Neutral Citation Number: [2022] EWHC 752 (Ch)

Case No: BL-2021-001027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 March 2022

Before :

Deputy Master Teverson

- -

Between :

(1) MR DAVID SAURYMPER	**Claimants**
(2) WHYTELEAFE LTD	
- and -	
FISHMAN BRAND STONE (a firm)	**Defendant**

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- -

Andrew R. Nicol (instructed by **Colman Coyle Limited**) for the **Claimants**
Benjamin Wood (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 25 February 2022

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Approved Judgment

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DEPUTY MASTER TEVERSON

This Judgment is deemed to have been handed down remotely at 10.30a.m. on 31March 2022

DEPUTY MASTER TEVERSON :

1. This is an application by the Defendant by application notice dated 20 January 2022 seeking an order that:-

   (i)the First Claimant's claim be struck out or summarily dismissed; and

   (ii) the Second Claimant provide security for the Defendant's costs in the form of a payment into court in the sum of £269,876 or such other sum as the court thinks appropriate within 28 days.

2. Following a hearing before Chief Master Shuman on 7 February 2022, the first part of the application is no longer opposed. The second part of the application is opposed. The Defendant seeks security for its costs in the form of a payment into court or its equivalent. The Second Claimant seeks permission to give security in the form of a Deed of Indemnity to be provided by the First Claimant in favour of the Defendant under which he would assume personal liability to the Defendant for any costs awarded against the Second Claimant in favour of the Defendant secured by one or more second legal charges. The First Claimant says that if security in that form is agreed, he will by 14 February 2023 provide cash security in the sum of £269,876.

3. The claim was issued on 17 June 2021. The claim seeks damages for breach of contract and/or negligence against the Defendant firm of solicitors in relation to the intended purchase of property at Whyteleafe House, 439-445 Godstone Road, Caterham[1], Surrey ("the Property"). The Second Claimant, Whyteleafe Limited, was incorporated on 25 June 2018 as an SPV for the purpose of purchasing the Property. The First Claimant is the sole shareholder and director of the Second Claimant. The First Claimant, who is known as "Mr Moses", is a jeweller by trade but also invests in property.

4. The claim concerns the planning status of the Property. The Property had the benefit of a planning permission granted on 1 August 2011 by Tandridge District Council for the demolition of the existing office building and the creation of a 4-5 storey building comprising 167 flats with basement parking and other facilities. Condition 1 of the permission was that the development should be begun before the expiration of 3 years from the date of the permission.

5. The following summary of events is taken from the Particulars of Claim. Contracts were exchanged on 29 June 2018 between Opecprime Properties Limited ("Opecprime") as seller and the Second Claimant as buyer. The price was £11.75m. A deposit of £1.175m was paid to the seller's solicitors as stakeholder. The contractual completion date was 7 September 2018.

6. Completion did not take place on 7 September 2018. The First Claimant negotiated for an extension. On 21 September 2018 Opecprime and the Second Claimant reached an agreement under which a new date for completion of 29 October 2018 was agreed. In consideration, the Second Claimant agreed to pay further sums of £180,788.92 and £47,500 (being costs Opecprime had incurred owing to the delay) and legal costs of £5,862 to Opecprime. The deposit of £1.175m was also released to Opecprime.

[1] The claim form refers to "Catering".

7. The Second Claimant was unable to satisfy its proposed lender that the planning permission was extant. It was thus unable to complete the contract on 29 October 2018.[2] Opecprime did not agree to extend the date for completion, but did agree to grant the Second Claimant an option to purchase the Property. On 10 December 2018 Opecprime granted the Second Claimant an option to purchase the Property for the period expiring on 31 January 2019 at a price of £1,526,810.74 of which £1.175m would be credited if completion took place.

8. The Second Claimant says it was unable to proceed with its intended sale and unable to exercise the option. The option lapsed on 31 January 2019. The Second Claimant claims to have suffered loss and damage in the sum of £1,760,961.64. It is alleged that the Defendant by its partner Mr Neidle failed to give the advice that it should have done.

9. The Defence was filed on 13 August 2021. The following is taken from the Defence and the Summary of the Defence. The First Claimant was introduced to the Property by Mr Billal Javed. The Claimants and Mr Javed knew and understood the planning status of the Property. They negotiated a substantial discount from the initially agreed price of £13.5m to £11.75m partly on this basis immediately prior to exchange of contracts. It was not the responsibility of the Defendant to advise on planning, valuation or commercial matters or on whether the Property might be suitable as loan collateral. The Claimants took a leap of faith that they would be able to secure a back-to-back sale. The Claimants allowed themselves to lose the purchase and are the authors of their own misfortune.

10. A Reply was filed on 6 October 202. It refers to the introduction by Mr Neidle of Mr Javed to the First Claimant. It then sets out the Claimants' response to the Defence.

11. The Defendant applies for security for costs on the grounds that:

    (i)The Second Claimant is a company and there is reason to believe that it will be unable to pay the costs of the Defendant if ordered to do so: CPR 25.13(2)(c); and

    (ii) having regard to all the circumstances of the case, it is just to make such an order: CPR 25.13(1)(a).

12. The Defendant's application is supported by the witness statement of Claire Elizabeth Roake, a solicitor at Mills & Reeve LLP, dated 20 January 2022. Ms Roake exhibits the unaudited accounts of the Second Claimant for the year ended 30 June 2020. They show the Second Claimant to have current assets of £2,986,274 and current liabilities of £2,995,623. The Second Claimant's accounts show a negative net liability and capital and reserves of (£9,648).

13. The issue of security for costs was first raised by Mills & Reeve LLP ("MR") in a letter dated 9 July 2021 to the Claimants' solicitors Colman Coyle ("CC"). The First Claimant as the sole director and shareholder of the Second Claimant was asked to provide written confirmation that he accepted personal liability for the full extent of any and all costs that the court might order the Claimants or either of them to pay the Defendant

[2] Paragraph 32 mistakenly refers to 29 October 2019.

during the litigation. CC responded on 15 July 2021 saying they did not understand the Defendant's concern or why an assurance should be provided.

14. By letter dated 13 September 2021, MR said that the First Claimant's inclusion as a party was not sufficient particularly when, as alleged in the Defence, his claim was legally flawed and should be discontinued. CC replied on 14 September 2021 confirming that the First Claimant accepted in the event that the court ordered costs to be paid by the Claimants, he would be personally liable to pay those.

15. By letter in reply dated 20 September 2021 MR noted the First Claimant's acceptance of personal liability. They said this did not dispose of the matter first because the First Claimant had not provided any information to show the First Claimant was anymore able to pay a costs order than the Second Claimant. Secondly, reference was made to *Dunn Motor Traction Limited v National Express Limited* [2017] EWHC 228 (Comm) as authority for the proposition that an indemnity from a shareholder is not a *"reliable source of litigation funding"*. In that case, the sole shareholder of a company had irrevocably undertaken to indemnify the claimant company in respect of its costs liability to the Defendant.

16. In reply on 1 October 2021, CC said that MR had never previously sought information to demonstrate that the First Claimant was able to pay the costs. They said the Defendant had previously acted for the First Claimant for many years and was well aware that he was a man of substantial means. They pointed out that in the *Dunn Motor* case the shareholder had only given an undertaking to his own company. They said that the First Claimant has given an assurance for the benefit of the Defendant. They said the First Claimant would be willing to enter a Deed in favour of the Defendant confirming the assurance which he had already given.

17. On 19 October 2021 MR suggested that in addition to the personal guarantee, the First Claimant agreed to pay a sum into CC's client account. The sum would be held to discharge any costs orders made against the Claimants during the claim.

18. By letter dated 5 November 2021, CC provided to MR six months bank statements from the First Claimant's private bank account showing he had maintained a balance in excess of £1m in the account. They attached office copy entries of the freehold title for 41 Castlewood Road London N16 and a valuation dated 30 August 2019 showing an estimated sale value of £3m. They said they were instructed the amount currently owing under the charge of the property was approximately £500,000 so that there was approximate equity in excess of £2.5m. They also attached office copy entries of the freehold title to 52 Castlewood Road London N16. They attached a valuation dated 30 August 2019 showing an estimated sale value of £1.6m. They said they were instructed the amount currently owing under the charge on the property was approximately £750k so that there was an approximate equity in excess of £850k. They said that given that the trial would not take place for at least a year, or possibly two, their client *"does not wish to have to deposit a substantial sum of money to be held for such a long period."* They suggested that at this stage a Deed of Indemnity would provide the Defendant with more than adequate protection.

19. By letter dated 25 November 2021 MR said they remained of the view that their client was entitled to and should be provided with the additional comfort of money on account, a bank guarantee or a payment into court.

20. By letter dated 17 December 2021 CC said MR had failed to take into account that the First Claimant was himself a party to the proceedings. They said they were instructed that the Second Claimant did have a substantial asset of its own. They said the Second Claimant was the owner of 50% of the shares in a company which had recently acquired a property at Bath Road. They said that property was valued in excess of £5m and was unincumbered. CC said their client was also willing to grant a second charge over one of the properties which he owns. They said this was 52 Castlewood Road with an equity of something like £750,000. In reply on 23 December 2021 MR said no evidence of the Second Claimant's asset had been provided. They asked for an up to date mortgage statement in relation to the charge over 52 Castlewood Road to enable their client *"to properly consider the value of a second charge"*. By email dated 6 January 2022 MR asked if there was an uncharged property that might be used as security.

21. On 6 January 2022, CC asked MR to confirm whether the Defendant agreed in principle to deal with the matter in the way suggested in their letter of 17 December *"i.e by our client offering a charge over property in support of his personal undertaking"*. In reply on 11 January 2022, MR confirmed that their client agreed in principle to security by way of the First Claimant's personal undertaking combined with a charge over a suitable property. They said this agreement was conditional upon

"1.Appropriate evidence that your client holds sufficient equity in the property to be charged; and

2. If the charge is a second charge, confirmation of the first charge holder's consent to the charge in favour of our client".

22. On 14 January 2022, CC said their client now suggested it would be more straightforward if he granted a charge over 41 Castlewood Road rather than granting a charge over the property previously mentioned. On 17 January 2022 MR said they had already confirmed that their client agreed in principle to a second charge over a suitable property. They said they awaited further information from CC.

23. On 17 January 2022 CC said they had no idea what proposals MR had in mind. They said the ball was in MR's court to provide them with the Deed. On 18 January 2022 MR said it was for the Claimants to provide a form of charge. They said the office copy entries for 41 Castlewood Road gave rise to various questions relating to the adequacy of any second charge. They said the property might be subject to overriding interests, such as of occupiers of the property. They enclosed with their letter a draft consent order. The draft order provided for the Second Claimant to provide security (i) by written confirmation of the agreement of the First Claimant to be jointly and severally liable to the Defendant in respect of the Second Claimant's costs liability and (ii) a legal charge over real property fully and adequately securing the Second Claimant's liabilities and all the costs and expenses associated with the preparation, registration and enforcement of that charge. The draft order provided that the Defendant was permitted to apply for security for costs in conventional form.

24. In a letter dated 20 January 2022 CC set out what it considered to be the history of the security for costs matter. They said their client was becoming increasingly exasperated by the Defendant's approach particularly to the question of security. They said their client did not want to find that he was in a spiral of ever increasing demands and that each time he responds the Defendant comes up with new points. They suggested MR

set out precisely what its client now required in relation to the proposed second charge and provided them with the deed of indemnity.

25. On 20 January 2022 MR enclosed by way of service their client's application to strike out the First Claimant's claim and for security for costs. On 25 January 2022 MR said that a second charge *"might potentially be appropriate"*. They said it was for the Claimants, not their client, to provide a suitably drafted charge for their consideration.

26. In reply on 26 January 2022, CC set out what they proposed. The steps proposed were that the First Claimant would execute a legal charge which would take effect as a second charge over the freehold of 41 Castlewood Road. The First Claimant would procure the consent of the first charge holder, Bank of Scotland Plc to the second charge and obtain confirmation the second charge would have priority over any further advances the bank might make. The First Claimant would obtain the written consent of his wife to the charge so that her interest in the property ranked behind the charge. The letter went on to state: *"She is the only adult occupier apart from our client. The four children of the family reside in the property but they are all under the age of 18"*.

27. On 28 January 2022, MR said that having taken further instructions, their client was concerned at CC's confirmation that the property being proposed as security was the First Claimant's family home occupied by his wife and four children rather than an investment property as originally proposed.

28. On 1 February 2022 Mr Howard Colman, a director of CC, filed a witness statement on behalf of the Claimants in response to Ms Roake's statement and in opposition to the Defendant's application dated 20 January 2022. Mr Colman referred to his letter of 20 January 2022 setting out the history of the correspondence between the parties. He said the First Claimant had sought to comply with every request made by the Defendant. He said the First Claimant had provided written confirmation that he accepted liability for the costs awarded and had offered to provide further security by means of a charge over a property which had substantial security.

29. The claim came before Chief Master Shuman on 7 February 2022 for a costs and case management conference. An application by the Claimant for further information was dismissed. The Defendant's application was adjourned for a 2 hour hearing. The claim was set down for trial between 17 April 2023 and 30 July 2023 with a time estimate of 7 days and a listing category C. Disclosure was directed to take place by 28 March 2022 and witness statements exchanged by 23 May 2022. Planning experts' reports were directed to be tendered for exchange by 12 September 2022 with valuation experts' reports to follow by 12 December 2022. The order recited the agreement of the parties that a mediation or other ADR was likely to be more effective if undertaken after disclosure and exchange of witness statements.

30. Following the hearing before Chief Master Shuman on 7 February 2022, CC by letter dated 15 February 2022 confirmed that the Claimants would not oppose the Defendant's application for the claim of the First Claimant to be struck out.

31. By letter dated 16 February 2022 CC said that the principal form of security the First Claimant was offering was his Deed of Indemnity. They said this put the Defendant in the same position as it would have been in if the First Claimant had brought the claim personally as an individual. They said the reason why they suggested 41 Castlewood

Road instead of 52 Castlewood Road was because 52 Castlewood Road was a property which comprised of two flats let on assured shorthold tenancies. They said the First Claimant had recently decided that long leases of the two flats should be created in his favour and he would obtain a mortgage on each of these. CC said the First Claimant would be willing to secure his liabilities on those leases, in addition to granting the charge over 41 Castlewood Road if that would assist. CC stated:-

"It will be detrimental to our client for him to have to tie up large amounts of cash for such a long period of time. In his business liquidity is often critical.

We are instructed that, for example, he owns a property in North London which comprises several flats and two shops. An opportunity has just come up for him to potentially acquire the remaining two shops in the parade which will significantly benefit him. In order for him to be able to secure these shops, he will need to be able to move speedily to exchange of contracts and completion. It would be his intention to use his liquid assets for that purpose and thereafter to re-mortgage the properties to replenish his funds. If he had to await until such time as he could secure a mortgage and complete that side of the transactions before being able to carry out the purchase there is a real risk that he would lose the opportunity given the delays that inevitably occur in arranging and formalising finance.

This is just an example of why our client resists having to deposit the cash at this stage."

CC said that if the Defendant was willing to proceed on the basis of a Deed of Indemnity supported by a Legal Charge for now, the First Claimant would be willing to agree to provide the cash security sought in the sum of £269,876 by 14 February 2023. They said this would avoid the First Claimant having to tie the money up for the next year but would be sufficiently ahead of the trial date for any sanction to be imposed *"in the unlikely event of default"*.

32. Those proposals were rejected by MR on 21 February 2022. They said one potential property was subject to tenancy agreements which could delay enforcement and the other was the First Claimant's family home.

33. Mr Colman made a second witness statement dated 23 February 2022. In his second witness statement, Mr Colman said the Claimants did not oppose the removal of the First Claimant from the claim. He said the First Claimant had offered to provide charges over two leasehold flats which were let on Assured Shorthold Tenancies. He said these were investment properties whose value was not adversely impacted by the Assured Shorthold Tenancies. He said if it were necessary to realise the equity, the properties would be sold with the benefit of the tenancies and the equity is calculated on that basis. He said there would be no need to obtain vacant possession. In relation to the family home, he said there was no realistic prospect of the First Claimant's wife being able to challenge the priority provided she was independently advised and in any event the First Claimant's equity would be more than sufficient.

34. Under CPR 25.13(1)(a) the court must first be satisfied that, having regard to all the circumstances of the case, it is just to make an order for security for costs under CPR 25.12. Secondly it must be satisfied that one of the conditions set out in CPR 25.13(1)(ii) is satisfied. The defendant relies on condition (c). In order to establish (c),

the Defendant must show *"there is reason to believe it [the Second Claimant] will be unable to pay the Defendant's costs if ordered to do so"*.

35. There was no dispute before me that condition (c) is satisfied. No attempt was made in the evidence filed on behalf of the Claimants to demonstrate that the Second Claimant would be in a position if ordered to do so to pay the Defendant's costs. It is established that in considering, for the purposes of CPR 25.13(2)(c), whether there is reason to believe that a company claimant will be unable to pay the defendant's costs, if ordered to do so, the relevant question is whether it would pay within the time ordered, that is usually 14 or 28 days. A company that has illiquid assets and could pay in the end but is unable to pay with any high degree of promptness is within the wording of the rule: *Longstaff v Baker & McKenzie* [2004] 1 WLR 2917 at [17]. There is no evidence that the Second Claimant has any liquid assets. The reference in correspondence to its acquisition of 50% of the shares in a company that owns a property in Bath Road is not evidenced but in any event a 50% shareholding would almost certainly not be a readily realisable asset. The identity of the other 50% shareholder was not disclosed.

36. The argument advanced on behalf of the Claimants is that having regard to the personal guarantee and indemnity offered by the First Claimant it would not be just to make the order sought by the Defendant. It was submitted on behalf of the Claimants by Mr Nicol that the Defendant's costs would be adequately secured by the proposals made by the Claimants in correspondence. It was submitted that from the date of acceptance of these proposals the Defendant would be able to call on the indemnity of the First Claimant who is a wealthy individual and that if by the date when the indemnity was called upon the First Claimant had ceased to be wealthy, his obligations would be secured by the second charges offered on his properties. It was submitted that if after 14 February 2023 cash security had not been provided the proceedings could be stayed.

37. I was referred by Mr Wood on behalf of the Defendant to the notes in the 2021 White Book at 25.12.8. The notes state that legal expenses insurance policies are sometimes accepted as reliable sources of litigation funding. The notes go on to state however that the same cannot be said of an indemnity given to a claimant company by its sole shareholder as there would be a real risk that the shareholder might procure the claimant company not to call upon the indemnity or might seek to resist enforcement of it. Reference is then made to the *Dunn Motor* case.

38. The guarantee and indemnity being offered in the present case by the First Claimant is in favour of the Defendant rather than an undertaking to indemnify the Second Claimant. Mr Nicol submitted that was an important distinction.

39. In paragraph [12], of his judgment in the *Dunn Motor* case Mr Justice Teare said that the sole shareholder of a claimant company *"is, in a practical sense (though not of course in the strict legal sense), the adversary of the party seeking security for its costs."*

Mr Justice Teare continued:-

In Longstaff International v Baker & Mckenzie [2004] 1 WLR 2917 where a claimant's subsidiary had offered an undertaking to meet any order for costs made against the claimant Park J. considered that the undertaking was not acceptable. The directors of the subsidiary were hostile to the claimant and, Park J. noted, "will probably be more

so if Longstaff has just lost a contested case between itself and Baker & Mckenzie". So here Mr Dunn who is hostile to the Defendant because his company is suing it for £20m. might well be more hostile to the Defendant if he has just lost his claim and been ordered to pay costs to the Defendant. I do not say that he has no intention of honouring the legal obligation which he has voluntarily assumed to the claimant (there was no evidence he lacked such an intention) but the Defendant must have a legitimate fear that Mr Dunn might procure the Claimant not to call upon the indemnity or might seek to resist enforcement of the indemnity."

40. At paragraph [14] Mr Justice Teare said:-

"I accept that an indemnity provided by the sole shareholder of the company is an asset of the Claimant and must therefore be taken into account when assessing whether there is reason to believe that the Claimant will be unable to pay the costs of the Defendant. But where the answer to that question would otherwise be in the affirmative such an asset will not, save perhaps in an exceptional case, cause the answer to be in the negative. That is because a sole shareholder cannot, for the reasons I have given, be regarded as a reliable source of litigation funding."

41. In the present case, the First Claimant is offering to provide a personal guarantee to the Defendant. I must and do proceed on the basis that it would be his intention to honour that obligation and that he is an honourable person. The First Claimant's stated concern is at the prospect of having to tie up a substantial amount of his funds now for a year or more before trial.

42. Looked at from the Defendant's perspective, therein lies the concern. The First Claimant is a property investor and does not want to tie up his cash. The possibility cannot be ruled out that when the indemnity is called upon the First Claimant's liquid assets are wholly or substantially invested in a property acquisition or other form of deal which means that they are not immediately available to pay costs when the costs ordered or agreed fall due for payment. Alternatively, and applying the reasoning of Mr Justice Teare, it is not fanciful to suggest that the First Claimant if called upon under the indemnity to pay the Defendant's costs might prefer to let the Defendant wait for its costs rather than lose a valuable investment opportunity if at the time there was one available to him.

43. To meet that concern, the First Claimant has offered security by way of a second legal charge over his interests in two properties to secure his obligations under the Deed of Indemnity. I was referred by Mr Wood again to the notes in the 2021 White Book at 25.12.8 which state that security by way of charge over real property is not commonly ordered since if the real property is valuable there should be no difficulty in providing security by way of bank guarantee or some other alternative that would be simpler to enforce if necessary. The notes state however that orders for security by way of a charge over real property are sometimes made.

44. In my judgment, it would be open to the court in its discretion to accept security in the form of a charge over property if satisfied that the property provided adequate security and that it would not be just to require the claimant to sell the property in order to pursue the claim. I do not suggest those are the only circumstances in which security by way of a charge over property may be permitted but it is plainly likely to be highly material that unless permitted to provide security in that form the claimant may be prevented

from pursuing the claim. That is not this case. The First Claimant is a wealthy individual with substantial liquid assets. He is in a position to provide security in a conventional form but wants to avoid tying up a significant sum in cash for a year or more. He is in effect seeking to put his own business interests ahead of those of the Defendant.

45. On behalf of the Claimants, it was submitted that the Defendant had agreed in principle that security should be provided in the form of a Deed of Indemnity in favour of the Defendant secured by a second charge and that the Claimants' solicitors had made repeated attempts to satisfy all the Defendant's demands in relation to security in this form.

46. The correspondence shows that the Defendant did agree in principle to the form of security being proposed by the Claimants. The agreement was however an agreement in principle only. The question is whether it is reasonable and just in all the circumstances for the Defendant now to be applying for security in conventional form.

47. The First Claimant initially proposed the granting of a second charge over his investment property at 52 Castlewood Road. This changed on 14 January 2022 to proposing that a second charge be granted in favour of the Defendant over 41 Castlewood Road. This prompted the Defendant's solicitors to raise the issue of overriding interests. The Defendant I infer either knew or suspected that 41 Castlewood Road was the First Claimant's family home. This was not confirmed until the letter from the Claimants' solicitors dated 26 January 2022 when it was disclosed that in addition to the First Claimant and his wife, 41 Castlewood Road was occupied by their four children under 18.

48. The First Claimant by his solicitor's letter dated 16 February 2022 then revealed that 52 Castlewood Road was a property which comprised of two flats let on assured shorthold tenancies. It was disclosed that the First Claimant was in the process of creating two long leases in his favour and obtaining a mortgage on each of these. The security being offered over that property was no longer a second charge over the freehold title but a second charge over two leases that were in the process of being granted.

49. Is the Defendant in these circumstances justified in saying that its agreement in principle to accept security in the form of the indemnity secured by a second charge no longer applies and in applying for security for its costs to be provided in a conventional form?

50. In my view it is. The possibility cannot be ruled out that at the relevant time in the future the First Claimant will not have sufficient liquid assets at his disposal to pay costs ordered against the Second Claimant when they fall due. It is not clear that either or any of the charges being offered fall into the category of readily realisable assets. 41 Castlewood Road is the First Defendant's family home. If enforcement were necessary, there is the obvious potential for a sale with vacant possession to be opposed or delayed on a number of grounds.

51. 52 Castlewood Road is in the process of being divided into two leasehold titles. The terms of the leases are not before the court. There is no evidence that they have been registered. There is no up to date valuation evidence before the court valuing the

leasehold interests subject to the existing Assured Shorthold Tenancies. No draft charges have been provided over the leasehold interests.

52. The offer to provide security in cash by 14 February 2023 does not protect the Defendant in the event the First Claimant decides before then to discontinue the claim or defaults in providing the cash security.

53. This is not a case in which ordering security in conventional form will stifle the claim.

54. I am satisfied that having regard to all the circumstances it is just to order that security be provided to the Defendant in a conventional form. The balance of injustice to the Claimant in having to tie up some of his cash until trial and the injustice to the Defendant in being without readily realisable security falls in favour of the Defendant. The claim is not one whose merits can be determined at this stage. Liability is being heavily disputed. An order for security in conventional form is normally appropriate where condition (c) is satisfied, and ordering security in that form will not stifle the claim: *Premier Motorauctions Ltd (in liquidation) v Pricewaterhouse Coopers LLP* [2017] EWCA Civ 1872 at paragraph [37].

55. Mr Wood explained the Defendant is seeking security for its costs in two stages. The first stage is up to and including the pre-trial review. The second covers trial preparation and trial. The Defendant filed a costs budget dated 11 January 2022. The incurred costs are shown as totalling £146,787.78. A costs management order was made by Chief Master Shuman on 7 February 2022 save in respect of the Disclosure phase. The Defendant's approved budget up to the PTR phase including ADR totals £109,250 with estimated costs for Disclosure of £43,100 making a total of £152,350 for approved or estimated costs. The total including incurred costs is £299,137.78. The Defendant is seeking £275,000 for the first stage of security. This amounts to the budgeted costs and around 87% of the Defendant's incurred costs.

56. The application for security was made some two and a half weeks before the costs and case management conference, the issue relating to security having first been raised on 9 July 2021 before the Defence was filed. It was not unreasonable for the Defendant to explore resolving the issue of security by agreement but in my view it should not have allowed the correspondence to continue for six months before issuing its application. There is in also a real possibility that the incurred costs will be reduced on detailed assessment.

57. In those circumstances, taking those matters into account, I will order security to be provided to cover 60% of the Defendant's incurred costs as at the date of its budget in the sum of £88,072.80 together with 90% of its approved or estimated costs up to and including the PTR phase and including ADR in the sum of £137,115. I will order that security in the sum of £225,187.80 be provided in a conventional form by 4pm on 28 April 2022.

58. This judgment will be handed down at 10.30am on 31 March 2022. Any typographical corrections are to be provided to the court in a single document by 12 noon on 30 March 2022.

Claimants' Note in response to the draft judgment.

59. In response to the judgment sent out in draft to counsel on 28 March 2022, Mr Nicol, counsel for the Claimants submitted a Note on 30 March 2022 setting out paragraph 51 of my judgment and stating that this assertion was not correct. It is not stated which assertion in paragraph 51 is not correct. Reference is made by Mr Nicol to paragraph 9.2 of Mr Colman's Second Witness Statement sworn on 23 February 2022. It was acknowledged that I had referred to this part of Mr Colman's evidence in paragraph 33 of my judgment *"however it is not readily apparent that its full import was apparent to the Court"*.

60. The submission I understand being made is that it is wrong to regard the leasehold flats at 52 Castlewood Road as not falling into the category of "readily realisable assets". Reliance is placed on Mr Colman's evidence that were it necessary to realise the equity, the properties would be sold with the benefit of the tenancies and there would be no need to obtain vacant possession. In paragraph 50 of my judgment, I stated that it is not clear that either or any of the charges being offered fall into the category of readily realisable assets. I remain of that view on the evidence before the court. Even were it to be demonstrated by further evidence that the leases would be readily realisable in the market place following trial, the Defendant would still be required to take steps to enforce any costs order in its favour following trial by procuring the sale of one or more of the leasehold properties. In circumstances where the ordering of security in conventional form will not stifle the claim, I remain of the view stated in paragraph 54 of my judgment that the balance of injustice falls in favour of the Defendant.