Neutral Citation Number: [2006] EWHC 231 (QB)

Case No: QB/2005/PTA/06343

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2006

Before :

THE HON. MR JUSTICE EADY

- -

Between :

Prince Radu of Hohenzollern	**Claimant**
- and -	
1.Marco Houston	**Defendants**
2. Sena-Julia Publicatus Ltd	

- -
- -

Patrick Moloney QC and William Bennett (instructed by **Carter-Ruck**) for the **Claimant**
Stephen Cogley (instructed by **Tarlo Lyons**) for the **Defendants**

Hearing dates: 31st January and 1st February 2006

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. The Claimant is married to the daughter of King Michael of Romania. He claims damages for libel against Mr Marco Houston, who is the editor, and Sena-Julia Publicatus Ltd, the publishers, of a magazine called *Royalty Monthly*. This has been described by Mr Cogley, appearing on their behalf, as "a barely solvent, tiny magazine". Nevertheless, it is not disputed that the Defendants published an article in volume 19, issue no. 5, headed "Scandal in Romania as Princess Margarita's husband is branded an impostor". The magazine was published in the jurisdiction and was plainly defamatory. It was pleaded on the Claimant's behalf that the words meant:

> "… the Claimant is a con man, a forger, and an impostor and a former secret policeman for the wicked Ceaucescu dictatorship who has falsely passed himself off as royal prince in order to con people out of money and to inveigle himself into high official positions which would otherwise have been denied to him".

2. The Defendants proposed to rely upon justification, fair comment and privilege. It was thus in issue, *inter alia*, whether the Claimant is entitled to use the name Prince Radu of Hohenzollern or, for that matter, Prince of Hohenzollern-Veringen. It also in dispute whether he was a member of the Ceaucescu secret police.

3. The present issues concern security for costs. The Claimant resides in Romania, which is due to become a member of the European Union on 1 January 2007. The evidence shows, however, that there is at least the possibility of postponement until 2008. At the moment, Romania is seeking to achieve compliance in many respects with standards laid down by the European Union. Some of these are concerned with the administration of justice and, in particular, the enforcement of foreign judgments.

4. Following a hearing on 14 July last year, Senior Master Turner, whose experience in this field stretches back over many years and is well known, made an order that the Claimant should pay £125,000 by way of security. On 24 August Treacy J refused the Claimant's application for an extension of time within which to make the payment, and judgment was entered for the Defendants in default of compliance the following day. He (like the Senior Master) had also refused to grant a stay. That order was not appealed. This regularly entered judgment thus presents the Appellant with a formidable obstacle. I shall need to return to this in due course. Meanwhile, I turn to the merits of the appeal and the present applications before the court. Nevertheless, even if the Claimant succeeds, in whole or in part on those matters, it will avail him nothing unless I set aside this judgment.

5. The Senior Master gave permission to appeal on two grounds only, which correspond to Grounds 5 and 6 in the Appellant's notice. They were identified by the Master in the form N460 as follows:

> "Permission to appeal is confined to two issues:
>
> 1. If this Claimant is to be believed he has virtually no assets; yet his relations and friends and others with whom he works

appear to be in receipt of substantial funds. Is he therefore a candidate for '*Yorke Motors*'?

2. If so, ought he to give security for the bulk of the additional costs of execution?"

The reference to "*Yorke Motors*" was to the case of *Yorke Motors v Edwards* [1982] 1 WLR 444, 449 where it was made clear that the court should take into account the fact that a litigant pleading impecuniosity "may have funds, he may have business associates, he may have relatives, all of whom can help him in his hour of need". The Master gave an extension of time for serving the Appellant's notice up to 14 September and, when it was served, it contained four other grounds upon which the Appellant was seeking permission to appeal. In the particular circumstances of this case, it seems to me right to set out all the grounds of appeal as they appear in the Appellant's notice:

1. The Master's decision to refuse the Claimant's application for an adjournment of the hearing in order to deal with the Defendants' recently-served evidence was wrong in law and/or an improper exercise of his case management discretion for the following reasons:

a) In breach of Part 23 CPR, the Defendants did not serve with their application notice any evidence as to the Romanian law and practice relevant to the enforcement there of UK judgments or the additional costs of such enforcement by comparison with a Brussels Convention jurisdiction.

b) The Defendants' evidence on that topic was served on 11 and 12 July 2005 (the hearing being on 14 July) and the quantum of £150,000 specified by letter of 13 July.

c) The Claimant had no or no sufficient opportunity to consider that evidence, let alone obtain instructions or evidence in answer as to Romanian law prior to the hearing.

d) Balancing the prejudice to the parties from hearing or adjourning the matter on 14 July, the only just solution was to grant the adjournment, (possibly with a stay meanwhile). By proceeding without relevant evidence and accepting as he did the Defendants' said evidence, the Master was bound to reach the wrong and unjust conclusions as to additional costs of enforcement set out at Grounds (3) and (4) below.

e) Further, the Master also permitted the Defendants to rely on evidence as to the Claimant's means and bad faith (the 4th WS of Mr Pennal) served after close of business on 13 July, to which the Claimant had no opportunity to respond, and refused him an adjournment to deal with that evidence.

f) Again, by proceeding without the evidence in response, and refusing an adjournment on terms, the Master was bound to reach the wrong and

unjust conclusions as to ability to pay, set out at Grounds (5) and (6) below.

2. Had the Master granted the adjournment sought, he would have been able to receive and consider the following additional evidence on the Claimant's behalf, which would or ought to have led him to a different decision on the merits and/or to have reached his decision in a just manner.

a) The evidence as to Romanian law and procedure set out in the Expert Report of Dr Bazil Oglinda;

b) The evidence as to the means of the Claimant and his wife, and the availability of third-party assistance in providing security, set out in the 2nd WS of the Claimant, and the 1st WSs of Princess Margarita and King Michael;

upon which the Claimant now seeks permission to rely.

3. For the reasons more fully set out in the Expert Report of Dr Oglinda, the Master's decision that the Defendants would, if successful in this action, face substantial additional costs of enforcement in Romania by comparison with a Brussels Convention country was plainly wrong in fact and law:

a) Since May 2004, Romania has in effect been a Brussels Convention country since its law on foreign judgments is now identical to that applicable in the EU.

b) The Master was therefore wrong to rely on his past experience of Romanian enforcements under the pre-Convention regime.

c) The Master had no or no sufficient evidence before him as to the costs of enforcement in Romania, let alone the comparative costs in EU countries, on which to base his conclusion that there was a material excess in those costs in Romania.

4. Even if the Master had rightly and/or fairly held that it was likely that there would be some additional costs of enforcement in Romania by comparison with a Convention country, there was no proper evidential basis for his conclusion that £125,000 was a proper quantum of security, and the evidence of Dr Oglinda shows this amount to be manifestly excessive.

5. Even assuming that a given amount of security would otherwise be due, the Master ought not to have ordered it unless satisfied that to do so would not stifle the Claimant's claim by reason of his inability to pay. The Master's conclusion that the Claimant could reasonably be expected to obtain funding from the ex-Royal Family was:

a) unjust, because reached on the basis of unfairly admitted and unanswered evidence of Mr Pennal referred to above;

b) wrong in fact, especially in the light of the further evidence as to the means of the Claimant and his wife, and the means and intentions of the King, referred to above.

6. In the light of that evidence (which the Master should have permitted to be prepared and adduced before him) to order any substantial security in this case would be to stifle an otherwise legitimate claim in breach of the Claimant's ECHR rights and contravention of the overriding objective.

6. I should point out at this stage that Grounds 5 and 6 have become redundant, since King Michael has subsequently made clear that he is prepared, if necessary, to provide up to £125,000 to enable the Claimant to meet any security requirement. No question of stifling now arises.

7. Mr Cogley, who has taken every conceivable point on behalf of his clients, has challenged the Claimant's right to introduce the first four grounds. Not only did he argue that none of them had any realistic prospect of success and that, accordingly, permission should be refused. He also suggested that an extension of time was required, over and above the extension for the Appellant's notice already granted by the Senior Master, since on a proper construction his permission should be taken to be limited to the two grounds which he had expressly identified. In other words, it was not enough for the Claimant's advisers to include the new grounds in the notice, when that came to be served in September, but rather they should have applied for a separate extension of time within which to apply for permission in respect of Grounds 1 to 4.

8. The response of Mr Patrick Moloney QC, appearing for the Claimant, is that this was quite unnecessary and that all that his client was required to do under the CPR was to include the proposed grounds within his Appellant's notice (in respect of which an extension had already been granted). He referred to the terms of CPR 52.4(1). Surely, he argued, his Client cannot be in a worse position in this respect simply because Master Turner granted permission to appeal on some grounds. I believe that to be a correct interpretation but, from an abundance of caution, I granted an extension of time in case I was wrong. My reason for doing so was that the Appellant's advisers acted reasonably and in accordance with what they, reasonably, believed to be the requirements of the CPR. To shut them out from even being allowed to ask for permission, in those circumstances, would seem to me to elevate technicality above the overriding objective.

9. Most of the first day of the hearing before me was devoted to the parties' counsel arguing whether or not the Claimant should have permission to argue Grounds 1 to 4 and to introduce fresh evidence for the purpose of his appeal. Again, much time was devoted to intricate technicality rather than substance and when this exercise finally concluded, at 3pm, I indicated that I was giving Mr Moloney permission to argue the new grounds and rely upon the fresh evidence. At that stage, in the interests of making best use of the time available, I gave no further reasons than that the four additional grounds of appeal each had a reasonable prospect of success. I now propose to consider these matters in a little further detail.

10. Mr Moloney submits that the Senior Master's decision to refuse an adjournment on 14 July was wrong and that it had the consequence of depriving him of relevant expert

evidence on the subject of current Romanian law and practice. It is, of course, very rare for an appellate tribunal to interfere with an exercise of discretion on a matter such as granting an adjournment. Mr Cogley argues that not only was the Senior Master entitled to refuse the adjournment, an option well within the range of reasonable decisions open to him, but that in the circumstances prevailing at that time it was the only appropriate course.

11. Mr Moloney, on the other hand, suggests that the burden of establishing the true position as to the enforcement of a costs order in Romania lay upon the Defendants and that, although their solicitor Mr Pennal had deposed in a statement dated as early as 10 June 2005 that there would be expert evidence on Romanian law, this only materialised shortly before the hearing. The Claimant had no realistic opportunity of dealing with it. He also argues that there was no particular urgency requiring the Senior Master to press ahead on 14 July, since the interests of the Defendants could have been adequately protected by granting a stay of the proceedings in the meantime, so as to avoid any unnecessary expenditure.

12. The Defendants' expert report was from Mr Octavian Nicolau, which was dated 8 July 2005 and received by the Claimant's advisers on Monday, 11 July. It raised a number of matters, concerning law and practice in Romania, which are controversial and which clearly required to be answered. Subsequently the Claimant was able to rely upon evidence from an independent expert called Dr Bazil Oglinda, dated 12 September 2005, and which I permitted to be introduced into evidence. It deals in some detail with matters of the current law and procedure relating to enforcement of foreign judgments in Romania. It makes clear that the relevant law (Law 187 of 2003), which came into effect in May 2004, was enacted specifically for the purpose of bringing Romanian procedure in this respect into line with the requirements of the European Union with a view to accession on 1 January 2007. What had not emerged very clearly on the face of Mr Nicolau's first report was that the terms of the law exactly correspond to the provisions applicable throughout the European Union, including in the United Kingdom: see Council Regulation (EC) No 44/2001, Chapter III, Articles 33-37 (Recognition) and Articles 38-52 (Enforcement).

13. Mr Cogley points out that the Senior Master, especially, cannot have been unaware at the hearing on 14 July that the new Romanian provisions corresponded to those applicable throughout the European Union. Nevertheless, the evidence of Mr Nicolau is confusing, in the sense that he sets out a selective summary of the provisions, and purports to identify problems and obstacles arising under the law, as though these were unique to Romania. What he should have done, in order to provide relevant and helpful evidence, was to explain in the light of *current* practice and procedure why it was that these identical legal provisions were still giving rise to more problems, or longer delays, than those inherent in other European jurisdictions – so as to assist in identifying the elements of additional cost.

14. As everyone recognises, it is important nowadays to concentrate on the principles identified by the Court of Appeal in *Nasser v United Bank of Kuwait* [2001] 1 WLR 1868, where it was made clear that the discretion to order security for costs should not be exercised in a manner which is discriminatory against those who reside outside the relevant zone. There is now no presumption that an order for security should follow from the mere fact of a litigant's residence in a non-Convention country. The court will require to be satisfied, usually on the basis of evidence, that any costs order made

in favour of the defendants would not be enforceable or, at least, that enforcement would be substantially more difficult in the relevant jurisdiction and correspondingly more expensive for the defendants.

15. In respect of countries where the evidence shows, or it is regarded by the court as obvious, that enforcement of a costs order would be completely impossible, it may well be that the court would regard this as providing "an objective justification for the court exercising its discretion to make an order for payment of the full amount of the costs likely to be ordered against the claimant if unsuccessful in the litigation": *Texuna International Ltd v Cairn Energy plc* [2004] EWHC 1102 (Com), *per* Gross J; see also *Abdel Mahmoud Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB).

16. Where, however, as in the present case, the evidence before the court shows that there is a realistic prospect of enforcement, a court will be likely to limit the order for security to a sum corresponding to the *additional* cost which will be incurred in the process of enforcement (i.e. as compared to the cost of enforcement in a jurisdiction within the relevant zone): see e.g. the observations of Mance LJ in the *Nasser* case at [67].

17. Mr Moloney, in the light of these principles, has consistently emphasised that the important issue in the present case is whether the Defendants (upon whom the burden clearly lies) have established to the required degree that enforcement in Romania now or in the future, notwithstanding the adoption of the law in May 2004, would be significantly more expensive than in an EU jurisdiction. He submits, quite rightly in my judgment, that it is upon that margin that the evidence and argument should have concentrated.

18. As a matter of fact, Mr Moloney also argues that the imminent accession of Romania to the European Union should disincline the court to make any order for security at all. It is almost certainly right that, if it ever arose, the Defendants' attempts to enforce in Romania would take place after 1 January 2007. Nevertheless, my approach was to address the situation as it currently stands. In my judgment, I should approach the issues on the basis that, if security for costs would otherwise be appropriate in accordance with the principles expounded in *Nasser*, I should give the Defendants that measure of protection in the meantime. If Romania does become a member of the European Union, as planned, on 1 January 2007, then no doubt an application to discharge the order for security would be assessed on its merits as and when the time arose. Another factor to take into account is that it is possible (albeit, I suspect, unlikely) that Romania's accession may be delayed – perhaps until 1 January 2008.

19. I return, in the light of these considerations, to the situation confronting the Senior Master on 14 July last year. I confess that I would probably have granted the adjournment sought, for the very reason that the evidence of Mr Nicolau required to be answered in the light of the developing situation in Romania, as it was attempting to achieve compliance with European Union requirements, but that is not the test. Under the new appeals regime, an appeal from a Master is not a re-hearing. I need to be satisfied that the Senior Master has erred in law, or that there has been procedural unfairness, or that in the exercise of a discretion he has stepped outside the bounds of the range of reasonable decisions available to him on the facts. Moreover, submits Mr

Cogley, I must judge the matter in the circumstances confronting him on 14 July and be wary of hindsight.

20. Mr Cogley has also argued that, as a matter of everyday practice in relation to applications for security, it is by no means always the case that expert evidence is relied upon. Senior Master Turner has enormous experience in these matters, and was entitled to take the view that a fair and proper decision could be reached without the Claimant having the opportunity to respond with expert evidence of his own.

21. There is, on the other hand, the need for "equality of arms" under the CPR. It may be reasonable to approach an application for security on the basis of experience, and without entertaining expert evidence on either side, but I have some difficulty with the notion that one side should be allowed expert evidence and yet the other side is to be deprived of the opportunity of responding. There was evidence before the Senior Master from Mr Pennal, the Defendants' solicitor, because he personally has long experience of litigation involving Romania and of the problems of enforcement within that jurisdiction. That was an advantage which was not available to the Claimant's advisers. Not only that, but the Defendants were accorded the additional advantage of putting in independent expert evidence on Romanian law and practice unilaterally.

22. It is true that the Claimant had put in evidence from a Romanian lawyer, Mr Adrian Vasiliu, which was dated two days earlier than the report of Mr Nicolau. As it happened, however, the Senior Master was unwilling to give much weight to this evidence because Mr Vasiliu was not regarded by him as truly independent. He has a role to play as a spokesman for the Romanian Royal Family. Moreover, he expressly stated "I have no specific experience related to enforcing English Court Judgments in Romania".

23. I have concluded, therefore, that there was a degree of unfairness so far as the Claimant's position was concerned on 14 July. I have naturally come to that conclusion with some diffidence, since I am only too conscious of Senior Master Turner's enormous experience in his field. If I may respectfully say so, however, I think that on this occasion his experience and familiarity with applications of this kind may have disinclined him, unconsciously, from standing back and reviewing the "equality of arms" situation as it presented itself on 14 July. One party had a solicitor with much direct experience of the problem in hand, as well as the support of an independent and apparently authoritative expert, whereas the other side was deprived of the opportunity of mounting any effective response. To that extent, I find that the Appellant's Ground 1 is well founded.

24. There is the separate but closely related question of whether I should admit the evidence of Dr Oglinda for the purpose of the appeal. It would certainly seem germane to Grounds 1 to 4. In this context, although they are no longer to be applied so strictly as in the past, I still need to have in mind the principles set out by the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489. For reasons which I hope are now apparent, I consider the requirements are met. (It is true that Dr Oglinda's evidence could have been obtained before 14 July, but not in the limited time available to respond to Dr Nicolau's evidence.)

25. I do not propose to speculate whether, if Senior Master Turner had received in evidence the report of Dr Oglinda, he would have come to a different conclusion.

Having admitted it for the purpose of the appeal, and having upheld the first ground of appeal, it seems right that I should exercise my own judgment independently in the light of the evidence before me, in particular applying the principles in the *Nasser* case, and thus approach the matter effectively by way of re-hearing.

26. I should, however, address the point made by Mr Cogley that the Senior Master must be taken to have realised, as was later emphasised by Dr Oglinda, that the law in Romania governing enforcement of foreign judgments had been on all fours with EU jurisdiction since May 2004. I am quite prepared to accept that he did. On the other hand, Mr Moloney has invited my attention to a particular passage in the judgment (at page 6) where he said this:

> "… Carter-Ruck produced a report from Mr Adrian Vasiliu who appears to be an '*avocati titulari*'. He does not claim to have any specific experience of enforcing English judgments in Romania. He cites a new law No 187 of 2003 which came into force on 16th May 2004 which he suggests is likely to result in quicker enforcement of EU Court judgments. He recites the procedure and the costs which are in line with those suggested in the letter of 4 July.
>
> All this would be impressive but Mr Vasiliu is unlikely to be an expert which would meet the necessary criteria of Pt 35 as he is none other than the spokesman for the former Romanian Royal Family – hardly the independent source which we now seek to rely upon.
>
> In contrast, the report of Mr Octavian Nicolau of 8 July 2005 is written with the criteria of Pt 35 in mind. His report on the practical problems of both obtaining the '*executator*' and the '*executarea silita*' accords with my own experience over the past nine years as the sole central judicial authority for England and Wales in respect of foreign process. My Membership of the EU Judicial Forum on cross border enforcement has taught me much of the problems associated with the procedure of the *executator*, an expensive exercise which EU Member States have tried to abolish.
>
> Mr Nicolau's report is in my opinion a fair and accurate account of this very protracted and expensive procedure. He estimates that a lawyer in Romania would be involved for over 250 hours over a period of between 18 months to 4 years. The lawyer's hourly rate would be about Euros 200. There is also the possibility of a judgment debtor seeking the protection of going bankrupt which would add possibly 6 months to the procedure and a further 50 hours work. He sums up the position so aptly as: '*the road to justice is long and exhausting and very costly here in Romania*'".

The conclusion which the Senior Master appeared to be drawing there, on the basis of his own experience in part, was that the long and protracted procedure was similar to

that which he had experienced over the past nine years – notwithstanding the adoption of the new Law in May 2004 and Romania's efforts to achieve compliance subsequently. It may be that, in the light of fuller evidence, it would be possible to draw the conclusion that nothing had changed, or alternatively that progress had been very slow since May 2004, but I am not persuaded that such a conclusion could be drawn on the basis of Mr Nicolau's description of the law itself. At least the evidence of Dr Oglinda attempts to grapple with recent developments. Although he is described rather dismissively on the Defendants' behalf as "academic", I cannot ignore his evidence to the effect that "I have extensive experience in managing enforcement proceedings both on behalf of creditors and debtors".

27. On the basis of Dr Oglinda's report, Mr Moloney submits that I should go so far as to conclude that it would actually be cheaper to enforce in Romania than would be the case in some European Union jurisdictions, including the United Kingdom. He points the contrast between the hourly rates payable to lawyers in Romania and those payable to, for example, the solicitors engaged in this case.

28. Mr Moloney submitted that it is important to make a comparison of cost, in the light of the evidence, with regard to three aspects of the enforcement process. First, there is the recognition and enforcement stage to which I have already referred. Second, there is the "bailiff stage". Thirdly, it is necessary to take account of the additional costs incurred by the English solicitors in engaging the foreign enforcement agents and supervising the process from afar.

29. As to the first stage, Mr Moloney invites me to conclude in the light of Dr Oglinda's report that the costs would be broadly comparable to those incurred in a typical European Union jurisdiction. He suggests that the application for a declaration of enforceability would take two to three months. The procedure is a formality, in the sense that the debtor would not be served with any documents by the court, and would not be permitted to take part in the procedure. Also, in the light of Law 187/2003, no security, deposit or guarantee can be required from the creditor on the ground that he is a foreign national. For the application of enforcement, a Romanian lawyer would probably charge a fixed fee in the range of between 300 and 1000 Euros. The preparation, filing and appearance in court should not take more than three to fours hours of work (which would only be relevant, of course, if hourly rates were charged rather than a fixed fee).

30. Dr Oglinda further gives evidence that, if the debtor took the opportunity to file an appeal on points of law, the entire process could then take three to six months. There are limited grounds available and the procedure is deemed by the law as requiring to be treated urgently. In that event, he suggests that some 30 to 40 hours of work would be involved for a lawyer and the cost would fall in the range of 6,000 to 8,000 Euros.

31. As to stage two, the "judicial executor" would not be a burden upon the creditor, because he would retain his fee from the money recovered from the debtor. There was some suggestion that there *may* be at least a temporary cost to the creditor in respect of the judicial executor's fee until such time as the money can be recovered from the debtor. My attention was drawn, however, by Mr Moloney to evidence from Mr Vasiliu:

> "The executive agent will ask for a fixed fee (approx 200-300 Euros) to start proceedings. The percentage will be cashed by the executive agent only if the sum is finally recovered and proportionally to the amount of the effective recovered sum. The agent's fee is not to be advanced by the creditor. It will be added to the sum to be recovered and will be paid by the debtor at the end of the day".

If this is correct, then naturally the need to engage such an agent would not entail any additional cost as compared to recovery within European Union states.

32. Understandably, the approach of the Defendants' lawyers has been somewhat impressionistic when it comes to assessing the appropriate amount of security. When asked last summer by the Claimant's advisers for a figure, so that they might consider it and take instructions, their solicitors came up with the suggestion of £150,000 – but only immediately prior to the hearing before the Senior Master. On that occasion, Mr Cogley appears himself to have increased the figure on a rather broad brush basis to £250,000. As I have already indicated, the Senior Master ordered security in the sum of £125,000. Mr Cogley invites me to conclude that, on the basis of his undoubted experience, he would have taken the starting figure of £150,000 and made a discount to take account of what enforcement would have cost in a typical Convention jurisdiction. I am not in a position to decide whether that is what happened or not. No reasoning has been set out in the judgment to enable me to say one way or the other. I do not know why, for example, it would be more appropriate for me to take the starting point of £150,000 rather than Mr Cogley's own suggestion to the Senior Master of £250,000. Mr Cogley invited me to conclude that he must have been "aiming off", and allowing a significant discount for advocate's licence. That seems to me entirely speculative.

33. I expect the Senior Master applied his judgment and experience, although I cannot in the circumstances decide whether he actually concentrated on the differential, as required by *Nasser*, rather than (say) making a discount from the figure put forward by the Defendants' solicitors – which appears to have been geared to the cost of enforcement, as estimated, rather than upon a comparison with enforcement elsewhere.

34. On the issue of quantification, Mr Moloney's argument is seductive and, although my own instinct like that of the Senior Master would incline to the grant of a substantial amount of security, the state of the evidence tends to support the submission that the need to fulfil the rigorous *Nasser* criterion has not been fulfilled. Specifically, I do not find Mr Nicolau's general and unfocussed material very persuasive. I am also satisfied that he is exaggerating.

35. There are a number of aspects of Mr Nicolau's evidence which I found unsatisfactory. Probably the most striking relates to the question of personal bankruptcy. He suggests in his first report that this could be a hurdle for the Defendants' enforcement process. This was directly contradicted by Dr Oglinda, who simply stated that the concept does not apply to individuals in Romanian law. Either that is accurate or it is not. In his second report, however, Mr Nicolau does not challenge Dr Oglinda's clear statement of the law. Instead he wastes time in taking umbrage that anyone should dare to join issue with someone of his qualifications and experience. Space was thus unnecessarily

taken up with bluster rather than substance. Mr Cogley invites me to disbelieve Dr Oglinda's evidence in this respect as inherently unlikely. I agree, it seems rather surprising. Since it is unchallenged, however, I do not consider it right to do so.

36. I should not ignore the material from the European Commission put in evidence by Mr Pepper, the Claimant's solicitor. This strongly suggests that Romanian aspirations are not being achieved as rapidly as hoped. In particular, this appears to be true in relation to the administration of justice and the rooting out of corruption at all levels. This is new evidence, and I have in mind particularly the 2005 Comprehensive Monitoring Report dated 25 October 2005. It purports to reflect the situation in Romania as at 30 September 2005. It contains some worrying passages:

> "B. POLITICAL CRITERIA
>
> The 2004 Report confirmed the conclusions of previous reports noted (*sic*) that Romania fulfilled the political criteria. However, the following areas were identified in the conclusions of the 2004 Report as requiring further improvements: public administration reform (all aspects, in particular local and regional administration, civil service reform, decentralisation, policy coordination, the parliamentary process, freedom of information, and transparency); justice reform (including management of court cases and quality of judgments); anti-corruption measures; trafficking in human beings; ill-treatment in custody and prison conditions; freedom of expression; child protection; property restitution; disabled and mentally ill people; protection of minorities and integration of the Roma minority.
>
> The principal purpose of this chapter is to assess the state of play on the issues identified last year as requiring further improvements.
>
> …
>
> *Justice system*
>
> In March 2005 the new Government adopted an ambitious revised Strategy and Action Plan 2005-2007 to reform the justice system. These documents represent a significant step forward in the plans to create an independent, professional and effective justice system and now need to be internalised by the relevant actors. The Action Plan is being implemented according to schedule, with comprehensive monitoring mechanisms consisting of an inter-institutional commission co-ordinated by the Ministry of Justice and a series of working groups within the Superior Council of the Magistracy. The full and effective implementation of the Action Plan should continue without delay. The availability of financial and human resources and comprehensive training as well as accurate and

standardised management statistics will largely determine the success of this operation.

…

The human resources situation in the justice system has shown some improvement, but the workload remains very high. Competitive examinations aimed at filling the vacancies for magistrates have not been very successful, though contest[s] held in May and August 2005 have resulted in economic managers being recruited in 56 courts. There are currently 439 vacancies for judges, 588 for prosecutors and 326 for court clerks. The Government's Action Plan proposes a range of measures to reduce workloads and solutions involving better use of auxiliary staff such as clerks would dramatically reduce the administrative burden on magistrates. Further improved access by judges to court jurisprudence and new legislation in the Official Gazette would also improve the quality of judgments.

Poorly justified adjournments for reasons such as non-attendance by lawyers of one of the parties remain a major cause of the delays in obtaining court judgments. Revisions to the Civil Procedure Code were introduced in June 2005 and amendments to the Criminal Procedure Code were approved by the government in September 2005. They now need to be implemented to try and make the lengthy and cumbersome court proceedings more effective. The problem is particularly acute in civil and commercial cases, thus limiting the emergence of a stable and predictable business climate. The proportion of first and second instance judgments that are successfully overturned on appeal remains about 30% in the case of Tribunals and 20% in the case of Courts of Appeal.

…

No progress can be reported as regards the enforcement of judgments in civil cases, through an evaluation of bailiffs' activities was completed in October 2005 and will serve as the basis for legislation that will reduce the length and complexity of enforcement proceedings. The Strategy also covers the effective implementation of the legal aid system, an important issue as in many cases lawyers are not paid.

…

In March and April 2005 the Director and all three Deputy Directors of the Directorate-General for Protection and Anti-Corruption (DGPA) were dismissed following the discovery of activities incompatible with the institution's legal base. A new Director was appointed in April 2005 and there is now

considerably more openness and transparency about the DGPA. There are no new reports of DGPA acting outside the prison system, where it has a legal mandate to ensure public safety. Given the abuses that continued until March 2005, questions remain about the rationale for the existence of a partly militarised security service within the Ministry of Justice.

Anti-Corruption Measures

Surveys and assessments conducted by both national and international organisations confirm that corruption remains a serious and widespread problem that affects many aspects of society. The impact to date of Romania's fight against corruption has been limited, there has been no significant reduction in perceived levels of corruption and the number of successful prosecutions remains low, particularly for high-level political corruption. Nevertheless, there has been an increase in political will to tackle corruption and several steps were taken that could have a positive impact if implemented fully.

The new Government declared the fight against corruption would be one of its highest priorities together with the preparations for EU accession, and even described corruption as a threat to national security.

…

Nevertheless, it is widely acknowledged that Romania's legislation already broadly complies with the relevant EU *acquis* and that what is urgently required is to implement the existing legislation more rigorously rather than proposing new laws. The Action Plan also focuses heavily on corruption within the judiciary, an institution that must have a central role in fighting corruption but in which integrity problems continue to be reported and which suffers from low public confidence. … Additional efforts are also required to address the problem of weak inter-institutional co-operation in fighting corruption and the proliferation of structures with overlapping competences, which remains major obstacle to effective and timely investigations.

…

The [National Anti-Corruption Prosecution Office]'s April 2005 activity report shows a significant increase in the number of cases dealt with. Some successful prosecutions are occurring against low-to-medium ranking public officials from, for example, law enforcement agencies or the judiciary. … Weaknesses in enforcing the current legislation are partly caused by a passive attitude on the part of prosecutors (i.e. a reluctance to conduct serious and thorough investigations) even

> when there are strong suspicions of corruption, in the frequency with which competence for cases is declined when the suspects are high-level figures, and in the lack of experience and training of those prosecuting complex financial cases.
>
> …
>
> … The [Directorate General for Anti-Corruption] is still in the process of recruiting its staff and cannot be expected to deliver concrete results in the fight against corruption before the beginning of 2006 at the earliest. This is a cause for concern as the integrity of law enforcement agencies is a key factor both in enabling Romania to reach a sufficiently high standard in the fighting corruption and in building public confidence in state institutions".

37. It should be noted that, although there was an intention to introduce "legislation that *will* reduce the length and complexity of enforcement proceedings" (emphasis added), this has not so far taken place.

38. It is perhaps not surprising that the Defendants in this case have concerns at problems which might arise in the enforcement of an order for costs in Romania having regard to the fact that the Claimant and his family might well be described as "high-level figures". Moreover, it is fair to say that this rather gloomy picture painted by the European Commission does not sit too comfortably with the rather breezy reassurance given by Dr Oglinda. It is rather more consistent with the Senior Master's personal experience. Thus serious question marks hang over both sets of expert evidence.

39. This material exhibited by Mr Pepper supports the proposition that Romanian aspirations are not yet being achieved. In particular, this appears to be true in relation to the administration of justice and the rooting out of corruption at all levels. Mr Moloney rather discounts this on the basis that Mr Cogley made clear that it was no part of his case that the Claimant would be likely to bribe a judge. On the other hand, as is widely known, in any system of administration where corruption is rife the danger is that wheels are likely to grind slowly unless palms are greased. That may sound offensive, and I am conscious of the demands of comity but it would be wrong for me to assume that the mere fact that a European Union model has been adopted, in the form of the law which came into effect in May 2004, means that the implementation of that law and the associated procedure will be as trouble-free as within EU jurisdictions or, to put it another way, in any jurisdiction where the relevant law and procedure have been effectively implemented and are not impeded by corrupt officials and inadequate structures.

40. If the administration in Romania is in transition, and as the evidence clearly indicates tainted by corruption, I should assume that there is at least a significant risk that this will entail greater delay than in a current Convention jurisdiction and that there will be increased costs in respect of consequential investigations and "chivvying". In the nature of things, that is not easy to quantify and an element of guesswork has to come into play. That is not inconsistent with the principle enunciated in *Nasser*, to the effect that decisions must be evidence based, since I am relying on Mr Pepper's exhibits in concluding that corruption is still a problem. The guesswork only comes into play at

the stage when a figure has to be put upon the likely consequences: in that context it is inevitable.

41. The exercise involves calculating the difference between enforcement in an efficient and non-corrupt system of judicial administration and enforcement in a corrupt system, where the "new brooms" appear to be still feeling their way. This is likely to be a problem requiring considerable input from Mr Pennal in chasing those seeking to enforce in Romania and, no doubt, there would be additional costs incurred by those on the ground.

42. In my judgment, these factors would need to be reflected in an order for security but, still, the quantification must be directed towards estimating the *difference*; that is to say, the margin between the cost in a Convention country and the increased cost attributable to inefficiency and corruption in Romania.

43. My attention was drawn again, in this context, to the helpful decision of Gross J in the *Texuna* case. There, while obviously recognising that enforcement would be relatively straightforward in Hong Kong, he nevertheless assessed the additional cost at £50,000. It is clear, says Mr Cogley, that the position is likely to be significantly worse in Romania. As a matter of impression, that is clearly right. But each case must turn upon its own evidence, and I should not take Gross J's assessment on the facts of his case as though it were a benchmark.

44. Although I have referred to "guesswork", my assessment will be very much influenced by the evidence in this case as to hourly rates both here and in Romania. I have decided, in all the circumstances, that the right figure to award would have been £80,000.

45. Standing back, and assessing the merits of the remaining grounds of appeal, I would uphold also Grounds 2 and 4 (but not Ground 3) in the light of the evidence to which I have referred.

46. None of this, however, can assist the Claimant unless I am prepared to set aside the judgment, regularly entered in August last year. It certainly does not follow automatically from the outcome of the appeal. The court will never lightly deprive a litigant of such a remedy. Moreover, in this case Treacy J was scathing about the evidence placed before him in an effort to obtain an indulgence by the extending of time for compliance (which had been set at 4pm on 25 August). It was in the light of his refusal, either to extend time or to order a stay of execution, that judgment came to be entered the following day.

47. It is to be noted that the Senior Master had also been asked for a stay of execution pending the outcome of the appeal (for which in two respects he had already granted permission). This was refused (see paragraph 7 of the order). That may seem at first sight surprising. If permission to appeal is granted, I would regularly grant a stay of execution – but always to prevent the pending appeal being stifled or rendered nugatory. There would appear to be no point in setting aside the order for security if, in the meantime, judgment has been entered. Yet, in this case, judgment was entered some three weeks before the date when (by virtue of the extension granted on 25 July) the Appellant's Notice was due to be served. Mr Moloney argues that this led to an anomaly.

48. Treacy J pointed out that the primary rule is that an appeal does *not* operate as a stay; a solid ground needs to be made out in order to justify a departure from that starting point: see *Hammonds Suddards v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at [22]. Where a stay is sought, all the circumstances must be considered. In particular, it is necessary to consider whether the appeal would be stifled. One must not only look at the means of the appellant himself but also consider whether the money could be raised from "backers or interested persons": *Contract Facilities Ltd v Estate of Rees (decd)* [2003] EWCA Civ 465 at [10]. What might appear to be unusual about this case is that the availability of such funds from other persons, and especially from the Romanian Royal Family, was intended at that stage to be the very subject-matter of the appeal (hence the Senior Master's reference to "*Yorke Motors*").

49. On the state of the Claimant's evidence when the stay was refused, taken at face value, it might seem that the appeal could well be stifled. There was no evidence of a willingness to support the Claimant. The Senior Master was clearly sceptical about this, and as to the extent of full and frank disclosure. The gaps in the evidence were not plugged by the time the matter came before the Judge on 24 August. He too was sceptical. At all events, Treacy J refused to grant a stay. He also refused permission to appeal. The obligation to bring the money into court remained effective notwithstanding the possibility that the Claimant might be successful on appeal.

50. It is necessary to identify the arguments raised before the Judge in a little detail. First, it was pointed out that the limitation period of 12 months would expire towards the end of September and the claim would therefore be extinguished unless fresh proceedings were launched by that time. In any event, the Defendants would remain entitled to recover the costs of the first action.

51. Secondly, it was argued that once judgment was entered costs were likely to be incurred in pressing on with enforcement, which might well be wasted if the appeal were to succeed. Thirdly, it was suggested that the judgment entered in default could be misinterpreted, as though it had followed a decision on the merits in the Defendants' favour. It was also submitted that no substantial prejudice would accrue to the Defendants if a stay was granted.

52. Treacy J, in the light of the evidence and submissions before him, concluded that there was no sufficient evidence to show that the sum of £125,000 *could* not be paid – as opposed to Mr Moloney's statement to the effect that King Michael was at that stage "unwilling" to fund the payment into court, as ordered by the Senior Master. That in itself the learned Judge took to be a sufficient reason for refusing a stay. Nevertheless, he went on to consider the other arguments addressed to him and still declined to order a stay (as had the Senior Master). That order was not appealed. He was naturally aware that the Senior Master had given permission to appeal, albeit on limited grounds, and that was fully taken into account.

53. It is by no means automatic that the judgment should be set aside purely because, in certain respects, the Claimant has subsequently succeeded on appeal. What is critical is that the order of Treacy J remained in force. Nor can it be said that later events have shown that he was in any way misled by the evidence on which he refused a stay. I can see no proper reason for me to go behind that order. I observe in passing that, even if the Senior Master had ordered £80,000 to be paid into court, there is no reason

to suppose that it would have been complied with. I invited Mr Moloney to indicate how he proposed to overcome the regularly entered judgment. He referred to the apparently anomalous position that no extension or stay had been granted despite the fact that the Claimant was given until 14 September to serve a Notice. But that is in effect to do no more than re-argue the merits of granting a stay – without having appealed the order of Treacy J.

54. Viewing the Senior Master's order in isolation, I would have been inclined to vary it, as I have indicated, so as to fix the sum for security at £80,000. This becomes academic, however, in view of the fact that the Defendants are entitled to the benefit of a regularly entered judgment. That must stand.