Neutral Citation Number: [2007] EWHC 968 (Ch)

Case No: HC05C02961

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th April 2007

Before :

THE HON. MR JUSTICE LINDSAY

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Between :

GOLDEN GROVE ESTATES LIMITED	**Claimant**
- and -	
CHANCERYGATE ASSET MANAGEMENT LIMITED	**Defendant**

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Catherine Newman QC and **Michael Gibbon** (instructed by Kerman & Co LLP) for the Claimant
Romie Tager QC and **Justin Kitson** (instructed by Jeffrey Green Russell) for the Defendant

Hearing date: 30th March 2007

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Judgment

Mr Justice Lindsay :

1. In this matter the Defendant in the action, Chancerygate Asset Management Limited ("CAM"), represented by Mr R. Tager QC and Mr J. Kitson, asks for security for costs against the Claimant, Golden Grove Estates Limited, represented by Miss C. Newman QC and Mr M. Gibbon. Mr Tager seeks such provision either by way of appeal from the Order of Master Bragge of the 23rd May 2006 or upon a renewed application.

2. I need say little about the action itself as the merits of the underlying action generally play only a subsidiary part when what is being considered is an award of security for costs – see *Porzelack KG v Porzelack (UK) Limited* [1997] 1 All E.R. per Browne-Wilkinson V-C.

3. The claim form was issued on 26th October 2005; the Claimant ("Golden Grove") claims £1,071,267 and interest for breach of contract. The Particulars of Claim of the same date describe Golden Grove as an investment company incorporated in the British Virgin Islands. The Defendant is described as being involved in property management and as a company in a group consisting of a number of companies involved in property dealing and property and asset management. The contract

alleged to have been broken by CAM is pleaded to be an oral one between a Mr Derek Baudains on behalf of Golden Grove and a Mr Johnson on behalf of CAM whereunder, if Mr Baudains was able to put CAM in contact with investors who subsequently invested in projects organised by companies in the CAM Group, an introduction fee would be paid to Golden Grove consisting of 1% of the amount of money introduced into CAM projects by such investors and 3% of the gross gain achieved on that proportion of the overall gain as was represented by monies introduced by way of Golden Grove's introductions. Golden Grove pleads, in the circumstances more particularly set out in the Particulars of Claim, that, under such an agreement, large sums had become due from CAM to Golden Grove. Indeed, it is pleaded that, by its solicitor's letter of 19th July 2004, CAM admitted that £135,000 was owing under the contract to Golden Grove. Golden Grove asserts that, despite such letter from CAM's solicitors, which included that an invoice in £135,000 would be paid, it was not paid and that CAM has subsequently refused to pay that sum or the larger sum, overall, which Golden Grove claims in the action.

4. On 24th February 2006 CAM served a Defence and Counterclaim. CAM, it asserted in its Defence, would have made no agreement with Golden Grove had it not been represented to it by Golden Grove that Mr Baudains controlled Golden Grove and that he was beneficially, if not legally, entitled to Golden Grove's issued share capital. If Mr Baudains transpired not to control Golden Grove or if he was not the beneficial owner of its share capital then, asserted CAM, the agreement, if any, made with Golden Grove was procured by a misrepresentation, was no more than a device to facilitate evasion of tax by Mr Baudains and was a sham. CAM asserts in its pleadings that, in all, some £147,000 odd had already been paid under a mistake of fact by CAM to Golden Grove and that sum was, it said, repayable. The alleged admission of a debt of £135,000 from CAM to Golden Grove was intended to be without prejudice and was to be left out of account; the pleadings are of considerable length and in them CAM counterclaims for a sum of almost £150,000 and interest. There is a Reply and Defence to Counterclaim.

5. On the 3rd February 2006 CAM lodged an application notice asking that Golden Grove should be required to provide £100,000 as security for costs "down to exchange of witness statements". The evidence in support of the application consisted of a witness statement made by CAM's solicitor, Mr P.G. Cohen. It demonstrated that Golden Grove was a company ordinarily resident in the British Virgin Islands but administered, it said, in Jersey. It identified two directors of Golden Grove and asserted that its "public face" was Mr Baudains, who, it said, had himself identified Golden Grove as "my off-shore company" and who, it also said, had a consultancy agreement with Golden Grove. Mr Cohen said that the consultancy agreement was a sham.

6. Mr Cohen stated that Golden Grove had no assets, although the reasons given for his so asserting are inadequate to support that conclusion. Later in the witness statement he said "as far as we know" Golden Grove had no assets and later still, "it has no assets either".

7. Earlier, on the 23rd November 2005, Golden Grove had paid £10,000 into court as security for costs and had advised Mr Cohen of that event. Golden Grove, well aware of the ratio of *Nasser v United Bank of Kuwait* [2002] WLR 1868 CA, had paid the sum into court voluntarily as, its solicitors said, "a genuine pre-estimate of the

additional costs likely to be involved [in] the enforcement of a costs order in the BVI" or in Guernsey. In his evidence Mr Cohen described the £10,000 as hopelessly inadequate; the additional costs of enforcement in the BVI or Guernsey would be relevant, he said, only if Golden Grove had assets and that they were there. CAM's view, as I have said, was that it had no assets. Mr Cohen's then view was that CAM's pre-estimate of its costs of the action down to trial was £150,000-£200,000. He produced a costs draftsman's estimate of the costs, including his own fees at £400 or £450 per hour. The costs draftsman's estimate from the start down to the end of a five-day trial, including the costs of an expert witness (as to whom no directions have been drawn to my attention) was then £212,632.50 of which some £58,807 had been incurred before the application for security was made.

8. As for CAM's costs down to the exchange of witness statements (the more relevant class of costs given that the application notice sought only those), the costs draftsman estimated them to be some £100,000 of which, as I say, about £58,800 had already been incurred.

9. Pausing to examine CAM's application as it then appeared to be, the condition of CPR25.13(2)(a) – residence out of the jurisdiction – was plainly satisfied by reference to Golden Grove's residence in the BVI (or in the Channel Islands) but 25.13(2)(c) – reason to believe it will be unable to pay – was not, in my view, satisfied as the bald assertion that Golden Grove had no assets was not such that it became substantiated by mere repetition. CAM had produced, for example, no accounts for Golden Grove, no credit-agency reports, no record of any winding-up petition anywhere, no evidence of unpaid debts and no admission of impecuniosity. It had, after all, volunteered £10,000. Whilst I would not underestimate the difficulty, in relation to the BVI company, in proving the required inability to pay, at that juncture and if left only supported by Mr Cohen's evidence, CAM's case for security – the onus being upon it – would, in my view, have fallen short.

10. A hearing of CAM's application before the Master was fixed for the 28th April 2006 and on the 21st April a witness statement from Mr J.K. Evans, Golden Grove's solicitor, was lodged. It stated that Golden Grove was administered in Guernsey (not Jersey, as Mr Cohen had said) and explained why the £10,000 had been paid into court. He set out in some detail how an Order of an English court could be enforced in the BVI or in Guernsey. Mr Evans thus asserted that there was no case for an award under CPR 25.13(2)(a) or (b). As for (c) – inability to pay – he asserted that Golden Grove was "in a substantial way of business with a large turnover"; it had a strong net assets position and substantial cash "available to ring-fence if necessary". He did not, however, condescend to any detail. Golden Grove was not obliged to file accounts or audited accounts under BVI law or tax returns there or in Guernsey.

11. Lest that response should prove not to suffice, Mr Evans referred to the evidence of Mr Terry Richardson of Knapp Richardson, Costs Draftsmen, to suggest that, if any award were to be made, it should be of less than £33,000 and that it should be provided by way of a ring-fenced account in the Channel Islands. That would ensure a higher rate of interest and the avoidance of tax on interest. Mr Evans asserted that CAM already owed Golden Grove a large sum; he and another deponent on Golden Grove's behalf, Mr S.D. Challis, Chartered Accountant and one of Golden Grove's

directors, deposed to the sum of £137,200 which CAM had offered to pay Golden Grove by way of an open offer. However, there is a contest on that as part of the many issues in the action.

12. In his evidence Mr Challis sought to explain Golden Grove's reticence as to detail by asserting that CAM would seek to misuse any confidential information provided to it. He stated that its net assets as at the 31st December 2005 were £227,657 and that as at the 30th April 2006 it would have over £70,000 at bank. He concluded:-

> "Golden Grove is asset positive, profitable and liquid. Were it to be obliged to provide substantial security it would have no difficulty in doing so. It would have views as to the best manner of providing the security, but its claim would not be stifled and its business would not be adversely affected".

13. In his evidence Mr Terry Richardson, the costs draftsman, estimated that CAM's costs down to exchange of witness statements of witnesses of fact would be of the order of £32,113.

14. Golden Grove's allocation questionnaire had estimated its overall costs down to the end of the trial to be of the order of £200,000, whilst CAM's had estimated its at £212,000 odd. It was in that shape that the matter came before Master Bragge. The representation at the first hearing, on 28th April 2006, was as it is now before me. The learned Master reserved judgment and hence there was a further attendance before him when it was handed down on 23rd May 2006.

15. In his judgment the learned Master set out the evidence in a way which I have not understood either side to criticise as unfair or incomplete. He pointed out that the application had been clarified to be made only under grounds (a) and (c) of CPR 25.13(2). He was referred to *Nasser* supra, to *Somerset Leeke v Kay Trustees* [2004] 3 All E.R. 406 and to *Texuna International Limited v Cairn Energy plc*, unreported, [2004] EWHC 1102 (Com). So far as concerned ground CPR 25.13(2)(a), he concluded or appeared, subject to a further issue, to conclude as follows:

> "In the light of the evidence produced by Mr Evans in his witness statement relating to registration of judgments in the BVI and enforcement in Guernsey (where the claimant is apparently administered and where it has a bank account) it would arguably not be appropriate to make any order based on ground (a), subject to what I say later. Care must be taken not to run contrary to what is said in *Nasser*".

16. He then turned to ground (c) where, he said, the evidence in support of the application for security for costs was insubstantial. He had been referred to the dictum of Sir Donald Nicholls V-C in *Re Unisoft Group Ltd* (*No 2*) [1993] BCLC 532 at 534e where the Vice Chancellor had made it clear that the phrase in the rule "will be unable" is different to "may be unable", and, as the Master added, as also had Sir Donald, the inability to pay in this context means inability to pay the costs as and when they fall due for payment, in ordinary course and in other words, at the end of the action. Indeed, as it is now common for there to be an order for a lesser payment on account and a somewhat protracted detailed assessment, the final quantification of

the balance and an enforceable obligation to pay it may first come into existence only well after the judgment. The Master then said that the question thus became whether Golden Grove would be able to meet the costs order at the time when the costs order was made and was required to be met. Appropriate inferences were to be drawn, he accepted, and, again referring to a remark made in *Unisoft* by Sir Donald Nicholls V-C, common sense was not to fly out of the window – p.534. The totality of the evidence had to be borne in mind. The learned Master was unconvinced by Mr Challis's evidence of the possible misuse of information provided to CAM. The Master continued, with my emphasis:-

> "But with one qualification the balance, in my assessment, falls in favour of the Claimant because, although there are defects and omissions in the details given, nonetheless it is a picture given by a chartered accountant which suggests that it is not possible to say that the Claimant will be unable to pay the Defendant's costs – there appears to me to be disclosed an income stream and a net asset position…. In my view this is a case where, notwithstanding omissions, it would not be correct to make an order for security under grounds (a) or (c) *provided that the Court is informed where the Claimant's assets are situated and a brief description of them provided*. Without information as to location it is not possible to assess in any sensible way the adequacy of the *Nasser*-type enforcement costs deposed to by Mr Evans or consider whether enforcement imposed extra obstacles. If the Claimant prefers not to disclose this information then, in my judgment, the Court would be objectively justified in making an order on non-discriminatory grounds under (a). It is appropriate to know where enforcement will or may be realistically pursued as part of the assessment of (c) and it would, in the absence of that, be just to order security."

17. Given the somewhat provisional form of the judgment, it is unsurprising that there was then a lively interchange on 23rd May, when leading Counsel appeared both for Golden Grove and for CAM, as to what further was required. The form of Order as it emerged, so far as relevant, provides as follows:-

> "AND UPON leading Counsel for the Claimant confirming (on instructions) that the Claimant intended to file the information referred to in paragraph 1 below IT IS ORDERED AND DIRECTED THAT:
>
> 1. The Claimant do by 4.30 pm on 6th June 2006 file and serve information as to where the Claimant's assets are situated, giving a brief description of them (without any obligation to make reference to values)
>
> 2. There be no order on the application.

> 3. There be liberty to the Defendant (if so advised) to renew its application following receipt of the information to be served by the Claimant
>
> 4. The Claimant's application for permission to appeal the decision contained in the judgment delivered today be refused, but that time to apply to the High Court for permission to appeal be extended to 4.30 pm on 27th June 2006.
>
> 5. The Defendant's application for permission to appeal the decision contained in the judgment delivered today is refused, but that time to apply to the High Court for permission to appeal be extended to 4.30 pm on 27th June 2006."

18. Costs were reserved but were to be dealt with by the Master in writing, he having made provision for the exchange of information between the parties on costs. The intent was that the reserved costs should be dealt with by the Master without a further oral hearing.

19. It is both convenient and appropriate first to assess matters as they stood on the 23rd May 2006. The Master's Order at paragraph 2 had said that there was no order made on the application. To that extent CAM had failed there and then on both grounds (a) and (c). It had thus failed even though, in his judgment, the Master had ruled against those grounds ("it would not be correct to make an order under grounds (a) or (c)") [my emphasis] only if the Court was informed where Golden Grove's assets were and was provided with a brief description of them. As at 23rd May 2006 the Court had had neither category of information. Consistent with the Master's delivered judgment, it could not have been right there and then to make no order on CAM's application. Mr Tager is entitled to say and does say that the appeal against the Order of 23rd May has to be allowed by reason of the important internal inconsistency between the speaking judgment and the Order.

20. There is further inconsistency: at first the learned Master says that it would not be correct to make an order for security under grounds (a) or (c) provided that the Court is informed where the Claimant's assets are situated and a brief description of them is provided, yet it is difficult to see why the situation of the assets is relevant to ground (c). Moreover, when the learned Master later says "it is appropriate to know where enforcement will or may be realistically pursued as part of the assessment of (c)" and that it would, in the absence of such information, be just to order security (presumably under (c)) he has, it seems, come to confuse the situation of assets, plainly relevant to the *Nasser* ratio and to ground (a), with inability to pay under ground (c). There is thus a powerful case for allowing the appeal against the Order of 23rd May.

21. But that is far from being where the matter stopped and, moreover, one cannot jump from the Order of 23rd May being in error of law to an assumption that, had there been no error of law, the Master would have awarded any or any particular sum as security costs in CAM's favour. He did not say what his answer would be if the further information he spoke of were not provided.

22. As I have understood the matter, when the judgment was handed down in the presence of Counsel on 23rd May 2006 there then followed a discussion as to the provision of further information of which the speaking judgment had spoken. It was proposed that the information should be provided by way of a solicitor's letter and, so far as I can tell – there is no evidence properly-so-called of what occurred in the course of the discussion – CAM's Counsel was content that a solicitor's letter should suffice. Later events support a view that, in point of form, a solicitor's letter was mentioned as sufficing.

23. On 6th June Golden Grove's solicitors sent to the learned Master, with a copy to CAM's solicitors, a letter which claimed to be written in compliance with the direction, as Golden Grove's solicitors had understood it to be, and it was said to be a letter written on the instructions of, and with information provided by, Golden Grove's board of directors. The letter continued:-

> "As at 31 December 2005 Golden Grove's net assets figure took account of the following assets:
>
> 1.1 Unquoted assets totalling £248,947 at cost. These comprised shareholdings in two UK companies; a shareholding in a Scottish company; and a shareholding in a BVI company. In the opinion of the directors the overall value of these investments is at least equal to cost.
>
> 1.2 Quoted investment of £2,081. This is a holding in a hedge fund formed in the BVI, managed in Guernsey and quoted in Dublin. There has been no material chance in its value since the balance sheet date.
>
> 1.3 Loans receivable from two individuals resident in the UK totalling £105,352. It is expected that the bulk of these loans will be repaid before the end of 2006.
>
> 1.4 Sundry debtor of £10,000. This is the amount paid into court by way of voluntary security in this action.
>
> Further, as at 30 May 2006 there were cash balances (in sterling, Euros, US dollars and Swiss francs) at the Royal Bank of Scotland in Guernsey of a total sterling equivalent of £112,904. The increase over the anticipated end of April figure of "over £70,000" given by Mr Challis in paragraph 9 of his statement reflects a receipt in respect of a one-off piece of business which was commenced and completed during May 2006.
>
> The above asset figures do not take account of the amounts claimed by Golden Grove from Chancerygate, which the directors consider to be due, and which are the subject of this litigation.

> For the avoidance of doubt, the information as to future receipts from deals A and C given in paragraph 9 of Mr Challis's statement remains correct, and it continued to be the position that there are other deals due to bring in fees over the latter part of 2006 and beyond. The directors anticipate that these other deals should lead to further payments to Golden Grove of up to £300,000 before the end of the year."

24. It seems there had been some arrangement whereunder the Master indicated (I apprehend, before 6th June) that should it transpire that he was not satisfied with the written further information supplied to him by Golden Grove then he would so indicate to the parties but that he did not so indicate to the parties.

25. If CAM was displeased with the provision made in respect of its application of the 7th February 2006 it now had at least two ways of taking matters further; it could renew its application under paragraph 3 of the learned Master's Order of 23rd May or it could seek permission to appeal against that Order. As it transpired, CAM did both. First it sought to renew its application to the Master under the liberty which the Order had given it in order to do so. That application came before the Master. Already it was by then clear that CAM was or would be attempting to obtain permission to appeal the Order of the 23rd May. In effect the Master ruled that if permission to appeal was granted then the renewed application should come before the Judge who heard the appeal; if permission to appeal was refused then it was to be the Master who heard the renewed application.

26. The application for permission to appeal by CAM was first refused by David Richards J. on paper but at the oral renewal was granted by Lewison J. It is in that somewhat unusual way in which I have before me both the hearing of an appeal against the Master's Order of 23rd May 2006 and the hearing of the renewed application made by CAM.

27. I have already indicated much of the argument on the appeal proper but now turn to the renewed application. Mr Cohen formed the view that CAM by then had to seek security for costs to trial rather than merely to the exchange of witness statements. Given that the new application of CAM, made on 11th July, was said to be made pursuant to paragraph 3 of Master Bragge's Order of the 23rd May 2006 and hence was a renewed application and does not in terms state that the nature of the costs for which security was sought had changed, CAM's application, strictly speaking, would still seem to be for and only for security for costs down to the exchange of witness statements. Mr Cohen's witness statement of 16th March 2007 put the estimate of the Defendant's total anticipated costs to trial now at £417,865, greatly up from the Defendant's earlier figure of £212,632. The proceedings, for reasons which Mr Cohen then gave, had undoubtedly proved more lengthy and expensive than would have been likely first to have been estimated and it was £417,865 which CAM now sought as security for costs, including costs of the whole of the trial. Again, a costs draftsman's analysis was exhibited in support of the claim.

28. On 22nd March 2007 Mr Challis, as I have said, a Chartered Accountant and a director of Golden Grove, made a second witness statement in response to CAM's renewed application. He said that Golden Grove had continued to do well since April 2006 and that it continued to be asset-positive, profitable and liquid. He said that Golden

Grove's total income for 2005 was £664,609 and for 2006 was "calculated" at £861,616. Net assets, he said, had risen to £381,865 from £227,657; he referred to Golden Grove's investments being in its books at cost but added that if they were revalued to market value the company's net asset position would be significantly stronger. Golden Grove, he said, was due to receive €200,000 into its bank account in Guernsey in mid-April 2007 as a one off commission on a recent transaction. At the date of his witness statement it had cash at bank, he said, in the sterling equivalent of £343,000. He saw no reason why Golden Grove's business would not continue to be profitable in 2007. It would, he said, have no difficulty in paying its own costs "or, if ordered to, both its own costs and the reasonable costs of the Defendant".

29. Mr Challis did not in terms verify the statements as to Golden Grove's finances that had been contained in the letter of 6th June supra, nor is it easy to correlate the letter of 6th June and its figures with the figures in Mr Challis's witness statement of 22nd March, nor, either, does Mr Challis say that he had made his second witness statement in response to the second witness statement of Mr Cohen.

30. Golden Grove's second costs draftsman, Mr Jack Levin, commented in detail on Mr Cohen's exhibit as to the Defendant's costs and his figure for the Defendant's estimated costs down to the end of the trial was £143,870. Finally, so far as concerns the evidence before me, on 22nd March 2007 Mr Evans of Golden Grove's solicitors made a fifth witness statement.

31. I should first mention some areas of dispute which I do not feel able to rule upon at this stage. The first is whether, if Golden Grove furnished further and more itemised information as to its financial position, that would risk CAM misusing that information? The second is who is the ultimate beneficial owner of Golden Grove? The third is whether, given the nature of Golden Grove's arrangements, the income of Golden Grove is merely precarious in the sense that its beneficial owner could, without Golden Grove being able usefully to complain, direct its remunerative work and hence its income elsewhere? None of those issues could be usefully determined without further evidence and perhaps only after cross-examination but I do hold that Golden Grove's belief that confidential information would, if supplied to CAM, be misused was a genuine belief (rather than a forensic construction) and was not wholly without reasonable ground. Mr Tager has sought to raise yet other issues, for example as to whether Golden Grove is engaged in tax evasion and whether it has any real connection with the BVI, that cannot be dealt with on the present evidence but as to which it would not be appropriate to delay in order that I should attempt to resolve them for the purposes of the application before me.

32. I turn, then, to three issues; firstly, if the appeal against para 2 of the Master's Order of 23rd May 2006 is allowed (which, for the reasons I have given, is something I am disposed to do), ought I to exercise the discretion in CAM's favour and award security and, if so, in what sum and on what, if any, terms? Secondly, what, if any, Order is properly to be made on the renewed application made by CAM, either (a) on the strict basis of it still being only an application for security for costs down to exchange of witness statements or (b) on the more liberal (to CAM) basis that it has become an application for security for costs right down to the end of the trial?

33. The trial is fixed for a window commencing 25th June 2007 and were I to allow the appeal against para 2 of the Master's Order of 23rd May but were I then to remit it to

him for him to exercise for the first time his discretion and for him then to fix the amount, if any, to be awarded as security, then the inevitable delay would jeopardise the trial date and so I shall not further consider that option.

34. So far as concerns the *Nasser* approach and ground CPR 25(13)(2)(a), I respectfully adopt the Master's view that one cannot say that the £10,000 voluntarily earlier paid in on that account (computed, it seems, by way of a comparison between enforcement in the UK on the one hand and enforcement in the BVI or Guernsey on the other) is sufficient without knowing where Golden Grove's assets truly are. But the letter of 6th June describes Golden Grove's assets as consisting of or including unquoted assets in two UK companies, a shareholding in a Scottish company, a share holding in a BVI company, quoted investments in Dublin and cash balances at bankers in Guernsey. None of those suggests that enforcement against such assets would be more expensive than would be enforcement against assets of a like kind situate in the United Kingdom or in Guernsey and accordingly (although it is not clear what the value of those described assets is in total and hence unclear whether execution would need to range beyond them) there is no sufficient reason (the onus being on CAM to satisfy me) to think that the £10,000 so far paid in would clearly not suffice to meet the *Nasser* point.

35. But Mr Tager quite properly takes the point that the letter of 6th June describes assets but fails to describe liabilities; it describes income or payments to Golden Grove without fully describing outgoings. He remarks on the absence of any accounts, let alone audited accounts. He says that as, it seems, trustees are the main shareholders in Golden Grove then I ought to assume that some form of accounts are necessary and must have been prepared , if only to satisfy shareholders of that character. I am not prepared to make that assumption. Mr Tager asks, forensically, what will be Golden Grove's financial position at the end of the trial? But that, surely, is more a question for him to satisfy me on rather than for Golden Grove. The rule creates an obligation upon the applicant that "there is reason to believe that [Golden Grove] will be unable to pay the Defendant's costs if ordered to do so". As Sir Donald Nicholls V-C pointed out, supra, it is not enough to show that the claimant might not be in that position. Nor, unless a defendant does enough to shift the burden of proof, which I do not hold CAM to have done, is it for the claimant to prove that it will be able to pay the defendant's costs at the appropriate time. Mr Tager also referred me to *Longstaff International Ltd v Baker & McKenzie* [2004] 1 WLR 2917.

36. Mr Tager complains that the letter of 6th June is not evidence properly-so-called. He is right to point out that in the Master's Order of 23rd May the obligation on the Claimant to "file and serve information" did not, certainly of itself, suggest that something short of evidence would suffice. However, there plainly was at least confusion on the format which the information was to take and Golden Grove plainly understood, from the interchanges that took place before the Master on 23rd May or thereafter, that both the Master and CAM would be satisfied were it to be supplied in the form of a solicitor's letter. The Master's later conduct, as I have mentioned, suggests that that was the understanding. On that basis it is difficult for CAM to insist that the letter of 6th June fell short of being acceptable in point of form. I accept Mr Tager's argument that, even as at 6th June 2006, Golden Grove were being reticent to a degree which was less than attractive; a figure for net assets was not then specified as the assets of Golden Grove referred to were not said to be all of its assets,

as a literal reading of the Order of 23rd May would suppose to have been required. There is, instead, the assertion that Golden Grove's net assets figure "took account of the following assets".

37. Mr Tager, of course, accepts that the Master at the hearing could have asked for additional information to have been supplied to him – see CPR 18.1(1)(b) - but, had he done so, as Mr Tager points out to me but had not pointed out to the Master, that would have required a verification by a statement of truth. None was supplied, although the need for a verification is underlined by CPR 22 PD.1.1(2). However, for the reasons I have given, CAM is not able to make much of a complaint as to the form in which the required information was given.

38. The approach I take to the immediate position upon the setting aside of para 2 of the judgment of 23rd May is that I should consider the exercise of the discretion consequentially conferred on me on the basis that I should take into account the information which the Master had asked for but not that I should be content with its taking the form (an unverified letter) which, it seems, he indicated he would be content to accept as sufficing. I should, instead, require that the letter of 6th June should be properly verified. Indeed, Miss Newman indicated in the course of argument that, if I were to hold that it should have been verified, then a statement of truth as to it would be provided. Thus I say this: if, before or within seven days after this judgment is handed down, a witness statement or affidavit is furnished by one or more directors of Golden Grove which plainly states that in no respect (either cumulatively or at all) is Golden Grove's current financial position worse, now or as to the future, than as was stated in the letter of 6th June then, although allowing the appeal, I shall not make any award for security for costs in CAM's favour. If the letter of 6th June is so verified then, taking the evidence as a whole at the point at which the information which the Master had called for had been completed, the position, in my judgment, was not such, the onus being on CAM, that one could say, despite the inconsistencies and weaknesses or omissions to which Mr Tager has referred, that there was reason to believe at that time that Golden Grove "will be unable to pay the Defendant's costs if ordered to do so".

39. That leaves the position on the renewed application. If I treat the renewed application as being for security for costs down to exchange of witness statements, then, if the letter of 6th June is verified as I have indicated, again the evidence is such that it fails to satisfy me that Golden Grove will be unable to pay. Golden Grove has undoubtedly elected to play its cards close to its chest and the picture painted by the letter of 6th June, even when joined with the earlier evidence, cannot be described as full and explicit but, as Miss Newman pointed out, the onus throughout has been upon CAM to satisfy the strict terms of condition 25.13(2)(c). On the renewed application, to judge from its form, it is only 25.13(2)(c) rather than (a) and (c) which is relied upon by Mr Tager. Where a Chartered Accountant, director of the company concerned, deposes, above a statement of truth, as he does, that the relevant company had substantial assets, which he quantifies, as at the last year end, has the substantial and growing stated income and was asset positive, profitable and liquid and where, moreover, the company, in addition to what I shall now take to be a verified letter, has indicated that it had the stated six-figure sum at its bankers in the Channel Islands, then it became a heavy burden upon CAM to prove the relevant inability to pay and in my judgment that never has been proved, at any rate relative to such sum as is truly

likely to be incurred by CAM down to the exchange of witness statements and even on the basis that Golden Grove would be required to pay its own costs. So far as concerns the renewed application for security for costs down to the exchange witness statements, I dismiss that renewed application.

40. As for treating the renewed application as if for the costs down to the end of the trial, that, in my judgment, would be at least be premature. The time the trial will take is uncertain. It is not clear what witnesses will give evidence nor whether their oral evidence will invariably be required, nor whether expert evidence will be needed. Disclosure has not yet been ordered and I would not expect it to have been duly completed without order. It might also be unfair to consider costs down to the end in the sense that it is far from clear that such application has ever been formally been made. It is not enough for the applicant's solicitor merely to assert in evidence that that is what it is apparent to him should be what the defendant must seek. Even were I to leave that aside (which I am not at all sure would be appropriate), given what, in my view, is a real prospect that the very sharp increase in the projected costs said to have been incurred and to be incurred on the Defendant's side in the action proves exaggerated and given also the March 2007 evidence on Golden Grove's part that it continues to be profitable and that it had, for example, at that time £343,000 at the bank and, overall, net assets at low book value of over £381,000, I am not satisfied that the condition at CPR 25.13(2)(c) is made good by CAM, even with respect to a larger figure for costs, namely those down to the end of the trial. But, given my approach as to prematurity and although I certainly would not encourage any such application, I would not take the history I have related to bar CAM from later making a fresh application for security for costs.

41. Accordingly and by way of conclusion:

(i) I allow the appeal against para 2 of the Master's Order of 23rd May 2006;

(ii) If the letter of 6th June 2006 is duly verified as I have indicated within the period I have described then I shall not, after allowing the appeal under (i) above, make any award of security for costs by way of my fresh exercise of such discretion as would arise upon my allowing the appeal and setting aside para 2 of the Master's Order;

(iii) If the letter of 6th June is duly verified as indicated then I make no award for security for costs in CAM's favour upon the renewed application, treating that renewed application as security for costs down to the exchange of witness statements;

(iv) Subject, again, to due verification of the letter of 6th June, I make no award of security for costs in CAM's favour on the renewed application treating it as an application for security for costs down to the end of the trial;

(v) Liberty to both sides to renew the matter before me on not less than 48 hours' notice if the letter of 6th June is not duly verified within the prescribed time or if there is a purported verification which falls short of what I have required of it.

(vi) As for costs and for any directions that conduce to the trial beginning as planned and as economically as possible in the circumstances, I shall hear the parties further.