JUDGMENT : Mr Justice Coulson: TCC. 6th March 2008.

1. The Defendants each seek security for costs against the Claimant pursuant to CPR Part 25 and s.726(1) of the Companies Act 1985. The Claimant accepts that, in this case, it is appropriate that it provide such security. There are, however, disputes between the parties as to the amount of the security to be provided and those disputes raise an interesting issue as to the extent, if at all, to which a party seeking security for costs can include within those costs the costs of a pre-action mediation.

2. The background to the litigation is as follows. The claimant was a printing company specialising in high quality print and reprographic products. In 2001, it purchased a large printing press from the 1st Defendant. The purchase was facilitated by finance provided by the 2nd Defendant. The Claimant alleges that the press was defective, and that, in consequence, it suffered extensive losses. Those losses are the subject of these proceedings.

3. The disputes about the alleged defects with the press had been ventilated in correspondence in 2004. In January 2005 there was what has been called a detailed mediation which unfortunately failed to resolve the disputes between the parties. In July 2005 the Claimant was placed in administration and the following year, on 13 July 2006, it was placed in liquidation.

4. These proceedings were commenced on 25 May 2007 in the TCC in Salford. The parties transferred the action by consent to the TCC in London in October 2007. That was the first time that the suggestion of security was raised by the Defendants. The 2nd Defendant's solicitors wrote on 17 October to identify it as an issue. On 2 November 2007, the Claimant's solicitors asked for details of what sum was being sought and the form and manner in which it was suggested that security be given. In response, on the same day, the 2nd Defendant's solicitors identified the sum of £20,000. In their response on 5 November 2007, the Claimant's solicitors said that they would take instructions and revert. Thereafter, nothing happened until the formal application was made on 5 February 2008. I note that at no time was a draft bill provided by the 2nd Defendant's solicitors for consideration by the Claimant's solicitors.

5. The same pattern can be discerned in the correspondence involving the 1st Defendant's solicitors. They also raised the question of security in mid October. They failed to respond to the Claimant's solicitors' letter of 2 November asking for details of the amount and form of security sought. Their application was made on 18 February 2008.

6. There is a significant discrepancy between the sum sought by way of security on the part of the 1st Defendant, and the sum sought by the 2nd Defendant. The 2nd Defendant does not seek any pre-action costs. It limits is claim for security today to £37,000, in respect of the costs incurred since the start of the proceedings up to today, and the projected costs up to the exchange of witness statements, which will take place in May. The £37,000 is an agreed figure: the only point between the Claimant and the 2nd Defendant is whether the Claimant should provide security for the period between the commencement of these proceedings and 5 February, the date that the formal application for security was made.

7. The 1st Defendant has put forward a draft bill in the sum of £363,014. That figure, which covers costs from the pre-action period, all the way up to the end of the trial, constituted the sum originally sought by way of security. Although, in recent days, the 1st Defendant has modified its demands for security, it maintained before me a request for security in the sum of £160,000 in respect of the costs incurred prior to the commencement of proceedings and the costs of these proceedings up to but not including the trial itself.

RELEVANT PRINCIPLES

8. Section 726(1) of the Companies Act 1985 provides as follows:-

   "Where in England Wales a limited company is [claimant] in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

9. The subsequent authorities establish:-

   a) Questions of delay are relevant both to the principle of awarding security and the amount of security to be granted: see ***Sir Lindsay Parkinson & Co v Triplan*** [1973] QB 609.

   b) The court is entitled to refuse to make an order for security for costs if it would result in oppression, in that the claimant company would be forced to abandon a claim which has a reasonable prospect of success: see ***Aquila Design (GRB) Products Ltd v Cornhill Insurance plc*** [1988] BCLC 134. However, a claimant seeking to avoid the order for security on this ground must satisfy the court that in all the circumstances it is probable that the claim would be stifled: see ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 3 AllER 534.

   c) It is usually impossible and/or inappropriate for the court to engage in any consideration of the merits of the underlying claim: see ***Fernhill Mining Ltd v Kier Construction Ltd*** [2000] C.P. Rep 69.

THE ISSUES

10. The issues which arise for me to decide on this application are:

    a) whether the amount of security should include pre-action costs (1st Defendant's application only);

    b) whether the amount of security should include the costs from the commencement of these proceedings to the making of the security applications (both applications);

    c) the appropriate quantum of the security awarded (1st Defendant's application only).

    I deal with each of those issues in turn below.

PRE-ACTION COSTS

11. In certain circumstances, the costs incurred by a party prior to the commencement of litigation can be recovered as costs: see ***In re Gibson's Settlement Trusts*** [1981] 1 Ch.179. In a more recent example of that principle, in **McGlinn v Waltham Contractors** [2005] 3 AllER 1126, this court concluded that the costs incurred by a party in complying with any pre-action protocol were capable of being costs 'incidental to' any proceedings which were subsequently commenced (if the protocol procedure failed to lead to an early settlement) and that they were therefore covered by s.51 of the Supreme Court Act 1981. However, in that case, the court refused to award a defendant costs thrown away at the pre-action protocol stage in successfully persuading a claimant to abandon particular heads of claim. It was held that those were not costs 'incidental to' any subsequent proceedings because, in those subsequent proceedings, such heads of claim did not feature at all.

12. It seems to me, therefore, that as a matter of principle, pre-action costs can be the subject of an application for security. That said, I consider that a court should be slow to exercise its discretion in favour of the applicant in such circumstances, because of the risk that, if the pre-action period was lengthy, the costs might be extensive, and any subsequent attempt to obtain security in respect of such costs might become penal in nature. Moreover, it must be right that, the greater the distance in time between the incurring of the costs and the commencement of proceedings, the greater will be the likelihood that the losing party will have good grounds to dispute its liability to reimburse such costs in any event, and/or will have a stronger argument to the effect that the court should not exercise its discretion under CPR 25 and order security in respect of such historic costs.

13. I note that, in the present case, in their first CMC questionnaire, the 1st Defendant's solicitors estimated their costs of the action as a whole at £100,000. That is, of course, far less than the costs that they now maintain they will incur in these proceedings. The only explanation for this considerable discrepancy with which I have been provided is that the £100,000 excluded all the pre-action costs. It seems to me, therefore, that the fact that the 1st Defendant's solicitors did not consider that such costs were relevant for the purposes of the questionnaire is an indication that they did not instinctively think that such costs would be recoverable in these proceedings.

14. In addition to the general point, Mr Ramsden takes four specific points as to why the costs incurred prior to the commencement of the proceedings should not now be the subject of the order for security. They are that:
    a) a considerable part of the pre-action costs were incurred in relation to the detailed mediation and that such costs cannot be recoverable in these proceedings in any event;
    b) a large proportion of those costs were incurred before the administration/liquidation, so that any order for security would be an unfair preference;
    c) to the extent that the security ordered was in respect of pre-action costs, the claimant would be unable to obtain After The Event insurance (ATE insurance) or, if they did so, would have to pay prohibitive premiums, and that therefore a genuine claim would be stifled;
    d) the length of the pre-action period was such that these costs should not form the subject of an order for security.

    I deal with these points in turn below.

(a) Mediation costs

15. There was a mediation in this case in January 2005 in accordance with the CEDR Model Form Procedure, in respect of which, pursuant to Clause 22 of the Procedure, the Claimant and the 1st Defendant agreed to bear their own costs. (They also agreed to share the mediator's costs, and the application for security does not include those mediator's costs). I do not consider that the costs of the pre-action mediation are likely to be recoverable in these subsequent proceedings, and I am firmly of the view that, even if they are, they should not form part of the security ordered. There are a number of reasons for that view.

16. First, unlike the costs incurred in a pre-action protocol, I do not believe that the costs of a separate pre-action mediation can ordinarily be described as "costs of and incidental to the proceedings". On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution. Those costs were incurred in a form of dispute resolution which had no connection to these proceedings, and which here took place 2.5 years before the proceedings even started. Both the course of the mediation itself and the reasons for its unsuccessful outcome are privileged matters, known only to the parties. As a matter of general principle, therefore, I do not believe that the costs incurred in respect of such a procedure are recoverable under s.51.

17. Due to the diligence of counsel, two authorities were identified in which it was either decided or agreed that the costs of a *post-action* mediation were recoverable. They were ***Chantrey Vellacott v The Convergence Group*** [2007] EWHC 1774 (Ch), a decision of Rimer J (as he then was) and ***Nat West Bank v Feeney*** [2006] EWHC 90066 (Costs), a decision of Master Campbell, upheld by Eady J (in a judgment for which only a short summary can be found). Both these cases were concerned with mediations after the proceedings had commenced, when it is much easier to see why they fell under s.51 and/or why, pursuant to Costs Practice Direction 4.6(8), the costs were found to be analogous to "work done in connection with a view to settlement". The same would not, I think, be true of a mediation which failed to prevent the commencement of proceedings over two years later. In addition, I consider that ***Chantrey Vellacott*** was a particularly strong case where, on the facts, the costs of the post-action mediation should have been recoverable on any view, whilst in ***Nat West Bank,*** the contrary point was not even argued.

18. There may be specific exceptions to any general rule that pre-action mediation costs are not recoverable in subsequent proceedings: if, for example, an expert's report is provided for the purposes of the mediation and then subsequently utilised in the court proceedings, then it may be that such a report would comprise "materials ultimately proving of use and service in the action" and therefore be recoverable as costs, in accordance with the principle set out in ***Pecheries Ostendaises v Merchants' Marine Insurance Co*** [1928] 1 KB 750, CA. But I consider that such costs would only be recoverable if, in some way, the parties had agreed, despite their agreement that the costs of the mediation would be shared, that those specific costs could be the subject of any subsequent application. That latter point does not arise here at all. The argument that some material has been of subsequent use may arise, but not to any significant extent; certainly, on the basis of the material with which I have been provided, I would not decide that any such exception had been triggered. Nor could I put any sort of cost figure to, say, the costs of particular reports, because none has been provided.

19. Secondly, this was a case where the parties agreed to bear their own costs of the mediation. It would be a breach of that agreement if, now, 3 years on, the 1st Defendant sought to recover from the Claimant their costs of the mediation. ***Nat West Bank*** is relevant on this point, too, because it was held in that case that a Tomlin order, which did not deal separately with the costs of the mediation, could not be used to re-open the agreement that the mediation costs should be borne by each side. Of course, the order might have reopened the costs issue, but only if the parties had specifically agreed that it would. In the absence of such an agreement, it was held that the position remained that the costs of the mediation should be borne by each side, because that is what they had agreed. That is precisely the position here.

20. Finally, even if I were wrong in principle on both these points, I would still exercise my discretion against including, within the order for security, the costs of the mediation. The parties have agreed that each side should bear their own costs of the mediation, and I do not consider that it would be appropriate to exercise my discretion in a way which upset or altered that agreement.

21. Accordingly, I conclude that the costs of the mediation are not recoverable in these proceedings and that therefore the security order that I make should not allow for the costs of the mediation. I am unable to say, on the material with which I have been provided, what proportion of the pre-action costs are covered by that finding but it appears to be a considerable proportion.

(b) The Alleged Preference

22. On behalf of the Claimant, it is argued that the costs that were incurred before the administration cannot be the subject of an order because the liquidator would be unable to provide security in respect of those costs without conferring on the 1st Defendant what amounts to a preference over other creditors at the date of administration. In response, Mr Lascelles argues that, by reference to the decision of the House of Lords in ***Norglen Ltd. (in liquidation) v Reeds Rains Prudential and others*** [1999] 2 AC 1, there is nothing in this point. In that case, the House of Lords were dealing with an order for costs, not an application or an order for security for costs. However, beginning at page 20, letter G, Lord Hoffmann said:

"It is in my view clear that the costs ordered to be paid by a company in liquidation to a successful defendant are payable out of the net assets in the hands of the liquidator, in priority to other claims, including that of the liquidator for his own costs … The right of a successful defendant to an action brought or adopted by a company in liquidation to be paid out of the assets in the hands of the liquidator is not parasitic on the liquidator's right to recover such costs. It is enforceable directly against the company by virtue of the order for costs … If the company in liquidation is liable for any costs at all, as is accepted by the liquidator, it is because it adopted the action …"

23. Mr Ramsden maintains that the decision in ***Norglen*** is concerned with an order for costs, which gave rise to a clear right to enforce, rather than an order giving security, which would only secure a contingent right.

24. I do not consider that it is necessarily right to say that the liquidator would be conferring a preference, although I recognise that the factual situation in ***Norglen*** was different to this case, which is concerned solely with security. Furthermore, I am reluctant to give a concluded view on the point when it is only of minor relevance to the application for security. For present purposes, it is probably sufficient for me to say that there is at least an argument available to the Claimant as to why it should not pay the pre-administration/liquidation costs and that is another factor that I must bear in mind when exercising my discretion.

(c) Stifling

25. I am not persuaded that I should make any finding as to the stifling of the claim. This would be dependant on it being impossible for the Claimant to obtain an ATE policy, or other financial assistance. Mr Ramsden fairly accepts that there is no evidence of such impossibility before me and that the highest he can put it is that, by inference, such a policy would be much more expensive if it included for pre-action costs. That seems to accept that it is not impossible for the Claimant to provide such a policy. I therefore reject the point as to stifling of a genuine claim: in accordance with ***Keary,*** I am not satisfied that that would be the outcome of any order for security.

(d) Delay

26. It seems to me that delay is also relevant to the pre-action costs. I repeat the point made above, that the longer the delay between the incurring of the pre-action cost and the application for security based on that item of cost, the more reluctant the court will be to make such an order. The pre-action period was very prolonged, covering a period from mediation to proceedings of nearly 2.5 years. I would be very reluctant to decide that, after all this

time, the Claimant should provide security to the 1st Defendant for the costs incurred during this period. That seems to me to be unnecessarily draconian.

(e) Summary in respect of post-action costs

27. The 2nd Defendant does not seek security in respect of its pre-action costs. As for the 1st Defendant's application, I consider that, in the exercise of my discretion, I should disallow the pre-action costs incurred by the 1st Defendant. The principal reason for that is that it seems clear that a large proportion of those costs relate to the mediation and, for the reasons set out above, I do not consider that such costs are recoverable as a matter of principle. In addition, I consider that the gap in time between the incidence of costs and the commencement of proceedings (some 2.5 years) militates against including such costs in the amount of security I order. Another (albeit lesser) factor, is the possible argument as to the recoverability in law of pre-administration costs in any event. For all those reasons, I do not consider that it would be appropriate to order the Claimant to provide security in respect of the 1st Defendant's pre-action costs.

COSTS INCURRED FROM THE COMMENCEMENT OF PROCEEDINGS TO THE MAKING OF THE APPLICATIONS FOR SECURITY

28. Both Defendants seek security for their costs from the date of the commencement of these proceedings. The only argument raised against that is the question of delay.

29. I have referred to the relevant chronology identified in the correspondence above. It seems to me that it is difficult to criticise the Defendants for delay, given that this is the first case management conference in this case. I accept that, up until now, this action has proceeded at a somewhat leisurely pace, but most of those delays were created by the fact that the Claimant originally brought this action in Salford. There is no doubt that there were delays in bringing about the transfer of the matter from Salford to London and I do not consider, on all the information available to me, that it would be fair to visit the consequences of those delays upon the Defendants.

30. I accept Mr Ramsden's point of principle that delays in the making of the application can be relevant to the amount of security ordered. However, I consider that in all the circumstances, this is not a case in which I should make any deduction in the amount of the security I would otherwise order because of the delays between the end of May 2007 and today.

31. There is a further point in respect of delay. It is not at all clear that there has been any prejudice at all to the Claimant as a result of the delay between the commencement of these proceedings and the making of the applications for security. Where an application for security is made very late then the court will be mindful of the fact that a claimant may have been lulled into a false sense of security in incurring costs in pursuing the claim almost to the door of the court, and that it would be an unfair exercise of the court's discretion to prevent the Claimant, at the last possible moment, from going on to trial. The prejudice in such a situation might well require the court to dismiss the application for security.

32. We are, however, a long way from that situation here. The trial will take place at the end of the year pursuant to the timetable outlined today. Whilst the matter would have proceeded to a trial much more swiftly if the action had been commenced in the TCC in London, it is not possible to see that any prejudice has been caused to the Claimant as a result of the application for security being made now, rather than in, say, September or October 2007. In addition, security has been plainly an issue since the middle of October, when the matter was raised by the solicitors acting for each Defendant. In all those circumstances, it does not seem to me that the delay since the commencement of the action should prevent the Defendants from recovering security for that period.

33. The 2nd Defendants' costs for that period are agreed, and are addressed below. The 1st Defendant's costs for this period are not separately identified. I would estimate them, for the purposes of this application, in the sum of £20,000.

COSTS TO BE INCURRED

34. On behalf of the 2nd Defendant, Mr Neaman has made plain that it is appropriate for the court to order security only up to the exchange of witness statements. That has always been the basis of the 2nd Defendant's application. Indeed, the 2nd Defendant has agreed with the Claimant that, if the costs are to run from the commencement of the action to the exchange of witness statements, the right figure for security is £37,000. That is therefore the amount I will order.

35. As previously noted, the 1st Defendant appeared to require the court to order security up to the end of the trial. Even by reference to its modified position, the 1st Defendant was still seeking costs up to the eve of the trial. I made plain in argument that, in my judgment, that was not appropriate and that, at this stage, the court should only order security up to the half way mark in the preparation for trial. That is the exchange of witness statements. Accordingly, I accept Mr Ramsden's submission that that must be the cut-off for the security which I order today.

36. That, of course, leaves over the quantum of the costs claimed by the 1st Defendant. I consider that the draft bill is excessive, not because of the hourly rates identified there, but because the time estimated for the carrying out of various tasks is far above what I consider to be a reasonable estimate. In addition, I do not consider that the disbursements will be incurred in anything like the amounts identified.

37. Mr Lascelles' modified figure identified the sum of £115,000 from the commencement of the proceedings until the trial. The Claimant has already offered £50,000 in respect of the period between the application and the

exchange of witness statements. It seems to me that that figure was a perfectly reasonable estimate of the costs likely to be incurred over that time. In those circumstances, on the material that I have, I consider that the £50,000 is the appropriate figure for this period.

CONCLUSIONS

38. For the reasons set out above, I order that the Claimant should provide suitable security for costs to the 2nd Defendant, up to the exchange of witness statements, in the agreed sum of £37,000.

39. In respect of the 1st Defendant, I consider that the Claimant should provide suitable security up to the exchange of witness statements in the sum of £70,000. That figure is made up of the £50,000 offered by the Claimant to the 1st Defendant to reflect the period from the application to the exchange of witness statements, and the assessed figure of £20,000 to reflect the costs incurred from the commencement of the proceedings to the formal making of the application for security for costs.

40. I will deal separately with all questions of the costs arising out of the Defendants' applications for security. I am grateful to all counsel for their assistance, particularly in relation to the point of principle concerning the costs of the pre-action mediation.

Mr James Ramsden (instructed by Freeth Cartwright) for the Claimant
Mr David Lascelles (instructed by Ross & Craig) for the 1st Defendant
Mr Sam Neaman (instructed by Teacher Stern Selby) for the 2nd Defendant