

**Neutral Citation Number: [2015] EWHC 1582 (CH)**  
**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/05/2015

**Before :**

**MR RICHARD MILLETT Q.C.**  
**(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)**

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**Between :**

**ALIAKSANDR Hniazdilau**

**Claimant**

**- and -**

**(1) ZOLT ADAM Vajgel**

**(2) KING HOWARD CORDERO HENRIQUES**

**(3) DMITRIY BRONOVETS**

**Defendants**

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**Thomas Roe Q.C. and Alexander Halban for the Appellant/Third Defendant**  
**Clifford Darton for the Respondent/Claimant**

Hearing dates: 6, 7 May 2015  
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**Judgment Approved**

**Mr Richard Millett Q.C. :**

### **Introduction**

1. This is an appeal by the Third Defendant (“D3”) by his application notice dated 3 March 2015 from the order of Master Clark dated 10 February 2015. It comes before me on an expedited basis with the permission of Warren J granted on 25 March 2015. By her order the Master dismissed D3’s application for security for costs in the sum of £285,000 and gave judgment in default against the First Defendant (“D1”) for costs only. She also ordered a detailed assessment of certain costs orders made by Chief Master Winegarten on 11 January 2013 and 4 March 2013 relating to D1’s unsuccessful challenge to the jurisdiction and *forum non conveniens* challenge (“the Winegarten costs”), and ordered a payment on account of £40,000.
2. D3 also applied for a stay of paras 3, 4 and 5 of the Master’s order pending this appeal, which was originally refused on paper by Morgan J but it has not been revived at this hearing because its timing has made it unnecessary.
3. There are two basic issues on this appeal. First, the question of whether D3 should have security for costs. Secondly, whether the Master was right to have granted default judgment against D1 and ordered a detailed assessment of the Winegarten costs (and the payment on account).

### **Chronology**

4. This case comes before me in circumstances where a seven day trial is due to take place in a window starting on 29 June 2015. As yet, strikingly, witness statements have not been exchanged and the case is not ready for trial. I am told that the Claimant will be in a position to serve his w/s in a matter of days from today, but D3 needs another month. It has not spent the money on producing statements unless and until it has security for costs. In order to understand that unsatisfactory state of affairs, and indeed the appeals before me, it is necessary to set out in detail the unusual and somewhat tortuous procedural history of this case.

18.10.12 Claim commenced against only D1

16.11.12 D1 applied to set aside service and a declaration of *forum non conveniens*

10.1.13 D1 served a witness statement from Mr Bronovets (who later became D3) in support of his application in which Mr Bronovets says that he is the beneficial owner of all the shares the subject of the dispute and that D1 holds them on trust for him

11.1.13 Chief Master Winegarten dismissed the application and orders D1 to pay the Claimant’s costs and adjourns the *forum non conveniens* application for further hearing

4.3.13 Chief Master Winegarten dismissed the *forum non conveniens* application and ordered D1 to pay the Claimant’s costs. D1 appealed with the permission of Chief Master Winegarten and the Claimant sought security for costs of appeal

18.6.13 D1 transferred the shares to the Second Defendant (“D2”)

- 24.10.13 Mr Robin Hollington QC ordered D1 to put up security for costs of the appeal by 8.11.13 or else it be struck out, with no order as to costs. No security provided and it was indeed struck out.
- 4.12.13 Master Bragge joined D2 to the action on application of the Claimant and ordered both Defendants to serve defences by 17.1.14 (which neither did). He ordered that costs be in the case.
- 31.1.14 D3 issued application to be joined as a Defendant
- 19.3.14 The Claimant applied for default judgment against D1 and D2
- 25.3.14 Master Bragge ordered D3 to be joined on terms as to D3 indemnifying the Claimant for the Winegarten costs as per para 2 of that order following a detailed assessment of default costs certificate or agreement as between the Claimant and D1 as to the amount. He adjourned the Claimant's default judgment applications against D1 and D2 generally with liberty to restore. At that hearing the Claimant had actively opposed the joinder of D3. Master Bragge gave directions for the service of amended pleadings, with the Amended Reply to be served by 13 May 2015 (although in the end it was served on 19 May).
- 9.6.14 Case management conference: Master Bragge ordered a trial with earliest date in window being 1 June 2015; the trial was eventually fixed at the end of August 2013
- 13.6.14 D3 formally sought security for costs from the Claimant
- 1.7.14 D3 issued application for security for costs, supported by a witness statement of Mr Kakkad. It was originally listed for 19.9.14.
- 21.7.14 The Claimant issues application notice for default judgment against D1 (notwithstanding that his earlier application for default judgment against D1 had been adjourned by Master Bragge). It was this application that was before the Master from whose order appeal is now made.
- 30.10.14 First hearing of security for costs application before Master Clark: adjourned to allow D3 to put in expert evidence of Belorussian law and response evidence
- 5.11.14 The Claimant serves Kakkad 2, relying for first time in the security for costs application on s 6 of the Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus dated 23 December 2005 N34, which had previously been in evidence on the jurisdiction challenge before Chief Master Winegarten on the forum non conveniens application as part of an expert's report of a Mr Verkhovodkho dated 25 January 2013.
- 5.12.14 The resumed hearing took place before Master Clark

- 18.12.14 Master Clark circulated her judgment in draft.
- 10.2.14 Master Clark formally handed down judgment and made her order. She refused permission to appeal.
- 3.3.15 D3 issued application notice for permission to appeal, supported by D3's skeleton. D3 also applied for a stay of part of the orders pending the hearing of the appeal.
- 5.3.15 Morgan J refused a stay on paper and directed that if a stay was sought D3 should apply at the hearing of the appeal by separate application notice giving 3 days' clear notice.
- 17.3.15 D3 applied for a stay of paras 3 to 5 of Master Clark's order
- 25.3.15 Warren J granted D3 permission to appeal on paper and expedited this hearing
- 16.4.15 Warren J extended time for the Claimant's Respondent's Notice to 20.4.15
- 20.4.15 The Claimant filed a Respondent's Notice relying on a statement contained within it by his solicitor, Ms Melinda Shashou of HCLS solicitors to the effect that there were further delay grounds on which the Master could have relied in coming to her conclusion and that there was now insufficient time for the order for security to be complied with given the proximity of the trial and the size of the sum, and that he would be deprived of his election between putting up security and abandoning the claim.

### **The issues on the pleadings**

5. The Claimant and D3 are Belorussian nationals. I am told that D1 is resident in Alice Springs, and D2 in Manila. The case is about which of the Claimant and D3 is the beneficial owner of the shares in a company called Bennet Invest Ltd, an English company ("the Company") incorporated in 2005. The Company owns valuable land in Belarus. There is no dispute between the Claimant and D3 that D1 held the shares only as trustee from the outset, nor that when the shares were transferred to D2 in June 2013, D2 was merely a replacement trustee for D1 and had no beneficial interest himself. It is also common ground that D1 accepted that he was a trustee for D3, and indeed on 10 Jan 2013, in support of his jurisdiction challenge the next day before Chief Master Winegarten, he adduced a w/s from D3 (who at that stage was not a party to the action) to the effect that D1 was trustee of the shares for D3. It is the Claimant's own pleaded case (at para 29D of the Re-Amended P/CI) that D2 was merely a replacement for D1 and was only a trustee, and that is admitted at para 48 of D3's Defence. It is also important to note two other matters from the pleadings: (i) that the Claimant positively alleges that D1 and D2 were always only ever controlled by D3 in relation to the shares and their response to this litigation; and (ii) that on 17 June 2013 D2, upon receiving transfer of the shares from D1, executed a declaration of trust of the shares in favour of D3. That declaration of trust is not admitted by the Claimant.
6. D3 counterclaims for a declaration that he is the beneficial owner of the shares and that they are held on trust for him by D2. The counterclaim relies solely on the facts and

matters pleaded in the Defence, and the defence to counterclaim relies solely on the matters in the Reply.

### **Security for costs**

7. The Master dismissed D3's application for security for costs. Her reasons are at para 64 of her reasoned judgment. She identified as specific factors (i) the fact that the Claimant had assets in Italy and Montenegro; (ii) D3's delay and, most importantly, as she said, (iii) the fact that the principle established by the CA in *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* [1990] 59 BRL 43 ("the Crabtree principle") applied because both the Claimant and D3 were in the position of claimants, and the position could not be saved for D3 by his proffering a *Dumrul* undertaking, i.e. to give up his counterclaim if the Claimant was ordered to but failed to put up security so that his claim was dismissed. At para 56 of her judgment she rejected the Claimant's submission that if an order for security were made it would stifle the claim. There is no challenge to that conclusion.
8. On this appeal, D3, represented by Mr Thomas Roe QC and Mr Alexander Halban, say that the Master erred in law or misdirected herself or otherwise exercised her discretion in a way that exceeded the generous ambit within which reasonable disagreement is possible in respect of every ground on which she relied. This is not a rehearing but a review of her reasons, and I bear firmly in mind that simply because I might have reached a different conclusion on the material had I been hearing the application, that is not of itself enough to disturb her conclusions.
9. I propose to deal with the issues on this appeal in the following order, viz.:
  - (i) The Crabtree point;
  - (ii) The Dumrul undertaking;
  - (iii) The relevance of the properties in Italy and Montenegro; and
  - (iv) Past delay and the position as at today

### **The Crabtree point**

10. The Master set out the Crabtree principle at para 20 of her judgment, as follows:

"As a general rule the court will not exercise its discretion under CPR 25 to make an order for security for costs of the claim if the same issues arise on the claim and counterclaim and the costs incurred in defending that claim would also be incurred in prosecuting the counterclaim."
11. This was explained further by the Court of Appeal in *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, specifically at 317 by Bingham LJ:

"The trend of authority makes it plain that, even though a counterclaiming defendant may technically be ordered to give security for costs of a plaintiff against whom he counterclaims, such order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself, or is he going beyond

mere self-defence and launching a cross-claim with an independent vitality of its own.”

12. Although, as Bingham LJ said, this principle operates in the “largely discretionary area”, nonetheless it is a principle which must be applied according to its terms; and as he went on to say, approving the decision of Field J in *Mapleson v Masini* (1879) 5 QBD 144 at 147, “the substantial position of the parties must always be looked at”. There is of course no rule of thumb to determine what in every case is the substance, which will always turn on the particular facts of each case.
13. In this case, the counterclaim is in substance purely defensive. It has no life of its own independent of that of the claim. If the claims against all the defendants were to fail or fall away, then D3’s counterclaim would be wholly unnecessary and he would not pursue it. The starting point is the pleading and the fact that there are no facts relied on by D3 which are separate from the facts on which he relies to establish his defence. But that is not all. Since D1 expressly submitted to the court on his jurisdiction challenge in January 2013 that D3 was the sole beneficiary of the shares, and since the Claimant positively alleges that D2 is no more than a replacement trustee (and therefore took legal title subject to D3’s beneficial interest), if the Claimant’s claims fail then D3 will be the unchallenged beneficial owner and entitled to call for the legal title in the shares by being entered in the Company’s register of members. That is not least because, as appears to be common ground, D3 de facto controls D2 in respect of both the conduct of this action and his holding of the shares.
14. The Master considered that since neither the Claimant nor D3 was the registered owner of the shares but rather competing claimants to the beneficial interest and hence the right to call for the legal title, they each needed to make good their claims as against D2, who held the legal title. The Master said it was not enough for D3 to succeed that the Claimant failed: D3 had to go on and prove that he had provided the funds for the property owned by the Company. In my judgment that was wrong. D2 is controlled by D3, and there is, as between the Claimant and D3, no dispute that if the Claimant lost then D2 would act according to D3’s instructions. Although Mr Darton, who appeared for the Claimant, suggested that there was no evidence as to D2’s intentions in that respect and that one could not assume that D2 would simply respect D3’s claim to the beneficial interest if the Claimant failed to establish his own claim to that beneficial interest, that suggestion is flatly inconsistent with the Claimant’s own case (at para 29I of his Re-Amended P/CI) that D3 has at all material times directed and controlled the actions of D1 and D2. It is also inconsistent with the entire premise of the order of Master Bragge of 25 March 2014, which is that the applications for default judgment against D1 and D2 would be adjourned generally with liberty to restore. As I understand it the basis on which the Master made that order was that D3 was being joined because it was desirable that the real issue in dispute, i.e. who of the Claimant and D3 was the beneficial owner of the shares, would decide the action. If he had allowed the Claimant to proceed to default judgment against D2 that would have rendered the joinder of D3 pointless because the Claimant would then have been able to get in the legal title to the shares from D2. Joinder of D3 was intended to stop that from happening where there was another claimant to the beneficial interest in the shares. The Master clearly treated D2 and D3 as standing or falling together. One can readily see why given that it was common ground that D2 was controlled by D3 and that D2 was a successor in title to D1 who had publicly declared in evidence in this action that he was a trustee for D3. It is also the case, although perhaps of less force,

that although D2 has never taken a stance in this litigation he executed a declaration of trust in favour of D3 in 2013.

15. The Master overlooked these points and was led astray by considering that each of the Claimant and D3 had to prove his claim to the beneficial interest as against D2 as a neutral trustee. But D2 was not a neutral trustee – he was on the Claimant’s own case under D3’s de facto control vis- a-vis the shares and was in no better position than D1 who had indeed taken a stance in this action that D3 was the beneficial owner.
16. The Claimant says that the true ratio of Crabtree is that the justice of ordering security for costs against a claim is to provide protection for a defendant who is “put to” the expense of defending himself; and he relies on the judgment of Parker LJ where he says that the purpose of security for costs (in that case under the old s. 726 of the Companies Act 1985) was “directed to ensuring that the proposed defendant is not forced to defend himself against allegations without protection in costs”. Mr Darton says that that ratio does not apply in the facts of this case because D3 is not forced to defend himself. That in turn is because he has voluntarily inserted himself into the case by his joinder, contrary to the Claimant’s own wishes, in order to gain an advantage. If the joinder had been refused D3 would have started his own proceedings and would not be entitled to security for costs.
17. This is a novel proposition and Mr Darton did not seek to support it by any authority. If it were correct it would mean that, in every case where a person applies to be joined as a defendant because it is desirable that all matters in dispute be determined as between all parties interested, that defendant would never be entitled to security for costs because he was not forced to defend himself. That overlooks the basic point that if the claimant had not claimed the defendant would not have had to apply to be joined. The whole point about the independent vitality test is that you can say that even if the claimant had not sued, the defendant could and would have made his own claim, such that it can continue if the claim is dismissed or falls away. That is not so here, as I have said. The fact that D3 is a party by reason of his application, even if opposed by the Claimant, is to look at the form and not at the substance. The substance is that D3 is in the action in order to ensure that he is bound by and can take advantage of the defeat (he hopes) of the Claimant’s claim as against D2, and not to pursue a claim of his own. D3 would not be able to take advantage of a judgment against the Claimant as res judicata unless he were a party, unless it could be argued that he had privity via D2. Privity was not argued before me and one must assume that the absence of arguments based on privity was one reason why Master Bragge thought it desirable to join D3 in the first place.
18. The Master did consider Mr Darton’s objection based on the ratio of Crabtree, but she did so not when considering the Crabtree argument but rather when considering whether D3’s Dumrul undertaking was sufficient. Since a Dumrul undertaking is generally intended for situations where the court is otherwise minded not to make an order for security, she did not consider the objection as a reason to decline an order for security for costs. At any rate, she thought it unnecessary to decide the point (at para 50).
19. Mr Darton also makes a related point that it would unjust to allow D3 to have security for costs in circumstances where neither D1 nor D2 could have obtained security since neither of them was a Belarus resident and could not have relied on section 6 and so

would have been constrained by *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868. I am not sure that this point was argued before the Master; it was not a reason she gave for refusing security and there is nothing in the Respondent's Notice on the point. Leaving that on one side, I am anyway not persuaded by the point. The fact that D3 was, by being joined, obtaining an advantage not available D1 or to D2 might have been a reason for refusing joinder, but once joinder was ordered, the fact that the other defendants could not seek security for costs cannot be a ground for denying it to D3. Mr Dart says that the s 6 point was not raised as a basis for security for costs until November 2014, so the Claimant did not know about it, but s 6 had been in the evidence since January 2013. The fact that Master Bragge was treating D2 and D3' case as standing or falling together on the merits does not mean that he was also treating them as of equal procedural standing when it came to matters such as security for costs, or costs more generally.

20. In conclusion on the Crabtree point, the Master in my judgment erred in law or misdirected herself as to the substance of the claims and counterclaim in this case.

#### The Dumrul undertaking

21. It follows that had the Master not so erred, it would not have been necessary for her to consider the Dumrul undertaking proffered by D3 in case the court was otherwise against him on the Crabtree point. The Dumrul undertaking takes its name from the decision of Hamblen J in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625, at [13ff]. The Master considered that the Dumrul undertaking would not avail D3 because the claim would still go on as against D1 and D2 even if the action were stayed as against D3 and D3 gave up his counterclaim (see para 52).
22. In my judgment the Master was also wrong about that. First, the Master herself said that the action as against D1 was concluded (see para 70, 72), which is the basis of her own reasoning as to why there should be a detailed assessment of costs as against D1 (and hence the orders she made at paras 2 to 5 of her order, which I address later in this judgment). Secondly, as to D2, the stay that D3 seeks as the sanction for failure to put up security is of the claims against himself and D2. That is self-evident otherwise any order for security for costs would be wholly without sanction since otherwise the Claimant's, although his claim would be stayed as against D3, could then enter default judgment against D2. That would completely undo the whole purpose of the joinder by Master Bragge. The Master's error in considering that the action would proceed against D2 (and hence for refusing a Dumrul undertaking) is traceable to the same error she made in considering that the Crabtree principle applied, namely in overlooking the basic rationale of the order of Master Bragge in both joining D3 and adjourning generally the application for default judgment against D1 and D2. So the Crabtree objection, had it applied (which in my judgment it did not) could have been avoided by D3's proffer of a Dumrul undertaking, since the sanction for the stay for non-compliance would have ensured that the action did not go on against D2. The fact that D3 would have then in effect won the battle over the beneficial interest is not a reason for not accepting it. Furthermore, as Mr Roe QC submitted, D2 was not making any independent claim to the beneficial interest.

#### The relevance of the properties in Italy and Montenegro



23. The Claimant's solicitor Ms Shashou put in some evidence before the Master (Shashou 4th witness statement) to the effect that he owns various properties including one in Montenegro and one in Italy. He says that the registered owner is his daughter Anna Markovich, although in his skeleton argument before me he maintains that he is the beneficial owner of these properties. Mr Darton submits that these properties are available for enforcement outside Belarus and are therefore not caught by the difficulties or impossibility of enforcement presented by s 6. So, he says, no security should be ordered since there is no evidence that there is any difficulty associated with the enforcement of an English costs order against real property in these two states.
24. However, there is no evidence as to the address of these properties or their nature beyond what Ms Shashou says at para 9(vi) and (vii) of her 4th witness statement. It is not known whether the Claimant's daughter accepts that her father is the beneficial owner (or what that means in Italy and Montenegro), or as to whether they are encumbered and if so to what extent, and what their estimated value is. It is therefore a matter of speculation as to whether they are available for enforcement and to what extent.
25. The Master relied, at para 37, on the decision of Mr Gabriel Moss QC in *AIMS Asset Management v Khazakstan Investment Fund Ltd* [2002] EWHC 3225, in which he rejected the submission that only the country of residence was relevant when assessing obstacles to enforcement, and the location the assets was equally important. She went on to say (para 39) that the Claimant was not required to provide evidence about his assets since if he were that would infringe the non-discrimination principle in *Nasser*. I disagree. The simple point is that if the applicant for security can avoid the *Nasser* strictures by pointing to the impossibility of enforcement of a costs order in the place of residence, then he has availed himself of the exception to the non-discrimination principle in *Nasser*. If a claimant then seeks to rebut that and to re-invoke the *Nasser* principle by reliance of the existence of assets in a reachable jurisdiction, he must adduce positive evidence to that effect. He cannot simply assert it and do no more. Otherwise it would be very easy for a claimant simply to say that assets exist in such a jurisdiction and no more, and thereby avoid an order for security even though enforcement is impossible in his place of residence. That is not a just result and would be an abuse or misuse of the *Nasser* principle, which is designed to eliminate or minimise discrimination on grounds of residence, not on the grounds of the location of particular assets otherwise available. It does not discriminate against the Claimant here to require him to prove on evidence that which he asserts to be true.
26. Accordingly, I disagree with the Master on that point too. Mr Darton said that this was an exercise of discretion by the Master, but it was not. She made no finding about the sufficiency or otherwise of Ms Shashou's evidence about the properties but simply took the fact of the properties into account on the basis that as a matter of law the Claimant was not required to give any detail about it. I consider that she was wrong in law to do so, and therefore she should have considered the sufficiency or otherwise of the evidence. She failed to take account of a relevant matter, namely the inadequacy of that evidence, and therefore I am entitled to disturb her finding and exercise my own discretion afresh. In my judgment the evidence about the Italian and Montenegrin properties falls very far short of enough to persuade a court that they are available for enforcement and that there are no obstacles to enforcement.

Past delay and the position as at today

27. I address these issues together taking into account both the points on the appeal and the points made in, and in response to, the Respondent's Notice.
28. Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see CPR 25.12.6). The question of delay must be assessed at moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in *Prince Radu of Hohenzollern v Houston* [2006] EWCA Civ 1575 (cited at White Book p 823-4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial.
29. The Master took account of delay in refusing security for costs (para 64). She relied specifically on two periods of delay. First, she held that D3 should have applied to join the proceedings as soon as he became aware of them; and although she did not say when that was, it cannot on any view have been any later than 10 January 2013 when D3 signed a witness statement in support of D1's application to challenge the jurisdiction. Second, she held that there was delay in making the application between the date of D3's joinder (25 March 2014) and the date of the application, namely 1 July 2014 (see para 62).
30. Mr Roe says that these periods of delay can be explained and are not culpable. He says that it was not reasonable to expect D3 to apply to be joined until after D1's jurisdiction challenge was disposed of, which was not until November 2013. He also says that even after joinder of D3 on 25 March 2014, it was not reasonable for D3 to apply for security because it did not know the scope and nature of the case because Master Bragge himself had laid down a timetable for amended pleadings which ran to mid May 2014. So, he says, it was reasonable to apply on 1 July 2014, having asked formally for security on 13 June 2014 (just after the CMC) and been rebuffed.
31. Mr Roe recognises that the Master, in relying on these periods of delay, was exercising a discretion but he says that she failed to take account of the relevant fact that the pleadings had not close and thus misdirected herself, or else exercised her discretion in such a way that her conclusion fell outside the generous ambit within which reasonable disagreement is possible. I reject that submission. The question of delay is a classic area of the exercise of discretion with which appellate courts should be very slow to interfere. In any event, even if I were to disturb her conclusions and exercise my discretion afresh, I would have reached the same conclusion. As to the period between learning about the claim in (latest) January 2015, but very likely before that given that D1 was de facto controlled by D3, I agree with the Master that D3 could and should have applied to be joined long before 31 January 2014, when he did apply. He decided not to do so but to cause D1 to challenge the jurisdiction of the court and pursue an application that failed, and then to pursue an appeal which was then effectively

abandoned only in November 2013. He therefore allowed at least a year to go by while D1 effectively delayed the proceedings before D3 applied to join. Of course I accept that it would have been inconsistent with such a strategy for D3 to apply to join earlier, but his strategy of causing D1 to pursue the jurisdiction challenge nonetheless caused delay, and if D3 was serious about ensuring that he became a party so that the real issues in dispute could be decided in one go, then he could and should have done so earlier. It is quite apparent that he only did so once it was clear that the jurisdiction challenge would not succeed, and in waiting until then to be joined he took the obvious risk that if he applied for security for costs the delay inherent in his strategy thus far would be held against him. He cannot complain that the Master did hold it against him.

32. As to the delay between D3's joinder and his application for security, this was a delay of over three months. Although the pleadings had not closed and had yet to be amended, the shape of the dispute was in my judgment sufficiently clear to D3 from the existing pleadings and his proposed position (which he had made D1 articulate as early as 10 January 2010). If there was any doubt about it then D3 certainly knew the Claimant's case against him when the Re-Am P/Cl was served. He could have made his application at that time, and it could have been determined at the CMC, as is usual. He chose to wait until after the CMC, knowing that the Master had ordered a trial in a window from June 2015.
33. In these circumstances I reject Mr Roe's submission that the Master erred in any way that allows me to disturb the exercise of her discretion; and even if I were wrong about that I would exercise my own discretion in the same way.
34. Mr Darton also relied on the period of delay from 1 July to 5 December 2014, when the hearing eventually came on before the Master, and he criticised D3 for not pushing for an earlier formal hand down of the Master's decision between 18 December 2014 (when it was circulated in draft) and 10 February 2015. The Master made no finding about the period between July and December 2014, some of which was attributable to D3's failure to place before the court the expert evidence of the law of Belarus on s 6 (which he only did on 5 November 2014) and there is no appeal from her failure to do so. Self-evidently she could not take account of any delay after her hand-down of a draft. Since I am not minded to interfere with the Master's decision on delay I do not need to consider these points as going to whether security should be granted or not.
35. They are of course relevant to whether I should grant security looking at matters as at today. If I had otherwise been persuaded that the Master was wrong about the delay on which she relied, then I would still have declined to order security because D3 would, if I ordered it now, not have a sufficiently generous time in which to be able to exercise a real choice. Furthermore, the closer to the trial that the Claimant would be required to put up security, the less effective as security it would be for D3, who would have by then incurred the imminent costs on finalising witness statements and incurring brief fees.
36. Mr Roe says that D3 cannot have it both ways, both seeking to hold his trial date and complaining that there is not enough time for him to put up security. He also says that the Claimant has not provided any evidence as to how long he needs to put up the money, and that just as the Master rightly rejected the stifling allegation on the grounds of the insufficiency of the evidence, so I should treat his claim to a generous period with circumspection. These points do have a degree of force, but in the end I am not

persuaded by them. Both parties have proceeded on the basis that the trial date must be kept, and there is in any event a public interest in the efficient administration of justice that requires that it be kept, so I am not ultimately attracted by the suggestion that Claimant is seeking to have it both ways. As to whether the Claimant can or cannot get the money together now, I cannot blame him for not having done so before: he was holding an order refusing security. Mr Roe's suggestion that the Claimant should have started getting the money together in anticipation of possibly losing on appeal is one which I find unattractive. Although it does remain a matter of speculation as to when D3 could (if now ordered) get the money together, if at all, the issue is not whether the CI's claim would be stifled, but whether he is being given a real choice as to whether to put up the security and go on or not do so and give up. The later the order for security is made and the more a claimant has spent on legal costs before that date (or in any case before the application) the smaller the opportunity to the claimant to have a real choice. Here the Claimant had already invested over £150,000 in his claim even before D3 was joined, and doubtless a great deal more since, and his choice would therefore not be between putting up security as the price of continuing or else giving up, but doing so as the price of not only continuing but saving his past investment. That is inevitable when the order sought is being made so close to trial. Each case will always turn on its own facts but the absence of evidence about his means would not persuade me, if I were exercising my discretion to order security myself, that it was just to do so in all the circumstances.

37. Accordingly, despite my disagreement with the Master on two out of the three grounds on which she relied on refusing security, I would uphold her decision on the grounds of delay. I therefore dismiss the appeal on security for costs, and para 1 of the Master's order stands.

#### **Paras 2 to 5 of the Master's order**

38. D3 seeks to set aside these parts of the order on the grounds that she erred in law or made a serious procedural error or misdirected herself because she was varying Chief Master Winegarten's orders for costs without any attendant change of circumstances but merely because she took a different view of them. It was also wrong, says D3, because Master Bragge had himself refused to enter summary judgment against D1 but had adjourned it in order to let the real defence, that is, the defence to be mounted by D3, go ahead. So once D3 filed a defence on the merits as it then did, default judgment could not be entered against D1. D3 contends that the Master was wrong to regard D3 as under a requirement as to his standing in order to oppose the application for default judgment. It follows, says D3, that the Master was giving Claimant a second bite at the cherry, which is not permitted in the absence of material change of circs. It further follows that the Master should not have ordered a detailed assessment, and should not have ordered any payment on account.
39. I reject these submissions. The default judgment granted against D1 by the Master under para 2 of her order was for costs, ie under CPR 12.9 (even though the application had been made under CPR 12.4). D1 was indeed in default of defence. He was no longer playing any part in the action, his part having been transferred to D2 when the shares were transferred to D2 in June 2013; and the case was thereafter being run by D3. D1 was simply dropping out. The Claimant was not seeking judgment on the merits or any substantive relief against D1 because (a) it was pointless doing so given that he was no longer the registered owner of the shares and (b) because the real battle

would take place between himself and D3. That is consistent with D3 serving a defence only on his own behalf and not on behalf of D1 (or D2).

40. When Chief Master Winegarten made his costs orders against D1 in Jan and March 2013 the action was going to proceed in full against D1, the jurisdiction and forum challenges having dropped away (subject to appeal). D1 was the registered holder at that time. D2 and D3 were not yet parties. Things did materially change thereafter: D1 transferred the shares to D2, D2, and then D3 became parties to the action, and the issue as to the beneficial ownership was joined by D3. In those circumstances for all practical purposes the action against D1 was indeed at an end. A judgment in default for costs under CPR 12.9 under D1 was apt since it provided the procedural route to an order for costs without a final order for substantive relief. It was not inconsistent with Master Bragge's order, since he had not in fact dismissed the application for summary judgment against D1 but merely adjourned it generally with liberty to restore. It is important to appreciate that the Master was not ordering default judgment on the merits but only as to costs. She understood that the merits of the claim against D1 would have to be decided by way of trial of the merits as between the Claimant and D3 (and D2). I would agree with Mr Roe that the Master was wrong to say that D3 had no standing to oppose the order for default judgment against D1, since the costs indemnity it had given as a condition of its joinder under the order of Master Bragge certainly gave him an interest, but it does not seem that she shut out or refused to take account of any points made by D3, and in any event she made it clear that the lack of standing of D3, as she saw it, was not the principal basis for her conclusion.
41. It follows that the order at para 2 of the Master's order was rightly made and I dismiss the appeal against it.
42. It should follow from that that the appeal against paras 3 to 5 of the Master's order is also dismissed. As to the order for a detailed assessment of costs at para 4 of her order, this would follow logically from the fact that the action against D1 is at an end as a consequence of the default judgment. It clearly includes the Winegarten costs orders but it would also include all other costs incurred by the Claimant in the action while D1 was the sole defendant, including in particular dealing with the costs of the appeal from Winegarten not falling within the Hollington order. I see no error or mis-exercise of discretion in the Master's ordering a detailed assessment of the D1 costs. I can see the force of the point that it would be an expensive and time-consuming distraction to have a detailed assessment of those costs this close to trial, when it can otherwise be swept up with the assessment of the rest of the costs of the action once the trial is over. Although I would certainly encourage the Claimant not to pursue a detailed assessment now but to wrap it up with the rest of the costs assessment after trial, that is not a good reason to disturb the Master's order.
43. In conclusion, despite my disagreement with those various aspects of the Master's order which I have identified, the Master's order