IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

BETWEEN **AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB")**

PLAINTIFF

AND

1. **SAAD INVESTMENTS COMPANY LIMITED ("SICL")**
2. **MAAN AL-SANEA**
3. **AWAL FINANCE COMPANY LIMITED (In Liquidation ("AWALCO")**

And various other defendant companies (in liquidation)

DEFENDANTS

IN CHAMBERS
THE 22ND TO 24TH OCTOBER, 2013
BEFORE THE HON. ANTHONY SMELLIE QC, CHIEF JUSTICE

APPEARANCES: **Mr. David Quest QC, instructed by Mr. Peter Hayden and Mr. George Keightley of Mourant Ozannes for AHAB**

Mr. Michael Crystal QC instructed by Ms. Colette Wilkins and Ms. Shelley White of Walkers for the GT Defendants

Mr. Marcus Smith, QC instructed by Mr. Ian Lambert of HSM Chambers for the AWALCos.

Mr. David Herbert of Harneys for SIFCO #5 (watching brief)

JUDGMENT

1. By a judgment in this action on 22nd February 2013, applications by some of the defendant companies to strike out AHAB's claim were refused. It was decided that the action shall proceed to trial and that directions to that end should be given promptly.

2. The parties now seek directions to trial and the liquidators of the defendant companies also seek further relief by way of additional security for their future costs of the action and an assessment now and order for payment of certain costs already incurred.

3. The defendant companies fall into two groupings roughly described as the "GT Defendants" (those having Grant Thornton representatives as their Joint Official Liquidators, including SICL) and the "AWALCos" (those part of the AWAL group having FRP Advisory LLP and Chris Johnson Ass. Ltd. representatives as their Joint Official Liquidators, together with those of the GT Defendants, to be referred to as the context requires as the "JOLs"). The defendant companies all have in common the fact that they come within the SAAD Group of Companies established by the second defendant, Mr. Maan Al Sanea, in this jurisdiction.

4. It is AHAB's case that the GT Defendants and the AWALCos were co-conspirators with Mr. Al Sanea and utilized by him, in the fraudulent misappropriation of massive sums of money from AHAB's Money Exchange business in Saudi Arabia, in the order of USD9.2 billion. The fraud is alleged to have been perpetrated between 2000-2009, the years during which Mr. Al Sanea had been put in charge of the Money Exchange by the AHAB partners.

5. In this action (the "Action"), AHAB seeks to recover, either by way of its proprietary tracing claim or its claim in damages, some USD6.2 billion of the sums defrauded. The main issues (apart from directions to trial) arising for resolution now, are raised on separate summonses issued by the GT JOLs and the AWALCos JOLs seeking relief by way of:

   (1) Additional security for costs of their companies in liquidation in defending the action, beyond the amount of USD5 million already provided by AHAB.

(2) The summary assessment and order for payment of damages (in the nature of legal costs and other liquidators' expenses) incurred in having to respond to the Worldwide Freezing Order ("WFO") granted by Justice Henderson of this Court over all the assets of the SAAD Companies and Mr. Al Sanea, at the instance of AHAB, on the 24th July 2009.

The WFO having been subsequently discharged on AHAB's admitted failure to have made full and frank disclosure when it applied for the WFO, AHAB became liable, under its undertaking in damages given as a condition of the WFO, to indemnify the GT Defendants and the AWALCos in respect of the consequential costs and expenses. This liability is still admitted by AHAB but it disputes that the liability is amenable to summary assessment and order for payment now.

6. As to the directions to be given to trial, I am able to record that an agreement was reached during this hearing and a form of directions order has been approved with the consent of parties.

7. Recognizing the scale, scope and complexity of the action, the directions embody a series of pivotal events with practical timeframes set towards their completion; including discovery by February 2015; the final amendments of pleadings by April 2015; the exchange of statements of witnesses and experts within 56 days of final amendments; and the trial to commence by April 2016.

8. The two contested issues, involving as they would the provision of many millions of dollars for security for costs or to compensate for loss, were not given to amicable settlement and so full arguments were heard over 2 ½ days. This is the judgment.

Additional Security for costs

9. The jurisdiction to make an order for security for costs is given in Order 23(1) of the Grand Court Rules which provides that on application by a defendant, the Court may order security for costs where:

   (1) the plaintiff is ordinarily resident out of the jurisdiction; or

   (2) the plaintiff is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so; or

   (3) The plaintiff's address is not stated, or incorrectly stated, in the writ or originating process (unless this is an innocent mistake); or

   (4) The plaintiff has changed his address in the course of proceedings with a view to evading the consequences of the litigation.

10. Where at least one of these conditions is met the Court may order the plaintiff to give security for costs, to the extent that it is considered just to do so and having regard to all the circumstances of the case: ***Cigna Worldwide Company v Ace Limited [2012] (1) CILR 55 at [38] to [39]*** per Cresswell J.

11. The appropriateness of security for costs, pursuant to the first condition of Order 23(1), has been acknowledged by AHAB, recognizing that, as a foreign plaintiff, it has no settled assets within the jurisdiction against which an order for costs could be levied.

12. It was on this basis that AHAB agreed the order of 24th February 2011 by which AHAB was required to and did provide security of USD5 million for the defendants' costs up to the first close of pleadings, which occurred on the 19 August 2011. Security was provided by way of a legal charge over a property in London, a large residential flat overlooking Grosvenor Square ("the London Property"). By the 24th February 2011

order, it was directed also with AHAB's agreement, that there should be liberty given to the JOLs to apply for further security such as the Court might deem appropriate.

13. Although a separate matter involving different legal principle, AHAB also accepts that the JOLs should, within reason, be able to fund the defence of AHAB's claims from assets available within their respective liquidation estates and AHAB provided its consent for this in another provision of the order made by the Court on the 24th February 2011[1].

14. Mr. Quest QC invites me to take this latter provision into consideration now as a reason for refusing to a large extent, the JOLs' applications for further security for their costs of defending AHAB's claim.

15. But this argument must be disposed of unhesitatingly, as it begs the very question to be decided at trial as to the true ownership and title to the assets.

16. Security for costs is justified so that in the event a defendant succeeds, there will be assets of the unsuccessful plaintiff available against which the costs of defending can be recovered, see ***In re Cybervest Fund*** (below). If the defendants succeed in this action, there could be no question as to their entitlement to recover their costs from AHAB, because the assets expended in defence of AHAB's claim would have been found to be the defendant's assets, not AHAB's. This therefore is the real basis in the circumstances of this case, for a requirement of security for costs from AHAB.

17. The GT JOLs seek additional security (on top of their percentage share of the USD5 million already provided) for estimated costs of some USD15,062,000 up to trial. They argue through Mr. Crystal QC, that the security provided is more than exhausted by their costs already incurred, including those directly incurred in responding to the WFO and

[1] Recognizing that AHAB's proprietary tracing claim would, if successful, attach to all the available assets, AHAB's consent was sought to allow the liquidators (without the need for a contested hearing) to use the assets to defend against AHAB's claim: see 2010(1) CILR 553 at 560 and the cases discussed there, including In re Berkeley Applegate (Investment Consultants) Ltd. [1989] Ch 32.

for which AHAB has admitted they are entitled to be indemnified. Their application is supported by projections and calculated estimates for the work to be undertaken as explained in the ninth affidavit of Mr. Stephen John Akers, one of the GT JOLs.

18. For their part, the AWALCo JOLs seek not very dissimilar amounts of USD14,143,000 for additional security up to trial, as projected and calculated in the seventh affidavit of Mr. Geoffrey Carton-Kelly, one of the AWALCo JOLs. They also say, per Mr. Smith QC, that their percentage share of the USD5 million provided has been exhausted by costs already incurred, including those related to the WFO. A third percentage share of the existing security is allocated to the costs of SIFCO 5, another company in liquidation and sued by AHAB, but which has succeeded in having AHAB's claim dismissed[2].

19. For the purposes of their present applications, the JOLs recognize however, that the proceedings to trial are to be undertaken in stages and so it is acknowledged that it may be appropriate for the Court to order further security for costs relative to those stages, to be provided in tranches. If so, Mr. Crystal and Mr. Smith would urge me nonetheless to set predetermined amounts for all stages up to the conclusion of the trial, in order to avoid further contested hearings over what those tranched amounts should be.

20. I will return to deal with these issues below.

21. For AHAB, Mr. Quest QC urges me to accept that the value in the London property – posited by reference to a professional valuation at USD18 million (£11.2 million) – is more than sufficient to secure the JOLs' costs up to and including the trial and that I should regard the full value of the London property as being available as security for those purposes.

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[2] On a Strike Out application: Written Judgment delivered on 22 February 2013 in this and in Cause 014 of 2010_ (ASCJ).

22. This proposition became the focus of the dispute about further security for costs. Mr. Quest's submission is that the amount of USD5 million plus a further amount of USD3 million now proposed by AHAB, would be sufficient and should be secured against the London property. All the more so he said, USD8 million should be sufficient when taken as augmented by costs orders already made in AHAB's favour in the Action but not yet paid and assessed by AHAB at $1.25 million. AHAB has however, presented no evidence to contradict the projections and calculations of Mr. Akers and Mr. Carton Kelly. As mentioned, their combined calculations call for the much higher sums in combination totaling USD29 million (approximately) mentioned above.

23. While I must scrutinize those calculations to assess reasonableness and accuracy, there can be no basis in my view for rejecting them outright, adopting instead, the much lower sum of USD8 million as AHAB would propose, in the absence of evidence to justify doing so.

24. Mr. Quest also sought to persuade me that I should refuse the application for further security being alive to the precarious financial position in which AHAB has been placed. Despite AHAB's claim to all their assets, he said the defendants are not only allowed to expend those assets to resist AHAB's claim (the point I addressed above) but also, being aware of the financial crisis into which AHAB has been plunged as the result of their fraudulent conduct in conspiracy with Mr. Al Sanea, now seek to impede AHAB's ability to prosecute its claim by insisting on these further large amounts for security for costs.

25. This argument also begs the same question of entitlement to the assets of the defendants in liquidation addressed above and that which is ultimately to be determined at trial. AHAB is required to provide security for costs because it is a foreign plaintiff whose claim to entitlement to the assets has not been established. This argument therefore can

provide no answer to an application for security for costs of the action which would otherwise be justified.

26. I must note however, that Mr. Quest in deploying this argument, significantly did not go so far as to say that an order for the provision of further security would stifle AHAB's ability to prosecute its claim, or its defence of the counter-claim brought by the GT JOLs.

27. There is instead merely a conclusory assertion to that effect in paragraph 17 of the fourth affidavit of Eric Lewis[3]; where he states: "*It is not accepted by AHAB that further security should be provided in circumstances where the amount sought or nature of such security is intended to or would result in a stifling of AHAB's claim.*" The only explanation for the assertion is given in three paragraphs of the Lewis affidavit in these terms:

> "*24. AHAB has several billion Riyals worth of assets in the Kingdom of Saudi Arabia. As the liquidators of the Defendants are aware, AHAB continues to be subject to an asset freeze in the Kingdom.*
>
> *25. Although AHAB's non-Saudi assets are not affected by the asset freeze, all or virtually all of such assets are currently restrained by precautionary attachments and other types of liens, and thus also cannot be liquidated.*
>
> *26. AHAB owns or partly owns a number of businesses in the Kingdom of Saudi Arabia. These businesses generate sufficient revenue for AHAB to pay its ordinary debts and obligations, including legal fees and expenses, on an ongoing basis.*

[3] An attorney at Lewis Bach LLP, the U.S. firm described by Mr. Lewis himself as the global legal coordinator of the litigation involving AHAB in different countries around the world.

28. I will return below to examine the implication of the assertion of a possible "stifling" of AHAB's claim.

The London property

29. While accepted by this Court and the JOLs as security for up to USD5 million, the London property is not legally owned by AHAB itself, but by a Jersey company Celendine Limited[4], the shares in which are beneficially owned by Dawood Algosaibi, an AHAB partner.

30. AHAB relies on the professional valuation of the London property which opines that its value is USD18 million. This would mean, says Mr. Quest, that with USD5 million secured against it, there is residual value of USD13 million still available in the London property by way of security for costs and he invites me to direct that any further amounts be secured against it.

31. There are however cogent objections to this proposal raised by both Mr. Crystal and Mr. Smith, and which I accept, as explained below, for not doing so.

32. In the first place, while the London property was accepted as security, it was not the preferred or conventional type. A cash deposit in an escrow account under the control of the Court is, as practical experience has shown, the usual form of security for costs.

33. Real property by contrast, is a relatively illiquid asset and can be problematic and time consuming to realize. Enforcing security against real property can also be a costly process all the more so when it is located in another jurisdiction.

[4] Per the 1st Affidavit of Mark Crispin Burgess-Smith, paragraph 10. He is a solicitor of Linklaters LLP, English Solicitors acting for the GT JOLs. He specializes in real estate practice in the United Kingdom.

34. Moreover, it is well understood that the ascription of "market value" to real property is not an exact science as the true market value will never be known until the property is sold, in a case like this, following the enforcement of security.

35. For such reasons, the JOLs propose that the London property should be discounted in value to no more than 65% (that is: USD12 million) of the valuation price in the event I direct that it be used for further security for costs. After deduction of the USD5 million sum already secured, that would leave a further security value of only USD7 million.

36. In inviting me to accept this proposition, Mr. Smith relies upon the evidence of Mr. Burgess-Smith, given his specialist knowledge in real estate practice in the United Kingdom. Mr. Burgess-Smith opines that for reasons of the sort discussed above, a prudent and conservative secured lender in the current United Kingdom market will typically assume that the available value in the property to satisfy the relevant secured liabilities, will be no more than 65% of the market value of the property at the time the security is taken.

37. Mr. Quest takes issue with the logic of this argument to the extent it would require me to approach the exercise of valuation as if I were "a prudent and conservative secured lender" – as if donning a banker's hat. He says that that would be an artificial and arbitrary approach that would be aimed at ascribing an unjustifiably low value to the London property.

38. I do not agree. Any less conservative and prudent approach would involving ascribing a value that may, in reality, be quite unattainable and, even if attainable, would require placing the risks and costs of realization entirely upon the shoulders of the JOLs.

39. The logic of the discounted value to 65% readily commends itself.

40. Circumstances have moreover, changed since the London property was accepted as security by the JOLs and the Court. That was on 16 June 2011, when, following the order of the Court, a first legal charge was secured against the London property in favour of the GT JOLs in the name of SICL and registered on 17 June 2011 with Her Majesty's Land Registry in England and Wales ("HMLR").

41. The SICL charge was given and registered by agreement with the JOLs, with SICL serving as the security trustee[5] and the value apportioned as security for their respective costs up to the close of pleadings and to fortify AHAB's undertakings in damages in respect of the WFO. The maximum secured by the SICL charge is:

(a) USD5,000,000

(b) any costs properly secured by SICL as Security Trustee or by any receiver appointed under the SICL charge;

(c) any further amount which may subsequently be ordered against AHAB in favour of the Defendants in Liquidation or agreed to be provided under the SICL charge.

42. Since then, the London property has become further encumbered by a second charge in favour of the Hong Kong Shanghai Banking Corporation Limited ("HSBC") and by many interim charging orders ("ICOs") in favour of five other banks including the Standard Chartered Bank ("SCB"). SCB's ICO alone purports to secure a sum of more than USD26 million, the subject of a judgment debt (like those of the other banks) obtained against AHAB in English proceedings.

43. The GT JOLs on behalf of SICL as security trustee (and thus in this context also on behalf of the AWALCOs and SIFCO 5) have consented to the registration of HSBC's secondary charge on condition that both Celendine Limited and HSBC entered a "deed of

[5] Including on behalf of the JOLs of SIFCO 5.

priority" with SICL. This deed expressly made clear (amongst other things) that the SICL charge is a first ranking charge and that HSBC could take no steps to enforce its secondary charge without SICL's consent or until SICL's rights to enforce the full security under its charge were discharged.

44. It is recognized as between HSBC and SICL that SICL's "rights to enforce the full security under its charge" would extend to item (c) above at paragraph 41, and thus to secure any further amount by way of security for costs that I might now order.

45. No such arrangement or recognition exists however, in respect of the many ICOs which, though regarded as ranking after the SICL charge, give rise to an argument whether amounts to be secured beyond the USD5 million would rank ahead of them by virtue of the rule known as "tacking" under English real property law.

46. Mr. Burgess-Smith's opinion is that there is a cogent argument that tacking would not be allowed.

47. While his evidence has been criticized by Mr. Quest as being that of a non-independent lawyer and so not truly that of an independent expert, his evidence on English real property law was the only such presented to the Court. AHAB could have filed refuting evidence but did not do so.

48. Given his qualifications and experience, Mr. Burgess-Smith's evidence on this point is worthy of consideration. It is to the effect that being on notice of the many subsequent ICOs, there is a significant risk that SICL's ability to realize any value at all in respect of any further amounts of security for costs to be secured under the SICL charge by way of tacking onto its existing priority charge, has been compromised.

49. In the practical context of considering the extent and likelihood of realizing the full security value of the London property, I find his evidence to be compelling, even if I need

not, and so do not now decide the legal issue of the priority of the ICOs vis-à-vis any extension of the SICL charge.

50. As Mr. Burgess-Smith explains (at paragraphs 23-26 of his 1st Affidavit), the potential existence of a tacking issue, arises from the principle that tacking occurs when the amount secured by a legal charge is increased by way of "further advances" after the date of the grant of security.

51. In this regard, section 49 of the Land Registration Act 2002 (the "LRA") enacted in England provides as follows:

> *"Tacking and further advances*
>
> *(1) The proprietor of a registered charge may make a further advance on the security of the charge ranking in priority to a subsequent charge if he has not received from the subsequent chargee notice of the creation of the subsequent charge.*
>
> *(2) Notice given for the purposes of subsection (1) shall be treated as received at the time when, in accordance with rules, it ought to have been received.*
>
> *(3) The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if –*
>
> *(a) the advance is made in pursuance of an obligation, and*
>
> *(b) at the time of the creation of the subsequent charge the obligation was entered in the register in accordance with rules.*
>
> *....(.6) Except as provided by this section, tacking in relation to a charge over registered land is only possible with the agreement of a subsequent chargee" (emphasis supplied).*

52. SICL does have notice of the subsequent ICOs in accordance with the rules referred to by section 49(1) and there is no basis for thinking that any of the banks holding the ICOs would, if asked, agree to SICL tacking on the further advances to be secured by the SICL charge.

53. Thus, the question whether section 49 of the LRA would apply turns on whether within the meaning of section 49, the proposed additional security for costs would operate as a "further advance".

54. While the LRA does not define the term "further advance" and it is acknowledged that English law is unclear as to whether a grant of further security for costs under an existing charge would fall within the meaning of the term, Mr. Burgess-Smith's opinion is that there is a real risk that any increase in the liabilities secured under the SICL charge would constitute a further advance for the purposes of the LRA. If so, there would be a real risk that the increased liabilities would rank after the ICOs (let alone HSBC's subordinated secondary charge) of which SICL already has notice.

55. Despite Mr. Quest's protestations to the contrary, that strikes me as a soundly based opinion, pointing to a real risk (I need state it no higher than that) of any further amount to be secured by SICL over the London property being unenforceable and so a risk which would be unreasonable to require the JOLs to assume.

56. Furthermore, from a practical perspective, as Mr. Burgess-Smith also observes, any prospective purchaser of the London property would be unlikely to purchase the property once being aware of the overwhelming number of adverse entries on the title. This is a factor which –when taken with the still further circumstance that the JOLs would not be able to appoint their own receiver with an unhindered right to sell – would further impact the property's sale value and the time frame in which it could be sold.

57. Finally, on this issue, I may not ignore the fact that when the London property was first accepted by SICL as security, that was by way first and then the only charge. That was before the collapse of AHAB's defence in the English proceedings and the resultant packing in of the number of banks who now claim to have security over the London property for their debts. Their ICOs have not been the subject of any definitive court action and so must be regarded as being effective in keeping with their terms and as recorded on the face of the register of title of the London property with HMLR.

58. The foregoing are, in my view, a preponderance of factors against an order for further security for costs being made to be attached against the London property. Those factors point to the need to consider further security by way of a cash deposit (or equivalent) within this jurisdiction. This is quite apart from having to decide the separate question also mentioned in the arguments, whether real estate outside the jurisdiction was ever, in the first place, a proper form of security. As to which, I will simply say in passing, I still regard that as a matter to be decided in the exercise of discretion having regard to all the circumstances presented.

59. I conclude that the present circumstances are a paradigm illustration of the purpose of an order for security for costs as stated by Sir Nicholas Brown-Wilkinson V.C.in ***Porzelack KG v Porzelack UK Ltd.***[6]

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs."*

[6] [1987] 1 WLR 420; [1987] 1 All. E.R. 1074; at 1076; cited and applied by this Court in ***In re Cybervest Fund*** 2006 CILR 80 at 87.

60. And so, while I do not resile from the appropriateness of the earlier acceptance of the London property as security for costs in this Action, I must bear in mind now that that was done by agreement of the JOLs and the order of 24th February 2011 did not limit further security to be in that form. Foisting that property upon the JOLs now as security for further amounts would not only be unacceptable transference of risk to them, but could also run counter to the recognized purpose of such an order as explained in the case law. The issues, when all is said and done, are about value and enforceability. Being realty, the London property is governed by English law, the *lex situs*. Whatever its true value, concerns raised about tacking can be resolved only as a matter of English law and so it cannot be said that the London property is amenable to direct enforcement by way of an order for security for costs by this court.

61. I am satisfied that further security for costs shall be met by way of cash deposit or equivalent within this jurisdiction. The question therefore becomes: in what amounts?

62. Supported respectively by the detailed breakdowns in the ninth and seventh affidavits of Mr. Akers and Mr. Carton Kelly respectively, the GT JOLs and AWALCo JOLs explain the future costs projected and calculated to conclusion of the trial in schedules. These were compiled into combined schedules at my request during the hearing.

63. The combined schedules include historic costs (i.e.: those incurred since close of pleadings on 19 August 2011) and future costs but future costs are projected in two different ways – those for up to trial and those, necessarily in lesser amounts – for up to and including discovery; final amendment of pleadings; the costs of some (but not all) experts anticipated to be called; and further interlocutory hearings. All calculations are based on expected recovery of costs on the standard, not the indemnity basis, and so are projected at 70% of full costs. The combined schedules are attached to this judgment.

64. For the GT Defendants the First Combined Schedule (that including historic costs and costs to trial) projects a total of USD15,062,732. For the AWALCos, the total on the same basis is projected at USD12,517,773. The difference between the two sets of projections– approximately USD2.5 million – is significant.

65. For the GT Defendants the Second Combined Schedule (that excluding the historic costs but including future costs up to interlocutory hearings after final close of pleadings) projects a total of USD8,240,713. For the AWALCos the total projected on the same basis is USD4,388,158. Again, the difference, at nearly USD4 million, is significant. Both sets of JOLs seek security now respectively in amounts to cover at least the projected costs in the Second Combined Schedule and orders, for further amounts, to be provided later in keeping with the First Combined Schedule.

66. As mentioned above, AHAB responds by proposing to (i) permit the JOLs to pay their costs of defending its claim from the assets of the liquidation estates up to and including trial and; (ii) increase the current level of security for costs by a further USD3 million (for a total of USD8 million) by way of extension of the legal charge over the London property together with liberty to apply for further security up to AHAB's "full value" of the London property, (that is: USD18 million), should costs reasonably incurred exceed that figure of USD8 million.

67. I have already explained why neither of these two propositions is acceptable.

"Stifling" AHAB's claim

68. Mr. Quest nonetheless argued further that an alternative form of security (that is: a cash deposit or equivalent) is not justified, here reverting to the "stifling" argument, which I must now examine. He asserted that AHAB has a limited number of assets outside Saudi

Arabia. Assets within Saudi Arabia have been frozen by order of the Royal Court and such assets as are outside the country, are already heavily encumbered. In the past AHAB was not able to provide a cash deposit and it cannot do so now.

69. However, as I have already mentioned, these assertions were not supported by the kind of evidence one would expect to be presented to substantiate them. All that was provided for these purposes was the bare assertion of Mr. Lewis' from his paragraphs 17 and 24-26 of his fourth affidavit[7] which itself gives a contrasting impression of AHAB's financial position.

70. For instance, while Mr. Lewis acknowledges that AHAB has "*several billion Riyals worth of assets within the Kingdom of Saudi Arabia*" and asserts that those assets are subject to an asset freeze there; he also, contradictorily, asserts that AHAB's Saudi businesses generate sufficient revenue for AHAB to pay its ordinary debts and obligations, including legal fees and expenses, on an ongoing basis.

71. Given this Court's impression (developed during the course of this Action) of the extensive nature of AHAB's Saudi businesses, that "ongoing" expenditure must be, by any measure, on a very significant scale.

72. AHAB's legal expenditure by itself – on lawyers and other professionals outside Saudi Arabia – is understood to be very considerable. In his second affirmation in these proceedings, Mr. Saud Algosaibi stated (at paragraph 17) that AHAB had devoted considerable resources to document management and analysis alone:

> *"We have retained a large team of professionals to take charge of the process. In addition to professionals from Deloittes LLP and our legal advisors (including Bach Robinson Lewis LLP, Withers LLP and Mourant*

[7] Excerpted above at paragraph 26 of this judgment.

Ozannes, among others), AHAB has engaged Autonomy, a leading international document management company, and Hobsa specialist legal documents reprographics company, to provide document scanning and management services – all at a huge cost."

73. Quite how these "huge costs" are defrayed it appears AHAB is not about to explain. While it would imply that its Saudi businesses defray these costs including, it must be assumed, its costs of litigation in this Action, it claims not to be able to provide further security for the costs of the defendants.

74. It is therefore an understandable criticism by the JOLs that it appears that when it suits AHAB to engage lawyers and other professionals needed to fight big and expensive litigation (as here and in the English proceedings), AHAB finds the money to do so, as it does when ordered to post bonds in substantial amounts[8]. They urge me to regard AHAB's position as one of convenience and that AHAB should be put to strict proof of its true financial position.

75. Some further insight into AHAB's financial position can be gleaned from paragraphs 8 and 9 of the sixth affidavit of Simon Charlton[9] where the following is stated:

> *"8. In December 2009, AHAB made presentations to the banks in London and Dubai of a proposed settlement. Many banks attended the presentation and the document was made available to all of the banks on the website.*
>
> *In summary, the proposal was that AHAB would make available SAR3 billion[10] immediately and a further SAR 3 billion over five*

[8]. Carlton- Kelly 7th Affidavit para. 31 where he states that he is also aware that AHAB has been able to post a USD500,000 cash bond in proceedings in California.

[9] The former lead forensic accountant from Deloittes who investigated AHAB's case, now engaged as C.F.O. of AHAB in Saudi Arabia.

years. The remainder of the settlement would be made up of the recoveries that AHAB hoped to make from Mr. Al Sanea and the SAAD Group. The first tier of potential recoveries (up to SAR 500 million) would be used to offset advisor costs and related costs, the second tier (up to amounts above SAR 15 billion are to be used to offset AHAB's out-of-pocket contributions to the settlement, with any excess paid to the banks....

9. The recoveries which AHAB hopes to make in the present proceedings (the only proceedings in which AHAB is claiming all of its losses arising out of the fraud) are therefore a critical component of the package offered to the banks. For that reason the banks took and continue to take, a very close interest in the litigation...."

76. With bank claims matching or even exceeding the massive extent of the alleged fraud of USD9.2 billion, this is indeed high stakes litigation for AHAB and its many creditor banks.

77. Ensuring that AHAB can see it through to conclusion must therefore be a matter of great concern not only to AHAB but to the banks as well. The many millions of dollars already spent on the prosecution of its claim is very tangible evidence of AHAB's commitment to the Action. It stands to reason that the banks are committed in this regard as well.

78. Given all this background, it was not unreasonable in my view for Mr. Crystal and Mr. Smith to argue as they did, that AHAB should be regarded as being able to post security

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[10] Approx. USD810 million at present rates of exchange: 1 SAR – 0.27USD.

for costs by way of a cash deposit from its own resources or by way of litigation funding (from its creditor banks) and that the burden of proof to the contrary rests upon AHAB. I accept that AHAB was therefore obliged to present evidence to justify its plea of impecuniosity implicitly raised by Mr. Quest but has not done so. Indeed, I would go further now to note that if it be the case, I would regard it as unreasonable of those banks to expect AHAB to prosecute its claim while not providing sufficient security for the costs of the defendants.

79. The cogency of the arguments and the conclusions for further security are readily apparent and borne out not only by common sense, but also by judicial pronouncement.

80. In ***Koeckner & Co. v Gatoil Overseas Inc***[11]**.,** Bingham LJ (as he then was) sitting as a single justice of appeal in an application for leave to appeal, considered the nature of the responsibility resting on an appellant [which I regard for present purposes as no different from that upon a party like AHAB at first instance] who seeks to argue that an order for the provision of security for costs would stifle the prosecution of his case. The learned Lord Justice of Appeal approved the following statement of the law upon refusing leave to appeal (at p. 7 of the transcript):

> *"The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the York Motors case*[12]*, the appellant must in my view*

[11] Unreported, Court of Appeal (Civil Division) Official Transcripts, 16 March 1990;
[12] York Motors v Edwards [1982] 1 W.L.R. 449; [1983] 1 All E.R. 1024 – where it was held (and applied by parity of reasoning by Bingham LJ) that payment into court to be required as a condition to leave to defend where defence appears weak or shadowy.

show not only that he does not have the money himself but that he is unable to raise the money from anywhere else."

81. The apparent ability of the party pleading lack of means to pay his own legal expenses can be a relevant concern, as Bingham LJ also declared (ibid):

"As I made clear at the hearing of the argument on security for costs, I am not satisfied that that evidence [(of impecuniosity)] demonstrates that this defendant is not able to raise security for costs from some quarter, and in reaching that view I am fortified by the fact that the defendant is represented by exceedingly prestigious solicitors and counsel. If it has the resources to pay its own solicitors and counsel then, in the absence of some very specific evidence to the contrary, I take the view that the court is justified in concluding that it has not been established that the award for security for costs would prevent the defendant from pursuing his appeal."

82. And further, reflecting on the paucity of the evidence presented in support of the appellant's purported lack of means, in terms which I regard as being fairly descriptive of AHAB's attitude here (at p.8):

"One sees no accounts. One sees only the barest detail of certain orders made against the (appellant). One finds nothing approaching a comprehensive financial analysis of the affairs of the group, nor any accounts of where the group has obtained credit in the past, nor of any evidence that it has sought to raise money in order to finance this appeal. Nor and significantly, despite express reference ...to the apparent ability

of the (appellant) to finance its own side of the litigation does one find any explanation at all of where and how that money is available[13]*."*

83. Finally, and very much to this point, I note the salutary advice of Peter Gibson LJ from ***Keary Developments v Tarmac Construction***[14]***:***

"...the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amounts needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see Flender Werft AG v Aegean Maritime Limited [1990] 2 Lloyds Rep. 27)."

84. That passage follows on from an earlier statement (at p. 539 j) that:

"The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security" (citing *Okotcha v Voest Alpine Inter trading GmbH [1993] BCLC 474 at 479* per Bingham LJ, with whom Steyn LJ agreed).

85. In ***Cigna Worldwide Ins.*** (above) at paragraph 34, Justice Cresswell of this court captured the principle quite neatly in these terms:

"A plaintiff who alleges that an order for security will stifle the claim must adduce satisfactory evidence that the plaintiff does not have the means to

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[13] When the matter came on later to be was heard by the full Court of Appeal , Bingham LJ's conclusion were approved.

[14] [1995] 3 All. E. R. 534.

provide security and that the plaintiff cannot obtain appropriate assistance to do so from any third party who might reasonably be expected to provide such assistance if they could" (citing with approval *Al-Koronky v Time Life Entertainment Group [2005] All. E.R. (D) 457).*

86. And so it is plain from all the foregoing, that Mr. Lewis' merely conclusory statement[15] that further security for costs would result in the stifling of AHAB's claim, may not suffice to preclude the making of an order.

87. The circumstances demand the presentation of at least a reliable and persuasive explanation of AHAB's financial affairs. Mr. Lewis' inherently contradictory statements at paragraphs 24-26 of his fourth affidavit only serve to confirm this as, for instance, where he states that "all or virtually all" of AHAB's non-Saudi assets are currently restrained, but without indicating which assets are not, or what their value might be. Further passages from Mr. Lewis' 2nd affidavit and Mr. Charlton's 6th Affidavit cited by Mr. Quest take the matter no further, in my view.

88. Mr. Charlton, who is now the CFO of AHAB and led its forensic audit team from before the commencement of this Action, in his 2nd affidavit explains only in the most general of terms that AHAB's net assets represent only 10-15% of its purported external borrowings and do not generate sufficient cash flow to service interest on those obligations, nor would they be sufficient, he says, to satisfy the asserted liabilities.

89. He does not however – as might be expected given the burden on AHAB to satisfy the Court – explain the prioritized nature of AHAB's obligations and why it is that some of the available cash may not be dedicated to meeting AHAB's obligations for security for

[15] From paragraph 17 of his fourth affidavit, see above at paragraphs 27 and 69.

costs in this Action; an action which he confirms is of pivotal importance to its arrangements with its lending banks[16].

90. And while I might accept, as Mr. Quest argued (citing Mr. Charlton's affidavit) – that as AHAB is not in any kind of formal insolvency process with a well ordered body of creditor banks who could be corralled together as a class to vote on funding for AHAB's provision of security – that very fact could be more indicative of financial flexibility on AHAB's part, than as financial constraint.

91. On the present state of the evidence there is, in my view, no basis for a conclusion that AHAB's ability to prosecute its claim would be stifled by an order for further security for costs to be met either by way of a cash deposit or otherwise than by way of further security over the London property.

92. A further point argued by Mr. Quest relates to the massive counterclaim – for USD8.5 billion – raised by the GT Defendants against AHAB in this Action.

93. His argument is that as the counterclaim will be proceeded with in any event, the future costs of the Action will be generally incurred and this is a relevant factor to be weighed in the balance now in exacting what the JOLs together regard as "sufficient" security for their costs of defending AHAB's claim.

94. I agree that this is a practical matter for consideration and it will be reflected in the orders I make.

Conclusion on further security for costs

95. Given the volume of documents and the complexity of the factual, legal and scientific forensic issues raised in the Action, the concern of the JOLs that the amount of security for costs should be increased, is, as I have found, not unreasonable.

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[16] See paragraph 75 above.

96. AHAB has not sought to refute the JOLs' estimates of future costs by its own, although AHAB could certainly have been done so with the assistance of the teams of lawyers and accountants engaged on its side.

97. All that AHAB provides by way of comparison is Mr. Lewis' statement in his fourth affidavit[17] that the costs incurred by AHAB itself in the Action up to 31st July 2013 amount to USD8,499,771; positing that the future costs to trial of the JOLs should not be more than that amount again.

98. That figure incurred by AHAB does not surprise, given all that has transpired so far in the Action but it is no measure, in my view, by which to gauge the future costs. I am therefore left to be guided by the estimates provided by the JOLs.

99. Carefully compiled though I regard the JOLs' estimates to be (coming as they are from officers of the court) it is only reasonable nonetheless to assume that they are calculated on the basis of assumptions which are most likely to be in favour of protecting the liquidation estates in the recovery of costs in the event they succeed against AHAB. In other words – and quite apart from the reduction to 70% applied in them to anticipate taxation on the lower standard rather than the indemnity basis – the JOLs' figures are likely to contain a significant buffer. As a starting point, that buffer – to which simply as a matter of commercial judgment of the JOLs I would attribute 20 percent – I think can safely be discounted for present purposes.

100. There is a further discount to be applied to the GT JOLs' estimates being mindful also of the fact that their massive counter-claim will also be proceeding to trial and so will have an overall impact upon the size, complexity and costs of the Action.

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[17] Paragraphs 29, 24 and 41.

101. Here again I note the significant disparities[18] between their estimates and those of the AWALCos JOLs. Examined in the light of their counter-claim and with no other conclusive explanation was given for those disparities, I think it is reasonable to assume that they are reflective of the work relating to the counter-claim.

102. And while I might recognize from my general knowledge of the Action, that the liquidation estates of the GT Defendants may be larger and more complex than those of the AWALCos, that by itself was not explored as a reason for that disparity in the estimated costs. A stark example is the difference in the estimates for the discovery stages done – USD6.68 million for the GT JOLs fully three times the USD2.22 million for the AWALCos JOLs.

103. Given also that these liquidations have all been underway for roughly the same period of time and should be at roughly the same levels of preparedness for the discovery exercises to come, it is not unreasonable to infer that some of these costs projected by the GT JOLs relate to the prosecution of their counter-claim and the added layer of complexity it will bring to the proceedings but which might otherwise be avoided for the purposes of defending AHAB's claim. For these reasons, I am satisfied that it would be appropriate to apply a further discount of 20 per cent to the estimates of the GT JOLs when providing for security for their costs.

104. This is all, of course, the outcome of the exercise of the broad discretion that I have in deciding whether to grant security for costs and in setting the amounts. I am allowed, in the exercise of this discretion, also to strike a fair balance between the need of the defendants for security for costs and the concern not to be too oppressive of a financially

[18] Discussed at paragraphs 64 and 65 above and as shown in the Combined Schedules.

compromised plaintiff company, such as AHAB may fairly be regarded, even on the limited information it makes available to the Court.

105. That balancing exercise is what leads me ultimately to the conclusion of what is sufficient security to be ordered at this time in the context of this Action.

106. And I accept, as was decided in a different but not unrelated context, that the aim is to provide "sufficient; not "perfect" or "complete" security; that is: "security of a sufficiency in all the circumstances of the case to be just[19]".

107. I conclude that AHAB should now provide further security for costs *up to final close of pleadings*, that being a stage at which, depending on what evidence is disclosed in the discovery process to support AHAB's tracing claim, AHAB may itself observe a watershed in its approach to this Action.

108. At that stage, were AHAB to remain fully committed to going to trial, there will be a further requirement for security for costs and any concerns about the potential stifling effect of an order regarded as further ameliorated by AHAB's resolve.

109. I am satisfied that the security to be then provided, will be the further amounts estimated respectively by the GT and AWALCo JOLs as set out in the First Combined Schedule, exclusive of the historic costs, but discounted on the same basis as discussed above, by 40 percent on the part of GT JOLs and 20 per cent on the part of the AWALCos JOLs.

110. I can see no reason in principle why the historic costs – those incurred since first close of pleadings on 19 August 2011 – should not also be provisioned now by way of further security, being satisfied that the security already provided in the amount of USD5 million

[19] Per McCowan LJ in ***Innovare Displays plc v Corporate Broking Services [1991] BCC 174,*** in deciding on an application for security for costs under section 726 (s) of the U.K. Companies Act 1985; followed and applied by Dillon LJ in ***Roburn Construction Ltd. v William Irwin (South) & Co. Ltd. [1991] BCC 726 at 728 H.*** The same approach should be adopted in an application under the RSC Order 59 [(or here GCR Order 23)] as under section 726(1) of the Companies Act1985; per Peter Gibson LJ in ***Keary Dev. V Tarmac Construction*** (above) at 541(g).

has, in all probability, been overtaken by the costs and other expenses[20] respectively incurred by the JOLs so far in responding to AHAB's claim.

111. The order I make is that AHAB provides, within six weeks, by way of further security for the GT Defendants' and AWALCos' costs of the Action, the following respective amounts (by way of cash deposits to be paid into Court or held in escrow in a bank account (or accounts) within the jurisdiction or to be secured by guarantee issued by a Class A Bank within the jurisdiction):

		USD
In escrow for the account of the GT JOLs:	for historic costs	901,502
	for future costs to final close of pleadings USD6,776,440 less 40%	4,065,864
		4,967,366
For the account of the AWALCo JOLs	for historic costs	813,019
	for future costs to final close of pleadings USD2,899,004 less 20%	2,319,203
		3,132,222
		4,967,366
	A total of	8,099,588
		4,900,000
		3,100,000
	rounded to	USD8,000,000

– bringing to USD13 million the security for costs in the Action for up to the end of discovery and final close of pleadings.

[20] As intended to include also the costs and expenses of responding to the WFO.

The WFO consequentials

Introduction

112. Pursuant to paragraphs 2 and 3 of the Order of 24th September 2011 ("24 September 2011 Order") the Court: (i) discharged the WFO; and (ii) (save for other undertakings provided by AHAB) ordered there to be an inquiry as to the losses incurred by the Defendants in Liquidation as a result of the WFO, all questions of directions for the inquiry and/or summary assessment of losses to be adjourned to the Case Management Conference ("CMC").

113. By paragraphs 2 and 3 of their Summons No. 3 dated 17 August 2011, the GT Defendants now seek orders that the Court do summarily assess (and make an order for payment in respect of) certain heads of loss caused to the GT Defendants as a consequence of the WFO (the "WFO consequentials"), viz:

(1) The fees and expenses of the receivers appointed in respect of the GT Defendants pursuant to the WFO; and

(2) The fees and expenses of the liquidators of the GT Defendants incurred in connection with the preparation of the report which contained the information required to be disclosed by the GT Defendants under the WFO.

(3) The GT Defendants also seek directions in relation to an inquiry as to any other kind of loss suffered by the GT Defendants under the WFO.

114. By their summons, the AWALCo JOLs seek similar orders in respect of the WFO consequentials, including to address the fees and expenses of the receivers appointed in respect of the AWALCos and the fees and expenses incurred in connection with preparing the several affidavits prepared by Mr. Christopher Johnson (one of the

AWALCo JOLs) and which contained the information required to be disclosed by the AWALCos under the WFO.

115. Like the GT JOLs, they also seek a further order that there be an inquiry as to any "other kind of loss" incurred as the result of the WFO.

The Background

116. On 24 July 2009, on AHAB's ex parte application, Mr. Justice Henderson made the WFO in respect of, amongst other defendant companies, the GT Defendants and AWALCos (although pertinently, at that date of course, they were not yet in liquidation). The amount frozen was US$9.2 billion. The WFO also ordered the immediate appointment of receivers in respect of, amongst others, the GT Defendants and AWALCos.

117. In paragraph 1 of Schedule B of the WFO, AHAB gave the Court an undertaking in the following terms ("the Undertaking"):

> *"If the Court later finds that this Order has caused loss to a Defendant, and decides that the Defendant should be compensated for that loss, the Plaintiff will comply with any order the Court may make." [(Emphasis supplied.)]*

118. In so far as the GT Defendants and AWALCs are concerned, the WFO initially required:

1) the freezing of their assets up to the amount of US$9.2 billion (paragraph 8 of the WFO);

2) that they provide information as to:

(i) the worldwide assets of each of the them exceeding US$10,000 in value (by later amending order increased to USD100,000), whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets (paragraph 14 of the WFO); and

(ii) all and any monies or assets which have been transferred to each of them or to any person or entity under their control from AHAB since 1 January 2004 (later by order narrowed to 1 January 2009), whether such transfer was made directly or indirectly or was made by loan or otherwise, stating in each case: (i) the date and amount of any such transfer or the assets transferred; (ii) the location, bank account, account holder and account into which any sums were received; (iii) what has become of such monies or assets; and (iv) identifying all assets which are now represented by the monies or assets transferred from AHAB, giving their location and value (paragraph 17 of the WFO); and

3) the appointment of Messrs Richard Douglas and Peter Anderson of Rawlinson & Hunter as receivers over them ("the Receivers") (paragraph 30 of the WFO).

119. Insofar as the GT Defendants and AWALCOs are concerned, the WFO was later further amended as follows:

> The Receivers were discharged from office in respect of them shortly after liquidators were appointed over each of the Defendants in Liquidation (by Order of Foster J. dated 11 August 2009, Order of Henderson J. dated 7 September 2009, Order of Quin J. dated 18 September 2009, Order of Henderson J. dated 28 October 2009, Order of Foster J. dated 16 November 2009 and Order of Foster J. dated 4 December 2009).

120. On 27 July 2009, a Writ of Summons was issued on behalf of AHAB against Mr. Al Sanea and all of the defendant companies, including the GT Defendants and AWALCos. On 10 November 2009, AHAB filed its Statement of Claim.

121. On 14 September 2009, Walkers the law firm, sent a letter on behalf of the GT Defendants to AHAB's Cayman Islands attorneys Mourant, enclosing a summons seeking orders for the discharge of the WFO as against the GT Defendants ("the Discharge Application"). That letter also invited AHAB to consent to the discharge of the WFO.

122. At a four-day hearing before the Court held between 14 and 20 January 2010, AHAB contested the application to discharge the WFO against the GT Defendants. At this time, there were various other summonses heard including, amongst others, applications made by AHAB specifically seeking the continuation of the WFO against the defendant companies and their compliance with those paragraphs of the WFO requiring the provision of information to AHAB (as set out above) ("the WFO Continuation Applications"). At that hearing, AHAB argued against the relief sought in the Discharge Application and in favour of the relief sought in the WFO Continuation Applications.

123. By Order dated 20 April 2010, AHAB's WFO continuation application was granted, requiring the defendant companies (including the GT Defendants and AWALCos) to provide AHAB with the information described above.

124. The GT JOLs served AHAB with the information required by the WFO by way of two Reports which were attached to affidavits of Hugh Dickson sworn on 18 May 2010 and 30 September 2010 respectively, as required by Order dated 20 April 2010. Copies of these affidavits and the Reports attached are exhibited to Mr. Aker's 5th (the affidavit filed in the present application at pages 46 to 255 of SJA-5). Both Reports are extensive and detailed.

125. For their part, the AWALCOs JOLs were also required to comply with the requirements of the WFO and provided the disclosure information by way of the several affidavits sworn by Mr. Christopher Johnson mentioned above.

The London Proceedings and Subsequent Developments

126. On 9 June 2011, the trial of certain claims against AHAB and others by a number of banks in the Commercial Court in London began before Mr Justice Flaux ("the London Proceedings"). The trial of the London Proceedings was listed to last for six weeks. However, on 15 June 2011 (the fourth day of the trial), AHAB abandoned its defence and consented to judgment against it.

127. Prior to the trial of the London Proceedings, on or around 10 and 11 May 2011, a significant number of documents relevant to the question of whether the partners of AHAB had knowledge of and/or authorised the alleged conduct of Mr Al Sanea (and which came to be called the "N Documents") were discovered in a cupboard belonging to Saud Algosaibi, a partner of AHAB, in his office in Al Khobar, Saudi Arabia.

128. As a consequence of this discovery and AHAB's admitted breach of its obligations to have disclosed the N Documents, it was, by Order of this court dated 24 September 2011, ordered that the WFO be discharged as against, amongst others, the GT Defendants and AWALCos. In the recitals to that Order, AHAB admitted that it had breached its duty of full and frank disclosure when it applied for the WFO. Paragraph 3 of that Order provided that there be an inquiry as to the losses incurred by the defendant companies as a result of the WFO, all questions of directions for the inquiry and/or summary assessment of losses to be adjourned to the adjourned CMC; that which has now been taken and hence, the WFO consequentials arising as the second main contested issue for determination.

The Law

129. Mr. Crystal and Mr. Smith both submit that where the Court has decided that a cross-undertaking in damages should be enforced, loss is assessed on the same basis as that

upon which damages are awarded for breach of contract. They rely on *F. Hoffmann-La Roche v Secretary of State* [1975] AC 295, wherein Lord Diplock said as follows at 361:[21]

> *"... if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction ..."*

130. Both counsel further submit that the fees and expenses of the Receivers appointed in respect of the GT Defendants and the AWALCos by the WFO, are obviously recoverable under this test. Mr. Crystal cites paragraph 16.026 of Stephen Gee QC's "*Commercial Injunctions*" (5th edition, 2004):

> *"If an order appointing a receiver has been discharged, the successful defendant may be entitled to an inquiry on the undertaking as to damages and, if he can show loss caused by the order because the assets have had to bear the remuneration, costs and expenses of the receiver, then this would fall within the scope of the undertaking."*

131. It is common ground between counsel – including as to the state of the law, Mr. Quest – that the Court has power to summarily assess loss payable under a cross undertaking in damages. As much is acknowledged at paragraph 173 of AHAB's Written Submissions dated 16 September 2011; and see *Columbia Pictures v Robinson* [1987] Ch 38 at 87 to 89; and recent judgment by me in *AHAB v Saad Investment Finance Company (No. 5) Limited* (16 October 2013) at [49].

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[21] See also *Harley Street Capital v Tchigirinsky* [2005] EWHC 2471 (Ch) per Michael Briggs QC (now Briggs LJ) in the context of an application for fortification of a cross undertaking in damages at [19] to [22]; where the causative test is proposed: "was the loss caused by the coercive effects (of the injunction)?"

132. Mr. Quest submits however, that whilst there is power to assess summarily, "the usual course" is to direct an inquiry; citing ***Dadourian Group Int'l v Simars [2009] EWCA Civ 169 at paras. 172, 173, 184 – 188***.

133. His opposites did not agree, pressing instead for assessment summarily in the present hearing.

134. Indeed, said Mr. Crystal, such an exercise accords with the general approach taken by the Court on an inquiry as to damages and that, moreover, it is a principle of any such inquiry that the assessment should be liberal. An inquiry as to damages following the discharge of a freezing injunction does not involve a process by which evidence of loss should be subject to minute criticism or scrutiny: citing ***Les Laboratoires Servier v Apotex Inc [2008] EWHC 2347 (Ch) at [9]*** per Norris J; ***Berkeley Administration Inc. v McClelland [1996] I L Pr 772 at [44]*** applied in the Cayman Islands by Henderson J in ***Sagicor v Crawford [2011 (1) CILR 130] at 151 - 152.***

135. At page 153 paragraph 38 of ***Sagicor v Crawford*** Henderson J also applied the following dictum of Mason J in ***Air Express Ltd. v Ansett Transport Indus. (Operations) Pty Ltd. (1981) 145 CLR 249 at 332:***

> *"Unless the circumstances indicate otherwise, when it appears that damage flows from the non-performance of an act and the performance of that act has been restrained by an interim injunction, the inference will generally be drawn that the damage has been occasioned by the injunction."*

136. That approach, said Mr. Crystal, admits of a summary assessment in which context inferences may readily be drawn as to the impact of the WFO.

137. Against that background of the summary of the legal principles, the GT JOLs and AWALCo JOLs invite me to summarily assess the loss caused to them as the consequence of the making of the WFO in connection with the two heads of loss

identified above – the appointments of the Receivers and compliance with the mandates of the WFO.

138. They say both of these categories of loss were plainly caused by the WFO and their quanta are readily ascertainable at this stage. The details are given in the supporting respective affidavits of the GT JOLs and the AWALCos JOLs and AHAB has filed no evidence in response to contradict.

139. Mr. Crystal (joined in this respect also by Mr. Smith) submits that the fees and expenses of the Receivers charged to the liquidation estates are plainly a loss caused by the WFO. If the Receivers had not been appointed no liability to discharge their fees and expenses could have arisen. The fact that the respective JOLs may subsequently have been appointed anyway, is irrelevant to quantifying the loss caused as a consequence of the wrongful appointment of the Receivers. AHAB should be liable to reimburse the liquidation estates of the GT Defendants and AWALCos in respect of the fees and expenses of the Receivers in circumstances where those Receivers should never have been appointed. Attorneys' fees in the Receivership also constitute loss to the estates, since they would not have had to incur those attorneys' fees had the Receivers not been appointed.

140. Further, the argument goes, as to the fees and expenses of the GT JOLs and AWALCo JOLs incurred in connection with preparing the respective Reports and affidavits referred to above, the suggestion made by Mr. Quest in his arguments on behalf of AHAB – that those fees and expenses would have been incurred in any event, is wrong and unsupported by evidence. Those fees and expenses are plainly a loss caused by the WFO.

141. In response on behalf of AHAB, Mr. Quest submitted that the exercise undertaken by the Receivers and the GT JOLs and AWALCo JOLs to meet the disclosure orders of the WFO were necessary and inevitable in any event, to meet their wider disclosure obligations in the Action. And, as to the exercise of identifying and tracing the transfer of assets which were within or remain within the respective liquidation estates (item (2) of the WFO consequentials), that too would inevitably have been undertaken in order for the JOLs to respond to AHAB's proprietary tracing claim in the Action.

142. Carrying out that exercise in response to the WFO therefore caused no loss to the GT Defendants or AWALCos. In other words, says Mr. Quest, a complete overlap between the exercises undertaken in consequence of the WFO and the similar exercises which the Action itself required. The JOLs always had an obligation he insisted, to identify which of the assets in their hands belong to the estates and which belong beneficially to other parties, in particular AHAB.

143. Moreover, as the Court has itself observed, the exercise of identifying the "true ownership and proper disposition of the assets" is a necessary part of the litigation[22].

144. So, says, Mr. Quest, the Court cannot conclude on a summary basis, that fees charged and expenses incurred for the exercise of responding to the WFO constitute wasted costs, in the sense of "loss" contemplated by the WFO cross-undertakings in damages. Nor does the fact that the Court has approved, in the usual context of its oversight of the liquidations, the incurring of the fees and expenses by the JOLs so as to allow them to be paid from the respective liquidation estates – a fact relied upon by the JOLs now – mean that the court is bound to regard them as recoverable loss or damages for the purposes of the WFO's cross-undertaking. There is no dispute that the fees and expenses were

[22] Judgment delivered in this Cause on 1 March 2013 but dated on 22 February 2013, (as yet unreported) paragraph 137.

properly incurred as the Court has found. The present dispute, he concluded, is whether they can be summarily treated as "loss" for the purposes of the cross-undertaking.

Analysis and conclusion

145. While I accept that the process of assessment of damages arising from the cross-undertaking will often not necessarily involve other than a summary assessment rather than a full inquiry in the mode of a trial[23], the correct procedure must, obviously, be dictated by the relative complexity of the issues to be assessed and determined by the judge on the case by case basis.

146. Here, the work undertaken, in particular by the GT JOLs in response to the disclosure orders of the WFO, was undoubtedly quite complex and involved. Some of that work, as revealed by Mr. Akers[24], necessarily involved investigating AHAB's claim and therefore would have involved work which remains relevant to this Action, the discharge of the WFO notwithstanding.

147. The amount claimed by the GT JOLs as part of the WFO consequentials – at USD3.5 million – is quite substantial. With only USD344,555 of that sum being attributable to the costs of the Receivers, the great bulk of it – USD3,155,445 – is said to be attributable to the work done by the GT JOLs post-receivership and in response to the disclosure orders of the WFO. That was the work which produced their extensive and detailed Reports.

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[23] As found suitable by Norris J in the ***Les Laboratories*** case (above) and as applied by Henderson J in ***Sagicor*** (also above) at paragraph 38.

[24] In his 8th Affidavit filed in the liquidation proceedings.

148. I accept, of course, that – as Henderson J declared in ***Sagicor v Crawford***[25] – the evidence may need show only that "*the injunction itself was a substantial contributor to the harm caused*".

149. But that is not the difficult enquiry here as I see it. Rather, the difficulty is as to whether and if so, to what extent, the investigatory work undertaken by the GT JOLs would have been required of them in any event, either for their distinct and separate purposes of administering their liquidation estates or for the investigation of AHAB's claim generally in the Action or, moreover, for the purposes of raising their own counter-claim. That is the enquiry that would allow me to determine whether and if so, to what extent their work is to be regarded as having involved wasted costs or loss to which the WFO may be regarded as a "substantial contributor".

150. This approach to the issue must surely be correct if the fundamental requirement of the showing of loss or damage is to be satisfied.

151. As Henderson J also stated in the ***Sagicor*** case[26], not to be overlooked is:

> "*...the principle...that compensation under the undertaking can be awarded only for damages which is proven to have been caused by the injunction and not by the action itself.*"

152. Accordingly, while the evidence of causation will not always necessarily "*be subjected to a minute and rigorous scrutiny*"[27], the evidence of the loss must be clear and the onus will remain upon the claimant (here the JOLs) to establish that loss.

153. For the reasons I have but mentioned, in a case as complex as this, the court may not simply infer that the costs of all work undertaken in response to the disclosure orders of

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[25] Above, (at paragraph 37).
[26] Above, (at paragraph 37).
[27] ***Sagicor*** (above) at paragraph 38

an injunction amount to loss or damage. A summary approach to the assessment of that issue must be intended by the case law only where no detailed enquiry would be needed because there already exists clear proof of the loss.

154. Other than those costs which relate directly to the receiverships appointed under the WFO and which respectively fell away upon the appointment of the JOLs, I agree with Mr. Quest that the present state of the evidence does not allow me to conclude summarily on the extent of the loss that should be attributable to the WFO and regarded as recoverable under the cross-undertaking in damages.

155. I think the correctness of this conclusion can readily be tested by way of practical illustration by posing the question: what if AHAB ultimately succeeds on its proprietary claim at trial? For, if AHAB were to succeed, the JOLs could not claim their own or their lawyers' costs of their work as loss or damage resulting, in any sense, from the by then irrelevant and historical imposition of the WFO. AHAB would ultimately be the victim of those losses.

156. On the other hand, if the JOLs succeed in resisting AHAB's claim, at least the legal component of these costs would become recoverable on the indemnity basis from AHAB (as so already ordered) but as costs in the Action; and to the extent any question of causation remains in respect of them, could be assessed and made payable after taxation on that basis.

157. Furthermore, when viewed in that way, those would be legal costs which could properly be left to be taxed and paid at the end of the Action, on the basis that they too are to be covered by security for costs which AHAB must provide, now to be increased to USD13 million. Moreover, if AHAB is given notional credit for the amount of USD1.25 million

it claims as costs already due to it[28], as I conclude it should, the real value of the security for costs to close of pleadings becomes USD14.5 million. This would be sufficient, in my view, to secure the possible unquantified losses arising from the WFO consequentials as well.

158. Apart from provisions for the direct costs of the Receiverships, that is the conclusion at which I arrive.

159. The direct costs of the Receiverships are what they are and require no assessment. They are without doubt the consequence of the WFO and even if, as Mr. Quest also argued, the work undertaken by the Receivers would have been done by the JOLs later, there can be no question but that there would inevitably have been a significant duplication of effort and fees. Viewed in this way, the direct costs of the Receivership can be regarded as having caused substantial "loss" within the meaning of the WFO. Even if AHAB is successful in the end, that will remain loss which should never have been incurred because the WFO was misconceived.

160. In that sense, I can be satisfied on "summary assessment", that the WFO was a substantial contributor to the Receivership costs, and so those costs become recoverable both to the GT JOLs and the AWALCo JOLs to the extent respectively paid by them.

161. That, as I understand it, yields the amount of USD344,553 already identified as damages to be paid now to the GT JOLs and USD213,321.84 to be paid to the AWALCos JOLs[29]. I order that these amounts also be paid within six weeks.

162. As to the third head of potential WFO consequential loss or damage – the potential but as yet entirely unidentified loss of enterprise or equity value of the GT Defendants and

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[28] As the result of cost orders made in its favour in any event in the Action.

[29] As explained in Mr. Carton-Kelly's 4th Affidavit, I am also told that a significant balance of the Receivers' costs and fees (approx. USD140,000) was paid directly to them by AHAB in keeping with its undertaking to them at the time of their appointment.

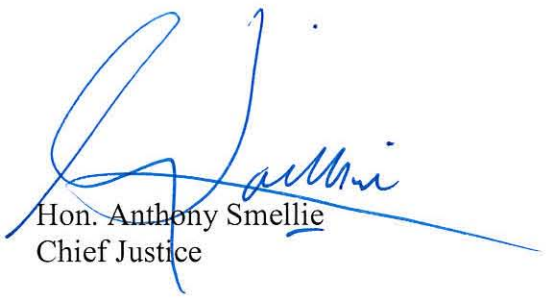
AWALCos as a consequence of the WFO – this would have to be the subject of a detailed (and most probably contested) enquiry.

163. It is an enquiry which Mr. Crystal urges me to direct *aliunde* the trial of the Action and to be concluded as soon as possible for fear of otherwise never being able to recover from AHAB if AHAB fails in the Action.

164. While I remain alive to such concerns, given the financial difficulties facing AHAB, I do not consider that there is, as yet, sufficient reason for directing such an enquiry.

165. As yet, no argument has been advanced to the effect that the WFO itself caused damage to the business enterprise or equity value of either the GT Defendants or the AWALCos. Yet that would be the essential issue for enquiry, given my decisions already taken and explained above, as to the treatment of the other WFO consequentials.

166. If an enquiry into damages of that kind is seriously intended by the GT JOLs or AWALCo JOLs apart from and before the trial commences, some evidence to justify directing an enquiry would be required. Armed with that evidence, the JOLs could reapply for directions for an enquiry.



Hon. Anthony Smellie
Chief Justice

November 15, 2013.

Finally released with typographical corrections and substantive correction to paragraph 161 on 31 January 2014.

FIRST COMBINED SCHEDULE

HISTORIC COSTS	GT	AWALCOS
Historic costs up to 19 August 2011 are not included.	N/A	N/A
Historic costs from 20 August 2011 to 28 February 2013	**US$901,502**	**US$354,242** (7 Geoffrey Carton Kelly §§39-40)
Historic costs from 1 March 2013 to 31 July 2013		**US$458,777** (7 Geoffrey Carton Kelly §§41-42)
Total	**US$901,502**	**US$813,019**
FUTURE COSTS	**GT** (all breakdowns are found at page 1 of SJA9 at D/tab14) The exhibits to Stephen John Akers' 9th	**AWALCOS** (all page references are to Exhibit GCK7 at D/tab 10)
Discovery	**US$1,042,000** • US$330,000 (third share of database) • US$403,200 (database costs re GT Defendants' discovery) • US$308,800 (database costs re received discovery) •	US$936,000 (Document management: p.18)
	US$3,042,942 • US$77,700 (Counsel) • US$1,500,000 (outsourced reviewers) • US$1,365,242 (attorneys) • US$100,000 (translators)	US$403,158 (Discovery: p.18)
	Included in Discovery.	US$107,234 (E-discovery protocol: p.18)
	US$2,599,200 • US$77,700 (Counsel) • US$521,500 (attorneys) • US$1,800,000 (outsourced reviewers • US$200,000 (translators)	US$714,504 (Review of others' discovery: pp.18/19)
		US$59,254 (Inspection: p.19)
	US$6,684,142	**Total: US$2,220,150**
Amendment of pleadings	**US$92,298** • US$55,748 (Counsel) • US$36,550 (attorneys)	US$130,687 (Reviewing amendments: p.19)
		US$467,628 (Amendments: p.19)
		US$80,539 (Reviewing amendments: pp.19/20)

	US$92,298	**Total: US$678,854**
Witnesses	**US$440,370** • US$30,870 (Counsel) • US$409,500 (attorneys)	US$599,718 (Witnesses: p.20)
	US$108,000	US$120,000 (Disbursements: p.20)
	US$548,370	**Total: US$719,718**
Experts	**US$3,846,360**	**US$3,554,085** (Experts: p.20)
Interlocutory hearings	• US$188,400 (Counsel) • US$244,650 (attorneys)	US$158,130 (Directions hearing: p.18)
		US$123,648 (Discovery hearing: p.19)
		US$179,508 (PTR: p.20)
		US$248,934 (Two further directions hearings: p.21)
	US$433,090	**Total: US$710,220**
Trial preparation	**US$1,815,660**	**US$2,403,282** (Trial preparation: p.21)
Additions – miscellaneous and other disbursements	• US$53,060 (Counsel) • US$418,250 (attorneys) • US$270,000 (disbursements)	**US$1,013,040** (litigation conferences, client meetings, etc: p.20)
		US$405,405 (correspondence, attendance on other parties: p.20)
	US$741,310	**Total: US$1,418,445**
Total future costs to trial (i.e. excluding historic costs)	**US$14,161,230**	**US$11,704,754**

SECOND COMBINED SCHEDULE

FUTURE COSTS	GT (all breakdowns are found at page 1 of SJA9 at D/tab14)	AWALCOS (all page references are to Exhibit GCK7 at D/tab 10)
Discovery	**US$1,042,000** • US$330,000 (third share of database) • US$403,200 (database costs re GT Defendants' discovery) • US$308,800 (database costs re received discovery)	US$936,000 (Document management: p.18)
	US$3,042,942 • US$77,700 (Counsel) • US$1,500,000 (outsourced reviewers) • US$1,365,242 (attorneys) • US$100,000 (translators)	US$403,158 (Discovery: p.18)
	Included in Discovery.	US$107,234 (E-discovery protocol: p.18)
	US$2,599,200 • US$77,700 (Counsel) • US$521,500 (attorneys) • US$1,800,000 (outsourced reviewers) • US$200,000 (translators)	US$714,504 (Review of others' discovery: pp.18/19)
		US$59,254 (Inspection: p.19)
100% included	**US$6,684,142**	**Total: US$2,220,150**
Amendment of pleadings	**US$92,298** • US$55,748 (Counsel) • US$36,550 (attorneys)	US$130,687 (Reviewing amendments: p.19)
		US$467,628 (Amendments: p.19)
		US$80,539 (Reviewing amendments: pp.19/20)
100% included	**US$92,298**	**Total: US$678,854**
Witnesses	~~**US$440,370**~~ ~~• US$30,870 (Counsel)~~ ~~• US$409,500 (attorneys)~~	~~US$599,718 (Witnesses: p.20)~~
	~~**US$108,000**~~	~~US$120,000 (Disbursements: p.20)~~
Excluded	~~**US$548,370**~~	~~**Total: US$719,718**~~

Experts 30% of forensic, attorneys and counsel but zero for other experts	~~**US$3,846,360**~~ **US$859,908**	~~**US$3,554,085**~~ (Experts: p.20) **US$300,000**
Interlocutory hearings	• US$188,400 (Counsel) • US$244,650 (attorneys)	US$158,130 (Directions hearing: p.18)
		US$123,648 (Discovery hearing: p.19)
		~~US$179,508~~ (PTR: p.20)
		~~US$248,934~~ (Two further directions hearings: p.21)
GT have taken 30%. The AwalCos 100% of the yellow highlighted hearings	~~**US$433,090**~~ **US$129,927**	~~**Total: US$710,220**~~ **US$281,778**
Trial preparation Excluded	~~**US$1,815,660**~~	~~**US$2,403,282**~~ (Trial preparation: p.21)
Additions – miscellaneous and other disbursements	• US$53,060 (Counsel) • US$418,250 (attorneys) • US$270,000 (disbursements)	**US$1,013,040** (litigation conferences, client meetings, etc: p.20)
		US$405,405 (correspondence, attendance on other parties: p.20)
64% included	~~**US$741,310**~~ **US$474,438**	~~**Total: US$1,418,445**~~ **US$907,805**
Total future costs to trial (i.e. excluding historic costs)	~~**US$14,161,230**~~ **US$8,240,713**	~~**US$11,704,754**~~ **US$4,388,587**