THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

ON APPEAL FROM THE GRAND COURT

Cause No. FSD 33 of 2011
C.I.C.A. No. 24 of 2014

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

BETWEEN: DD GROWTH PREMIUM 2X FUND (In Official Liquidation)

(Defendant) Appellant

AND: RMF MARKET NEUTRAL STRATEGIES (MASTER) LIMITED

(Plaintiff) Respondent

IN CHAMBERS

Appearances: **Mr. Nigel Meeson QC, Mr. Ben Hobden and Mr. Ryan Charles of Conyers Dill and Pearman for the Applicant/Respondent to the Appeal.**

Mr. Peter McMaster QC and Mr. Jeremy Snead of Appleby for the Appellant/Respondent to the application.

Before: **THE HON. JUSTICE MANGATAL**
(Sitting as a single Judge of the Court of Appeal)

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Heard: **22nd April & 29th May 2015**

REASONS FOR JUDGMENT

Civil Practice and Procedure- application for security for costs of an appeal-Sub-section 19(2) of the Court of Appeal Law (2011 Revision) - Section 74 of the Companies Law (2013 Revision)

1. This is an application by RMF Market Neutral Strategies (Master) Limited, the Respondent ("RMF') seeking against DD Growth Premium 2X Fund (In Official Liquidation) ("the Appellant"), security for costs of the appeal in respect of which Notice of Appeal was filed December 23, 2014.

2. The application was made pursuant to Rule 19(2) of the ***Court of Appeal Law (2011 Revision)*** (" the ***Law***") which provides as follows:

> " **Appeals in civil proceedings.**
>
> **19....**
>
> **(2) The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may**

direct, and such security for costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court."

3. By virtue of section 33 of the ***Law*** all powers conferred on a single Judge of the Court of Appeal may be exercised by a Judge of the Grand Court.

4. This application was sought by way of summons filed January 21, 2015. Originally, RMF had also sought security for costs incurred at first instance. However, on the eve of the hearing before me, learned Queen's Counsel Mr. Meeson indicated a withdrawal of that aspect of the application. Having had an opportunity to consider the authority of ***Cay Realty v Hadsphatic International Limited*** [1952-79 CILR 185], which was an authority referred to in the Appellant's skeleton argument, RMF decided that it would not pursue that part of its application regarding the costs at first instance, and would instead limit its application to costs of the appeal alone. This, as well as revised costs estimates for the appeal provided by RMF, resulted in a substantial reduction in the security for costs initially sought, from a total of US $1,020,728 to US$249,500.

5. Before turning to the evidence and arguments, I will set out the background to this application very briefly.

Background

6. The Appellant was a feeder fund, incorporated in the Cayman Islands on 2 February 2007 as an exempted company with limited liability to operate as a private investment fund. The Appellant was placed in official liquidation on 29 May 2009.

7. RMF is a fund of hedge funds incorporated in the Cayman Islands on 12 March 2001. RMF held, and now to a lesser extent, continues to hold redeemable shares in the Appellant.

8. In response to the Appellant writing to RMF to suggest that certain redemption proceeds should be repaid, RMF commenced proceedings by way of originating summons dated February 21 2011 seeking a declaration that it was not required to repay monies to the Appellant.

9. It was agreed that the parties would put forward their respective cases in Statements of Grounds. It was further agreed between the parties and Consent Orders were entered before Smellie CJ, with directions being given, on the 18 December 2013 and 15 August 2014, by which certain issues would be tried first, namely a claim referred to as the Section 37 Claim (in relation to certain provisions of section 37 of the ***Companies Law (2007 Revision),*** and Claims referred to as Mistake and Preference Claims. By consent certain other claims and/or issues were ordered stayed until further order of the Court.

10. The trial in relation to the agreed issues took place before the Honourable Chief Justice between the 24-26 September, 2014, and a written judgment was handed down on the 17 November 2014. The Order dated 17 November 2014 reflects the judgment of Smellie CJ and by Notice of Appeal dated 23 December 2014, the Appellant has appealed against this Order. Grounds of Appeal have

not yet been filed as the time provided for in the Rules for the drawing up of the Grounds had not up to the time of this application commenced running.

RMF's Evidence

11. The affidavit of Mr. Michael Beurer, was filed on March 10 2015 in support of the application. Mr. Beurer is the Head of Secondaries, Workout and Transitions at FRM, a division of Man Group plc, which manages RMF. Part of his duties, he indicated, include overseeing this litigation on behalf of RMF. At paragraphs 15 of his Affidavit, Mr. Beurer states as follows:

> **"DD Growth is Insolvent and has Insufficient Assets to Pay Costs**
>
> **..........**
>
> **15. RMF was concerned that DD Growth has what was in essence a 'free shot' against it in FSD 33 of 2011. DD Growth has nothing to lose given that it would be unable to meet any costs award made against it (as was proved to be the case) and was not responsible for its lawyers who were funding the litigation and sharing in the proceeds of the litigation on a contingency fee arrangement. RMF continues to be concerned that this remains the position, and in essence means that DD Growth has nothing to lose by pursuing its appeal. The parties to this litigation are therefore not on an even playing field. Put simply, RMF considers this situation to be unfair and unjust."**

12. Mr. Beurer at paragraphs 16 and 17 indicates that there have been limited attempts to agree security as the Appellant had made its position clear from the outset, including in its letter to the

Registrar of the Court of Appeal, Mrs. Audrey Bodden, dated 23 December 2014. In that letter it was opined by the Appellant's Attorneys Appleby that it would not be appropriate to provide security at all.

The Appellant's Evidence

13. The application for security for costs has been opposed. The second Affidavit of Tammy Karina Fu, dated 26 March 2015 was filed on behalf of the Appellant. Ms. Fu is a partner of Zolfo Copper, who together with her fellow partner Gordon Ian Mac Rae, are the Joint Official Liquidators, the "JOLs", of the Appellant. In paragraph 21 of this Affidavit Ms. Fu refers to the fact that the parties have agreed to provisionally list the appeal for the November session of the Court of Appeal. Whereas the Appellant's Attorneys have estimated that the appeal will take a day, RMF's Attorneys estimate a day and a half. Miss Fu refers to and exhibits the letter to the Registrar of the Court of Appeal, Mrs. Audrey Bodden, as well as an email from the Registrar, listing the appeal for the 10-11 November 2015.

In the letter to the Registrar, the Appellant's Attorneys stated, amongst other matters, that security in excess of CI $50 would not be appropriate because the Appellant quite simply does not have any assets available from which substantial security could be paid and that therefore such an order would stifle a meritorious appeal.

14. In a number of paragraphs of her Affidavit, Miss Fu makes the point that the it has never been denied that the Appellant is wholly insolvent and devoid of cash. She refers to the initial funding arrangements and subsequent conditional fee arrangement with Appleby and other evidence to show the Appellant's financial status. See in particular paragraphs 25-28.

15. At paragraphs 29 and 30 Miss Fu claims that it is the Appellant's very lack of cash that caused it to claim that the payments should be recovered and that RMF is liable to repay them to the Appellant.

16. At paragraphs 30 and 31 Miss Fu speaks to the nature of the appeal and the advice that has been received from Appleby. The advice is, and it has been so argued before me, that the appeal turns in part on a disputed issue of construction of a Statute and the question whether, if the Appellant's construction is correct, there is a remedy in restitution to recover money paid in contravention of the Statute. Further, that the appeal is an appeal with genuine merit and that it would therefore be wrong to make an order that would stifle the appeal by imposing a condition of payment that could not be met.

17. At paragraphs 33-38 Miss Fu then discusses the topic "The ability of the 2X Fund to obtain further funding". Mr. Meeson QC has described this as "the crux of the matter."

Miss Fu states as follows:

> "33. **As indicated above, the 2X Fund has $15,027.60 funding remaining, which is insignificant in proportion to the award sought. This was advanced for the specific purpose of funding claims against early redeemers and accordingly has not been used for the Non RMF Debts.**
>
> 34. **The funding arrangement, as approved by the CFA Judgment, has a strict repayment waterfall indicating how any recoveries must be paid (the Waterfall): ....**

35. **The above waterfall was sanctioned by the Court, …. And has the effect of subordinating all of (a) the Provisional Liquidators' fees and expenses; (b) the Liquidators' fees and expenses; and (c) any adverse costs award, to the above.**

36. **The Liquidators cannot unilaterally amend the Waterfall. For the 2X Fund to obtain further funding to pay RMF's requested costs would require the stakeholders in the above waterfall to agree to subordinate their interests to any new funder. ….**

37. **As the Court will be aware, the 2 X Fund recently settled an unrelated claim against another redeeming investor for $350,000. This sum fell to be paid in accordance with the Waterfall. This money cannot be used to provide security for costs of the appeal without the consent of the Lender and Petitioner A. Although the Liquidators have raised this issue with them, their consent to use this money for security has not been forthcoming. Had consent been given, then the other stakeholders would have had to have been consulted.**

38. **The Liquidators have unsuccessfully investigated further sources of funding. No funder is prepared to provide funding for the Costs below and the Appeal Costs."**

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RMF's Arguments

18. Mr. Meeson QC provided written and oral submissions. Reference was made to section 19(2) of the ***Law***. Reference was also made to section 74 of the ***Companies Law (2010 Revision)*** (which is in the same terms as the current 2013 Revision) which states as follows:

> **"Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."**

19. It was submitted that whilst in the context of an appeal RMF is a 'respondent' as opposed to a 'defendant' the provisions of section 74 continue to apply. Mr. Meeson relied on paragraph 24 of the decision of the Judicial Committee of the Privy Council in ***Re Bancredit Cayman Limited*** [2009] CILR 578, where it was stated, though not in the context of an appeal, that:

> **"[T]he applicant would be in the position of a plaintiff and the respondent in the position of a defendant whatever their respective roles in the instant action. The ability of the court to entertain an application by the respondent for security for costs of the applicant's application to set aside the compromise could surely not be denied on the ground that the application was not in form an originating process and so did not constitute "proceedings" for s.74 or O. 23 purposes."**

20. The submission continues that it therefore follows that the circumstances within which the Court can grant security pursuant to section 74 are exceptionally wide and applies to appeals, the important consideration being one of substance, and not of form.

21. It was argued that where a claim is brought by an insolvent company in liquidation it follows that section 74 is engaged and *prima facie* security should be provided by the liquidator because the company has insufficient assets to pay the respondent's costs.

22. It was also submitted that, unlike a Court at first instance, in deciding whether to award security for the costs of an appeal, the Court of Appeal has to take into account the fact that the Appellant has already had the issue concerned determined against it, and it is *prima facie* an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce a costs order against the appellant. There is accordingly, it was argued, a heavy burden on an insolvent appellant to discharge in order to resist an order for security for costs on an appeal.

23. Importantly, RMF submitted that where an appellant suggests that an order for security would prevent it pursuing an appeal, it is necessary for the appellant to establish not only that it is unable to furnish security for costs from its own resources, but also that it is unable to raise the money elsewhere.

24. Reference was made to the oft-cited decision of Peter Gibson LJ, sitting in the English Court of Appeal, in ***Keary Developments Ltd. v Tarmac Construction Ltd*** [1995] 3 All E.R. 534 at page 540, g-j.

25. Learned Queen's Counsel also referred to the decision of Barma J, as he then was, in the Hong Kong decision in ***Easy Watch Products Manufacturing Co. Ltd.*** [2003] HKCFI 325, where at paragraphs 15 and 16 Barma J stated:

> **"15. In this case, the Plaintiff has seen fit only to make the bare assertion that its shareholders and directors are unable or unwilling to fund the litigation. No attempt has been made to indicate what assets the shareholders have available to them, or as to the sources of finance that might be available to them……..**
>
> **16. Moreover, it seems to me that Mr. Chan is right in saying that in general, <u>unwillingness</u> of the backers of a company to put up funds to enable it to proceed with a claim which it is making should be afforded little, if any, weight when considering whether or not a claim will probably be stifled if security for costs is ordered. This is particularly so where, as here, it would seem that the Plaintiff is no longer operating and that the only person likely to benefit from a successful claim are its shareholders. In such a case, their professed <u>unwillingness</u> to fund the claim should not, in my view, be regarded as an impediment to the making of an order for security, particularly where the court, as here, cannot be satisfied on the evidence presented that they are actually <u>unable to do so"</u>**
>
> (Emphasis provided by Counsel)

26. Indeed, in ***Global Fixed Income Limited and Euro Fixed Income Limited v HSBC Bank Cayman Limited*** (unreported), delivered 24 March 2009, Smellie CJ, in his ruling refusing leave to appeal an earlier ruling he had made granting security for costs, cited the ***Easy Watch*** case with approval. –see paragraph 7. The [2008 CILR Note 7] regarding the security for costs decision states as follows:

> **"In an application for security for costs by a defendant, the court has to balance the risk of stifling a valid claim by an impecunious plaintiff against the risk of that impecuniosity being used as a weapon against the defendant if the plaintiff is allowed to pursue a cause of little merit, at no financial risk to himself. While the plaintiff only has to demonstrate some prospect of success in order to satisfy the court that an order for security will be oppressive to it, proprietary connections to richer parties, (eg., investors, where the plaintiff is a company), who are clearly unprepared to fund the claims of the plaintiff, will give rise to concerns about the genuineness of the action, and security may be granted, pursuant to section 74 of the Companies Law (2007 Revision), which is designed specifically to prevent the risk of such abuse. (Pearson v Naydler [1977] 1W.L.R. 899 applied; Keary Devs Ltd…..applied."**

27. It was submitted that in the present case, the Court is not dealing with investors who are without means. Mr. Meeson submits that it is beyond question that they would be able to put up the funds, they are just simply unwilling to do so. Mr. Meeson made the point that after being paid out the subject sums, his client RMF still remains the largest investor in the Appellant. Learned Queen's Counsel says that the other investors are Banks and other institutions like his client, or there are

also some very wealthy individuals. In other words, Counsel indicated, we are not dealing here with, to use his descriptive language, "orphans and widows". In any event, it was posited that Ms. Fu's Second Affidavit fails to disclose which investors the JOLS consider will potentially benefit from the appeal (RMF itself being the largest unpaid investor), and the ability of said investors to provide security.

28. Further, that the fact that the Appellant cannot get third party Funders to invest and to indicate willingness to provide security speaks volumes about the merits of the appeal.

29. It was submitted that the Appellant cannot come close to suggesting that its appeal is so likely to be successful that it would justify the risk of exposing RMF to the injustice of having to bear its own costs of an appeal, even if successful. In all of these circumstances, RMF asks that the Court exercise its discretion to order security for costs.

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The Appellant's Arguments

30. Learned Queen's Counsel Mr. McMaster also provided both written and oral submissions. He argued against the order for security for costs upon multiple bases. Queen's Counsel submitted that impecuniosity alone is not sufficient reason for the Court to exercise its discretion to award security. In considering whether to exercise its discretion, it was urged that the Court should consider:

(1) The stage in proceedings at which security is sought. Although it was admitted that the security for costs application in respect of the appeal was

being made at the very earliest stage, it was pointed out that no attempt had been made to obtain security in respect of the costs below.

(2) Whether the security will stifle a meritorious claim.

(3) Whether the plaintiff's want of means has been brought about by any conduct of the defendant.

31. Learned Queen's Counsel stated that the Appellant seeks recovery of sums paid to RMF at a point in time when the Appellant was insolvent (as found, it was submitted, by the Court below). The argument continued, that if those monies had not been paid to RMF, the Appellant would not now be impecunious. It was submitted that the Appellant's impecuniosity is therefore caused, in part, by the actions of the Respondent.

32. Counsel highlighted the fact that the Liquidators have explored sources of funding but that none are currently available. Any order for security would, Mr. McMaster posited, therefore stifle the appeal.

33. It was submitted that the appeal is meritorious for the following reasons:

(1) The Grand Court was wrong to reject the Appellant's construction of the relevant provisions of the ***Companies Law***, and hence the payment was in fact unlawful.

(2) In reaching its own construction, the Grand Court had regard to material on which it did not give the Appellant an opportunity to be heard, in breach of natural justice and the *audi ateram partem* rule.

(3) The Grand Court did not go on to find whether (had it found a breach of the statutory prohibition) there was a good claim in restitution or by way of constructive trust, but that that should be determined by the Court of Appeal and determined in favour of the Appellant.

34. Mr. McMaster also traced the history of the application, and the various transformations it has gone through. This included what he submitted was an unprecedented attempt to obtain as a condition of being allowed to take the matter to the Court of Appeal, an order securing the costs in the Court below. Learned Queen's Counsel classified the application as a crude attempt to stifle a genuine appeal.

35. In all of the circumstances, it was argued that the Court should exercise its discretion by refusing the application for security for costs. In the alternative, if the Court were minded to grant the application, Mr. McMaster argued that the amount sought for costs is excessive. He reminded the Court of the old case of ***Aberdare and Plymouth Co. v Hankey (No. 2)*** (1887-1888) 32 Sol J. at 644, which is often cited for the proposition that the court never orders an amount as security that would cover the entire costs of the appeal, but only orders security of a reasonable amount.

Resolution of The Issues

36. I start my consideration of the issues by noting that section 19(2) of the ***Law*** does not provide any guidance or set out any specific basis upon which security for the costs of an appeal may be directed. This may be contrasted, for example, with section 74 of the ***Companies Law (2013 Revision)*** which deals with companies and speaks to a basis of reason to believe that the company will have insufficient assets to pay the successful defendant's costs. However, I agree with Mr.

Meeson QC that where, as here, it is plain that the party pursuing the appeal is an insolvent company, and one in liquidation, section 74, or indeed, the rationale behind it, should enter into the Court's consideration when an application is made under section 19(2) of the ***Law***. I find that the decision in ***Re Bancredit Cayman*** is supportive of such reasoning. Section 19(2) of the ***Law*** is also to be contrasted with Order 23 of the ***Grand Court Rules*** which provides more detailed guidance as to when the Grand Court may order security for costs in respect of an action or other proceedings at first instance in the Grand Court. It would in my judgment seem clear that Mr. Meeson is right that RMF's application gains considerable strength and traction from the fact that it has already secured a win in the Court below, and that in the circumstances that prevail there is reason to believe that the appellant will not be able to, and its assets will be insufficient to pay RMF's costs were RMF to succeed on appeal. However, it is also plain that when an appeal is filed there are no *a priori* assumptions, and the question of whether to order security for costs remains a matter involving the exercise of the Court's discretion.

37. In the circumstances it does seem to me that the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the ***English Company Law*** provision discussed in ***Keary*** provide useful guidance. Though the English section under consideration is differently worded from section 74 of the ***Cayman Companies Law,*** it is sufficiently similar for present purposes to inform the Court as to some of the considerations that should enter the analysis under section 19(2) of the ***Law*** in the present circumstances. These principles may be summarized as follows (see pages 539-542 of ***Keary***):

1. The Court has a complete discretion whether to order security, and accordingly it will act in light of all the relevant circumstances.

2. In considering all of the circumstances, the Court will have regard to the appellant's chances of success, though it should not go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

3. The possibility or probability that the appellant will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security. Indeed, in relation to companies governed by the ***Companies Law***, Parliament having worded section 74 the way it did, it must have been envisaged that the order might be made in respect of a company that would find difficulty in providing security.

4. In considering the application for security for costs, the Court must carry out a balancing exercise. On the one hand, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security. This must be placed against the possibility of injustice to the respondent if no security is ordered and the appeal fails and the respondent finds itself unable to recover from the appellant the costs incurred in resisting the appeal. The Court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company. This is particularly the case when the failure to meet the claim might in itself have been a material cause of the plaintiff's impecuniosity. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company uses its inability to pay costs as a means of putting unfair pressure on the more prosperous company.

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5. Before the Court refuses to order security on the grounds that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence. However, such a case is likely to be far rarer than those cases in which the Court will require evidence from the appellant to make good the assertion that the claim would probably be stifled by an order for security for costs. Further, the Court should consider in the case of an appellant company, not only whether the company can provide security out of its own resources to continue the appeal, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the appellant company, it is for the appellant to satisfy the court that it would be prevented by an order for security from pursuing the appeal.

6. The lateness of the application for security is a circumstance which can properly be taken into account, however, what weight to give it must depend upon the circumstances. It is proper to take into account the fact that costs have already been incurred without there being an order for security. Nevertheless, it is appropriate for the Court to have regard to what costs may yet be incurred.

7. The Court in considering the amount of the security that might be ordered will bear in mind that, provided it is more than simply a nominal amount, the amount ordered is not bound to be substantial.

38. Guided by those principles, I start with the prospects of success of the appeal. I am satisfied, particularly given that the grounds involve matters of law, including the construction of a Statute,

that this is not an appeal of which it can be said that there is no real prospect of success. Further, it cannot be demonstrated clearly that there is either a high degree of probability of success or failure. It would therefore be wrong to delve any further into the merits in order to decide whether it would be just or appropriate to make an order for security for costs. I therefore move on to consider other aspects of the matter.

39. I remind myself that the possibility or probability that the Appellant might be deterred from pursuing its appeal is not without more necessarily a sufficient reason for not ordering security. Indeed, when orders are made under section 74 of the ***Companies Law*** in so far as they are made in circumstances where the Court has reason to believe that the company's assets will be insufficient to satisfy the defendant's costs, it must be the case that a company that is in severe financial straits may be exposed to such an order being made against it.

40. In terms of the timing of the application, in my view, the appeal stage is quite different from the first instance stage in the sense that new considerations and factors may apply. Thus, upon reflection, I do not think that the fact that RMF did not apply for security for costs in respect of the proceedings below sways the matter one way or the other. It does not, in any event, make this an application at a late stage. It simply means that RMF had no security for costs in the Court below. That in my view ought not to count against it with regard to the making of the application at the appeal stage, Round 2, so to speak.

41. In carrying out the balancing exercise, I have examined the Appellant's claim that the actions of RMF may in part have contributed to the Appellant's impecuniosity. I agree with Mr. Meeson that this does appear to be a circular argument. The Appellant relies on its very state of

impecuniosity as the reason why it makes its claim against RMF, i.e.one of the main planks of its claim is that the payments it made to RMF were made at a time when the Appellant was unable to pay its debts as they fell due-see paragraphs 29-30 of Ms. Fu's affidavit . Further, RMF, like others put in its redemption request. Even if the Court of Appeal were to find that the funds should not have been paid out to RMF, it is not immediately apparent to me that this would mean that RMF even caused the payment. Without more, it would seem that it would have been, as Mr. Meeson submitted, the Directors of the Appellant who would have directed the payment out. I do agree with Mr. McMaster that the wording in ***Keary*** does not suggest that the deed or misdeed needs to be as direct or serious as to be of the nature of tortious or other wrongdoing on the part of the applicant. However, on the basis of the instant case as pursued thus far, and in respect of the matters the subject of the appeal, it appears to me that, without more, any actions or inactions of RMF fall short of the mark as being a material cause of the Appellant's impecuniosity. In any event, they are not such as to constitute a factor properly weighing against RMF and its application for security.

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42. However, perhaps the most decisive factor in this application is the question of whether an order for security for costs would stifle the Appellant's case because it is financially unable to furnish security. In my view, this is not a case where the Court could properly draw such an inference without direct evidence. Thus, I must scrutinize the evidence with care. I appreciate that at the time that Ms. Fu swore her Affidavit, RMF had not yet abandoned a substantial aspect and amount of the sum claimed for security. However, there is no evidence about the investors' inability to pay security for costs, in any sum whatsoever, whether the original sum or the reduced sum. Further, in their written submissions at paragraph 41, the Appellant's Attorneys make the bare statement, unsupported by sufficient evidence, that even the sum of U.S.$147,907.25 would

stifle the Appeal. In relation to other sources of funding, Ms. Fu has said that no funder is prepared to provide funding for the Appeal Costs. She has not said that they cannot afford to provide the funding. Mr. McMaster candidly conceded that there is a certain lack of evidence regarding the willingness of funders or investors to provide the reduced amount of security sought. However, he asked the Court to protect the Appellant against this attempt to stifle the Appeal.

43. In my judgment, the Appellant has not provided sufficient information as to the identity of its investors or backers. Nor has it provided sufficient evidence as to the inability, as opposed to the unwillingness, of its investors to put up funds in respect of security for costs. It is not enough to show that the Appellant has no ability to furnish security from its own resources. Nor is it sufficient to show that investors or funders are unwilling to fund. Indeed, if they are unwilling to fund that may carry negative connotations for the genuineness or merits of the Appeal.

44. As to the suggestion that RMF is deliberately attempting to stifle the appeal, I do not think that is a view I could properly or lightly take. It does seem to me that it would be quite a leap for me to find that that is the situation. RMF is in fact a party in whose favour a judgment has been given and an order for costs made. Further, although there was a change in the nature and quantum involved in the application over time, including on the eve of the hearing, I do not consider that there is a sufficient evidential basis upon which I could find that there has been a deliberate attempt to stifle the appeal, whether by way of an express finding or by way of the drawing of a reasonable inference. I do not therefore find that this application is being made in an oppressive fashion.

45. However, in any event, the onus is on the Appellant to satisfy the Court that a genuine appeal may probably be stifled. If that is not shown, then RMF's intentions are less significant. It is for the Appellant to go further than it has done and to show that its investors are unable to put up the funds. The Appellant would have these matters peculiarly within its knowledge and it has failed to satisfy me that it would be prevented from pursuing the appeal if I were to make an order for security for costs. In my view, the reasoning on this point in ***Keary, Easy Watch and Global Fixed Income*** (discussed above) is applicable to the instant case.

46. In my judgment, it would be appropriate in all of the circumstances to order security for costs. The question remaining is as to the amount. I agree with Mr. McMaster that the figures quoted do appear excessive. For example, the estimated number of hours of correspondence, up to and including the Court of Appeal hearing, 40 hours for Mr. Meeson QC, 60 for Mr. Hobden, and 20 for Mr. Bodden, seems far from reasonable. That amounts to nearly a third of the total US$249,500 sought. I bear in mind that all I need order is a reasonable amount for security. The cases demonstrate that this aspect of the exercise of the Court's discretion is not a particularly scientific exercise. Mr. McMaster had suggested what he considered a more realistic range of $75,000-$100,000.

47. In all of the circumstances, it seems to me that an appropriate sum for security for costs would be US $80,000.00. As regards the costs of this application itself, I have taken into account the stage at which the application for the first instance costs was withdrawn and the reason for so doing. As a result, I will reduce the successful party RMF's costs to 75% – see paragraph 24 of the decision of the Judicial Committee of the Privy Council in ***Seepersad v. Persad*** [2004] UKPC 19.

48. After consultation with Counsel as to the terms of the Order, it is hereby ordered and directed that –

1. The Appellant shall provide security for costs of the appeal in the sum of US $80,000 by depositing in the Grand Court that sum (the **Security**) within 28 days of the date of this Order.
2. The Appellant shall be at liberty to apply for any extension of time before the expiry of the said 28 days.
3. In the absence of any application for extension of time or the provision of the Security within the said 28 days, this appeal shall stand dismissed.
4. The Appellant shall pay 75% of the Respondent's costs of this application, to be taxed if not agreed.

Dated this 29th day of May, 2015

Mangatal J.
Judge of the Grand Court