Jirehouse Capital v Beller [2008] APP.L.R. 07/30

CA on appeal from Chancery (Briggs J) before Mummery LJ; Arden LJ; Moore-Bick LJ. 30th July 2008

Lady Justice Arden :

1. This is an appeal with the permission of the judge against the orders of Mr Justice Briggs dated 16 January 2008 ordering the claimants in this action ("*the appellants*") to provide security for the defendants' costs. We are not concerned with the amounts he ordered or the terms he imposed. This appeal concerns two questions of interpretation which arise from CPR 25.13(2)(c). In the appendix to this judgment, I set out CPR 25.12 and 13. It will be seen that CPR 25.13(2)(c) has two parts or limbs. The two questions in issue on this appeal are as follows:
   i) Are unlimited companies, registered in Great Britain, alternatively unlimited companies registered in Great Britain having only an individual or individuals as member(s), excluded from the expression *"a company or other body (whether incorporated inside or outside Great Britain)"* within the first limb of CPR 25.13(2)(c)? (Issue 1)
   ii) Does the condition in the second limb of CPR 25.13(2)(c) that "*there is a reason to believe that it will be unable to pay the defendant's costs if ordered to do so*" mean that the court must be satisfied on a balance of probabilities that the company will be unable to pay those costs when ordered to do so? (Issue 2)

2. Also set out in the appendix is s 726 of the Companies Act 1985, which enables the court to make orders for security for costs against limited companies, as defined in that Act. The second limb of CPR 25.15(2)(c) mirrors the wording of s 726 and it will be necessary to look at authorities on s 726 in consequence. The first limb however is not replicated in s 726. That section, which in its original form predated even the Companies Act 1862, applies only to limited companies. Thus it has been said that the policy behind section 726 is to impose the obligation to give security on companies as the price of limited liability (see for example *DSQ Property Co Ltd v Lotus Cars* Ltd [1987] 1 WLR 127 per Millett J). The word *"company"* is defined in s 735(1) of the Companies Act 1985 as "*a company formed and registered under this Act, or an existing company*", the latter phrase meaning a company formed and registered under specified earlier Acts. An unlimited company registered in Great Britain is a *"company"* as defined in the Companies Act 1985. However, it is not a *"limited company"* for the purpose of that Act because, by definition, an unlimited company is one which does not have any limit on the liability of its members (see s 1 of that Act).

Background

3. The judge summarised the background as follows:
   "3. The first claimant, Jirehouse Capital, is an unlimited company in which Mr Stephen Jones is the only shareholder. The second defendant, Jirehouse Capital Trustees Ltd. is, as its name implies, a limited company. It is a wholly owned subsidiary of the first defendant. Both companies were incorporated in England. There are three sets of proceedings to which the security for costs application relates. Firstly, a claim for damages and for recission of a document known as the Jirehouse Capital's release, based upon alleged fraudulent misrepresentations and/or conspiracy to injure on the part of the defendants. Secondly, a claim under section 262 of the Insolvency Act to revoke Mr Beller's IVA. Thirdly, a bankruptcy petition against Mr Beller. All those proceedings have been ordered to be tried together in the Chancery Division, the order having been made by Mr Justice Lindsay on 4th October 2007. Subject to an outstanding question of whether there should be directed to be tried one or more preliminary issues, all proceedings are currently due and on course for a trial in November 2008."

4. The first appellant ("Jirehouse") is an unlimited company registered in England. At all material times Mr Stephen David Jones ("Mr Jones") was and remains its sole shareholder. He offered an undertaking to the court to remain the sole shareholder until any costs orders in favour of the respondents had been paid in full. Jirehouse's business is that of an incorporated legal practice and it is regulated by the Solicitors Regulation Authority. It has its business address and registered office in London. It produces accounts which are audited by its auditors. The second appellant ("Jirehouse Capital Trustees") is a limited company registered in England and a wholly-owned subsidiary of Jirehouse.

The judge's judgment

5. On issue 1, the appellants submitted to the judge (among other submissions) that the defendants' application under CPR 25.13(2)(c) could not succeed as the court had no jurisdiction to order security for costs against an unlimited company incorporated within the jurisdiction. The judge held that CPR 25.13(2)(c) enabled the court to make an order for security for costs even as against an unlimited company:
   "13. The first question is whether the court should ever make a security for costs order against an unlimited company incorporated within the jurisdiction which, by its nature, may, through its liquidator, look to the whole of its shareholders' assets for the resources with which to pay its debts. Mr Auld QC, for the first claimant, says that the position is analogous to that of an individual claimant in relation to whom there is no jurisdiction to order the payment of security for costs where a claimant is resident within the jurisdiction. While it is clear that security for costs cannot be ordered under section 726 of the Companies Act against an unlimited company, in my judgment part 25.13(2)(c) plainly contemplates that security may be ordered against any kind of corporate body whether resident or incorporated within or without the jurisdiction. That is what the sub-rule says in terms, and I see no reason to put any gloss on it. It is clearly, in my judgment, not a mere re-enactment of Section 726, nor a repeat of that jurisdiction in the rules. It is a self-standing which, I must conclude, after due thought, has been expressed in broader terms than the jurisdiction conferred by the Companies Act 1985. Accordingly, although the assets of an unlimited company's shareholders may be highly relevant to the question whether the condition in CPR 25.13(2)(c) is satisfied in any particular case, there is, in my judgment, plainly jurisdiction for making an order

for security for costs against the first claimant in this case, if there is, to use the words of the condition itself, 'reason to believe' that the company will be unable to pay the defendant's costs."

6. On issue 2, the judge considered that there was a lack of unanimity in the authorities. He took the cases in chronological order: ***Re Unisoft Group Limited (2)*** [1993] BCLC 532 per Sir Donald Nicholls, the VC at 534 e-i ; ***Phillips v Evershed*** [2002] EWCA Civ 486, Buxton LJ at Para 6; ***Marine Blast Limited v Targe Towing Limited and Another*** [2003] EWCA Civ 1940 per Mance LJ at Para 11; ***Texuna International Limited v Cairn Energy PLC*** [2004] EWHC 1102 (Comm) per Gross J; ***Mbasogo v Logo Limited*** per Auld LJ at Para 12.; ***Aerotel Limited v Wavecrest Group Enterprises Limited*** [2007] EWCA 104 (Pat) per Mann J at Para 11. The judge summarised the authorities. He held that the effect of the guidance in them is that:

*"the burden is on the applicant for security not to show that the claimant company will probably be unable to pay costs if ordered to do so, but that the phrase in the CPR, 'reason to believe that it will be unable to pay' requires it to be shown on the evidence that there is, at the very least, a significant danger that it will be unable to do so. In many cases the **Unisoft** test and the significant danger test may produce the same result. However it seems to me inescapable that the formulation in the **Mbasogo case** of significant danger imposes a substantially lower threshold for the exercise of the court's discretion to order security than the probability test originally enunciated by the Vice Chancellor in **the Unisoft case**."*([13])

7. The judge held that on the facts there was a significant danger that the appellants would not be able to pay costs ordered against them and that the court should exercise its discretion to award the security for costs sought.

Grounds of appeal

8. The first ground of appeal is that the judge was wrong to hold that CPR 25.13(2) (c) gave the court jurisdiction to order security for costs against an unlimited company. The second ground of appeal is that the judge was wrong to hold that he had jurisdiction to award security for costs against the appellants despite the fact that it had not been established on the balance of probabilities that the appellants would be unable to pay the respondents' costs if ordered to do so.

9. The respondents also seek to uphold the order of the judge on the ground that the judge was wrong to hold that the defendant had not established on a balance of probabilities that the claimants would be unable to pay the defendant's costs if the defendants were successful. We have not called upon the respondents to address us on the respondents' notice.

Issue one – submissions

10. Mr Stephen Auld QC, for the appellants, submits that the judge should have interpreted CPR 25.13(2)(c) consistently with section 726 of the Companies Act 1985 and held that the jurisdiction extends only to limited companies. The policy underlying the rule is to order security against impecunious companies. The policy does not apply to unlimited companies. Alternatively the judge was wrong to hold that CPR 25.13(2)(c) gave the court jurisdiction to award security for costs against an unlimited company with a sole shareholder. The shareholder is jointly and severally liable for payment of the company's debts (section 24 of the Companies Act 1985). A costs order against an unlimited company is akin to a costs order made against a sole shareholder and accordingly there is no difference in principle between a security for costs order made against such a company and a security for costs order made against the sole shareholder. It was contrary to the policy of CPR 25.13(2)(c) to allow the court to order security for costs where the claimant is an unlimited company with an individual as sole shareholder, but not where he is an individual.

11. Mr Auld puts forward alternative interpretations of CPR 25.13(2)(c). His primary submission is that no unlimited companies are included in the expression "company". He submits that that construction should be imposed so as to be consistent with s 726. Likewise, the words "*body (whether incorporated inside or outside Great Britain*)" does not refer to an unlimited company, wherever incorporated. In the alternative, Mr Auld submits that the word "company" and the word "body" should be interpreted to exclude unlimited companies with an individual as the single member or having only individuals as members. He accepts that on the actual wording ("company or other body (whether incorporated inside or outside Great Britain)") unlimited companies are included. But he submits that the phrase "company" is not intended to refer to an unlimited company. RSC Ord 23 did not include unlimited companies and CPR 25.13(2)(c) was intended to reflect s 726. In December 1997, when the drafting of the CPR was under consideration, the Department for Constitutional Affairs ("the DCA") issued a consultation paper entitled *Civil Procedure Rules – Security for Costs*. Mr Auld submits that that consultation paper accepts that individuals should not have to provide security for costs. The only change suggested by the DCA consultation paper was to include overseas companies.

12. Mr Auld submits that a liquidator could obtain the amount of the costs from the shareholder. He also relies upon ***Re Dawes v Henderson*** [1999] All ER (D) 70. That case involved an application under s 17 of the Company Directors Disqualification Act 1985 by a person subject to a disqualification order for leave to act as a director. Sir Richard Scott VC held that the fact that the person in question wished to be a director of an unlimited company was relevant to the exercise of the discretion because it would elevate form over substance to hold that there was a difference between trading as an individual and trading as an unlimited company. So, too, here the court should see that it is dealing with substance and not form. The purpose of the change in wording in CPR 25.13(2)(c) was to deal with foreign companies. Unlimited companies are rarely found, and they should not be brought within the security for costs regime by a side wind. Mr Auld submits that it is an oversight that CPR 25.13(2)(c) does not refer to a "*limited company*", rather than simply a "*company*".

13. Mr Auld submits in the alternative that the court should hold that the fact that Jirehouse was an unlimited company with a single individual shareholder was an extremely powerful factor in the exercise of the court's discretion and that, accordingly, no order for security ought to be made in the circumstances of this case. He submits that this point was argued below and that there is a fine line between jurisdiction and discretion: see, for example, ***Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation*** [2004] 1 AC 260. He further submits that CPR 25.15, which enables this court to order security for the costs of an appeal, contains an indication that an unlimited company is not within CPR 25.15 because CPR 25.15(2) expressly replicates s 726(1). CPR 25.15(2) would have been unnecessary if CPR 25.13 had conferred power as against registered companies since it also gives power to order security on same grounds against a claimant as under CPR 25.13.

14. Mr Michael Driscoll QC, for the respondents, submits that the DCA consultation paper makes it clear that the rule about security for costs then under consideration was very different from that ultimately adopted and that accordingly very little assistance can be obtained from that consultation paper. He rejects Mr Auld's interpretation of CPR 25.13(2)(c) since it would mean that there was no power to order security for costs against an insolvent unlimited company, whose shareholders were limited companies, or an unlimited company which had individual shareholders who were resident outside the European Union. In his submission, CPR 25.13(2)(c) had been drafted as widely as possible, and the court would not exercise its discretion if there was no need to order security.

15. Mr Driscoll further submits that this appeal is limited to questions concerning the interpretation of CPR 25.13(2)(c). Accordingly, this court is not concerned with laying down a principle about the exercise of the discretion under that rule. There is no attack on the exercise of the discretion. He submits that the observations in *Eram* do not apply where there is a statutory jurisdiction: see per Lord Hoffmann at [59] ("On the other hand, a principle is not the same as a statutory rule restricting the jurisdiction. It may have to give way to some other overriding principle.") and per Lord Millett at [80].

Issue 1 - conclusions.

16. In my judgment, the DCA consultation paper does not assist. As Mummery LJ pointed out in the course of argument, it was only a consultation document. It did not purport to set out the final policy behind the new security for costs regime to be inserted into the CPR. Accordingly, it provides no assistance and is not admissible as an aid to the interpretation of CPR 25.13(2)(c).

17. It is a striking feature of that provision that it does not use the expression "limited company" which is a feature of section 726. In my judgment, the rules committee which was responsible for the CPR must have been aware that section 726 was restricted to limited companies. The change of terminology must, as Moore-Bick LJ pointed out in argument, have been deliberate.

18. Likewise, in my judgment, there is no assistance to be gained from CPR 25.15. True, as Mr Auld submits, para (2) of that rule specifically repeats the power already conferred by section 726. That he submits gives rise to an implication that para (1) of CPR 25.15 does not apply to unlimited companies. I agree that it was unnecessary to have para (2) of that rule but no doubt it was included for completeness. That provision cannot affect the interpretation of CPR 25.15(1) which gives this court all the powers that the trial judge has under CPR 25.13. Therefore, CPR 25.15 provides no assistance to Mr Auld's argument.

19. In my judgment, the judge was correct for the reasons he gave: CPR 25.13(2)(c) provides that the court may make orders for security against "companies", without distinction. Moreover, I do not accept the argument that to include unlimited companies is unprincipled. Although Millett J described the policy behind s 726 as one of imposing a price for the privilege of limited liability (a policy which would not include extending the security for costs regime to unlimited companies), Mr Auld accepted that there was no statement of policy that this was the only reason for having a security for costs regime against companies. It is well known that the members of unlimited companies are often themselves limited companies. They could be shell companies. If the members are substantial individuals or companies, that point can be taken into account in the exercise of the court's discretion or in the second limb. The DCA consultation paper states that it is not intended to extend the security for costs regime against a claimant who is an impecunious individual. Accepting for this purpose that this policy was implemented in the CPR, there is nothing to suggest that this immunity was intended to extend to individuals who choose to trade through a corporate vehicle. In those circumstances, there is no justification for reading down the clear words of CPR 25.13(2)(c). In my judgment the court cannot adopt any of the interpretations for which Mr Auld has argued.

20. Mr Auld's further submission is that this court should lay down that it would be wrong in principle for the court to exercise its discretion under CPR 25.13(2)(c) so as to impose security for costs on an unlimited company with individual members. He submits that that factor is extremely powerful. In my judgment, this submission seeks to raise an argument which is outside the grounds of appeal. In any event, it would be wrong to lay down a rule that would fetter the exercise of the court's discretion in this way. The court has to take all the circumstances into account and to give them appropriate weight.

Issue 2 – submissions

21. This issue has arisen because the judge applied a test of significant danger that the company would be unable to pay costs ordered against it, rather than a "*probability test",* which the judge took to have been established by ***Unisoft.*** Mr Auld therefore seeks to persuade the court that the judge made the wrong choice. Mr Auld submits that CPR 25.13(2)(c) is unambiguous and does not leave room to introduce a lower standard of proof such as that applied by the "*significant danger*" test. The equivalent wording in section 726 has been held to mean that the

court must accept that the company will be unable to pay the costs awarded against it (***Unisoft*** at 534). That test was accepted as correct in ***Texuna.*** The test applied by the judge is far too low and represents a radical departure from the wording of CPR 25.13(2)(c). Accordingly, the judge was wrong to apply a significant danger test. Mr Auld further submits that there is a risk of satellite litigation if the threshold test is set too low. If he is wrong in his submission that the test is one of balance of probabilities, or something akin to that, Mr Auld does not take issue with the significant danger test or suggest that it is in some way different in those events from "*reason to believe*". Mr Auld submits that in ***Fordgate Midland Properties Ltd v John Laing Construction Ltd*** (18 January 1995, unreported) this court upheld ***Unisoft***.

22. Mr Driscoll submits that the Vice-Chancellor's decision has to be understood in the context of argument being put to him by Counsel in that case, Mr Robin Potts QC. Mr Driscoll submits that the Vice-Chancellor does not lay down a balance of probabilities test. He further submits that the later cases decided by single Lords Justices in this court are saying the same thing as "reason to believe". If, therefore, the court finds that there is a significant danger, that would amount to reason to believe. He cites ***Davies v Taylor*** [1974] AC 207 and other cases which establish that where the event relates to the future all the court can do is evaluate the chances of it happening. As to ***Fordgate,*** Mr Driscoll submits that there was there no dispute as to what the test was, and that ***Fordgate*** therefore was not an authority which upholds *Unisoft* and decides what the test is. Both parties in that case were content to apply ***Unisoft.***

The second issue-conclusions

23. The relevant passage in the judgment of Sir Donald Nicholls VC in ***Unisoft*** was as follows:

"Before me there was a dispute between the parties on the proper interpretation of s 726(1) and, in particular, of the effect of the words 'if it appears by credible testimony that there is reason to believe'. Mr Potts QC, for the respondents to the petition, submitted that the question is not whether the court is satisfied on the balance of probabilities that if the plaintiff loses it will definitely be unable to pay the costs of the defendants; the test is whether there is reason to believe, being a belief derived from credible evidence, that the company will be unable to pay if it loses. If there is such evidence, the threshold requirement is satisfied even though there may be contrary evidence from the plaintiff company.

I start consideration of the subsection by noting that the phrase ***'the company will be unable to pay the defendant's costs if successful in his defence'****, is clear and unequivocal. The phrase is* ***'will be unable'****, not* ***'may be unable'****. 'Inability to pay' in this context I take to mean inability to pay the costs as and when they fall due for payment. Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met. The court will draw appropriate inferences and here, as elsewhere, it will not let common sense fly out of the window.*

The phrase ***'the company will be unable to pay'*** *is preceded by the words* ***'if it appears by credible testimony that there is reason to believe'****. I do not think this latter phrase has the effect of watering down the words which follow. The court, on the basis of credible testimony, must have* ***'reason to believe'****, that is, to accept, 'that the company will be unable to pay'. If this were not so, and the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. It cannot, surely, suffice that the applicant's accountant, for example, who is a credible witness, puts forward a case of inability to pay. If there is conflicting evidence the court must have regard to that also. The court must reach a conclusion on the basis of the totality of the evidence placed before it, giving such weight to the various matters deposed to as is appropriate in the circumstances. The matter on which, in the end, the court is required to reach a conclusion is whether the company will be unable to pay."*

24. In my judgment, Mr Driscoll is correct in his submission that the Vice Chancellor was primarily concerned with answering the submission by counsel that if there was evidence which could be described as credible testimony that the company would not be able to pay the costs if ordered to do so, the threshold requirement in s 726 was satisfied even though there might be contrary evidence from the company. The answer given by the Vice-Chancellor contains a number of points. First, as the Vice-Chancellor makes clear, the phrase ***"the company will be unable to pay"*** requires more than simply that there is doubt whether the company will pay. Otherwise the second limb would have to say "***the company may be unable to pay the costs***". Secondly, the Vice-Chancellor holds that the court must have regard to conflicting evidence. The court must reach its conclusion as to whether the conditions in the statute are satisfied by reference to the totality of the evidence.

25. Mr Auld particularly relies on two sentences in the last paragraph cited above. *The first sentence is as follows: "The court, on the basis of credible testimony, must have* ***"reason to believe"****, that is to accept,* ***"that the company will be unable to pay"*** (emphasis added). In my judgment, this sentence merely indicates that the court has got to reach some conclusion on the basis of the "*credible testimony*". The Vice-Chancellor uses the words "*reason to believe*", and, as I see it, the type of conclusion to which he was referring was a conclusion that there was reason to believe. Mr Auld also relies on the last sentence in the last paragraph cited above: "*The matter on which, in the end, the court is required to reach a conclusion is whether the company will be able to pay*". In my judgment, the conclusion to which the Vice-Chancellor was referring here was again a conclusion that there was reason to believe.

26. In my judgment, there is a critical difference between a conclusion that there is "*reason to believe*" that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the

company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balance of probabilities. Furthermore, the Vice-Chancellor uses the words "reason to believe" and not words indicating a test on a balance of probablities. Accordingly, I conclude that, the Vice-Chancellor in ***Unisoft*** did not lay down any test on the balance of probabilities, as the judge thought.

27. It is significant that a test along those lines was originally contained in the precursor of s 726 but was subsequently modified to the formula of "*reason to believe*". The precursor was s 24 of the Joint Stock Companies Act 1857, which provided:

> *"XXIV. Where a Limited Company is Plaintiff or Pursuer in any Action, Suit, or other legal Proceeding, any Judge having Jurisdiction in the Matter may,* ***it if be proved to his Satisfaction*** *that there is Reason to believe that if the Defendant be successful in his Defence the Assets of the Company will be insufficient to pay his Costs, require sufficient Security to be given for such costs, and may stay all Proceedings until such Security be given."* (Emphasis added)

28. This was re-enacted in s 69 of the Companies Act 1862 with the material change that the words italicised above were replaced by the words "*if it appears by any credible Testimony*". This may well have been because the standard set by the 1857 Act had been difficult to meet. This amendment strongly suggests that there was a deliberate change in favour of a lower threshold test.

29. I do not accept the argument, advanced by Mr Auld, that the test of "*reason to believe*" must be elevated to a test of balance of probabilities simply because the matter to which the test relates is something which, as the Vice-Chancellor held, must be established and not simply identified as a possibility. That which has to be established is something that will occur only after the order for security is made. It can therefore only be a matter of evaluation. A person can have a reason to believe that a future event will occur. The companies legislation uses the expression "*reason to believe*" in relation to both present and future events: see, for example, ss 423(3)(b), 1213(8) and 1215(7) of the Companies Act 2006 and s 327(1) of the Companies Act 1985.

30. The next question is whether the test that a company is *"in significant danger*" of not being able to meet any order for costs is a different test from that of reason to believe that that will be the state of affairs. This court developed the significant danger test, and Mr Auld has not in fact taken issue with it if he is wrong in his submission on the balance of probabilities test (or a test akin to it). In other words, he has not argued that if his submission as to a balance of probabilities test fails, the judge was still in error for applying the significant danger test. However, this court should consider whether that test is different from that of reason to believe.

31. The test emerges in ***Phillips v Evershed*** where Buxton LJ, sitting as a single Lord Justice, held:

> *"On the evidence before me, which I am not going to detail, I am satisfied that RSL is in significant danger of not being able to meet any order for costs. I have come to that conclusion not only on the basis of the evidence that has been filed but also because RSL have not filed any accounts since 1998, and the court will make adverse inferences against a company that fails to file accounts and where no explanation has been given on its behalf, either of the failure or of its present financial position. I therefore think it right and equitable and justified that an order for security for costs should be made against RSL*."

32. In ***Marine Blast,*** Mance LJ went back to the wording of the rule of the statute. He added the point that the question was not whether as a matter of probability the company would pay, but whether there was reason to believe that it would be unable to pay. In ***Mbasogo,*** Auld LJ followed both Mance LJ and Buxton LJ. Again, both Mance LJ and Auld LJ were sitting as single Lord Justices.

33. In my judgment, Buxton LJ was not formulating a different test from that of "reason to believe" but simply expressing those words in his own words. In the sense in which Buxton LJ was using the term, there was no real distinction between significant danger and reason to believe. Since the event in question (non-payment of an order for costs) is a future one, what the court has to do was to evaluate the risk, or the danger, of that event occurring. That said, however, there may be contexts in which a test of significant danger does produce a different result from *"reason to believe*" and so it would be much safer to use the statutory words in future.

34. Mr Auld submits that the reason to believe test will set the threshold too low and encourage satellite litigation. I do not accept that submission. As the Vice-Chancellor held in ***Unisoft,*** the court has to look at the evidence put forward on the application as a whole and form an assessment on the basis of the evidence as a whole as to whether there is reason to believe that the company will not be able to pay costs ordered against it. Thus the jurisdiction is not triggered, as counsel sought to persuade the Vice-Chancellor in ***Unisoft,*** simply by the evidence of one party only. It is open to the company to rebut the evidence of the applicant for security. As the Vice-Chancellor said in ***Unisoft*** , the court "*will not let common sense fly out of the window*".

35. The judge was referred to two first instance decisions. In ***Texuna,*** Gross J. applied ***Unisoft*** without further analysis of the test, and it is common ground that authority does not assist. In ***Aerotel,*** Mann J referred to ***Unisoft.*** He held that the test was akin to a balance of probabilities test so that it had to be established on the evidence that the court thought that it was probable, or more probable than not, that the company would not be able to pay the debts as they fall due. It follows from my judgment above that the judge in that case was in error in holding that the test was one of balance of probabilities. Mann J also considered that there might be a difference between the decisions of Mance and Auld LJJ. For the reasons given above, I do not consider that there was any such difference.

36. Mr Auld's submission on *Fordgate* does not now assist him and, in any event, in my judgment Mr Driscoll's reading of that case is to be preferred.

Disposition

37. For the reasons given above I consider that this appeal should be dismissed.

Lord Justice Moore-Bick:

38. I agree that the appeal should be dismissed for the reasons given by Arden LJ and wish to add only this. It is most unwise in my view for judges to paraphrase the wording of the rules in cases such as the present. One could debate at length the nuances of an expression such as "reason to believe that the company will be unable to pay the costs", but to do so only gives rise to a danger of creating competing tests in slightly differing terms, as this case demonstrates. In my view judges should simply ask themselves whether the requirement set out in the rules is satisfied and express their conclusions in those terms, giving their reasons for doing so.

Lord Justice Mummery:

39. I agree with both judgments.

Mr Stephen Auld QC & Mr David Caplan (instructed by Messrs Mishcon de Reya) for the Appellant
Mr Michael Driscoll QC (instructed by Messrs Byrne & Partners) for the Respondent

APPENDIX

Extracts from the CPR:

Security for costs

25. 12(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.

(Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to Part 20 claims).

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it will -

(a) determine the amount of security; and

(b) direct—

(i) the manner in which; and

(ii) the time within which

the security must be given.

Conditions to be satisfied

25. 13 (1) The court may make an order for security for costs under rule 25.12 if —

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are—

(a) the claimant is—

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;

(b) [omitted]

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

(Rule 3.4 allows the court to strike out a statement of case and Part 24 for it to give summary judgment)

S 726 of the Companies Act 1985:

726 Costs and expenses in actions by certain limited companies

(1) Where in England and Wales a limited company is plaintiff 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.

(2) Where in Scotland a limited company is pursuer 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 defender's expenses if successful in his defence, order the company to find caution and sist the proceedings until caution is found.