Neutral Citation Number: [2025] EWHC 1157 (Comm)

Claim No: CL-2023-000687

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2025

Before :

MR JUSTICE FOXTON

- -

Between :

(1) VIRGO MARINE	
(2) NIXIE MARINE INC.	**Claimants**
- and -	
REED SMITH LLP	**Defendant**
- and -	
BARCLAYS BANK PLC	**Third Party**

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Jacob Turner and (instructed by **Zaiwalla & Co Limited**) for **the Claimants**
Jawdat Khurshid KC and **Anna Gotts** (instructed by **Clyde & Co LLP**) for **the Defendant**

Hearing date: 1 May 2025
Draft judgment to the parties: 7 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Foxton:

1. This is the Defendant's ("**RSUK**"'s) application for security for costs, heard at the first CMC in these proceedings, which were commenced on 5 October 2023. Although applications of that kind are routinely resolved by an ex tempore judgment at the CMC, this application raised a number of complex issues, with the result that judgment was reserved. The complexity of those issues has defied my attempts at an introductory summary, and I have decided that the attempt is best returned to once I have summarised the factual background.

A The background

The MOA

2. On 14 July 2022, the First Claimant ("**Virgo**"), a company registered in Dubai, entered into a Memorandum of Agreement ("**MOA**") with a Marshall Islands company called Kibaz Shipping LP ("**Kibaz**") to purchase an oil tanker, the MT KIBAZ ("**the Vessel**"). That contract was on "SALEFORM 2012" terms.

3. RSUK, a well-known law firm and UK registered partnership, was retained as Kibaz's legal representative in the sale transaction.

The Escrow Agreement

4. On 19 July 2022, RS, Virgo and Kibaz entered into an escrow agreement governed by English law ("**the Escrow Agreement**"). This provided for a deposit in the amount of 15% of the purchase price for the Vessel, USD 1,965,000 ("**the Deposit**") and the balance of the purchase price of USD 11,350,000 ("**the Balance**") to be paid into RSUK's client account, a USD account RSUK held with the Third Party ("**Barclays**"). I will refer to that bank account as "**the RSUK USD Client Account**". RSUK had the option to transfer those amounts from the RSUK USD Client Account to "a separate designated account" established by RSUK. It was suggested at the hearing that the funds had been transferred into such an account (with Barclays) at some point, but then returned.

5. Clause 2 of the Escrow Agreement provided that the duties, responsibilities and obligations of RSUK would "be limited to those expressly set out in this Escrow Agreement, each of which is administrative in nature, and no duties, responsibilities or obligations shall be inferred or implied." Clause 3 stated:

> "The Escrow Holder may, following establishment of a designated escrow account, transfer the Escrow Funds from the above client account to such designated escrow account. The Deposit shall be held by the Escrow Holder for the benefit of the Sellers and the Buyers and the Balance Payment shall be held by the Escrow Holder to the order of the Buyers and in each case subject to the terms set out herein."

6. Clause 5 set out the circumstances in which the amounts paid by way of escrow – **the Escrow Funds** – were to be distributed. This provided for the release of the Deposit on the joint instructions of the parties to the MOA, of the Balance pursuant to an

instruction from Virgo, (those instructions being referred to as "Release Notices") or in each case:

> "as ordered by a court or any legal or regulatory authority of competent jurisdiction or a final arbitration award of an arbitration tribunal of competent jurisdiction or to reimburse the Escrow Holder for money spent by it in accordance with the terms of this Escrow Agreement or owed to it under any indemnity provided in this Escrow Agreement."

7. Clause 6 provided that upon receipt of a Release Notice, RSUK would "instruct the bank holding the Escrow Funds to make each payment set out in the Release Notice as soon as is reasonably practicable after receiving the Release Notice".

8. Clause 11 provided that RSUK "shall not be liable to the Parties for any mistake of fact, error of judgement or act or omission of any kind unless caused by its gross negligence, fraud or reckless disregard of its obligations under the terms of this Escrow Agreement."

9. Clause 13 provided that "the Parties jointly and severally agree to indemnify" RSUK "against any and all losses, liabilities, claims, demands, deductions, fees or expenses whatsoever (including, without limitation, charges incurred in holding the Escrow Funds) incurred as a result of actions taken or omitted pursuant to this Escrow Agreement or otherwise arising out of or in relation to this Escrow Agreement, except for liabilities incurred by the Escrow Holder resulting from its gross negligence, fraud or reckless disregard of its obligations under the terms of this Escrow Agreement." RSUK was to have "a first lien over the Escrow Funds to secure the obligations of the Parties under this clause or otherwise to the Escrow Holder under this Escrow Agreement." It is RSUK's case that the indemnity and lien did not extend to costs liabilities arising from these proceedings, and there was no attempt at the hearing to argue the contrary.

10. Clause 15 provided that RSUK "shall not be in breach of its obligations or otherwise be liable to the Parties, or any other party, as a result of any act, omission, failure, fraud, delay, negligence, insolvency or default of any bank, financial institution, clearing or payments system, or regulatory, governmental or supra-national body or authority or any of their directors, officers, partners, employees, agents or representatives".

The RSUK USD Client Account

11. On 21 July 2022, Virgo paid the Deposit into the RSUK USD Client Account. By 5 September 2022, Virgo had paid the Balance into that account. These payments were made from an account in Virgo's name at Ajman Bank in the UAE.

12. The terms governing the RSUK USD Client Account as between RSUK and Barclays are principally contained in two documents: "the Customer Agreement Core Terms" ("**the Core Terms**") and the "Customer Agreement – Country Terms (United Kingdom)" ("**the Country Terms**").

13. Clause 4.1 of the Core Terms provides that "Barclays is not obliged to make any payment from an account that, in its opinion, may damage its reputation, or break a law, regulation, or sanction." By Clause 4.6, RSUK agreed "not to give an instruction which

would cause Barclays to breach sanctions imposed by, or the law of, any country affecting Barclays."

14. Clause 7.2 of the Country Terms provides:

> "[RSUK] must provide Barclays with any information it requests, now or in the future, about [RSUK], its use of an account or service, a payment, or the origin or destination of funds. [RSUK] must notify Barclays if there is a change to its regulatory status or any information [RSUK] had provided previously in an Application."

15. Clause 10.1 of the Country Terms provides that "Barclays may, at any time and without notice, set off any of the Customer obligations (whether joint, several, future or contingent) to Barclays or any other member of the Barclays Group against any liability of Barclays to the Customer in any country." However, that right is excluded where "the Customer holds that balance on behalf of another person and has informed Barclays of that, and …Barclays has acknowledged this in writing or the account is designated as a 'client' or 'trust' account."

16. Finally, Clause 16 of the Country Terms provides that "the UK Customer Agreement, and any non contractual obligations arising from it, are governed by English law" and that "the English courts have exclusive jurisdiction."

Events subsequent to the payment into the Escrow Account

17. It is the Claimants' case that the Second Claimant ("**Nixie**") replaced Virgo pursuant to a contractual right of substitution in the MOA, and that Virgo's rights under the MOA were novated to Nixie on 22 September 2022. Those contentions are disputed, it being RSUK's contention that its only contractual or other legal relationship is with Virgo.

18. On 29 September 2022, Virgo was designated by the US Office of Foreign Assets Control ("**OFAC**") under US Executive Order 13846. The following day, RSUK contacted Barclays informing them that Virgo had been added to the US sanctions list and asked Barclays "to block all amounts received from Virgo".

19. On 1 October 2022, RSUK (acting for Kibaz) informed Virgo that the MOA was being terminated for repudiatory breach by reason of the designation of Virgo by OFAC. The Vessel appears to have been sold thereafter to another buyer.

20. In correspondence sent on 15 November 2022, RSUK stated that it had concluded that it was subject to EO 13846 because it was a "US person" for the purposes of that provision.

21. On 3 March 2023, RSUK informed Barclays that it no longer considered itself a "US person" for the purposes of EO 13846. On 23 March 2023, RSUK informed the Claimants' solicitors that it was prepared to instruct Barclays to return the Balance to Virgo, subject to receiving certain information and signed documents. Exchanges between the Claimants' solicitors and RSUK followed.

22. On 9 August 2023, RSUK instructed Barclays to repay the Balance to Virgo (there is an ongoing dispute between the Claimants and Kibaz as to who is entitled to the Deposit,

which remains in the Escrow Account pending the resolution of an arbitration between them). Barclays has refused to follow that instruction on the basis (among other matters) that this might cause "US persons to violate US sanctions".

B The proceedings

23. As a result, the Claimants have brought these proceedings against RSUK alleging breach of contract, duty of care and fiduciary duty in giving the original instruction to Barclays to freeze the sums in escrow and breach of contract in failing to pay the Claimants the Balance, either initially or at all. By way of a simplified summary, the Claimants advance two broad case narratives:

    i) that RSUK is under an absolute duty to pay the Claimants the Balance, or at least a duty which is not excused by Barclays' failure to follow RSUK's instructions;

    ii) that Barclays' refusal to follow RSUK's instruction is RSUK's own fault, such that RSUK cannot rely upon it as a reason for not paying the Balance to the Claimants or is liable in damages for loss caused to the Claimants by its failure to do so.

24. RSUK denies liability on a number of grounds. Again, with some over-simplification, its case narrative is as follows:

    i) Its only liability under the Escrow Agreement is to give the instruction to Barclays to make the payment, which it has done, the other legal duties it is alleged to owe being misconceived as a matter of law and/or inconsistent with the terms of the Escrow Agreement.

    ii) If RSUK acted in breach of any legal duty, this did not cause the Claimants any loss, there being an intervening cause in the form of Barclays' refusal to honour its instructions and/or because Barclays would have refused to honour any instruction to pay the Claimants in any event and/or because it is the Claimants' failure to provide information requested by Barclays which is the true cause of any loss suffered by the Claimants.

    iii) Any liability on RSUK's part is excused or limited by the terms of the Escrow Agreement (which has in turn given rise to the issue of whether those terms are unenforceable under the Unfair Contract Terms Act 1977).

25. RSUK has also brought an additional claim against Barclays ("**the Additional Claim**") alleging breach of contract by Barclays in not complying with RSUK's instruction to pay the Balance to the Claimants and seeking specific performance and damages. To the extent Barclays relies on US sanctions as a reason for not complying with RSUK's instruction to pay Virgo, RSUK pleads that this is contrary to Article 5 of the Retained Blocking Regulation and a criminal offence under The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996. It claims damages for breach of contract and/or of the blocking statutes.

26. Amongst the relief sought by RSUK at paragraph 23 of the Additional Claim Particulars of Claim is as follows:

> "If [RSUK] is successful in its Amended Defence and Counterclaim, [RSUK] is entitled to and hereby seeks an order requiring the deduction and payment from the Balance of: (a) [RSUK's] loss, fees and expenses incurred as a result of its communications with Barclays and the Claimants' representatives in relation to the transfer of the Balance. (b) [RSUK's] reasonable costs in defending the claim brought against it by the Claimants, as may be ordered by the Court, including (a) costs incurred by [RSUK] in pursuing this Additional Claim, and (b) costs incurred by Barclays in defending the Additional Claim which the Court requires [RSUK] to pay."

27. Barclays is defending that claim relying on express terms of the banking contract. Barclays relies on Clause 4.1 of the Core Terms, and also argues that on the proper construction of Clause 3.1.3 of the Core Terms and/or Clauses 7.2 and/or 13.12.1 of the Country Terms, Barclays is not obliged to process a payment instruction where the relevant customer has not provided information requested by Barclays which relates to the relevant payment, which it alleges is the position here. Barclays denies the application of the Retained Blocking Regulation and similar legislation saying that it is relying on its own contractual provisions as a reason for not processing the instruction rather than the legal effect of the foreign sanctions measures, and because the blocking legislation is only engaged when the relevant foreign sanctions legislation would otherwise have extra-territorial, rather than intra-territorial, effect.

28. Barclays' response to the plea advanced at paragraph 23 of the Additional Claim Particulars of Claim is as follows:

> "Barclays is neither able to admit nor deny whether [RSUK] is entitled to such relief, that being a matter for [RSUK] to establish as against the Claimants."

The effect of that paragraph appears to be that Barclays will not be advancing any positive case at trial that if RSUK succeeds, it will not be entitled to an order permitting it to deduct the amount of its own costs and any costs it is obliged to pay Barclays from the Balance in the Escrow Account.

29. The case is now proceeding to a 12-day trial, with permission for two expert witnesses per party.

C RSUK's application for security for costs

30. I now turn to RSUK's application for security for costs under CPR 25.27 in the sum of £6 million, the security to cover RSUK's own costs of defending the Claimants' claim, its costs of pursuing the Additional Claim and its potential liability for Barclays' costs in the Additional Claim.

31. Putting the position of the Balance to one side, I accept that the jurisdiction to order security for costs under CPR 25.27(b)(ii) is made out, namely that the Claimants are bodies corporate and there is reason to believe that they will be unable to pay RSUK's costs if ordered to do so. Indeed Mr Turner did not seek to argue the contrary. Both Virgo and Nixie are foreign companies. They are incorporated in jurisdictions which do not require the publication of accounts, and neither has responded to the request that they provide details of their assets and financial positions. This is a state of affairs which the Commercial Court has long treated as sufficient to justify an order for

security for costs, and, following a brief hiatus, the correctness of that practice was confirmed by the Court of Appeal in *Sarpd Oil International v Addax Energy* [2016] EWCA Civ 120.

32. Nor was there any attempt to argue before the court that the effect of ordering the security sought would be to stifle the claim. Further, the "full, frank, clear and unequivocal evidence" required for such an argument (*Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB), [31]) has not been produced, and the assertion by the Claimants that it would be "burdensome if not impossible" to provide the security sought does not come close to meeting the forensic burden on a party who seeks to resist security for costs on stifling grounds.

33. The real issue on this application is the effect of the Balance of USD11m currently held in the RSUK USD Client Account and whether, given the presence of that Balance in an account in the jurisdiction:

    i) RSUK is able to meet the burden of showing that there is "reason to believe" the Claimants will be unable to pay any costs order made against them in favour of RSUK; alternatively

    ii) if RSUK is able to meet that burden (or assumed to do so), it would be just and convenient to make the order for security.

34. Before considering those issues, it is necessary to explore at rather greater length than was done at the hearing, the legal relations between the parties brought into being by the escrow arrangements and the payment made into the RSUK USD Client Account.

D The legal position

The Claimants and RSUK

35. There are a number of authorities which have considered the legal relationships generally brought into being when one party acts as stakeholder or escrow agent in the context of a transaction (or sometimes a dispute) between two other parties. The general thrust of these authorities is to analyse the relationships of the parties in contractual rather than trust terms.

36. In *Potters v Loppert* [1973] Ch 399, 406, Sir John Pennycuick V-C stated:

    > "Turning now to authority, it is to my mind conclusive that, apart from agreement to the contrary, a contract deposit paid to a stakeholder is not paid to him as trustee, but upon a contractual or quasi-contractual liability with the consequence that the stakeholder is not accountable for profit upon it."

    The words "apart from agreement to the contrary" make it clear that the case and the authorities it cites are addressing a legal default position from which the involved parties are free to depart, rather than a mandatory rule of law. The issue in that case was an entitlement to interest on the period between receipt and repayment of the deposit (an issue which appears to have heavily influenced the analysis of stakeholder relationships under English law when this was the means by which the stakeholder was remunerated). The Vice-Chancellor noted at p.406 that:

> "One might at first sight rather expect that where any property is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee, and that the property and the investments for the time being representing it represent the trust estate. Where the property is something other than money - for example, an investment - that must, in the nature of things, almost certainly be the position. But where the property is money - that is, cash or a cheque resulting in a bank credit - this is by no means necessarily so. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal upon a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event.
>
> It must depend upon the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money."

37. The same approach was adopted in relation to a contractual deposit held by solicitors which the parties had agreed should be paid into a "special designated deposit account" in *Hastingwood Property Ltd v Saunders Bearman Anselm* [1991] Ch 114. In that case, the solicitor-stakeholder had applied the funds to meet certain expenses, and closed the account. The claimant sought an order requiring the solicitors to reconstitute the account in the manner of a trust fund. Mr Edward Nugee QC rejected the suggestion that, once the condition for payment has occurred, but there is a dispute as to whom the amount is payable, the solicitor was bound to maintain the deposit in the account until the dispute had been determined. At pp.124-24, he stated:

> "It seems clear to me that, in the common case of a deposit paid to a stakeholder on the signing of a contract for the sale of land, if the stakeholder repays the deposit to the purchaser in the belief that the contract is at an end the remedy of the vendor who claims to be entitled to forfeit the deposit is, so far as the stakeholder is concerned, limited to an action to recover the amount of the deposit, which will be an action in contract or, more usually, an action for money had and received … I do not consider that the vendor would be entitled to an interlocutory order requiring the stakeholder to replace the amount of the deposit in a designated account or to pay it into court."

38. In *Manzanilla Limited v Corton Property and Investments Limited* [1996] Lexis Citation 3767, deposits for four contracts of sale were paid to the vendor's solicitors as stakeholders. The contract failed, each side blaming the other. It is not clear from the report whether the sale contract provided for the escrow amount to be paid into the solicitor's client account, but that is what happened. Prior to the commencement of proceedings, the solicitors transferred the deposit from their client account to their office account, and set it off against amounts said to be due from the vendors to the solicitors. The vendor and purchaser reached a settlement accepting the purchaser's entitlement to the deposit, and the purchaser sought summary judgment against the solicitors. In the course of addressing whether there was an arguable defence to the claim, Millett LJ reviewed the legal obligations assumed by a stakeholder, which he summarised as follows:

> "(1) The relationship between the stakeholder and the depositors is contractual, not fiduciary. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual obligations to the

depositors … The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer.

(2) Until the specified event occurs, the stakeholder is entitled to retain the interest on the money. This is usually described as his reward for holding the money …This right may be excluded by special arrangement, and was excluded in the present case.

(3) Until the event happens the stakeholder holds the money to the order of both depositors and is bound to pay it (strictly speaking an equivalent sum) to them or as they may jointly direct: *Rockeagle v Alsop Wilkinson* [1992] Ch. 47, [1991] 4 All ER 659.

(4) Subject to the above, the stakeholder is bound to await the happening of the event and then to pay the money to one or other of the parties according to the event. The money is payable to the party entitled on demand, and if the stakeholder fails to pay in accordance with a proper demand he is liable for interest from the date of the demand …

(5) If the occurrence of the event is disputed, the stakeholder cannot safely pay either party, for if he mistakenly pays the party not entitled the payment will not discharge his liability to the other. In these circumstances he may (i) interplead and pay the money into Court; (ii) retain the money pending the resolution of the dispute; or (iii) take the risk of paying one party. The choice is entirely his.

(6) If he takes the second course, he may notify the parties that he is content to abide the outcome of the dispute. There is then no need to join him in any proceedings which are taken to resolve it. If he is not joined, the Court cannot order the money to be paid to the successful party. All it can do is to declare that the successful party is entitled to give a good receipt for the money …

(7) If the stakeholder is not content to abide the outcome of the proceedings, he may be joined in order to bind him. This was done in the present case, albeit on the application of the stakeholder."

39. Millett LJ distinguished between the position when the relevant event determining how the deposit should be applied had yet to occur ("pre-contingency"), and, where it had occurred ("post-contingency"). In the former case, the other parties were in principle authorised to revoke the mandate and demand payment as they directed, and the stakeholder was not able to exercise rights of set-off or lien against the payment of the deposit. Once the event had happened, the stakeholder came under a debt to the party to whom the payment was due, and was permitted "to exercise any rights of lien or set-off against him."

40. In *Bristol Alliance Nominee No1 Limited v Bennett* [2013] EWCA Civ 1626 a lessor and lessee entered into an agreement by which the landlord agreed to accept the surrender of the lease in return for a cash payment, which sum was paid into escrow pending completion of the surrender lease, and held in the solicitor's client account. At [24], Rimer LJ held that the solicitors held the escrow amount as stakeholders and not

as trustees. In that paragraph, Rimer LJ referred to the payment obligation post-contingency as being to "pay an equivalent sum", as Millett LJ had in *Manzanilla*. Those comments make it difficult to argue that, whatever the position pre-contingency, the solicitor-stakeholder in these cases held the amount in the escrow or client account on trust for the party entitled to payment post-contingency.

41. Finally, in *PDVSA Servicios S.A. v Clyde & Co LLP, Petrosaudi Oil Services (Venezuela) Limited* [2020] EWHC 2819 (Ch), Sir Alistair Norris considered an application for an injunction in respect of amounts held in escrow by solicitors, to be paid out under the escrow agreement in accordance with the decision of an arbitral tribunal in a reference between PDVSA and POSVL. The tribunal having found in POSVL's favour, PDVSA brought a challenge to the arbitral award in the courts of the arbitral seat (France), and sought an injunction to prevent the solicitors paying the escrow amount to POSVL pending the determination of that challenge. On PDVSA's case, this was a pre-contingency case, its entitlement to payment being contingent on success in the proceedings before the curial court to challenge the award. The terms of the escrow agreement bore some similarities to those in this case, but there are or may be material differences.

42. The injunction proceedings were brought by PDVSA under CPR 64.2, which concerns the court's inherent jurisdiction to determine any question arising in the execution of a trust. Sir Alistair Norris held that this was "an entirely conventional escrow arrangement" and that "it is well established that such arrangements do not of themselves create a trust of the monies so received" ([26]), such an agreement not customarily creating "property rights in a segregated fund" ([29]). At [32], Sir Alistair suggested that "the wording of the Tripartite Agreement points away from the creation of a trust of the escrow account", pointing to the provision that the solicitors' duties were 'administrative only' and limited to instructing the bank "to hold and deal with the escrow monies in accordance with the orders of the Tribunal".

43. This line of cases would suggest that the rights as between the Claimants and RSUK are essentially a matter of contract: certainly in the pre-contingency scenario, and also in the post-contingency scenario, save possibly where the effect of realisation of the contingency is to oblige a solicitor-stakeholder to pay money to its client with whom is it already in a fiduciary relationship (which may explain why it was common ground in *Petrosaudi Oil Services (Venezuela) Limited v Clyde & Co LLP* [2021] EWHC 444 (Ch) that the solicitors holding the escrow at issue in *PDVSA Servicios S.A. v Clyde & Co LLP, Petrosaudi Oil Services (Venezuela) Limited* held the monies on trust for POSVL, in whose favour the arbitral tribunal had ordered the payment should be made, and for whom the solicitor-stakeholder was acting in the arbitration).

44. Ultimately, however, that is a matter of construction of the Escrow Agreement at trial. I note that in *Tradegro UK Ltd v Wigmore Street Investments Ltd* [2011] EWCA Civ 268, [16], Sir David Neuberger observed that the undertaking in that case could be "interpreted in such a way as to give rise to a trust, a stakeholder arrangement, a solicitor's undertaking, or a personal contract (and not all of these are by any means mutually exclusive), but that is merely a result of the interpretation exercise." Further:

    i) Where a solicitor receives money from a client into its client account, the monies are subject to a trust in favour of the client (*Irwin Mitchell v Director of Revenue and Customs Protection Office* [2008] EWCA Crim 1741, [31]).

ii) The bank holding the client account can be liable for dishonest assistance in breach of trust where money is wrongfully applied from that account by the solicitor account holder (e.g. *Magner v Royal Bank of Scotland* [2020] UKPC 5, [10]-[11]).

iii) It may be relevant to note that, for the purposes of SRA Accounts Rules 2019 (made under s.32 of the Solicitors Act 1974), sums held by a solicitor in escrow are treated in a similar way to sums received from clients. The definition of "client money" in rule 2.1 includes at (b) money held or received "on behalf of a third party in relation to regulated services delivered by the firm (such as money held as agent, stakeholder or held to the sender's order)", and rule 4 requires such money to be kept separate from money belonging to the firm. Rule 5.1 only allows for withdrawals of client money so-defined from client account in accordance with specified reasons, including "for the purpose for which it is being held" and "following receipt of instructions from the client, or the third party for whom the money is held."

45. On this basis, if RSUK successfully defends the Claimants' claim, this might be because:

i) neither Claimant has a fiduciary interest in the money;

ii) even if one of the Claimants had some form of equitable interest in the Balance, the relevant Claimant is not entitled to a distribution of the trust fund (or at least RSUK should not be required to make one (*Petrosaudi Oil Services (Venezuela) Limited v Clyde & Co LLP* [2021] EWHC 444 (Ch));

iii) no debt due from RSUK has arisen; or

iv) the relevant debt is not yet payable.

46. It is clear that RSUK denies that either Claimant has any form of equitable interest in the Balance. It was not clear at the hearing whether it contended that no debt had arisen in respect of the Balance, or whether it was said that the debt was not yet payable.

RSUK and Barclays

47. The position here would seem to be rather more straightforward.

i) RSUK has a debt claim against Barclays in the amount of the Balance in the RSUK USD Client Account (*Irwin Mitchell v Director of Revenue and Customs Protection Office* [2008] EWCA Crim 1741, [31]).

ii) Under s.85(a) of the Solicitors Act 1974, Barclays is under no obligation to make any inquiry, and is not deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it.

iii) Under s.85(b), Barclays is not entitled to exercise any right of set-off in relation to the credit balance of that account "in respect of any liability of the solicitor to the bank .. other than a liability in connection with the account."

iv) A solicitor may be authorised to make deductions from sums held on behalf of a client in the client account to meet a bill due from that client where the client has agreed or is treated as having agreed the amount of the bill (*Menzies v Oakwood Solicitors Limited* [2024] UKSC 34). As noted in *Irwin Mitchell v Director of Revenue and Customs Protection Office*, [32] there are rules which "govern the means of exercise of the solicitors' contractual right to payment from the fund, which arose from the agreement and the work done."

48. I do not understand Barclays to be disputing the existence of a debt to RSUK in the amount of the Balance, but to be challenging that the debt is currently payable to the recipient to whom RSUK has instructed payment to be made.

E Is there "reason to believe" the Balance will not be available to RSUK to discharge any costs liability of the Claimants to RSUK?

The test

49. The court has jurisdiction to order security for costs under CPR 25.27(b)(ii) if the claimant is a body corporate and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. This requires more than the court or the defendant being left in doubt as to a claimant's ability to pay, but it does not require a finding on the balance of probabilities (*Jirehouse Capital v Beller* [2008] EWCA Civ 908).

50. In *Chemistree Homecare Ltd v Teva Pharmaceuticals* [2011] EWHC 2979 (Ch), [3], Briggs J said:

> "Inability to pay means to pay when the costs fall due for payment… This calls for an assessment of what the claimants may be expected to have available for payment at the due date or dates in the form of cash or other readily realisable assets…"

51. In that regard, it has been held that where the claimant has illiquid assets, such that it could pay in the end but not with any degree of promptness, the jurisdictional threshold for awarding security will be satisfied: *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852 (Ch), [17]-[18]. The significance of the nature and liquidity of the claimant's assets when determining if the "reason to believe" test is satisfied was also emphasized in *Thistle Hotels Ltd v Gamma Four Ltd* [2004] EWHC 322 (Ch). In this regard, there is a significant difference in approach to the position for natural persons, where difficulty in enforcement of the costs order where enforcement will ultimately succeed is dealt with by giving security for the additional costs of enforcement and possibly for any loss flowing from the delay in the form of increased cost or interest burden (*Danilina v Chernukhin* [2018] EWCA Civ 758, [51(7)]-[51(8)]-[52].

RSUK's position

52. RSUK submits that, notwithstanding the presence of the Balance in the RSUK USD Client Account, there is "reason to believe" that any costs order will not be capable of enforcement against the Balance when the time for payment of any costs order arises. That submission is made against the following background:

i) RSUK first raised concern as to the Claimants' ability to meet any costs order on 21 November 2023, expressing the view in that letter that the Balance was not "readily realisable".

ii) On 21 May 2024, in order (RSUK said) to "test that scenario", RSUK's solicitors wrote to Barclays' solicitors stating that RSUK were considering whether to seek security for costs against the Claimants, and needed in that context to understand whether the Balance was available to RSUK to stand as security. The specific question asked was whether Barclays would be willing to process a payment order for payment to RSUK, to implement a court order requiring the Claimants to pay RSUK's costs or requiring a reduction from the Balance of RSUK's costs.

iii) Barclays' solicitors sought further information in a letter of 5 June 2024. In response, RSUK's solicitors said that the premise of the order was that it would become entitled to an indemnity under the terms of the escrow agreement in respect of certain costs incurred and would obtain a costs order for the costs of the litigation.

iv) In response, Barclays' solicitors said that it was Barclays' view at that time that complying with an instruction to apply the Balance in these circumstances "may damage its reputation or break a law, regulation or sanction, for similar reasons to those that apply in respect of the payment instruction that is the underlying subject matter of proceedings".

v) On 11 December 2024, RSUK sent Barclays a further letter asking what Barclays' position would be if the court made an order requiring Barclays to pay the Balance or part of it to RSUK in discharge of any costs order.

vi) The response of 17 December 2024 confirmed that Barclays would, in principle, comply with such an order, but said that Barclays could not commit at that point to how it would respond to a hypothetical order which had not in fact been made, stating:

> "In particular, Barclays would need to satisfy itself that any costs order requiring it to deduct an amount from the Escrow Funds in order to make a payment to your client would not result in the risk of prosecution in another jurisdiction, and that the terms of such an order contained adequate provision (including liberty to apply) for any relevant party to seek and obtain any licenses or consents necessary to comply with the order".

Does Barclays' position in relation to processing instructions for the payment of the Balance impact on the Claimants' ability to pay any costs order made in RSUK's favour?

53. I will proceed for the purposes of this application on the basis that RSUK cannot satisfy any costs order in its favour simply by setting-off the amount due against any liability to the Claimants to pay the Balance. Clearly if no debt has arisen under the Escrow Agreement, there would be no liability against which the costs order could be set off. Ordinarily, at least, if a debt is due, but at the date of the costs order is not yet payable, then it is not available for set-off in law or equity: *Smith, Fleming & Co.'s Case* (1866) 1 Ch. App. 538.

54. Mr Turner submitted that even if Barclays refused to transfer amounts from the RSUK USD Client Account to RSUK's office account, this would not prevent the Claimants "paying" RSUK, it being sufficient that RSUK received "the unconditional right to the immediate use of the funds transferred" into the RSUK USD Client Account (quoting from Brandon J in *Tenax Steamship Co v Owners of the Motor Vessel Brimnes (The Brimnes)* [1983] 1 WLR 386). In reliance on two authorities dealing with payments into nominated bank accounts under contracts where the recipients' ability to use the funds paid into those accounts was curtailed by sanctions, Mr Turner submitted that the fact that Barclays might limit RSUK's ability to apply the Balance did not prevent payment from having taken place.

55. The first of those cases was *Havila Kystruten AS v STLC Europe Twenty Three Leasing Ltd* [2022] EWHC 3166 (Comm), [97], in which Stephen Houseman KC rejected a contention that there had been no payment for the purposes of four finance bareboat charterparties when the contractually designated accounts into which the payments were made were in jurisdictions in which the payee was subject to sanctions. At [96]-[97], Mr Houseman KC said:

> "The defendants argue that the concept of payment, or indeed receipt, requires that the payee or recipient has a right to the immediate use of the funds. Reliance is placed upon *The Brimnes* [1973]1 WLR 386. The answer to this lies in what the parties agreed here. They agreed that payment into the bank account described in clause 6.6(b) was required. They agreed nothing else about what payment or receipt meant or required. They therefore agreed that if such payment was made, this was sufficient for all contractual purposes, which envisaged receipt of payment.
>
> Whether or not the payee, here the lessor, has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial to this contractual analysis. This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor, i.e. the lessee, which is what matters most."

56. The second was a decision of mine, in a very similar commercial context, *Gravelor Shipping Ltd v GTLK Asia M5 Ltd* [2023] EWHC 131 (Comm), in which I held at [83]:

> "… I do not accept Mr Smith KC's submission that if, because of characteristics or attributes of the payee (here the fact that they became a Sanctions Target), the payee may have difficulty in accessing (or indeed be wholly unable to access) the funds if paid into a particular bank account, it follows that there has been no payment within the ordinary meaning of that concept, or in accordance with clause 9 of the Charterparties:
>
> (i) Brandon J in *The Brimnes* was addressing the issue of when the process of payment was complete, and whether hire had (yet) been paid when a transfer order was received by the payee's bank correspondents, or only when the funds were actually credited to the payee's bank …
>
> (ii) *The Chikuma* is another case in which the issue was whether matters intrinsic to the receipt and processing of the payment in the banking chain, before that process had completed its ordinary course (such that the amount

was not yet capable of earning interest for the payee), meant that there had been no payment. Lord Bridge approved Robert Goff J's conclusion that Brandon J's reference to 'unconditional' meant 'equivalent to unfettered and unrestricted'.

(iii) In the present case, however, payment into an account of a bank which would seek to comply with its obligations under the EU and US sanctions regimes would not leave the payment process incomplete, nor would the Owners' difficulty in accessing those funds (or perhaps the impossibility of doing so) result from any feature of the payment process. Instead, it would be the result of an entirely external limitation arising from a perceived characteristic of the payee.

(iv) I understood that Mr Smith KC was ultimately disposed to accept that payment into a bank account which could not be accessed by the payee because of a freezing injunction would still constitute payment and give the payor a good discharge. Whether accepted or not, the proposition is correct, and even applies when it is the paying party who has obtained the freezing order as the 'ship sale' freezing order cases show (*The P* [1992] 1 Lloyd's Rep 470, 472; *Ateni Maritime Corp v Great Marine Ltd (The Great Marine)* [1990] 2 Lloyd's Rep 245, 249).

(v) I also understood Mr Smith KC to accept that, if the nominated account had been an account which was 'frozen' in the sense in which the term is being used in this case (i.e. an account with a bank which will seek to comply with the EU and US sanctions regimes), payment into that account would nonetheless constitute payment for the purposes of the Charterparties. That was the conclusion reached (in my view, correctly) by Mr Houseman KC sitting as a deputy judge of the High Court in *Havila Kystruten AS v STLC Europe Twenty Three Leasing Ltd* [2022] EWHC 3166 (Comm), [97] …

(vi) In my view, the position would not change if the account had become frozen after nomination. By paying into it, Gravelor would have done all that the Charterparties required.

(vii) It is clear, therefore, that the mere fact that the transfer of funds is made into a bank account from which the Owners will have great difficulty withdrawing them does not *of itself* mean that payment has not taken place for the purposes of the Charterparty."

57. The premise of this argument is that RSUK is holding "more than US$13m of the Claimants' money" in the RSUK USD Client Account, and that if that amount or some part of it is "re-designated" as RSUK's rather than the Claimants, payment will have been made even if RSUK is unable to transfer the re-designated amount from the client account to the office account. "Re-designation" appeared to involve a change in the title to the funds, and, more specifically, the Claimants surrendering any beneficial interest so that RSUK became the owner in equity as well as in law of the relevant balance, or, more specifically, the chose in action constituting it.

58. This was an interesting argument. However, it seems to me to involve a significant number of difficulties, and I have not found it sufficiently compelling to be able to

conclude, on an interim security for costs application, that there is for this reason no "reason to believe" the Claimants will be unable to pay any costs order in RSUK's favour for this reason alone.

59. First, it assumes that the Claimants (or at least Virgo) has a beneficial interest in the Balance. That is not an issue I am able to decide, but there is a considerable body of authority which I have referred to above which might weigh against it. If the actual position is that the Claimants have no beneficial interest in the Balance, but that the Claimants are either owed no debt at all by RSUK, or at least no such debt is payable when RSUK obtains a costs order in its favour, with RSUK having a debt claim against Barclays (albeit constituted by a bank account which, for SRA purposes, is subject to a number of regulatory limitations), it is not clear to me what it is said the Claimants could "re-designate" and what this would amount to in legal terms.

60. Second, without reaching a final decision on the matter, it seems to me that the better view is that RSUK could not re-designate funds in the RSUK USD Client Account such that they would no longer constitute "client monies" for SRA Accounting Rules purposes without transferring the relevant amount out of the client account, given the obligation in Rule 4.1 to "keep client money separate from money belonging to the authorised firm." Further Rule 4.3 suggests that when a solicitors' firm wishes to use money in a client account to pay fees due to it from the client, a transfer from the client account is necessary to make the payment (Rule 4.3 referring to the solicitor "transfer[ing] any client money from a client account to make the payment"). While I accept that Rule 2.1(d) might suggest that "client money" ceases to be "client money" once the solicitor has delivered a bill, that provision appears to concern money specifically paid to the solicitor by a client properly so-called on account of fees. Even in this context, the mere delivery of the bill is not sufficient to effect payment (*Menzies v Oakwood Solicitors Ltd* [2024] UKSC 34), so that Mr Turner's submission that "as soon as a bill is delivered, the funds held on account of costs to which that bill relates cease to be client money" cannot be right. The argument of the unsuccessful solicitors in that case was not that payment took place while the funds were still in the client account, but when, following the submission of the bill, they were transferred to the office account: [33]. In the same case, the Court of Appeal at [2023] EWCA Civ 844 had reached a different conclusion as to the significance of the delivery of the bill, but were content at [41] to adopt a definition of payment as "a transfer of money (or its equivalent) in satisfaction of a bill with the knowledge and consent of the payer."

61. Third, payment ordinarily requires acceptance on the part of the payee (Brindle and Cox, *Law of Bank Payments* (5th), [1-002] and *TSB Bank of Scotland Ltd v Welwyn Hatfield District Council* [1993] 2 Bank LR 267). If so, it would be open to RSUK to refuse to accept payment by a "re-designation". While a wrongful refusal to accept payment might give the putative payor a defence of tender, it is far from clear that a refusal by RSUK of payment by the "re-designation" of amounts in an account which it is unable to access (which is the present assumption) would be regarded as wrongful.

62. Fourth, I accept that the authorities on payment generally require the payee to have the "unconditional right to the immediate use of the funds transferred": *The Brimnes* [1973] 1 WLR 386, 402 and *Awilco of Oslo A/S v Fulvia SpA di Navigazione of Cagliari (The Chikuma)* [1981] 1 WLR 314, 318-320, which RSUK does not presently have in relation to that part of the Balance referable to the Escrow Agreement. The decisions in *Havila Kystruten* and *Gravelor* involved payments into contractually designated

accounts, where the payee's use of the fund was constrained by characteristics of the payee existing independent of the act of payment. The former feature is not applicable to any purported discharge of a costs order in RSUK's favour, and the latter is much less clearly present, if present at all, because Barclays' concerns arose out of characteristics of the Claimants rather than RSUK. Further, the issues restricting RSUK's unconditional use of the funds have arisen prior to any transfer from the current location of the funds, rather than as a result of such a transfer.

63. Fifth, it is open to the court to make it clear what must be done in order for payment of a court order to take place, and oust what might otherwise be permissible means of payment in the process: *Parsdome Holdings Limited v Plastic Energy Global Ltd* [2024] EWCA Civ 1293, [43]. If RSUK successfully defends the claim, on the premise that it has done all it has to do under the Escrow Agreement and that Barclays' refusal to process the payment instruction it gave is something it is not responsible for, there must at least be a real possibility that RSUK could persuade the court to order that the Claimants should not be able to discharge any costs order in its favour by simply purporting to appropriate part of the Balance to RSUK.

64. Finally, if the Claimants had had a bank account with Barclays, and sought to make an intra-bank transfer to an RSUK account with Barclays (a situation not different in substance from the Claimants' characterisation of the present facts), there could clearly be no payment unless the bank had decided to make the transfer, had the payee's actual or apparent authority to accept the transfer and accepted those funds for the payee's account (Brindle and Cox, [3-125], *The Brimnes* (an intra-bank transfer case) and *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] AC 850). Brindle and Cox note that a scenario where the bank might decide not to accept the transfer on the payee's behalf is if "the bank may be concerned that it will break the law by crediting the payee's account, e.g. where regulations prohibit credits being made to the accounts of certain foreign nationals" ([3-133]).

65. Mr Turner's second ground for submitting that RSUK had not shown that there was "reason to believe" that the Balance would not be available to discharge any costs order in RSUK's favour rested on what was said to be the inadequacy of the evidence as to how Barclays would act in the event that such a costs order was made. I have concluded that this aspect of the argument is best considered at the second stage of the enquiry, namely whether I am satisfied "having regard to all the circumstances of the case that it is just to make such an order". One reason for approaching matters in this way is that Barclays is not party to, and did not make any submissions on, the security for costs application, and yet I am being asked in the context of this issue to make findings about Barclays and its likely actions. Another is that my assessment of that issue is heavily influenced by the nature and weight of the evidence before the court.

Having regard to all the circumstances of the case it is just to make an order for security for costs?

66. I did not understand RSUK to suggest that if Barclays agreed to transfer the funds out of the RSUK USD Client Account to RSUK's office account, RSUK would be unable to apply that fund to discharge a costs order made in its favour against the Claimants (the Claimants having confirmed in correspondence that they do not oppose such a course, albeit I will ask the Claimants to give an undertaking to this effect before finally disposing of the security for costs application).

67. In these circumstances, the court must look with care at the suggestion that Barclays would not make such a transfer for the purpose of discharging an order made by this court in RSUK's favour, and that, for this reason, the Claimants who have already transferred over USD11m of money into a bank account in this jurisdiction, which neither RSUK nor Barclays contend is "theirs" in an economic sense, should be required to transfer a further USD6m to provide security for the costs which RSUK and Barclays will incur in these proceedings.

68. I have already summarised the material relied upon by RSUK as to Barclays' likely attitude in such circumstances at [52] above. It is fair to say that I have found that limited material far from compelling:

    i) Barclays' initial response was a letter from its solicitors stating that complying with an instruction (presumably from RSUK) to apply the Balance in these circumstances "may damage its reputation or break a law, regulation or sanction, for *similar* reasons to those that apply in respect of the payment instruction that is the underlying subject matter of proceedings" (emphasis added).

    ii) I found that a surprising statement. The underlying subject-matter of the proceedings was a refusal to make a payment to *the Claimants*, one of whom is an OFAC sanctioned entity. However, a payment of funds to an RSUK account for the purpose of indemnifying RSUK against the costs it had itself incurred, or applying the funds to Barclays itself to discharge any costs liability RSUK may have to Barclays, would appear to be a very different thing from the circumstances of the payment instruction in issue in the litigation. Further, to the extent that Barclays are currently resisting RSUK's payment instruction on the basis of a failure to provide information about the Claimants, similar issues are unlikely to arise in relation to payment to RSUK, an established customer.

    iii) When asked in correspondence how it would respond if the English court made an order for payment of the Balance or part of it to RSUK in discharge of any costs order, Barclays offered a very general response about needing "to satisfy itself that any costs order requiring it to deduct an amount from the Escrow Funds in order to make a payment to your client would not result in the risk of prosecution in another jurisdiction, and that the terms of such an order contained adequate provision (including liberty to apply) for any relevant party to seek and obtain any licenses or consents necessary to comply with the order".

    iv) However, the position taken in the correspondence, sent in the context of a proposed application by RSUK for security for costs, goes appreciably further than Barclays' pleaded case on this issue, which does not mount any positive challenge to RSUK's pleading that if it wins in the main action, it will seek a court order to this effect (see [26]-[28] above).

    v) When considering the limited information provided in two short solicitors' letters as to why Barclays might refuse to pay a debt due to RSUK for the purpose of enabling RSUK to obtain the discharge of an order of this court, it is important to remember that the legal jeopardy referred to arises by reason of foreign laws which have no territorial application in this jurisdiction, in circumstances in which Barclays has agreed that the English court has exclusive jurisdiction over disputes arising in relation to the RSUK USD Client Account which is held here.

vi) When faced with arguments of this kind, the English court carefully scrutinises the realities of the risk of foreign legal jeopardy relied upon, generally on the basis of expert evidence the cogency of which can be tested by the court. That can be seen when procedural orders by the English court are opposed on this basis (see e.g. *O v C* [2024] EWHC 2838 (Comm) in relation to an order to pay the proceeds of sale into court following the sale of cargo under s.44 of the Arbitration Act 1996 and *Bank Mellat v HM Treasury* [2019] EWCA Civ 449, [63] and the authorities collected in that case in relation to orders for disclosure). That same approach was adopted by Miles J when a trustee sought to resist an order requiring it to pay the trust fund into court for the purpose of making some part of it available to a sanctioned beneficiary in *Petrosaudi Oil Services (Venezuela) Limited v Clyde & Co LLP* [2021] EWHC 444 (Ch), [58]. However, there is no evidence of this kind in this case.

vii) Further, in explaining its concerns to date, Barclays has laid significant emphasis on the need to convert USD into sterling for the purposes of transferring the Balance or part of it into Zaiwalla & Co Limited's GBP office account or RSUK's GBP office account. This is on the basis that conversion would involve the use of Barclays' personnel and offices in New York, within the territorial scope of US sanctions as recognised by English law. However, it is not clear to me whether RSUK has a non-client USD office account with Barclays in this jurisdiction as well as the RSUK USD Client Account, and, if not, whether it could open one. It has been noted in litigation concerning previous US sanctions purporting to have extra-territorial effect that an intra-bank transfer between two accounts of the same branch of a London bank will not involve any acts on US territory. In *Libyan Arab Bank v Bankers Trust Co* [1989] QB 728, 750-52, Staughton J noted:

> "If Bankers Trust held an account with the A bank which was in credit to the extent of at least $131m, and the Libyan Bank also held an account at the A Bank, it would require only book entries to achieve an account transfer … The obligation of Bankers Trust is extinguished and the obligation of A bank to Bankers Trust extinguished or reduced; the obligation of A bank to the Libyan Bank is increased …
>
> This is quite simple, as has been explained. It involves no action in the United States. But it cannot take place unless the Libyan Bank are able to nominate some beneficiary who also has an account with Bankers Trust London."

viii) This possibility was not addressed in the correspondence, no doubt because it was not raised before the hearing. However, it is a reminder that major UK banks have been navigating the issues raised by US sanctions which purport to have extra-territorial effect for some years, and have accumulated significant know-how. This is a case in which effort and ingenuity must be applied in the attempt to search for means by which the Balance could be made available to discharge any costs order made by this court, not solely in the search for difficulties.

69. In these circumstances, the argument that Barclays would resist making a payment from the Balance to RSUK for the purposes of satisfying a costs order of this court in RSUK's favour appears thin, and its ability to resist such a payment in the face of an

order of this court requiring transfer of the relevant part of the Balance for this purpose particularly so.

70. In reply, Mr Khurshid KC effectively threw down the challenge as to the basis on which such an order might be made. It is not possible to provide a definitive response on this issue in the absence of argument on this point, but I am not persuaded that that forensic vacuum can be accorded much weight in the discretionary evaluation.

71. The court is not unfamiliar with cases in which it is argued that a financial obligation is not amenable to execution by a third party debt order (or, I might add, set off) because it is not yet payable. The court's power to appoint a receiver by way of equitable execution to take control of the asset and requiring payment to the receiver has been exercised in a variety of contexts to address similar issues, reflecting the strong public policy that satisfaction of judgments is not prevented by technical arguments.

72. The width of the court's powers under s.37(1) of the Senior Courts Act 1981 was emphasised by the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, in which the two requirements for granting relief were (i) an interest of the applicant which merited legal protection and (ii) a legal or equitable principle which justified granting relief. While primarily concerned with the power to grant injunctions, the observations of the Privy Council are equally relevant to the power to appoint receivers (see *Kerr & Hunter on Receivers and Administrators (*22nd), [2-46]).

73. A receiver can be appointed over an asset which is not amenable to legal execution (*Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303). In *Masri*, a receiver was appointed over future debts which could be subject to attachment at law (debts which had yet to accrue, rather than simply debts which had accrued but were not yet payable). In *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm), a receiver was appointed over assets over which the judgment debtor had de facto control. In *Merchant International Company Limited v Natsionalna Aktsionerna* [2015] EWHC 1930 (Comm), a bank held funds as principal paying agent for a note issue, in circumstances in which there was no debt due from the bank to the judgment debtor, but the bank itself claimed no interest in the fund (which had been paid to it by the judgment debtor). At [26], Stephen Hofmeyr KC addressed the argument "that, even if the contractual arrangements between [the judgment debtor] and the Bank have successfully prevented [the judgment debtor] acquiring any legally enforceable rights at all against the Bank, [the judgment debtor] nevertheless has a sufficient expectation of being paid by the Bank to make it appropriate for the court to appoint a receiver in respect of that expectation". Mr Hofmeyr KC confirmed he would have been willing to appoint a receiver on this basis as an incremental development of the court's jurisdiction, although he did not find it necessary finally to decide the issue.

74. The strong public policy of the English court that its orders (or awards of arbitral tribunals in that context) should be enforced is frequently identified as a factor justifying the appointment of a receiver (e.g. *Cruz City 1 Mauritius Holdings v Unitech Ltd (No.2)* [2014] EWHC 3131 (Comm), [21] and [47(a)] and *Bacci v Green* [2022] EWCA Civ 1393, [25]-[26]). It has been noted that the jurisdiction will normally not be exercised "unless there is some hindrance or difficulty in using the normal processes of execution" (*B Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2019] EWHC 530 (Ch), [7]).

75. Pulling these threads together, in this case the evidence that Barclays would face real legal jeopardy in making a payment from a bank account in this jurisdiction to RSUK to discharge a liability due to RSUK arising by reason of an order of this court is thin and unpersuasive. Further, to the extent a court order is necessary, there must be very strong prospects that, rather than throw up its hands in despair and do nothing, a court would be able to order relief, the effect of which would be to enable RSUK to discharge any costs order in its favour from a fund in a bank account in its name which neither RSUK nor Barclays contend is, for any relevant purposes, economically "theirs", and which would involve the use of an asset to discharge the Claimants' costs' liability in which the Claimants have the principal economic interest.

76. Against that background, I am not persuaded that it would be just to make the order for security for costs which RSUK seeks.

77. I have not, for this purpose, placed reliance on any of the other factors relied upon by the Claimants as part of the discretionary mix. I am not persuaded that the application was "tactical" in any pejorative sense (and I would expect most steps in litigation to be tactical to some degree) nor, in the absence of any stifling argument, can it be said to be oppressive. This is not one of those cases where the merits are sufficiently clear to be a factor in themselves, and that includes the suggestion that RSUK are somehow the authors of their own misfortune.

If security for costs had been appropriate, should the court order security for the costs of the Additional Claim?

78. That is sufficient to dismiss this application. Had it proceeded further, an issue would have arisen as to whether any order for security for costs should include the costs which RSUK might incur and be ordered to pay to Barclays in the Additional Claim. As I heard argument on this point, I will deal with it.

79. It is clear that in an appropriate case, such an order can be made. In *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120, Sales LJ summarised the position as follows at [24]-[25]:

> "Mr Lewis submitted that although these costs are currently Glencore's costs and not Addax's costs, once Addax are ordered to pay them they become Addax's costs and are therefore within CPR r25.12 which entitled a defendant to apply 'for security for <u>his</u> costs' (underlining supplied). An order for security for costs looks inevitably forward to the time when, at the end of the trial, a party is ordered to pay costs. If Sarpd loses, it is unlikely that Glencore would get an order for costs directly against Sarpd who had not sued it; it was much more likely that Addax would be held liable to pay Glencore's costs. Addax's costs would then include not merely its own costs of defending Sarpd's claim but also its own costs in the Part 20 proceedings and the costs for which it was held liable in those proceedings against Glencore.
>
> We consider this approach to be correct inasmuch as by the time the court makes its final order as to costs it will have determined (if Sarpd loses) that Glencore has won as against Addax. It would inevitably award costs to Glencore to be paid by Addax; it is highly likely that Addax will be entitled to recover those costs from Sarpd (as well as its own costs of defending itself against Sarpd and of suing

Glencore). Those costs then become Addax's own costs and thus costs for which, pursuant to CPR r.25.12 , it ought to obtain security if it can come within CPR r25.13".

80. Sales LJ noted that, in the "back-to-back" claims before him, the failure of Sarpd's claim against Addax meant that Addax's claim against Glencore would fail. Mr Turner submitted that the effect of the Court of Appeal's decision was that only in such circumstances would security for the costs of the additional claim be appropriate. However, Sales LJ's reasoning was that the failure of Addax's additional claim would "inevitably" lead to a costs order in Glencore's favour, and it was "highly likely" that Sarpd would be ordered to indemnify Addax against those costs. That did not involve, in my view, the Court finding "inevitability" of "back-to-back" liability nor a "high likelihood" of the claimant being ordered to pay the additional party's costs if its own claim failed before an order could be made requiring the claimant to provide security for those costs.

81. Whenever a court makes an order for security for costs, which is inherently forward-looking, there may be a number of contingencies which will affect the amount of the defendant's costs recovery (and hence the level of costs exposure to be secured). Most obviously, there is the amount of costs which will be incurred and awarded on assessment. In *Bluewaters Communications Holdings LLC v Bayerische Landesbank Anstalt Des Offentlichen Rechts* [2018] EWHC 78 (Comm), [30], Popplewell J held that the test to be applied in this context was as follows:

> "The test which I apply is essentially that I should award the sum which the court considers the applicant would be likely to recover in a detailed assessment if awarded costs on a standard basis following trial having regard to the factors set out in the relevant CPR rule 44.5(3). That was the test adumbrated in *Vald Nielson Holding AS v Baldorino* and is commonly applied in this court."

That was a reference to a characteristically cogent Commercial Court judgment by the late Robin Dicker QC reported at [2017] EWHC 1033 (Comm), [13], where he stated:

> "Under CPR 25.13(1)(a) the court has a discretion to award security in an amount which it considers just having regard to all the circumstances of the case. The appropriate amount will generally be the sum which the court considers that the applicant would be likely to recover in a detailed assessment if awarded costs on a standard basis following the trial, having regard to the factors set out in CPR 44.5(3)."

That test has been applied in a number of authorities over the years (e.g. *Procon (Great Britain) Ltd v Provincial Building Co Ltd* [1984] 1 WLR 557, 571B).

82. As a distinct enquiry within that overall question, there is the issue of whether an order for costs against the claimant will be made on a standard or indemnity basis. It had at one point been suggested that a "reasonable possibility" rather than "speculative possibility" that costs would be awarded on an indemnity basis was sufficient (*Danilina v Chenukhin* [2018] EWHC 2503 (Comm), [14]), or a "real possibility" (*BSG Resources Ltd v Vale SA* [2019] EWHC 2456 (Comm), [36]-[37]). In *Phones 4U Ltd v EE Ltd* [2020] EWHC 1943 (Ch), Roth J addressed the test in greater detail. He held that it was not sufficient that it could not be said at the time of the application for

security that an order for indemnity costs was not realistically arguable, saying this "puts the threshold much too low" ([24]). At [31], the test he applied was whether an order for costs on an indemnity basis was "such a significant possibility or, to put it another way, that there is a real prospect of such an order so as to justify a requirement to provide security for costs on that basis."

83. Finally, so far as security for the costs of an additional claim is concerned, the relevant test was considered by Cockerill J in *Maroil Trading Inc v Cally Shipholdings Inc* [2020] EWHC 3041 (Comm). Cockerill J applied a "likelihood" test, while noting at [31]:

> "In the end, although this is obviously not an entirely straightforward point, I have come to the view that, as a matter of jurisdiction, the test may well be one of likelihood, as appears to be indicated, albeit in passing, by *Sarpd*, or it might be said to be something rather lower. Though, given the seriousness of having to provide security, it is unlikely to be very low, as in a mere possibility, and it is likely to be not unadjacent to a likelihood. Alternatively, if the test is somewhat lower, it would seem to me right that the lesser degree of likelihood goes to the exercise of the discretion, given that the authorities seem to be quite clear that there are circumstances in which, in Part 20 claims, costs should be recoverable and there are circumstances in which they should not. So there must be a sliding scale."

84. I am satisfied that something distinctly more than a "real possibility" of a costs order against a claimant for the costs of liability of the defendant in an additional claim if the claimant's claim fails is required before it would be appropriate for the court to order a claimant to provide security for costs of those proceedings. That is consistent with Roth J's considered assessment of the position so far as ordering security on an indemnity basis is concerned, and with the views expressed in *Sarpd* and *Maroil*. For my part, I struggle to see why different tests fall to be applied to different contingencies when working out the amount of security required for the costs order a defendant would obtain if the claim fails, although it is important in all cases to avoid going into the merits of a case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure (*Danilina v Chernukhin* [2018] EWCA Civ 1802, [69]).

85. Just as a decision on whether to order security by reference to an indemnity assessment of the recoverable costs is likely to involve looking at the broad nature of the allegations in a case (rather than their individual likelihood of success and failure) and deciding whether, if the claimant fails, there is a sufficient prospect of such an order so as to justify a requirement to provide security for costs on that basis, so too when security is sought for the costs of an additional claim, the court will need to look at the broad nature of the allegations in both the claim and additional claim, and ask whether, if the defence succeeds in the main claim, there is a sufficient prospect of the claimant being ordered to indemnify the defendant against the costs of the additional claim to justify an order for security for costs on that basis.

86. Mr Turner's principal reason for suggesting that this requirement is not made out in this case is that there are realistic scenarios in which RSUK could defeat the Claimants' claim, and yet succeed in the Additional Claim. I accept this – an obvious one being if RSUK establishes that its only obligation under the Escrow Agreement is to pass on an

instruction to Barclays, and yet Barclays is in breach of contract for not processing that instruction.

87. However, the scenario which RSUK needs security for is one in which its claim against Barclays fails. In that scenario, I am satisfied that there is a high likelihood that Barclays would obtain an order for its costs against RSUK, and that RSUK would obtain an order against the Claimants in respect of those costs. Further, it is clear that RSUK's claim against Barclays has only been brought because of the Claimants' claim against RSUK, and the Additional Claim does not raise independent issues, only issues raised by way of response to the Claimants' claims. In these circumstances, had I been persuaded that it was appropriate to exercise the discretion to award security, I would have been persuaded that the security ordered should include security for costs of the Additional Claim.

88. Finally, I should mention that there was no suggestion that the issues raised by the Balance when considering whether to order security for costs might justify a different approach as between RSUK's application for security for the costs of defending the Claimants' claim, and security for the costs of the Additional Claim including those payable to Barclays. I have not therefore considered this issue.

The amount and timing of security

89. I also heard submissions as to the amount and timing of security which I will also address.

90. RSUK sought security as follows (with some rounding):

Costs to the completion of disclosure

i) £886,870 for its own costs of defending the claim to completion of disclosure (£567,875 incurred and £318,995 to be incurred).

ii) £220,740 for RSUK's costs of the Additional Claim to completion of disclosure (£146,810 incurred and £73,930 to be incurred).

iii) £660,550 for Barclays' costs of the Additional Claim to completion of disclosure (£317,771 incurred and £342,779 to be incurred).

Costs to the completion of the PTR

iv) £917,304 for its own costs to completion of the PTR.

v) £176,371 of RSUK's costs of the Additional Claim to completion of the PTR.

vi) £640,402 for Barclays' costs of the Additional Claim to completion of the PTR.

Costs to the end of the trial

vii) £1,229,962 for its own costs to the end of the trial.

viii) £409,988 of RSUK's costs of the Additional Claim to the end of the trial.

ix) £935,078 for Barclays' costs of the Additional Claim to the end of the trial.

91. A detailed costs budget was provided for RSUK's costs. Barclays' costs are not broken down but provided in headline form in a letter to RSUK.

92. Mr Turner took two issues with the amount of security sought in respect of RSUK's costs:

i) The rates claimed were above Guideline rates, particularly for lower grade fee earners.

ii) Too much of the work was being done and projected to be done by Grade A fee earners.

93. The Grade A rates claimed are £680, £620 and £545 as against the current guideline Grade A rate of £566. The Grade C rate claimed is £460 as against the current guideline rate of £299.

94. It is right to say that a significant part of the work done is based on a Grade A fee-earner with a rate of £620 and that the involvement of Grade A fee earners is high:

i) On statements of case and CMC costs, of a total of £540,000, one Grade A fee earner amounts to £245,000. For disclosure, Grade A fee earners are responsible for 131 hours of a total of 361 hours, and total fees of £127,000 of a total of £214,000.

ii) For witness statements, Grade A fee earners are responsible for about 230 hours of a total of 357 hours, and total fees of £138,000 of a total of £191,555.

iii) For expert reports, Grade A fee earners are responsible for about 204 hours of a total of 267 hours, and total fees of £141,000 of a total of £169,000. I should mention that the expert fees include one expert (on escrow agent terms) which I am not presently persuaded is necessary.

iv) For PTR costs Grade A fee earners are responsible for about 67 hours of a total of 108 hours, and total fees of £40,000 of a total of £56,000.

v) For trial preparation and trial costs, Grade A fee earners are responsible for about 480 hours of a total of 734 hours, and total fees of £290,0000 of a total of £386,000.

95. I accept that some adjustment is required to reflect these facts. While this is necessarily a broad brush analysis, I am satisfied that a reduction of 30% will address those two issues. I have also rounded the figures down, reflecting the broad brush nature of the exercise and the scope for challenges on assessment.

96. So far as Barclays' costs are concerned, I do not have hourly rates or a breakdown. In my view, it is reasonably likely that its recoverable costs will be lower than RSUK's costs of defending the Claimants' claim, given the narrower scope of the Additional Claim, and I have arrived at a conservative estimate on that basis.

97. On that basis, RSUK's own costs for the three stages would be as follows:

Costs to the completion of disclosure

i) £620,000 for its own costs of defending the claim to completion of disclosure.

ii) £150,000 for RSUK's costs of the Additional Claim to completion of disclosure.

iii) A reasonable estimate for Barclays' recoverable costs of the Additional Claim to completion of disclosure is £400,000.

Costs to the completion of the PTR

iv) £610,000 for its own costs to completion of the PTR (reflecting an additional deduction for the expert witness I have not allowed and associated costs).

v) £120,000 of RSUK's costs of the Additional Claim to completion of the PTR.

vi) A reasonable estimate for Barclays' recoverable costs of the Additional Claim to completion of the PTR is £400,000.

Costs to the end of the trial

vii) £860,000 for its own costs to the end of the trial.

viii) £286,000 of RSUK's costs of the Additional Claim to the end of the trial.

ix) A reasonable estimate for Barclays' recoverable costs of the Additional Claim to the end of the trial is £550,000.

98. It was agreed that security should be provided in three tranches. Had I been persuaded to order security for costs, I would have ordered security in three tranches as follows:

i) £1,170,000 within 14 days.

ii) £1,130,000 within 14 days from completion of disclosure.

iii) £1,696,000 within14 days from completion of the PTR.