Neutral Citation Number: [2020] EWHC 3264 (Ch)

Case No: CR-2018-009638

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

IN THE MATTER OF TRILOAD CAPITAL LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Teams Remote Hearing

Date: 13/11/2020

Before :

Deputy Insolvency and Companies Court Judge Kyriakides

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Between :

(1) Robert Vacek — **Applicants**
(2) Daniel Krivanek
(3) Jiri Kubelka

- and –

Triload Invest s.r.o (in Liquidation)
and 40 others — **Respondents**

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Dirk van Heck (instructed by **IMD Solicitors LLP**) for the Applicants
Michal Hajek (Solicitor Advocate) for the Respondents

Hearing dates: 13 November 2020

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down shall be treated as authentic.

DEPUTY I.C.C. JUDGE KYRIAKIDES

Introduction

1. The application before me is an application for security for costs ("**the Application**"). It is brought by Robert Vacek, Daniel Krivanek and Jiri Kubelka, who are three of six respondents to proceedings issued against them by Triload Invest s.r.o and forty individuals pursuant to section 212 of the Insolvency Act 1986 ("**the Main Proceedings**").

2. In this judgment, I shall refer to:

   2.1. Mr Vacek, Mr Krivanek and Mr Kubelka as "**the Respondents**";

   2.2. Triload Invest s.r.o as "**Triload Invest**";

   2.3. the forty individual applicants as "**the Individual Applicants**"; and

   2.4. Triload Invest and the Individual Applicants as "**the Applicants**".

3. The Application against Triload Invest is made pursuant to CPR 25.13(1) and 25.13(2)(c) and/or CPR 3.1(a) and 3.1(5). The Application against the Individual Applicants is made pursuant to CPR 3.1(3)(a) and 3.1(5) only. I shall consider the two separate bases separately. Before I do this, however, it is necessary to summarise the claims in the Main Proceedings and what has happened to date in the proceedings.

The Main Proceedings

4. Triload Capital Limited ("**the Company**") was incorporated in England and Wales on 10 February 2012 under the name of Red Square Partners Ltd. It subsequently changed its name to BANCIBO UK Ltd, then on 18 April 2016 to KKIG Capital UK Ltd and finally, on 14 August 2017 to Triload Capital Ltd.

5. The Company was dormant until about May 2016. Between June 2016 and June 2017 the Company issued notes to individual investors in amounts totalling CZK 103,500,000 (about £3 million) at an interest rate of 12% per annum, payable quarterly with a final repayment date in June 2019 ("**the Notes**"). In the Points of Claim it is alleged that most of the proceeds from the Notes were transferred to KKIG UK Ltd (the Company's parent

company, now in liquidation ("**KKIG UK**")), KKIG Foodmarket s.r.o, Jiri Kunelka, Robert Krejci, BANCIBO, SE and Martin Welsch.

6. After September 2017 the Company defaulted on its interest payments to the holders of the Notes and subsequently, in June 2019 failed to repay the principal due. Prior to this, on 23 January 2019 the Company went into compulsory liquidation and Paul Barber and Paul Stanley of Begbies Traynor were appointed as liquidators by the Secretary of State ("**the Joint Liquidators**").

7. The Applicants are all holders of Notes of various amounts and have all filed proofs of debt in the liquidation of the Company.

8. The Main Proceedings were commenced on 11 June 2020. In summary, the Applicants claim that the respondents to those proceedings, including the Respondents, were either directors, de facto directors and/or promotors of the Company and that in breach of their statutory duties to the Company, they have misapplied Company assets, including the proceeds of the Notes.

9. On 28 March 2020, prior to the issue of the Main Proceedings, Triload Invest issued an application for permission ("**the Permission Application**") to commence proceedings under section 423 of the Insolvency Act 1986 ("**IA**"). On 6 May 2020 the Applicants applied for permission to serve the Main Proceedings out of the jurisdiction ("**the Service Application**") and on 11 August 2020 the Respondents issued this Application and an application to Strike out the Main Proceedings ("**the Strike-Out Application**"). The first hearing of this Application was on 25 August 2020, when the court gave directions for evidence and for the hearing of the Application

10. On 16 October 2020, the court:

    10.1. granted the relief sought in the Permission Application;

    10.2. determined that permission to serve the Main Proceedings outside the jurisdiction was not necessary in respect of those respondents who were resident within the EU, but granted permission to serve the Main Proceedings on those who were resident outside the EU; and

10.3. ordered the Applicants to pay the Respondents' costs on the basis that in relation to the Service Application, whereby the Respondents had been compelled to file evidence, the Applicants had failed to make full and frank disclosure.

11. On 26 October 2020, the court dismissed the Strike-Out Application and gave directions on the Main Application.

The Claim for Security for Costs under CPR 25.13(1) and 25.13(2)(c)

12. Under CPR 25.13(1) and 25.13(2)(c) an order for security for costs will be made if the court is satisfied:

12.1. first, that 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 ("**the Jurisdictional Hurdle**"); and

12.2. secondly, having regard to all the circumstances of the case, that it is just to make such an order "(**the Discretionary Hurdle**").

The Jurisdictional Hurdle

The Law

13. The cases establish the following principles:

13.1. the court does not have to be satisfied on balance of probabilities that a company will be unable to pay a defendant's costs. It must, however, have reason to believe that it will be unable to do so. This will require the court to look at all the evidence before it as a whole and form an assessment on the basis of that evidence as to whether there is reason to believe that the company will not be able to pay the costs ordered against it (*Jirehouse Capital v Beller* [2008] EWCA Civ 908 at [26], [29] and [34]);

13.2. the fact that a company is in liquidation is sufficient reason to believe that it will be unable to pay costs awarded against it unless evidence to the contrary is produced

(*Northampton Coal, Iron & Waggon Co v Midland Waggon Co* [1878] 7 Ch D 500, 503).

Discussion

14. Triload Invest, which is a company incorporated in the Czech Republic, is currently in liquidation. I was told by the Respondents' counsel that under Czech insolvency law, the Respondents would have to prove as unsecured creditors in the liquidation should a costs order be made in their favour.

15. The liquidation of Triload Invest gives rise to the presumption that it will be unable to pay the Respondents' costs, if ordered to do so. The onus is, therefore, on Triload Invest to satisfy me by credible evidence that this will not be the case.

16. Mr Hajek, a solicitor advocate representing the Applicants, referred me to paragraph 6 of his witness statement dated 10 September 2020, in which he states that Triload Invest will be able to pay the Respondents' costs, because the debts owed to it, which total about 75.7 million CZK (about £2.5 million) and which the liquidator, Mr Jan Langmeier ("**the Czech Liquidator**") is actively pursuing, are significantly greater than the creditors' claims against the company, which total about 38.5 million CZK (about £1.3 million). Consequently, Mr Hajek submits, there is no reason to believe that Triload Invest will be unable to pay the costs of the Respondents if ordered to do so.

17. However, whilst Triload Invest might be owed the debts asserted, it has not produced any credible evidence that these debts are likely to be realised or that they will realise sufficient funds to pay the total amount of any costs ordered in the Respondents' favour. In his third witness statement dated 29 September 2020, Olexandr Kyrychenko of IMD Solicitors LLP, the Respondents' solicitors, exhibits an updated Inventory of Assets filed with the Czech court. This inventory shows that the only potential assets of Triload Invest are the following receivables:

    17.1. a claim in the sum of £850,000 against Sklarna Zihle s.r.o for advance payments made to purchase a recreation area in the Sklarna Zihle area;

    17.2. a further claim in the sum of £5,567.28 against Sklarna Zihle s.r.o in respect of a loan allegedly provided;

17.3. a claim in the sum of £115,124.33 against Igor Osvald in respect of an advance payment made to purchase the shares in Pokrov s.r.o;

17.4. a claim in the sum of £12,342.33 against Triload, Pliciní stredisko Bilovec s.r.o for a loan allegedly provided to the company;

17.5. a claim in the sum of £117,740.76 against KKIG UK seeking a refund of the purchase price of shares in the Company after allegedly withdrawing from a contract;

17.6. a claim in the sum of £183,531.55 against Radek Petrzilka for the alleged purchase price for the transfer of shares in SAM-bau, a.s;

17.7. a claim in the sum of £2,502.70 against Triload, Hotel Lucany s.r.o for a loan provided to the company;

17.8. a claim in the sum of £1,226,324.43 against the Company in respect of bonds entitled "KKIG Capital UK 12%/2019"; and

17.9. a claim in the sum of £43,750.97 against Tak Dost s.r.o. relating to a contract of purchase.

18. However, it would appear from Mr Kyrychenko's evidence, which is not disputed by Triload Invest, that Sklarna Zihle s.r.o, Triload, Pliciní stredisko Bilovec s.r.o, Tak Dost s.r.o, the Company and KKIG UK are all in liquidation. Therefore, even if Triload Invest's claims against these companies are good claims, there is no evidence that their respective liquidations will produce sufficient funds to satisfy them, whether in whole or in part. Further, any recovery in respect of Triload Invest's claim against the Company must stand or fall with the Main Proceedings. If the Applicants do not succeed in their claims against the respondents, then, not only will Triload Invest have to pay the Respondents' costs, but the Company will not have any funds to distribute to Triload Invest in order to meet those costs. Consequently, the amount of potential recoveries by Triload Invest from its debtors will reduce by £1,226,324.97. This means that the remainder of Triload Invest's claims against its debtors will be less than the amount claimed by its creditors and, not taking into account the liquidations of the other entities referred to above, will be insufficient to discharge any costs order. Finally, as Mr Van Heck on behalf of the Respondents pointed out to me, although Triload Invest has been in

liquidation for eighteen months, so far there have been no recoveries in respect of any of the above claims.

19. In light of the above, I am of the view that Triload Invest has not displaced the presumption arising from its liquidation and am satisfied that there is reason to believe that if it were ordered to pay the Respondents' costs, it would be unable to do so.

The Discretionary Hurdle

The Law

20. The starting point regarding the factors that may be relevant to determining whether it would be just to order security for costs are set out in the judgment of *Sir Lindsay Parkinson & Co. v Triplan* [1973] QB 609, although as was made clear by Mr Justice Marcus Smith in *Absolute Living Limited (in liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch), the statement of law set out in the *Triplan* case has been expanded upon and articulated further in a number of subsequent cases.

21. Using the guidance in the above cases, the following factors have been raised, which I must take into account in considering whether to make an order for security for costs:

    21.1. whether the claim is bona fide and not a sham;

    21.2. whether Triload Invest's want of means was brought about by the conduct of the Respondents;

    21.3. whether the application for security for costs is being used oppressively to stifle a serious or genuine claim;

    21.4. whether the application for security for costs has been brought too late; and

    21.5. whether the existence of the Individual Applicants should affect the court's decision about whether or not to grant security.

The Discussion

The first factor: whether the claim is bona fide and not a sham

22. In relation to the extent, if any, to which the court should look at the merits of a case in an application for security for costs, in *Absolute Living Limited (in liquidation) v DS7 Limited* (supra) Mr Justice Marcus Smith stated at [7] and [8] as follows:

> "7. But that is precisely the problem. On an interlocutory application such as this, a court must be wary about being drawn into an analysis of the merits. The court does not have before it all of the relevant material that the trial judge will have. To go beyond assessing the arguability of a claim involves the court in a process that – in most cases – it is simply not equipped to carry out, because of the early stage at which the application is made in the proceedings.
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> 8. For this reason, the notes in Civil Procedure 2018 make clear that it is important for the court to try to avoid a situation in which the merits have to be considered. The parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure."

23. In this case, both sides accept, and in my view, correctly, that Triload Invest's claims against the Respondents are bona fide and not a sham. They also accept, particularly in view of the early stage of the Main Proceedings where not even defences have been served, that it is not appropriate for the court to consider the merits of the claims against the Respondents.

24. Accordingly, save to the extent that I find that Triload Invest's claims are bona fide and not shams, I make no findings about the strength or otherwise of those claims.

The second factor: whether Triload's want of means was brought about by the conduct of the Respondents

25. Triload Invest argues that its want of means has been brought about by the conduct of the Respondents. The Respondents deny this and claim that its want of means has been brought about by another respondent to the Main Proceedings, namely, Robert Krejci.

26. In *Absolute Living Limited (in liquidation) v DS7 Limited*, Mr Justice Marcus Smith recognised that whether a company's want of means had been brought about by the conduct of the parties seeking security was a factor that was linked to the first factor referred to above concerning the merits of the case, and that the same reasoning that applied to that factor also applied to this factor (see [13] and [15] of the judgment).

27. In the present case, where allegations are made against various parties, including the Respondents, that they have acted in breach of duty in divesting the Company of assets, and, in particular, the substantial proceeds received by the Company from the Notes, it is not possible at this early stage of the proceedings to reach any conclusion that Triload

Invest's want of means was caused by breaches of duty alleged against these particular Respondents. In the premises, I find in favour of the Respondents on this point.

Whether the grant of security will stifle Triload Invest's claim

28. The starting point on the extent, if any, to which the possibility of a claim being stifled in the event that an order for security for costs is made against a claimant is the judgment of Gibson LJ in K*eary Developments Ltd v Tarmac Constructions Ltd* [1995] 3All ER 534, where he stated at page 539:

> "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 Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 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 (see *Pearson v Naydler* [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per 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 (see *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 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 (see *Pearson v Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906)."

29. In this case, the Respondents argue that an order for security for costs against Triload Invest would not stifle its claims against the Respondents. The Respondents rely upon two grounds in support of this submission, which I deal with below.

The first ground

30. The Respondents submit first that the burden is on Triload Invest to demonstrate with evidence that on balance of probability its claim would be stifled if security was ordered and that it must show that it has exhausted all avenues for raising funds for security. In support of this proposition, the Respondents rely first on the case of *Brimko Holdings Ltd v Eastman Kodak Company* [2004] EWHC 1343. However, this case does not support the Respondents' submission that a claimant must show that all avenues for raising security have been exhausted. The test is, in fact, somewhat narrower as shown by the judgment of Mr Justice Park at [11] and [12] where he stated:

"11. That basic proposition needs to be considered together with two other propositions. First, the burden of establishing that a claim would be stifled by an order for security rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled if security was ordered. Second, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs.

12. At the same time the court should not press too far the proposition that the burden rests on the claimant. It should be recalled that when the claimant has to establish that third parties do not exist from whom security can reasonably expected and obtained, that is to place on the claimant the burden of proving a negative. That is always difficult to do, and the court should, in my judgment, evaluate the evidence with a degree of sympathy for the difficulty which a claimant faces. I would venture, if I may, to draw attention to a paragraph in a judgment which I wrote sitting in the *Court of Appeal in Anglo-Eastern Trust Ltd v Kermanshahchi [2002] EWCA Civ 198* . The relevant paragraph is paragraph 55. I will not prolong this judgment by reading it out, but I draw attention to what I have said."

31. Mr Van Heck also referred me to the case of *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) where the judge at [31] stated:

"I need to remember, however, that it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not".

32. In *Tasty Bakery Ltd v MA Enterprise (UK) Ltd* [2016] EWHC 1038 (IPEC), another case which Mr van Heck relied on, it was held that the above meant producing evidence not only that the company did not have the requisite resource, but satisfactory evidence that it could not obtain the necessary financial assistance from a third party who might reasonably be expected to provide such assistance if it could (see: [9]).

33. On the basis of these authorities, Mr van Heck submitted that Triload Invest had failed to produce any evidence appertaining to whether or not its claim would be stifled if security for costs were ordered and that consequently, the court could not conclude on the balance of probability that its claim would be stifled.

34. In response to Mr van Heck's submissions, Mr Hajek referred me to the approach of the court in *Absolute Living Limited (in liquidation) v DS7 Limited (*supra). In that case, which involved a claimant company in liquidation, there was evidence from the liquidator that all of the professionals were acting on a contingent basis and that none of the creditors had been approached for funding. The liquidator also stated that she was not

prepared herself to fund the litigation. In reaching the conclusion that an order for security would stifle the claimant company's claim, the judgment of Mr Justice Marcus Smith is instructive both as regards the role of a liquidator and the practical difficulties that face him or her in seeking funding to secure payment to meet an order for security for costs.

35. First, the court emphasised that whilst creditors can put up money, the jurisdiction is not against creditors but against the company. The question, therefore, for the court is: "can the company raise the money or can the company not raise the money with the result that the claim will be stifled?"

36. In considering this question, the Judge stated that where it had been concluded that the claimant company in liquidation would not be able to pay any costs ordered against it at the conclusion of proceedings, there could only be three possible outcomes if security for costs were ordered, namely:

36.1. the claim would not proceed further;

36.2. the liquidator would, contrary to all normal practice, cause her firm to pay the amount of security ordered; or

36.3. the liquidator would seek to persuade the company's creditors to each put up some funds to enable the security to be provided.

37. As regards the second potential outcome, the Judge stated at [33(5)] as follows:

> "(5) I begin with the second potential outcome: the liquidator causing the security to be paid out of her firm's coffers:
>
> (a) It is plain that this is not a case of the Claimant, the company, raising funds. Self-evidently, these funds are coming from a third party, the liquidator.
>
> (b) Moreover, I am satisfied that the liquidator would not make such a payment. It would be an entirely unusual course for a liquidator to take such a course, and nothing in the evidence persuades me that it would occur in this case. I regard the prospect as theoretical or fanciful.
>
> (c) Yet still further, I see real difficulties in taking the liquidator's propensity to pay into account when considering the question of security. It is well-established that a liquidator will not be obliged to pay costs by way of a third party costs order made pursuant to section 51 of the Senior Courts Act 1981 unless there is a degree of impropriety or misconduct in the bringing of the proceedings. The mere fact that the liquidator has caused proceedings to be brought, but has lost, does not result in general in a third party costs order. Were I to make an order that the Claimant provide security in circumstances where I appreciated that that security would, in reality, be provided by the liquidator, I take the view that what I would be doing is in effect creating a regime where, in advance of an adverse costs order, the liquidator was being obliged to provide the security. That, as it seems to me, is entirely contrary to the public

> interest in the insolvency regime that exists in this jurisdiction. It is critical in the public interest that liquidators proceed in a manner that is uninhibited in terms of deciding how to bring actions, including how those actions are framed and funded.
>
> For these reasons, I conclude that there is no real prospect of the company funding any order for security through the liquidator; and that such funding would not be out of the Claimant's funds in any event."

38. At [33(6)] he dealt with the third potential outcome, stating:

> "(6) The third potential outcome involves funding from the creditors. As to this:
>
> (a) It is the liquidator's duty and obligation to determine whether and, if so, how a company in liquidation brings claims against third parties. It is for the liquidator to determine how such claims are to be funded. In some cases, the liquidator may seek to engage in some form of funding arrangement, whereby the claim is paid for by somebody else. In such circumstances, it is quite clear that, as regards such a funder, the section 51 jurisdiction would be engaged.
>
> (b) Such a course has emphatically not been taken in this case. The liquidator has chosen to structure the manner in which this litigation is funded by deferring all costs that can be deferred on a contingent basis. In short: no win, no fee. It is true that to a limited extent some unavoidable costs have been incurred to date. These are costs that the liquidator has chosen to incur as an incidence in bringing these proceedings.
>
> (c) The liquidator has chosen not to approach the creditors. I find the explanation for that in Mr. Davis' statement entirely credible and it seems to me that it is not for this court to look behind the funding decisions of the liquidator regarding the progression of this claim. Such decisions are nuanced and difficult and – in the first instance – for the liquidator alone. Indeed, as I have noted, were the remaining creditors to be persuaded to put in money to fund the claim, they would expose themselves to a risk of a third party funding order themselves in due course, were the Claimant's claim to be lost.
>
> Whilst I accept, therefore, that there is the potential for creditor funding of any security for costs, that potential is one for the liquidator to explore. I cannot say whether – were an order for security for costs to be made – creditor funding would be forthcoming. But it seems to me wrong to second guess the liquidator's approach; and in any event, any creditor funding would not be funding from the company. I do not consider that the fact that a company in liquidation has creditors in the wings to be a relevant factor to take into account unless there is an actual approach involving those creditors actually being encouraged to fund the claim, which they are not in this case."

39. The Judge then concluded that were he to make an order for security for costs, there would be no source of funding available to the Company that would enable it to finance such an order and that what was a bona fide and genuine claim would be stifled.

40. In the present case, I am of the view that the approach taken in *Absolute Living Limited (in liquidation) v DS7 Limited* is apposite to the present case, where Triload Invest is in liquidation, although I also bear in mind the principles from the other cases referred to above.

41. As regards the first potential outcome, if an order for security for costs is made in this case, I have already found that there is reason to believe that Triload Invest will not be able to pay from its own resources the Respondents' costs if ordered to do so at the conclusion of the Main Proceedings. Likewise, it will not, in my judgment, on the balance

of probability, be able to fund an order for security for costs from its own resources, if such an order were to be made by me.

42. As regards the second potential outcome, if security were to be ordered, Mr Hajek in his skeleton argument informed the court that the Czech Liquidator would not be willing to provide funds to satisfy the order. I accept that this is not in Triload Invest's evidence. However, as held by Mr Justice Marcus Smith in *Absolute Living Limited (in liquidation) v DS7 Limited*, it cannot be right to make an order for security for costs, which might force the Czech Liquidator to satisfy that order, even though he himself cannot be made personally liable to pay litigation costs ordered against Triload Invest unless a third party costs order is made against him. Such orders would be contrary to the public interest for the reasons stated in that case.

43. That leaves me with the third possible outcome of the required funding coming from Triload Invest's creditors. In this respect, I bear in mind that my jurisdiction is not against them, but against Triload Invest itself.

44. Although Triload Invest has not adduced any evidence which deals with this possibility, the evidence produced by the Respondents shows that the Czech Liquidator has chosen to fund this litigation on a no win no fee basis, a contract which the Czech Liquidator states in his letter dated 29 January 2020 was approved by the creditors' committee. That this is the position was also confirmed by Mr Hajek in court. In my judgment, it is to be inferred from this, that the Czech Liquidator has not approached the creditors of Triload Invest for any funding. This inference also appears to be supported by paragraph 24 of the second witness statement of Olexandr Kyrychenko in which he states that Triload Invest's own creditors have disagreed with the Czech Liquidator's actions and have filed a complaint against him. Indeed, this evidence seems to go further and suggests that if the Czech Liquidator had approached Triload Invest's creditors to fund an order for security for costs, it is unlikely that they would have agreed to provide the required funding.

45. In light of the matters set out above, I have reached the conclusion that, on the balance of probability, Triload Invest would not be able to meet any order for security for costs and that it would not be able to raise any money to meet any such order. Accordingly, if I made an order for security, in my judgment, the effect would be to stifle Triload Invest's bona fide and genuine claims under IA section 212 against, inter alia, the Respondents, although I accept that the claims of the other Applicants, which are exactly the same as Triload Invest's claims, would continue without the company.

The second ground

46. The Respondents also argued that, regardless of any inability of Triload Invest to meet any order for security for costs, Triload Invest's claim would still continue because the Joint Liquidators of the Company were under a duty to pursue the claim. After I questioned Mr van Heck on his proposition, he watered it down somewhat and added that they were under such a duty to do so if they considered it right to do so.

47. In my judgment, there is currently no basis for the court to conclude that if Triload Invest ceased to pursue its claims, the Joint Liquidators would take over those claims. Indeed, the letter from the liquidators dated 22 July 2020 shows that they do not currently believe themselves to be in any position to pursue claims against the Respondents, although they have no objection to the action taken by the Applicants.

48. Accordingly, in my judgment, there is no substance in this point.

The fourth factor: whether the application for security has been brought too late

49. Mr Hajek on behalf of Triload Invest argued that security should not be ordered because of the lateness of the Application and the delay caused by its having been adjourned on 25 August 2020. In my judgment, this argument is wholly without merit. The Application was brought only two months after the Main Application had been filed in circumstances where nothing of substance had happened in respect of it as the parties and the court were dealing with issues of service. Further, the adjournment on 25 August 2020 occurred as part of the normal procedure of the court in giving directions for evidence and listing the final hearing of the Application.

The fifth factor: miscellaneous

50. The final factor which Triload Invest invites me to take account of is the fact that it is only one of forty-one applicants. Mr Hajek submitted that if the Applicants at any time were ordered to pay costs to the Respondents and Triload Invest was unable to do so, then the Respondents would be entitled to enforce the order for costs against the Individual Applicants. He referred me to *Mark Alan Holyoake and others v Nicholas Anthony Christopher Candy and others* [2016] EWHC 3065, where at paragraph 63 Mr Justice

Nugee stated that security need not be ordered against a company that is unable to pay if someone else will.

51. As against this, Mr Van Heck referred me to *John Bishop (Caterers) Ltd v National Union Bank Ltd* [1973] 1 All ER 707 in support of the proposition that even in a case where there are several claimants, the court can still order, as a matter of its discretion, security for costs against one claimant.

52. In *John Bishop (Caterers) Ltd v National Union Bank Ltd*, the reason why the court exercised its discretion to make an order for security for costs was because there was very little overlap between the claim of the claimant company against whom security was sought, and the claim of the other claimant in the action. The court held that if the claims went to trial and the claimant company lost, the other claimant would not necessarily be ordered to pay the defendants all the costs that they had incurred against the claimant company.

53. In my judgment, the facts of the present case are different, and distinguishable, from those in the *John Bishop* case since the claims of all of the Applicants are the same. If, therefore, Triload Invest's claims fail, the Individual Applicants' claims will also fail and the same costs order will be made against all of the Applicants. As they will all be jointly and severally liable to pay the amount of costs ordered, in the event that Triload Invest cannot pay, the Respondents will have the right to enforce the order against the forty Individual Applicants.

54. I accept that there is no evidence before the court about the financial position of any of the Individual Applicants. However, there is nothing to suggest that, together, they would be unable to meet a costs order. Indeed, it seems improbable that all forty would be impecunious, particularly in light of the significant investments made by some of them into the Company.

55. In light of the above, the joinder of the Individual Applicants is a factor which, in the balancing exercise to be carried out, falls on the side of not making an order for security for costs.

Conclusion on the Respondents' application CPR 25.13(1) and CPR 25.13(2)(c)

56. Having regard to all the factors referred to above, and carrying out a balancing exercise between the interests of Triload Invest, or, more particularly, the interest of its creditors, and the interests of the Respondents, I have reached the conclusion that the balance favours Triload Invest, and its continuing to pursue its claims against the respondents to the Main Proceedings, including the Respondents.

57. I, therefore, refuse the Respondents' Application under CPR25.13(1) and CPR 25.13(2)(c).

The application under CPR 3.1(a) and 3.1(5)

58. The Respondents also seek security for costs against all the Applicants under CPR 3.1(a) and 3.1(5). Those rules provides as follows:

"*3.1(3) When the court makes an order, it may –*

(a) Make it subject to conditions, including a condition to pay a sum of money into court….

(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, a practice direction or a relevant pre-action protocol."

59. In support of their application the Respondents relied on the case of *Olatawura v Abiloye* [2002] ECA Civ 998. The principles set out in that case and the approach of the court in relation to the exercise of its discretion under CPR 3.1(5) were, after having cited the relevant passages in *Olatawura v Abiloye*, summarised by Lord Justice Clarke in *Mohammed Waris Ali v Keith Hudson (trading as Hudson Freeman Berg*) [2003] EWCA Civ 1793 at [40] as follows:

"40. Those principles show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows:

i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;

ii) in any event,

a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and

> b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding."

60. The first issue is whether my jurisdiction under CPR 3.1(5) is engaged. Has there been a breach by the Applicants of a rule, practice direction or pre-action protocol?

61. In support of their application under CPR 3.1(5), the Respondents rely on the Applicants' failure to give full and frank disclosure in the Service Application, which resulted in their being ordered to pay adverse costs. Although the Respondents could not point to any particular rule or practice direction in the CPR alleged to have been breached, Mr Van Heck on behalf of the Respondents argued that:

    61.1. the term "rule" as used in 3.1(5) should be construed more widely than a rule of the CPR and should encompass generally "procedures" of the court, which the Court of Appeal referred to in *Olatawura v Abiloye*, when considering how the court's discretion should be exercised (see paragraph 56 above); and

    61.2. the procedures of the court included the duty to make full and frank disclosure. In this respect, Mr Van Heck referred me to the case of *Fundo Soberano de Angola and others v Hose Filomentodos Santos* [2018] EWHC 2199 (Comm), where the court stated at [51]:

> "51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights . It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process."

62. Having regard to the above, and in particular, the purpose of the duty to make full and frank disclosure, in my judgment, the duty falls within the duty of the parties required in CPR 1.3, which is to help the court to further the overriding objective to deal with cases justly and at proportionate cost. The failure by the Applicants to make full and frank disclosure in relation to the Service Application was, therefore, a breach of CPR 1.3.

63. The next issue is whether, in the exercise of my discretion, I should order the Applicants to pay security for costs. I have concluded that no order should be made for the following reasons:

    63.1. first, in relation to Triload Invest, I have already found on the application under CPR 25.13 and 25.13(2)(c) that it is more likely than not that an order for security for costs against it would stifle its claim. I do not consider this to be an exceptional case, which would justify me in ordering security against the company despite this finding. As regards the Individual Applicants, I accept, however, that there is no evidence before me on which I could properly find that their claims would be stifled;

    63.2. secondly, the breach of rule 1.3 was a one-time occurrence, in respect of which the court showed its disapproval by ordering the Applicants to pay costs. According to Mr Hajek, and not disputed by Mr Van Heck, these costs have now all been paid. Pursuant to its case management powers, it would also have been open to the court, had it considered it to be appropriate to have done so, to have ordered the Applicants to pay a sum into court by way of security for costs under either CPR 3.1(a) or CPR 3.1(5). This it did not do and, indeed, no request for such an order was made by the Respondents at the time;

    63.3. thirdly, no evidence has been adduced before me that the Applicants have failed to demonstrate good faith in these proceedings as defined in the cases referred to in paragraph 59 above. There is no evidence of a lack of will on their part to litigate what is a bona fide and genuine claim as expeditiously and as economically as reasonably possible. I have not been provided with any real details concerning the Service Application, but it would appear that the Applicants misguidedly believed that the permission of the court was required to serve the respondents to the Main Application. Nor have I been provided with any details concerning the nature of the information that the Applicants failed to disclose to the court. However, the fact that full and frank disclosure was not made does not of itself, without more, demonstrate, in my judgment, a lack of will on the part of the Applicants to progress their claim expeditiously and as economically as possible. As stated above, insofar as their actions caused additional costs, they were, in any event, penalised by the court for this by being ordered to pay the Respondents' costs. I do not think that their actions justify any further penalty by the court.

Conclusion on the application under CPR 3.1(3)(a) and 3.1(5)

64. For the reasons stated above, I conclude, in the exercise of my discretion, that no order for security for costs should be made against the Applicants under CPR 3.1(3)(a) and 3.1(5).

Conclusion of the Application

65. For all the reasons stated above, I dismiss the Application.