



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009 (ASCJ)

**BETWEEN AHMAD HAMAD ALGOSAIBI
AND BROTHERS COMPANY (“AHAB”) PLAINTIFF
AND SAAD INVESTMENTS COMPANY LIMITED
(IN OFFICIAL LIQUIDATION) (“SICL”)
MAAN AL SANEA AND OTHERS DEFENDANTS**

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

**THE 16TH DAY OF JUNE 2017, 5TH DAY OF SEPTEMBER 2017 AND 19TH DAY OF
OCTOBER, 2017**

APPEARANCES: Mr. Thomas Lowe QC and Mr. Jack Watson instructed by Mr. William Peake of Harneys for the liquidators of SIFCO 5.

Miss Shelley White and Miss Sarah Gavin of Walkers for the liquidators of the GT Defendants.

Ms. Harriet Fear Davies instructed by Mr. Ian Lambert of HSM Chambers for the liquidators of the AWALCo Defendants.

Mr. Hector Robinson QC instructed by Ms. Delia McMahon of Mourant for the plaintiff, AHAB.

Jurisdiction vested by Grand Court Rule Order 23, Rule 1 to make orders for security for costs to be exercised in a non-discriminatory manner consistent with the right to fair trial guaranteed by the Constitution – the imposition of such orders by simply having regard to a plaintiff’s non-resident status would be contrary to that right – principles applicable to the making of awards for full security for costs different from those applicable to making an award for security for the costs of enforcement of a costs judgment abroad – jurisdiction to award further security where order for the whole action already made exists only where a material change of circumstances arises since earlier order was made.

**RULING ON APPLICATION FOR
FURTHER SECURITY FOR THE COSTS OF THE DEFENDANTS**

1. The Defendants apply for further security for their costs in the context of this very complex and lengthy case in which some US\$76.1 million¹ have already been ordered by the court and provided by way of security for the Defendants' costs. While that very large sum included security to cover the Defendants'² recoverable costs up to and including the costs of the trial, it did not anticipate the actual overrun on the estimated length of the trial and so the Defendants now seek to secure the further costs attributable to that overrun by reference to the realized time costs and disbursement costs of the trial.
2. AHAB does not contend that the Defendants should not be entitled to security for the further costs but, in light of modern developments in the English and local case law, argues for the application of different principles to the determination of that entitlement.
3. AHAB's primary contention is that the Defendants should be entitled to security only for such costs as could reasonably be incurred by them in having to enforce abroad in AHAB's domicile of Saudi Arabia, any ultimate award of costs against AHAB obtained in these proceedings. This proposition implicitly contemplates the risk that AHAB might fail to honour such an award and, at least, that there would be costs of enforcement against AHAB in Saudi Arabia.
4. This concession as to a limited kind of security which I will call the "costs of enforcement", would stand in contra-distinction to security for the full amount of any recoverable costs of the action to be awarded against AHAB, in the event the Defendants are successful (which I will call "full security").



¹ References throughout are to United States dollars.

² The liquidators of the SIFCO5 Defendant agreed with the plaintiff, AHAB, upon a sum to cover their further costs and so were not involved in the contested hearing. Mr. Lowe QC had earlier however provided full written submissions at my request upon the relevant principles. I record here my appreciation for his helpful research and arguments.

5. As a corollary to its primary contention that only the costs of enforcement should be awarded, AHAB argues through Mr. Robinson QC, that as the relative amount of such costs would be very small (if not indeed *de minimis*, in the context of this case), the Defendants should be regarded as being adequately secured for them by the very large sums of security already awarded.
6. AHAB's contention proceeds on the basis that in the circumstances of this case and notwithstanding the large sums of security already awarded the Defendants are unable to satisfy the test laid down by the modern case law for the grant of full security.
7. Citing the same leading cases as cited by the Defendants to be discussed below³, Mr. Robinson submits that the only justifiable rationale for the existence of the jurisdiction to award security for costs, are the potential difficulties and burdens of enforcement in Saudi Arabia. Accordingly, that the cases have set the evidential threshold which must be met by the applicant seeking full security at "*a real risk that (the applicant) will not be in a position to enforce an order for costs*"⁴. That threshold, he submits, is referable to whether or not enforcement is possible, not merely to whether there will be difficulties in the enforcement process. This he further submits, is the only basis upon which a distinction can be drawn between the test for an award of full security and that for an award for the costs of enforcement, the former contemplating insuperable obstacles but the latter contemplating merely that there will be difficulties or burdens to be encountered in the process of enforcement.



³ Nasser v United Bank of Kuwait [2002] 1 WLR 1868 ("*Nasser*") and the decision of the English Court of Appeal in *Bestfort Developments LLP v Ras Al Khaimah Inv Auth.* [2016] EWCA 1099 ("*Bestfort*").

⁴ Part of the dicta from the cases as will be shown further below.

8. Thus understood, Mr. Robinson argues that the test for an award of full security in the circumstances of this case is that the applicants must show that enforcement in Saudi Arabia would be practically impossible.
9. Miss White and Ms. Davies disagree⁵: they contend that the test is different and that by reference to the same leading case authority that “*it is sufficient for an applicant for security for costs simply to adduce evidence to show that ‘on objectively justified grounds relating to obstacles to or the burden of enforcement’, there is a real risk that it will not be in a position to enforce an order for costs against the plaintiff and that, in all the circumstances, it is just to make an order for security*”⁶.
10. I am satisfied that this is the correct statement of the applicable principle and that which has been applied in the recent case law in this jurisdiction such that it is now to be regarded as part of the established law on the subject of security for costs⁷.
11. Mr. Robinson’s formulation of the test is different and unacceptable for more than mere semantic reasons. In placing undue emphasis upon the need to show proven insuperable difficulties rather than simply a real risk of difficulties, it would impose a mandatory but unrealistic requirement, that an applicant for security must adduce evidence as to the actual existence of an insuperable obstacle to the enforcement of a costs judgment in the home jurisdiction of the plaintiff. That approach would, in my view, hamper unduly the purpose of the jurisdiction to award security for costs.
12. In the practical application of the Rules as developed in the case law, it is now settled that the purpose of the jurisdiction is to protect a successful defendant from the real risk of

⁵ They both adopt and reply upon Mr. Lowe QC’s full written submissions as well.

⁶ *Bestfort* at paragraph 77 per Lady Justice Gloster, following and applying the earlier dictum of the Court of Appeal from *Nasser* at paragraph 66 per Lord Justice Mance (as he then was).

⁷ See *Elliot v CI Health Services Authority* [2007] CILR 163, *Gong v CIH China Management* [2011] 1 CILR 57, *Dyxnet Holdings v Current Ventures 11 Ltd* [2015] 1 CILR 174; *Locke v CWM Ltd* (unreported) Cause FSD 104 OF 2016 (RMJ) 7 April 2017.

unenforceability of an award of costs against a foreign plaintiff⁸. A mandatory requirement for a showing of insuperable difficulty would unjustifiably circumscribe and delimit the clear judicial discretion granted by Grand Court Rules (GCR, or the Rules), Order 23, Rule 1 (1), for the making of such orders in appropriate circumstances where it provides:

“Where, on the application of a defendant to an action or other proceedings it appears to the Court-

(a) *That the plaintiff is ordinarily resident out of the jurisdiction; ...then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceedings as it thinks just.”* [Emphasis added].

13. The words in emphasis connote a broad discretion such as would be incompatible with the exclusion from consideration of apparent or real risk of difficulties, while confining the consideration only to circumstances of insuperable difficulties.
14. Nothing in the modern case law suggests the need to confine the judicial discretion artificially in that way.
15. As will be further explained below, the focal concern of the modern case law is not to ensure that a plaintiff is seldom required to provide security or that orders for security are only exceptionally made but to ensure that such orders are not imposed in an arbitrary or discriminatory manner. Accordingly, the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the

⁸ See, for instance, the previous decisions in this Cause on the subject of security for costs; delivered on 15 November 2013, 10 November 2015 and 23 June 2016 and in which the risk of impecuniosity of the plaintiff, AHAB, was a decisive factor.



discriminatory basis of the plaintiff's foreign status but because real risks of unenforceability are shown "*on objectively justified grounds*" to exist: per Lady Justice Gloster in her dictum cited above from *Bestfort*, applying the dictum of Mance LJ from *Nasser*.

16. This approach dictated by the modern cases, is aimed at addressing not only basic tenets of fairness but more particularly, the requirements of the Constitutional Bill of Rights⁹ where, in section 16, it is mandated that "*government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution*"¹⁰ – the most directly operative here being that right to a fair and public trial guaranteed by section 7¹¹ which states that "*Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.*"

17. And while under section 1(3) of the Constitution it is provided that the reference in section 16 to "*government*" shall "*include public officials and the Legislature but shall not include the courts*", it must be recognized that it is by an act of government, in the exercise of the legislative authority delegated to the Grand Court Rules Committee that GCR Order 23, Rule 1 is promulgated, pursuant to section 19 of the Grand Court Law (as revised)¹².

18. Accordingly, as Mr. Lowe submits and as I accept, it should now be taken as understood that the policy underlying the action of "*government*" taken in the promulgation and

⁹ In the context of the United Kingdom, the equivalent requirements are those of Article 14 of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998.

¹⁰ The Cayman Islands Constitution Order 2009, Schedule 2 Part 1, the Bill of Rights, Freedom and Responsibilities ("the Constitution or the Bill of Rights" as the context requires), section 16(1). Section 16(2) reads: "*In this section, "discriminatory" means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status*".

¹¹ Acting with the approval of Cabinet when prescribing the rules for the fees of the Court.

¹² Section 19 creates the Rules Committee, prescribes the membership, stipulates the purposes for which rules may be made and vests the rule making power- the power by which the GCR are made, including Order 23, Rule 1.



preservation of GCR Order 23 Rule 1, comes within the purview of the right to a fair trial guaranteed by section 7 of the Bill of Rights and so the Rule must be applied in a non-discriminatory manner within the meaning of section 16. In the case of a non-resident plaintiff, this principle will therefore exclude the making of security for costs orders on the merely discriminatory basis of such a plaintiff's foreign status; viz: its domicile or nationality.

19. Accordingly, while the Constitution does not itself expressly impose upon the courts the obvious obligation to ensure that the Rule is applied in a non-discriminatory way, the right to a fair trial under section 7 is that which is to be assured by an "independent and impartial court." It must follow that the court, which is a creature of the Constitution¹³, must exercise the jurisdiction and plenitude of powers vested in or conferred on it by the Constitution and any other law, in a manner in keeping with the Constitution. This would include for present purposes, that GCR Order 23, Rule 1 is applied impartially, in keeping with the non-discriminatory tenets of section 16.

20. As the Court of Appeal stated in *Dyxnet Holdings* (above) per Chadwick P.¹⁴, (at paragraph 48.c) "*Section 16 Part 1 (the Bill of Rights, Freedoms and Responsibilities) of the Cayman Islands Constitution requires that the government shall not treat any person in a discriminatory manner in respect of the rights under that Part. In that context, discriminatory means affording different and unjustifiable treatment to different persons on any ground such as, inter alia, national origin or other status. The rights under*



¹³ See section 94 which provides that: "There shall be a Grand Court for the Cayman Islands which shall be a superior Court of Record and shall have such jurisdiction and powers as may be conferred on it by this Constitution and any other law."

¹⁴ When examining the different but related question whether there was jurisdiction to make orders for security for costs against a plaintiff non-resident company in favour a defendant company upon a winding up petition. The question arose because section 74 of the Companies Law provides that security for costs could be ordered to be given by a plaintiff company registered in the Cayman Islands while being silent as to whether such an order could be made against a plaintiff non-resident company. The court decided that in order for the statutory power to be applied in a non-discriminatory way in keeping with section 16 of the Constitution, the court must be able to exercise its inherent jurisdiction to make an order for security for costs against a plaintiff non-resident company, as well.

Part 1 include at s. 7, the right to a fair and public hearing in the determination of his or her legal rights and obligations. In exercising its own powers, the court is required to give effect to those provisions by avoiding discriminatory treatment between different classes of litigant. That principle was recognized in the context of security for costs in the decisions of Jones J, to which I have referred earlier in this judgment (Gong v CDH China [above]) and in the earlier decision of Sanderson Actg J. in Elliott v Cayman Islands Health Services Authority [also above]”.

21. As already touched upon above, the mandate to avoid discrimination in the exercise of the jurisdiction for the award of security for costs against a non-resident plaintiff, does not justify the imposition of unreasonable burdens upon a defendant applying for security. Such an imposition could itself effect discrimination in favour of plaintiffs simply on account of their foreign national, domiciliary or non-resident status¹⁵, in cases where security would be unfairly denied to a defendant who can show real risks of difficulty of enforcement. An evidential burden to prove the existence of substantial – let alone insuperable – difficulties of enforcement could, in my view, operate unconstitutionally in that way.

22. Again, as the passage quoted above from *Bestfort* explains, what is required is more simply evidence showing that there would be a real risk that the defendant applicant would not be in a position to enforce a judgment for costs “*by reference to the difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic*” (*op. cit.* at paragraph 69).



¹⁵ In *Dyxnet* (above) it appears from the passage quoted that the Court of Appeal regarded either as coming within the meaning of “status” as defined by section 16(2) of the Constitution. While GCR O.23 Rule 1 is concerned with plaintiffs who are “ordinarily resident out of the jurisdiction”, the expression is wide enough in my view, to encompass plaintiffs who are foreign nationals such as to bring them within the contemplation of the non-discriminatory tenets of section 16(1).

23. It must also be recognized that what will happen at the stage of enforcement is prone to mere speculation. A defendant should therefore not be expected to show in any definitive sense by a misapplication of the learning from *Bestfort*¹⁶ that “*it will not be in a position to enforce an order for costs*”¹⁷ but only that there is a real risk that it will not be able to enforce. It is clear from the cases that an order for security for the recoverable costs of the proceedings is justified if there is a real risk that enforcement might fail because of difficulties or obstacles to enforcement, not that it will fail; the former connoting the inherent nature of a real risk, the latter connoting certainty of failure.
24. Where no real risk of unenforceability is shown to exist, there may well however, be the different entitlement to security for the costs of enforcement in recognition of the likelihood – or one might even say in many cases inevitability – of significant costs to be incurred in having to enforce in the foreign jurisdiction.
25. This is the dichotomy of considerations for the court in deciding whether to award full security rather than security for the costs of enforcement. And this is all clearly explained by Lady Justice Gloster in *Bestfort* (at paragraphs 71-77) by reference to *Nasser – Bestfort* being a case where an award of full security was made and *Nasser*, a case where only the costs of enforcement were awarded.
26. For the reasons which follow, I am satisfied that this remains a case where there is a real risk that the Defendants’ efforts at enforcement in Saudi Arabia will fail because of difficulties or obstacles there to enforcement and the order I make will therefore give security for the as yet unsecured part of the recoverable costs of the proceedings, not merely any additional costs of enforcement.



¹⁶ See paragraph 77 (quoted herein above at paragraph 9 – emphasis here added.)

¹⁷ Barring of course, reliance by a defendant on some insuperable difficulty such as legal impediment.

**DIFFICULTIES LIKELY TO BE ENCOUNTERED
BY THE DEFENDANTS IN SAUDI ARABIA**

27. This issue is the subject of detailed discussion in the affirmation of Mr. Monaji Zamakhchary, the Saudi lawyer engaged by the GT Defendants to give expert evidence on the question of enforcement. His evidence, which is aimed at addressing in context the requirements of the English and local case law on security for costs, was unchallenged by AHAB. This was except in so far as Mr. Robinson pointed to what he described as internal inconsistencies in views expressed by Mr. Zamakhchary, on the need for reciprocity as a requirement of enforcement of foreign orders in Saudi Arabia.
28. I discerned no real basis for that criticism. Rather, I discern that Mr. Zamakhchary merely seeks to distinguish between instances in the past where foreign (including Cayman) orders have been enforced and there being a perceived to be settled precedent of reciprocity upon which to base an assumption that such orders will in future be enforced.
29. By way of background for the context of his discussion, it should be noted that there is underway in Saudi Arabia, a special judicial process for the resolution of bank claims against AHAB and related entities (and against the second named defendant Maan Al Sanea and his related entities). That process is engaged before the Joint Directorate of Enforcement at the General Court in Al-Khobar (the "JDEK"), appointed by the King of Saudi Arabia for the stated purposes. A very relevant question arising now for my consideration on this application, and one which is therefore addressed in some detail by Mr. Zamakhchary, is whether the Defendants would be able to enforce an award of costs against AHAB before the JDEK, particularly in the context where the



JDEK is commissioned to take claims for amounts valued at no less than SAR 500 million (approximately US\$ 133 million).

30. I have read and considered the detailed explanation of the JDEK process provided by Mr. Zamakhchary and of the legal and procedural rules explained by him as likely to operate in Saudi Arabia in relation to the enforcement of any costs judgment granted here in favour of the Defendants.

31. In sum, it is apparent from Mr. Zamakhchary's affirmation that there are real, if not insuperable, risks of difficulties to be faced by the Defendants in seeking to enforce a costs judgment against AHAB. While the Defendants do not accept that AHAB should be entitled to place any of these difficulties in their way or should otherwise be able to resist, in Saudi Arabia, a judgment for costs duly obtained in this jurisdiction, the reality is that AHAB gives no assurances that it will not seek to do so. I therefore accept the following propositions as summarized by Miss White from Mr. Zamakhchary's affirmation, with the addition of other factors arising from the evidence:

- (a) **The JDEK** was established to adjudicate on the claims against AHAB. It is a new tribunal, applying a new law, and the JDEK process is untried and untested and, therefore, inherently uncertain;
- (b) **Reciprocity** - it is unclear whether there is sufficient precedent that a Saudi Arabian judgment would be enforceable in the Cayman Islands such that the JDEK will find a judgment of the Grand Court to be enforceable in Saudi Arabia;
- (c) **Value** - the JDEK is directed to deal only with the enforcement of judgments exceeding SAR500 million (approximately US\$133 million) and it is unclear whether the JDEK would enforce a claim against AHAB with a value below



SAR500 million, such as would be the final costs judgments in favour of the Defendants in this case;

- (d) **Timing** - by the time the Defendants obtain a final, unappealable and therefore enforceable order from the Grand Court¹⁸ it is likely to be too late to enforce against AHAB. Either the JDEK will have completed its enforcement or AHAB will be in an insolvency process potentially precluding enforcement;
- (e) **AHAB Opposition** – AHAB has indicated that it will oppose applications to enforce in the JDEK by the GT Defendants;
- (f) **Interest unenforceable** - the JDEK has made it clear that interest claims will not be enforceable in the JDEK;
- (g) **A possible insolvency process** - there is a draft insolvency law currently in the final stages of approval in Saudi Arabia and will potentially apply in AHAB's situation; and
- (h) **Uncertainties surrounding settlement** - there are ongoing settlement negotiations in Saudi Arabia with AHAB and certain of its creditors. That process, and the effect of acceptance of a settlement, creates additional uncertainty for parties prevented from participating in these negotiations (such as the Defendants here).



MATERIAL CHANGE OF CIRCUMSTANCES

32. Having regard to the words of GCR Order 23, Rule 1¹⁹, it is clear that the Court has a wide discretion to make an order for security for costs if the Court thinks it is just to do

¹⁸ This assumes that all of the requirements for enforcement of an enforceable instrument set out by Mr. Zamakhchary are satisfied, which as he also explains, is not certain.

¹⁹ See paragraph 12 above.

so “having regard to all the circumstances of the case”²⁰. It is also settled that the discretion extends to an application to vary an existing order for security, where there is a “material change of circumstances” since the original order for security was made. This latter statement of principle has already also been recognized in these proceedings²¹ by the approval and adoption of dictum from *Republic of Kazakhstan v Istil Group Inc.*²² per Sir Anthony Clarke on behalf of the English Court of Appeal where he stated:

“The correct approach, which is the same as that under CPR 25.12 and 25.13, is again not in dispute. It is that where the court has awarded security in respect of, say, the whole of an action or application, it will not make a further order in the absence of a material change of circumstances. However, it will or may do so if there has been a material change of circumstances, depending of course, upon the circumstances of the particular case: see, for example, Gudmundur Kristjansson v R Verney and Co Ltd (unreported), a decision of this court made on 18 June 1998. That principle applies where a court makes an order for security for costs and is asked to make a further order. Moreover, it applies whether the first order is made with or without the consent of the parties. Thus it applies, for example, where the parties consent to an order. Subject to the express terms of the agreement it also applies where the parties agree that security will be provided and security is provided pursuant to an agreement without an order.”



²⁰ And see *Tasaruff Mevduati Sigorta Fonu v Wisteria Bay Limited* 2006 CILR 351 paragraph 7.

²¹ See the 10 November 2015 Judgment at paragraph 90.

²² [2005] EWCA Civ 1468. The dictum has been applied in subsequent English cases two of which in particular were cited and relied upon by the parties here: *Stokors SA & Ors v IG Markets Limited* [2012] EWHC 1684 (Comm) (“*Stokors*”) and *Vald Nielson Holding A/S and others v Baldorino and others* [2017] EWHC 1033 (Comm). (“*Vald Nielson*”).

33. In *Stokors*, (at paragraph 13) Popplewell J. (citing the *Republic of Kazakhstan* case) stated the principle in terms which have also already been accepted by this court²³ and which bear repetition here because of the nature of the Defendants' application citing material change of circumstances within a particular stage (i.e.: the trial stage) of the proceedings:

"The next matter of principle which is important is that where a security for costs up to a particular stage of proceedings has already been provided, a defendant who applies to increase the amount of security for the costs of that same stage in proceedings will generally have to justify a further order by reference to circumstances which did not exist or were not apparent at the time the order was made. For it to be just to order further security, a defendant will generally have to show a material change of circumstances from those which pertained or were envisaged when the matter was before the court making the order. Otherwise, the court is simply being asked to reconsider a decision made on the basis of arguments which were made or could have been made at the time."

34. Here, the over-arching change of circumstances relied upon by the Defendants is the aforementioned unanticipated extension of the trial period. More particularly, they rely upon the additional expenses incurred by way of professional time costs and disbursements which they say resulted from the extension of the trial period.

35. Against the background of earlier orders for earlier stages of the proceedings, the most recent security for costs order, dated 23 June 2016²⁴, was intended to provide security for the Defendants' costs up to the end of the trial which began on 18 July 2016 and was



²³ See paragraph 95 of the 10 November 2015 Judgment.

²⁴ And the subject of the 23 June 2016 Judgment.

expected to end 8 months later, on 24 February 2017. This was based on an estimated trial of 100 sitting days in court and 80 work days out of court (including 12 days for any over-run) over the 8 month period – all as accepted by the court at the time as being the parties’ best estimates of the trial timetable.

36. As events transpired, including adjournments to allow for the availability of witnesses, the trial took 129 sitting days in court²⁵ and did not conclude until 27 July 2017, some 5 months later than the expected end-date of 24 February 2017.

37. That being so, the Defendants invite me to calculate the further amounts to be secured now, not simply by reference to the fees and expenses to be attributed to the additional number of sitting or working days actually taken for the trial but by reference to the fees and expenses actually incurred. This on the further basis that, to the extent the actual amounts have exceeded the amounts ordered on the 23 June 2016, they are attributable to work and expenses arising from and undertaken during the entire extended period which ran for 5 months beyond the expected end-date of 24 February 2017.

38. The former approach would involve me taking account of the 29 day extension beyond the expected 100 sitting days or a 29% increase. The latter approach, as explained by the Defendants²⁶, would take account also of non-sitting days and instead of the additional 29 days actually taken in court for the trial, would yield an additional 123 days or a 68% increase to the number of days originally estimated for the trial (i.e.: from 180 days to 303 days).



²⁵ This is as recorded in the Opus Magnum database of the transcripts and not 117 days as mentioned at paragraph 11 of the Walkers letter of 31 May 2017 sent on behalf of the defendants to the plaintiff, as discussed below.

²⁶ Originally in their letter of 13 March 2017 followed up in the letter of 31 May 2017 per Walkers on behalf of the GT Defendants to Mourant on behalf of the Plaintiff, later adopted by Mr. Stephen Akers, one of the GT Liquidators in his 25th Affidavit and by Mr. Geoffrey Carton-Kelly, one of the Liquidators of the AWALCOs, in his 13th Affidavit. This is in response to the Plaintiff's proposition that only a percentage increase relative to the increase in the number of sitting days actually taken for the trial should be allowed (see paragraphs 8 – 13 of the Walkers letter).

39. The rationale for this much larger increase say the Defendants, is the fact, among other things, that the Plaintiff provided ongoing disclosure and applied to amend its case such that they had to carry on working on the trial issues out of court between 24 February and 27 July 2017, even on those days when the court was not sitting.
40. The Plaintiff objects to that approach on the basis that the Defendants have not explained or justified why it would have been necessary to undertake work out of court so grossly disproportionate to the additional days actually spent in court.(i.e.: 123 days compared to 29 days).
41. The Plaintiff contends through Mr. Robinson that in keeping with the earlier patterns established during the expected trial period, work by the lawyers out of court would have been required and at maximum, might be allowed, only for a number of days roughly matching those actually taken in court for the trial.
42. In principle, I consider this contention of Mr. Robinson's to be correct. It will therefore be the basis upon which I approach the calculation of the quantum of further security for costs while recognizing however, that it is appropriate only for the calculation of the time costs of the trial but not for the costs of the actual disbursements. This is because the latter are accountable by reference to expenses actually paid by the Defendants and so the question is not one essentially of quantum but rather whether the expenses were reasonably incurred in relation to the trial.



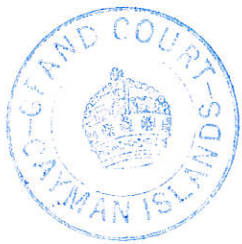
QUANTUM OF TIME COSTS

43. Having so identified the approach I will take to the calculation of the additional time costs for the extended time of the trial, I will explain briefly why I think that this approach is both realistic and fair.

44. First and foremost, there must be a reasonable basis for all work undertaken. No such basis has been explained upon which I might accept that the extension of the estimated trial period by 5 months resulted necessarily in work having to continue throughout the entirety of that extended period. Time taken out of court for such primary matters as preparation for cross-examination of witnesses (including expert witnesses), research and closing arguments, would have been built into the original time estimates in any event. With one exception, the fact that the trial period was extended had no obvious correlation to additional work not anticipated originally. That single exception was the work involved in the Defendants having to respond to the Plaintiff's application to amend its pleadings to introduce its case on alleged manipulation of documents. The additional days in and out of court which I will allow are intended to allow for that work. No other exceptional task out of court has been identified. In particular, the Defendants having to deal with ongoing disclosure by AHAB involved no exceptional work out of court which could not have been done during the additional days which I will allow.

45. Secondly, it should be reaffirmed that under GCR Order 23, Rule 1, the court's discretion to award security is a discretion to award an amount which it considers just, having regard to all the circumstances of the case. The appropriate amount will generally be the sum which the court considers the applicant would be likely to recover in a detailed assessment upon taxation if awarded its costs on the standard (as distinct from the indemnity) basis following the trial²⁷.

46. But although the exercise required looks forward in that manner to what will happen at a detailed assessment of costs, it is not the task of the court upon an application for security



²⁷ This was the approach adopted in the earlier Security for Costs Judgments and in earlier cases. See for example, *Procon (Great Britain) Limited v Provincial Building Co. Ltd & Another* [1984] 1 WLR 557. It proceeds on the well-recognized premise that no more than 70% of the costs recoverable on the full indemnity basis will be recoverable on taxation on the standard basis.

to undertake a similar exercise by way of a detailed assessment. What is required is a robust examination of the evidence relied upon by the Defendants in support of their applications for security and the application of a broad brush to the estimation of the costs. Indeed, in the previous applications made in these proceedings, I consistently endorsed the “broad brush” approach to the setting of security for costs²⁸. At paragraph 62 of the 10 November 2015 Judgment, I noted that:

“The exercise of assessment of quantum for these purposes must of necessity be by application of a “broad brush” approach. This exercise is not like that involved at the later stages of taxation of costs where, in a complex case like this, a line by line or item by item assessment may be required.”

47. At paragraph 5, the 23 June 2016 Judgment states that:

“At its core, it is accepted that the setting of security for costs is a discretionary exercise to be undertaken by the judge necessarily applying a “broad brush”. The objective is to arrive at a fair and realistic, not necessarily a precise or generous, estimate of the costs to be incurred by the Defendants for the trial.”

48. Furthermore, having regard to the concerns of risks of unenforceability cited by the Defendants here, there is a risk of prejudice to them if the quantum of security is set too low, even while the Plaintiff AHAB is concerned at being prejudiced by having to provide too much security. This tension gives rise to what has been termed “*the balance*



²⁸ Applying in particular, dicta from *Stokors*, per Popplewell (at paras 5 – 8).

of prejudice” as explained in the following dictum from *Stokor*²⁹ identifying the need for a balancing exercise:

“The next matter of principle which I bear in mind is that where the court is asked to choose between rival contentions which it cannot and should not seek to decide definitively on disputed evidence, it is right to have in mind the nature and degree of prejudice which might fall on each party if the figure turns out on one hand too high, or on the other hand too low. If a defendant is under-secured, the likelihood is that the defendant will be prejudiced by the amount of the shortfall in security because that is the amount of costs which it is unlikely to be able to recover. If on the other hand the defendant is provided with excessive security so that it is over-secured, the excessive security will ultimately be returned to the claimant. In those circumstances, the prejudice to the claimant in providing excessive security is not the whole amount of the excess but only potentially the costs to the claimant of providing that excess, to the extent that such cost proves to be irrecoverable.

Assuming it to be irrecoverable, which I do not decide, the financial impact of getting it wrong in the defendant’s favour is therefore usually less, indeed usually much less compared with the financial impact of getting it wrong in the claimant’s favour. That factor, which is sometimes referred to as the balance of prejudice, is usually the reason for resolving any doubts in favour of a defendant rather than a claimant.”



²⁹ At paragraphs 8 and 9 per Popplewell J; also adopted and applied in the 10 November 2015 Judgment at paragraph 98.

49. This sound advice which I intend to follow by the further awards I make, does not however detract from the basic approach adopted before in these proceedings and which requires that the amount of security should be neither more nor less than what appears to be fair and realistic in all the circumstances presented. This approach in my view remains applicable notwithstanding the Defendants' contention that I should resolve my doubts in their favour by having regard only to the actual costs incurred because AHAB would recover any excess upon taxation.
50. On the basic approach, I can see no good reason why any uplift for the additional time costs of the Defendants should not be assessed by reference to the additional number of days actually taken in court for the trial plus an equal number of days out of court for work necessarily done for presentation of the case or closing arguments in court; and together calculated as a percentage of the amounts already awarded. This is the broad brush approach which I am satisfied should now be applied in the present circumstances of an application to vary an award already made for a particular stage of the proceedings. It is an approach which also has the built in advantage of applying the same deductions (and for the same reasons) as were applied to the earlier awards³⁰.
51. In this context I should emphasize my conclusion that the fact that the actual time costs incurred by the Defendants for the trial have turned out to be greater than the amounts already secured, is nothing to the point. With those costs yet to be subject to taxation, I may not assume that they have all been reasonably incurred so as to regard them as justifying an award of further security now to make amends for any perceived shortfalls in the 23 June 2016 award. The simple fact itself of greater costs having been incurred



³⁰ A 20% reduction in recognition of the likely buffers built into their estimates by the liquidators and a 20% reduction to reflect the costs incurred by the GT Defendants in the presentation of their counter claim rather in the defence to the Plaintiff's claim.

than secured, can hardly be regarded as a material change of circumstances than existed at the time of the earlier applications. Such costs may yet be shown to some significant extent at least, to be the result of unnecessary work or expenditure.

52. The security already awarded and paid by the Plaintiff for all Defendants for the trial, is \$21,766,961 (both for time costs and disbursements).
53. In the case of the GT Defendants, the cost for the trial already awarded is \$8,214,763 (being \$5,459,507 time costs and \$2,755,256 for disbursements)³¹. The amount said to have been actually incurred is \$14,602,528 (after application of the same levels of discount as the court applied for the award for the trial on the 23 June 2016 Judgment and as applied for the earlier stages of the proceedings). The amount now claimed by the GT Defendants is the difference of \$6,387,765; (i.e.: \$14,602,528 - \$8,214,763).
54. Treating those greater costs actually incurred as if they arose inevitably from the extension of the trial period would be contrary to the requirements for the showing of a material change of circumstances. That would also involve an impermissible revision of the earlier awards in a way tantamount to interference with the earlier Judgments for security for costs in a manner discountenanced by the dictum from *Stokors* cited above (at paragraph 33). Such an approach cannot be justified on the basis of the court's power to vary an existing order, a power which is premised on there being real material change of circumstances.
55. My task even at this latter stage post-trial, remains essentially the same as required before and explained above – that of providing amounts of security which will fairly and realistically secure the reasonable costs of the Defendants while not imposing an unfairly

³¹ See 23 June 2016 Judgment at page 6.

onerous burden upon the Plaintiff which, by all accounts, is a partnership entity tethering on the brink of insolvency.

56. And so as regards the time costs of the GT Defendants for the trial, the award of further security is as follows.

57. Security already provided: \$5,459,507 (representing 180 days' work in and out of court).

58. Security now awarded: \$1,747,042 (representing the increase of 58 days (29 days in court plus 29 days out of court) an increase of roughly 32% of the time costs awarded for 180 days).

DISBURSEMENTS

59. As regards disbursements the GT Defendants claim \$4,214,495.

60. As these are said to be expenses actually incurred for the entire trial period less amounts already awarded (i.e.: \$6,969,751- \$2,755,256); Miss White argues that there is no basis for the discounts which were applied upon earlier applications to take account of over-estimation. While I accept this argument, there is however, a very large item described as "litigation support" in the amount of \$3,452,855 which is of concern. The only explanation given is that this refers to fees paid for the provision of forensic accountancy evidence, provided in the main by an employee of the GT Liquidators' affiliate firm³². I am not satisfied that this should be accepted for present purposes without any discount to allow for the reasonable possibility that these services could have been obtained less expensively at arms' length from a third party provider. The discount I feel obliged to apply to this claim for litigation support is 30% of \$3,452,855 or \$1,035,856; thus reducing the amount allowed overall for disbursements to \$3,178,639.

³² Mr. William Davies of the Forensic and Investigation Services Dept. of Grant Thornton UK LLP



61. This brings the total of the additional security now awarded to the GT Defendants to \$4,925,681; (i.e.: \$1,747,042 + \$3,178,639).
62. The AWALCOs were awarded security for the costs of the trial in the amount of \$7,363,224. This was broken down as to \$5,950,224 for time costs and \$1,413,000 for disbursements³³.
63. According to Mr. Carton-Kelly³⁴ in the updated Schedule to his 13th and 14th Affidavits, the final projected costs to be incurred by the AWALCOs in respect of the trial will be \$9,221,463 (\$6,617,633 in time costs and \$2,603,830 in disbursements) and so the top up security now sought is the difference between \$9,221,463 and \$7,363,224 or \$1,858,239. It follows the time costs element of this would be \$667,409 (i.e.: \$6,617,633 - \$5,950,224) and the disbursements the balance of \$1,190,830.
64. This increase in time costs claimed (\$667,409) represents just over 11% of the time costs already awarded (\$5,950,224). The application of the same broad brush approach taken to the assessment of the time costs for the GT Defendants would have yielded a roughly 32% increase for 58 additional days. By that measure the AWALCOs' claim seems quite reasonable and I therefore accept them. Similarly in relation to their claim for disbursements, for instance, the amount claimed for forensic accounting expert fees at \$934,462, is less than one-third that claimed under this head by the GT Defendants although the AWALCOs engaged two independent experts³⁵.
65. As to the costs of disbursements, I accept that the additional amount sought represents expenses actually and reasonably incurred in relation to the extended trial.

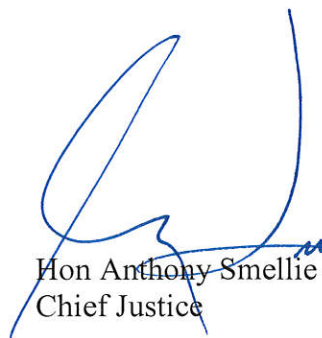
³³ See the 23 June 2016 Judgment at page 7.


³⁴ One of the AWALCO's liquidators.

³⁵ Mr. Nick Hourigan of FTI Consulting LLP and Mr. David Lawler of Navigant Consulting (Europe) Limited.



66. The total sum of additional security for costs now awarded to the AWALCOs will be
aforementioned amount of \$1,858,239.
67. As mentioned above, the Defendant SIFCO5 was able to agree its claim with AHAB and
so I am no longer called upon to rule on its application.
68. The amount of further security for the costs of both the GT Defendants and the
AWALCOs awarded now, is, \$6,783,920.
69. The costs of this application are reserved.


Hon Anthony Smellie
Chief Justice



19th October, 2017

JUDGMENT RELEASED AS REDACTED FOR CONFIDENTIALITY REASONS.