Neutral Citation Number: [2006] EWCA Civ 1123

Case Nos: A2/2005/1956, A2/2005/1956(A),A2/2005/1956(C)
A2/2005/1956(D), A2/2005/1956 (E)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE EADY
HQ04X02761

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2006

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE KEENE
and
LORD JUSTICE LONGMORE

- -

Between:

AL-KORONKY & ANOR	**Claimants/ Appellants**
- and -	
TIME-LIFE ENTERTAINMENT GROUP LIMITED & ANOR	**Defendants/ Respondents**

- -
- -

Mr G Shaw QC and Mr H Starte (instructed by Messrs Carter-Ruck) for the **Appellants**
Ms A Page QC and Mr M Nicklin (instructed by Messrs Reynolds Porter Chamberlain) for the **Respondents**

Hearing dates: Wednesday 5 July – Friday 7 July 2006

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Approved Judgment

Lord Justice Sedley :

1. All three members of the court have contributed to the judgment which follows.

The background

2. The claimants are husband and wife. The husband was at the times with which we are concerned a career diplomat in the service of the Sudanese government. The wife is a qualified civil engineer. From 1994 to 2002 they were stationed in London, where the first claimant, Mr Al-Koronky, served as press attaché, between 1998 and 2000 acted up as chargé d'affaires and ambassador. During this time the second claimant looked after their five children and did not work on her own account. Since their return to Sudan, Mr Al-Koronky has left the government service and has sought to establish himself in journalism.

3. From June 2000 the claimants' London household in Deerhurst Road, Willesden Green, included a domestic servant, Zainab Nazer, also known as Mende (which is the name we shall use for her in this judgment). In September 2000 Mende left (the defendants say escaped from) the Al-Koronky household and claimed asylum on the ground that she had been brought and kept there against her will as a slave. Towards the end of 2002 she was granted asylum.

4. Very shortly after Mende's departure from the Al-Koronky household the Sunday Telegraph published an article reporting it as the escape of a slave. In the libel proceedings which Mr Al-Koronky promptly issued, the newspaper pleaded justification but by June 2002 had settled the claim, apologising publicly, withdrawing the allegations and paying the claimant £100,000 damages. This, however, did not stop the preparation, which was already under way, or the publication in Germany in October 2002 of the book, *Slave*, which is the subject-matter of the present claim. Written by the second defendant, Damien Lewis, it was published during 2003 in the United States and then, in January 2004, by the first defendants in the United Kingdom.

5. The book alleges that the claimants kept Mende as a slave in their London home. Slavery is a crime in Sudan as it is here, and carries similar public opprobrium, but the defence is that the allegation is true. Correspondingly, say the claimants, the book either says or implies that the statement made in open court in the Sunday Telegraph case, asserting that Mende was the family's au pair and that her tale of abduction and enslavement as a child in the Sudan was a fabrication, was to Mr Al-Koronky's knowledge false. To this too the defendants plead justification.

6. The foundation of the defence of justification is Mende's account of having been abducted from her village by raiders in 1994 when she was about 12 years old and kept in a state of servitude until her escape in 2000. The claimants advance documentary evidence, including attested photographs and letters, which, if genuine, demonstrate both that Mende is considerably older than she claims and that her story

of being enslaved cannot be true. The defence case is that these are forgeries and that the statements supporting them are untruthful.

The application for security for costs

7. Because the claimants are ordinarily resident out of the jurisdiction and not in one of the groups of exempted states which have measures for reciprocal enforcement with the United Kingdom, it is open to the defendants to apply for security for their costs pursuant to CPR 25.13. This they did before Eady J in the course of four days during July 2005. They sought security for their costs up to disclosure of documents in the estimated sum of £433,028.

8. In a reserved judgment delivered on 29 July, [2005] EWHC 1688 (QB), Eady J concluded that it was not practical to adjourn the application in the hope that scientific tests might establish Mende's true age or the authenticity or inauthenticity of the letters attributed to her or of the photograph purporting to show her. He held

   (a) that the claimants had not shown that there was a strong likelihood, on the evidence as it then stood, that they would succeed at trial;

   (b) that an eventual costs order against the claimants would not in practice be enforceable in Sudan;

   (c) that the claimants had not asserted or shown by adequate evidence that they could not afford to lodge a sum of the size sought; and

   (d) that in the circumstances it was just and proportionate to require the claimants to put up £375,000 as security for the defendants' costs down to completion of disclosure.

The appeal

9. Permission was granted by Sedley LJ on sight of the papers to appeal against this decision on two of the three grounds advanced on the claimants' behalf: that there had arguably been an omission to take the claimants' means into account in setting security, and that the finding about the difficulty of enforcing an eventual costs order trespassed on the principle of comity. On renewal, a full court (Pill, Keene and Wilson LJJ) granted permission to appeal on the third ground, namely that there was arguably a strong likelihood of success which precluded the making of any order for security. It adjourned to this court the application to admit new evidence.

10. Since the admissibility of the new evidence depended in part on its content, we indicated at the outset of the hearing that either side could deploy it in argument, subject always to the issue of its admissibility. Our conclusion on this aspect of the case, for reasons to which we now turn, is that (with an exception which we will explain in relation to evidence about funding from the Sudanese government) the new evidence is not admissible, or alternatively ought not to be admitted, on this appeal.

The new evidence

11. The new evidence sought to be advanced by the claimants is intended to help refute the findings of Eady J set out in sub-paragraphs (a) and (c) of paragraph 8 of this judgment. In other words it is directed towards showing that the claimants could not find security on the scale ordered and that there is a high probability that their claim will succeed at trial. In the former category come a third, fourth and fifth witness statement of the first claimant, dated respectively 31 August 2005, 15 September 2005 and 3 July 2006. These seek to provide more information about his assets, his income and his attempts to find financial support from others. The last of them also deals with the merits of the case and hence the prospect of success at trial, an issue which is also the subject of a great deal of other fresh evidence not before Eady J.

12. It consists of reports from four expert witnesses and statements from ten witnesses of fact, together with witness statements from the claimant's solicitor explaining how the various reports and witness statements came into existence. The reports of the four experts deal with the topics of handwriting, photograph authenticity and facial mapping. The ten statements from witnesses of fact were all obtained in late May this year in Khartoum and are the subject of an application for permission to admit dated as recently as 20 June 2006.

13. The legal principles applicable to the receipt by this court of new evidence are not controversial. The relevant CPR rule is not itself one which contains much guidance. CPR 52.11.(2) merely states:

> "Unless it orders otherwise, the appeal court will not receive –
>
> (a) …
>
> (b) evidence which was not before the lower court."

This leaves the court with a broad discretion.

14. Nonetheless, it is a discretion to be exercised in accordance with principle, including the overriding objective of doing justice. There is also a body of authority to the effect that the principles which operated before the Civil Procedure Rules came into effect remain relevant to the exercise of discretion under those Rules: see *Banks v. Cox* [2000] LTL 17 July 2000; *Hertfordshire Investments Ltd v. Bubb* [2000] 1 WLR 2318 at 2325H; and *Hamilton v. Al Fayed* (No 4) [2001] EMLR 15, where Lord Phillips MR stated that the old cases "remain powerful persuasive authority".

15. These old cases include the well-known decision in *Ladd v. Marshall* [1954] 1 WLR 1489, which was dealing with the situation where there had been a trial at first instance. In such a situation, said this court, three conditions had to be met in order to justify the reception of fresh evidence on appeal. Those were:

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have

> an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible." (page 1491)

Those were regarded as strict conditions. In *Electra Private Equity Partners v. KPMG Peat Marwick* [1999] EWCA Civ 1247; [2001] 1 BCLC 589, it was said that in interlocutory appeals some relaxation of the strictness of those conditions might be appropriate, according to the nature of the interlocutory hearing and the individual circumstances of the case: page 620(i). That would particularly be so where the battleground or its timing were not of the appellant's choice.

16. In the present case the nature of the interlocutory hearing was that of an application for security for costs. That situation was specifically considered by this court in *Thune v. London Properties Limited* [1990] 1 WLR 562, where Bingham LJ (with whom the other two members of the court agreed) acknowledged that *Ladd v. Marshall* need not be applied "in its full rigour", but went on to say at page 571:

> "There is nonetheless a clear duty on parties to present their full case at first instance, and it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is. The defendants here, in my judgment, were put on inquiry and failed to deal with this point, although ease of enforcement is now known to be a very relevant consideration."

The court rejected the application to adduce fresh evidence.

17. Applying those principles to the present case, we note that the defendants began to express concern about security for costs some ten months before the hearing began before Eady J: see letter from defendants' solicitors, 13 September 2004. Mr Geoffrey Shaw, Q.C., on behalf of the claimants, accepted in the course of argument that the application for security came as no surprise to them. It was formally made on 2 March 2005 and was accompanied by a witness statement by the defendants' solicitor quantifying the amount sought at £433,028. Insofar, therefore, as the claimants intended to argue that they would be unable to provide such a sum or anything approaching it, with the result that their claim would be stifled by such an order, they had ample time in which to produce full evidence about their own financial resources and their ability (or inability) to obtain funds from other sources. Furthermore, such evidence as was initially produced by Mr Al-Koronky in the shape of his first witness statement was challenged as to its adequacy and accuracy by the defendants before the hearing took place, albeit only shortly before the first day of that hearing on 7 July 2005. The hearing did not conclude until 26 July 2005, during which time a second witness statement by Mr Al-Koronky was put in. Any deficiencies in the evidence about the claimants' financial position as identified by Eady J cannot therefore be explained as being the result of a lack of opportunity to remedy them, and correspondingly such new evidence on that topic as is now tendered could, for the most part, have been produced for the hearing at first instance.

18. We say "for the most part" for two reasons. First, there has been some updating of the evidence about the claimants' financial position, but not in any way which is of real significance. Secondly, the fourth witness statement of Mr Al-Koronky, dated 15 September 2005, contains a correction to the information provided in his first witness statement (and indeed in his third statement, though that post-dates Eady J's judgment). In his first statement it had been said that his solicitors held £20,000

> "which I paid to them before these proceedings were commenced on account of expenses of this action …" (paragraph 5)

That witness statement went on at paragraph 12 to say that he received "no payments whatsoever from the Government [of Sudan]."

19. In his fourth witness statement Mr Al-Koronky states that it has been pointed out to him by his solicitor that it was incorrect to say that he had paid the £20,000.

> "The £20,000 was paid to my solicitors by the Sudanese Embassy in London on 6 April 2004." (paragraph 3)

He then describes this as an "initial response" by the Government to his request for support. Patently the statement that £20,000 has in fact been paid by the Sudanese Government towards the expenses of the present action is an admission against the claimants' interest, since it evidences a degree of financial support, at one stage at least, from that source. Moreover, it corrects an earlier statement by Mr Al-Koronky which had the potential to mislead the court. We regard that as a piece of fresh evidence which, in those particular circumstances, it is in the interests of justice to admit, and we do so.

20. In respect of the remaining fresh evidence about the claimants' financial position, we have had regard to its evidential value and to its potential to alter the conclusion reached on the "stifling" issue by Eady J. The plain fact is that none of this remaining fresh evidence goes beyond assertions by Mr Al-Koronky: there is a complete absence of any supporting documentation. The weaknesses of the claimants' case on this topic as seen by Eady J would in consequence not be substantially overcome even were this evidence to be admitted. For all these reasons we decline to admit the fresh evidence as to the claimants' financial position, save to the very limited extent indicated in the previous paragraph.

21. We turn to the other fresh evidence, which relates to the prospects of the claim succeeding at trial. It seeks to demonstrate that the defence of justification is ill-founded because Mende's story of enslavement is untrue. Much of what we have already said about the claimants' opportunity to prepare its evidence for the hearing before Eady J applies to this evidence also. The defence in these proceedings was served on 1 February 2005, five months before that hearing started. The defence asserted that the letters, photograph and other documentation, relied on by the claimants to disprove Mende's story, were forgeries. It follows that, insofar as the claimants intended to resist an order for security for costs on the basis that there was a strong probability of success at trial, such a contention was going to depend on their demonstrating that the documents they relied on were genuine. This issue was clear well before the first-instance hearing began.

22. In any event, the fresh evidence now tendered on this issue and not put before Eady J is very much in contention. While the expert evidence on hand-writing might seem at this stage to be persuasive, there is fresh evidence in rebuttal tendered by the defendants in the shape of a report by Professor Abu-Deeb dealing with linguistic analysis which points to a contrary conclusion. The weight to be attached to a report of a photographic expert may be limited because of the absence of negatives. The recently obtained statements of witnesses of fact are challenged because of the conditions existing in the Sudan, where these statements were made, and the lack of opportunity for the defendants to verify their accuracy and reliability. The reality is that there is a huge divide between the parties on the credibility of such factual evidence, which creates an issue very difficult to resolve in advance of trial.

23. When we add these problems as to the weight to be attached to the fresh evidence on the justification issue to the failure of the claimants to produce it at the hearing before Eady J., we are forced to conclude that it would be wrong and contrary to the interests of justice to admit it at this stage. We would, in effect, be conducting a new and very different hearing from that which occurred at first instance, and such a departure from the well-established principles is not justified. It follows that we decline to admit the fresh evidence tendered on either side relating to the truth or falsity of Mende's story.

Security for costs: principles

24. Some of the governing principles are uncontroversial. One is that a claimant resident abroad whose case, at the moment of the interlocutory decision, appears highly likely to succeed at trial will not be required to lodge security for the defendant's costs: see *Keary Developments Ltd v Tarmac Constructions Ltd* [1995] 3 All ER 534, 540. A second is that an order for security may not legitimately be based on the bare fact of residence abroad, which would amount in most cases to discrimination on grounds of national origin, but requires an established difficulty of enforcement there: see *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, §61.

25. A third principle, in our judgment, is that the court must not order security in a sum which it knows the claimant cannot afford. We will develop this below. For the defendants, Adrienne Page QC does not deny but seeks to qualify the principle. She submits that a claimant who chooses to litigate extravagantly (as she submits these claimants are doing) cannot complain if the security ordered is unaffordably high. In support she cites what Mance LJ (as he then was) said in *Nasser v United Bank of Kuwait*, ante, §60:

> "The new arrangements for funding litigation certainly appear capable of throwing up possible imbalance, in so far as they permit contingency fee arrangements with uplifts potentially recoverable from losing defendants but enable claimants to pursue litigation without insuring or securing the defendants' fees …"

26. We will come later to the relevance of conditional fee agreements (CFAs), but we do not consider that this passage has any bearing on the amount to be secured. The way to deal with extravagant litigation is by the use of the court's case management powers, including the striking out of unnecessary or unsustainable pleadings, the capping of costs and the restriction of disclosure and evidence. Deliberately to require an unaffordable amount of security as a separate way of disciplining a wayward claimant is to transform security for costs into a means of striking out a claim without any of the ordinary safeguards. In our judgment the principle of affordability, if we may call it that, is not qualified in the way Ms Page proposes.

27. This said, it is both clear on authority and requisite in principle that a claimant resident abroad who wants to ensure that any security he is required to put up is within his means must be full and candid in setting out what his means are. True, as Park J noted in *Brimko Holdings v Eastman Kodak Co.* [2004] EWHC 1343 (Ch), §12:

> " … the court should not press too far the proposition that the burden [of showing that an order in more than a certain sum will stifle the claim] rests on the claimant. It should be recalled that when the claimant has to establish that third parties do not exist from whom security can reasonably [be] expected and obtained, that is to place on the claimant the burden of proving a negative."

But this does not relieve the court of the need to scrutinise as much as it is told with a critical eye and to note unexplained gaps in the information which the claimant volunteers or in the documentary support for it. Unless the court were prepared to draw adverse inferences from such lacunae, a claimant would have only to deny that he can find the sum asked in order to avoid an order.

28. It follows that the court, once satisfied that the case is one in which the claimant ought to put up security for the defendant's costs before continuing with his action, is going to find itself in one of two situations. Either it will be satisfied that it probably has a full account of the resources available to the claimant, in which case it can calculate with reasonable confidence how much the claimant can afford to put up; or it will not be satisfied that it has a full account, and so cannot make the calculation. Does it follow in the latter situation that the court must go straight to the amount sought by the defendant and, having pruned it of anything which appears excessive or disproportionate, fix that as the security? Or is there a middle way - for example to set an amount which represents the court's best estimate of what the claimant, despite having been insufficiently candid, can afford?

29. In our judgment there is such a power, but it resides in the court's discretion rather than in legal principle. In the second situation we have postulated, the requirements of the law have been exhausted: what remains is to set a suitable sum. This classically is where discretion fills the space left by judgment: the court has a choice of courses, none of which it can be criticised for taking provided it makes its election on a proper factual basis uninfluenced by extraneous considerations.

30. We agree with the submission of Mr Shaw for the claimants that article 6 of the European Convention on Human Rights has a bearing on this issue, by virtue of s.3(1) of the Human Rights Act 1998 which requires both primary and subordinate

legislation to be read and given effect, so far as possible, compatibly with the Convention rights. In *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, §59, the European Court of Human Rights held, what it has since reiterated, that while the state has power to regulate access to its courts, it must not do so in ways which "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired". The court also insisted on "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". The domestic obligation to read CPR 25.13 conformably with the law of the Convention is met, we believe, by the approach taken in this judgment and, in particular, by the principle that the court may not fix security in what it knows to be an unaffordable amount.

31. It is in the context of what we have said so far that, in our respectful view, the judgment of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, 539-40, and that of Potter LJ in *Kufaan Publishing Ltd v Al-Warrak Publishing Ltd* (1 March 2002, unreported), should be read. There is a clear difference between incurring a substantial risk, in the overall interests of justice, that a claimant will not be able to raise the sum required as security, and setting a sum in the knowledge that he cannot do so. The latter is tantamount to striking out his claim and requires the same process and justification as any other strike-out. The former is the striking, within the Convention paradigm, of a balance of the kind described in the two judgments we have mentioned.

32. It is this rather than the fact that those two cases were concerned with companies that, in our view, marks them out. The fact, relied on by Mr Shaw, that companies are subject to a distinct security regime based on their legal personality, while individuals are protected by law against being made to put up security for costs merely because they live abroad, relates not to the setting of an appropriate sum but to the availability in principle of an order for security. It follows that Eady J did not err in law in §28 when he declined, in relation to the setting of an amount, to distinguish *Keary*'s case. Nor did he err in relation to article 6 of the Convention when he spoke in the same paragraph of "the parties' respective rights" under it. Mr Shaw submits that the only relevant right here is the claimants' right of access to the courts. But it is manifest that defendants too have entitlements under article 6, including a right not to have *their* access to a court rendered prohibitive by the prospect of irrecoverable costs or, as demonstrated by the judgment in *Tolstoy*, an entitlement to have claimants' access limited by relevant and proportionate conditions.

Conditional fee agreements

33. At more than one point of the judgment below, and at more than one point of the argument before us, the inflationary effect on costs of the claimants' CFA with their solicitors has been canvassed. In a paragraph cross-headed "The relevance of the conditional fee agreement" Eady J said this:

> 30. It has already been recognised that when considering "unfair pressure" it is relevant for the court to take into account the fact that a claimant is pursuing his or her case with the benefit of a conditional fee agreement with a substantial uplift – especially if there is no "after the event" insurance

> ("ATE"): see e.g. the observations of Mance LJ in *Nasser* at [60]. Here it has, after a considerable lapse of time, finally been acknowledged on the Claimants' behalf by their solicitor that there is no ATE insurance that is likely to be of any value whatsoever to the Defendants should they succeed. What is more, as I understand it, there is no challenge to the Defendants' assumption that in this particular case there is likely to be a 100% uplift.

34. What Mance LJ said in *Nasser* was this:

> 60. I would interpose at this point that, even where a claimant or appellant is resident abroad, there may of course be special factors indicating that any order for costs will be satisfied in some other fashion. The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere. The new arrangements for the funding of litigation certainly appear capable of throwing up possible imbalance, in so far as they permit contingency fee arrangements with uplifts potentially recoverable from losing defendants, but enable claimants to pursue litigation without insuring or securing the defendants' fees. The claimant's contingency fee arrangement in the present case is, however, without uplift.

35. Thus a claimant's (or for that matter a defendant's) entry into a CFA with his solicitor has by itself no impact on the case for or against the making of an order for security for costs. This proposition now marches with the decision of the House of Lords in *Campbell v MGN Ltd (No.2)* [2005] UKHL 61 that the enabling provisions of the Courts and Legal Services Act 1990, s.58, as amended, are compatible with article 10 of the Convention, their differential impact being a matter for Parliament. What may matter, however, is what insurance the claimant has obtained against the eventuality of having to pay the defendant's costs. A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.

36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective.

37. It follows that the claimants' CFA, while it does not count against them either in law or in the exercise of the judge's discretion, does not help them to ward off an order for security for costs. Eady J made no error in this regard. While he refers to the probable 100% uplift in the event of success, he does not suggest – and neither does Ms Page - that this enhances the defendants' case for security.

Enforcement and comity

38. We turn to the submission that the judge ought not to have held that any order for costs in the defendants' favour made after trial in England would not be enforceable in Sudan. This is an important part of the case because, in the absence of any such finding, it is to be presumed that any order for costs could and would be enforceable in Sudan; the fact that the claimants might not have sufficient assets for a full recovery to be made is not, of itself, a ground for ordering security. This is apparent from the judgment of Mance LJ in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 WLR 1868, 1885-6 where he said:-

> "61. …….. The former principle was that, once the power to order security arose because of foreign residence, impecuniosity became one along with other material factors: see the Thune case [1990] 1 WLR 562 cited above. This principle cannot, in my judgment, survive in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniosity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation, since the power under CPR r 25.13(2)(c) applies to companies wherever incorporated and resident and is not discriminatory.
>
> 62. The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some - it may well be many - cases there are likely to be substantial obstacles to, or a substantial extra burden (e g, of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state. In so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as do exist abroad or (ii) as a practical matter, to make it more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad.
>
> 63. It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be

> exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).
>
> 64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases . . . . it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden."

39. The respondents have never suggested that Sudan is a country in respect of which the natural assumption is that there is complete impossibility of enforcement but they have contended, on the basis of evidence, that it would in fact be impossible to enforce any order for costs which they may in due course obtain. That evidence is contained in Mr Mathieson's second witness statement and is in the following terms:-

> "37.The UK does not have any enforcement treaties with Sudan and therefore there is no straightforward route in which the Defendants could seek to have any order obtained in the UK courts enforced in the Sudan.
>
> 38. We have consulted a lawyer in Sudan. He has advised us first that the judiciary in Sudan is not independent. That is indeed a matter of record: see http://www.icj.org/IMG/pdf/sudan.pdf. He advised us second that the First Claimant's links with the Government would ensure that he and his wife would be protected by the judiciary. He has advised us third that the subject matter of this case would eliminate any possibility of a judgment against the Claimants being upheld since it would offend the Government and would be tantamount to an admission that slavery exists in the Sudan, something the Sudanese government has repeatedly denied. In summary, the Sudanese lawyer has advised us that we have no prospect of enforcing any United Kingdom judgment against the claimants in Sudan."

40. The judge referred to this evidence and then said:-

> "35 . . . . . There is no evidence relied upon on the claimants' behalf by way of rebuttal. Ordinarily, therefore, I would

> expect to proceed on the basis of that unchallenged evidence and to work on the assumption that it would be impossible to enforce any order in the Defendants' favour.
>
> 36. Mr Shaw, however, urges me not to do this for reasons of comity. He suggests that it would be inappropriate, on grounds of public policy, for an English court to assume that duly appointed judges in that jurisdiction will act improperly, unlawfully or in bad faith. So it may be. It is not necessary, on the other hand to come to any such conclusion in arriving merely at the decision that an order would be difficult or impossible to enforce. An example I cited in the course of argument was that of the attitude of the courts in the United States towards the enforcement of damages awards in favour of claimants in English libel proceedings. There are differences of policy as between the English courts and those of the United States in that context. To conclude that an English award would not be enforceable in the United States is not to criticise the judiciary or to act inconsistently with the demands of comity.
>
> 37. I prefer to take the more conventional course of proceeding on the evidence before me. Since Mr Pepper has chosen not to counter the Defendants' evidence on the subject with any legal opinion from Sudan, I regard myself as required to proceed on the basis of the only evidence I have on that topic."

41. Before us Mr Shaw attacked this conclusion by submitting that the judge had not separated out and then dealt correctly with the three elements of the advice received by the defendants. He submitted that if one referred to the website referred to by Mr Mathieson one discovered that it set out a post-2001 report on Sudan by the International Commission of Jurists which queried the independence of the judiciary largely on the basis that it was the President of the Republic who appointed the Chief Justice and his deputies and likewise all other judges, albeit on the recommendation of the Supreme Council of the Judiciary (whose role was, however, only advisory). He pointed out that much the same could be said of the judiciary in other countries (including our own) in respect of which it could not be suggested that the judiciary was not independent. The second element of the advice was, submitted Mr Shaw, no more than an unparticularised assertion that all members of the judiciary would corruptly decide any enforcement application against the defendants on the basis that the Claimants were linked to the Government, while the third element of the advice came to much the same thing since it was said that no judge would enforce a judgment which "would offend the Government", as a decision of an English judge on costs in favour of the defendants would do. He further submitted that the contents of the unidentified Sudanese lawyer's advice amounted to a general attack on a foreign country's judiciary which gave rise to an issue which, on grounds of comity, could not be entertained by the courts of this country.

42. For this last proposition Mr Shaw cited the otherwise unreported decision of *Jeyaretnam v Mahmood* (The Times, 21st May 1992) in which, for the purpose of an application to discharge an order for service on a defendant outside the jurisdiction,

Brooke J (as he then was) declined to evaluate allegations of lack of independence or impartiality in the defendant's home country of Singapore on the grounds that such allegations were not justiciable, in the same way as the allegations in *Buttes Oil and Gas Co v Hammer* [1982] AC 888 were held not to be justiciable. While we accept that any court is always reluctant to pass judgment on the judiciary of a foreign country in the context of jurisdictional disputes, we doubt if there is any general principle that the courts of this country will never do so in any context. First, as noted by Morland J in *Skrine & Co v Euromoney Publications Ltd* [2001] EMLR 16, para 18(1) the *Buttes Oil* case concerned past transactions of foreign states, not the likely behaviour of judges in the future. Secondly, in the context of dealing with asylum-seekers it is frequently relevant to consider whether the courts of a foreign state afford any remedy against persecution, the risk of which is said to be a reason for not returning the applicant to his home state. Thirdly, any such principle would not sit happily with cases decided in relation to the law of repressive regimes such as Nazi Germany, as Dicey and Morris imply in their reference to Jeyaretnam, see *Conflict of Laws*, 13th edition, para. 11-125, note 27.

43. Be this as it may, we would be inclined to accept Mr Shaw's submission that if any allegation as to ineffectiveness, let alone partiality, is to be made against the judiciary of a foreign state, it must be supported by much more than the mere generalised assertion of an unidentified lawyer with knowledge of the foreign law. Properly attested examples should be given which can then form a suitable evidential foundation for any such conclusion, before any answer can be expected from a claimant.

44. Different considerations apply, in our judgment, to the third aspect of the foreign lawyer's advice set out in Mr Mathieson's witness statement. Here the lawyer (albeit unidentified) says not that a corrupt or ineffective judiciary would not enforce a costs judgment because of the Claimants' connection with the Government but that any judgment, the basis of which was that slavery existed in Sudan or was practised by a Sudanese official, would not be enforced because it would offend the government. This seems to us not to be part and parcel of a generalised assertion of corruption but a specific assertion that any such judgment would not be enforced on grounds of public policy. It is well-recognised in private international law that states do take the view in relation to certain foreign judgments that they cannot be enforced for reasons of public policy. If, indeed, the situation was reversed and enforcement was sought in England and Wales of a judgment of a foreign court, the basis of which was that slavery existed in England, it is by no means obvious that enforcement or recognition would automatically occur.

45. We do not consider that any question of act of state in the *Buttes Oil and Gas* sense arises in the present case. While we do not consider that issues relating to the quality of a foreign judiciary can never be adjudicated upon (see, for example, asylum cases), it goes without saying that the judiciary of this country will be extremely cautious about criticising the judiciary of another country. It is unnecessary for us to address that question in this case, however, because the third element of the evidence in paragraph 38 of Mr Mathieson's witness statement relates simply to the enforceability of a possible individual future judgment.

46. In relation to this aspect of the evidence, it is relevant that there has been no answer from the claimants to the specific assertion made by the defendants. In our view the

judge's conclusion that he should proceed on the basis of the evidence which did exist, not on the basis of evidence which did not exist, cannot be criticised. That evidence was sufficient to sustain the defendants' case that any eventual award of costs against the defendants in the present case will not, on the balance of probabilities, be enforceable against the claimants.

Eady J's decision

47. Because Eady J's judgment is as accessible as this one, we have refrained from setting out substantial passages from it. But it is necessary to set out his concluding paragraph:

> 71. In all the circumstances, I have come to the conclusion that this is overwhelmingly a case for an order for security. I bear in mind proportionality, but I also need to have very much in focus the evidence of the enormous expenditure which the Defendants have already had to incur in investigating the situation in Sudan because of the way the case has been framed against them. It seems to me to be right to make an order that security be provided in the sum of £375,000 down to completion of the disclosure process. Subject to any further submissions, it would appear to be reasonable to allow the Claimants until 1st October 2005 to produce the security. There will be liberty to all parties to apply and I would not wish to inhibit, in the meantime, any expert assessment of the disputed original photograph "recovered" last week (for whatever that may be worth). Subject to that, and to the preparation of Mende's witness statement, the action will be stayed forthwith until security is provided.

Conclusions

48. We have therefore reached this position. Apart from those elements of the first claimant's evidence which amount to recent admissions against interest, there is no good ground for admitting the evidence assembled on the claimants' behalf since the hearing before Eady J. The claimants' evidence as it stood before Eady J, cogent as it may have been, was not such that he was compelled to find their case overwhelmingly or highly likely to succeed at trial. In deciding, next, that enforcement of a costs order in the defendants' favour would be impractical in Sudan he acted on evidence and breached no principle of international comity. He was therefore entitled to order security for costs. In deciding so to order, and in setting the amount, he justifiably found that he had not been provided with a full and candid account of the claimants' actual and potential means. In this situation he had to set a suitable sum in the exercise of his discretion.

49. The factual basis of the judge's exercise of discretion, which properly included the defendants' estimate of costs, properly excluded the first claimant's evidence of limited means because his statement was demonstrably (both then and since) neither full nor candid. For the rest, no error of law or other extraneous consideration entered

into the judge's choice of a figure. In these circumstances his exercise of discretion, while it might equally legitimately have settled upon a substantially lower figure, is unappealable.

50. This appeal is accordingly dismissed.