Case No: HC-2015-004539

Neutral Citation Number: [2016] EWHC 874 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2016

Before :

MASTER MATTHEWS

- -

Between :

Coral Reef Limited	**Claimant**
- and -	
(1) Silverbond Enterprises Limited	**Defendant**
(2) Eiroholdings Invest	

- -
- -

Romie Tager QC (**Henry Webb** on 20 April 2016) (instructed by **McFaddens LLP**) for the **Claimant**
David Head QC (instructed by **Dentons UKMEA LLP**) for the **Defendants**

Hearing date: 4 March 2016

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Judgment

Master Matthews :

Introduction

1. This is my judgment on an application by the Defendants, made by notice dated 22 January 2016, for security for their costs of the claim brought by the Claimant against them. The application was heard on 4 March 2016, when David Head QC (instructed by Dentons UKMEA LLP) appeared for the Defendants and Romie Tager QC (instructed by McFaddens LLP) appeared for the Claimant. For the Claimant, this was a change of representation from the earlier hearing before me on 3 February 2016, when I gave case management directions. At the end of the hearing, I invited certain written submissions, which were supplied to me on 11 and 14 March 2016. I refer further to these below.

2. The application is made in the context of a claim concerning the beneficial ownership of 9.99% of the issued shares in the First Defendant, a company registered in England and Wales. It is very valuable. It runs a casino business in the Hilton Hotel in Park Lane, London W1. The Second Defendant is a company registered in Latvia, whose shares are owned by a Latvian businessman, Vasily Melniks, and which since 24 July 2013 has been the sole registered owner of the shares in the First Defendant. The Second Defendant acquired the shares in the First Defendant in tranches from a Mr Yoram Yossifoff, understood to be the previous owner of those shares.

3. The Claimant is a private company incorporated in Hong Kong in 2008, with a paid-up share capital of HK$1. According to a filed Annual Return of 30 January 2015, the sole director and sole listed shareholder are two named persons, each with an Israeli address. It is not known whether either of these persons is beneficially interested in this company, and there is apparently no Hong Kong regulatory requirement that the beneficial ownership be made public. The company claims a 9.99% shareholding in the First Defendant on the basis of an alleged allotment of shares pursuant to the terms of a subscription letter dated 18 December 2012, recorded in signed minutes of the company's board of directors and in other documents. The Claimant's case is that it agreed to pay a total of £2.6m for its stake, of which £1.1m had been paid. The Defendants do not admit the authenticity or provenance of the various documents relied on, or the time and circumstances in which they were executed. In any event they deny that the Claimant has any beneficial interest or any right to rectification of the company's register of members.

Procedure

4. The claim was commenced on 2 September 2015 by Part 8 claim form in the Central London County Court, seeking summary rectification of the share register of the First Defendant under s 125 of the Companies Act 2006. Since the claim was both fact-intensive and highly controversial, this was an unusual way to proceed with such a claim, and, given the value, an unusual venue in which to do it. The Defendants applied to transfer the proceedings to the High Court, Chancery Division, and on 21 October 2015 DJ Hart so transferred them, directing that they continue under CPR Part 7 with statements of case.

5. The matter first came before me on 3 February 2016, when I gave case management directions leading to the trial of the claim over 7 days in early 2017. One matter that

was not substantively dealt with on 3 February was security for costs. The Defendants had first raised this issue with the Claimant in correspondence on 14 December 2015, inviting the Claimant either to provide information as to its finances, or agree in principle to give security. No substantive response was received. Unsatisfied in either respect, therefore, on 22 January 2016 the Defendants issued an application notice which included an application for security. It was supported by a witness statement from their solicitor, Mr Thomas Leyland.

6. The Claimant's then solicitors, David Cooper & Co, in correspondence made a number of points in response to the application. These included that the Claimant was "capable financially", although evidence was not immediately available, that its main asset was a property in Costa Rica, that it owned other substantial assets in Costa Rica, and that its other assets were precious stones. All of this, it was said, would cover any possible costs liability.

7. The matter was raised at the case management conference on 3 February. The Claimant's then solicitor represented it, as its then counsel was unable to do so. The Defendants were represented, as on 4 March, by Mr Head QC and his instructing solicitors. At that hearing the solicitor asked for more time to obtain valuation reports in relation to the Claimant's assets and to make inquiries as to how security might be provided. I directed that the application be heard on 4 March 2016, and gave further directions. These were that the Claimant should inform the Defendants by 12 February of its position in relation to security, that it should serve any evidence on which it relies by 23 February, and that the Defendants should serve any evidence in reply by 1 March.

8. At the same time I directed that the Claimant should preserve certain documents important to the claim which the Claimant had previously acknowledged that it held and which it would be prepared to produce to the Defendants.

9. On 11 February 2016 the Claimant changed solicitors from David Cooper & Co to McFaddens LLP, and thereafter Mr Tager QC was instructed. They did not inform the Defendants of the Claimant's position in relation to security until 18 February, following an extension of time agreed by the Defendants (explaining the lateness by reference to the change of solicitors), but did serve evidence in the form of a witness statement from its solicitor Mr Max Eppel on 23 February. The Defendants served a further witness statement in reply from Mr Leyland on 1 March. Although not provided for in my directions, the Claimant served a short further witness statement from Mr Timothy Eppel on 3 March.

10. I record here that no application was made on either side for cross-examination on witness statements. What that means in practice is that I cannot reject any written evidence as being untrue, *unless* on the basis of all the evidence before me I consider that that written evidence is simply incredible. At the hearing, I was not invited to reject any of the written evidence on that basis.

11. I should also record that it appears that in correspondence since 3 February 2016 the Claimant has now said that it does not have the documents directed by me to be retained, but that some or all of them are or may be in the hands of a third party firm of solicitors.

The law

12. Security for costs in the present case is governed by CPR rules 25.13 and 25.14, which read as follows:

"**25.12**
(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.
(Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to Part 20 claims)
(2) An application for security for costs must be supported by written evidence.
(3) Where the court makes an order for security for costs, it will –
(a) determine the amount of security; and
(b) direct –
(i) the manner in which; and
(ii) the time within which
the security must be given.

25.13
(1) The court may make an order for security for costs under rule 25.12 if –
(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
(b)
(i) one or more of the conditions in paragraph (2) applies, or
(ii) an enactment permits the court to require security for costs.
(2) The conditions are –
(a) the claimant is –
(i) resident out of the jurisdiction; but
(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;
(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;
(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.
(Rule 3.4 allows the court to strike out a statement of case and Part 24 for it to give summary judgment)"

13. These rules are derived from the equivalent rules under the previous procedural code, the RSC. Many of the relevant authorities were decided under the RSC, but are treated as being still authoritative under the CPR, so far as the rules do not provide

differently. So for example in *Keary Developments v Tarmac Construction* [1995] 3 All ER 534, Peter Gibson LJ (with whom Butler-Sloss LJ agreed) said this:

> "The relevant principles are, in my judgment, the following.
>
> 1. As was established by this court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd.* [1973] QB 609 the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
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> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security: see *Okotcha v Voest Alpine* [1993] BCLC 474, at 479 per Bingham LJ, with whom Steyn LJ agreed. By making the exercise of discretion under section 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (*Pearson v Naydler* [1977] 1 WLR 899, 906 per Sir Robert Megarry V-C).
>
> 3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff, if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant, if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (*Farrer v Lacy Hartland & Co* (1885) 28 Ch D 482, 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (*Pearson v Naydler supra* at p 906).
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> 4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (*Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420, 423 per Sir Nicolas Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.
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> 5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not

bound to make an order of a substantial amount (see *Roburn Construction Ltd. v William Irwin (South) & Co. Ltd* [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (*Trident International v Manchester Ship Canal* [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, that there had been evidence that it had previously received support from another company, which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the Judge in that case did not think, on the evidence, that that company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyds Rep 27). […]

7. The lateness of the application for security is a circumstance which can properly be taken into account, (see paragraph 23/1 - 3/28 of the Supreme Court Practice 1993). But what weight (if any) this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff' without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."

The claim and the security application

14. The argument for the Defendants in the litigation itself may be summarised as follows. The case for the Claimant depends on the authenticity of a number of documents which the Defendants deny. In so denying, the Defendants rely on (i) a number of alleged anomalies in the documents, (ii) certain threats said to have been made against the Defendants, (iii) the delay between the time the transactions under which the claim is made are alleged to have occurred and the time that the claim was first made, (iv) the non-filing of the critical documents at Companies House, and (v) the assurances the Second Defendant received from the vendor when it bought its shares.

15. The argument for the Defendants in the security application is twofold: (1) there is reason to believe that the Claimant will be unable to pay the Defendants' costs if so ordered, within CPR rule 25.13(2)(c), and (2) the Claimant is resident outside a convention state, within CPR rule 25.13(2)(a). I deal with these in turn.

16. As to the first of these, the evidence establishes that the Claimant was incorporated in Hong Kong in 2008 with a share capital of HK$1 and has (lawfully) filed no financial information, and that a Dun & Bradstreet report confirms that no other relevant information is available. The communications from the Claimant's then solicitors, David Cooper & Co, concerning its assets, referred to above, are in my judgment of little or no weight in considering the ability of the Claimant to pay any costs award.

17. Of course there is nothing inherently wrong in businessmen forming a one dollar limited company in almost total secrecy in order to carry on business. Secrecy is prized not only by crooks, but also by people who value their privacy above all else, often for entirely lawful and understandable reasons. And Hong Kong is far from the only jurisdiction to allow such behaviour. But, on the other side of the fence, no-one is obliged to do business with a person that they do not trust. So, if you do form such a company, you cannot complain if others are as a result unwilling to do any business with you. What is sauce for the goose is sauce for the gander. It is a calculated trade-off. My privacy for your business.

18. Here, however, we are not concerned with business on the open market. Instead we are concerned with the rules-based 'business' of litigation. So we must consider the procedure rules and the cases decided on them. I have already set out above the relevant rules.

19. As to cases, the Claimant says that, in deciding (as it did) not to supply any information to the Defendants, it relied on the decision of Andrew Smith J in *Sarpd Oil International v Addax Energy SA* [2015] EWHC 2426 (Comm), to the effect that a respondent to a security application has no duty to volunteer evidence about its financial position, nor to explain why it is unwilling to do so, and is entitled to exploit the resulting forensic advantage, so that no adverse inference may be drawn from the failure to disclose financial information. That would mean that, compared with business outside the courts, the trade-off between privacy and business need not be made, and that the claimant in litigation can both have his cake and eat it.

20. Unfortunately for the Claimant, however, on 3 March 2016, the day before the hearing of this application, the Court of Appeal reversed the decision of Andrew Smith J. It decided that, if a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so, there is every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so: [2016] EWCA Civ 120, [17]. The desire for confidentiality for business reasons can be accommodated in other ways ([18]). The court also said that a practice of the court that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, is a sound one ([19]).

21. Mr Tager QC, who at the hearing frankly told me that he first heard of the Court of Appeal's decision only that morning, submitted that the court could and should still not draw any inference from his client's refusal to volunteer information, because it had been acting on advice based on the decision of Andrew Smith J that it was entitled to do so. Mr Tager accepted that if the hearing had been a month later he would not have been able to make that submission. It was only because the decision of Andrew Smith J had been reversed the day before that he could do so.

22. In my judgment there is a strong air of unreality about this argument. The claim was issued in September 2015. Even if the decision of Andrew Smith J (still then unreported) just a few weeks before had provided some comfort for the decision to refuse to disclose information, nonetheless it was well known that other judges in similar situations had taken the opposite view, drawn an inference and ordered security. Indeed, the judge himself referred to it: see [2015] EWHC 2426 (Comm), [12], and see also the cases cited by Mr Head QC in para [5] of his Supplementary Note.

23. Of course, a High Court judge will as a matter of judicial comity usually follow the decision of a fellow High Court judge unless he or she is convinced that the first decision is wrong (see *Halsbury's Laws of England*, vol 11, 2015, para 32), but the Claimant, proceeding in the Chancery Division, could not have had Andrew Smith J (from the Commercial Court) as the judge deciding the Defendants' security application.

24. At the very least therefore there would have been doubt as to what the judge hearing the application would have decided, and whether the decision of Andrew Smith J would or would not have been followed. Indeed Lewison LJ gave permission to appeal in September 2015 on the footing that this was an important point of practice which should either upheld or rejected at appellate level. In my judgment the Claimant was taking an obvious and significant risk in refusing to provide any information. The appeal might well have been allowed (as indeed it was). And, once one adds in the Claimant's admission that the strength of the argument must disappear as time elapses between the decision of the Court of Appeal and the hearing of the application, in my judgment it loses all moral or legal force.

25. It can however be said that the Claimant, in proceeding in the Chancery Division, could realistically expect that, as normally happens in this Division and indeed did happen, the application would be heard in the first instance, not by a High Court Judge, but by a *Master*. And, submitted Mr Tager, a Master *is* bound by the decision of a High Court Judge, even if the Master is convinced that the judge is wrong. This was a point which had not been foreshadowed in the evidence or skeleton arguments. I therefore asked for, and was sent after the hearing, written submissions on the question of how far Masters are bound by the decisions of High Court Judges.

The doctrine of precedent

26. Mr Tager produced a comprehensive written submission on precedent dated 11 March 2016, for which I am very grateful. I have of course read it completely, and with much benefit, but, if I may summarise its main thrust in syllogistic form, I would put it this way:

    (1) Decisions of High Court Judges are binding on other judges below them in the hierarchy of authority, not because of (for example) the destination of appeals, but because of the status of the decision as the decision of a High Court Judge;

    (2) A Master can perform nearly all judicial functions of the High Court, but occupies an office at a lower level than a High Court Judge in the hierarchy of authority;

    (3) Therefore, a Master is automatically bound by the decision of a High Court Judge.

27. Mr Head QC for the Defendants, in his Supplementary Note dated 14 March 2016, agrees with *Halsbury* that the rule for judges of first instance is that such judges will usually follow the decision of another judge of first instance unless convinced that it was wrong. But he says that it is not the seniority or status of the *judge* that is relevant, but instead the superiority of the *court*. On that basis, the decisions of High Court Judges and Masters exercising the jurisdiction of the High Court are decisions of a court of co-ordinate jurisdiction (indeed, the same court). Hence the rule that a first instance judge follows the decision of another first instance judge, except where the second judge is convinced that the earlier decision is wrong, applies as between decisions of High Court Judges and Masters.

28. In support of the view expressed in *Halsbury* there is cited the dictum of Lord Goddard CJ, with whom Atkinson and Lewis, JJ, agreed, sitting in the Queen's Bench Divisional Court in *Police Authority for Yorkshire v Watson* [1947] KB 842, that

> "a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court."

29. The passage in *Halsbury* based on that dictum was expressly followed by Gloster J in the recent case of *Lornamead Acquisitions Ltd v Kaupthing Bank HF* [2013] 1 BCLC 73, [52], [56], where the judge followed an earlier decision of another first instance judge, despite her doubts, because she was not convinced it was wrong. The same rule was expressed, and applied, in *HMRC v S & I Electronics plc* [2012] UKUT 87 (TCC), [15], in the context of the Upper Tribunal.

30. There is almost no authority on the question whether and how far a Master is bound by the decision of a High Court Judge. The only case bearing on it which I was aware of beforehand (and which I therefore mentioned to counsel at the hearing) is that of *Randall v Randall* [2014] EWHC 3134 (Ch), a decision of Deputy Master Collaço Moraes. In that case a preliminary issue was tried as to whether the Claimant had an interest in a deceased's estate sufficient to give him legal standing to bring a contentious probate claim.

31. A question arose as to the meaning of the phrase "an interest in an estate". Two cases, both in the Chancery Division, were cited to the deputy master on the question whether a claim under the Inheritance (Provision for Family and Dependants) Act 1975 could amount to an interest in an estate. They reached diametrically opposed conclusions. In one, *Green v Briscoe* [2005] EWHC 809 (Ch), Master Bragge had decided that it did not. In the other, *O'Brien v Seagrave* [2007] EWHC 788 (Ch) (which was an appeal from Master Price, later in time) HHJ Mackie QC sitting as a High Court Judge decided that it did.

32. HHJ Mackie QC had the decision of Master Bragge cited to him (though at that stage he did not know the identity of the master), but unfortunately there was no transcript or other statement of his reasons then available. He said this (at [9]):

> "Through no fault of the Master concerned, the reasons for his decision in *Green v Briscoe* are not available, and, even if they were, while entitled to respect, they would not bind me."

33. It may be observed that, in accordance with the dictum of Lord Goddard CJ and the passage in *Halsbury* already cited, this is strictly correct. HHJ Mackie QC was in any event not "bound" to follow the decision of "a judge of equal jurisdiction". It is however possible that HHJ Mackie QC was intending to go further than this, and to assert that he, sitting as a judge of the High Court under s 9(1) of the Senior Courts Act 1981, occupied a position in the judicial hierarchy superior to that of Master Bragge for the purposes of the doctrine of judicial precedent. Even if this were so, no reasons were given for that view's being taken, and it is not known whether the point was the subject of any argument. From the absence of any reference in the short judgment (10 paragraphs in total) to any such arguments, and in the context of the decision as a whole, it does not appear so.

34. Before Deputy Master Collaço Moraes, the Claimant in *Randall v Randall* argued that the decision of HHJ Mackie QC should be preferred to that of Master Bragge under the rules of precedent. The argument was rejected in these terms:

> "82. Mr Littman asserted that a decision of a Master of the High Court is not of the same 'quality' as that of a Judge of the High Court and that consequently a judgment of a Judge should be preferred to that of a Master. Mr Baxter submitted that the decisions were of the same standing. In my judgment a decision of a Master and a Judge of the High Court are of the same standing in terms of the doctrine of precedent. They both are judges of the High Court exercising the same jurisdiction, though the jurisdiction of Masters is subject to certain restrictions. Further, it is of note that a Master will have greater experience of certain types of disputes and of particular relevance is the fact that the Masters of the Chancery Division are likely to have a greater familiarity with the issue of an 'interest in an estate' than a Judge of the same division."

(For completeness, I add here that the then restrictions on the jurisdiction of masters, referred to by the deputy master, have since been almost wholly removed, and masters can now hear and try more or less the same cases as the High Court judges. In practice most of their work involves procedural disputes, as before.)

35. The deputy master went on to distinguish the decision of HHJ Mackie QC on the facts of the case. But he concluded that, if required to choose between them, then he preferred the reasoning of Master Bragge. He added that he bore in mind the decision in *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, 85, but noted that at the time of his decision HHJ Mackie QC had neither a note or a transcript of the decision of Master Price (from whose original decision the appeal came before him), nor the reasoned judgment of Master Bragge in *Green v Briscoe*.

36. In the present case before me, Mr Tager QC argued that the decision of the deputy master was wrong because it sought to develop the law:

> "18. Finally, it is submitted that it is not open to a Master to develop the English doctrine of precedent by holding that, in the absence of authority on

> the point, it is open to him to treat the judgments of Masters exercising the jurisdiction of the High Court as having the same status as judgments of High Court judges. A Master cannot extend the doctrine of precedent if, prior to the extension, a Master's decisions are not relevant within the common law doctrine of precedent.
>
> 19. Hence the decision in *Randall v Randall* [2014] EWHC 3134 (Ch) could not possibly have this effect, and should not be followed…"

37. So far as I know, Mr Tager QC is right to say that there is no other instance of a master deciding on the status of a master's decisions within the doctrine of precedent. But I am not very impressed with the argument that because it has never been done before it is therefore wrong. It reminds me of the famous quotation from the judgment of Denning LJ in *Packer v Packer* [1954] P 15, 22:

> "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both."

38. In the same vein there are other judicial statements, such as that of Lopes LJ in the Court of Appeal in *Re Davy (a lunatic)* [1892] 3 Ch. 38, 40:

> "If there is no precedent for the course which the Court is now taking, the sooner a precedent is made the better"

and of Scrutton LJ (also in the Court of Appeal) in *Ellerman Lines v Read* [1928] 2 KB 144, 152:

> "If there is no authority for this, it is time we made one".

(See also Lord Merrivale P in *Miller v Miller* (1928) 72 SJ 205, and Pring J in *Ferris v Lambton* (1905) 22 WN (NSW) 56, 57.)

The fact is that I have now to decide the point, one way or the other.

39. In the past, I have no doubt that the 'off the cuff' view of most High Court judges would have been that masters were obviously inferior to, and therefore bound by the decisions of, judges. For example, I remember being in court one day in the 1980s when counsel, in the course of his taking the judge through the documents in the bundle, perhaps rather unwisely said something about an order of a High Court judge (fortunately, not that judge) having been "varied by the master". "Mr *Blank*," said the judge, "how on *earth* can a *master* vary the order of a *judge*?"

40. But the world has moved on since those days. For example, there is no longer an automatic right to ask the judge to rehear any application made to the master; an appeal must be brought, and permission obtained. It is necessary to reconsider the matter on principle, and under the civil procedure system as it is at the present day. Some assistance is to be found in the decision of the Court of Appeal in *Howard de Walden Estates Ltd v Aggio* [2008] Ch 26, which was cited to me. In that case, which

dealt with two appeals from the county court in separate cases, the court delivered two judgments. One was on the substance of the appeals, concerning the right of a tenant to a new lease under specific legislation. It was later taken to the House of Lords and was overturned there: [2009] AC 39. I say no more about that. The other was on the doctrine of precedent, was not subject to any appeal, and therefore was not affected by the decision of the House of Lords on the substance.

41. Although the Court of Appeal said nothing about the relationship between High Court judges and masters, it did say some things of relevance to the question before me. The judgments being appealed to the Court of Appeal were decisions of two judges in the county court. The Court of Appeal noted that the county court judges had treated the decision of a deputy High Court judge on a similar point as

> "88. … the decision of a court of co-ordinate jurisdiction which was not binding on the county court, although it would, as a matter of judicial comity, usually be followed by a judge of the county court unless convinced that the decision was wrong.

42. The Court of Appeal stated:

> "89. In this context we do not think that there is any relevant difference between the decision of a High Court judge and the decision of a deputy High Court judge."

But went on:

> "90. Although both Judge Crawford Lindsay QC and Judge Collins correctly stated the principle of stare decisis applicable to decisions of co-ordinate courts of first instance (see *Huddersfield Police Authority v Watson* [1947] KB 842, 847; *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80), this principle does not, in our judgment, apply as between decisions of the High Court and the county court, even when each court is exercising the same first instance jurisdiction. The relationship between the High Court and the county court is that of superior court and inferior court and the decisions of the former, whether made on appeal or at first instance, are binding on the latter.
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> 91. With the benefit of the research conducted by counsel and by the judicial assistants in the Court of Appeal, we state the position as follows.
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> 92. In accordance with the well established principles of stare decisis the decisions of a higher court are binding on judges sitting in a lower court. This principle serves the interests of legal certainty: see *Broome v Cassell & Co Ltd* [1972] AC 1027, 1054. The needs of litigants and their advisers to know where they stand is not served if a lower court is free to create a conflict of authority by declining to follow the relevant decision of a higher court.
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> 93. The county court is a lower court than the High Court in the hierarchy of the legal system of England and Wales and is bound by the decisions of the High Court, as well as those of courts above; see *Cross & Harris, Precedent in English Law*, 4th ed (1991), p 123 which refers to an almost invariable assumption to this effect.
>
> 94. The Chancery Division of the High Court does not cease to be a higher court than the county court when it exercises the same first instance

> jurisdiction as has been conferred on the county court by the Leasehold Reform Acts. The fact that both the High Court and the county court are courts of first instance exercising the same statutory jurisdiction does not justify the creation of an exception to the general rule of stare decisis stated in para 92 above.
>
> 95. We do not accept the tentative suggestion that it is arguable that a county court judge is not bound by the decision of a judge of the High Court because appeals from the county court can go to the Court of Appeal: see *Salmond's Jurisprudence*, 12th ed (1966), p 163 footnote (w). The fact that both the High Court and the county courts are lower than the Court of Appeal, to which appeals lie, does not mean that the High Court and the county court are courts of co-ordinate jurisdiction for the purposes of the doctrine of stare decisis."

43. It is notable that the Court of Appeal does not put the rule in terms of the status of *judges*, but instead on the basis of the status of *courts*, just as Mr Head QC argued. Indeed, it treats the decision of a deputy High Court judge as of the same status for precedent purposes, no doubt for this reason. On the face of it, therefore, one might have thought that the same should be true where, by virtue of the statutory rules governing jurisdiction, a master is exercising the jurisdiction of the High Court.

44. The same is almost self-evidently true in the converse situation, where a judge having a particular status sits temporarily in a court lower in the hierarchy than that in which he or she would normally sit. Well-known examples are Brightman LJ in *Bartlett v Barclays Bank (No 2)* [1980] Ch 515, and three Lords of Appeal in Ordinary sitting in the Court of Appeal in *Stockton v Mason* [1978] 2 Lloyd's Rep 430. In this Division the Chancellor regularly sits at first instance. In recent times Scott Baker LJ and Hallett LJ have both sat as assistant deputy coroners (then the lowest possible rank of coroner) in important coroners' inquests. But the decisions made in all these cases have no more value for the purposes of the doctrine of precedent than they would have if the judges had been regular judges of the courts in question.

45. In his decision in *Randall v Randall*, Deputy Master Collaço Moraes referred (at [82]) to the fact that masters were usually specialists in their fields, whereas judges (and deputy judges), being required to deal with a wider field, may well not be. In the Queen's Bench Division, masters may be experts in (say) defamation, clinical negligence or mesothelioma claims. In the Chancery Division they may be experts in (say) trust or estate disputes, or intellectual property claims. And all High Court masters are experts in matters of procedure, deciding far more cases dealing with such matters than any High Court judge. It is not easy to see why the considered decisions of masters on particular points arising in the course of their judicial work should be treated as any the less valuable decisions of the High Court than those of High Court judges, circuit judges and recorders sitting under s 9(1) of the Senior Courts Act 1981, and qualified lawyers sitting as deputy High Court judges under s 9(4) of that Act.

46. In practice, as HHJ Mackie QC recognised in *O'Brien v Seagrave*, no High Court judge, having had cited to him or her the reasons for a decision of a master that was in point, would today simply ignore them. But if the High Court judge thought that the decision was wrong then he or she would say so, and would be free to decide differently. That is what happens between High Court judges now. There is no

obvious reason why it should be even difficult, let alone impossible, to do the same as between a High Court judge and a master.

47. Mr Tager QC seeks to argue that masters are simply not judges. Instead, he says, they are simply 'officers' of the court, and refers to ss 19(3)(b) and 89 of the 1981 Act. Those sections do indeed refer to masters as 'officers' of the court. After all, they hold a statutory office. However, there is no *a priori* reason why the description given in this particular statute should have any impact on the rules of precedent in the absence of any statutory or caselaw rule for doing so. None was cited to me. Moreover, elsewhere in the Act it is made clear that High Court judges (and those above them in the legal hierarchy) *also* hold an office: see *eg* s 11. So they too are 'officers' of the court. They are all *judicial* officers of the court, in contrast to, say, solicitors. In my judgment, there is nothing in this point.

48. Mr Tager QC argues (at [15]) that, as there is no routine reporting of masters' decisions, there can be no certainty of the kind required for the operation of the doctrine of precedent. I accept that in the past masters' decisions have not been commonly available. But, as HHJ Mackie QC noted in *O'Brien v Seagrave*, all that means is that, if a judge does not have the master's reasons for judgment, he or she cannot take them into account. A judge reaching a different decision from that of the master in the absence of the master's reasons is all the more likely to be convinced it is wrong. But in modern times, with the growth of computer databases (both proprietary and free), searchable over the internet, important masters' decisions are now readily available. Given the specialist skills that masters have, and the important role that they play in the procedure of Queen's Bench and Chancery litigation, this can only be an advantage.

49. He also argues (at [16]) that there is only a limited number of High Court judges, and that "comity as between them … assists the orderly development of the law." But, he says, anomalies would arise if the decisions of masters were to be treated as of equal precedent status as those of High Court judges. He then gives some examples of what he says are such anomalies. But, as Buckley LJ said in *Pearson v IRC* [1980] Ch 1, 24D, "The ingenuity of counsel can almost always produce possible anomalies in either direction, and that has been the case here." (See also in the House of Lords, [1981] AC 753 775D, 786F-H.) As a result, consequentialist arguments of this kind are of limited value to begin with.

50. Moreover, I am looking at the facts of this case. I am only concerned here with the question whether a master, faced with a decision in point of a High Court judge, is automatically *bound* to follow that decision, or is merely *expected* to do so unless convinced it is wrong. Whether other consequences should or do follow from that are matters which are not before me and which I do not need to decide now.

51. My conclusion is therefore that a master exercising the jurisdiction of the High Court *is* bound by relevant decisions of the Court of Appeal and the Supreme Court, but is *not* bound by a relevant decision of a High Court judge. However, just as between two High Court judges, a master will usually follow such a decision out of comity, unless convinced that it is wrong. In the present case, to the extent that it is relevant to ask whether I am convinced that the decision of Andrew Smith J in *Sarpd Oil International v Addax Energy SA* [2015] EWHC 2426 (Comm) is wrong (and of

course it is a wholly unreal question), the answer must be Yes, and for the reasons given by the Court of Appeal in the same case in reversing him.

This application

52. My initial reaction to the Claimant's argument before me that no inference can be drawn from its failure to disclose information about its financial position because it relied on the first instance decision of Andrew Smith J was negative (see para [24] above). The consequence of my conclusions on precedent is to reinforce that reaction. In my judgment it *is* open to me to draw the same inference, in an appropriate case, as was drawn by the Court of Appeal in *Sarpd Oil International v Addax Energy SA* [2016] EWCA Civ 120, [17], reversing the decision of Andrew Smith J.

53. Mr Tager QC says however that this is not an appropriate case. He seeks to distinguish *Sarpd* on the basis that there the claimant had chosen to say nothing at all and the defendant had no information at all. By contrast, in the case before me, says Mr Tager, the Claimant in solicitor's correspondence volunteered the information that it owned a property in Costa Rica and also some gemstones. Moreover the Defendant had acquired additional information about the Claimant in the form of a Dun & Bradstreet report.

54. I am not impressed by these attempted distinctions. No hard information was forthcoming about the property, and the gemstones turned out to belong to someone else, not to the Claimant. Essentially the Claimant gave up both points. The Dun & Bradstreet report revealed no useful information not already known to the Defendants. These are tiny factual distinctions making no legal difference. Indeed, the failure to say any more about the Costa Rican property and the falsity of the information about the gemstones work in the opposite direction, by exciting greater suspicion than there might have been if nothing at all had been said.

55. For the purposes of CPR r 25.12(2)(c), I have to consider, on the totality of the evidence before the court, whether I am satisfied that there is reason to believe that the Claimant, being a company, will be unable to pay the Defendants' costs if ordered to do so. I do not have to be satisfied that the Claimant *will* be unable to pay, only that there is *reason to believe* it. That is a lower standard than, say, the balance of probabilities: see *Jirehouse Capital v Beller* [2009] 1 WLR 751, [26]-[29], CA.

56. The evidence before me demonstrates: (i) serious attempts by the Defendants to find out the Claimant's means, (ii) an almost total lack of success in doing so without fault on their part, (iii) assertions by the Claimant that it would be able to pay such costs, supported by unparticularised reference to foreign-sited and unidentified property (and also to movables which were however later confirmed not to be the Claimant's), followed by (iv) a blanket refusal by the Claimant to provide any further information (despite being given, at its explicit request for this purpose, further time to provide such information), but also (v) no explanation of any inability to do so, or any request for any further extension of time.

57. The legal burden of proof must lie on the Defendants, as applicants for security, to satisfy the court that there is such 'reason to believe' within the rules. But, once the court is satisfied that, despite the Defendants' attempts to obtain it, there is no useful evidence of means, and that the Claimant could assist the court and deliberately chooses not to do so, it is clear from the cases cited by Mr Head QC in para [5] of his

Supplementary Note that it is open to the court to find that there is 'reason to believe' that the Claimant will be unable to pay the Defendants' costs if ordered to do so. As Sales LJ said in the Court of Appeal in *Sarpd* (at [19]),

> "Any evaluation has to be made on the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it."

58. In my judgment, in the circumstances of this case, and for the reasons given, I consider that there is such reason to believe and the threshold for ordering security has been overcome. I consider the question of discretion below.

59. Under CPR r 25.12(2)(a), the threshold test is whether the Claimant is non-resident in the UK or a Convention or Regulation state. Again the legal burden lies on the Defendants as applicants for security. However, the Claimant's current solicitors have in correspondence accepted that, since the Claimant is incorporated in Hong Kong, the test is satisfied. They have accordingly offered security in the sum of £30,000 to cover the additional costs of enforcing any costs order in Hong Kong. This is based on an estimate by the Defendants' solicitors.

60. But, since there is no evidence that the Claimant has *any* assets in Hong Kong, and no useful evidence of assets anywhere else, an offer of security in a sum intended to cover simply the costs of enforcing in Hong Kong is meaningless. Before the court can be satisfied with an offer of this kind, the court needs to consider both the risk and the costs of enforcement in both the place of residence and the place where the assets of the Claimant are, or are likely to be: *Nasser v United Bank of Kuwait* [2001] 1 WLR 1868, [67], [76]. I have no material on which to be satisfied as to that. Accordingly, in my judgment, I should discount the offer, and go on to consider whether, as a matter of discretion, security should be ordered under this head also.

61. As already stated, the court has a complete discretion whether to order security, and accordingly will decide in the light of all the relevant circumstances. In this case, they include the following:

    (1) There is no evidence, because the Claimant has deliberately chosen to adduce none, that the Claimant will be deterred from bringing its claim by any order to give security. The court is always concerned not to allow the power to order security to be used as an instrument of oppression, so as to stifle a genuine claim. But there is simply no basis for supposing that to be so here.

    (2) I must have some regard to the Claimant's prospects of success, albeit without going into the detailed merits unless it can clearly be demonstrated that there is a high degree of probability of success or failure. So far as I am aware there have been no open offers or payments into court. On the face of it, the circumstances in which the claim arises are both peculiar and suspicious. It has been not been made at the time one might have expected, it depends on the authenticity of certain documents which are alleged to have come into existence despite the vendor's assurances to the contrary and yet whose originals are not currently available for inspection, and is unsupported by filings at Companies House that one might have expected to see. That does not mean that the claim will fail. But it does mean that I need not approach the application on the basis that the claim is a strong one.

(3) The conduct of the Claimant in prosecuting the claim and defending the application has been poor. Its choice of form of claim (summary application to alter the register) and venue (the county court) were both inappropriate for the important and valuable claim actually advanced, requiring both transfer to the High Court and directions for pleadings and further prosecution. It has without any explanation changed its position on delivery up of the documents in question, negatively. It has, also without any proper explanation, changed its position on the provision of security, also negatively, indeed admitting that some of the assertions made in order to deflect the application for security were false (though ascribing the responsibility for this to others).

(4) The application for security is not, and has not been argued to be, late.

(5) Whilst at this stage I have not had the benefit of submissions on quantum, the Defendants' evidence seeks security in the sum of £1,115,000, and shows how it is made up. They say these are complex and high value proceedings, and a lot of work will be needed, at considerable cost. The Claimant's evidence does not address the issue of quantum, but of course the Claimant denies the need for security at all. However I am at least satisfied from all the evidence that this is not a trivial matter, and that the Defendants will be put to significant expense in defending it.

Decision

62. Taking the above into account, when I weigh (i) the injustice to the Claimant in being required to put up security and perhaps prevented from pursuing a proper claim against the Defendants against (ii) the injustice to the Defendants if no security is granted and at trial the claim fails, and the Defendants are unable to recover their costs of the defence from the Claimant, I am clear that the balance comes down in favour of ordering security. Indeed, in my judgment this is a case which cries out for security to be given. I will therefore relist this application in order to hear submissions on the quantum to be ordered, and the time or times at which it is to be provided, unless of course the parties are able to agree this.

Footnote

63. I add this. In Mr Timothy Eppel's short second witness statement, of 3 March 2016, he refers to the fact that the Claimant's former solicitor had asked for more time to obtain information about the Claimant's assets, and goes on to say this:

> "After my firm came on the record on 11 February 2016 advice was sought from leading counsel, Romie Tager QC, regarding the Defendants' application for security for costs. As a result of that advice (and without waiving privilege) no further steps were taken by the Claimant to obtain valuation reports or any further information regarding the property in Costa Rica nor in relation to any other assets of the Claimant or its financial position."

64. If the point of this evidence was properly to explain the change in attitude of the Claimant towards the provision of security, then it fails to do so. Moreover, on its face (and subject to submissions to the contrary) it appears to be deploying the advice of Mr Tager QC to resist the application on a different basis to that previously put

forward, and thus risks a finding of waiver of privilege in his advice. The bald, throw-away assertion by Mr Eppel that the statement is made without the intention to waive privilege will not avail the Claimant if, on a proper analysis of the situation (which of course I have not been required to carry out, nor have in fact carried out), it would be unfair to the Defendants for the Claimant to seek to rely on the statement whilst withholding the advice on which it was based.