



**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: Tuesday 7<sup>th</sup> November 2023

**Before :**

**MR ROGER TER HAAR KC**

**Sitting as a Deputy High Court Judge**

**Between:**

**BEND WELD ENGINEERING SDN. BHD**

**Claimant**

**- and -**

**FMC TECHNOLOGIES LIMITED**

**Defendant**

**Lauren Adams** (instructed by **Freeths LLP**) for the **Claimant**  
**Marc Lixenberg** (instructed by **Burness Paull LLP**) for the **Defendant**.

Hearing date: 20 October 2023  
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**APPROVED JUDGMENT**

**This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 7 November 2023 at 10.30am**

**Mr Roger ter Haar QC :**

1. The application before the Court is the Defendant’s application for security for costs.

**Background**

2. The Claimant (“BWE”) is a fabricator and supplier of metal components based in Malaysia.
3. The Defendant (“FMC”) is a company specialising in industrial manufacturing including constructing and/or managing the construction of the metal structures required for offshore petroleum and natural gas extraction.
4. Between April 2019 and July 2020, the parties entered into a series of contracts under which BWE was engaged by FMC to fabricate and supply metal structures for use in its offshore oil and gas projects.
5. It is BWE’s case that by a letter dated 22 July 2020 FMC wrongfully terminated all open purchase orders. It is also BWE’s case that there were a number of unpaid invoices.
6. The unpaid invoices amount to US \$85,958. The larger part of the claim relates to sums said to be payable in respect of purchase orders wrongfully cancelled or terminated on 22 July 2020. This part of the claim is in the sum of US \$1,496,459.33. There is a further claim for US \$144,000 in respect of storage charges for the cancelled items.
7. These proceedings were issued on 15 June 2023.

8. The issue of proceedings triggered an almost immediate response on behalf of FMC. On 19 June 2023 Burness Paull LLP, FMC's solicitors, wrote seeking security for costs:

So far as the application for security itself is concerned, the conditions at CPR 25.1.3(2)(a) and (c) are both satisfied in this case. We anticipate it being uncontentious that such conditions are satisfied but would welcome your confirmation in this regard.

As to CPR 25.13(2)(c), we note that based on your client's most recent set of accounts to 30 June 2022 (using rounded-up figures and an exchange rate of c. RM 5.7 to GBP 1):

1. Your client's total revenue in 2022 was RM 5.8m (£1m);
2. Your client made a pre-tax loss of RM 3.39m (£0.6m) (on top of a pre-tax loss of RM 2.6m (£0.46m) in the previous year);
3. Your client was propped up by a cash loan of RM 4m (£0.7m) from a holding company) and
4. Your client only has cash/cash equivalents of RM 238k (£42k) (down from RM 854k (£151k) the previous year).

Our client only intends to pursue its counterclaim in the event that your client's claim is pursued. Moreover, our client would consent to the dismissal of its counterclaim (assuming the timing were such that it had been brought), in the event your client's claim were dismissed for failure to put up security.

Please confirm that your client would in principle be agreeable to providing security for our client's costs ..... We intend to prepare a draft Precedent H costs budget in order that the quantum of such security may then be agreed, alternatively determined by the Court.

9. On 22 June Freeths LLP, solicitors for BWE, responded:

Our client also confirms its agreement in principle to provide security for your client's costs. However, in order to consider the same our client will need to understand your client's projected costs.

10. On 26 June Burness Paull wrote:

We welcome your client's co-operative approach signalled by way of your letter.

....

We enclose a copy of our client's draft Precedent H costs budget. Please note that we have not included any costs in respect of a security for costs application on the basis that, in light of your letter, we do not anticipate at this stage that such an application will be necessary. However, should it not be possible to reach agreement in relation to the amount of any security, we shall separately seek our client's costs of any application.

In accordance with the attached, we invite your client to agree to provide security for costs in the sum of £800,223.

11. On 30 June 2023 Freeths responded. I do not set out the letter in full. It made two major points: first that the assumption should be that costs should be assessed on a standard basis, suggesting taking 65% of FMC's Precedent H costs. Second, that because it appeared that FMC was intending to put forward a counterclaim, allowance should be made for those costs attributable to the counterclaim. On those bases it was said:

As previously indicated, our client is willing in principle to provide security in respect of your client's costs but only for those that are reasonable and proportionate and which relate to the defence of our [client's] claim (but not those costs that relate to your client's counterclaim).

In light of the above, our client would agree to making a payment into Court for your client's security of costs as follows:

- costs relating to the expert report phase should be excluded, leaving £657,973.00;
- on the basis that your client's counterclaim is 141% of our client's claim in terms of quantum (based on the figures set out in the Pre-Action Protocol correspondence), it seems a reasonable assumption that the majority of your client's costs will be spent on the counterclaim. We would expect the ratio between the costs of the defending the claim compared to dealing with the counterclaim are likely to be in the order of 1:3, so 33% of £657,983.00 leaves £217,131.09; and
- we have assumed a 65% recovery of the above sum representing costs assessed at the standard basis should

your client successfully defend our client's claim. This leaves £141,135.21.

12. On 5 July Burness Paull made a counterproposal:

3.1 In light of the position you have adopted regarding the 'basis of assessment', we propose agreement in line with the enclosed draft Consent Order.

3.2 We consider it ought to be possible to reach agreement in relation to the quantum of security up to and including the CMC stage of the proceedings.

3.3 Rather than effectively having an arguable premature debate as to our client's Precedent H costs budget, the attached proposal will enable the parties to agree (alternatively for the Court to determine) the question of costs budgeting in the usual manner – and then for the quantum of further security to be easily resolved against the background thereof at the first CMC.

3.4 We have calculated the total sum in respect of security (£162,078.40) (for the stages of the proceedings in respect of which we propose security is provided at this point) in the following manner:

3.4.1 80% of incurred Pre-action costs (£114,098) in the sum of £91,278.40).

3.4.2 100% of Issue/statement of case costs in the sum of £45,250.

3.4.3 100% of CMC costs in the sum of £25,550.

3.5 We consider the above to be a reasonable position that we anticipate would be accepted by the Court if disputed.

3.6 Insofar as there is any modest quantum disagreement between the parties surrounding the above proposed figure of £162,078.40, we suggest that the parties agree that such disagreement be resolved by the Court (subject of course to the Court's agreement) based on brief written submissions. Indeed, to the extent that you were able to take issue with the said figure, as well as explaining the basis for doing so, we respectfully invite you to confirm your client's incurred and estimated costs in respect of the same initial stages of the proceedings.

13. In response, on 10 July Freeths declined to confirm BWE's incurred and estimated costs, and made the following proposal in respect of security up to the CMC stage of proceedings:

- Pre-action costs: £114,098 x 33% x 65% = £24,474.02;  
plus
- Issue/statements of case: £45,250 x 33% x 65% =  
£9,706.13; plus
- CMC: £25,550 x 33% x 65% = £5,480.48.

TOTAL: £39,660.63.

14. Thus the parties' positions were defined and remained the same before me save that before me Ms. Adams on behalf of BWE challenged FMC's entitlement on the evidence before the Court to any order for security for costs at all.

## **Entitlement**

15. CPR 25.12 provides:

- (1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings...
- (2) An application for security for costs must be supported by written evidence.

16. CPR 25.13 provides:

- (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 ...

(2) The conditions are:

(a) the claimant is –

(i) resident out of the jurisdiction ...

(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.

17. In support of his application, Mr. Lixenberg relied upon a decision of Mr Peter MacDonald Eggers KC in *Explosive Learning Solutions Ltd v Landmarc Support Services Ltd* [2023] EWHC 1263 (Comm) in which he said:

17. First, the basis of the jurisdiction being that there is a "reason to believe" that the Claimant will be unable to comply with a costs order, if made, signifies that the Defendant does not have to prove that there is a likelihood or probability that the Claimant will be unable to pay (*Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 WLR 751, para. 26-35). That said, the Defendant must establish that there is reason to believe that the Claimant will not be able to pay the ordered costs. Furthermore, there must be justification for the reason for that belief and evidence for that justification. It is not sufficient if there is no more than a doubt that the Claimant is able to pay or if it is established that the Claimant might be unable to pay (*Phaestos Ltd v Ho* [2012] EWHC 662 (TCC), para. 71; *Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 17).

18. Second, the burden of proof rests on the Defendant applicant for security for costs. The Court's inquiry is not to be addressed as to the Claimant's current inability to pay a costs order (unless the costs order is imminent), but an order requiring costs to be made at some future time, often after the trial of the action (*Guest Supplies Intl Limited v South Place Hotel Limited* [2020] EWHC 3307 (QB), para. 65). If, however, the Defendant establishes legitimate concerns about the Claimant's financial position, and if the Claimant provides no evidence to override those concerns, the Court may be justified in concluding that the Claimant will be unable to pay the costs order which might be made.....

18. I accept that those principles are applicable in this case.



19. FMC's application was accompanied by a witness statement from Jody Stephen Crockett. In respect of entitlement under CPR 25.13, Mr. Crockett referred to the correspondence and set out his understanding that BWE accepted that it should provide security at this point, but that there were issues as to the amount of that security.
20. In response, BWE's solicitor, Alex Johnson, filed a witness statement which drew attention to the requirements of CPR 25.12 and 25.13 and asserted that FMC had not filed any evidence showing that the requirements of those provisions had been satisfied. Mr Johnson referred to Burness Paull's first letter and then said:

24. The analysis was based on BWE's audited accounts for the period 2021/22 and as at 30 June 2022, some 15 months ago. FMC has not provided any information to indicate why BWE's financial position in June 2022 is relevant to, or indicative of, BWE's likely financial position at the end of these proceedings. Given the delay that FMC's application has already caused to the service of its Defence and Counterclaim, the close of pleadings and later steps in the proceedings it is likely that any trial of BWE's claims and FMC's counterclaims will not occur until sometime in mid- to late 2025, with Judgment later that year or the following year.

25. I understand that BWE does not need to demonstrate that it has liquid assets (i.e. cash) equivalent to FMC's reasonably incurred costs of defending this claim sitting in an account at the date of this application.

26. I am instructed that BWE's financial position as stated in the 30 June 2022 accounts (and in its accounts for the previous year, ending 30 June 2021) was significantly contributed to by the revenue lost due to FMC's failure to settle BWE's invoices and by FMC's wrongful termination of several Purchase Orders, which are the subject of BWE's claims in this litigation. I am instructed that prior to FMC's wrongful termination BWE was provided work by various companies within FMC's group from multiple countries which was a substantial workstream that dried up following FMC's wrongful termination of the Purchase Orders. I am instructed that BWE no longer carries out any work

for FMC or companies in FMC's group, which was a significant loss of custom for BWE.

27. I am instructed that BWE's accounts to 30 June 2023 are currently under preparation and are expected to be available by the end of September 2023. I am instructed that they are expected to show a broadly similar financial position as that reported in the 30 June 2022 accounts. I am instructed that BWE's business within the oil and gas market has been slower this calendar year, although BWE has experienced an increase in order numbers more recently.

28. I am instructed that BWE is a wholly owned subsidiary of Kobay Technology Bhd which is a listed company of Bursa Malaysian Securities Berhad since 1997. I am instructed that BWE's ultimate holding company is funding BWE's costs of this litigation and also the amount that BWE offered as security for costs ... I am instructed that BWE's ultimate parent company has provided a short-term loan to BWE in the sum of approximately MYR5.4m (GBP 930,000) to support BWE's business as a going concern.

21. In reply FMC filed a second witness statement from Mr. Crockett in which he said:

5. I do not purport in this statement to address all (or even most) of what Mr Johnson of Freeths LLP says in his witness statement in response to FMC's application – which are largely matters for submission:
  - a. Rather, I address those points which FMC considers to be matters for factual evidence.
  - b. For the avoidance of doubt, I did not seek to provide factual evidence in my first statement in relation to the threshold condition(s) set out at CPR 25.13(2), since at that point in time I understood BWE to have accepted the principle of security for costs being due (subject to BWE's objections as to the level of FMC's costs, and principle surrounding the counterclaim).
  - c. In light of Mr Johnson's evidence, I confirm that FMC's position is that:
    - i. The condition at CPR 25.13(2)(c) (there is reason to believe that BWE will be unable to pay the defendant's costs if ordered to do so) is satisfied (for reasons arising from the matters set out in Mr Johnson's own statement, being matters for submission).

ii. Even though the condition at CPR 25.13(2)(a) is also satisfied, FMC generally accepts the position set out in the second sentence of paragraph 20 of Mr Johnson's statement – since FMC is seeking security for all of its costs, FMC is content to rely principally on the condition at CPR 25.13(2)(c) having been satisfied.

22. Ms Adams argues that FMC has not complied with CPR 25.12(2) in that FMC did not provide evidence with its application showing that either CPR 25.13(a) or (c) was satisfied.
23. This is strictly correct, but I accept the reason given by Mr. Crockett in both his witness statements for this omission, namely that he believed that there was no dispute that the grounds for the application were agreed, but that there were issues as to the basis upon which the amount of security should be calculated and as to the amount of security.
24. Be that as it may, the position is that I do have evidence which satisfies me on the information presently available that BWE would be unlikely to be able to satisfy an order for costs in the Defendant's favour at the end of the proceedings. It appears from Mr. Johnson's statement that BWE does not itself have the funds to pay its own costs, being reliant upon a loan from its holding company, that as at 30 June 2022 it did not have assets sufficient to satisfy such an order, and that the position now is, if anything, worse than it was in June 2022.
25. It is to be noted that BWE has not put in evidence either its annual accounts to 30 June 2023 or up to date management accounts in order to show a picture different from that summarised in Burness Paull's letter of 30 June 2023.
26. Accordingly, on the evidence before me I am satisfied that the gateway provision in CPR 25.13(2)(c) is satisfied.

## What account should be taken of the Counterclaim

27. Whilst no Defence or Defence and Counterclaim has yet been served, in Mr Crockett's first witness statement he set out the nature of the case which FMC intends to put forward.
28. Generally it is FMC's case that BWE's welding work was defective. This gives rise to a counterclaim totalling about US \$2m (paragraph 19 of Mr Crockett's first witness statement). He exhibits two schedules setting out how that figure is calculated and justified.
29. Conceptually there are a group of items arising out of the purchase orders and invoices upon which BWE bases its claim, and a balance relating to costs alleged to arise out of defective work carried out by BWE under other purchase orders.
30. It is FMC's case in short that the legal work done to establish the defects in BWE's works has been and will be carried out in order to defend the claim brought by BWE.
31. BWE contends that the work done to create the counterclaim goes far beyond that necessary to defend the claim brought by it. It suggests that this should be dealt with by the court apportioning FMC's costs estimate attributing one third to the defence and two thirds to the counterclaim.
32. Mr Lixenberg relies heavily upon the decision in the Commercial Court of Mr Peter MacDonald Eggers KC in *Explosive Learning Solutions Ltd v Landmarc Support Services Ltd* to which I have already referred. Ms Adams suggests the principles set out in that case in respect of the consequence of a counterclaim

being brought need to be treated with a little caution when applied to cases in this Court, but in my judgment the principles set out in that case are well established and apply in the TCC as well as in the Commercial Court. In that case Mr MacDonald Eggers said in respect of the counterclaim issue:

21. Where, as in the present case, the Defendant applying for an order for security for costs in respect of its defence of the Claimant's claim is advancing a counterclaim and that counterclaim is based wholly or in a very substantial part on the same facts or substantially the same facts as the Claimant's own claim, additional considerations arise in respect of the application for security for costs. In such cases, what may be described as the default principle is that the Court will not order security for costs against the Claimant. The principle was summarised by Moore-Bick, LJ in *Anglo Irish Asset Finance Plc v Flood* [2011] EWCA Civ 799, at para. 20:

*"If the claim and counterclaim raise the same issues it may well be a matter of chance which party is the claimant and which a counterclaiming defendant and in such a case it will not usually be just to make an order for security for costs in favour of the defendant, although the court must always have regard to the particular circumstances of the case."*

22. The rationale for this principle is that the sanction for not complying with the security for costs order is that if security were ordered and not provided, the claim might well be dismissed (Commercial Court Guide, Appendix 10, para. 6; *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, para. 19) but the same underlying factual issues would still be litigated in the trial of the counterclaim (*BJ Crabtree (Insulations) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43; *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, para. 18; *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm), para. 67; *Abbotswood Shipping Corporation v Air Pacific Limited* [2019] EWHC 1641 (Comm), para. 29).

23. That said, the fact that there is a claim and counterclaim arising out of the same or substantially the same facts and matters does not, of itself, mean that the defendant must be denied security for costs (*Jones v Environcom Ltd* [2009] EWHC 16 (Comm); [2010] Lloyd's Rep IR 190, para. 17-27). For example, if it is established that the Defendant would not have advanced its counterclaim had the Claimant not instituted proceedings, that well may be a relevant consideration in granting security for costs (*Autoweld Systems Ltd v Kito Enterprises LLC* [2010]

EWCA Civ 1469, para. 58-60). If, however, both parties - the Claimant and the Defendant - were intending to advance a claim and it was only a matter of chance of who instituted proceedings first, the Court might in those circumstances refuse to order security for costs, or it might order that both parties should provide security for costs, assuming that it had jurisdiction to do so (*The Silver Fir* [1980] 1 Lloyd's Law Reports 371; *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Law Rep 603).

24. Insofar as any unfairness arising from this state of affairs might exist, if such unfairness can be neutralised, that may sweep aside any concerns entertained by the Court in allowing the application for security for costs. Thus, in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, Hamblen, J said at para. 19:

*"If security is not put up the likely outcome is dismissal of the claim. If the Bank wishes to obtain security it should make it clear now what its position would be in that eventuality. If it was prepared to undertake to consent to the dismissal of the counterclaim in the event of the Claimant's claims being dismissed for failure to put up security then the difficulty raised by the Crabtree principle would be avoided. However, unless an undertaking is given to that effect, I do not consider that it would be appropriate to exercise my discretion to order security."*

33. Later in the judgment he said:

37. Once it is established, as it is in this case, that there is reason to believe that the Claimant will be unable to comply with a costs order made in favour of the Defendant, it is ordinarily just to order security for costs. This is because the Defendant would otherwise be required to defend the proceedings and incur substantial costs in doing so without any assurance that it will be unable to recover its reasonable costs from the Claimant should the claim not succeed.

....

39. The substantial factor militating against such an order is the fact that the Defendant has its own counterclaim against the Claimant based on facts which substantially overlap with the facts on which the Claimant relies in support of its claim against the Defendant. I am not convinced that the Defendant would have pursued its counterclaim had the Claimant not instituted these proceedings, given that in December 2019 the Defendant issued a notice to terminate the Sub-Contract and the Claimant instituted the current action in October 2021 and it was only in response to the claim that the Defendant advanced its

counterclaim. That said, I have not reviewed the entirety of the pre-action correspondence and so I am unable to reach any conclusions in this regard.

40. In any case, the Defendant has given an undertaking that, in the event of the dismissal of the Claimant's claims as a result of it failing to provide security for costs in accordance with an order to that effect, the Defendant will consent to the stay or the dismissal of the counterclaim. With the benefit of the undertaking, any reservation I had about concluding that it was just to order security for costs is assuaged.

34. In the present application, the costs which are sought to be secured are (1) the costs of the proceedings from their commencement to the CMC; and (2) FMC's costs incurred before proceedings were started.
35. Insofar as the first category of costs is concerned, it seems to me that this case raises similar issues to the *Explosive Learning* case: I accept that, absent the proffered undertaking, this would be a case where the costs of FMC preparing its defence overlap substantially with the costs of preparing the counterclaim, and therefore security would not be ordered (see paragraph 21 and the first sentence of paragraph 39 of the judgment in *Explosive Learning*). Thus the starting point is that security for costs should not be ordered.
36. However, as that case makes clear, if a counterclaim is being deployed for all practical purposes solely as a defence whether by way of abatement or by legal or equitable set-off, and an undertaking in *Dumrul* terms (see paragraph 24 of Mr MacDonald Eggers's judgment) is proffered, then an order for security for costs is likely to be appropriate. Here such an undertaking has been proffered.
37. At present I have not seen a draft Defence and Counterclaim, still less a Defence and Counterclaim finalised and served. When such a document is served, it may evince an intention on FMC's part to put forward its defects case as more than

simply a defence. At present, I understand the position to be that it will be deployed purely defensively.

38. On that basis it seems to me appropriate to order security for FMC's costs in this action up to the date of the CMC: I deal with the amount below.
39. The second category of costs seems to me more troublesome.
40. There is authority binding on me that security for costs can be ordered to include "incurred" costs in the language used for preparing a "Precedent H" for cost budgeting purposes: see, in particular, paragraphs [41] to [53] of the judgment of Sales LJ in *Sarped Oil International Ltd v Addax Energy SA and another* [2016] EWCA Civ 120.
41. However, that case was considering "incurred" in contrast to "estimated" costs in an approved costs budget. By the time that a case comes before the Court to consider approval of costs budgets, there will be two categories of "incurred" costs – those before the proceedings have started and those after they have started up to and including the CMC.
42. At this point I am considering principally costs incurred before proceedings were commenced.
43. From the Claimant's perspective, there is no reason to differentiate between the pre- and post- proceedings costs. They will be costs which the Claimant contends that in due course the Defendant will pay when the Claimant succeeds. Those costs, the Claimant will say, include the costs of investigation and getting its claim together before the proceedings were commenced and those incurred after the proceedings have been instituted.



44. From the Defendant's perspective, the position is somewhat different. Once the proceedings have started, the costs are likely to be mainly incurred in respect of the claim brought, but there may be other issues to be dealt with by way of counterclaim which can be differentiated.
45. However, before proceedings are commenced that defendant's concerns may be differently focussed, and the costs incurred may not be clearly directed to the claimant's claim rather than to the defendant's counterclaim.
46. This case seems to me to illustrate the dilemma. The starting point may be (depending upon each party's perspective) FMC's decision to terminate various purchase orders. That was a positive action on the part of FMC which might well in due course involve close examination of FMC's motives and the legal basis underlying that decision.
47. Usually, but not always, a decision to terminate places a real time burden upon the terminator to justify its actions (I am not commenting upon where the legal burden lies), laying the ground to be able to defend that decision if later challenged by the other party.
48. At that point the Defendant justifying termination becomes, in real terms, the party putting forward a positive case. Thus, in this case, an evidential, but not a legal burden, may move to FMC to justify the termination.
49. As to the defects case, there can be no doubt that in practical terms it is for FMC to establish that BWE's works were defective.

50. At the stage before proceedings are commenced, the terminating defendant is likely to be principally concerned with whether it has the evidence available to justify termination.
51. With those thoughts, I return to the judgment of Mr MacDonald Eggers in *Explosive Learning*. He was not concerned, as I am at this point, with costs mainly incurred before proceedings were commenced.
52. Unlike him, I have the benefit of correspondence between the parties. I have before me FMC's solicitor's letter of 23 July 2021<sup>1</sup> which appears to me to very clearly put forward a counterclaim intended not only to defend BWE's claim (which had been intimated in correspondence), but also to assert an entitlement on FMC's part to receive monies from BWE. Thus the contemporaneous correspondence appears to show FMC incurring costs not merely defensively (although that was part of what was happening) but also in putting together a positive case.
53. Thus, in respect of the time before proceedings were commenced, it seems to me difficult to reach a conclusion that costs were being incurred substantially by FMC by way of defence, rather than by way of (1) defence and also (2) counterclaim.

### **A conceptual problem**

54. Thus, there is, firstly, a problem on why the costs were incurred: were they incurred defensively (in which case the fact that a counterclaim is later formulated may be of minimal significance in respect of an application for

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security for costs) or offensively, thus enabling an application for security for costs to be resisted?

55. There is, as it seems to me, a second problem. In the *Explosive Learning* case, the learned deputy judge explained the rationale for a security for costs order as follows (emphasis added):

37. Once it is established, as it is in this case, that there is reason to believe that the Claimant will be unable to comply with a costs order made in favour of the Defendant, it is ordinarily just to order security for costs. **This is because the Defendant would otherwise be required to defend the proceedings and incur substantial costs in doing so without any assurance that it will be unable to recover its reasonable costs from the Claimant should the claim not succeed.**

56. I accept that reasoning, which causes me to question, what is the basis for a court to order security in respect of costs already incurred by the defendant before proceedings have been started?

57. It seems to me that in the context of a case where the defendant is itself considering bringing a claim against the claimant, before the claimant brings proceedings, then those pre-actions costs of the defendant should fall outside the remit of a security for costs order, which is fundamentally concerned with the costs which the defendant will incur as a result of the claimant bringing proceedings.

58. A separate way of considering these costs is to recognise that before the claimant starts proceedings, the defendant's costs which had already been incurred were "sunk" costs, in respect of which an order for security only becomes available because the claimant has proceeded to start proceedings. Had the claimant not chosen to do so, no legal mechanism for recovery of the

defendant's costs exists, unless the defendant had chosen to commence proceedings. Thus these costs were not costs of defending the proceedings: it is not, to use the expression highlighted above, a case where "*the Defendant would otherwise be required to defend the proceedings and incur substantial costs in doing so without any assurance that it will be unable to recover its reasonable costs from the Claimant should the claim not succeed.*"

59. For the above reasons I decline to order security for costs in respect of FMC's costs incurred before proceedings were commenced. This does not mean that FMC may not be able to recover these costs on assessment in the event that its defence of these proceedings is successful.

### **The amount of security to be ordered**

60. In respect of the costs of these proceedings after commencement, FMC relies upon the Precedent H form to which I have already referred. This estimates costs under the heading "Issue/statements of case" in the sum of £45,250, and under the heading "CMC" in the sum of £25,550, a total of £70,800.
61. On behalf of BWE, Ms Adams points out that at this stage the cost budget has not been approved. She submits that there should be reductions firstly to reflect the fact (as BWE submits) that the greater part of these costs are attributable to the counterclaim and secondly to allow for the fact that on assessment the costs estimated may well be significantly reduced.
62. As to the first point, I have given my reasons above for rejecting it.
63. As to the second point, the costs estimated do not seem to me to be unrealistic given the complicated issues which will arise in pleading the defence and

counterclaim and in preparing for the CMC. It is to be noted that the cost schedules for this hearing amount to £50,512.59 for BWE and £48,870.41 for FMC. Those substantial sums give me some comfort that the Precedent H estimates are of the right order.

64. It is also noteworthy that at this stage BWE has not assisted me by providing its own estimates of the costs it will incur in those two phases of the proceedings.

### **Conclusion**

65. For the above reasons I order that BWE should provide security for FMC's costs up to the conclusion of the CMC in the sum of £70,800.
66. I invite the parties' submissions as to the terms of the consequent order.