[2010–12 Gib LR 385]

ALIANTHUS CONSULTING SL v. DAVIDSON

SUPREME COURT (Prescott, J.): December 12th, 2012

Civil Procedure—costs—security for costs—just to make order in proceedings for registration/enforcement of foreign order if persuasive arguments against registration, e.g. judgment contrary to public policy or constitutional rights

Civil Procedure—execution—foreign judgments and orders—may be contrary to public policy or constitutional rights to property, protection of law, or fair hearing to register/enforce foreign execution order assigning right of action without consent of party otherwise entitled to exercise it

The claimant company applied for the registration and enforcement of a Spanish judgment.

The claimant company was controlled by Mr. Allan Davidson, the defendant's brother. The defendant (Mr. Stanley Davidson) had commenced an action in 1992 against Allan to establish his beneficial ownership of Salec Ltd., a Gibraltar company. He also brought various proceedings against Allan in Lichtenstein, in which he obtained a judgment for £295,000. Allan commenced Spanish debt proceedings against Stanley and obtained a judgment for €73,000 in 2003. Neither brother paid the sum that he had been ordered to pay. In 2005, Allan sought execution of the 2003 judgment in Spain, and the Spanish court did so by auctioning Stanley's rights in the 1992 action and the Lichtenstein proceedings to the claimant company without his consent. Stanley claimed that he only became aware of the 2005 order in 2010, but his appeal to have it set aside was dismissed in 2011. The claimant did not seek to register the 2005 order in Gibraltar until the present proceedings in 2012, when it sought its registration and enforcement. Stanley opposed the application and sought security for costs.

He submitted that security for costs should be ordered, as (a) there was reason to believe that the claimant would be unable to pay his costs, if so ordered, and it was just, given that the claimant's application was unlikely to succeed, to order that it provide security for costs; (b) the claimant's application was not *bona fide*, as it was trying to enforce a judgment that had fraudulently deprived him of his right of action; (c) an order for security for costs in applications to register and enforce foreign judgments was not limited to exceptional circumstances and, in any case, the loss of

a right to litigate was an exceptional circumstance; and (d) in opposing the claimant's application, he was the defendant for costs purposes.

The claimant submitted in reply that (a) although it could not demonstrate an ability to pay Stanley's costs, if so ordered, it would not be just to order security for costs as its application had good prospects of success; (b) no evidence of fraud had been adduced; (c) an order for security for costs in applications to register and enforce foreign judgments could only be made in exceptional circumstances that did not exist in the present case; and (d) in opposing its application, the defendant had become the claimant and was therefore not entitled to security for costs under the CPR, r.25.13.

Held, ordering security for costs:

(1) The court would allow the defendant's application by ordering security for costs. There was reason to believe that the claimant would be unable to pay the defendant's costs if so ordered, as there was credible evidence that it had made no profit between 2005 and 2009, but rather suffered losses. There were no subsequent records available, but there was no indication that sufficient funds would be forthcoming. It was just to order security to be given, as there were persuasive arguments against the claimant's application to have the order registered and enforced. Although the court could not go behind the Spanish decision refusing to set aside the judgment, to enforce the order would, for the purposes of Council Regulation (EC) No. 44/2001, art. 34, arguably be contrary to public policy. The assignment of the defendant's bare right of action without his consent might prove contrary to the Gibraltar law of assignment or a violation of his constitutional rights, under the 2006 Gibraltar Constitution, ss. 6(1) and 8(8), to have his claim adjudicated and not to be deprived of his property without adequate compensation (para. 4; para. 7; paras. 16–25; paras. 31–38).

(2) The defendant's submission that security for costs should be ordered because the claimant's application was not *bona fide* (as it was trying to enforce an action that had fraudulently deprived him of a right of action against his brother) would be rejected, as no evidence of fraud had been adduced and it was not disputed that the Spanish judgment had been legitimate (para. 9; para. 19).

(3) Assuming, without deciding, that security for costs in respect of summary and quasi-administrative enforcement proceedings should only be awarded in exceptional circumstances, such circumstances were present as the defendant had been removed from an action and lost his right to litigate (paras. 28–30).

(4) Further, although the defendant opposed the registration and enforcement of the foreign judgment, he did not thereby become the claimant for costs purposes and would still be entitled to seek security for costs under the CPR, r.25.13, as the party seeking enforcement and registration was the true claimant (para. 28).

Cases cited:

(1) *Bamberski* v. *Krombash*, [2001] Q.B. 709; [2001] 3 W.L.R. 488; [2001] Q.B. 709, followed.

(2) *Gater Assets Ltd.* v. *Nak Naftogaz Ukrainiy*, [2008] Bus. L.R. 388; [2007] 2 Lloyd's Rep. 588; [2007] EWCA Civ 988, *dicta* of Rix, L.J. considered.

(3) *Relational LLC* v. *Hodges*, [2011] EWCA Civ 774, referred to.

(4) *Simpson* v. *Norfolk & Norwich Univ. Hosp. NHS Trust*, [2012] Q.B. 640; [2012] 2 W.L.R. 873; [2012] 1 All E.R. 1423; [2011] EWCA Civ 1149, followed.

(5) *Trendtex Trading Corp.* v. *Credit Suisse*, [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, considered.

Legislation construed:

Civil Procedure Rules, r.25.12(1):

"A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings."

r.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—

. . .

(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 . . ."

r.74.5: "(1) Subject to paragraphs (2) and (3), section II of Part 25 applies to an application for security for the costs of—

(a) the application for registration;

(b) any proceedings brought to set aside the registration; and

(c) any appeal against the granting of the registration as if the judgment creditor were a claimant.

(2) A judgment creditor making an application under the 1982 Act or the Lugano Convention, the Judgments Regulation may not be required to give security solely on the ground that he is resident out of the jurisdiction.

(3) Paragraph (1) does not apply to an application under the 1933 Act where the relevant Order in Council otherwise provides."

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.6(1):

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description

shall be compulsorily acquired, except where the following conditions are satisfied . . ."

s.8(8): "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and . . . the case shall be given a fair hearing within a reasonable time."

Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2001, L. 12), art. 34: The relevant terms of this article are set out at para. 14.

art. 35(3): The relevant terms of this article are set out at para. 26.

art. 36: The relevant terms of this article are set out at para. 26.

K. Azopardi, *Q.C.* and *K. Navas* for the claimant;
A.A. Vasquez, *Q.C.* and *A. Haynes* for the defendant.

1 **PRESCOTT, J.:** This is an application by the defendant for security for costs against the claimant, in relation to an action initiated by the claimant upon application notice for registration and enforcement of an order made by the Juzgado de Primera Instancia of Marbella, Spain on October 5th, 2005 ("the Spanish judgment"). As explained to the parties at the conclusion of the hearing on Thursday last, I am giving reasons in the nature of an extempore ruling.

2 I take the background to the Spanish judgment from the skeleton argument of Mr. Azopardi, which for reasons of expediency I do not set out herein.

3 The action (1992 Comp 33) referred to in the skeleton argument of Mr. Azopardi, relates to proceedings in which Stanley Davidson, as claimant, seeks to establish his beneficial ownership of a Gibraltar company called Salec Ltd., which as I understand it owns bank accounts holding in excess of £1.2m.

4 Provisions governing the grant of an order for security for costs are governed by the CPR, r.25.13(1)–(2), which provide that the court may make an order for security for costs if it is satisfied that it is just to make such an order, the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.

5 Further, by virtue of the CPR, r.74.5, it is apparent that an application for security for costs applies to an application for registration of a judgment.

6 Evident from the commentary to the *White Book* is that the fact that a company may be unable to pay its costs is not sufficient for such an order to be made, but rather all the circumstances of the case must be considered. Whilst security for costs is designed to prevent injustice to the

applicant, this must be carefully balanced against causing an injustice to a respondent who has a meritorious claim, who would be prevented from pursuing it if required to provide security for costs. That said, it is apparent from the guidelines in the *White Book* (1 *Civil Procedure 2011*, para. 25.13.1, at 725) that—"it is important to try to avoid a situation in which the merits have to be considered . . . An application for security for costs should not be made the occasion for a detailed examination of the merits of the case."

7 Mr. Vasquez, for the applicant, has gone into some considerable detail as to the merits, particularly with regard to background, no doubt bearing in mind the provisions of the *White Book* (*loc. cit.*, at para. 25.13.13) which highlight particular discretionary factors for the court to take into account where condition r.25.13(2)(c) is relied on; in particular, whether the claimant's claim is *bona fide* and not a sham and whether the claimant has a good prospect of success.

8 In so far as the consideration of a *bona fide* claim is concerned, the defendant alleges that—

> "the purported 'acquisition' by the claimant of the 1992 action is nothing other than a transparent and unsophisticated attempted fraud by Mr. Allan Davidson, assisted by other parties, to deprive him of his right of action, an action in which Mr. Allan Davidson himself is defendant."

The skeleton argument of Mr. Vasquez thereafter sets out the basis for the allegation of fraud which, once again for reasons of expediency, I do not reproduce.

9 This background reveals that there is clearly more to the matter than an isolated debt owed by Mr. Stanley Davidson to Mr. Allan Davidson which gave rise to the Spanish judgment, and it may well be that some of the historical matters leading up to the Spanish judgment appear at first glance to be somewhat suspect. However, I express that view with caution, because there is no real evidence before me today upon which such a view can legitimately be maintained. In any event, I am not persuaded that for the purposes of this application the issue of "background" fraud is entirely relevant. I say this because it is not disputed that the Spanish court on December 10th, 2003 legitimately issued an order directing that Stanley Davidson pay Allan Davidson the sum of €73,000.

10 That order is not challenged, therefore the matters leading up to it, *i.e.* the Lichtenstein litigation and allegations of fraud (matters which might come to the forefront in due course, in the event that they are supported by appropriate evidence), have no real impact upon it for the purposes of this action. The reason Stanley Davidson failed to honour the judgment of December 10th, 2003 was because, arising from earlier

proceedings in Lichtenstein, by order of the Lichtenstein court, Allan Davidson still owed him SFr.426,000 (some £295,000), and in the circumstances—"it is hardly surprising that Mr. Stanley Davidson did not pay the sum ordered by the Spanish court to Allan Davidson" (skeleton argument of Mr. Vasquez).

11 It appears Stanley Davidson had a counterclaim against Allan Davidson. Whether that was pleaded before the Spanish court or not, I am ignorant of, but in any event, as a result of non-payment, Allan Davidson levied execution of the judgment against Stanley Davidson and it was under those proceedings that the Spanish court proceeded to auction Stanley Davidson's rights in the 1992 Gibraltar proceedings as well as in the Lichtenstein proceedings, having first carried out a valuation of both proceedings and attached a monetary value to each. So far as I am aware, and I so assume, the proceedings in Spain are proper under Spanish law and remain valid under Spanish law. What is challenged in this jurisdiction is the claimant's application to register the Spanish judgment which has allowed for the removal and substitution of a party without his consent.

12 This brings me to assess whether the claimant has a reasonably good prospect of success.

13 Registration of the Spanish judgment is sought under s.6 of the Civil Jurisdiction and Judgments Act 1993, which provides the statutory framework for Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Regulation").

14 Article 34 of the Regulation provides:

> "A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
>
> 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so . . ."

15 For the defendant, it is said that the application for registration will fail on two grounds: (a) because it is manifestly contrary to public policy in this jurisdiction; and (b) because Stanley Davidson was not served with notice of the proceedings by which the Spanish court purported to confiscate his interest in the Gibraltar and Lichtenstein cases.

16 As regards (b) above, it is said for the defendant that he only became

aware of the relevant proceedings five years after the order was made. For the claimant, Mr. Varas, one of its directors, says in his affidavit that Stanley Davidson was notified of the judgment of December 10th, 2003, although he does not say when or by whom. However, he is silent as to whether there was notification by the claimant to the defendant of the Spanish judgment.

17 It is interesting to note that despite the substitution of the parties having been ordered and effected by order of the Spanish court in 2005, the claimant has not sought to register it in Gibraltar until now, some seven years on, and, so far as I understand, has never taken any steps to register it in Lichtenstein. This means that although pursuant to Spanish law the claimant acquired Stanley Davidson's rights of action in 2005, the Lichtenstein proceedings, which were very much alive at the time, progressed for another four years thereafter without the claimant taking any steps to take over litigation in the action. If Stanley Davidson is to be believed, in so far as he was ignorant of the substitution, it is not surprising that he did not raise the issue, but I find it baffling that the claimant did not raise the issue with the Lichtenstein court. Be that as it may, this objection appears to have been addressed by the Spanish court in a ruling of May 3rd, 2011, resultant from an appeal by Stanley Davidson against the Spanish judgment. The matter is explained by Mr. Haynes in his witness statement thus:

> "Indeed, Mr. Stanley Davidson only became aware of the confiscation order in 2010, almost five years after the order was made. He immediately applied to have this set aside on the ground that he had never been served with notice of the intended auction by the Spanish court of his rights of action. A copy of the Marbella court ruling of May 3rd, 2011 dismissing that application can be found exhibited to the witness statement of Mr. Daniel Quijada Rodriguez. The grounds of Mr. Davidson's application to dismiss are set out in the opening section of the court's ruling which found that '. . . the hypothetical event that the lawyer and the court attorney had not informed their client about the enforcement of the court proceedings is not a basis for alleging ignorance and defencelessness and would solely and exclusively have effects in the sphere of the professional relationship with the earlier mentioned.'"

18 Given the findings of the Spanish court on the question of non-service of the order, I do not propose to look behind that ruling. For the purposes of this application, I find that there is little merit in the objection raised by the defendant that he was not served with notice of the Spanish judgment. I therefore move on to objection (a) above.

19 For the defendant, it is said that the application to register the Spanish judgment is doomed to fail because:

(a) The Spanish judgment deprives the defendant of his constitutional right to have his claim adjudicated (s.8(8) of the 2006 Gibraltar Constitution).

(b) The Spanish judgment was procured by fraud (I have already dealt with this issue and propose to say no more).

(c) The Spanish judgment breached Mr. Davidson's constitutional right not to be deprived of his property without adequate compensation (s.6 of the 2006 Gibraltar Constitution).

(d) The Spanish judgment is unlawful because a legal assignment of a chose in action has to be executed under the hand of the assignor.

(e) Gibraltar law recognizes no principle of assignment of bare rights in litigation.

20 Given the above, the submission is that the Spanish judgment should not be registered on the ground that to do so would offend public policy. On the face of it, that a party to an action should have his right to litigate in that action unilaterally removed without his consent appears somewhat odd. That said, it is important to note that neither the defendant nor this court casts any aspersions on the validity or legality of the Spanish judgment according to Spanish law. The pertinent question for this court is whether the Spanish judgment, valid as it is in Spain, would go against public policy in this jurisdiction.

21 As to how public policy is determined, the ECJ case of *Bamberski* v. *Krombash* (1) is instructive ([2001] Q.B. 709, at para. 24): "[I]t is not for the Community judicature, but for the national court, to identify the internal provisions which have the force of principles of 'public policy' in the national legal system."

22 In support of the proposition that the Spanish judgment is against public policy, the defendant relies on *Simpson* v. *Norfolk & Norwich Univ. Hosp. NHS Trust* (4). That case is best summarized by part of the digest in the *All England Direct Law Reports (Digests)* which reads as follows ([2011] All E.R. (D.) 102):

> "The instant case was a case of an assignment of a bare right of action, in the sense that it was an assignment of a claim in which the assignee had no legitimate interest and it was, therefore, void. The claimant did not have an interest in C's claim of a kind that the law should or did recognise as sufficient to support an assignment of what would otherwise be a bare right of action and was therefore guilty of wanton and officious intermeddling with the disputes of others. The assignment in the instant case plainly savoured of champerty, given that it involved the outright purchase by the

claimant of a claim which, if it were to succeed, would lead to her recovering damages in respect of an injury that she had not suffered."

23 The defendant draws attention in his skeleton argument to the fact that, in his view, the claimant has no ostensible interest in either the Gibraltar or Lichtenstein claims, and Mr. Varas has—

"singularly failed to address any of the legitimate queries raised by the defendant which would go some way to establishing the *bona fides* of the claimant company. What type of business, exactly, does it actually undertake? What on earth persuaded it to pay €21,000 (purportedly) for the purchase of these actions? What research did it carry out? How did it propose to capitalize on this 'investment'? Why did it do absolutely nothing for five and a half years?"

24 I take Mr. Azopardi's point that the *Simpson* case involves party-to-party assignment whereas this case involves an assignment ordered by a court of law, but to my mind the principle expounded in that case is applicable here, and that is that the assignment of a right of action to a party who has no discernible interest in the action is likely to be considered void. In *Simpson* (4), Moore-Bick, L.J., discussing the case of *Trendtex Trading Corp.* v. *Credit Suisse* (5), had this to say ([2012] Q.B. 640, at para. 15):

"I think it is clear from what was said both by Lord Wilberforce and Lord Roskill that the law will not recognise on the grounds of public policy an assignment of a bare right to litigate, that is, a right to litigate unsupported by an interest of a kind sufficient to justify the assignee's pursuit of proceedings for his own benefit. Moreover, as the decision in the *Trendtex* case itself demonstrates, the assignment of a cause of action for the purposes of enabling the assignee or a third party to make a profit out of the litigation will generally be void as savouring of champerty."

25 I remind myself that I do not need to determine today what principles of public policy are applicable in this jurisdiction, nor whether such an assignment as ordered by virtue of the Spanish judgment is in fact contrary to our public policy, merely the impact that such an argument might have upon the prospect of success of the claimant's case. Even without embarking upon a detailed consideration of the arguments against registration of the Spanish judgment, it is apparent that there exist cogent and sensible arguments in favour of the application for registration being resisted.

26 For the claimant, Mr. Azopardi submits that an attempt to prevent registration of the Spanish judgment on the grounds that it goes against public policy amounts to an attack upon the jurisdiction of the foreign

court and should, therefore, not be entertained. He relies upon the Regulation, arts. 35(3) and 36, which provide, respectively, that—

> "the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.
>
> . . .
>
> Under no circumstances may a foreign judgment be reviewed as to its substance."

27 Mr. Azopardi submits that there is no evidence that the Spanish judgment is extraordinary. Perhaps I apply too simplistic an approach to the issue, but in my view such evidence is unnecessary. I find no inconsistency between holding on the one hand that the Spanish judgment is good and valid within the jurisdiction of Spain and on the other that, perchance, it ought not to be registered if it offends public policy in this jurisdiction. In coming to that conclusion I do not seek to comment on, or review the substance of, the Spanish judgment, nor do I look behind it in order to question the jurisdiction of the Spanish court. The definition of public policy in this jurisdiction, and precisely what offends against it, are clearly matters for the substantive hearing, but for the purposes of this application I am satisfied that there is a persuasive argument against inevitable registration, and at this stage it cannot be said that the claim appears highly likely to succeed.

28 Mr. Azopardi submits that the court should tread carefully when considering the question of ordering security for costs in relation to an application for the registration of a foreign judgment (*Relational LLC* v. *Hodges* (3) ([2011] EWCA Civ 774, at para. 25)). Mr. Azopardi places further reliance on *Gater Assets Ltd.* v. *Nak Naftogaz Ukrainiy* (2) for the proposition ([2008] Bus. L.R. 388, at para. 72, *per* Rix, L.J.) that—

> ". . . enforcement is in principle different from an ordinary claim. Above all, there is something counter-intuitive about an award debtor being able to obtain security for costs in order to challenge the formal or public policy validity of an award in what are clearly intended to be, in the absence of a challenge by the award debtor, highly summary and essentially quasi-administrative proceedings."

He continued (*ibid.*, at para. 75)—

> ". . . I consider that as a matter of principle, the courts should be reluctant, save in an exceptional case, to order security for costs against the award creditor, even if the power to do so is technically available."

29 Having read and considered both the above authorities carefully (and despite the fact that both relate to the enforcement of arbitration awards,

which must be distinguished from the enforcement of judgments) I say this: The power to order security for costs in relation to the application for registration of judgments is expressly enshrined in the CPR, r.74.5, as read with the CPR, r.25, so that there can be no dispute that the power exists and as such is at the disposal of the courts. I accept the proposition that great care must be exercised by the court before it orders security for costs in these cases, and whilst I note that the *White Book* makes no reference to such a power being exercised sparingly or in exceptional circumstances, the cases cited appear to suggest that this is a power which should, in fact, only be exercised in exceptional circumstances. I do not decide the point, given that in order to do so I would require substantive and full submissions from both sides, but assuming for a moment that Mr. Azopardi is right and exceptional circumstances are required, I am with Mr. Vasquez that a purported removal from a party to an action of his right to litigate appears, on the face of it at least, to come within the remit of exceptional.

30 There is one other matter arising from the *Gater* case which I shall deal with very briefly, and that is the submission by Mr. Azopardi that in the case of an application to set aside registration of a foreign judgment the defendant becomes the effective claimant and, therefore, is not entitled to claim security for costs. There was some discussion of this point in the *Gater* case, and a definitive answer not settled upon. My view is that the CPR, r.25 exists in order to allow a defendant to apply for security for costs. The defendant in the action in respect of which security is being sought is Stanley Davidson. The CPR, r.74.5 extends the provisions of the CPR, r.25 to applications for registration of judgments. Despite the fact that in an application to resist registration, the role of the claimant might become a defensive one, the realistic position is that Alianthus is the claimant seeking to enforce the Spanish judgment and Stanley Davidson is the defendant opposing it and seeking security for costs. I find little merit in the attempt to resist the application for security on this ground.

31 I now turn to the further consideration under the CPR, r.25.13(2), and that is whether there is reason to believe that the company will be unable to pay the defendant's costs if ordered to do so. The CPR, r.25.13(2) is mirrored in s.377 of the Companies Act 1930, which is also relied upon by the defendant.

32 In considering these provisions, I draw guidance from the commentary in the *White Book* (1 *Civil Procedure 2011*, para. 25.13.12–25.13.14, at 730–732):

> "In order to establish ground (c) the applicant must show 'there is reason to believe that it [*i.e.* the claimant company] will be unable to pay the defendant's costs if ordered to do so'. . . The defendant does not have to show on a balance of probabilities that the claimant company 'will be unable to pay' etc: the defendant may well be able

> to show that there is reason to believe that the company will not be able to pay even if the company can adduce substantial evidence to the contrary . . . However, the test to be applied is lower than a balance of probabilities test . . ."

It is apparent from this commentary that the court will take account of the evidence adduced by both sides and that the application for security for costs must be supported by evidence which credibly and reasonably shows the inability of the company to pay the costs of the successful defendant.

33 The defendant relies upon the information contained in the first witness statement of Mr. Haynes, who attests that, upon receiving no satisfactory information as to the claimant's assets or activities, he instructed a legal firm in Madrid to carry out a company search. The translated report by the Spanish firm of lawyers is attached to the witness statement of Mr. Haynes, who summarizes the information as follows:

> "It will be appreciated that, far from being an active and substantial company involved in the acquisition of financial assets as asserted by Mr. Larian Varan in his witness statement, the reality of the matter is that:
>
> (a) The company has no employees.
>
> (b) The company filed no annual accounts at the Registro Mercantil between 2003 and 2010, as required under Spanish law.
>
> (c) In 2010, the company filed accounts for the years 2005 to 2009.
>
> (d) From those accounts it appears that:
>
> (i) In 2005, the company had no income and made a loss of €57.
>
> (ii) In 2006, the company had no income and made a loss of €113.
>
> (iii) In 2007, the company had no income and made a loss of €255.
>
> (iv) In 2008, the company had no income and made losses of €560.
>
> (v) In 2009, the company had no income and made losses of €1,271.
>
> (e) Mr. Enrique Penichet concludes that, although it is apparent from the records at the Mercantile Registry that Alianthus is an existing company, its accounts reveal that it is not doing

business of any sort, has no employees and enjoys no income whatsoever.

(f) No records are available yet for the [*sic*] 2010 and 2011."

34 In reply, the claimant has filed an affidavit by a Spanish lawyer, Maria Belinda Rodriguez Vera, in which Ms. Vera asserts that—"while Alianthus may have conducted a block filing of its accounts in 2010, it is clear that the accounts for the years 2005–2010 and 2011 have been filed," that Alianthus has been registered in the Central Companies House in Madrid "since 20/03/2001" [*sic*], that the company is fully and properly incorporated, and that it is up to date with its registration of annual accounts. Needless to say, proper incorporation and due filing of accounts does not to my mind indicate an ability to pay costs and no evidence has been produced of solvency or pecuniosity.

35 In his witness statement, Mr. Varas, for the claimant, states:

"Alianthus is a company targeting the acquisition, management and transfer of real estate properties shares and other financial assets. In the ordinary course of business we regularly express interest in the sale of assets by the Spanish court by auction."

36 Such a statement appears somewhat irreconcilable with the fact that the company has made no profit but instead has sustained a loss for the period 2005–09 (no records are available for 2010–11). It is also interesting that at the time of the claimant's purchase of the right of action in 2005, for allegedly €21,932, records show a loss for that year of €57. In any event, the mere fact that the company has made a loss for the last five recorded accounting years is cause for concern and raises the suggestion that it would be unable to pay costs if ordered to do so. Strengthening this suggestion is the fact that the claimant has not met the burden of showing that, even if it is not in funds to pay costs, there would be a "prospect of funds being available and forthcoming from an outside source" (commentary in the *White Book*: 1 *Civil Procedure 2011*, para. 25.13.13, at 731).

37 For these reasons, I conclude that there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so.

38 The inability to pay costs, coupled with my assessment of the prospect of success of the claimant's claim, leads me to the conclusion that this is an appropriate case for this court to make an order for security for costs. The amount originally requested was for £25,000. That has been raised in this application to £35,000. Whilst I can well appreciate the predictable and foreseeable expenses of litigation, I am also cognizant of not causing undue hardship to the claimant, who appears to be of limited means and who is effectively carrying out an administrative exercise of seeking to enforce a foreign judgment, although it is true to say that the claimant is not alleging that an order for security for costs would result in

its being forced to abandon its claim. In the circumstances, I award £25,000 and order to issue accordingly.

Orders accordingly.
