6) The order for security should generally be tailored to cater for the relevant risk – see *Nasser* at [64].

(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings – see, for example, the orders in *De Beer* and *Bestfort.*

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement – see, for example, the order in *Nasser.*

52. I would add the following observations:

(1) The relevant risks are of (i) non-enforcement and/or (ii) additional burdens of enforcement. A real risk of either will suffice to meet the "threshold" test.

(2) Some of the authorities refer to difficulties of enforcement. Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of "substantial obstacles" is directed. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the "substantial obstacles" required for there to be a real risk of non-enforcement.

(3) Delay is mentioned as a relevant additional burden of enforcement, but it is difficult to see how this can be quantified in terms of security unless it is likely to result in some additional cost or interest burden.

53. In the present case the judge found there to be a real risk of non-enforcement and made an order for security by reference to the costs of the proceedings. She then, however, graded the degree of risk of non-enforcement and discounted the costs figure accordingly.

54. The appellants contend that this "sliding scale" approach is wrong in principle and contrary to authority. In particular, they contend that:

(1) The starting point, where a real risk of non-enforcement is demonstrated, is to order security in respect of the entirety of a defendant's costs since the relevant risk is non-recovery of those costs.

(2) The judge's approach is inconsistent with the outcome and reasoning in *Bestfort.*

(3) It is inconsistent with the outcome, since in *Bestfort* full security was awarded without any reduction based upon the nature and extent of the risk in question.

(4) It is inconsistent with the reasoning, since the court emphasised the difficulties in determining issues in the context of an interlocutory hearing, observing at [81] that: "At best, all that could be shown was a "proper basis for considering that such obstacles may exist" – i.e. a real risk". That being the correct analysis, it would be unreasonable and unfair to impose a burden on a defendant (within the confines of an interlocutory hearing) to demonstrate, not only a real risk, but a real risk at the higher end of the spectrum in order to justify an order for full security.

(5) Further, the advantages of the real risk test as explained in *Bestfort* would be undermined if there were to be a further level of analysis to quantify that risk once it had been established and to apply some sort of sliding scale.

(6) There is no support in the case law for the approach adopted by the judge.

55. In support of the judge's decision, on behalf of Mrs Danilina it is contended, in particular, that:

(1) Whether to order security and, if so, in what amount is a matter for the discretion of the court. It depends on the court's view as to what is "just" having regard to "all the circumstances of the case".

(2) It is accordingly necessary to show that the judge's decision is outside the generous ambit within which reasonable disagreement is possible.

(3) The judge directed herself correctly in law and in accordance with the relevant authorities.

(4) The judge's exercise of her discretion as to the quantum of security was correct and in any event within the generous ambit allowed to her.

(5) Her approach finds support in the decision of Gross J in *Texuna International v Cairn Energy Plc* [2004] EWHC 1102.

56. I recognise the importance of the discretionary nature of the power to award security for costs, but I consider that there is force in the criticisms made of the judge's approach.

57. In principle, security should be tailored so as to provide protection against the relevant risk. On the judge's findings the relevant risk is that of non-enforcement of any costs order obtained. The purpose of ordering security in such circumstances is to secure the defendant against the risk of non-recovery of those costs. Since that is the risk against which the applicant is entitled to protection, I agree with the appellants that the starting point should be that the defendant is entitled to security for the entirety of his costs.

58. As a matter of authority, this court has held in *Bestfort* that the appropriate "threshold" test when considering the issue of whether there are "substantial obstacles" to enforcement is one of real risk rather than likelihood. Various reasons are given for reaching that conclusion, including the need for a simple and clear approach to issues which will be considered at an interlocutory hearing on the basis of what "necessarily and proportionately, will be limited evidence" – at [48].

59. Whilst the court in *Bestfort* was concerned with the "threshold" test for exercising the discretion to order security for costs in a non-discriminatory manner rather than any discretion as to the amount of security to be ordered, I consider that the court's

approach should be consistent. If, for the reasons given in *Bestfort*, it is not appropriate to require that more than a real risk be established for the purpose of non-discrimination, it is equally inappropriate to do so for the purpose of quantum. The consequence of adopting a sliding approach is in effect to require the defendant to establish likelihood of non-enforcement (if not more) if security for the entirety of the costs is to be obtained.

60. Further, it would lead to the type of detailed evidentiary exercise which the court was keen to avoid through its decision in *Bestfort.* It would allow in via the back door all the evidence and evidential inquiries which the court in that case took care to shut out via the front door.

61. The difficulties to which a sliding scale approach could lead are illustrated by this case. It would first be necessary to identify the appropriate total costs figure. In this case the judge had no evidence of the total costs and so had to extrapolate. It would then be necessary to grade the risk and arrive at an appropriate discount. That is a difficult and speculative exercise and it is to be noted that the judge did not identify the discount applied. If it is considered that non-enforcement is likely (i.e. more than a 50% chance) does that mean the appropriate figure is the entirety of the costs? If not, then the defendant would be required to establish more than that required by the high threshold test rejected in *Bestfort.* If so, then grading would be limited to cases where the probability of non-enforcement lies somewhere between whatever (uncertain) percentage "real risk" represents and 50%. Neither approach is satisfactory.

62. Nor do I consider that the *Texuna* case provides support for the judge's approach. In that case the claimant was resident in Hong Kong but also had a substantial asset in Russia. The judge awarded security of £50,000 to reflect the additional burden of enforcement in Hong Kong. However, since it was unlikely, but possible, that the available assets in Hong Kong would be insufficient to meet the defendant's costs, the judge also ordered a further £50,000 by way of security in respect of the risks of enforcement in Russia, where enforcement would be "difficult, time consuming and expensive". The costs figure in relation to Russia was accordingly discounted because it was only a contingent risk and a risk which, if it eventuated at all, was only likely to relate to part of the costs. There is no suggestion in the judgment that the discounting was carried out by reference to grading of the risk of non-enforcement, nor that this point was argued or suggested. Indeed, as the appellants pointed out, there appears to be no prior case in which the sliding scale approach of the judge has been adopted.

63. For all these reasons I consider that the judge did err in law in adopting a sliding scale approach. To be fair to the judge she did not have the benefit of any detailed argument on the issue, whereas it has been the main focus of a one day appeal before this court.

64. In my judgment, once it has been established that there are "substantial obstacles" sufficient to create a real risk of non-enforcement, the starting point is that the defendant should have security for the entirety of the costs and there is no room for discounting the security figure by grading the risk using a sliding scale approach.

65. That is the starting point but it by no means follows that security for all or indeed any of those costs will be ordered. The quantum of security is a matter of discretion and discretionary factors such as, for example, delay or stifling, may affect the amount of security to be ordered, if any.

66. I would therefore allow the appeal on ground 1.

Ground 2 – Whether the judge erred in ordering security for costs by reference to the entire costs of the action when the application was advanced by reference only to costs up to the CMC and/or by extrapolating, without any proper evidential basis, the total costs from the costs figures up to the CMC and/or in failing to identify the extrapolated total costs figure or the discount made.

67. In the light of my decision on ground 1 it is not necessary to determine this ground of appeal. Whilst it may well have been open to the judge to determine that there should be a once and for all determination of security for costs rather than a staged approach, I consider that it would have been preferable if she had made it clear that she had this in mind so that the issue of the appropriate total costs figure could so far as possible be addressed.

Ground 3 – Whether the judge failed to have appropriate regard to following discretionary factors which militated in favour of an order for full security:

(i) The claim had been instigated and was driven by Mr Deripaska pursuant to an improper agreement made with Mrs Danilina.
(ii) Mrs Danilina had demonstrated a want of probity in making false and/or misleading statements in relation to her assets.
(iii) Mrs Danilina's claims are palpably weak.

68. It is equally unnecessary to determine this ground of appeal, which was in any event only pursued to the extent that it was needed.

69. In relation to the appropriateness of considering arguments on the merits, the position is correctly summarised in the notes to the 2018 White Book at 25.13.1:

> "Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. See *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074".

70. I agree with the judge that the summary in the following paragraph of the notes in the White Book is inconsistent with this well established approach and should not be followed. It is there stated:

> "In considering an application for security for costs against a claimant, the court must take into account the claimant's prospects of success…"

This statement should not be followed.

Ground 4 - The judge erred in law in holding that Mrs Danilina was not "acting as a nominal claimant" for the purposes of CPR 25.13(2)(f).

71. It is not necessary to address this ground of appeal in any detail, but, in the light of the judge's understandable finding that Mrs Danilina had a significant interest in the outcome of the litigation, her conclusion that she was not a "nominal claimant" would appear to be orthodox, consistent with authority and correct.

Conclusion

72. For the reasons outlined above I would allow the appeal on Ground 1.

73. There was a dispute between the parties as to what should happen in those circumstances. The appellants submit that the court should order that security for costs up to the CMC be provided in full, with liberty for them to apply for further security. On behalf of Mrs Danilina it is contended that the court should remit the applications for security back to the High Court for determination, with the appellants being required to provide their own figures of the total full costs of the proceedings until the end of trial, so that arguments, including as to quantum and stifling, can be considered and made as appropriate.

74. Given the nature of the issues between the parties, and the imminence of the trial, I agree that the respondent's proposal is to be preferred. The security so far provided can be treated as a payment on account of security for the costs of the action. Any further application for security should be addressed in accordance with the approach set out in this court's judgment, but arguments as to matters such as quantum and stifling remain open to Mrs Danilina.

Sir Stephen Richards:

75. I agree.

Lord Justice Longmore:

76. I also agree.