

Civil Justice Quarterly

2009

Security for costs and the foreign resident claimant

Jane Ching

Subject: Civil procedure

Keywords: Enforcement; Overseas assets; Residence; Security for costs

Legislation: Civil Procedure Rules 1998 (SI 1998 3132) Pt 25 r.25.13 (2)(a)

Cases: Somerset-Leeke v Kay Trustees (Security for Costs) [2003] EWHC 1243 (Ch); [2004] 3 All E.R. 406 (Ch D)

AIMS Asset Management v Kazakhstan Investment Fund Ltd (Ch D)

Roto Packing Materials Industry Co LLC v Latest Technologies & Products Ltd [2004] EWHC 2451 (Ch) (Ch D)

Nasser v United Bank of Kuwait (Security for Costs) [2001] EWCA Civ 556; [2002] 1 W.L.R. 1868 (CA (Civ Div))

***C.J.Q. 89 Abstract:** *This article considers the jurisdictional threshold of what is now CPR r.25.13(2)(a) for the award of security for costs against residents of countries outside the Brussels regime and the interaction between a jurisdictional test based on residence, particularly in the case of multiple residence, and the problem of the possible location of assets which outside the country of residence, concluding that the wording of the rule in the CPR should be amended to reflect a focus on the difficulty of enforcement rather than on residence and to provide for disclosure of the location of the respondent's assets.*

Introduction

In this article I consider the jurisdictional threshold of what is now CPR r.25.13(2)(a) for the award of security for costs by a court in England and Wales against residents of countries outside the Brussels regime. The basis of that threshold remains articulated as the respondent's residence (i.e. focused on the person), a test which has been complicated by changes in the language of the rule and by cases of multiple residence. Further, both pragmatically and as a result of attacks on the threshold as discriminatory, the application of the rule is now focussed more on difficulty of enforcement (i.e. on the assets). Consequently I conclude that the wording of the rule should be amended to reflect actual practice.

The claimant based outside the jurisdiction

The risk of an order for security for costs might be regarded as a natural price to be paid by the forum-shopping claimant choosing to institute proceedings ***C.J.Q. 90** away from home. What is apparent from recent development of the case law in this jurisdiction is that the exercise of power to award security against a putative future costs award is no longer based on the "foreignness" of the claimant but explicitly conceived of as related to difficulty of enforcement of that costs award; a gloss that does not appear in the rule as it is set out in the CPR.¹ There is, therefore, an "invisible" additional burden of proof of such difficulty on the applicant defendant (who may have no reason to know the extent or the location of the respondent's assets).

CPR r. 25.13(2)(a) assumes that the claimant's nationality coincides with residence and that residence coincides with the location of assets. In an age of increased global movement for individuals as well as for corporate entities, of offshore investment and multi-national companies, that is, of course, not necessarily the case. There can clearly also be practical difficulty in the enforcement of an order for costs against a claimant resident in this jurisdiction, if that claimant's assets are located in, say, Kazakhstan,² although this is a situation to which CPR r.25.13 (2)(a) does not extend and was not intended to.³

My first step, then, is to examine first the "residence" element of the threshold, and secondly, to explore the way in which, the residence test having been satisfied, difficulty of enforcement as a result

of the location of the respondent's assets affects the exercise of the discretion to grant an award.

The “residence” threshold

The language of the threshold

A difficulty in reviewing the case law in this area is the need to keep track of the redrafting of the threshold test over time. Until 2000, the test was given in RSC O.23 r.1 as “the claimant is ordinarily resident out of the jurisdiction”; that ground being established, there was then assumed to be a discretion to make the order.

The 14th amendment to the CPR in April 2000 replaced this threshold with CPR r.25.13(2)(a), making a distinction in wording--if not in effect--between corporate and individual claimants:

***C.J.Q. 91** “The conditions are--

a the claimant is an individual

i who is ordinarily resident out of the jurisdiction; and

ii is not a person against whom a claim can be enforced under the Brussels Convention or the Lugano Convention, as defined by section 1 (1) of the Civil Jurisdiction and Judgments Act 1982;

b the claimant is a company or other incorporated body--

i which is ordinarily resident out of the jurisdiction; and

ii is not a body against whom a claim can be enforced under the Brussels Convention or the Lugano Convention.”⁴

The 26th amendment to the CPR, in January 2002, simply added the Regulation 44/2001 (“the Brussels Regulation”).⁵

However, in February 2003,⁶ the rule was substantially streamlined. The word “ordinarily” was removed from the residence requirement⁷; a single rule for both individual and corporate respondents was reinstated and the second limb clarified,⁸

“a the claimant is--

i resident out of the jurisdiction; but

ii not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982”.

***C.J.Q. 92** This wording remains in place at the date of writing (July 2008),⁹ although in all cases, where the threshold is satisfied, there remains a discretion to make the order “if it is just to do so”.

The fact is, of course, that not only may they diverge but also that nationalities, residences and locations of assets may be *multiple*. Basing the threshold on residence (or nationality) not only assumes that the respondent's assets will also be in the same place but may prompt allegations of inappropriate discrimination. In my discussion here of three issues derived from the use of “residence” as a threshold: (a) the significance of the change from “ordinary residence” to “residence”; (b) the problem of multiple residence; and (c) the question of discrimination, and in the second part of this paper, on the relevance of the location of assets, I wish to distinguish between two concepts: “notional ease of enforcement” and “actual difficulty in enforcement”. The former describes circumstances in which there is legislative provision for enforcement of a final costs order, even if there are additional costs of doing so. The latter describes circumstances in which--whether or not there is notional ease of enforcement--there will be demonstrable difficulty in enforcing a final costs order in the individual case.

“Ordinarily resident” or merely “resident”

Until 2003 the threshold was “ordinarily resident” outside the jurisdiction. The location of the respondent's assets and any difficulty of enforcement went, if at all, to the exercise of the discretion. Where there was notional ease of enforcement, however, at least in respect of the remainder of the

United Kingdom, protocols were adopted to preclude security being awarded.¹⁰ After 2000, residence in a state where there is notional ease of enforcement under the Brussels regime forms a complete bar to the award, even if there is proven impecuniosity on the part of the claimant and even if there is actual difficulty in enforcement.¹¹

The phrase “ordinary residence” was, apparently, retained until 2003 on grounds of familiarity, although “habitual residence”, assumed to be a synonym, was suggested by a 1997 consultation paper as an alternative.¹² When “ordinarily resident” was replaced by “resident”, the change passed without comment in the 2003 edition of the *White Book*,¹³ the editors of the ***C.J.Q. 93** 2004 edition finally suggesting it to be “unlikely that this change was intended to change the scope of the ground”.¹⁴ Samuel suggests that “[w]hatever this subtle change may mean, it cannot reduce what is caught within the scope of the word”.¹⁵ I suggest, on the contrary, that there is a distinction between “residence” and “ordinary residence” such that caution should be taken in relying on pre-2003 case law.

“Ordinary residence” is, first of all, a familiar concept in private international and tax law, implying prolonged presence less than permanence; less than “habitual residence” or “domicile” and distinct from nationality. In *R. v LBC Barnet Ex p. Shah*,¹⁶ Lord Scarman provided a definition subsequently drawn on in security for costs cases,

“ordinarily resident’ refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration”.¹⁷

Bankruptcy jurisdiction under Insolvency Act 1986 s.265, is also founded on “ordinary residence”. So, in *Skjevesland v Geveran Trading Co Ltd (No.4)*,¹⁸ ordinary residence by an individual involved both mens rea (an intention to reside for a substantial period of time) and actus reus (so residing). This element of intention creates a meaningful distinction, I submit, between “ordinary residence” and mere “residence”. “Residence”, then, incorporates “ordinary residence” but not vice versa. Whilst an individual may, however, possess more than one “ordinary residence”—Collier refers to a case of dual “ordinary residence” for tax purposes in Ireland (75 per cent) and England (25 per cent)¹⁹—one might employ “ordinary residence” to distinguish the primary residence from lesser mere “residences”. So, as soon as the award is barred by mere “residence” as opposed to “ordinary residence”, the threshold changes. An example may be instructive. X spends ten months of each year in New York (his “ordinary residence”) and two in London (a “residence”):

- until 2000, the “residence” in London was irrelevant²⁰ and X was vulnerable to an order (although the presence of any assets in London was relevant to the exercise of the discretion);²¹

***C.J.Q. 94** • between 2000 and 2003, the result was the same although, if X was “a person against whom a claim can be enforced” under the Brussels regime there would be no jurisdiction;

- only from 2003 is the mere “residence” in London relevant and now precludes an award, a topic I discuss further below in the context of *Leyvand v Barasch*²² and *Tatnall v Longley*.²³

A different approach to “ordinary residence” has been taken in the context of corporate entities. In *Little Olympian Each Ways Ltd, Re*,²⁴ Lindsay J. said:

“The addition of the adverb ‘ordinarily’ does add something of importance to the word ‘resident’. It connotes a degree of continuity being required, a reference to the way in which things are usually or habitually ordered ... Whilst the added word might not have a corresponding effect in the case of an individual, as I see it is more difficult for a corporation to be ordinarily resident in more than one place than it would for it merely to be resident in more than one place.”²⁵

The “ordinary residence” of a company, derived from *De Beers Consolidated Mines Ltd v Howe*²⁶ was the place of its “central management and control”,²⁷ the result being, in the view of Lindsay J., “that, in relation to a corporation, it is likely to lead to only one place of ordinary residence”.²⁸ Using that test, a company registered and trading in England and Wales but controlled from the United States²⁹ might still have been vulnerable to an order until 2003 as that control rendered it ordinarily resident out of the jurisdiction and it could, by definition, only have a single “ordinary residence”.

There seems no reason, however, why a company should not be able to have more than one “residence”, so that, from 2003, a company which is foreign-registered or foreign-controlled (or both) may escape the jurisdictional threshold by relying on some form of parallel trading presence within the

Brussels regime. Clearly “residence” as a result of trading also implies the presence of some assets but need not do so. Indeed, where residence in, say, *C.J.Q. 95 Japan, is inferred from parental “control” from a head office in Tokyo, there is no reason to assume the presence of assets belonging to the subsidiary in Tokyo at all.

Before I move on to discuss the effect of the modern wording on cases of multiple residence, a question remains: by what law is the question of residence to be determined? Clearly, in most cases residence has been treated as a matter of fact and determined, if in issue, by the forum. In *Roto Packing Materials Industry Co LLC v Latest Technologies & Products Ltd*,³⁰ the respondent was resident out of the jurisdiction, but it was not clear where. If he was “resident” in a Brussels regime state the second limb of the rule precluded an award. It was suggested that he was:

- resident only in Italy;
- resident in Italy *and* the Ivory Coast; or
- resident only in the Ivory Coast.

There was evidence that his Italian residence certificate would be treated by an Italian court as *prima facie* evidence of residence in the Ivory Coast (it was not clear whether Italian law would allow for dual residence). The respondent provided other evidence suggesting that he spent 15-20 days a month in Italy, voted there and had registered as resident in the Ivory Coast for tax reasons. The location of his assets was unclear, but Lindsay J. appears to have been of the view that any costs order would have to be enforced in Italy, and it was this question of enforcement that prompted him to take the pragmatic view that:

“Whilst I recognise that there must not be discrimination between the treatment of residents of this jurisdiction and those of other community jurisdictions, there would be little practical point, in relation to security for costs, in an English Court taking the view that, applying an English test, [the respondent] was resident in Italy if, by Italian law, he was resident elsewhere and if the Italian Court thus would have no jurisdiction to enforce an English costs order.”³¹

Whilst it is my argument that difficulty of enforcement has become the principal factor in the exercise of the discretion, in this case it was allowed to influence determination of the jurisdictional threshold. If there had been evidence that all the respondent's assets were in the Ivory Coast, so that that was where any order for costs would have to be enforced, I wonder whether the result would have been the same.

*C.J.Q. 96 Multiple residences

The problem of multiple residences, raised above in the case of X and in *Roto Packing Materials Industry Co LLC* is now particularly acute because of the use from 2003 of two concepts of residence:

- residence *out* of the jurisdiction;
- residence *in* a Brussels regime state.

Where there is a sole residence the jurisdiction is, therefore, confined to residents of states outside the Brussels regime. Where there are multiple residences, of course, some might be outside the Brussels regime.

In *Leyvand v Barasch*,³² heard in 2000 when the only ground was “ordinary residence” out of the jurisdiction, a respondent ordinarily resident in Israel spent 80 days a year in England. Samuel describes the rule at this stage as a “non-exclusionary” provision: one “ordinary residence” out of the jurisdiction would satisfy the threshold and permit an order, irrespective of any other “ordinary residences”.³³ Per Lightman J.,

“[i]t is well established that a claimant³⁴ may have two ordinary residences, one within the jurisdiction and one outside. The fact that a claimant who is ordinarily resident outside the jurisdiction is also ordinarily resident within the jurisdiction does not preclude the court ordering security”,³⁵

although the extent of the residence (or at least the presence of assets) in the jurisdiction was relevant to the exercise of the discretion. The 2003 wording, however, adds what Samuel describes as an “exclusionary” second limb: any “residence” in a Brussels regime state *frustrates* the jurisdiction. So, in the earlier example, as X has “residences” both in the United States and in England

and Wales, the jurisdiction ostensibly granted by the first limb of the rule (residence in New York) is now snatched away by the second limb (residence in London) provided the extent of the presence in London is at least a “residence”. This effect is described by Samuel as “dramatically reduc[ing]” the power to grant the order unless the second limb is read as “a Convention state outside the U.K.”,³⁶ a result which, whilst reinstating *Leyvand*, would, I suggest, revive the discrimination arguments I discuss below. The requirement that the presence within the Brussels regime for the purposes of the second limb need only amount to a “residence” also, I suggest, contributes to the reducing effect: *Leyvand* only deals with competing “ordinary residences”. It has been held, in an unreported county court decision, *Tatnall v Longley*,³⁷ that the 2003 wording renders *Leyvand v Barasch* no longer good law. In *Tatnall*, the respondent’s *C.J.Q. 97 parallel residence in England precluded the award. Both X and Mr. Leyvand would now be similarly protected by virtue of their “residences” in England.

A question arises as to the definition of a Brussels regime state for the purposes of the threshold. In *Prince Radu of Hohenzollern v Houston*³⁸ the claimant was Romanian. Romania was at that stage “moving towards” EU accession and had, in 2004, adopted provisions for enforcement of foreign judgments identical to those of the Brussels Regulation. Although any enforcement of a costs order would take place after the planned accession date, Eady J. chose to assess the position at the time of making the security order:³⁹ on accession the order could be discharged.⁴⁰

Discrimination

In *Roto Packing Materials Industry Co LLC*, Lindsay J. acknowledged the potential for inappropriate discrimination against the respondent. The addition of the second limb in 2000 and its clarification in 2003 codified existing accretions of practice where there was notional ease of enforcement as in *Porzelack KG v Porzelack (UK) Ltd*⁴¹ by virtue of emerging harmonisation within the Brussels regime. Because the threshold is based on *residence*, English or Welsh nationals and companies could as we have seen, as a result of “residence” elsewhere, become subject to the jurisdiction. The second limb of the rule was added in 2000 following a series of cases culminating in *Chequepoint SARL v McClelland*,⁴² where it was suggested that the threshold of ordinary residence out of the jurisdiction was in breach of anti-discrimination obligations. The Treaty of Rome art.6 (now art.12), prohibiting “any discrimination on the grounds of *nationality*” (italics added) was invoked.⁴³ It was argued in *Chequepoint* that despite its basis on *residence*, in practice the rule discriminated against foreign *nationals*, who, of course, tend to reside out of the jurisdiction. The court found that the French national (and resident) impecunious plaintiff was being treated no worse than an equivalent domestic company would have been treated under the separate jurisdiction to award security then found in Companies Act 1985 s.726⁴⁴: there was no discrimination. Per Lord Bingham C.J., approving *Porzelack*,

*C.J.Q. 98 “the rule was to be read as if it were subject to a proviso that discretion to order security under the rule should not be exercised in a manner contrary to Community law”.⁴⁵

The question of discrimination, then, went to the discretion rather than the jurisdictional threshold.⁴⁶

The discrimination provisions, insofar as they are based on *nationality*, might therefore in principle hinder an order being made against, for example, a French national (wherever resident) with assets in, say, Somalia, if an English national (wherever resident) would not be subject to the order. This would have been the effect of the second limb suggested in the 1997 consultation paper, expressly intended to deal with the discrimination arguments.⁴⁷

It was also suggested that the residence threshold might constitute discrimination within the European Convention on Human Rights and Fundamental Freedoms (ECHR) art.14,⁴⁸ which prohibits,

“discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”⁴⁹;

again, grounds which do not specifically include residence but which may cover it. The intersection between the threshold and art.14 is seen in *Somerset-Leeke v Kay Trustees*⁵⁰ where the court heard that “it is essentially an administrative matter to get an English judgment registered in Monaco”, i.e. that there was at least notional ease of enforcement, and dismissed the application. Jacob J. relied on dicta of Mance L.J. in *Nasser v United Bank of Kuwait (Security for Costs)*,⁵¹ currently the defining precedent as to exercise of the discretion. In *Nasser*, a US national resident in Milwaukee relied on ECHR arts 6 (as to the right to a fair trial)⁵² and 14 to support an argument that the 2000 version of *C.J.Q. 99 the rule discriminated against residents (and nationals) of non-Brussels regime states. Mance L.J. treated the question of discrimination under the ECHR as equivalent to that under the EC

Treaty and concluded that the distinction in the rule between residents of Brussels regime states and others was not of itself discriminatory, as it merely created a rule of thumb as to potential actual difficulty of enforcement. Where the threshold was satisfied, the discretion to award security was not to be exercised in a discriminatory way but on,

“objectively justifiable grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned”.⁵³

Such obstacles would fall for consideration if identified in,

“his or her (or, in the case of a company, its) country of foreign residence or wherever his, her or its assets may be”.⁵⁴ (Italics added.)

Somerset-Leake and Nasser were followed in *Weissfisch v Julius*⁵⁵ where the respondent was resident in the Bahamas (with which the United Kingdom has enforcement arrangements) and had substantial assets there. The application was under both CPR r.25.13(2)(a) and r.25.13(2)(g), the latter requiring steps to have been taken in relation to assets to make enforcement difficult. Peter Smith J. found that, “any rule which makes it more difficult for a foreign litigant to bring proceedings in these jurisdictions would be regarded as discriminatory”.⁵⁶

A question related to that of discrimination has, however, re-emerged, in the new landscape where actual difficulty of enforcement is emphasised, by way of criticism of the foreign court's ability to enforce the future costs order. Actual difficulty of enforcement might be more political than financial or procedural. So, in *Al-Koronky v Time-Life Entertainment Group Ltd*⁵⁷ it was argued on appeal⁵⁸ that, “the finding about the difficulty of enforcing an eventual costs order trespassed on the principle of comity”.⁵⁹ Factors raised included not only the difficulty of enforcing any judgment in the Sudan given a lack of reciprocal enforcement arrangements and an alleged lack of independence in the Sudanese judiciary, but that the respondent's connections with the Sudanese Government might add to difficulties of enforcement, as would the nature of any judgment against this respondent,

***C.J.Q. 100** “since it would offend the government and would be tantamount to an admission that slavery exists in the Sudan, something the Sudanese government has repeatedly denied”.⁶⁰

The Court of Appeal required cogent evidence before lack of effectiveness or partiality in the foreign jurisdiction would be considered,

“while we do not consider that issues relating to the quality of a foreign judiciary can never be adjudicated upon … it goes without saying that the judiciary of this country will be extremely cautious about criticising the judiciary of another country”.⁶¹

An example, however, is provided by *Prince Radu of Hohenzollern v Houston*,⁶² where despite notional ease of enforcement, questions of corruption in the administration of justice created a “significant risk” of additional delay in enforcement of a putative costs order, justifying an award of £80,000.

The shift towards actual rather than notional ease or difficulty in enforcement, then, seems to have come into focus as a response to allegations of discrimination but locating the spotlight for investigation of such discrimination not within the jurisdictional threshold but within its attendant discretion. Difficulty of enforcement is, of course, tied inextricably to the question of the location of the assets.

Location of the assets against which the costs order is to be enforced

Relevance of the location of the assets to the discretion

In *Nasser v United Bank of Kuwait*⁶³ it was thought that the respondent's assets were likely to be in the place of her residence in the United States (where there was no notional ease of enforcement). There was, however, no evidence of any substantial actual difficulty in enforcing an order for costs there and the award of security was reduced by the Court of Appeal from £17,500 to £5,000. The risk against which the order provided protection was conceptualised as “an extra burden in terms of costs and delay” in enforcement in the United States, when compared to enforcement here or under the Brussels regime. In *Texuna International Ltd v Cairn Energy Plc*,⁶⁴ however, the “extra burden” of enforcement in Hong Kong was assessed at £50,000 (an additional £50,000 awarded against the risk of having to find and enforce against assets possibly in Russia).

***C.J.Q. 101** In *Nasser* the respondent's residence and assets coincided. In *Aims Asset Management v Kazakhstan Investment Fund Ltd*,⁶⁵ however, the respondent was in the Cayman Islands whilst its assets were in Kazakhstan. The question was of the proper exercise of the discretion, relying in part on the questions of discrimination that had arisen in *Nasser* and its indication that evidence of an actual difficulty in enforcement in the location of the assets should be adduced. The deputy judge considered himself bound by *Nasser*:

"The relevant risk relates to the question of enforcing judgment. In my judgment, that risk in relation to enforcement must, in order to give the question of risk a practical content, relate to enforcement where the assets of the defendant are or are likely to be."⁶⁶

Although there was no evidence before the court as to any actual difficulty of enforcement in Kazakhstan, the judge was prepared to hold in its absence that there was "a very substantial risk" that enforcement in that country would "even if not impossible, be extremely difficult and expensive".⁶⁷ The respondent suggested, in my view, somewhat desperately, that the question of difficulty of enforcement in Kazakhstan was irrelevant and that the court was entitled only to consider any actual difficulty of enforcement in the Cayman Islands as the place of residence, an argument that could *only* be raised because the emerging criterion about difficulty of enforcement was not explicitly articulated in the CPR. This argument was rejected, first on the ground that the first part of the rule at that stage only required residence out of the jurisdiction and not residence outside the Brussels regime. More significantly for my discussion, the emphasis of the jurisdiction was confirmed to be on enforcement (i.e. assets), not residence (i.e. the person),

"the emphasis in 25.13(2)(b) at (ii) is on the question of enforcement, not residence. So the C.P.R., in my judgment, is pointing to the inability to enforce under those Conventions or the Regulation and not to the exact situs of the company or other incorporated body in question".⁶⁸

Consequently, where residence and location of assets are divorced, the focus for the court is properly on the location of the assets. A different result may occur where the location of the assets is unknown. So, in *Somerset-Leeke v Kay Trustees*,⁶⁹ there was notional ease of enforcement in the respondent's Monaco residence, but the location of his assets was less than clear. The applicant sought to extend the result of *Aims Asset Management* into an obligation that the respondent disclose whether he had any assets in Monaco. Jacob J. refused to go that far, distinguishing *Aims Asset Management* on its facts,

***C.J.Q. 102** "[i]t is evident that in [Aims Asset Management] the Cayman Islands was a shell place from which the assets were controlled but one cannot elevate what [the deputy judge] did in that case to a general principle that any non Brussels/Lugano resident must indicate assets in his place of residence (or I suppose within Brussels/Lugano) failing which security will be ordered. That would be discriminatory",⁷⁰

and dismissed the application for security.

Both cases were cited in *Texuna International Ltd v Cairn Energy Plc*, the respondent again arguing that considering the location of the assets was discriminatory. Gross J. approved the position taken in *Aims Assets Management*:

"The relevant comparison is between enforcement within the zone [of the Brussels regime] and enforcement in the country where enforcement will or may realistically be pursued, whether that is the country of residence of the claimant or the country where his, her or its assets may be: *Nasser* at [63].... Given the focus on enforcement, the location of the claimant's assets is relevant and it is not discriminatory to take it into account; alternatively its relevance is objectively justified on grounds relating to enforcement.... it would be absurd to refuse an order for security for costs against a company claimant, resident outside the zone, on the ground that the obstacles to enforcement are minimal in its country of residence when its assets are situated in another country where it is well-known that enforcement is impossible."⁷¹

One can, therefore, extract from Mance L.J.'s judgment in *Nasser* and its careful dissection in *Texuna International*, the following principles once the residence threshold is satisfied:

- There is no inflexible assumption of actual difficulty of enforcement in the place of residence or the location of the assets.⁷²
- A "proper basis" must be found for the conclusion that actual difficulty "may exist".

- Judicial notice may be taken of “obvious realities” suggesting difficulty of enforcement although the mere absence of notional ease of enforcement does not justify an award.⁷³ In such cases a “full” award representing the costs of the case, appeal, or relevant part of it, may be appropriate.

- As to other places (particularly those where notional ease of enforcement exists),

“it may be incumbent on an applicant to show some basis for concluding that enforcement would involve any extra burden meriting the protection of an order for security for costs”.⁷⁴

***C.J.Q. 103** In such cases the quantum of the award may be limited to the extent of the additional burden:

This produces a continuum of risk from places where the “obvious reality” implies difficulty of enforcement permitting judicial notice to be employed, to places where there is notional ease of enforcement creating a positive burden to prove a difficulty in enforcement (related to the location of the assets). Evidence to be considered, then, in preparation for making an application is:

- evidence of the residence of the respondent;
- evidence of the likely costs;
- evidence of the location of the respondent's assets;
- evidence as to risk of impossibility, difficulty or additional difficulty in enforcement in location of the assets.

Difficulties arise, therefore, where assets are insufficient (creating actual difficulty of enforcement), where the location of assets is unknown, or both (cases (c) and (d)). Similarly, there is a practical difficulty for the applicant in determining whether the difficulty in enforcement is so apparent to allow judicial notice to be taken without evidence (case (d)).

Proof and burden of the location of assets or actual difficulty in enforcement

I suggest that four possibilities are relevant:

- the respondent's assets are known to be within the jurisdiction or within the Brussels regime;
- the respondent's assets are known to be outside the jurisdiction and the Brussels regime;
- there is no evidence of the location of the respondent's assets (case (c));
- there is a question as to the sufficiency of the respondent's assets to meet the order (case (d)).

***C.J.Q. 104 (i) The respondent's assets are known to be within the jurisdiction or within the Brussels regime**

Here, there is notional ease of enforcement, so, following *Nasser*, an award will be made only if actual difficulty in enforcement can be demonstrated. Given the strength of the presumption of ease of enforcement, this will be a difficult burden to satisfy and may amount either to an allegation of want of probity leading to likely evasion of the order, or a problem of impecuniosity. In *De Beer v Kanaar* (No.1),⁷⁵ for example, the risk that assets might be moved from Switzerland to the US justified security of £130,000. However, where a complex corporate structure distances domestic assets from immediate enforcement,

“[i]t is common sense that, in order to gain access to the assets of [two U.K. subsidiaries of Jersey and British Virgin Islands companies] within the jurisdiction, [the applicant] would inevitably face extra costs and delays in enforcing its award”⁷⁶

an order may be justified.

(ii) The respondent's assets are known to be outside the jurisdiction and the Brussels regime

Following *Nasser*, there may be circumstances in which the court is prepared to take judicial notice of enforcement difficulties, particularly where these amount to impossibility. I have already identified such considerations in the cases of Kazakhstan, Sudan and Romania, and one can realistically

assume that judicial notice might also be taken in respect of Afghanistan, Somalia and the Democratic Republic of the Congo. Political difficulties may combine with personal difficulties of the respondent, so evidence of want of probity or likely evasion of the order is relevant.⁷⁷ In *Dumford Trading AG v OAO Atlantrybflot*,⁷⁸ for example, the respondent was a Russian company with no assets anywhere in the European Union and it was conceded that it was appropriate to make an order. There was also evidence that an order might be evaded and of impecuniosity in the respondent. On the facts, and because there was evidence that a third party was funding OAO's legal costs, a "full" award of £38,000 was made.

Before moving on to consider those circumstances in which there is no evidence of the location of the respondent's assets, it is worth pausing to consider the United States. The lack of formal reciprocal enforcement arrangements with the United States does not of itself mean that it falls into the category of cases in which judicial notice can be taken. So, in *Nasser*, the justification for the award was not the lack of reciprocal enforcement per se:

***C.J.Q. 105** "No country has ever entered into any treaty providing for recognition and enforcement of judgments with the United States of America. But the reason is concern about the breadth of American jurisdiction,⁷⁹ the corollary of which has been a willingness on the United States' part to recognise and enforce judgments by action on a similarly liberal and flexible basis.... no evidence has been put before us to suggest that the defendants would, or even could, face and real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant."⁸⁰

Mance L.J. was, however, prepared to take judicial notice of an additional administrative burden, (in addition to the implications of the respondent's impecuniosity):

"First the defendants would have to bring an action on any English judgment for costs before proceeding to any enforcement steps that United States law or the law of Wisconsin permits."⁸¹

In *Antonelli v Allen*, where there was a suggestion that the order might be evaded, the burden seems to have been reversed. Robert Walker L.J. was,

"[n]ot prepared to assume in the absence of evidence that the costs of enforcing a judgment against Mrs. Antonelli in New York would not be substantial and would not, for the most part, be irrecoverable",⁸²

in making a "full" award. In *Alpha Lettings Ltd v Neptune Research and Development Inc*, however, where there was, again, suggestion of evasion, the basis of the order was that risk of evasion, rather than any argument that, "the courts of New Jersey would not be prepared to enforce any judgment of this court".⁸³ In the case of the United States, therefore, I suggest that a "full" award, rather than an award limited to the additional costs of enforcement, will be available only if additional factors of evasion, want of probity or impecuniosity are present, to the extent that, where those factors are present, the burden of proof is reversed requiring the respondent to provide an explanation.

The themes of lack of probity and evasion are not restricted to the special case of the United States. Whilst either may be relevant to the exercise of the discretion as an example of an "objective difficulty in enforcement",⁸⁴ in *Antonelli*; *The Republic of Kazakhstan v Istil Group Inc*,⁸⁵ and *Weissfisch v Julius*, parallel applications were made under subpara.(g), a head of the jurisdiction specifically based on evasion.

***C.J.Q. 106 (iii) There is no evidence of the location of the respondent's assets**

In *Zappia Middle East Construction Co Ltd v Clifford Chance*,⁸⁶ Robert Walker L.J. commented that the respondent's assets "may not be easy to track down for enforcement purposes ... Furthermore, no particulars are given of Mr. Zappia's own wealth".⁸⁷

The absence of evidence of the extent and whereabouts of the respondent's assets did not prevent an order in *Semen Briskin v Oakland Finance Ltd (in Liquidation) (Security for Costs)*,⁸⁸ producing the same effect as in *Aims Asset Management*. In *Nasser*, there was limited positive evidence of the location of Mrs. Nasser's assets (if she had any). In *Somerset-Leeke*, as we have seen, where there was doubt about the location of the claimant's assets, it was argued that, "it was incumbent upon Mr. Somerset-Leeke to disclose where his assets were". Pragmatically, one can see the utility of the request for this direction, if the crucial question is not residence, but location of assets.

Where a freezing order is granted to ring-fence an award of damages, domestic procedure has developed a mechanism requiring the respondent to disclose relevant assets for the purpose of having them frozen.⁸⁹ In a summary judgment application where there is a prospect of a conditional order requiring the respondent with a weak case to pay sums into court, the court is encouraged to receive evidence of means.⁹⁰ In both cases, however, there is some element of unattractive conduct by the respondent which justifies imposing this burden of disclosure: a real risk of dissipation of assets or deliberate prosecution of a weak case. No such factor was present in *Somerset-Leeke*, where the basis for rejecting the request for disclosure of the location of assets was that of discrimination:

"It is said that it was incumbent upon Mr Somerset-Leeke to disclose where his assets were. In my judgment, that would be making a discriminatory basis for operating under rule (a). If Mr Somerset-Leeke had gone to a Convention country, he would not have to show what assets he had and where they were for the purposes of ground (a). That is because the rationale for ground (a) is simply that you can get the judgment registered and put into force. That can be done just as well for Monaco as in a Brussels or Lugano country, subject to the payment of the fee, as to which security has been offered or indeed provided."⁹¹

This, I suggest, is not an entirely happy justification. If Mr Somerset-Leeke had taken up residence in a Brussels regime country, he would not have been required to disclose his assets in aid of an order under CPR r.25.13(2)(a) *C.J.Q. 107 because an order under that head *cannot be made against Brussels regime residents*, even if their assets are known to be in, say, Somalia. A better approach might be derived from the basis on which Jacob J. went on to distinguish *Aims Asset Management*, suggesting that some want of probity, lack of integrity (which it is possible to detect, I submit, in *Semen Briskin*) or evidence that the residence was an asset-free shell might be required before an assumption was made that assets were outside the reach of the Brussels regime.

Nevertheless, if the application for security is coupled with an application on the corporate impecuniosity ground,⁹² evidence of means (including location of assets) may well be adduced by the respondent to counter the allegation of impecuniosity.⁹³ Similarly, where the respondent alleges that an award of security would "stifle" a legitimate claim⁹⁴ --an argument debated in *Nasser, Zappia, Aims Asset Management, Alpha Lettings, Prince Radu of Hohenzollern and Al-Korony*-- evidence of means may be adduced in support of that contention. Where there is want of probity or suspicion of evasion, parallel applications may be made under subparas (e) or (g). In any of these cases, then, revelation of the location of assets as a defence might actually support an application under CPR r.25.13(2)(a). So, in *Kuenehelia v International Hospitals Group Ltd*,⁹⁵ De Beer was cited to Irwin J. as authority for the proposition that, at least where there was a want of probity on the part of the respondent, added to a lack of property within the jurisdiction, or easily moveable property, an award could be justified. Finding no lack of probity or "deliberate misstatement" as to means and a risk of stifling, Irwin J., applying the overriding discretion that an order should be made only when it is "just to do so", refused to award security. A request for details of the assets (a deceased's estate)-- which would have disclosed location as well as extent-- had been made in early correspondence. Irwin J. noted that the only purpose of such a request could be an application for security for costs⁹⁶ and commented that there might be a, "burden so as to show where the assets were, what they were and how they had come to be as they are".⁹⁷

The Court of Appeal,⁹⁸ whilst still treating the question as one of exercise of the discretion, felt that Irwin J. had taken "an over charitable view of the claimants' position",⁹⁹ particularly as to evasion and want of probity. The stifling argument also failed.

Nevertheless, reference is made in the judgment to the respondents having failed to provide details of the estate "since mid-2005",¹⁰⁰ the application for security being made in late 2005. An obligation to "explain" the assets seems *C.J.Q. 108 to have been thought to arise, therefore, prior to the issue of the security application which triggered the stifling argument as defence. If, in mid-2005, the applicants had tried to enforce their request for disclosure, one wonders whether *Somerset-Leeke* would have been called in aid to prevent it. I conclude, that disclosure cannot not be compelled, but if there *is* disclosure, whether as a matter of courtesy; in support of a stifling claim¹⁰¹; or as a defence to a parallel application under another head, it must be accurate. *Somerset-Leeke* is then explicable as a case in which none of these complicating factors were present to justify disclosure of the respondent's assets.

An alternative, pragmatic solution is that adopted in *Texuna International*, in which an element of the award of security was attributed to the risk of tracking down and enforcing against undisclosed

assets; in which case the respondent might be prompted to disclose the location of those assets in order to defeat that element. Otherwise the applicant will have to guess where the assets might be for the purposes of enforcement, one state at a time.

(iv) There is a question as to the sufficiency of the respondent's assets to meet the order

The interaction between this head of security and that available separately in the case of impecunious companies¹⁰² is seen in *Longstaff International Ltd v Baker & McKenzie*¹⁰³ where the respondent had substantial paper assets in the form of 100 per cent of the shares of an English company. The English subsidiary's assets were illiquid but it undertook to underwrite its parent's liability for costs. There was also evidence that enforcement in the respondent's residence, "would not be appreciably more difficult than enforcement of such an order in England against a company incorporated in England".¹⁰⁴ Consequently security was refused under CPR r.25.13(2)(a) although the strength or otherwise of the English asset was relevant to the award of security on the ground of corporate impecuniosity.¹⁰⁵

In *Thune v London Properties Ltd*, it was emphasised that,

"it cannot be too emphatically stated that the impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security".¹⁰⁶

Nevertheless, impecuniosity was a relevant factor in the exercise of the discretion. Where the impecunious respondent is resident within the Brussels regime, of course, no award can be made. Where the residence threshold is satisfied, however, Mance L.J. considered, in *Nasser*, that,

"[i]n so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any *C.J.Q. 109 judgment but on the ground (where this applies) that the effect of the impecuniosity would be either i) to preclude or hinder or add to the burden of enforcement abroad against such assets as do exist abroad or ii) as a practical matter, to make it more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad",¹⁰⁷

and restated the position that severe impecuniosity might amount to "stifling" of a meritorious claim or appeal. Clearly, where impecuniosity is relied on as part of a stifling defence, the burden of proving the lack of accessible liquid assets (and thereby, by implication, their location), is on the respondent). Where it is relied on as a difficulty in enforcement, the burden is on the applicant, who has, therefore, exactly the same problem as before--in the absence of an obligation of disclosure or a complicating factor prompting disclosure by the respondent--in determining the extent of the assets as in identifying their location. It appears from *Nagshineh v Chaffe*¹⁰⁸ that, in the absence of evidence of a want of probity by the respondent, the fact that liquid assets are susceptible to being moved is not a relevant consideration in the exercise of the discretion. The want of probity that is sufficient to permit an order would not, I suggest, necessarily have to fall within the strict threshold of subparas (d), (e), (f) or (g) but appears, from the cases, to encompass a wider range of circumstances such as the misstatement of means in *Kueyehia*.

Conclusion

It was decided in 1997 not to incorporate a list of the guidelines for the exercise of the discretion to make the order,¹⁰⁹ nor to elevate the final three grounds (subparas (e), (f) and (g)) related to evasion into a single ground of, "taking steps with a view to evading the consequences of litigation".¹¹⁰ We are, therefore, left with a threshold expressed in terms of "residence" which causes complexity in cases of multiple residence and has subtly changed its meaning between 2000 and 2003 to counter problems of discrimination. The making of the award is now, therefore, a dog wagged by the tail of the discretion as extrapolated by the case law, focussing on the difficulty of enforcement, which is itself irretrievably connected to the location of assets. The complications of modern supra-national commerce and lifestyle, I suggest, now demand a reconsideration of the drafting of the rule, so that what is now acknowledged as the primary focus of the jurisdiction is explicitly expressed in it. This could be done simply by expanding the existing statement of the discretion ("just to do so") to reflect Mance L.J.'s "objectively justifiable grounds"--without discrimination--to believe that there will be obstacles to the enforcement of *C.J.Q. 110 a costs order; a statement that can apply equally to the foreign residence head (subpara.(a)); the corporate impecuniosity head (subpara.(c)¹¹¹) and the four evasion heads (subparas (d), (e), (f) and (g)).

This primary focus, and the need for redrafting, was identified as long ago as 1990 by Bingham L.J. in *De Bry v Fitzgerald*,

"the Supreme Court Procedure Committee should give urgent consideration to whether Order 23 should not be amended to reflect its rationale more clearly. This is that a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order. If this difficulty will arise from the impecuniosity of the plaintiff, the court will of course have to take an account of the likelihood of his succeeding in the claim, for it would be a total denial of justice that poverty should bar him from putting forward what is *prima facie* a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by significant expenditure of time and money, the defendant should be entitled to security. On this footing the discrimination is not based upon nationality or residence, but upon the need to administer justice effectively",¹¹²

and the wording of the rule still fails adequately and explicitly to reflect that intention as it is manifested in the modern case law. Any redrafting should also, I suggest, consider whether, in the absence of serendipitous factors or parallel applications under other heads that might prompt the respondent to disclose the extent and location of assets, some statement should be made of the circumstances in which a disclosure order, perhaps along the lines of those used in freezing orders, might attach to an application for security for costs, saving a good deal of guesswork as to assessment of the likely difficulty in enforcement, not only by the applicant, but also by the judge.

M.A. (Cantab.), F.H.E.A., Solicitor, Reader in Course Design and Curriculum Development (Civil Litigation), Nottingham Law School, Nottingham Trent University. Law and procedure stated is believed to be up to date to July 2008 (including the 46th amendment to the CPR). I am indebted to the anonymous reviewer for much helpful guidance, but any errors remaining are very much my own.

C.J.Q. 2009, 28(1), 89-110

1. The consultation paper proposing a first CPR version of the security for costs rules, however, cites the underpinning principle of the jurisdiction to award security to the effect that, "claimants ... who take advantage of the court system should demonstrate their willingness (or at least do not demonstrate *un* willingness) to comply with the court's decision on costs, even if the case is lost": LCD, *Security for Costs, Proposed New Rules* (LCD, 1997), para.2.
2. If this claimant has, however, deliberately located assets abroad or in a particular country in an attempt to defeat an award for costs, that will found jurisdiction to make an award of security under CPR r. 25.13(2)(g): "the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him". In *Chandler v Brown* [2001] C.P. Rep. 103 Ch D, Park J. seems to have envisaged that action must actively have been taken, otherwise, I suggest that the deliberate retention abroad of assets previously innocently located there (i.e. inaction), in an attempt to frustrate a costs order, might also engage CPR r.25.13(2)(g), assuming such an intention could be proved.
3. LCD, *Security for Costs, Proposed New Rules*, para.13.
4. It should be noted that a draft rule in the 1997 consultation paper preceding implementation of this wording made no distinction between individuals and corporate entities but that its proposed second limb precluded an order being made against a *national* of a member state: LCD, *Security for Costs, Proposed New Rules*, para.12.
5. Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
6. Civil Procedure (Amendment No.2) Rules 2002 (SI 2002/3219).
7. The word "ordinarily" is retained, however, in the equivalent provision of the Arbitration Act 1996 s.70(6) permitting security to be awarded by a court considering an application under ss.67-69 of that act. In *The Republic of Kazakhstan v Istil Group Inc* [2005] EWHC 2309 QBD Commercial Court, Christopher Clarke J. described this jurisdiction at [20] as "not dependent on the applicant or appellant being resident anywhere", approved by the Court of Appeal [2005] EWCA Civ 1468; [2006] 1 W.L.R. 596. The principle adopted under the Arbitration Act 1996 has long been founded explicitly on the sufficiency and availability of assets to enforce the order: *Azov Shipping Co v Baltic Shipping Co (No.2)* [1999] 1 All E.R. (Comm) 716 QBD. See also on availability of security for costs in proceedings relating to the enforcement of an arbitration award, *Gater Assets Ltd v Nak Naftogas Ukrainy* [2007] EWCA Civ 988; [2007] 2 Lloyd's Rep. 588.
8. The wording "against whom a claim can be enforced", as an attempt to dealt with discrimination arguments, caused considerable difficulty in practice between 2000 and 2003. See, for a pragmatic approach to the problem, *Zappia Middle East Construction Co Ltd v Clifford*

Chance [2001] EWCA Civ 946 and for the solution adopted prior to the change in wording, *De Beer v Kanaar & Co (No. 1)* [2001] EWCA Civ 1318; [2003] 1 W.L.R. 38.

9. The 2000 wording is, however, retained by, for example, r.45(5) (a) and (b) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372).
10. See *Raeburn v Andrews* (1873-74) L.R. 9 Q.B. 118 QBD; *DSQ Property Co Ltd v Lotus Cars Ltd* [1987] 1 W.L.R. 127 Ch D.
11. This approach was approved in *Dynaspan (UK) Ltd v H. Katzenberger Baukonstruktionen GmbH & Co KG* [1995] 1 B.C.L.C. 536 Ch D, where a distinction was made between: (a) consideration of the plaintiff's financial position under RSC O.23 r.1 as a factor to be taken into account in exercise of the discretion; and (b) the centrality of the question of impecuniosity to the separate jurisdiction under Companies Act 1985 s.726. DSQ was approved in Scotland where an order was sought at common law against an insolvent Italian company: *La Pantofola D'Oro SpA v Blane Leisure Ltd (No.2)* 2000 S.L.T. 1264 Court of Session (Outer House).
12. LCD, *Security for Costs, Proposed New Rules*, para.14.
13. *Civil Procedure 2003* (London: Sweet & Maxwell), Vol.1, p.560.
14. *Civil Procedure 2004* (London: Sweet & Maxwell), Vol.1, p.597.
15. R. Samuel, "All Change: Security outside the jurisdiction" (2003) 153 *New Law Journal* 1710.
16. *R. v LBC Barnet Ex p. Shah* [1983] 2 A.C. 309 HL.
17. *R. v LBC Barnet Ex p. Shah* [1983] 2 A.C. 309 HL at [343].
18. *Skjevesland v Geveran Trading Co Ltd (No.4)* [2003] B.C.C. 391 Ch D.
19. *I.R.C. v Lysaght* [1928] A.C. 234 HL cited in J.G. Collier, *Conflict of Laws*, 3rd edn (Cambridge University Press, 2001), p.54.
20. Even if this residence amounted to a parallel "ordinary residence" the effect at this stage would be as in *Leyvand v Barasch* (2000) 144 S.J.L.B. 126 Ch D, discussed below, where there was no jurisdiction to make the award.
21. Under the draft CPR rule proposed in 1997, the result would be the same unless X was a *national* of a Brussels regime state, in which case there would be no jurisdiction: LCD, *Security for Costs, Proposed New Rules*.
22. *Leyvand v Barasch* (2000) 144 S.J.L.B. 126 Ch D
23. *Tatnall v Longley* Unreported October 15, 2003 Central London CC.
24. *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560; [1994] 4 All E.R. 561 Ch D.
25. *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560, 565.
26. *De Beers Consolidated Mines Ltd v Howe* [1906] A.C. 455 HL.
27. As opposed to its "nationality", being that of the place of its incorporation; contrasting with its "domicile" under what is now Brussels Regulation art.60: its statutory seat, central administration or principal place of business. Article 60(2) provides that for the UK and Ireland, the "seat" is the company's place of incorporation; registered office; place under the law of which its formation took place. For the purposes of the Brussels and Lugano Conventions, by Civil Jurisdiction and Judgments Act 1982 s.42, the "seat" of a domestic company is the place within the United Kingdom of incorporation, or management and control. In *Texuna International Ltd v Cairn Energy Plc* [2004] EWHC 1102 (Comm), a Hong Kong registered company with British-resident directors was determined--in a judgment citing *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560--to be resident in Hong Kong on the basis of a "working assumption" derived from the place in which it paid corporation tax.
28. *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560 at [568].
29. The second limb of the rule would prevent an order if the ordinary residence was in a Brussels regime state.
- 30.

Roto Packing Materials Industry Co LLC v Latest Technologies & Products Ltd [2004] EWHC 2451 (Ch D).

- 31. *Roto Packing Materials Industry Co LLC v Latest Technologies & Products Ltd* [2004] EWHC 2451 at [15].
- 32. *Leyvand v Barasch* (2000) 144 S.J.L.B. 126 Ch D.
- 33. *Leyvand v Barasch* (2000) 144 S.J.L.B. 126 Ch D.
- 34. Where the claimant is an individual: see discussion of *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560 above.
- 35. *Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560 at [5] of the transcript.
- 36. A possible attempt to achieve this level of precision from the opposite perspective appears in CPR r.34.23, "(a) outside the jurisdiction; and (b) in a Regulation State".
- 37. *Tatnall v Longley* Unreported October 15, 2003 Central London CC.
- 38. *Prince Radu of Hohenzollern v Houston* [2006] EWHC 231; [2007] C.P. Rep. 11 QBD.
- 39. Contrast the corporate impecuniosity cases where an assessment has to be made of the likelihood of the respondent's being able to pay at the time of the putative future costs order.
- 40. A later successful appeal was on a different basis: *Prince Radu of Hohenzollern v Houston* [2006] EWCA Civ 1757; [2007] C.P. Rep. 11.
- 41. *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 W.L.R. 420; [1987] 1 All E.R. 1074 Ch D.
- 42. *Chequepoint SARL v McClelland* [1997] Q.B. 51; [1996] 3 W.L.R. 341 CA. Permission to appeal was refused by the House of Lords: [1996] 1 W.L.R. 1431 HL.
- 43. Restrictions on the type of security acceptable might offend other international rights such as those of free movement of capital: *Piazza v Paul Shurte AG* (E-10/04) [2005] 2 C.M.L.R. 59 EFTA Court of Justice.
- 44. Companies Act 1985 s.726 itself operated in favour of some foreign registered companies, as noted by Phillips L.J. in *Chequepoint SARL v McClelland* [1997] Q.B. 51 at [64]: "an oversea[s] company, which is ordinarily resident within the jurisdiction, even if impecunious, cannot be required to give security for costs [under s. 726]". The proviso to CPR r.25.13(2)(c) now allows the order to be made--in claims to which the CPR apply--whatever the nationality of the company.
- 45. *Chequepoint SARL v McClelland* [1997] Q.B. 51 at [59].
- 46. An impecunious English-registered company "resident" out of the jurisdiction would, however, be vulnerable to awards of security on both grounds. Following the introduction of CPR r.25.13(2)(c) which, unlike the Companies Act 1985, provides grounds to award security against "a company or other body ... whether incorporated inside or outside Great Britain", a foreign-registered company resident here would be vulnerable on the grounds of its impecuniosity only.
- 47. LCD, *Security for Costs, Proposed New Rules*, para.12. An example of the oddity of the effects of the distinction between the nationality provisions of the EC Treaty and the residence-based jurisdiction is seen in *Greenwich Ltd v National Westminster Bank Plc* [1999] 2 Lloyd's Rep. 308 Ch D where an Isle of Man company was subject to the jurisdiction under RSC O.23 r.1 but not entitled to rely on the non-discrimination argument. This was not only because the EC Treaty has limited application to the Isle of Man, but also because there is no obligation under the EC Treaty for a Member State to treat its own nationals equally; that is, to treat a Manx company as if it were an English company.
- 48. Given direct effect in this jurisdiction by Human Rights Act 1998.
- 49. Where enforcement proceedings themselves are concerned, however, Brussels Regulation, art. 51, precludes security being required if an application is made in member state A for enforcement of a judgment made in member state B on the ground that the applicant is a foreign national or not domiciled or resident in state A.
- 50. *Somerset-Leeke v Kay Trustees* [2003] EWHC 1243; [2004] 2 All E.R. 406 Ch D.
- 51. *Nasser v United Bank of Kuwait (Security for Costs)* [2001] EWCA Civ 556; [2002] 1 W.L.R. 1868 CA.

52. ECHR art.6 has been used to suggest that the jurisdiction to award security at all is contrary to the right of access to justice: *Tolstoy Miloslavsky v United Kingdom* [1996] E.M.L.R. 152; (1995) 20 E.H.R.R. 442; *Federal Bank of the Middle East v Hadkinson (Security for Costs No 2)* [2000] 1 Costs L.R. 94 CA. Article 6 will remain relevant where it is argued that the award (or an award in a particular sum) will "stifle" a meritorious claim although, as pointed out by Sedley L.J. in *AI-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123 at [32], "defendants too have entitlements under article 6, including a right not to have *their* access to a court rendered prohibitive by the prospect of irrecoverable costs or, as demonstrated by the judgment in *Tolstoy*, an entitlement to have claimants' access limited by relevant and proportionate conditions".
53. *Nasser* [2001] EWCA Civ 556, per Mance L.J. at [61].
54. *Nasser* [2001] EWCA Civ 556, per Mance L.J. at [63].
55. *Weissfisch v Julius* [2005] EWHC 2746 (Ch).
56. *Weissfisch v Julius* [2005] EWHC 2746 (Ch) at [8].
57. *AI-Koronky v Time-Life Entertainment Group Ltd* [2005] EWHC 1688.
58. *AI-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123; [2006] C.P. Rep. 47.
59. *AI-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, per Sedley L.J. at [9].
60. *AI-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123 at [39].
61. *AI-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, per Sedley L.J. at [45].
62. *Prince Radu of Hohenzollern v Houston* [2006] EWHC 231 (QBD).
63. *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 All E.R. 401.
64. *Texuna International Ltd v Cairn Energy Plc* [2004] EWHC 1102; [2005] 1 B.C.L.C. 579 QBD Commercial Court. See also Morgan J., *Butterworths Costs Service Bulletin* (August 2004).
65. *Aims Asset Management v Kazakhstan Investment Fund Ltd* [2002] EWHC 3225.
66. *Aims Asset Management* [2002] EWHC 3225, per Mr G. Moss Q.C. sitting as a deputy judge; unpaginated transcript.
67. *Aims Asset Management* [2002] EWHC 3225.
68. *Aims Asset Management* [2002] EWHC 3225.
69. *Somerset-Leake v Kay Trustees* [2003] EWHC 1243; [2004] 3 All E.R. 406.
70. *Somerset-Leake* [2003] EWHC 1243, per Jacob J. at [10].
71. *Somerset-Leake* [2003] EWHC 1243 at [23viii].
72. *Somerset-Leake* [2003] EWHC 1243 at [63].
73. *Somerset-Leake* [2003] EWHC 1243 at [64].
74. *Somerset-Leake* [2003] EWHC 1243 at [64].
75. *De Beer v Kanaar (No.1)* [2001] EWCA Civ 1318; [2003] 1 W.L.R. 38.
76. *Thistle Hotels Ltd v Gamma Four* [2004] EWHC 322; [2004] 2 B.C.L.C. 174 Ch D, per Miss S. Proudman Q.C. sitting as a deputy judge at

- [14].
77. As in *Al-Koronky* [2006] EWCA Civ 1123 and *Prince Radu of Hohenzollern* [2006] EWHC 231, discussed above.
78. *Dumford Trading AG v OAO Atlantyrbolot* [2004] EWCA Civ 1265.
79. Including the breadth, in some cases, of its damages awards, see Protection of Trading Interests Act 1980.
80. *Nasser* [2001] EWCA Civ 556, per Mance L.J. at [65].
81. *Nasser* [2001] EWCA Civ 556, per Mance L.J. at [66].
82. *Antonelli v Allen* [2001] EWCA Civ 1563 at [11].
83. *Alpha Lettings Ltd v Neptune Research and Development Inc* [2003] EWCA Civ 533, per Tuckey L.J. at [10].
84. As in *Kuonyehia v International Hospitals Group Ltd* [2006] EWHC 3503; [2007] EWCA Civ 274.
85. *The Republic of Kazakhstan v Istil Group Inc* [2005] EWHC 2309 (QBD Commercial Court).
86. *Zappia Middle East Construction Co Ltd v Clifford Chance* [2001] EWCA Civ 946.
87. *Zappia* [2001] EWCA Civ 946 at [18].
88. *Semen Briskin v Oakland Finance Ltd (in Liquidation) (Security for Costs)* [2004] EWHC 1262 (Ch D).
89. CPR PD 25a, standard freezing injunction in the annex, paras 9 and 10.
90. *Anglo Eastern Trust Ltd v Kermanshahchi (No.2)* [2002] EWCA Civ 198; [2002] C.P. Rep. 36. Whilst this opportunity should be offered by the court in summary judgment cases, it is not a general rule that the respondent should be offered the opportunity to adduce evidence of poverty: *Redcliffe Close (Old Brompton Road) Management Ltd v Kamal* [2005] EWHC 858 (Ch).
91. *Somerset-Leeke* [2003] EWHC 1243, per Jacob J. at [8].
92. Companies Act 1985 s.726, to be repealed by Companies Act 2006; CPR r.25.13(2)(c).
93. See, for example, *Mbasogo v Logo* [2006] EWCA Civ 608, where the absence of evidence of means was treated as highly significant to the impecuniosity application.
94. *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All E.R. 534 CA.
95. *Kuonyehia v International Hospitals Group Ltd* [2006] EWHC 3503.
96. *Kuonyehia* [2006] EWHC 3503 at [23].
97. *Kuonyehia* [2006] EWHC 3503 at [49].
98. *Kuonyehia v International Hospitals Group Ltd* [2007] EWCA Civ 274.
99. *Kuonyehia* [2007] EWCA Civ 274, per Tuckey L.J. at [26].
100. *Kuonyehia* [2007] EWCA Civ 274, per Tuckey L.J. at [26].
101. Full and candid disclosure in a stifling claim is demanded by *Keary* [1995] 3 All E.R. 534 CA.

102. Companies Act 1985 s.726, to be repealed by Companies Act 2006; CPR r.25.13(2)(c).
103. *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852; [2004] 1 W.L.R. 2917.
104. *Longstaff International* [2004] EWHC 1852, per Park J. at [2923].
105. Blurring between questions of location of assets (relevant to this ground) and sufficiency of assets (relevant particularly to the impecuniosity ground) can also be seen in *Golden Grove Estates Ltd v Chancerygate Asset Management Ltd* [2007] EWHC 968.
106. *Thune v London Properties Ltd* [1990] 1 W.L.R. 562 CA, per Bingham L.J. at [571].
107. *Nasser* [2001] EWCA Civ 556 at [62].
108. *Nagshineh v Chaffe* [2003] EWHC 2107.
109. LCD, *Security for Costs, Proposed New Rules*, para.6.
110. LCD, *Security for Costs, Proposed New Rules*, para.19.
111. There is, currently, no sub-para.(b) as a result of the individual and corporate foreign-residence grounds having been combined in 2003.
112. *De Bry v Fitzgerald* [1990] 1 WLR 552 CA, 558.

© 2012 Sweet & Maxwell and its Contributors

