

Indemnity costs

2. Mr. Lowe argues on behalf of SIFCO 5 that its costs of the action should be awarded on the indemnity basis.
3. He argues that the indemnity basis is justified having regard to what he described as the “*unreasonable manner of AHAB’s conduct of the proceedings against SIFCO 5*”.

The argument was developed as follows:

The claim against SIFCO 5 was made on the basis of fraud; more particularly that SIFCO 5 conspired with and dishonestly assisted its principal Mr. Al Sanea in his misappropriation of AHAB’s money and subsequently knowingly received proceeds of the fraud. These allegations were relied upon to base AHAB’s proprietary tracing claim by which it asserted that SIFCO 5’s assets represented its property obtained by way of the fraudulent conduct.

The proprietary claim thus came to be raised in AHAB’s statement of claim by way of a single compendious factual allegation¹, that SIFCO 5 had received AHAB’s monies which its principal Mr. Al Sanea had misappropriated from AHAB. This is pleaded as giving rise to the inference that monies contributed to Mr. Al Sanea’s Cayman Islands companies, including SIFCO 5, was part of the proceeds of his fraud on AHAB.

As a result of this proprietary claim and the Worldwide Freezing Order (“WFO”) obtained by AHAB at the outset of the action, SIFCO 5 was placed into liquidation. It is said that consequently its assets had to be liquidated and that this destroyed their value, although its assets had been treated internally

¹ At paragraph 166 of the Amended Statement of Claim.

as ring-fenced for Barclays Bank PLC. It was averred in SIFCO 5's Defence that Barclays always had a clear contractual entitlement to those assets.

AHAB's claim was always denied. In its Defence, SIFCO 5 asserted that it was at all material times an SPV used for a specific loan transaction with a bona fide third party bank (that is: Barclays)² and AHAB was challenged to give proper particulars of its allegations.³

The further argument is that AHAB persisted in its claim for three and a half years between 2009 and 2012, even when AHAB ought to have known the facts, having had disclosure from SIFCO 5's liquidators in their report provided in response to the disclosure of the WFO. Further, that even after AHAB was in receipt of SIFCO 5's Defence, AHAB persisted in the proprietary claim, vastly prolonging the period during which SIFCO 5's legitimate stakeholders would be kept out of their money.

AHAB's claim was always spurious and unsustainable, said Mr. Lowe. Even after the Court, at an earlier stage, had encouraged AHAB to amend its claim and provide proper particulars⁴, AHAB continued to press the claim for fraud against SIFCO 5. Since no particulars were given nor evidence produced, it is plain that there was never any evidential basis for AHAB's claim in the first place. The allegations were made it is therefore to be inferred, merely in the hope evidence would turn up.

Ultimately, says Mr. Lowe, AHAB's conduct in commencing and prosecuting a claim, making serious allegations without any sufficient evidential basis,

² Paragraph 8 of the Defence

³ Paragraph 7 of the Defence

⁴ For reasons explained in the 22nd December 2011 Ruling (see below).

takes this case out of the norm. Conduct of this kind is not reasonable and should carry some mark of disapproval – here by way of AHAB being ordered to pay indemnity costs. In support, he cited *Bonotto v Boccaletti*⁵; *Sagicor v Crawford Adjustors*⁶; *Reid Minty v Taylor*⁷ and *Excelsior v Salisbury Hamer*⁸; all of which are examples of such orders being made to mark the courts’ disapproval of the bringing of spurious claims.

4. Mr. Hayden’s response on behalf of AHAB is as follows, relying heavily upon the dicta of the decided cases in this jurisdiction as well as in England and Wales, and in particular, upon an earlier judgment of this Court in which an order for indemnity costs against AHAB was refused (the 2nd December 2011 ruling).⁹
5. Both counsel before me agree that these earlier cases (several as discussed in the 2nd December 2011 ruling) correctly identify the guiding principles to be appropriately applied when this Court is asked to consider making an award of indemnity costs. In summary, such an order should be made only in the exceptional circumstances where it is shown that the losing party has behaved improperly, unreasonably, or negligently; for instance by the pursuit of a spurious claim – one that may be described as plainly “*speculative, weak, opportunistic or thin*”.
6. This basis of the jurisdiction is found in GCR O. 62 r.4(11)¹⁰ which provides:

“The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has

⁵ 2001 CILR 292

⁶ [2008] CILR 482

⁷ [2002] 1 WLR 2800

⁸ [2002] EWCA Civ 879

⁹ On the application of the 3rd, 5th, 9th, 12th 20th – 29th and 38th -43rd Defendants (“The Maples Defendants”) in Cause FSD 54 of 2009 ASCJ.

¹⁰ This statutory power was introduced in January 2002 as part of the revision to modernize the local costs rules, following the Court of Appeal’s decision in *Bonotto v Boccaletti* (above); where it was said that the power existed only in equity.

conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.”

7. It follows that the fact that a claim has been unsuccessful will not by itself necessarily be persuasive. In *Simms v The Law Society* [2005] EWCA Civ 849 at para 16, Carnwath LJ, giving the judgment on behalf of the Court of Appeal, made the following observations:

“The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p1085 ff) show that costs will normally be awarded on the standard basis –

“...unless there is some element of a party’s conduct of the case which deserves some mark of disapproval. It is not just to penalize a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for an award of costs on the indemnity basis.... - (p10878).

Similarly, in Kiam v MGN No. 2 [2002] 2 All E.R. 242, 246, Simon Brown LJ, while agreeing that –

“...conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs....”

Added –

“To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight....”

Thus, when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party’s conduct of the case, rather than the substantive merits of his position.”

8. A similar approach was adopted in *Bonotto v Boccaletti* (above), where the Court of Appeal held that costs should only be ordered to be paid on the indemnity basis in the most exceptional circumstances such as – in the case then before the Court – where the party had engaged in conduct amounting to gross dishonesty, bribery and attempts to obstruct justice (at paras 41 and 64).
9. Further examples of the treatment of the issue of indemnity costs by the English courts reinforce the principle, that the focus should be upon the manner of the losing party’s conduct of the litigation rather than merely upon the fact of the unsuccessful outcome.
10. In *Excelsior Commercial and Industrial Holdings Ltd. V Salisbury Hamier Aspden & Johnson*¹¹ Walker LJ expressed the view that the issue whether indemnity costs should be ordered depends on whether there is:

“...Something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs.”

11. In *Three Rivers v Bank of England*¹², Tomlinson J sought to categorize the principles as he gleaned them from the earlier case law, citing the “fifth principle” justifying an order as follows:

“Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.”

¹¹ [2002] EWCA Civ. 879

¹² [2002] 5 Costs LR 714

12. While Tomlinson J's categorization may more aptly be described as being illustrative of circumstances rather than as he described them: "*principles justifying indemnity costs*", they nonetheless provide guidance in the former sense¹³.
13. I think it can safely be said that there is a commonality of approach to the question of an award of indemnity costs both here and in England and Wales. The following passage¹⁴ summarizes the approach by reference to the distinction in principle between an award of costs made on the ordinary basis and one made on the indemnity basis:

"The difference between [ordinary] indemnity costs...and full indemnity costs is one of both principle and scope – in the former, the ordinary case, the objective is to reimburse the costs which have been reasonably incurred and proportionate in amount to the cause of action and (in our jurisdiction) by reference to a prescribed scale of hourly rates; in the latter, the exceptional case, the conduct of the unsuccessful party is such as to justify requiring it to repay all the costs actually incurred by the successful party on the attorney and own client basis, without regard to such concerns as scale of fees or proportionality, provided only that the rate or scale of fees is not plainly unreasonable in the sense of being exorbitant."

14. My attention has been directed to the recent ruling of Justice Jones of this Court in *Riad Al Sadik v Investcorp Bank BSC and others*.¹⁵

¹³ And so regarded in the 2nd December 2011 ruling at paragraph 20.

¹⁴ Taken from the 2nd December 2011 Ruling at paragraph

¹⁵ Written ruling on costs delivered on 3rd July, 2013 in Cause FSD 47 of 2009 (AJJ) (at pp7,8)

15. There the learned judge explains in clear and full terms which I also adopt, the distinction between “standard” and “indemnity” costs under the regime of GCR Order 62 and the associated Guidelines Relating to the Taxation of Costs.
16. In dealing with the application before him for indemnity costs, he however expressed the view that the English cases presented to him “*were not particularly helpful*” a sentiment which I am unable to share in light of my reference to and reliance on such cases both in this and in the 12 December 2011 ruling¹⁶.

Should an award of indemnity costs be made against AHAB?

17. I proceed by emphasizing my acceptance of the principle that AHAB should not have an award of indemnity costs made against it simply to punish it for having failed in its claims (per Carnwath LJ in *Simms* (above)). The issue here is whether AHAB conducted its claim “unreasonably” or “improperly” in the sense contemplated by GCR O.62 r. 4(11). “Unreasonable” or “improper” in this context does not mean merely wrong or misguided in hindsight (*Simms* *ibid.*). No allegation of negligence in the sense of O.62 r.4 is raised.
18. I do not find that AHAB’s conduct falls foul of the principles. In particular, it was not unreasonable for AHAB to rely for the purposes of its pleadings upon the inference that SIFCO 5 was funded by and controlled by Mr. Al Sanea. This inference was based upon a detailed forensic investigative report from Deloitte which showed the misappropriation by Mr. Al Sanea of massive sums from AHAB’s Money Exchange in Saudi Arabia and the transfers by him of large amounts of those sums to Saad Trading Contracting Company (“STCC”) and through STCC into

¹⁶ Which appears from the *Al Sadik* judgment not to have been cited to Jones J; although it should have been brought to his attention.

AWAL Bank which he established and controlled in Bahrain (now in administration in that country) and further, into some of the SAAD Companies at the top levels of the Cayman corporate structure – companies which were owned and/or controlled by him.

19. In light of the forensic evidence, AHAB had been regarded in a number of judgments of this Court and of the Court of Appeal, as having shown a good arguable case, not only as against Mr. Al Sanea himself, but also as against several of his SAAD Group Companies; including SIFCO 5.
20. This showing of a *prima facie* connection, as it related to SIFCO 5, came to be refuted by evidence from its liquidators presented only latterly during the course of these proceedings and in support of SIFCO 5's strike out application. There then no longer appearing any reason to think that AHAB would be able, even after discovery, to establish its proprietary claim against SIFCO 5, the strike out application was granted.
21. The report produced by the SIFCO 5 liquidators earlier in response to the WFO disclosure order was not the same thing as full discovery. AHAB was not allowed inspection of the material upon which the report was based. Instead, SIFCO 5 chose to resist discovery until after the close of pleadings.
22. It would therefore seem to me inappropriate to characterize AHAB's conduct of its case against SIFCO 5, as "*unreasonable*" or "*improper*", or in terms more pejorative than "*merely wrong or misguided in hindsight*".
23. It follows that an order for costs to be taxed on the full indemnity basis, as distinct from on the standard basis, may not be granted.

24. The proper result is that AHAB has now had its claim against SIFCO 5 struck out and will be liable in the ordinary way for costs. It will also be liable on the indemnity basis for the costs of the WFO (and renewed WFO), as earlier conceded by AHAB on account of its admitted misconduct in having obtained and maintained those Orders. There is no basis, in my view, for penalizing AHAB further in costs.
25. An award against AHAB for full indemnity costs would also be inconsistent with the approach taken to the award of costs in favour of certain other defendants (the Maples Defendants) upon the discontinuation of AHAB's claim against them (see the 2nd December 2011 ruling).

Immediate Taxation

26. The action as it relates to SIFCO 5 is at an end. AHAB nonetheless argues through Mr. Hayden that SIFCO 5 should not be allowed to proceed to taxation immediately for the following reasons:
- (i) In the Cayman Islands the usual rule under GCR O.62 r.9(1) is that costs shall not be taxed until the conclusion of the cause or matter in which the proceedings arise. It has been held that an order for taxation forthwith should only be made in exceptional circumstances: *In Re Sphinx Group of Companies*¹⁷;
 - (ii) The usual rule has been applied during the course of these proceedings: in its Certificate of Order dated 19 April 2011 – based on a ruling delivered per Chadwick P. on 7 April 2011 in CICA No. 1 of 2010 – the Court of Appeal ordered that whilst other defendant companies against whom the proceedings

¹⁷ [2009] CILR 178

had been discontinued were entitled to their costs forthwith, this did not apply to other appellants against whom the action would continue. Notwithstanding that the WFO had been discharged against those appellants and liability for the attendant costs admitted by AHAB, it was held that there was *'no reason as to which those costs ... should depart from the normal practice to defer taxation until the end of the proceedings.'*

- (iii) Here, it is said that there are also good practical reasons why taxation of the costs should not take place until the conclusion of the whole action. A number of costs orders have been, or should be, made in AHAB's favour. AHAB would be entitled to set off any costs due to it against any costs it may be liable to pay to SIFCO 5. If taxation is to take place at this stage, it would therefore be necessary to tax AHAB's costs as well as SIFCO 5's costs. Further, other Defendant Companies in liquidation – conveniently described as the GT Defendants and the AWALCOs – have an interest in the taxation of AHAB's costs because they are liable to pay a proportion of them. They would therefore either have to participate in the forthwith taxation or the taxation would not be binding on them and would have to be repeated at the conclusion of the action, when all the other costs are taxed. There would thus be a risk of the Court taking an inconsistent approach on the different taxations and there would be an unnecessary duplication of costs.
- (iv) SIFCO 5 also seeks immediate taxation of the costs ordered to be paid by AHAB pursuant to paragraph 4 of the Order dated 24 September 2011, namely the WFO costs. However, it is difficult to isolate these costs from the

costs incurred by SIFCO 5 in the action. Further, if AHAB is right that the taxation of the costs incurred in the action should await the conclusion of the whole action, if the Court ordered the WFO costs to be taxed at this stage it would be necessary to have two taxations, unnecessarily taking up valuable court time and incurring unnecessary costs. Proper and effective case management dictates that all the issues are resolved in a single taxation at the conclusion of the whole action.

- (v) SIFCO 5 made its strike out application against AHAB on 2 September 2011. In the 2 December 2011 Ruling, the Court suggested that SIFCO 5's appropriate recourse was not by way of the strike out application (as it was then framed); instead that SIFCO 5 should, in due course, issue an application for summary judgment.
- (vi) Rather than withdrawing the strike out application and pursuing a summary judgment application as suggested, SIFCO 5 sought to maintain its strike out application whilst also issuing a summary judgment application on 2nd November 2012. In deciding to prepare and issue the summary judgment application, SIFCO 5 was well aware that, if the strike out application which it sought to maintain (notwithstanding the Court's suggestion) succeeded, all the costs related to the summary judgment application would be wasted. SIFCO 5 nevertheless chose to proceed with the summary judgment application and therefore chose to incur all the costs of preparing and pursuing that application.

AHAB submits that it was entirely unnecessary and unreasonable for SIFCO 5 to proceed as it did and expect AHAB to pick up all the wasted costs incurred in relation to the summary judgment application.

(vii) Further, in the usual course, the costs of an interlocutory application are awarded in favour of the party which succeeds on the application. The summary judgment application has not been heard by the Court and the arguments advanced by SIFCO 5 in that application have not been determined. In the circumstances, it would be wrong for the Court to assume that the arguments advanced by SIFCO 5 have real merit and would have succeeded had the application been determined.

(viii) The correct approach is for SIFCO 5 to withdraw^{*} the summary judgment application, given its success on the strike out application. Where a party withdraws or discontinues an application, the usual approach is for that party to bear the costs of and associated with the application. The appropriate order in this case is therefore for SIFCO 5 to pay AHAB the costs of and associated with its summary judgment application, to be taxed on the standard basis if not agreed.

27. I do not accept most of these arguments. So far as SIFCO 5 is concerned the action is indeed at an end. It would be unfair to require it to await recovery of its costs until the ultimate conclusion of AHAB's action as against all the other defendants. That could be years from now. I accept however, that AHAB should have its costs of SIFCO 5's summary judgment application which can no longer be pursued and which must therefore be regarded as at an end in light of the striking out of AHAB's claim

against SIFCO 5. That application should be withdrawn by SIFCO 5 to allow for its own costs to proceed to taxation, vis-à-vis any costs that might be found against it in AHAB's favour.

28. Any proper claims for costs that AHAB may in consequence have against SIFCO 5 can be set off against any owed to SIFCO 5. I am not persuaded that that exercise cannot be effectively undertaken without the costs generally in the action as they might affect other defendants, being also resolved on the inter parties basis.
29. The order is therefore for immediate taxation of SIFCO 5's costs and for those costs awarded against it to AHAB to be taxed and paid immediately with appropriate set-offs to be made. To the extent that SIFCO 5 may be jointly liable with other defendants for any of AHAB's costs, SIFCO 5's liability must be amenable to being apportioned in the context of a global sum to be identified as due to AHAB in any event up to now and AHAB can claim against it on that basis. I do not see how SIFCO 5 could be liable for any of AHAB's costs to be incurred from now on.

Enforcement against AHAB's security for costs and interim payment

30. SIFCO 5 seeks leave to enforce its entitlement to costs against the security paid into Court by AHAB when its entitlement will have been taxed and quantified. I do not regard that as an appropriate order to make now in the circumstances of this case where the security was paid in as against any award of costs that any defendant might ultimately become entitled to. SIFCO 5 will be entitled to its costs when quantified but must either enforce against other assets of AHAB's (if not paid forthwith) or await the final outcome and claim pro rata when the security becomes available to be levied against by all defendants.

31. In any event, costs must first be taxed before the court could order their enforcement. It would therefore be premature for me to make an order now relating to the enforcement of orders for costs which have not been taxed and are not currently due and payable. Only if AHAB fails to pay after taxation would any question of enforcement arise.
32. Nor is it clear, or conceded by AHAB, that there is jurisdiction to order such an interim payment on account of costs. Indeed, the case law decided in England before the introduction there of an express power (under the Civil Procedure Rules 1999 (“CPR”)) shows that the power did not exist under the predecessor Rules of the Supreme Court (the “RSC”).
33. That power under the CPR in England now allows the courts there to order payment on account of costs even though they have not yet been assessed: CPR r. 44.3(8). There is no equivalent provision in the local GCR.
34. The lack of jurisdiction in the English Courts prior to the CPR was highlighted in the Woolf Report which led to the implementation of the CPR. At Chapter 7 para 40 the Woolf Report stated¹⁸ *“The court should be able to award interim costs in appropriate cases, in the same way as interim damages would be payable. That is to say, interim costs would be payable forthwith, although the ultimate liability would remain subject to the court’s determination....”*.

¹⁸<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec2c.htm>

35. *In Mars UK Ltd v Teknowledge Ltd*¹⁹, a case decided under the (then new) CPR, Jacob J., reflecting upon their history, observed at p4 that “*before the CPR, if costs were sent off to taxation there was no power to order interim payment*”.
36. Given that history, I am satisfied that as our rules stand, there is no power to order interim costs. Indeed, GCR O.29 r.11 and 12 provide for the interim payment of damages and certain other sums but costs are specifically excluded: O.29 r.12(c).
37. That being the state of the rules, it is unsurprising that AHAB has been unable to identify any Cayman precedent for an interim payment of costs. Any meaningful precedent would have had to address and consider the matters raised above, all of which indicate that the Grand Court does not have a power, even an inherent power, equivalent to the English Court’s under the CPR, to award the interim payment on account of costs sought in this case. The Rules Committee has (thus far at least) decided not to adopt the CPR and Mr. Hayden for AHAB argues that this Court should therefore not go about inventing a new inherent power to do through the back door, what the Rules Committee has decided not to do by the exercise of the statutory powers vested in it.
38. However, I see from the *Al Sadik*²⁰ case that Justice Jones was called upon to address this issue and came to a different conclusion declaring²¹ that this Court does have an inherent jurisdiction to order an interim payment of costs. He concluded that the fact that the Rules Committee under GCR O. 62 made no rules for interim payment, indicates that the inherent jurisdiction to make such orders is not precluded.

¹⁹ [1999] 2 Costs LR 44

²⁰ Above.

²¹ At pp12-14.

39. I must hesitate to disagree with an earlier decision of this court given by a judge exercising co-ordinate jurisdiction on a substantive matter of principle²². There is no need to do so now in light of the decision I have reached on this issue as explained below.
40. However, I am obliged to recognize this question about the court's jurisdiction in light, especially, of the earlier pronouncements in the English authorities.
41. The concern starts from the premise that the power to award costs is statutory (save for the equitable power in cases of fraud recognized in *Bonotto v Boccaletti*²³) and so there is strong ground for an argument that its enlargement may not be a matter for the exercise of the inherent jurisdiction. As noted above²⁴, GCR O. 62 r.9(1) explains that in the ordinary situation, the costs of any proceedings shall not be taxed until the conclusion of the case in which the proceedings arise. Although under r.9(2) an order for "taxation forthwith" may be made, this was never regarded as allowing an order for interim payment prior to taxation.
42. It therefore seems to me that the jurisdiction to make an interim order should be put on a clear statutory footing by the Rules Committee as a matter of urgency.
43. Questions about the jurisdiction aside, I would not, in any event, have made an order for interim costs in this matter now. There is to be no stay of SIFCO 5's application for taxation of costs. SIFCO 5 may therefore proceed to taxation and, as already noted, proceed to recovery or enforcement against AHAB in whatever way it may properly do so. It is apparent that an order for an interim payment would be

²² The rule is fully explained by Justice Cresswell in a recent ruling delivered in FSD Cause 8 of 2012 – In the Matter of Dynax Holdings Limited, delivered on 8th October 2013.

²³ Above.

²⁴ At paragraph 26.

meaningless unless there are assets available immediately against which to enforce payment but only the payment into court has been identified. But those are not to be available to SIFCO 5 in preference to other potential claimants for reasons already explained.

44. Justice Jones in *Al Sadik*²⁵ recognized that only in exceptional circumstances would it be appropriate to order interim payment given the way in which the taxation process works. He there recognized the fact that a successful party may, instead, immediately seek an interim certificate from the taxing officer for so much of the bill of costs that is not to be in dispute. That being the process, it would indeed be a “wholly exceptional circumstance”, as Jones J also observed, that could justify the court making an order for interim payment “*prior to, or conceivably instead of, the delivery of a bill of costs*”²⁶.
45. The present case, on any view, presents no such circumstance.

Inquiry as to damages arising from the WFO

46. As mentioned above, AHAB already accepts that it is liable, on the indemnity basis, for SIFCO 5’s costs relating to the discharged WFO. SIFCO 5 now also seeks directions for an enquiry into the damages incurred by it arising from the WFO, which it says could be as much as 50-60 million dollars.
47. AHAB’s response is as follows:
- (i) The Court has not given any directions in relation to an inquiry into damages and it is not appropriate for SIFCO5 to seek to include directions in this Order, which deals with matters that have been determined by the Court in the

²⁵ Above.

²⁶ Above at para. 17

context of the interlocutory proceedings. If SIFCO5 wishes to apply for directions for an inquiry into damages, it should follow the usual approach and issue and list a summons seeking directions.

- (ii) This is necessary here because it is likely that any inquiry will be a substantial hearing in its own right and that the directions to the inquiry will resemble those to an ordinary commercial trial. The extent to which the inquiry will be a substantial exercise is apparent from the evidence filed by all the liquidators in relation to the Case Management Conference (“CMC”), from which it is apparent that they will make substantial and potentially complex claims to damages in the inquiry. The SIFCO5 liquidators have indicated that they will pursue claims including a claim for what they say was a reduction in the net asset value of the company's portfolio caused by the ‘*particular difficulties in selling private equity interests in a liquidation scenario*’ (see Mr. Matthews’ 7th Affidavit paragraph 31(a)). Even in the brief description of it in the evidence presently before the Court, it seems that this claim will involve difficult questions of causation and will require the parties to obtain expert valuation evidence.

It is therefore apparent that the issue of directions in relation to an inquiry into damages is not straightforward. SIFCO5 has not even sought to formulate detailed directions or to suggest appropriate timescales for dealing with matters. AHAB should be afforded a proper opportunity to deal with these matters. In the usual way, SIFCO5 should formulate detailed proposals and seek to agree them with AHAB, before asking the Court to make directions.

AHAB would wish to consult with and take advice from its leading counsel in relation to any such directions and may wish to instruct leading counsel to attend any directions hearing, if matters cannot be agreed. None of these things have yet happened.

a. AHAB had previously argued that any inquiry in damages arising from the WFO should await trial, so that the action is not unduly delayed further and the case is managed in the most efficient manner. AHAB maintains that this is the correct approach, that the Court has a broad discretion in relation to how and when cross-undertakings in damages (of the kind given in the WFO) are to be enforced, and its power to adjourn applications for inquiries in the manner suggested by AHAB has been expressly recognised: see *Cheltenham and Gloucester Building Society v Ricketts*²⁷.

(iii) Although the Court has ordered that the claim against SIFCO5 should be struck out, the time limit for AHAB filing an appeal has not yet expired (at the time of this hearing). This is yet another reason why directions should not be given at this stage.

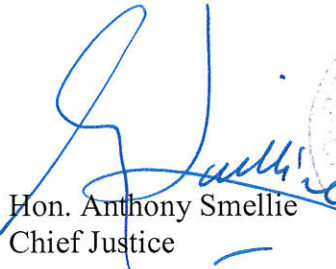
48. While I recognize, as Mr. Lowe further argued, that the *Cheltenham* case (above) was decided while the action in it had not yet concluded, I regard the factors cited by AHAB as justifying a separate application for directions for the enquiry as proper reason nonetheless, for not attempting to give those directions now.


²⁷ [1993] 4 All ER 276 at 281 (Neill LJ)

49. I accept, for the record, that the *Cheltenham* case is nonetheless clear authority that the discretion resides with the Court to decide as to at which stage to direct an enquiry.
50. SIFCO 5 must arrange a directions hearing for the trial of the assessment of damages and should seek to agree the terms of the directions (including as to the calling of expert evidence) with AHAB beforehand.

Costs of these applications

51. Given the mixed results of the present applications, I consider that AHAB should have sixty percent of its costs (reflecting the importance of the indemnity costs issue on which it succeeded) in any event, to be taxed if not agreed.


Hon. Anthony Smellie
Chief Justice



October 16, 2013