



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 105 OF 2014 (DDJ)

BETWEEN:

- (1) ARNAGE HOLDINGS LIMITED**
- (2) BROOKLANDS HOLDINGS LIMITED**
- (3) EAST FARTHING HOLDINGS LIMITED**
- (4) MS KATIA RABELLO**
- (5) MR FERNANDO TOLEDO**

Plaintiffs

AND

WALKERS (A FIRM)

Defendant

Appearances:

Harry Matovu KC and Stuart Diamond of Diamond Law
for the First to Fourth Plaintiffs

Mark Simpson KC and Sebastian Said, Nico Leslie and
Susan Fallan of Appleby (Cayman) Ltd for the Defendant

Before:

His Hon. Justice David Doyle

Heard:

5 October 2022

Draft Judgment circulated:

21 October 2022

Judgment delivered:

28 October 2022



HEADNOTE

Dismissal of application by the First to Fourth Plaintiffs to set aside or vary an order of the Court of Appeal in respect of security for costs – Granting an application by the Defendant for the dismissal of the proceedings with costs against the First to Fourth Plaintiffs – consideration of relevant law and legal principles

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JUDGMENT

Introduction

1. I heard oral submissions on 5 October 2022 in respect of a summons of the First to Fourth Plaintiffs (the “**Relevant Plaintiffs**”) dated 5 September 2022 (the “**Relevant Plaintiffs’ Application**”) and a summons of the Defendant dated 28 July 2022 (the “**Defendant’s Application**”) and reserved judgment. I now deliver judgment.

Access to justice

2. In modern sophisticated common law jurisdictions which respect the rule of law (such as the Cayman Islands) access to justice is important. It goes to the core of a civilised existence. As Lord Reed put it in the *Unison* case [2017] UKSC 51 at 68: “*Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.*”



3. Section 7 (1) of the Bill of Rights scheduled to the Cayman Islands Constitution provides that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time. It is in similar terms to Article 6 of the European Convention on Human Rights and Fundamental Freedoms. It is important in civilised communities that natural persons and other legal entities have access to justice by way of a fair trial.
4. If a plaintiff or a claimant has a legal claim they file a formal document (in Cayman a writ) with the court and serve it on the defendant. Formal written pleadings are exchanged concisely setting out the respective cases of the parties. Discovery or disclosure of the relevant documents takes place. Evidence is exchanged. The matter normally, after some interlocutory skirmishes between the parties, proceeds to a trial and the dispute is decided on the merits unless it is settled or dismissed beforehand. At the trial the judge hears the evidence and submissions, applies the law and in accordance with his or her (or in the future perhaps “its” if AI continues to develop) judicial oath, reaches a determination of the claim and gives reasons for such. This litigation process is expensive. Normally the legal costs “follow the event” which means if the plaintiff is successful the defendant must pay the plaintiff’s costs and vice versa.

The overriding objective

5. The overriding objective of most courts is to deal with cases justly. In the Cayman Islands the overriding objective is set out in the Preamble to the Grand Court Rules as follows:

“Preamble

1. *The Overriding objective*



- 1.1 *The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*
- 1.2 *Dealing with a cause or matter justly includes, as far as is practicable –*
- (a) ensuring that the substantive law is rendered effective and that it is carried out;*
 - (b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;*
 - (c) saving expense;*
 - (d) dealing with the cause or matter in ways which are proportionate*
 - (i) to the amount of money involved;*
 - (ii) to the importance of the case; and*
 - (iii) to the complexity of the issues;*
 - (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.*
2. *Application by the Court of the overriding objective*
- 2.1 *The Court must seek to give effect to the overriding objective when it*
- (a) applies, or exercises any discretion given to it by these Rules; or*
 - (b) interprets the meaning of any Rule.*
- 2.2 *These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.*



3. *Duty of the parties*

The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

4. *Court's duty to manage proceedings*

4.1 *The Court must further the overriding objective by actively managing proceedings.*

4.2 *This may include –*

- (a) identifying the issues at an early stage;*
- (b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- (c) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (d) helping the parties to settle the whole or part of the proceeding;*
- (e) deciding the order in which issues are to be resolved;*
- (f) fixing timetables or otherwise controlling the progress of the proceeding;*
- (g) considering whether the likely benefits of taking a particular step will justify the cost of taking it;*
- (h) dealing with as many aspects of the proceeding as is practicable on the same occasion;*
- (i) dealing with the proceeding without the parties needing to attend at court;*
- (j) conducting procedural hearings by means of telephone conference calls;*
- (k) making appropriate use of technology; and*
- (l) giving directions to ensure that the trial proceeds quickly and efficiently.*



4.3 *Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules.”*

6. I stressed the importance of the overriding objective in *Toledo v Walkers* (unreported judgment 25 January 2022). The parties and their attorneys must assist the court in advancing the overriding objective. Attorneys have an overriding duty to the court in the fair, just and efficient administration of justice.

Four important principles

7. There are four other important principles that courts also have regard to:

Cards on the table from the outset and one bite at the cherry

- (1) Firstly, the modern litigation culture requires parties to be open and co-operative. Their cards should be put on the table at the outset. They should not keep cards up their sleeves to be played later. They should raise all relevant issues at the outset. This is not entirely new. As Wigram V-C famously said on 20 July 1843 in *Henderson v Henderson* [1843-60] All ER Rep 378 at 381:

“... the court requires the parties to ... litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only



because they have, from negligence, inadvertence or even accident, omitted part of their case.” [to which I would add a fortiori if a party makes a deliberate decision not to raise a specific point or adduce evidence at the outset but later attempts to rely upon it]

The oft-quoted words of Buckley LJ uttered over 138 years later on 4 November 1980 in *Chanel Ltd v Woolworth & Co* [1981] 1 WLR 485 at 492 to 493 are also worth remembering and they are particularly relevant to the circumstances of the issues for determination presently before this court:

“Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party’s position.”

As Dyson, Waller and Neuberger LJJ said in *Collier v Williams* [2006] EWCA Civ 20 at paragraph 119 an unsuccessful party “*should not be allowed to have a second bite of the cherry merely because he failed to succeed on the first occasion.*” In a similar vein Brooke, Laws and Dyson LJJ in *Woodhouse v Consignia plc* [2002] EWCA Civ 275 at [53], in the context of an issue as to whether an application had been made to lift a stay on the first available occasion and the application of CPR 3.9(1), made the following criticisms: “*If no such application was made at that time, one could and should have been made. If such an application was made, it was made incompetently since it was not supported by evidence. There was no reason why an application could not have been made, supported by evidence,*



on the first occasion. Either way, the second application was an abuse of the process of the court. In the exercise of its case management powers, the court has a discretion whether or not to allow or refuse a “second bite at the cherry” in such cases.”

The formidable trio of English appellate judges at paragraph 55 added:

“There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application.”

At paragraph 59 it was stressed that *“in the absence of special circumstances, it is contrary to the good administration of justice to permit parties to have a second bite at the cherry on the basis of evidence that was available on the first occasion.”*

Finality

(2) Secondly, finality. Courts are understandably reluctant to re-open previous decisions or orders, except by way of appeal and even then strict conditions must be met. Albeit in a different context to the case presently before me, Lord Briggs and Lord Sales (with whom Lord Hodge, Lord Hamblen and Lord Leggatt agreed) in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16 in a judgment delivered on 15 June 2022 emphasised the importance of *“finality in litigation”* (at paragraph 29) and reinforced *“the long-standing principle of finality, which had been an objective of civil procedure for at least 175 years”* (at paragraph 31), *“finality is likely to be at its highest importance in relation to orders made at the end of a full trial. But other kinds of final*



order, which end the proceedings at first instance, will attract the finality principle to almost as great a degree. Case management and interim orders lie towards the other end of the scale, and indeed many reserve liberty to the parties to apply to vary or discharge the order, even after it has been sealed. But the finality principle cuts inwhen the order is made, not merely when it is sealed. After the order is sealed, the finality principle applies in a more absolute way, to put it beyond challenge in the court which made it, subject to any liberty to apply in the order, the application of the power in CPR Part 3.1 (7) to vary or revoke it and the slip rule.” (paragraph 35). At paragraph 39 there was reference, in the context of that case, to “the deadweight of the finality principle.”

Abuse of process

- (3) Thirdly, the courts have an inherent power to strike out proceedings as an abuse of process and this well-established power is one “*which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice in disrepute among right-thinking people*” (*Hunter v Chief Constable of West Midlands Police* [1982] AC 529 and 536 per Lord Diplock); and



Proportionality

- (4) Fourthly, proportionality. Courts must deal with cases and issues in ways which are proportionate. This is expressly provided for in the overriding objective of dealing with cases justly.

Policy considerations and security for costs

8. Although civilised legal systems place great weight on access to justice and the desirability of deciding cases on their merits, they also sensibly and fairly recognise that plaintiffs who are resident out of the jurisdiction and/or companies who have insufficient assets to cover costs liabilities may attempt to abuse the system. This is why the courts permit defendants to apply for security for costs against such plaintiffs. If a plaintiff is unsuccessful after a trial on the merits and is ordered to pay the defendant significant costs and cannot or will not pay such costs then a gross injustice may arise. Just as courts will want to prevent an order for security being wrongly used to stifle a genuine claim so too courts will be concerned not to be so reluctant to order security that, as the caselaw states, it becomes a weapon which certain plaintiffs can wrongly use against defendants. Fairness and justice require that defendants be protected in respect of costs, if at the end of the day the claim against them is unsuccessful and the plaintiff is ordered to pay their costs.
9. Sometimes claims are not determined on their merits. As the European Court of Human Rights said in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at [57]:



“Certainly, the right of access to the courts is not absolute but may be subject to limitations ...”

A claim may be made outside the limitation period setting out the deadlines for bringing claims and stale claims issued outwith the limitation period will be dismissed no matter what their perceived merits. Moreover, summary judgment may be entered (in Cayman under Order 14 of the Grand Court Rules), without a trial on the merits, if there is no real prospect of success. Cases may be dismissed for want of prosecution and cases may be dismissed for a failure to comply with court orders, including orders for plaintiffs to provide security to cover the defendant’s costs, to take just a few examples.

10. With those introductory comments, I now turn to consider the applications before the court in this case.

The Defendant’s Application

11. The Defendant’s Application requested:

- “(1) an order that the First to Fourth Plaintiffs’ claims are struck out and/or dismissed for failure to comply with the Court of Appeal’s Order of 4 October 2021 requiring security for costs of US\$4.25m to be paid within 45 days of the date of that order;*
- (2) an order that upon the strike out/dismissal of the First to Fourth Plaintiffs’ claims, they do pay the Defendant’s costs of the action and of this application, to be subject to taxation on the standard basis if not agreed.”*



The Relevant Plaintiffs' Application

12. The Relevant Plaintiffs' Application requested:

“an order pursuant to the provision in paragraph 3 of the Order of the Court of Appeal dated 4 October 2021 (the “Order”) granting liberty to apply and/or the inherent jurisdiction of the Court that paragraphs 2 and 3 of the Order requiring the First to Fourth Plaintiffs to give security for the Defendant’s costs of the action be set aside or varied in such manner as the Court thinks fit.”

Background

13. These proceedings have a lot of history. A little bit of it is covered in the judgments of the Court of Appeal delivered on 1 February 2021 and 2 August 2021 and my judgments delivered on 5 May 2021 and 25 January 2022.

14. I set out below the background to these proceedings insofar as it is relevant to the issues presently before the court for determination.

2014 - 2019

15. These proceedings were started by the Plaintiffs in 2014 and on 21 February 2014 the Defendant’s attorneys wrote to the attorneys for the Plaintiffs and raised the issue of security for costs indicating that if assets were not available to satisfy a costs order the Defendant would be *“facing a US\$0.5 billion claim, brought by plaintiffs who have no*



financial risk in the litigation.” There was reference to plaintiffs using their lack of funds as a “*weapon against the defendant*” (per Smellie CJ in *Global Fixed Income Limited v HSBC Bank Cayman Limited* [2008] CILR Note 7, based on comments to like effect of Megarry V-C in *Pearson v Naydler* [1977] 1 WLR 899 (Ch D). A response was requested by 28 February 2014.

16. The statement of claim was filed on 24 February 2014 and a defence and a request for further and better particulars of the statement claim was filed on 6 June 2014. On 24 July 2014 the Defendant filed a summons seeking a strike-out and/or summary judgment on the claim and security for costs. On 8 September 2014 a reply to the defence was filed together with a response to the request for particulars. On 10 September 2014 an amended defence was filed. On 18 September 2014 the Plaintiffs filed a summons seeking strike-out and/or summary judgment on issues of liability.
17. The Plaintiffs on 24 February 2016 filed their written submissions in relation to security for costs. They relied on three reasons why they said the security application should be dismissed:
 - (1) the Plaintiffs have strong claims;
 - (2) if the Plaintiffs’ summary judgment application is successful then it is the Defendant who should be making a payment on account to the Plaintiffs;
 - (3) in any event, the current financial position of the First to Fourth Plaintiffs is a direct result of the Defendant and the Defendant should not be permitted to take advantage of its own conduct.

At paragraph 26 the Plaintiffs say in the alternative if the Defendant’s assertion that the Plaintiffs have insufficient assets to meet any future liability for costs (which was denied



by the Plaintiffs) is correct, *“the gravity of security would stifle what are arguable, meritorious and genuine claims. This, in itself, would be wholly unjust.”*

18. The first hearing of the applications of the parties before Chief Justice Smellie was on 1 March 2016 and adjourned. Between 27 April and 2 May 2016 there was a trial of the Defendant’s allegation of abuse of process with the Chief Justice dismissing it by judgment delivered on 10 August 2016.
19. By letter dated 31 August 2017 the Defendant’s attorneys wrote to the Plaintiffs’ attorneys asking for confirmation as to who had paid the costs of the Plaintiffs to date and requested details as to resources and the identity of any third parties who have paid them.
20. The Defendant’s skeleton argument in respect of security for costs was filed on 14 May 2018. At paragraph 10 f. it was stated that it is not open to a respondent *“to argue that ordering security will be oppressive and stifle a genuine claim, unless they provide evidence concerning whether money be raised from directors, shareholders, other backers or interested persons.”* At paragraph 10 g. there is reference to *DD Growth*, (Mangatal J sitting as a single judge of the Court of Appeal), and the need to provide sufficient information as to backers: *“It is not enough to show that the Appellant has no ability to furnish security from its own resources. Nor is it sufficient to show that investors or funders are willing to fund.”* It is stated *“No such evidence has been adduced by the Plaintiffs ...”*.
21. From 22 – 25 May 2018 there was the second hearing of the parties’ applications (part heard) which was resumed on 7 December 2018 and completed on 20 December 2018 with the security for costs application being dealt with on the final day. The transcript records the following exchanges between Chief Justice Smellie and Anthony Akiwumi, the



attorney for the Plaintiffs during the hearing on 20 December 2018: (Day 12 pages 90 – 102):

“THE CHIEF JUSTICE: Well, there are some important questions of fact raised by Mr Said, for instance, that you have not responded to requests for disclosure of assets or information about the financial position of the plaintiffs which is an important question going to whether an order should be made I think you should be prepared to address your mind to those issues. It’s now after 1 o’clock. How much longer do you think you might require?

MR AKIWUMI: Well my Lord, if I’m to deal with that properly I would be asking for this matter to be stood out for an opportunity for me to be able to resolve that issue, because in our respectful submission there are some obvious points in relation to proving the status of the financial position no prejudice to the defendant, that we would be permitted a little bit of time in order to respond more fully to this ... if there is a need to complete the evidential gap

THE CHIEF JUSTICE: Well, you raised stifling in your arguments.

MR AKIWUMI: Yes, my Lord.

THE CHIEF JUSTICE: And that would have required you to have instructions and I would think evidence ... as to the reason why the claim is stifled.

MR AKIWUMI: Well, my Lord, we have put ... the reasons as to why we think that the claim would be stifled. We set them out in our written submissions. Your Lordship asked me a direct question in relation to the evidential lacuna, if I may put it that way, as a result of what Mr Said has said, and so I have responded to it We are content to rest on the arguments that we have advanced in our written submissions...”



After the luncheon adjournment Mr Akiwumi confirmed that they were content to rest on their written submissions which prompted the following additional exchanges:

“THE CHIEF JUSTICE: But on the face of it, there must be funds available from somewhere.

MR AKIWUMI: Well, I’m not sure what your Lordship’s observation is based on.

THE CHIEF JUSTICE: Well, you are standing before me for the last three weeks.

MR AKIWUMI: We can’t make assumptions, my Lord.

THE CHIEF JUSTICE: Your clients have been running this case for what is it? Six years now?

MR AKIWUMI: To exhaustion.

THE CHIEF JUSTICE: That costs money.

MR AKIWUMI: To exhaustion.

THE CHIEF JUSTICE: ... you are alleging impecuniosity Even while you are mounting an expensive litigation... So on the face of it there has been significant sums of money available funding the litigation.

MR AKIWUMI: The operative phrase is “There has been” ... That is a legitimate question, my Lord, but as counsel, I’m not giving evidence ...

THE CHIEF JUSTICE: ... the requirements of the case law which, amongst other things, is that if it appears that you can get funding from somewhere you have to address that issue ... fairly and squarely

MR AKIWUMI: I rest on what is before you.

THE CHIEF JUSTICE: Well, I thought it only fair to point out that there is that gap.

MR AKIWUMI: Indeed, and that has been, I hope, heard loud and clear behind me.” (my underlining)



22. On 24 July 2019 the Chief Justice delivered his 149-page judgment. At paragraph 492 he dismissed the Defendant’s strike out application and at paragraph 493 granted the Plaintiffs “*summary judgment on liability with loss/damages to be assessed*” and at paragraph 494 stated that the Plaintiffs were entitled to their costs.

2020 - 2021

23. By order dated 19 February 2020 and filed 6 March 2020 the Chief Justice dismissed the Defendant’s Strike Out, Summary Judgment and Security for Costs Applications, granted the Plaintiffs’ Summary Judgment Application and refused the Defendant’s Leave to Appeal Application “*with reasons to follow*”.
24. In what he described as his ruling on the Defendant’s Applications for Leave to Appeal and Security for Costs dated 8 August 2020 the Chief Justice provided his reasons for the Order made on 19 February 2020. At paragraph 71 the Chief Justice stated “*the granting of security would stifle what are now found to be meritorious and genuine claims*”.
25. By Certificate of Order of the Court of Appeal dated 2 March 2020 it was ordered that the Defendant be granted leave to appeal. Paragraph 1 of the reasons of Goldring P read:

“Although the Respondents’ acceptance of instructions from Dr. Alfonso Braga was indefensible, this appeal has a sufficient prospect of success for leave to be granted for the reasons set out in the Appellants’ Skeleton Argument”.



26. The Defendants' appeal in the Court of Appeal was heard on 18 – 20 November 2020.
27. On 1 February 2021 the judgment of Sir Alan Moses JA (with whom Martin JA and Sir Bernard Rix JA agreed) was delivered. The appeal of the Defendant against summary judgment was allowed and the Defendant's appeal against the refusal to strike out the Statement of Claim was dismissed. Sir Alan Moses JA referred to the Defendant's defence of causation (paragraph 128 onwards) and concluded at paragraph 155 that "*the issues of causation were substantial and could not be dismissed without trial*". Sir Alan Moses JA referred to the Defendant's defence of illegality (paragraph 156 onwards) and at paragraph 169 added that: "*The court will have to assess the extent and gravity of [the Fourth Defendant's] wrongdoing; much will depend on the facts as found at trial*" adding at paragraph 171: "*It is beyond argument, and was agreed by the Plaintiffs that a successful deployment of the doctrine of illegality is a bar to a claim.*" Sir Alan Moses JA concluded his judgment as follows:

"178. I conclude that none of the arguments advanced by Walkers in their denial of any relevant lawyer/client relationship with the Plaintiffs, in relation to causation or in relation to the doctrine of illegality can be dismissed as incontrovertible. Each of them required consideration of the full facts and after full disclosure of documents at trial. None of the Plaintiffs deserved to be condemned in relation to the serious allegations of fraudulent conduct without a full opportunity to defend themselves at trial. Walkers should not have been condemned of serious breaches of their obligations as lawyers on the Islands without a full opportunity to defend themselves at trial.



179. *I repeat, I understand and sympathise with the Chief Justice’s wish to bring an end to what appeared to be interminable proceedings. But only a sensible compromise or a trial can achieve that result. I would allow Walkers’ appeal against summary judgment and dismiss their appeal against the refusal to strike out the Statement of Claim.”*

28. On 4 February 2021 the Plaintiffs issued a summons at first instance seeking directions for a preliminary issues trial in respect of retainer, duty and breach in advance of a trial on other issues including loss, causation and illegality. I was subsequently assigned to the matter, after my swearing in on 23 March 2021. I heard the summons on 19 April 2021 and dismissed it on 5 May 2021 for the reasons in a judgment delivered on that day.

29. The Plaintiffs filed written submissions in respect of the security for costs appeal on 20 May 2021 and included in those submissions were the following statements:

Footnote 3 (referring to the Defendant’s skeleton argument of 11 November 2020 at 12.2 (c)):

“Even there, it is not said in terms that Walkers is not seeking to stymie or stifle the claim.”

“... it would be a gross injustice to permit what is a tactical ploy to stymie the claims to succeed.” (paragraph 3).

“This is a clear case of a defendant seeking to outspend a plaintiff so as to avoid a trial and stymie a meritorious claim” (paragraph 5 (2)).



“... the Chief Justice also considered and found that the application was being pursued oppressively with a view to stifling the claim” (paragraph 48).

“Insofar as stifling is concerned, where a claimant contends that an order for security would stifle its claim then, ordinarily, this will require a filing of evidence to that effect. However, the authorities also make it clear that there may be occasions when the impact of any order can be demonstrated by inference from other facts. Moreover, irrespective of the actual or likely impact of an order for security, the court can and should take into account whether the application is being pursued oppressively with the intention of seeking to stifle the claim.” (paragraph 49 footnote omitted).

“The Chief Justice’s findings and the exercise of his discretion cannot be shown to be wrong” (paragraph 63).

30. On 10 May 2021 I made directions for substituted pleadings and discovery with a further case management conference to be listed for the first available date after 27 September 2021. There then followed protracted email correspondence with court administration and the attorneys in respect of availability culminating in an email from court administration on 30 July 2021 confirming that the case management conference had been set for 16 November 2021 and the trial remain listed for 10am on 3 October 2022 for the duration of 12 weeks.
31. On 25 May 2021 the Court of Appeal heard the Defendant’s appeal on security for costs. The following are extracts from the transcript of the hearing at page 72 lines 13 to 21:



“HONOURABLE JOHN MARTIN: You haven’t mentioned, Mr Chapman [the attorney appearing for the Relevant Plaintiffs], in your five reasons, I think, anything about stifling. Are you contending that the effect of an award of security would be to prevent your clients from pursuing their defence, or their pursuit of the claim?”

MR CHAPMAN: No, my lord. That’s not how the position was put before the Chief Justice and not the finding that the Chief Justice made which I seek to defend in terms of oppression.”

At page 100 lines 20 – 22:

“HONOURABLE JOHN MARTIN: ... You told me earlier that you’re not saying that your claim would be stifled And that presumably applies to all of your clients ... if an order for security were made ...”

32. Sir Alan Moses JA at page 122 lines 18 – 22 noted that Mr Chapman was being careful not to allege stifling. Mr Chapman does not disagree.

33. Mr Said for the Defendant at page 138 at lines 4 – 13 states:

“... we now know that they’re not saying that the claim would be stifled ... There’s not even an argument that it will stifle the claim ... They’re not saying that the claim would be stifled, there’s no evidence that they can’t pay the security. That’s a critical factor. It’s the elephant in the room ...”



Mr Chapman did not dissent. It is plain that at the Court of Appeal hearing the Relevant Plaintiffs expressly disclaimed any reliance on the stifling point.

34. On 28 June 2021 the Plaintiffs' substituted Statement of Claim was filed.
35. On 2 August 2021 the judgment of Sir Bernard Rix JA on security for costs was delivered (in respect of an appeal heard on 25 May 2021). The Court of Appeal considered that security for costs in the sum of US\$4.25 million should be given by the Relevant Plaintiffs. Paragraph 31 of the judgment read as follows:

“In the present case, there is no allegation that an order for security, even in the large amount requested, would stifle the Plaintiffs' claim. Given the scale of this litigation, and the apparent ability of the Plaintiffs, somehow or other, to finance it, this acceptance, even if it came somewhat late, is understandable. Therefore, the cases which demonstrate that an order for security for costs will generally not be made where it would stifle a bona fide and reasonably arguable claim, are of no ultimate assistance.” (my underlining)

36. At paragraph 18 of the judgment it was stated that the Plaintiffs had *“not explained how the expense of this litigation has been supported, or what the source of their funds for fighting it has been. Consistently with that, the Plaintiffs ultimately accept that they cannot say that the ordering of security would stifle their claim.”* (my underlining)
37. At paragraph 51 of the judgment there was reference to Ms Rabello being made *“formally bankrupt in Brazil”* and the following stated:



“Nevertheless, despite that bankruptcy, she and the other plaintiffs in these proceedings have had the wherewithal to conduct extremely expensive proceedings over many years (in circumstances where it is not said that an order for security would stifle these proceedings in the Cayman Islands); and such litigation has not only been conducted in the Cayman Islands but elsewhere, and its costs form part (some USD 15 million) of the claim in these proceedings. It is reasonably clear therefore that Ms Rabello is, or has at some time been, able to find the means, possibly through an international network of arrangements, to dispose of funds located in several jurisdictions in the world.” (my underlining)

38. At paragraph 52 of the judgment it was stated that *“Ms Rabello appears able to draw on assets to support her litigation in spite of her bankruptcy.”* (my underlining)
39. At paragraph 56 of the judgment the following appears:

“Subject to any further submissions in writing, such security [i.e. the USD 4.25 million] shall be provided in 30 days. The Court has not heard submissions as to the consequences of default; and the Parties are at liberty also to make submissions in writing thereon within 14 days.”

40. On 16 August 2021 the Plaintiffs and the Defendants filed their submissions on ancillary matters within the Court of Appeal. The Relevant Plaintiffs at paragraph 3 stated:

“(1) There should be a provision for the security ordered in the sum of US\$4.25 million to be provided within a period of 90 days, with liberty to apply.



(2) *In the event of non-compliance with the requirement to post security, then the Appellant [Defendant] should have liberty to apply (the same order as is habitually made by the English Commercial Court when ordering security) ...”*

41. The Relevant Plaintiffs at paragraph 9 added:

“The Respondents [Relevant Plaintiffs] believe there to be no prospect of them being able to raise sufficient sums to fund either the ordered security of US\$4.25 million or any further security based on the latest demand. Moreover, an order requiring security of US\$4.25 million to be posted while these other matters, including the latest demand for further security are being addressed, will have the effect of stifling the Respondents’ [Relevant Plaintiffs’] claims.”

42. At paragraph 16 the Relevant Plaintiffs requested 90 days to provide the security with liberty to apply:

“That time period ought to enable the [Relevant Plaintiffs] time in which to pursue applications for leave to appeal the Judgment and to stay its effect pending any appeal.”

It is noticeable that the Relevant Plaintiffs were not seeking time to enable them to obtain funds to comply with an order for security.

43. At paragraph 17 the Relevant Plaintiffs submit that the correct consequence of non-compliance would be to give liberty to apply.



44. At paragraph 18 the Relevant Plaintiffs referred to the observations of Waller LJ in the English Court of Appeal in *Radu v Houston* [2006] EWCA Civ 1575 at [18] which they regarded as “*instructive*”. These observations included the following: The making of an order for security for costs is intended: “*to give a claimant a choice as to whether he puts up security and continues with his action or withdraws the claim ... the attitude in the commercial court [is] that an order for very large sums should not be made subject to the “unless” sanction [i.e. unless security is provided within the time specified the claim will be dismissed] until a real opportunity has been given to the claimant to find the money.*”
45. In the Defendant’s written submissions on the form of order for security for costs dated 16 August 2021 the Defendant pressed the Court of Appeal to retain the 30-day period for provision of the Security and also sought an order that the proceedings be subject to an automatic strike out in the event of non-compliance. The Defendant referred to the English Civil Procedure Rules and CPR r.4(1) which it says provide for security for costs orders to be in the form set out in Practice Form 44 which, it says, in turn provides for an unless order as the “*standard form*” order and CPR r.4(2) provides that this form may be varied by the court if the variation is “*... required by the circumstances of a particular case.*”
46. The Defendant referred to *Allen v Bloomsbury Publishing* [2011] EWCA Civ 943 and emphasised the following words of Lloyd LJ (Rix and Sullivan LJJ agreeing) at paragraph 28 and submitted that such should be followed in the Cayman Islands and that the form of order for security should be tailored to the circumstances of the particular case at hand:

“the use of an unless order has to be seen in the context of the history ... There was ample reason for adopting an unless order rather than a stay which would either be indefinite, leaving all parties in suspense, or for a specific period, giving the



claimant a possibility of a second chance for the final striking out sanction ... Moreover, the practice direction to part 24, paragraph 5.2 provides for the model of a striking out sanction as the terms of a conditional order. Accordingly, it seems to me wrong to say that in this context an order for stay on non-payment is the normal form of order.”

47. The Defendant at paragraph 17.4 stated that it would be open to the Relevant Plaintiffs to “*apply for an extension of time for compliance if they had good and genuine reasons justifying such an extension.*”
48. On 20 August 2021 the Defence to the Plaintiffs’ Substituted Statement of Claim was filed.
49. On 30 September 2021 the Plaintiffs’ Reply to the Substituted Defence was filed.

The Court of Appeal Order for security for costs 4 October 2021

50. The Court of Appeal (Sir Bernard Rix, Sir Alan Moses and John Martin, Justices of Appeal) on 4 October 2021, having considered the written submissions, made an Order (the “**Court of Appeal Order**”) which included the following paragraphs:

“2. *By no later than 45 days from the date of this Certificate of Order, the First, Second, Third and Fourth Respondents are jointly and severally liable to give security for the Appellant’s costs of the proceedings incurred up to 30 April 2021 in the sum of US\$4.25 million (Security) by way of:*

a. A payment into Court; or



- b. *A guarantee provided by a first-class bank.*
3. *All further proceedings in respect of the claims of the First, Second, Third and Fourth Respondents be stayed (a) until Security is given as aforesaid, and (b) without further order in the event that the Security is not provided as aforesaid, save as set out in paragraph 4 hereof below, and save also that there be liberty to apply in respect of the consequences of the Order.*
4. *There be exempted from the stay under paragraph 3 above any application to this Court by the First, Second, Third and Fourth Respondents for leave to appeal to the Privy Council: provided that any such application be filed and served within 21 days of the date of this Certificate.” (my underlining)*

The Plaintiffs’ application to the Court of Appeal for leave to appeal to the JCPC

51. The Plaintiffs applied to the Court of Appeal for leave to appeal by application dated 22 October 2021.
52. The following appears in the Relevant Plaintiffs’ skeleton argument seeking leave to appeal dated 22 October 2021:

“... inhibit or stifle a legitimate claim against it through the misuse of the security for costs jurisdiction” (para 6(b));

“...the application was being brought oppressively with a view to preventing the claims coming to trial” (para 8(1));



“... It is obvious that the security for costs jurisdiction is being abused by Walkers in an attempt to stifle a meritorious claim and prevent it from coming to trial” (para 20).

The Court of Appeal *“also failed to consider at all that the application for security was being pursued aggressively and with the improper motive of seeking to stifle the claim ...”* (para 21 (3)).

The Court of Appeal Order 2 November 2021 refusing leave to appeal

53. By Certificate of Order the application for leave to appeal to the Judicial Committee of the Privy Council (the “**Privy Council**”) was dismissed by the Court of Appeal on 2 November 2021. Justices of Appeal Rix, Martin and Moses stating:

“The application raises no point of great general and/or public importance which ought to be reviewed by the Privy Council; on the contrary, the issues raised are entirely ad casum; the complaint of stifling is made for the first time and runs contrary to what was accepted on the appeal of the Court (see paragraph 31 of the Court’s judgment); the views of the Chief Justice on the right to summary judgment and the merits of the claim cannot survive the Court’s appeal decision; the complaint of interference with the Chief Justice’s discretion is therefore unarguable; and the complaint about the quantum of security is entirely one off and personal to the individual case.” (my underlining)



Mr Toledo's stay application

54. On 4 November 2021 the Fifth Plaintiff applied for a stay of his claim and on 16 November 2021 I delivered a judgment which dismissed the application and gave directions for the progression and hearing of the Fifth Plaintiff's claim.

Failure to provide security

55. 18 November 2021 passes and the Relevant Plaintiffs fail to comply with the deadline for the provision of the security in plain breach of the Court of Appeal Order.

Application by the Relevant Plaintiffs to the JCPC for permission to appeal

56. By application dated "5 January 2021" (presumably a typographical error for 2022) the Relevant Plaintiffs sought permission from the Privy Council to appeal.
57. In Annex B: Grounds of Appeal and Reasons Why Permission Should be Given (Harry Matovu KC) just two grounds of appeal are stated at paragraph 7 namely (1) the Court of Appeal was wrong to interfere with the multi-factorial evaluative decision of the Chief Justice; (2) the Court of Appeal's approach was flawed. In particular:
- (a) the Court of Appeal failed to take proper account of (i) the merits and (ii) the fact that the Plaintiffs' impecuniosity was or might have been caused by the Defendants' misconduct and or (iii) the factor of oppression;



(b) the Court of Appeal exercised its discretion in relation to the Fourth Plaintiff in a discriminatory and unjust fashion.

At paragraph 24 it is stated:

“... the CICA also failed to consider at all that the application for security was being pursued oppressively and with the improper motive of seeking to stifle the claim ...”

58. In the Defendant’s Notice of Objection (Mark Simpson KC) it is stated:

“Moreover, the argument at the heart of their leave application to the CICA [footnote 5: See, in particular, [5] – [6] and [22] of the Appellants’ skeleton argument seeking leave to appeal from the CICA], that the order for security would stifle the claim and so raised important issues regarding access to justice, was contrary to what they accepted on appeal (J. 18, 21, 31) and has now been abandoned” (at paragraph 12); and

“.... The Appellants accepted before the CICA, as they had not before the Chief Justice, that they could not say that the ordering of security would stifle their claim ...” (at paragraph 17 (i)).

59. In the Relevant Plaintiffs’ Supplemental Note dated 14 February 2022 (Harry Matovu KC) the Relevant Plaintiffs take issue in respect of what they describe as a “*sustained attack on the Fourth Appellant*” and the reference to Ms Rabello being a “*convicted fraudster*” but do not take issue with the Defendant’s point that they had abandoned the “*stifle*” point in the Court of Appeal or indeed in the Privy Council.



JCPC's refusal of permission to appeal 19 July 2022

60. By report dated 19 July 2022 the Privy Council reported to Her Majesty their opinion that the application for permission to appeal by the Relevant Plaintiffs should be refused because the application did not raise an arguable point of law.

Subsequent correspondence and applications July 2022 to September 2022

61. On 20 July 2022 Appleby wrote to Diamond Law and stated:

“We note that the First to Fourth Plaintiffs have previously confirmed that they are unable to put up this security. Please therefore confirm that the First to Fourth Plaintiffs now agree to a dismissal of their claims with costs.

In the event that the First to Fourth Plaintiffs refuse to consent to a dismissal of their claims, we require the First to Fourth Plaintiffs to provide that security by 4pm 27 July 2022, failing which our client will apply forthwith to dismiss their claims.”

62. Appleby say that they received no response to that letter and no one has referred me to one.
63. There is no evidence before me that the Security has been provided. The Relevant Plaintiffs have failed to comply with the Court of Appeal Order made as long ago as 4 October 2021. They remain in default and the proceedings remain stayed.



64. On 28 July 2022 the Defendant's Application was filed.
65. On 5 September 2022 Stuart Diamond for the Fifth Plaintiff (Mr Toledo) indicated that Mr Toledo's claim had been resolved. This settlement was confirmed at paragraph 4 of the Defendant's skeleton argument dated 29 September 2022. The three-week trial regarding Mr Toledo's claim was vacated.
66. On 5 September 2022 the Relevant Plaintiffs' Application was filed.

October 2022 hearing

67. On 5 October 2022 the hearing of Defendant's Application and the Relevant Plaintiffs' Application took place.

The Evidence

68. I have full regard to the evidence put before the court. I record that oddly there is no direct evidence from the "family and friends" stated to have funded the Plaintiffs in respect of these proceedings and no direct evidence from potential funders. This lack of evidence is important for reasons which I will come to.

David Lewis-Hall

69. There is no evidence from the Defendant direct but David Lewis-Hall a Cayman attorney, provided a short affidavit sworn on 28 July 2022. I note the facts contained in such



affidavit. At paragraph 15 Mr Lewis-Hall of Appleby (Cayman) Ltd, the attorneys acting for the Defendant, confirms “*that the Defendant considers that a continuation of the stay would be highly prejudicial to the Defendant, in particular given the Plaintiffs’ approach to this litigation to date.*”

70. At paragraph 24 Mr Lewis-Hall states that the “*security was not paid and the First to Fourth Plaintiffs’ claims have now been stayed for over 8 months.*” Mr Lewis-Hall concluded his affidavit as follows:

“The Defendant now seeks an order that the First to Fourth Plaintiffs’ claims be dismissed for failure to provide the security. The Defendant believes that such a dismissal will provide finality in substantial litigation which has already been running for 8 years in a context in which the Plaintiffs’ position on their ability to provide security has previously changed without explanation.”

Robert B Macaulay

71. Robert B. Macaulay, an American attorney and shareholder of Carlton Fields, says that he is authorised to make his fourteenth affidavit (sworn on 5 September 2022) by the First to Fourth Plaintiffs.
72. Mr Macaulay at paragraph 14 says that if the Court of Appeal Order stands the Relevant Plaintiffs’ claims will be stifled: “*This is not a situation that the Plaintiffs anticipated when the appeal in respect of security for costs was heard by the CICA in May 2021*”.
73. Mr Macaulay says at paragraph 16:



”...the Plaintiffs’ financial resources are exhausted, and since the CICA Judgment and Order, they have sought to raise third-party funding for the pursuit of their claims and the provision of security for the Defendant’s costs. I have been previously responsible for assisting Plaintiffs in their efforts to obtain third-party funding, and it has proved to be very difficult.”

74. Mr Macaulay at paragraph 26 states:

“Since 2013, the First – Fourth Plaintiffs have managed to meet their own costs of the action to date with the assistance of family and friends.” (my underlining)

75. At paragraph 27 Mr Macaulay says that *“the support of family and friends does not and will not extend to the provision of security for the Defendant’s enormous costs which the CICA ordered.”* There is no evidence from “family and friends”.

76. Mr Macaulay at paragraphs 31 – 47 sets out the discussions he says he has had *“with several potential funders.”* There is no evidence from these “potential funders” or from those who have funded the proceedings to date.

77. Mr Macaulay at paragraph 45 says that from August 2019 until October 2020 in addition to the entities previously described in his affidavit he presented the opportunity to finance the Relevant Plaintiffs’ claims directly to *“at least eight potential investors and funders.”* He adds that the case was presented on his behalf *“to another major UK litigation fund through a Brazilian lawyer friend. However, while none of them expressed any doubt about the merits of the Plaintiffs’ case, all of them either explicitly declined to invest or ceased responding to my emails. If these investors were not even willing to finance*



Plaintiffs' own costs, it would have been fanciful to assume that, once the CICA Judgment on security for costs was issued in August 2021, they would have been interested in providing security for the Defendant's costs, over which they would have had no control".

78. Mr Macaulay finishes his affidavit evidence as follows:

"Summary

48. *In all, since the December 2018 hearing of the Defendant's application for security for costs, I have presented the case as an investment opportunity to at least 10 litigating funding firms or private equity firms involved in litigation funding and at least 18 wealthy individuals and corporate investors. Not one potential funder expressed any concern about the merits of Plaintiffs' claims. However, several have expressed their skepticism as to the likelihood that Plaintiffs would receive a fair trial, based on the procedural history, and especially the CICA Order requiring the First – Fourth Plaintiffs to give security of millions of dollars to the Defendant in a case in which they had previously been granted summary judgment with costs by the Chief Justice.*

49. *However, on the basis of my discussions, I am confident that some of the funders whom I have approached would look seriously at the opportunity to finance the claims of the First – Fourth Plaintiffs if they could be assured that the Court no longer sought to burden them with a requirement to provide millions of dollars' worth of security to the Defendant for its costs.*

Conclusion

50. *As previously mentioned, the Fourth Plaintiff is an undischarged bankrupt and the First – Third Plaintiffs are companies with no assets. None of them has*



any realistic prospect of securing any financing from professional lenders or financiers. Although family and friends have lent money for the Plaintiffs' own costs and my firm has extended substantial credit in respect of its outstanding fees, none of these sources is prepared to provide the multi-million dollars' worth of security that the Defendant demands. The Plaintiffs have no resources and all their third-party funding efforts have failed to date. Following the refusal by the Privy Council to grant permission to appeal against the CICA Order, the Plaintiffs' legal options are exhausted, and unless this Court revisits the order for security, it is now clear that the Plaintiffs' claims will be stifled.

51. *I therefore respectfully ask the Court in its discretion to set aside or vary the order for security for costs. I believe that that is the only course that would enable a fair and just adjudication of the Plaintiffs' claims."* (my underlining)

Katia Rabello

79. Katia Rabello (the Fourth Plaintiff) in her first affidavit sworn on 5 September 2022 at paragraph 5 she says that due to her personal financial collapse since 2013 she has been "unable to provide any material financial resources to fund the litigation of the Plaintiffs' claims, and I have had to rely on friends and family for my own financial support. I have been supported by family and friends in funding my costs in the litigation, although the collapse of our family business interests has caused considerable strain with family members". At paragraph 6 she adds "Although they have been generous in supporting me since my bankruptcy, my family and friends are not prepared to provide security for the payment of the costs of the Defendant, who they blame heavily for my bankruptcy, the destruction of the business group which my father built up and the collapse of our family's fortunes and interests. I have read Mr Macaulay's 14th affidavit, in which he explains the



efforts that he and Mr Toledo have made to secure financing from external funders and investors. Despite their efforts, it is clear that external funders are also unwilling to provide security for the Defendant's costs." (my underlining). At paragraph 9 she states that she does "not have the means to provide the security demanded ...I cannot rely on friends and family to provide the security, and it seems from Mr Macaulay's affidavit that professional funders and investors will not provide the security either." Ms Rabello states that if the court continues to require the Plaintiffs to post security for the Defendants' costs in order to avoid having their claims struck out then the Relevant Plaintiffs' claims will be struck out without ever being heard:

"This is piling injustice upon injustice. In the interests of justice, I ask this Honourable Court in its discretion to set aside the order for security for costs and to allow the Plaintiffs' claim to proceed to trial."

The appearances, the bundles and the submissions

80. Mark Simpson KC, Sebastian Said, Nico Leslie and Susan Fallan of Appleby (Cayman) Ltd appeared for the Defendant and Harry Matovu KC and Stuart Diamond of Diamond Law Attorneys appeared for the Relevant Plaintiffs.
81. I record also that I have considered the bundles and written and oral submissions presented to the court. The parties will be able to glean from the determination section of this judgment which submissions I have accepted and which submissions I have rejected.
82. It may assist readers, however, if I summarise some of the main competing arguments of the parties.



The Defendant's submissions

83. On behalf of the Defendant:

- (1) The claims should be dismissed with costs. The Court of Appeal Order is unambiguous and all avenues of appeal have been exhausted. The position of the Relevant Plaintiffs is that they cannot find the security that has been ordered and that those who have funded the action to date are “*not prepared*” to fund it;
- (2) Dismissal is the usual order where (i) the action is not being pursued with due diligence (ii) there is no reasonable prospect of security being paid or (iii) the court has prescribed a time limit for the payment of security and that time limit has been disregarded by non-payment (*Caribbean Islands Development Ltd (in official liquidation) v First Caribbean International Bank (Cayman) Ltd*; 2014 (2) CILR 220 Smellie CJ at paragraph [48] and at paragraph [52] stating “*An order dismissing an action already stayed for a failure to comply with an order for security, will ordinarily be the appropriate order to make.*”);
- (3) The Relevant Plaintiffs’ Application is hopeless. There has been no material change of circumstances since the Court of Appeal order and, in any event, the evidence served in support is wholly inadequate. The Relevant Plaintiffs have run and dropped the stifling point, for what appears to be purely tactical reasons, at numerous points since the security application was made in a context in which they have been able to fund very substantial costs of the action throughout;



- (4) The court has jurisdiction to vary an interlocutory order where there has been a material change in circumstances or the court has been misled (*a fortiori* where the order contains a “liberty to apply” provision). See *Re China Shanshui Cement Group Ltd* 2019 (2) CILR 74 per Mangatal J at [116]; *ArcelorMittal North America v Essar Global* 16 November 2021 Kawaley J at [65] and *Tasarruf v Wisteria Bay Ltd* 2006 CILR at [7] to [13] Smellie CJ;
- (5) The Court of Appeal was not misled on the security application;
- (6) There has been no material change in circumstances;
- (7) In this case the tactical changes of position by the Relevant Plaintiffs on the stifling issue is an abuse and the court should take that into account when exercising its discretion. The Relevant Plaintiffs alleged stifling in 2016 and 2018, unsupported by any evidence. Despite that, they then managed to fund the claim through to May 2021. Consistent with having been able to do so, they then accepted before the Court of Appeal in May 2021 that the claim would not be stifled by any order for security that the Court of Appeal might make. Yet as soon as the Court of Appeal ruled against them they again alleged stifling, again without any evidence, then dropped it again before the Privy Council. None of these changes of position have been explained. In a context in which the Relevant Plaintiffs have been able to find very substantial funds whenever they have needed them, their whole approach to the stifling issue has been abusive and the Relevant Plaintiffs’ Application is merely the latest example of that. Having run the stifling point in an attenuated and inconsistent form since 2016, giving no relevant disclosure, and then, having lost at every level, it is prejudicial to seek to re-run exactly the same argument with new



evidence now, shortly after the Privy Council appeal has been refused. Indeed, the evidence now relied on (albeit inadequate) could have been, but was not, submitted at any point during the lengthy appeal process;

- (8) The relevant law (*Goldtrail Travel v Onur Air* [2017] 1 WLR 304, *Gama Aviation v Talaveras* [2019] Costs LR 497 at [45 – 49]) in respect of the applicable principles in relation to an assertion of stifling is as follows (i) the court must not impose a condition requiring security with which it is likely to be impossible for the relevant party to comply [45]; (ii) the burden is on that party to establish on the balance of probabilities that it would be unable to comply with that condition [46]; and (iii) in order to discharge that burden the party must show, not only that it does not have the necessary funds, but that no such funds would be made available to it, whether (for a corporate entity) by its owner or (in any case) by some other closely associated person. The mere unwillingness by a third-party backer to fund proceedings, as opposed to inability, is insufficient to discharge the relevant burden (*DD Growth* at paragraphs 42 – 3 and *AHAB v SAAD* transcript pages 413 to 414);
- (9) The Relevant Plaintiffs have in any event, come nowhere near establishing, on the balance of probabilities, that their claim will be stifled if the Court of Appeal Order stands. The evidence they have provided is still wholly inadequate;
- (10) The Relevant Plaintiffs’ evidence simply states that “friends and family” are not “prepared” to fund these proceedings. It does not say that they cannot fund them. Merely asserting that third party backers are unlikely to fund is not sufficient without adducing evidence that they are unable to fund; and



- (11) In any event the Relevant Plaintiffs' evidence falls far short of the "*full, frank, clear and unequivocal*" evidence required.

The Relevant Plaintiffs' submissions

84. On behalf of the Relevant Plaintiffs:

- (1) this case is an important case for the Relevant Plaintiffs and the legal system of the Cayman Islands and it would be contrary to the overriding objective to stop it going to trial and being heard on its merits;
- (2) the court has jurisdiction to hear the Relevant Plaintiffs' Application under the liberty to apply provision in the Court of Appeal Order and under its inherent jurisdiction and the Defendant has raised no objection to the jurisdiction of the court;
- (3) the Relevant Plaintiffs have no means of financing the requirement of security themselves, and they have made serious and wide-ranging efforts to secure funding to comply with the Court of Appeal Order. Despite their best efforts it is now apparent that they cannot obtain funding to provide the security;
- (4) the Relevant Plaintiffs seek to set aside the Court of Appeal Order in light of the circumstances which have become apparent since the order was made. Although the Relevant Plaintiffs had anticipated that they would be able to obtain funding, given their assessment of the strength of their claim, it is now apparent that no such



funding is to be found, and so the Court of Appeal Order threatens to stifle their claim;

- (5) it is well established that security should not be ordered if the effect of such an order would be to prevent a plaintiff from pursuing its claim (*Goldtrail Travel Ltd v Onus Air Tasmacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014 at [12].) The test is that security should not be ordered if the plaintiff is able to establish that “*it would probably stifle the [claim]*” (*Goldtrail* at [16]). The question is simply whether the plaintiff has established on the balance of probabilities that no funds would be made available to it as would enable it to satisfy the order for security. The court should judge the probable availability of the funds by reference to the underlying realities of the plaintiffs’ financial position (*Goldtrail* at [23] – [24]);
- (6) the Relevant Plaintiffs have a serious case to be tried;
- (7) there is clear evidence that the Relevant Plaintiffs have made untiring efforts to obtain funding to meet the Court of Appeal Order;
- (8) the Relevant Plaintiffs’ efforts to obtain funding have spanned many months, several continents and several different sources of finance. Although there might be a prospect of funding for their own costs, it is apparent that no one is prepared to provide funding to the Relevant Plaintiffs to enable them to provide security. If the Court of Appeal Order is maintained, it is clear, when one looks at the underlying realities of the Relevant Plaintiffs’ financial position, that it would probably stifle the claim;



- (9) the Relevant Plaintiffs have provided sufficient evidence to establish stifling; and
- (10) it would be disproportionate to dismiss the claim without a hearing on the merits.

The Law

85. The parties set some of the relevant law out in their skeleton arguments and I have full regard to the authorities relied upon which are referred to in this judgment.

Security for costs

86. I turn first to the caselaw on security for costs.

Goldtrail

87. The attorneys made detailed reference to *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] UKSC 57; [2017] 1 WLR 3014. In that well-known English authority on security for costs and the issue of stifling Lord Wilson (with whom Lord Neuberger and Lord Hodge agreed) delivered the main judgment in characteristically clear terms. Lord Clarke and Lord Carnwath dissented on the facts but not to any great extent on the applicable principles. At paragraph 12 Lord Wilson made the point that to stifle an appeal is to prevent an appellant from bringing it or continuing it. If an appellant has permission to bring an appeal it is wrong to impose a condition which has the effect of preventing him from bringing it or continuing it:



“There will seldom be a “fair hearing” within article 6 [of the Convention for the Protection of Human Rights and Fundamental Freedoms] if a court which has permitted a litigant to bring an appeal then, by indirect means, does not permit him to bring it.”

88. Lord Wilson at paragraph 13 referred to a variety of situations in which a party submits that the effect of granting or refusing an application would be to stifle his continued participation in the proceedings including in response to an application by a defendant for him to provide security for costs.
89. Lord Wilson at paragraph 15 states that there is no doubt that an objection as to stifling needs to be established by those who make it on the balance of probabilities because the other side *“can hardly be expected to establish matters relating to the reality of the [relevant party’s] financial position of which he probably knows little.”*
90. Lord Wilson indicated at paragraph 16 that for all practical purposes courts can proceed on the basis that, were it to be established that it would probably stifle the proceedings the condition should not be imposed.
91. At paragraph 17 Lord Wilson made the important point that it is clear even when the relevant party to the proceedings has no realisable assets of its own to satisfy it, a condition for payment *“will not stifle its appeal if it can raise the required sum.”* Lord Wilson quoted from Brandon LJ in the *Yorke Motors* case: *“The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.”*



92. Lord Wilson at paragraph 18 referred to the position of the ability of a corporate entity to raise money and after referring to *Prest v Prest* [2013] 2 AC 415, 487 para 34 concluded:

“The question should never be: can the shareholder raise the money? The question should always be: can the company raise the money.”

93. Lord Wilson referred to the judgment of Clarke LJ in the *Hammond Suddards* case and the observation, in that case, that (1) it would be difficult for the respondents to exercise the normal mechanisms of enforcement against the appellant and (2) the appellant had had access to resources which had called it to secure representation of the highest quality in the proceedings to date concluding *“There is no convincing evidence that the appellant does not either have the resources or have access to resources which would enable it to pay the judgment debt and costs as ordered.”* Lord Wilson said that no criticism had been directed at that conclusion and added at paragraph 21 that *“It was an impeccable summary of the court’s reason for acceding to the respondents’ application”*. Clarke and Waller LJ found in the *Hammond Suddards* case that the appellant’s disclosure of its financial affairs had been inadequate.

94. Lord Wilson at paragraph 23 of *Goldtrail* felt no need to approve the superimposition upon the relevant criterion a test of exceptional circumstances *“that over-used store-room in the mansion of the law”* adding:

“In this context the criterion is: “Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to



satisfy the requested condition?” (My underlining to emphasise the word ‘would’ rather than the word ‘could’).

95. To Dario Fo’s “Can’t Pay Won’t Pay” Lord Wilson has added the legal test of “Would Pay”. Lord Wilson felt that Patten LJ wrongly applied a “Could Pay” test. Lord Wilson at paragraph 25 stated that it was a “misconception” to consider “*that in exceptional circumstances an order for a party, without apparent assets of its own, to make a payment into court could be justified by whether another person probably could advance the necessary funds to it irrespective of whether he probably would do so.*”
96. Lord Wilson at paragraph 24 stated that the criterion was simple but wisely acknowledged that its application is likely to be far from simple. Lord Wilson referred to the likelihood of those against whom a condition may be imposed “*to dispute its imposition tooth and nail*” adding:

“In cases, therefore, in which the respondent to the appeal, suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.” (my underlining)



97. Lord Wilson applied those principles to the appeal before him. In that case Mr Bagana, who “largely owned” Onur, a Turkish airline, provided no evidence himself in respect of any further advances of money to his company. The “family and friends”, the previous funders and potential funders have not provided any evidence to this court. Lord Wilson at paragraph 25 stated:

“Oddly no statement was filed on behalf of Onur by Mr Bagana himself but the chief financial officer’s evidence was that he would contemplate making further advances only to enable Onur to make commercial payments necessary in order to keep itself in business. This second-hand assertion called for careful scrutiny ...”
(my underlining)

Lord Wilson stated that it was a misconception of Patten LJ to conclude “*that in exceptional circumstances an order for a party, without apparent assets of its own, to make a payment into court could be justified by whether another person probably could advance the necessary funds to it irrespective of whether he probably would do so.*”

Lord Wilson felt obliged to allow the appeal and remit the matter back to Patten LJ for him to determine Onur’s application for discharge of the condition by reference to the correct criterion.

AHAB v SAAD

98. *Goldtrail* was applied by the Cayman Islands Court of Appeal in *AHAB v SAAD* (Civil Appeal 015/201 transcript of *extempore* judgment delivered on 16 November 2018 by Rix JA with whom Martin JA and Goldring P agreed). Rix JA, who must have been burning



the midnight oil during a busy Court of Appeal session, dealt with these heavy applications which required prompt determination to enable the parties to know where they stood by way of an impressive *extempore* judgment. At page 391 of the transcript Rix JA refers to the “*importance to an appellant of access to the court protected by Article 6 of the European Convention on Human Rights insofar as the United Kingdom is concerned and applicable principles so far as these islands are concerned.*”

Rix JA also had in mind that “*one might have to have some sympathy for the difficulty of someone facing an application for security for costs to prove a negative as to what was not possible in various suggested ways. One also has to have a firm degree of realism and scepticism which is the effect of what Lord Wilson is saying in paragraph 24.*” (my underlining)

99. Rix JA stated at page 392:

“ultimately the exercise of the jurisdiction to award security for costs and to avoid the danger of stifling an appeal, which I remind myself these appellants have as a right in this jurisdiction, is the exercise of a jurisdiction essentially in the interests of justice and which requires the Court to carefully consider and take into account all the matters which ultimately are going to be encapsulated in an exercise of what is the Court’s ultimate discretion.”

Rix JA at 393 answers in the negative the question “*have the appellants established on the balance of probabilities that no funds would be made available to them.*” Amongst the matters which Rix JA had in mind but which were not “critical” to his judgment was the fact that the appellant had already spent quarter of a billion dollars on advice. Rix JA



thought that the Judicial Directorate of Enforcement at the General Court in Al Khobar which controlled the freezing of the appellants' assets may be called upon to assist.

100. At page 403 of the transcript Rix JA refers to well established policy considerations in respect of security for costs orders:

"It is the view of the law of these islands that if a party who does not have funds available to it in these islands because it is neither here and, far more important, is insolvent, wishes to bring proceedings against another party to which it may be liable in costs if it loses those proceedings, then it is only fair that the potentially successful party should have security for these costs for which the losing party will ultimately be liable. Otherwise, one party can bring proceedings and because it is insolvent render itself impervious for any liability for costs, however much it loses in a case that it brings." (my underlining)

101. Rix JA at page 412 commented to the effect that there was no satisfactory answer to the question of what the creditors would do if faced by an order for security. Rix JA was not persuaded that he "could conclude on the balance of probabilities the creditors would not be willing to fund security for costs if that order was made ... If, however, that were to be the response to such an order of this Court, then rather along the lines on which I spoke about JDEK's response to an order of this Court, I would consider that to be the response of the creditors, those who are most interested in the outcome of this litigation ... And if those who are most interested consider that they would not support such an appeal, I for myself would not consider that that was a basis upon which one could say that the appeal was being stifled. It would be the basis upon which those who are most interested in the appeal and at whose behest the appeal is being conducted are being unwilling to proceed



with it... I would say that I am not satisfied on the balance of probabilities that the provision of security will not be forthcoming, either from an unfreezing from JDEK, which the creditors could support and they have not said whether they would support the request for an unfreezing to that extent, or from the creditors directly.”

Gama Aviation

102. *Goldtrail* was also applied by the English Court of Appeal in *Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC* [2019] EWCA Civ 119; [2019] Costs LR 497. The comments of Males LJ in that case at paragraph 62 on the unsatisfactory nature of the evidence before the court are illuminating. Males LJ took the view that the evidence fell far short “of what is required to discharge the burden on the defendant to establish that funds would not be made available to it, whether by its owner or some other closely associated person ... it consists of nothing more than assertion as to inability to make the payment.” (my underlining). The court had been provided with no material (such as latest accounts) upon which to assess the underlying realities of the financial position. There was no evidence from the owner or about the “defendant’s relationship with its owner, including the extent which he is supporting and has supported the defendant financially” (my underlining). Males LJ at paragraph 63 concluded:

“In effect the court is being asked to accept the defendant’s case at face value, which is precisely what Lord Wilson said in Goldtrail at [24] that it should not do.”



Harbour Castle

103. *Goldtrail* was also applied in *Harbour Castle Limited v David Wilson Homes Limited* [2019] EWCA Civ 505. In that case the English Court of Appeal was dealing with an appeal against an order striking out proceedings as an abuse of process of the court. HCL had commenced a first action but it was struck out in December 2012 under the terms of an unless order for failure to provide security for costs. Subsequently HCL commenced a second action in December 2016 with the same cause of action but with an added claim for consequential losses. David Richards LJ at paragraph 10:

“In the present case, the first action was struck out for failure to comply with a peremptory order for the provision of security for costs. Such an order will not normally be made if security cannot be provided and the order would stifle a legitimate claim. On that basis, one would expect HCL’s second action to be regarded as an abuse of the process. HCL accepts that this would be so, were it not for the decision of the Supreme Court in Goldtrail ...”

104. David Richards LJ at paragraph 13 referred to various submissions to the effect that if HCL was not able in December 2012 to raise the requisite funds or other security from Mr Jeans (the sole directing mind of HCL) it would be wrong to conclude that there was a deliberate breach of the order. David Richards LJ continued:

“If that fact could be established, it follows that, on the law as it now stands, Master Marsh’s order would have been discharged since it became clear that Mr Jeans was not prepared to back HCL with the necessary funds to provide security ...”



105. At paragraph 14:

“I accept that, if Mr Jeans ceased to be prepared to fund the provision of security as alleged, it could not in light of Goldtrail be said that HCL’s failure to provide security by 20 December 2012 was a deliberate breach of Master Marsh’s order. If that is right, it is bound to have a very significant, and probably decisive effect on whether the second action is an abuse of process.”

106. David Richards LJ at paragraph 15 stated the question was whether in fact Mr Jeans would have provided the requisite funds if requested to do so by HCL. It was for HCL to show that it could not raise funds from Mr Jeans. It could hardly be otherwise because DWHL would be in no position to prove that negative proposition.

107. There was no dispute that Mr Jeans was the sole directing mind of HCL and had financed both HCL and the litigation up to December 2012 and continued to finance HCL after that time (paragraph 17). Evidence on this issue was put before the judge in the form of witness statements of Mr Jeans and others (paragraph 18). The judge found that the decision not to provide the security was taken by Mr Jeans in his capacity as the directing mind of HCL and that if, in that capacity, he had concluded that it was in the interests of HCL to proceed with the litigation, he would personally have provided the necessary funding. HCL therefore did have access to the funding if it chose to seek it (paragraph 23). It was a deliberate decision by HCL not to comply with the peremptory order for security. David Richards LJ stated (at paragraph 24):

“In my judgment, it was in those circumstances a clear abuse to commence new proceedings making the same claim.”



108. In addition to the important and high-level guidance provided by Lord Wilson in *Goldtrail* general guidance as to the type of evidence required to satisfy the burden of establishing stifling can be gleaned from other judgments. I take on board Mr Matovu’s helpful warning to consider these cases in their own contextual background and facts and not to extrapolate too much from them as a matter of applicable general principles. The cases are however nevertheless of some considerable assistance and underline the well- established need for full evidence to be put before the court, to assist the court into coming to an informed decision on stifling.

DD Growth

109. Mangatal J (sitting as a single judge of the Court of Appeal) in *DD Growth Premium 2X Fund (in Official Liquidation) v RMF Market Neutral Strategies (Master) Limited* (FSD 33 of 2011m CICA No.24 of 2014; Reasons For Judgment 29 May 2015 pre *Goldtrail*) at paragraph 25 referred to the judgment by Barma J in *Easy Watch Products Manufacturing Co. Ltd.* [2003] HKCFI 325 at paragraphs 15 and 16 which state:

“15. ... *the Plaintiff has seen fit only to make the bare assertion that its shareholders and directors are unable or unwilling to fund the litigation. No attempt has been made to indicate what assets the shareholders have available to them, or as to the sources of finance that might be available to them*

16. *Moreover, it seems to me that Mr Chan is right in saying that in general, unwillingness of the backers of a company to put up funds to enable it to*



proceed with a claim which it is making should be afforded little, if any, weight when considering whether or not a claim will probably be stifled if security for costs is ordered. This is particularly so where the court, as here, it would seem that the Plaintiff is no longer operating and that the only person likely to benefit from a successful claim are its shareholders. In such a case, their professed unwillingness to fund the claim should not, in my view, be regarded as an impediment to the making of an order for security, particularly where the court, as here, cannot be satisfied on the evidence presented that they are actually unable to do so" (emphasis in original)

110. Mangatal J at paragraph 26 refers to Smellie CJ's decision in *Global Fixed Income Limited and Euro Fixed Income Limited v HSBC Bank Cayman Limited* (unreported, 24 March 2009) where he cited *Easy Watch* with approval at paragraph 7. Mangatal J at paragraph 42 said that she must "*scrutinize the evidence with care*" and at paragraph 43 stated:

"In my judgment, the Appellant has not provided sufficient information as to the identity of its investors or backers. Nor has it provided sufficient evidence as to the inability, as opposed to the unwillingness, of its investors to put up funds in respect of security for costs. It is not enough to show that the Appellant has no ability to furnish security from its own resources. Nor is it sufficient to show that investors or funders are unwilling to fund. Indeed, if they are unwilling to fund that may carry negative connotations for the genuineness or merits of the Appeal."

111. At paragraph 45, Mangatal J added:

“It is for the Appellant to go further than it has done and to show that its investors are unable to put up the funds. The Appellant would have these matters peculiarly within its knowledge and it has failed to satisfy me that it would be prevented from pursuing the appeal if I were to make an order for security for costs.”

112. I fully appreciate that I should read these comments in the light of *Goldtrail*.

Al-Koronky

113. In *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) Eady J at paragraph 31 made his oft quoted statement, which I think survives *Goldtrail* and is indeed supported by it (Lord Wilson at paragraphs 15 and 24):

“... 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 approach the matter on 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.” (my underlining)

114. Eady J at paragraph 33 stated that a *“vitaly important principle for me to have in mind in the instant case ... is that the court should not, upon such application, enter into the merits of the case in any detail, save in the exceptional case where one party or the other can demonstrate a high degree of probability of success.”* (my underlining)



Dubai Islamic Bank

115. Tomlinson LJ (with whom Lloyd LJ agreed) in *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2011] EWCA Civ 761 at paragraph 30 stated:

“Where a party seeks to suggest that he is devoid of assets and yet able to maintain an expensive lifestyle and to fund litigation on the basis of loans from his family or other third parties, it is incumbent upon him in my judgment to provide details of the nature of those loans, the terms upon which they are granted and in particular to condescend to some further detail in relation to the efforts he has made to obtain further funds from the same sources.” (my underlining)

Wallis v Soberano

116. In *Wallis v Soberano* (Appeal Division Isle of Man judgment 16 January 2015) at paragraph 13 the court referred to the onus being on the party who contends that an award of security for costs would have the effect of stifling the claim “*to adduce full, frank and clear unequivocal evidence to support such a claim*” and noted Manx authorities agreeing with the observations of Eady J in *Al Koronky* and accepting and adopting such approach. In *Wallis* the Appeal Division at paragraph 21, reflecting perhaps the need for scepticism recognised by Rix JA in *AHAB* and Lord Wilson in *Goldtrail*, stated that on the evidence before the court they were not persuaded by the Appellant, upon whom the burden was, that the effect of ordering security against him would have the effect of stifling or preventing him from pursuing the appeal. The Appeal Division noted the Appellants’ demonstrated resourcefulness in obtaining money when the need arose, and they felt he would be able to pay the security into court.



Agrichem

117. In *Agrichem v Hammond Suddards* [2002] EWCA Civ 335 at paragraph 9 Waller LJ highlighted the need for evidence to be placed “clearly before the court.” (my underlining)

English Civil Procedure Rules commentary

118. At paragraph 25.13.1.1 of the *English Civil Procedure Rules* commentary under the heading “*stifling*”:

“If the effect of an order for security would be to prevent the respondent to application from continuing its claim, then security should not be ordered – see Goldtrail Travel Ltd v Aydin [2017] UKSC 57; [2017] 1 W.L.R. 3014, per Lord Wilson at [12]. However, the burden lies on the respondent to show, on the balance of probabilities, that the effect of an order would be to stifle the claim – see Goldtrail per Lord Wilson at [15] and [23]. To discharge that burden the claimant will need to show that it cannot provide security and cannot obtain appropriate assistance to do so. The court will expect the claimant to be full and frank in relation to these matters ... Al-Koronky v Time Life Entertainment Ltd [2005] EWHC 1688 (QB) Eady J ... at [31] ...”

The jurisdiction to set aside an interim order

119. The parties agree that the Court of Appeal Order was an interim or interlocutory order. It was not a final order. Mr Simpson submitted that I had jurisdiction to set it aside if the



Relevant Plaintiffs could show a material change of circumstances since the making of the order. Mr Matovu submitted that the jurisdiction to set aside such an order was a very wide and flexible jurisdiction and especially where there was an express liberty to apply provision and was not limited to those cases where a material change of circumstances could be shown. I will therefore have to consider the law in this area in some detail and reach a conclusion as to the nature of the court's jurisdiction and how on the facts and circumstances of this case I should exercise it.

ArcelorMittal

120. Kawaley J has already shone a bright light on the court's jurisdiction to set aside interim orders. In *ArcelorMittal North America Holdings LLC v Essar Global Fund Limited* (FSD unreported judgment, 16 November 2021) Kawaley J considered whether a Norwich Pharmacal Order ("NPO") he had made was final or interlocutory or a hybrid form of order and whether the trial judge retained the competence to set aside such an order made on an *inter partes* basis on the ground of material change of circumstances. Kawaley J at paragraph 21 referred to submissions in respect of the test for setting aside a final order:

"The authorities reveal that those exceptional circumstances are only likely to be: (i) in cases obtained by fraud; (ii) where an order was made in the absence of the party now seeking to set it aside; and (iii) final orders on admissions. Absent these exceptional circumstances, it can be an abuse of process to seek to set aside a final order by way of application to the trial judge rather than via an appeal."

Kawaley J at paragraph 22 referred to a submission that the primary circumstances by which an interim order may be set aside are normally only (1) where there has been a



material change of circumstances since the order was made; or (2) where the facts on which the original decision was made were misstated. However, the courts have consistently emphasised that (such is the interests of justice in the finality of a court's order) that it ought normally to take something out of the ordinary to lead to variation or revocation of an order: *Tibbles v SIG plc* [2012] 1 WLR 2591 at 2602 (per Rix LJ). At paragraph 33 Kawaley J stated: "*The appellate status of an order and the retained jurisdiction to revoke it are inextricably intertwined expressions of the finality principle.*" At paragraph 39 Kawaley J found that an NPO was "*a final Order for the purposes of delineating the Grand Court's jurisdiction to revoke (i.e. set-aside) and vary one of its own orders by reason of subsequent developments.*" At paragraph 42 Kawaley J accepted a submission that "*the Grand Court's power to set aside its own orders must be viewed as deriving from its inherent jurisdiction.*"

At paragraph 65 Kawaley J stated:

"In my judgment this Court has a flexible jurisdiction to vary interlocutory orders to respond to material changes of circumstances or misrepresentations (and possibly mistakes which cannot be cured under the slip rule as well), particularly in relation to what may broadly be termed "case management orders" or "procedural orders" but also in relation to "continuing" orders which are made expressly or impliedly subject to "liberty to apply"...Exceptional circumstances would be required to justify revoking or setting aside an inter partes interlocutory order altogether in circumstances where it is not spent." (my underlining)

Kawaley J (at paragraph 65) felt that GCR Order 45 r.11 was probably the jurisdictional basis for the Court's power to vary interlocutory orders, codifying the inherent jurisdiction



of the Court would otherwise have possessed, where it states: “*a party against whom a judgment has been given or an 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.*”

Kawaley J at paragraph 68, on the facts of the case before him, dismissed the application to set aside the NPO.

TMSF

121. Smellie CJ in *Tasarruf Mevduati Sigorta Fonu v Wisteria Bay Limited* 2006 CILR 351 at paragraph 8 relying upon a persuasive judgment of the English Court of Appeal states:

“a plaintiff who has had an order for security for costs made against him may apply to have it varied or discharged if he can show a material change of circumstances since the date of the previous order. However, he may not do so by seeking to produce fresh evidence about his affairs at the date of the previous order ...” (my underlining)

122. As Kerr LJ said in another case (*Parkinson v Myer Wolff & Manley*; unreported 23 April 1985) “*Whether the court would accede to such an application must then depend on the circumstances, the nature of the order previously made and any other material considerations.*”



Tibbles

123. The English Court of Appeal in *Tibbles v SIG Plc* [2012] EWCA Civ 518 considered CPR 3.1(7) which provided that a power of the court under the Rules to make an order includes a power to vary or revoke the order. Rix LJ considered the relevant English provisions and caselaw including *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945. At paragraph 39(i) Rix LJ stated that the English rule was “*apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise open discretion.*” (my underlining). The cases warn against any attempts at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise but at paragraph 39 (ii) Rix LJ provides firm guidance that the discretion will normally be exercised “*only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.*” (my underlining). At paragraph 39 (v) Rix LJ adds “*where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.*” Rix LJ at paragraph 39 (vii) stressed that:

“*...such is the interest of justice in the finality of a court’s orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.*”



124. I also bear in mind that these comments are of even more force since the decision of the Supreme Court of the United Kingdom in *AIC* stressing the importance of finality in litigation.

China Shanshui

125. Mangatal J in *China Shanshui Cement Group Limited* 2019 (2) CILR 734 considered a validation order made largely by consent and an application for a variation. At paragraph 102 Mangatal J expressed her view that the company did make it clear that they reserved the right to apply to vary the order. Mangatal J at paragraph 116 stated:

“Having looked at the matter closely, it does not seem to me that even though proceeding under the “liberty to apply” may encompass wider grounds than a change in circumstances in relation to interlocutory injunctions, where one is dealing with a consent order containing the term “liberty to apply”, good grounds must be shown. As stated in [Chanel Ltd v F.W. Woolworth & Co Ltd [1981] 1 WLR 485], even in interlocutory matters a party cannot fight over a battle which has already been fought unless there has been some significant change of circumstances or the party has become aware of facts which he could not reasonably have known, or found out, in time for their first encounter ...” (my emphasis).

English Civil Procedure Rules commentary

126. At paragraph 25.12.14 of the English *Civil Procedure Rules* commentary under the heading “*Subsequent applications concerning security for costs*” it is stated that “*Before the court*



*considers revising the form of security on a subsequent application, the appellant has to show a material change of circumstances: see *Stokors SA v IG Markets Ltd* [2012] EWHC 1684 (Comm), *Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468; [2006] 1 W.L.R. 596 and *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2021] 3 WLUK 1091 ... *Holyoake v Candy* [2016] EWHC 3065 (Ch); [2016] 6 Costs L.R. 1157 (Nugee J) ...” (my underlining)*

127. At paragraph 25.12.18 under the heading “*Applications to reduce security*”:

*“Once an order for security has been made it is difficult to obtain a further order which reduces the amount of security to be provided. The party applying for a reduction would have to show some exceptional event which renders the assumptions previously made by the court and by the parties fundamentally misplaced (*Harlequin Property (SVG) Ltd v Wilkins Kennedy (A Firm)* [2015] EWHC 3050 (TCC); and see also *Recovery Partners GB Ltd v Rukhadze* [2018] EWHC 95 (Comm); [2018] 1 WLR 1640).”*

Zuckerman on Civil Procedure

128. *Zuckerman on Civil Procedure* (Fourth edition 2021) at paragraph 10.314:

*“The court may vary an order for security for costs by increasing or decreasing the amount of security, or indeed discharging it, if there has been a material change of circumstances [*Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468; [2006] 1 WLR 596.]” (my underlining)*



Roye on Civil Litigation in the Cayman Islands

129. In *Roye on Civil Litigation in the Cayman Islands* (Third edition 2016) at paragraph 14.8 under the heading “*Discharge or Variation of the Order*”:

“It is open to the plaintiff to apply to discharge or vary an order for security for costs, if the plaintiff can show the court that there has been a significant change in circumstances since the making of the order In the local case of TMSFSmellie CJ re-stated the need for a material change in circumstances to be shown when determining whether an order for security for costs should be discharged ...” (my underlining)

What are the consequences if an order for security for costs is not complied with?

130. I turn now to consider the caselaw on the consequences if an order for security for costs is not complied with.

Caribbean Islands Development

131. The leading local authority is *Caribbean Islands Development Ltd (in official liquidation) v First Caribbean International Bank (Cayman) Limited* 2014 (2) CILR 220 where an order for security for costs in the sum of US\$100,000 was made and the action was ordered to be stayed if the plaintiffs failed to comply. The security was not provided on time. The parties agreed to an order that unless the plaintiff provided the security within 90 days the plaintiff’s claim be struck out and the action dismissed. At a hearing for the enforcement of the unless order the plaintiff sought a retrospective variation to permit the security to be



provided by way of an indemnity bond (FSD 52 of 2013, unreported, 16 September 2014). Chief Justice Smellie at paragraph 48:

“The power to dismiss an action or to make an “unless order” in circumstances of default by a plaintiff in failing to comply with an order for security, derives from the inherent jurisdiction of the Court: Speed Up Holdings Ltd v Gough & Co Handy [1986] FSD 330. In that case the Court recognised that there are three principal bases upon which the jurisdiction to make an unless order might be exercised and with which I agree:

- (a) where the court became satisfied that the action was not being pursued with due diligence;*
- (b) where the court became satisfied that, notwithstanding that the relevant limitation period had not expired, there was nonetheless no reasonable prospect that security was going to be paid;*
- (c) where the court has prescribed a time limit within which the security shall be paid and that time limit has been disregarded by non-payment.”*

132. At paragraph 52 the Chief Justice states:

“An order dismissing an action already stayed for failure to comply with an order for security, will ordinarily be the appropriate order to make.”

133. At paragraph 65 the Chief Justice stated:

“... the Plaintiff has failed to comply and continues to be in breach of the Unless Order. In all the circumstances, I am satisfied that the only proper order to make



is one confirming therefore that the Plaintiff's claim stands dismissed in accordance with the Unless Order, with costs to the Defendant."

Speed Up

134. The Chief Justice in *Caribbean Islands Development* set out the main parts of the impressive judgment from E. Evans-Lombe sitting as a Deputy Judge of the High Court of England and Wales in *Speed Up Holdings Limited v Gough & Co (Handly) Ltd* [1986] FSR 330. The judge in that case, having reviewed the relevant English provisions and authorities held that the court possessed the power to dismiss an action where security had not been provided pursuant to an order that it be provided. In that case an order had been made and the proceedings stayed until security was given. No time period for the provision of the security had been set in the order. An order was then made that security be provided within a specific time period and unless it was provided the action would be dismissed with costs. At page 333 the judge referred to a quote from the *Annual Practice*: "*If the plaintiff makes default in giving security he may be ordered to give security within a limited time, and in default the action may be dismissed.*" In our case, of course, the Court of Appeal had specified a time period within which the security should be provided. At page 334 the judge refers to another extract from the *Annual Practice* to the effect that the court has a "*general or inherent jurisdiction*" to dismiss an action in default of security for costs being provided. The judge then went on to consider in what circumstances such jurisdiction ought to be exercised. At page 335 the judge states:

"The third circumstance in which this jurisdiction might be exercisable seems to me to be that where the court has prescribed a time limit within which the security is to be paid and that time limit has been disregarded by non-payment."



135. At page 336 the judge refers to the comments of Whitford J, reflecting the well-established position that *“it was not open to him on the evidence which was before him really to take any view on the strength or otherwise of the plaintiffs’ case for breach of confidence which would largely depend on the oral evidence brought before the court and cross-examination of the witnesses giving such evidence.”*

136. The Deputy Judge of the High Court gave some further time to pay the security adding:

“I will, however, make an order that in default of payment on that date the action shall stand dismissed.”

137. It is interesting to note that at page 337 the judge considered possible prejudice to defendants if indefinite stays are granted. In doing so he recognised the policy of the law not to have stale claims hanging over the heads of defendants indefinitely.

English Civil Procedure Rules commentary

138. The English *Civil Procedure Rules* commentary when dealing with security for costs at 25.12.13 under the heading *“Default in giving security”* refers to the relevant form of order (PF44) which refers at paragraph 2 to proceedings being stayed until security is given and an alternative at paragraph 3 that unless security is given as ordered the claim is struck out without further order. The commentary adds that if the order does not contain such a provision, a party alleging default could apply for an order striking out the opponent’s statement of case and for consequential orders. The paragraph ends:



“Orders for security in the commercial court do not usually provide for the claim to be struck out without further order. Instead the other party is given liberty to apply to the court in the event of default. This enables the court to put the paying party to their election and then if appropriate to dismiss the claim.”

Meldex

139. The case digest in respect *Meldex International Plc v Trevillion* [2010] EWHC 1342 (Ch), [2010] 5 WLUK 639 notes in its summary that Sales J held that it was appropriate and just to strike out an action under CPR r3.4 (2) where the claimant had failed to comply with a consent order requiring it to provide substantial security for costs. In that case the claimant stated that it was unwilling to confirm that it would provide the security contemplated as it would place a serious strain on its ability to continue to trade. It made no alternative proposal and an order appears to have been made by consent. There was a failure to provide the ordered substantial security and the claim was struck out with costs against the claimant to be assessed on the indemnity basis.

Other authorities on dismissal/strike out

140. In the *AHAB* appeal (in respect of the undesirability of security being given by way of a charge over the party’s own property) Rix JA referred to *AP (UK) Ltd v West Midlands Fire & Civil Defence Authority* [2001] EWCA Civ 1917. It is interesting to note that in that case the judge on 1 March 2001 made an order that the claim be dismissed unless security in the traditional form of payment into court or a bank guarantee was provided by 16 March 2001. On 15 March the judge refused an application for a 40-day extension so the claim did stand dismissed on 16 May 2001. The English Court of Appeal had no



difficulty in dismissing the appeal. The consequence of default was a dismissal of the claim. Rix JA in the *AHAB* appeal ordered security in the total amount of \$10.6 million adding:

“I would make those orders for security as a condition for the continuation of this appeal, which would otherwise be struck out.” (my underlining)

An indefinite stay was not imposed. The consequences of default would be a strike out.

141. In *Harbour Castle* an action was struck out under the terms of an unless order for failure to provide security for costs. The consequences for failure to comply with the order was a strike out. The commentary to the English Civil Procedure Rules at 25.12.13 refers to form of order (PF44) which refers at paragraph 2 to a stay and at paragraph 3 a strike out without further order.

Roye on Civil Litigation in the Cayman Islands

142. *Roye in Civil Litigation in the Cayman Islands* at paragraph 14.7 under the heading “*Effect of Non-Compliance*” drawing heavily on *Caribbean Islands Development* which in turn drew heavily on *Speed Up* concisely sets out the position as follows (footnote omitted):

“The plaintiff must comply with the time for payment of the security for costs. The Court may dismiss the action, and will do so where it considers that: the plaintiff is not pursuing the action sufficiently diligently; there is no real likelihood of the money being paid; and the time for complying with the order has been ignored.”
(my underlining)



Determination

143. I now turn to my determination of the applications before the court together with my brief reasons. Having already set out at length the facts, the law and the competing arguments I can deal with this section of the judgment fairly concisely.

The Relevant Plaintiffs' Application

Jurisdiction

144. In respect of the Relevant Plaintiffs' Application the first issue is one of jurisdiction. The Relevant Plaintiffs seek an order from me, a judge sitting at first instance, to set aside or vary the Court of Appeal Order. They did not say in their application or their skeleton argument how I should vary it. The whole thrust of their argument was that I should set it aside because they say they cannot pay and it would be unjust and disproportionate to deprive them from access to justice.
145. I am satisfied that I have jurisdiction to entertain the Relevant Plaintiffs' Application.
146. Mr Simpson says the Relevant Plaintiffs have to show a material change of circumstances. Mr Matovu says that my discretion under the liberty to apply provision is much wider and not dependent on proof of a material change of circumstances and that I must take into account proportionality considerations. Mr Matovu adds that if a material change of circumstances is required then such is apparent from the evidence now before the court.



Reasons for determination

147. In my judgment in the circumstances of this case even looking at the matter at large I have concluded that I should not exercise my discretion in favour of the Relevant Plaintiffs. I think however that they have the burden of showing a material change of circumstances and they have not done that. Even if a material change of circumstances was not required and I was considering the matter afresh, I have not been persuaded that the Relevant Plaintiffs have established that their claims have been stifled, or that it is otherwise appropriate to set aside or vary the Court of Appeal Order.
148. The Relevant Plaintiffs chose not to support a stifling argument at first instance before the Chief Justice with any evidence and did not run the stifling point before the Court of Appeal or in their application to the Privy Council for leave as a specific ground of appeal. Mr Matovu accepts that the Relevant Plaintiffs did not produce evidence on the stifling point before the Chief Justice and in his words: “*They therefore took a forensic decision that did not work.*” The Relevant Plaintiffs have no grounds for legitimate complaint if their “tactical decisions” do not pay off or if in such circumstances a court does not exercise its discretion in their favour. They are engaged in high stakes litigation and if they make a tactical decision that does not work they only have themselves to blame at the end of the day. The administration of justice is not a game to be played with cards being kept up sleeves for tactical reasons. The rules and court orders must be complied with and if they are not serious consequences may follow such as dismissal of an action without a determination on the merits.
149. I am not persuaded that there has been a material or significant change of circumstances since the Court of Appeal Order. There has been no relevant legitimate change of



circumstances. The Relevant Plaintiffs are attempting to fight a battle which has already been fought and lost all the way up to the Privy Council. Moreover, the law required the Relevant Plaintiffs to bring forward any case they may have on stifling at first instance before the Chief Justice and with proper evidence in support. They failed to do that and their attempts to have a second bite of the cherry fall foul of the *Henderson v Henderson* line of authorities.

150. The Relevant Plaintiffs have, in any event, produced insufficient evidence to support their application for this court to set aside the Court of Appeal Order on the basis that it was stifling the progression of their long outstanding claims. As Mr Akiwumi (the then attorney for the Relevant Plaintiffs) realistically recognised on his feet at first instance on 20 December 2018 before the Chief Justice there was a serious “evidential gap” or an “evidential lacuna”. The Relevant Plaintiffs deliberately chose not to fill it either at first instance before the Chief Justice or on appeal and they have not filled it even now with the inadequate evidence which they have placed before the court. As the Court of Appeal stated in the judgment delivered on 2 August 2021 the Relevant Plaintiffs had “*not explained how the expense of this litigation has been supported, or what the sources of their funds for fighting has been.*” It is totally inadequate for the Relevant Plaintiffs now to attempt to rely on generalised assertions that they have been funded by “family and friends.” They needed to support these assertions with evidence from those specific members of family and those specific friends who have funded. They should have given chapter and verse with corroborative evidence in support. In full knowledge of what the law required and with many prompters having been provided to them they have failed to provide the necessary detailed evidence, even at this very late stage.



151. Litigants must take the legal consequences of “tactical” decisions or the “litigation games” they play. If they do not provide sufficient evidence then they do not succeed on the stifling point. If they do not comply with an order for security for costs then they run the risk of having their claim dismissed without a hearing on the merits. It really is as simple as that.
152. It was not until nearly 4 years after the hearing in December 2018 that the Relevant Plaintiffs sought to fill the obvious evidential lacunas and gaps. Even now the Relevant Plaintiffs have not addressed the funding issue “fairly and squarely” (the phrase used by the Chief Justice of the December 2018 hearing). The belated evidence put before this court fails to meet the required standard as specified in the authorities. I do not accept that the evidence now provided is “*full, frank, clear and unequivocal*” (Eady J in *Al-Koronky* at paragraph 31).
153. Mr Matovu says that the Defendant will never be satisfied with evidence presented on behalf of the Relevant Plaintiffs. That submission misses the point. It is for this court to either be satisfied or not on the evidence presented. I am not so satisfied. No evidence whatsoever has been provided by the “family and friends” who are said to have funded the litigation. There is no detail of how the case has been funded to date. No evidence whatsoever has been provided from the potential funders specified in Mr Macaulay’s evidence. Mere assertion is not enough. The evidence is woefully inadequate.
154. Mr Matovu in effect invites me to accept the evidence of Mr Macaulay and Ms Rabello at face value. I do not accept that invitation. Their evidence is lacking in the required detail and there is no evidence from family and friends or the potential funders referred to in the limited evidence of Mr Macaulay and Ms Rabello. Lord Wilson (in *Goldtrail* at paragraph 24 – an authority heavily relied upon by the Relevant Plaintiffs) cautions judges not to take



this type of evidence at face value. Males LJ (in *Gama Aviation*) also declined to accept the evidential case at face value. Rix JA (in *AHAB v SAAD*) wisely advises judges to have “a firm degree of realism and scepticism” in respect of such evidence. For the reasons I have endeavoured to outline in this judgment the evidence presented in the case before me is inadequate to persuade me to grant the Relevant Plaintiffs the relief they now seek.

155. I should add that I do not accept Mr Simpson’s submission that the mere unwillingness by a third-party backer to fund proceedings, as opposed to inability, is insufficient to discharge the relevant burden in respect of stifling. Some of the authorities relied upon by Mr Simpson (for example *DD Growth*) were decided before *Goldtrail* and must now be read in light of that important authority which in effect changed the relevant test in respect of stifling. Lord Wilson in *Goldtrail* (paragraph 23) teaches us that the relevant test is: has the relevant party established on the balance of probabilities that no funds would be available to it as would enable it to satisfy the security. The emphasis is on the word “would” rather than the word “could”. The problem for the Relevant Plaintiffs is that they have not satisfied me, on the balance of probabilities, on the very limited evidence provided that no funds would be provided. Frankly, bearing in mind the history of these proceedings and the position the Relevant Plaintiffs have from time to time adopted on the stifling point, I am extremely sceptical about the Relevant Plaintiffs’ claims that they are unable to come up with funds to comply with the Court of Appeal Order.
156. There are no grounds justifying this court setting aside the Court of Appeal Order. In the particular circumstances of this case I do not think it unjust, unfair or disproportionate to dismiss the Relevant Plaintiffs’ Application. There should be no further adjournment to enable the Relevant Plaintiffs to put in proper evidence. They have had plenty of time to do that already. There should be no further adjournment to enable the Relevant Plaintiffs



to put up the security ordered as long ago as October of last year. The interests of justice (of which finality is an important part) require me to dismiss the Relevant Plaintiffs' Application.

157. For all these reasons I dismiss the Relevant Plaintiffs' Application. I also order that the Relevant Plaintiffs jointly and severally pay the costs of the Defendant and that such costs to be taxed on the standard basis in default of agreement.

The Defendant's Application

Jurisdiction

158. In respect of the Defendant's Application the first issue is also one of jurisdiction. The proceedings are presently the subject of a stay imposed by the Court of Appeal "*save also that there be liberty to apply in respect of the consequences of the Order*" (paragraph 3 of the Court of Appeal Order). The Court of Appeal did not expressly state that the liberty to apply provision was limited to applications to the Court of Appeal. The Court of Appeal in the judgment on appeal on security for costs delivered on 2 August 2021 were in effect exercising afresh the discretion in respect of security for costs, which is vested in the Grand Court at first instance. At paragraph 8:

"...we consider that the Chief Justice's security for costs judgment below cannot survive the overturning of his summary judgment on the merits".

At paragraph 9: "*... a new discretion arises in this court.*"



In effect the Court of Appeal were exercising the court's discretion in respect of security for costs *de novo* as a judge of the Grand Court at first instance would have done.

I am persuaded by the submissions of Mr Simpson that paragraph 3 of the Court of Appeal Order is wide enough to cover applications to the Grand Court at first instance and that I have jurisdiction to entertain the Defendant's Application which plainly relates to "*the consequences of the Order.*" Mr Matovu sensibly accepts that the Court has jurisdiction to entertain the Defendant's Application and raises no jurisdictional objections. The main thrust of his submissions was that it would be disproportionate to exercise such jurisdiction in the circumstances of this case.

Reasons for determination

159. It is common ground that the security has still not been provided as ordered by the Court of Appeal over a year ago now.
160. Smellie CJ in *Caribbean Islands Development* having reviewed the relevant authorities including *Speed Up* at paragraph 52 stated:

"An order dismissing an action already stayed for failure to comply with an order for security, will ordinarily be the appropriate order to make ..."

161. In this case the Court of Appeal made an order as long ago as 4 October 2021 giving the Relevant Plaintiffs 45 days to provide security and imposed a stay. The time period for providing the security has been disregarded by non-payment. It would be against the policy of sophisticated common law jurisdictions worldwide and simply unfair and unjust to



permit the Relevant Plaintiffs to disregard the Court of Appeal Order, regard the stay as lifted and seek to proceed against the Defendant at no risk as to adverse costs, in effect in the words of Mr Simpson (at paragraph 29 of the Defendant's skeleton) to have a "free shot" against the Defendant. Mr Simpson referred to various authorities on the well-established policy of the law in this area. Mr Matovu says that the Defendant's "free shot" point is a "cheap shot". I do not accept that. It simply reflects the legitimate policy of the common law as outlined above in the relevant authorities.

162. I do not agree with Mr Matovu's submission that to dismiss the claims at this stage would be a disproportionate exercise of this court's jurisdiction. I agree with Mr Matovu that this is an important case and that there are serious issues to be tried. It is also important that court orders are complied with. Moreover, as the Supreme Court of the United Kingdom has recently emphasised in *AIC* the importance of finality in litigation should not be underestimated. I appreciate that a dismissal is prejudicial to the Relevant Plaintiffs. It is also prejudicial to the Defendant to permit an indefinite stay which would mean that the serious allegations against a professional firm would remain undetermined for an indefinite period of time. Furthermore it would be highly prejudicial to the Defendant if this court was to set aside the Court of Appeal Order and in Mr Simpson's justifiable phrase allow the Relevant Plaintiffs a "free shot" against the Defendant.
163. I appreciate that dismissal of an action without consideration of the merits may be regarded as a harsh result but there comes a time when a court must conclude that enough is enough. That time has arrived.
164. I am not persuaded that this court would be justified in providing the Relevant Plaintiffs further time to provide funds in belated compliance with the Court of Appeal Order. On



the Relevant Plaintiffs' own case no funds would be made available. As the authorities make plain the consequences of default in complying with an order for security may include dismissal and normally would. As the Chief Justice stated in *Caribbean Islands Development*: “An order dismissing an action already stayed for failure to comply with an order for security, will ordinarily be the appropriate order to make.” As can be seen from my review above, the law reports contain numerous cases where a claim has been dismissed for failure to provide security. It is the normal order.

165. Mr Matovu gently suggested that there were other more proportionate options rather than dismissal. When asked to name them reference was made to an unless order. In my judgment that would just waste time and costs and put off the inevitable. That would not be in accordance with the overriding objective. On the Relevant Plaintiffs' own case they will not be coming up with the money.
166. As to the option of an adjournment to allow the Relevant Plaintiffs to provide further evidence, the Relevant Plaintiffs were well aware of the need to adduce full evidence and they have failed to do so. They should not be given yet another bite at the evidential cherry. Mr Matovu realistically recognised the inadequacy of the evidence recently filed on behalf of the Relevant Plaintiffs when he suggested that if the court felt the evidence was unsatisfactory the Relevant Plaintiffs should be given more time to consider the position and if appropriate to file further evidence in effect to fill in any gaps identified by the court. The Relevant Plaintiffs have had plenty of time to get their evidential ducks in a row and have lamentably failed to do so. It would not be just or proportionate to adjourn and give them yet further time.

167. For the reasons I have provided I am driven to the conclusion, in the particular circumstances of this case, that the action must be dismissed. I therefore grant the relief prayed for in the Defendant's Application. I make an order that the Relevant Plaintiffs' claims are dismissed for failure to comply with the Court of Appeal Order and that the Relevant Plaintiffs jointly and severally do pay the Defendant's costs of the Defendant's Application and of the action such costs to be taxed on the standard basis if not agreed.

Orders

168. The attorneys should provide a draft order reflecting my determinations for my approval as soon as possible and in any event before 3pm on 3 November 2022. The attorneys should also provide a draft order for my approval within the same timescale disposing of Mr Toledo's claim as agreed.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT