



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 203 OF 2020 (NSJ)

BETWEEN

ABDULHAMEED DHIA JAFAR

PLAINTIFF

AND

(1) ABRAAJ HOLDINGS
(in official liquidation)

(2) GHF GENERAL PARTNER LIMITED
(in its capacity as general partner of GHF Fund, LP (formerly Abraaj Growth Markets Health Fund L.P.) and GHF Fund (B), L.P. (formerly Abraaj Growth Markets Health Fund (B) L.P.))

(3) THE GHF GROUP LIMITED
(formerly The Abraaj Healthcare Group Limited)

(4) ABRAAJ GENERAL PARTNER VIII LIMITED
(in its capacity as general partner of Neoma Private Equity Fund IV LP (formerly known as Abraaj Private Equity Fund IV LP))

DEFENDANTS

Appearances:

**Stephen Atherton QC and Sarah Tresman instructed by
Matthew Goucke, Shelley White, Patrick McConvey and Will
Waldron of Walkers for the GHF Parties**

**Andrew Ayres QC instructed by Jennifer Fox, Rebecca Findlay
and Victoria King of Ogier for the Fourth Defendant**

**Michael Bloch QC instructed by John Harris and Alice Carver of
Nelsons for the Plaintiff**

Before:

The Hon. Justice Segal

Heard:

1-2 July 2021

Draft judgment

Circulated:

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Judgment Delivered:

10 August 2021



HEADNOTE

Applications for security for costs – GCR O.23, r.1(1) - non-resident Plaintiff – exercise of the Court’s discretion as to whether just to order security - substantial obstacles amounting to a real risk of non-enforcement – risk of non-enforcement in the UAE – determining the quantum and timing of the provision of security

JUDGMENT ON SECURITY FOR COSTS APPLICATIONS

Introduction

1. This judgment deals with two applications for security for costs against the Plaintiff. First, an application by the Second and Third Defendants (the ***GHF Parties***) made by a summons dated 9 April 2021 and secondly an application by the Fourth Defendant made by a summons dated 29 April 2021. Both applications are opposed by the Plaintiff.
2. The Plaintiff is an individual domiciled in the UAE. The applications relate to proceedings commenced by him for damages, the repayment of sums received and proprietary relief arising out of three loans which he claims to have made to the First Defendant and the First Defendant’s subsidiary, Abraaj Investment Management Limited (***AIML***). Both the First Defendant and AIML are in official liquidation in this jurisdiction.
3. The Plaintiff claims to have advanced in December 2017 three loans (the ***Loans***) in an amount in UAE dirham (***AED***) equivalent to approximately US\$350 million, The Loans were made by means of (i) an advance of AED 367,300,000 on 21 December 2017 to AIML; (ii) two advances of AED 367,300,000 on 27 December 2017 to the First Defendant; and (iii) an advance of AED 183,650,000 on 28 December 2017 to the First Defendant. The third of the Loans is alleged to have been repaid. The Plaintiff also alleges that following receipt of the Loans the monies received by AIML and the First Defendant were immediately transferred from AIML’s and the First Defendant’s accounts with the Commercial Bank of Dubai and First Abu Dhabi Bank to, amongst other entities, the Third and Fourth Defendants. The Plaintiff alleges that all of the Defendants were corporate entities within a corporate group he has termed the "***Abraaj Group***" and that Mr Arif Naqvi (***Mr Naqvi***) was the founder of the Abraaj Group and a member, together with five other individuals, of what the Plaintiff refers to as the "***Abraaj Leadership***", which he says controlled the "***various entities that comprised the Abraaj Group***". The Plaintiff claims that the Loans were induced by fraudulent representations made to him orally, in person or over the telephone, by Mr Naqvi, allegedly acting on his own behalf and on behalf of the Defendants. The Plaintiff makes tortious claims in unlawful means conspiracy and deceit;



claims for restitution for the Third Defendant's and Fourth Defendant's unjust enrichment; a proprietary claim under UAE law; two claims under Cayman Islands law for proprietary remedies based on constructive trusts; and a claim in knowing receipt. The Plaintiff claims that the substance of the tortious causes of action arose in the UAE and that his tortious claims satisfy the requirements of the common law rule of double actionability.

4. The Abraaj Group comprised a large number and complex web of companies and partnerships (many of whose names were changed as a result of a major reorganisation in 2019). A number of the companies acted as general partners or managers of investment funds which were created as or which involved various partnerships. These proceedings involve corporate entities some of which operated on their own behalf and some of which operated as general partners of partnerships established to hold and manage large investment portfolios. The Second Defendant is the general partner of the GHF Fund, L.P. and the GHF Fund (B), L.P. (together, the **GHF Fund**). The GHF Fund was formerly known as the Abraaj Growth Markets Health Fund L.P. and was referred to as the Healthcare Fund. The Third Defendant is a company within the GHF Fund structure. It is the sole shareholder of two companies which in turn were the shareholders of eight companies through which the GHF Fund acted and made its investments. In this sense, the Third Defendant serves as a holding company for the GHF Fund. The Third Defendant was, until 20 June 2019, called The Abraaj Healthcare Group Limited. The Fourth Defendant is the general partner of Neoma Private Equity Fund IV LP (**NPEF IV**), previously known as Abraaj Private Equity Fund IV, and is sued in that capacity.
5. The Plaintiff's claim (cause number FSD 203 of 2020) is being tried together with three other related claims (one of which is stayed for the time being). The two related claims, which have not been stayed (the **Related Claims**) have been brought by the joint official liquidators (**JOLs**) of the First Defendant against the Third Defendant (cause number FSD 150 of 2020) and against NPEF IV (cause number FSD 158 of 2020). The JOLs seek to recover funds paid away by the First Defendant following receipt by it of the proceeds of the Loans.

The applications

6. The GHF Parties rely on the Second Affidavit of Richard Lewis (**Lewis 2**) and his Fourth Affidavit (**Lewis 4**). Mr Lewis is an employee of FFP (Cayman) Limited (**FFP**), a well known firm providing corporate services to clients including arranging for its employees to become corporate directors. Mr Lewis is (and gives his evidence as) a director of the Second Defendant, which is itself a director of the Third Defendant. The GHF Parties also rely on two letters of advice from their UAE legal advisers, DLA Piper Middle East LLP (**DLA**) dated 7 April 2021



(the *DLA April Advice*) and 16 June 2021 (the *DLA June Advice* and together with the DLA April Advice, the *DLA Advice*).

7. The Fourth Defendant relies on the following evidence:
- (a). the Second Affidavit of Neil Hayward sworn on 23 April 2021 (*Hayward 2*). Mr Hayward is a partner in KordaMentha Corporate in Sydney and until August 2020 was a partner in Alvarez & Marsal in Dubai. He addresses the circumstances in which the application is made, the reasons for the application and the quantum of security sought;
 - (b). the First Affidavit of James Fox sworn on 30 May 2021 (*Fox 1*). Mr Fox is a lawyer advising the Fourth Defendant with extensive experience in the DIFC and UAE. Mr Fox sets out the reasons why in his opinion there is a real risk that an onshore UAE court might refuse to enforce a costs order made by this Court against the Plaintiff;
 - (c). the Third Affidavit of Mr Hayward sworn on 16 June 2021 (*Hayward 3*). This responds to the First Affidavit of Mr Barnaby Stueck (*Stueck 1*) filed on behalf of the Plaintiff (as does Lewis 4); and
 - (d). the Second Affidavit of Mr Fox sworn on 20 June 2021 (*Fox 2*). This (and the DLA June Advice) responds to the evidence of Mr Ali Al Aidarous (*Mr Al Aidarous*) who addressed matters of UAE law on behalf of the Plaintiff.
8. The Plaintiff relies on Stueck 1 and the expert report of Mr Al Aidarous. Mr Al Aidarous is a native Arabic speaker and qualified UAE lawyer of 30 years' experience.

The applicable law

9. O.23, r.1(1) of the Grand Court Rules 1995 (Revised Edition) (the *GCR*), provides as follows:

“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.”

10. It is common ground that the Plaintiff is ordinarily resident outside of the jurisdiction so that the jurisdictional threshold set out in O.23, r.1(1)(a) is satisfied. Therefore, the dispute relates to whether it is just in the circumstances to grant security and, if the Court considers that it is, the quantum, form and timing of the security that the Plaintiff should provide.
11. As regards the exercise of the Court's discretion in a case based on O.23, r.1(1)(a), a number of propositions were also common ground and uncontroversial:
- (a). once the residence pre-condition is satisfied, the Court has a discretion to make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. For the Court to be so satisfied the Court has to ensure that its discretion is being exercised in a non-discriminatory manner (*Chernukhin v Danilina* [2018] EWCA Civ 1802, [2019] 1 WLR 758 (**Danilina**) at [51(2)]).
 - (b). in *Danilina*, Lord Justice Hamblen (as he then was), after having considered the three leading decisions of the English Court of Appeal addressing the equivalent residence pre-condition contained in CPR 25.13 (namely *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 (**Nasser**); *De Beer v Kanaar & Co* [2003] 1 WLR 38 and *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099 (**Bestfort**)) summarised the relevant legal principles at [51] as follows:
 - “(1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident: (i) out of the jurisdiction; and (ii) in a non-Convention state.
 - (2). Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR r 25.13(1) if “it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.”
 - (3). In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of articles 6 and 14 of the Convention: see the *Bestfort* case...paras 50-51.
 - (4). This requires “objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned”: see *Nasser’s* case..., para 61 and the *Bestfort* case at para 51.
 - (5). Such grounds exist where there is a real risk of “substantial obstacles to enforcement” or of an additional burden in terms of cost or delay: see the *Bestfort* case at para 77.

- (6). *The order for security should generally be tailored to cater for the relevant risk: see Nasser’s case at para 64.*
 - (7). *Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for example, the orders in De Beer’s case... and the Bestfort case.*
 - (8). *Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see, for example, the order made in Nasser’s case”.*
- (c). as regards the issue of whether a real risk exists, Hamblen LJ added (at [52]) the “following observations”:
- “(1). *The relevant risks are of (i) non-enforcement and/or (ii) additional burdens of enforcement. A real risk of either will suffice to meet the “threshold” test.*
 - (2). *Some of the authorities refer to difficulties of enforcement. Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of “substantial obstacles” is directed. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the “substantial obstacles” required for there to be a real risk of non-enforcement.*
 - (3). *Delay is mentioned as a relevant additional burden of enforcement, but it is difficult to see how this can be quantified in terms of security unless it is likely to result in some additional cost or interest burden”.*
- (d). Lord Justice Hamblen’s summary of the position in English law also reflects the position under the law of the Cayman Islands:
- (i). in *AHAB v SICL* [2017] (2) CILR 602 (*AHAB v SICL*), the Chief Justice accepted that the Grand Court, as a “creature” of the Cayman Islands’ Constitution (the **Constitution**) “*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 O.23, r.1 is applied impartially, in keeping with the non-discriminatory tenets of s.16*”. As such, “*the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the discriminatory basis of the plaintiff’s foreign status but because*



real risks of unenforceability are shown “on objectively justified grounds” to exist.” The Chief Justice said (at [9]-[10]) that the test articulated by Gloster LJ in *Bestfort* was 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 costs*”.

- (ii). in *Worthing Properties Limited v Sterling Macro Fund* (Unreported, 4 April 2018) (**Worthing**), Justice Mangatal set out at [21], and applied at [31], the “*Bestfort test*” and in doing so, had said (at [31]) it was for the applicant to, “*identify a real risk that it will not be in a position to enforce an order for costs...*” Mangatal J had further accepted the applicant’s submission that the test was “*real risk ... as opposed to fanciful risk*” and said that the applicant did not, “*have to show more than a real risk that enforcement might fail or be much more problematic*”.

- (e). when exercising its discretion under GCR O.23, r.1(1)(a) the Court may also take into account other factors, including those listed in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 at 539-540 (**Keary**) and *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at page 626F (**Sir Lindsay Parkinson**) (see *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 996 (Comm.) (**Kazakhstan**) at [210] to [222]).

- (f). the other matters which the Court may consider and take into account when exercising its discretion as identified in *Sir Lindsay Parkinson* (at page 626F-H) are conveniently summarised in the 2021 “*White Book*” at [25.13.13] as follows (with appropriate amendments for context):
 - (i). whether the plaintiff’s claim is *bona fide* and not a sham.
 - (ii). whether the plaintiff has a reasonably good prospect of success.
 - (iii). whether there is an admission by the defendants on the pleadings or elsewhere that money is due.
 - (iv). whether there is payment into court of a substantial sum of money or an “open offer” of a substantial amount.



- (v). whether the application for security was being used oppressively, e.g., so as to stifle a genuine claim.
 - (vi). whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of any work.
 - (vii). whether the application for security is made at a late stage of the proceedings.
- (g). although the Court may have regard to the plaintiff's prospects of success, it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure as regards the plaintiff's case (see *Danilina* [69]).
- (h). the usual form of security is a cash deposit in an escrow account under the control of the Court (*Caribbean Islands Development Ltd v First Caribbean International Bank* [2014] (2) CILR 220 (*Caribbean Islands*) at [46] citing *AHAB v SICL* [2016] (2) CILR 208 (*AHAB v SICL, 2016*), at [32] -[60]). However, security in another form may be provided. The “essential question” in deciding on what form of security is acceptable is whether what is proposed does indeed provide real security: *Locke v CWM Ltd* (Grand Court, unreported, 7 April 2017, MacMillan J) (*Locke*) at [20] citing *Caribbean Islands* at [37]. “This it may do if it amounts to a promise which would in all likelihood be honoured, given an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given a truly creditworthy entity”: *Caribbean Islands* at [37]-[39] citing the decision of Christopher Clarke J in *Versloot Dredging B.V. v. HDI Gerling Industrie Versicherung A.G.* [2013] EWHC 658 (Comm.) (*Versloot*) at [10].
- (i). the Court will consider, in exercising its discretion as to whether a proposed form of security amounts to “real security” whether the security is offered from an entity or from assets available within the jurisdiction. In *Caribbean Islands*, the form of security proposed was an after-the-event insurance policy and an indemnity bond (governed by English law) to cover security, (referred to as the “*QBE insurance and bond*”) purchased from an insurer with no corporate presence in the Cayman Islands. The Chief Justice identified at [41]-[42] the following, “important concerns which must be addressed in answering the “essential question” posed by Christopher Clarke J in *Versloot*”:

“...whether or not the QBE bond would be enforceable by the defendant according to its terms as a matter of the English law which governs it is a matter about which the defendant’s local lawyers have not, and may not, advise the defendant. The defendant would therefore be required to go to the expense of obtaining English legal advice before it could be satisfied about that issue. Already there is a significant area of uncertainty as to whether the QBE bond would cover costs orders in any event already made in the defendant’s favour and which already would consume half of the security to be provided by the security order. Moreover, the defendant would be required to seek enforcement of the QBE bond in England if a dispute arose, notwithstanding that it is entitled to the enforcement of the security by the court before which it has been sued. All of these considerations arise against the background of recalcitrance and lack of relevant disclosure on the part of the party proffering the bond”.

- (j). in *Caribbean Islands*, the “essential question [had] not been satisfactorily answered”: per the Chief Justice at [43]. The QBE bond failed to satisfy the principle that the purpose of an order for security was to ensure that a successful defendant will have a fund available within the jurisdiction of the Court against which it can enforce a costs order. In *Locke*, McMillan J cited *Caribbean Islands* and concluded at [25] that the, “relevant questions therefore are whether the security is a real security, whether there is a fund available within this jurisdiction, and whether in the case of a bond or other instrument of security any issue arises as to potential difficulties of enforcement”.

The parties’ submissions – the GHF parties

12. Mr Lewis noted (Lewis 2 at [38]) that the Plaintiff had declined to provide the GHF Parties with details of his assets or their location. He had refused to say whether he had assets in the UAE, the DIFC or the Cayman Islands or any other jurisdiction readily amenable to the enforcement of a costs order made by this Court. Therefore, in the GHF Parties’ view, any costs order made against the Plaintiff would need to be enforced through the UAE Courts, where he is resident, and his assets are or are likely to be located (the GHF Parties submitted that the Plaintiff’s evidence in answer to the security for costs applications, namely Stueck 1 and the expert report of Mr Al Aidarous, proceeded on the basis that the Plaintiff’s assets, or sufficient against which a Cayman costs order could be enforced, were located in the UAE).
13. Before the start of the hearing and in response to a challenge made by the Plaintiff to the explanation provided in the DLA Advice as to who had been responsible for writing the letters from DLA and for giving the advice contained therein, and as to the expertise and qualifications of DLA to give advice on the UAE law questions, the GHF Parties filed further evidence dealing with these issues. An affidavit was filed by Mr Ahmed Hammadi, a senior associate of DLA Piper Middle East LLP with ten years’ experience practising in the UAE, in which he confirmed

that he and two others were the authors of the DLA Advice. The other authors were Wissam Dagher and Henry Quinlan who are partners of DLA. Mr Dagher is the head of the onshore UAE litigation practice in DLA and had had fifteen years of experience practising in the UAE. Mr Quinlan is the practice group head of DLA's litigation, arbitration and investigations practice in the Middle East and had 12 years of experience practising in the UAE. Mr Dagher and Mr Quinlan also filed affidavits confirming this. In addition, an affidavit was filed by Ahmed Ramadhan, who has rights of audience before the UAE courts and is the managing partner of Ahmed Ramadhan & Haleema Al Marzooqi Advocates and Consultants, in which he confirmed that he had read the DLA Advice and agreed with its contents, which he believed to be a true and accurate explanation of applicable UAE law.

14. The GHF Parties submitted that the key points made in the DLA Advice were as follows:

(a). foreign judgments and orders can be enforced in the UAE Courts in accordance with a (relevant) treaty, designed to create reciprocal enforcement obligations between the signatory states or where no treaty applies, pursuant to the terms of UAE Federal Law No. 11 of 1992 (as amended) (the **Civil Procedures Law**) and the Executive Regulations issued pursuant to the Cabinet Decision No. 57/2018 (as amended) by Cabinet Decision No. 33 of 2020 (the **Regulations**). It was common ground that no treaty applied in the present case.

(b). the relevant provision of the Regulations is article 85. This states as follows:

“1. *Judgments and orders issued in a foreign state may be ordered to be enforced in the State under the same conditions prescribed in the Law of that foreign state for the enforcement of judgments and orders issued in the State.*

2. *The order for enforcement shall be applied for by a Petition to be submitted by the party concerned, and containing the data identified in Article (16) hereof, to the Enforcement Judge, and the latter shall issue an order no later than three days of the submission date thereof. The order so issued may be appealed according to the rules and procedures prescribed for appealing the judgment. The enforcement may be ordered only after the following is verified:*

A. *That the Courts of the State do not have exclusive jurisdiction over the dispute on which the judgment or order has been issued, and that the Foreign Courts that issued the same have jurisdiction according to the rules of International Jurisdiction prescribed in its Law.*

- B. *That the judgment or order has been issued by a Court in accordance with the Law of the State in which the judgment or order has been issued and duly certified.*
- C. *That the Parties to the Lawsuit on which the foreign judgment is issued had been required to appear and were properly represented.*
- D. *That the judgment or order has acquired the legal effect of res judicata according to the Law of the issuing Court, provided that a certificate shall be furnished indicating that the judgment has acquired the legal effect of res judicata, or where the same is already stated in the judgment itself.*
- E. *That the judgment neither conflicts with a judgment or an order previously issued by a Court of the State nor involves anything that violates the public order or morality.*
3. *The Enforcement Judge shall have the authority to demand documents that support the application before his decision is made”.*
- (c). article 85(1) establishes the reciprocity condition. In [6.4] and [6.5] of the DLA June Advice, DLA dealt with this condition and stated as follows (underlining added):

“6.4 *In this regard we agree with Aidarous that reciprocity can be established under Article 85(1) by demonstrating that the conditions for enforcing a foreign judgment are the same as and not more burdensome, than those prescribed by Article 85. However, we do not agree with the suggestion (if it is made) at paragraph 23.3.1 of Stueck I that the example of the English High Court enforcing a Dubai Court judgment in Lenkor Energy Trading DMCC v Puri would be determinative of reciprocity. We would say the same, by analogy, in relation to the case of Credit Agricole Corporate and Investment Bank v Ahmad Hamad Algosaibi & Brothers Company where the Grand Court of the Cayman Islands appears to have enforced a Dubai Court judgment.*

6.5 *A UAE Court judge would need to be satisfied that the conditions for enforcing a foreign judgment in the laws of the judgment issuing jurisdiction are the same as and not more burdensome those prescribed under UAE law. This is likely to require explanation of the relevant foreign law, possibly supported by an expert opinion. This is not necessarily a straightforward matter for reasons including:*

6.5.1 *by way of example, in Dubai Court of Cassation 269 of 2005 the Dubai Court of Cassation struggled to understand the provisions of English Civil Procedure in relation to the enforcement of foreign judgments. It appears that the evidence that was put before the Court included extracts of the relevant provisions of the English Civil Procedure Rules that cross-referenced a number of other laws and materials that were not before the Court (or explained to it). As a result, the UAE Court did not consider that there was evidence of reciprocity before it; and*

6.5.2 as evidenced by an interim judgment relied on by Aidarous, an execution judge may look to rely on a treaty to demonstrate reciprocity. That interim judgment states:

“To submit the treaty by and between the UAE and UK for recognition of judgments, or to submit the following (conditions decided by the law of that country – Great Britain – to executive judgments and [orders] issued in the UAE)”.

15. The GHF Parties therefore submitted that it appeared to be common ground that the reciprocity condition could be met by demonstrating that the conditions for enforcing a foreign judgment were the same as, and not more burdensome, than those prescribed by article 85 but that DLA was of the view that the reciprocity condition would not be met simply by reason of there being examples of the issuing jurisdiction (here the Cayman Islands) having previously enforced UAE judgments or orders. Consequently, this Court’s apparent recognition of a Dubai Court judgment in *Credit Agricole v AHAB* (a decision relied on by the Plaintiff that was referred to by Mr Stueck in Stueck 1, based on a report to him by Mr Harris of Nelsons although there appears to have been no written judgment delivered) would not enable the GHF Parties to satisfy the reciprocity condition before the UAE Court. The recognition of a Dubai Court judgment in the English case of *Lenkor Energy Trading DMCC v Puri* [2020] EWHC 75 (QB) (*Lenkor*) would also be of no assistance (in so far as recognition by an English court could be seen as relevant in a case involving a Cayman Islands judgment). The GHF Parties noted and relied on the conclusion apparently reached recently by the English High Court in *Hirbodan Management Co v Cummins Power Generation Ltd* [2021] 3 WLUK 446 (*Hirbodan*). This was a judgment of Simon Rainey QC sitting as a deputy judge but unfortunately only a summary of the facts and decision are available. The summary stated that the second claimant was domiciled in Dubai. The defendant applied for security for costs. The advice on Dubai law was that the second claimant was located in the Jebel Ali Free Zone, which was outside the jurisdiction of the Dubai International Financial Centre (*DIFC*) courts, and subject to the Dubai onshore courts. The Dubai onshore courts only enforced judgments when there was reciprocal or mutual enforcement with the other foreign jurisdiction. Historically there had been no reciprocity with England and, although an English judgment in 2020 did recognise an onshore Dubai judgment, it had not been translated into a recognition of mutuality in the Dubai courts. As standalone costs orders did not exist under UAE law, there might be additional problems in enforcement. Mr Rainey QC held that there was a real risk of total non-enforcement of an English costs order in the Dubai onshore courts. Even if the DIFC court did make an order permitting enforcement, unless the second claimant had assets in the DIFC jurisdiction, the court would go no further. The defendant did not have visibility of the second claimant's assets. Therefore, there was a substantial obstacle and additional burden to enforcement amounting to a real risk of total non-

enforcement of a costs order in Dubai. The GHF Parties submitted that findings of another court could be relied upon at an interlocutory stage for the purposes of demonstrating, for example, whether there was a serious issue to be tried (*Sabbagh v Khoury & others* [2014] EWHC 3233 (Comm.) at [202]-[207]) and they relied on *Hirbodan* by way of analogy for the purpose of demonstrating that there was a real risk of substantial obstacles to enforcement in a case involving the need to enforce a costs order in the UAE.

16. The GHF Parties submitted that even if the reciprocity condition could properly be treated as satisfied, they would still need to satisfy the other conditions set out in article 85(2) A – E and that in reliance on DLA’s opinion the Court should conclude that a number of the conditions could not be treated as satisfied. In the DLA April Advice, DLA had opined (at [5.4]) that (underlining added):

“In practice, the Conditions are notoriously difficult to satisfy and leave considerable scope for unhelpful judicial intervention. Whilst a UAE court should not examine the merits of the underlying case, in practice, judgment debtors will often exploit the breadth of the Conditions in an attempt to re-litigate the issues already decided in the substantive dispute. In practice, therefore, a Cayman Islands judgment is highly unlikely to be enforced”.

17. DLA had in the DLA April Advice concluded that (underlining added):

“5.10 we assess the prospect of the UAE courts permitting enforcement of [a Cayman costs order] in the UAE as very low to nil, on the basis [that] the UAE Court of First Instance will determine it has jurisdiction to hear and determine the dispute. As such, GHF are highly unlikely to be able to recover their costs against Mr Jafar onshore in the UAE, notwithstanding the terms of [a Cayman costs order].

...

7.1 ...we consider that:

7.1.1 the UAE onshore courts are highly unlikely to permit enforcement of [a Cayman costs order] onshore in the UAE”.

18. In particular, the requirement in article 85(2) A that the UAE courts did not have “*exclusive jurisdiction*” could not be satisfied. DLA dealt with this issue (at least explicitly) only in the DLA June Advice although the GHF Parties submitted that it had been dealt with implicitly and taken into account in DLA’s analysis and conclusions in the DLA April Advice. At [5.6] – [5.9] of the DLA June Advice, they state as follows (again underlining added):

“5.6 *In the present case, it is our view that the principal question to be answered is what is meant by the word "exclusive" for the purposes of Article 85(2)(a).*

5.7 *In this regard we note that:*

5.7.1 *Aidarous does not provide a definition of what "exclusive" jurisdiction means, or when the UAE Court would determine that it had "exclusive" jurisdiction; and*

5.7.2 *there is nothing in the Civil Procedures Law or the Regulations that addresses the general jurisdiction of the UAE Courts other than what appears in Articles 20 to 41 of the Civil Procedures Law.*

5.8 *On that basis, it is our view that:*

5.8.1 *the Courts would decide jurisdiction on a case-by-case basis in accordance with Articles 20 to 41 of the Civil Procedures Law; and*

5.8.2 *the best evidence of the Court's approach on jurisdiction remains what appears in the Civil Procedures Law at Articles 20 to 41 and the judgments issued in connection with them. In summary, this approach is that, if the UAE Courts consider that they have jurisdiction, they regard that jurisdiction as being exclusive and/or exclusive of any other Court which might regard themselves as having jurisdiction.*

5.9 *In other words, notwithstanding the addition of the word "exclusive" in Article 85(2)(a), in our view the most likely position is that "exclusive" jurisdiction will be given the same meaning as "general" or "original" jurisdiction (or simply "jurisdiction") and that the UAE Court will regard itself as having general, original or exclusive jurisdiction within the meaning of Article 85(2)(a) over the dispute that is the subject of the Proceedings for a number of reasons falling within Articles 20 to 41, including:*

5.9.1 *Mr Jafar being domiciled in the UAE on the basis of Article 31(1) of the Civil Procedures Law, which provides:*

"The court, in whose circuit the defendant's domicile exists, should have the jurisdiction unless the law stipulates otherwise, in case he had not a domicile in the state, the jurisdiction should be given to the court in which area his residence or his workplace exists.";

5.9.2 *the acts and facts around which this case revolves having occurred in the UAE, including the alleged entry into, and performance of, contractual obligations in the UAE. In this regard, Articles 31(2) and 31(3) of the Civil Procedures Law provide:*

"2 - It is possible to institute proceedings at the court in which area the prejudice has taken place, and that is



to be in case of the actions of indemnity for the occurrence of damage on a person or a property.

- 3- *The jurisdiction should be in the commercial matters of the court in which circuit the defendant's residence exists or be given to the court in which circuit the agreement has been concluded, totally or partially executed or to the court in which circuit the agreement should be executed."; and*

5.9.3 *Mr Jafar brought claims in the UAE in connection with these facts and circumstances before he brought claims in the Cayman Islands. In this regard, Article 31(2) of the Civil Procedures Law provides:*

"2 - It is possible to institute proceedings at the court in which area the prejudice has taken place, and that is to be in case of the actions of indemnity for the occurrence of damage on a person or a property".

19. In the DLA April Advice, DLA had concluded that (at [5.10]):

*"...the prospect of the UAE courts permitting enforcement of the Cayman Order in the UAE as **very low to nil**, on the basis the UAE Court of First Instance will determine it has jurisdiction to hear and determine the dispute. As such, [the GHF Parties] are highly unlikely to be able to recover their costs against Mr Jafar onshore in the UAE, notwithstanding the terms of the Cayman Order".*

20. DLA said that their assessment was supported by several decisions of the UAE Court of Cassation, two of which were:

- (a). Cassation Appeal No. 713 of 27 Judicial Year 6/5/2009, in which the Supreme Federal Court held that:

*"Since the provisions of Article 235 of the Code of Civil Procedure provide that the judgments and orders issued in a foreign country may be executed in the United Arab Emirates by applying for execution before the Court of First Instance in the jurisdiction such judgment/order is intended to be executed, the application shall be filed by following the ordinary procedure for filing a lawsuit. **Execution shall not be ordered unless the Courts of the State are not competent to hear the dispute, the subject matter of the judgment or order.**" (emphasis added by DLA).*

- (b). Claim No. 114 / 1993, Cassation, the Dubai Court of Cassation in which it was held that:



"If the UAE Courts have the jurisdiction to consider the claim, the order of enforcement may not be issued even if the foreign judgment to be enforced is issued in accordance with the international rules of jurisdiction as per the laws of the foreign country that delivered the judgment. The petitioner's argument that the local Courts having jurisdiction means that such Courts have the exclusive jurisdiction to consider the claim is invalid. It is established as per the rulings of this Court that there is no room for jurisprudence when it comes to the provisions with substantial evidence. That is to say, if the provision is clear, there is no room to construe it. If no stipulation in the law that UAE Courts have the exclusive jurisdiction, the generality of the said provision may not be limited. Therefore, the contested judgment abided by such argument and relied on that since the UAE Courts have the jurisdiction to consider the claim, no order may be issued to enforce the foreign judgment even if the foreign judgment that delivered it has the jurisdiction to consider the said claim" (Emphasis added by DLA).

21. DLA also considered the position in the DIFC. Their conclusion was that enforcement of a Cayman costs order in the DIFC was likely to be comparatively straightforward, with limited difficulties or obstacles to successful enforcement, if there were assets of Mr Jafar in the DIFC. However, in their opinion, the DIFC courts could not (any longer) be used as a conduit jurisdiction so that it would not be possible to enforce a Cayman costs order through the DIFC court with the purpose of seeking onward enforcement against assets held by the Plaintiff in the (onshore) UAE.
22. The GHF Parties submitted that in these circumstances the Court should conclude that there was a real risk of a substantial obstacle, alternatively substantial obstacles, to enforcement of a Cayman costs order against the Plaintiff in the UAE Courts. This obstacle was, or obstacles were, sufficiently substantial so as to amount to a real risk of non-enforcement. In the circumstances, the Court could be satisfied that it was exercising its discretion in a manner that is not discriminatory but rather on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant (the Plaintiff) or country (the UAE) concerned.
23. In addition, the GHF Parties submitted that the Court ought to have regard to the following circumstances, which supported the conclusion that the GHF Parties' application should be granted: that the Plaintiff did not have a reasonably good prospect of success; that they had demonstrated that there was a high degree of probability that the Plaintiff's claims against the GHF Parties would fail; that the application had not been made oppressively and that they had not delayed making the application.



24. As regards the merits of the Plaintiff’s claim, the GHF Parties argued that there was a high degree of probability that the Plaintiff’s claims in tort against the GHF Parties and his receipt-based claims against the Third Defendant would fail. They pointed to what they submitted were serious flaws and weaknesses in the Plaintiff’s case based on the attribution of Mr Naqvi’s knowledge and actions, and of the knowledge and actions of the so-called Abraaj Leadership, to the GHF Parties; based on his reliance on the concept of a “*directing mind and will*”; based on his reliance on the representations allegedly made to him; and based on his rescission rather than affirmation of the Loans and in the proprietary claims.
25. As regards the quantum of the security for costs to be ordered by the Court, the GHF Parties submitted that since the relevant risk in this case was the risk of non-enforcement (as opposed to additional burdens of obtaining enforcement), security usually would, and in this case should, be ordered by reference to the costs of the Plaintiff’s proceedings. That was the amount that the Court considered the GHF Parties would be likely to recover following a detailed assessment if awarded their costs on a standard basis after a trial: *AHAB v SICL* [2016] (2) CILR 244 (*AHAB v SICL, 2016 (2)*) at [98], applying *Stokors SA v IG Markets Ltd* [2012] EWHC 1684 (Comm.) (*Stokors*) at [5]. They have calculated their recoverable costs to be US\$4,643,620.44.
26. The GHF Parties noted that the Chief Justice had said that the “*exercise of assessment of quantum for these purposes must of necessity be by application of a broad-brush approach*”: *AHAB v SICL, 2016 (2)* [62] and [98]. 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 GHF Parties at trial. The Chief Justice had applied the judgment of Mr Justice Popplewell in *Stokors* at [7] where the learned judge said this:

“although the exercise required looks forward to what will happen at a detailed assessment of costs, it is not the task of the court when hearing an application for security to undertake a similar exercise, to seek to carry out a detailed assessment. It is necessary to approach the evidence about the amount of costs which have and will be incurred, and their reasonableness or otherwise, on a robust basis and applying a broad-brush”.

27. The GHF Parties relied on the deputy judge’s statement in *Tugushev v Orlov* [2018] EWHC 3471 (Comm.) (*Tugushev*) at [23] of the principles to be applied (as guidance in applying the “*broad-brush*” approach) when “*undertaking this general quantification exercise*” which they paraphrased as follows:

“(a). the purpose of an order for security for costs is to provide protection to a defendant who is being sued by a claimant who may well not be



in a position to satisfy a costs order made against the claimant at the conclusion of the action or of a particular stage of an action.

- (b). the protection must be suited for the purpose and therefore cannot exceed any sum which goes beyond what may reasonably be expected to be recovered by the defendant.*
- (c). in determining what may reasonably be expected to be recovered by way of a costs order, the Court should take into account, “the nature of the litigation, or the stage of the litigation, to which the proposed security relates, what that litigation entails in terms of the provision of legal services by both counsel and solicitors, the production of factual and expert evidence, and other associated costs and disbursements.”*
- (d). the costs for which security is sought should be costs which, as an estimate, can be considered by the Court to be both reasonable and proportionately incurred and reasonable and proportionate in amount. GCR O.62, r. 13(2) provides that where the amount of costs is to be taxed on the standard basis, the allowable costs will be those which are not only reasonable but are also proportionate to the matters in issue having regard to (i) the amount of money involved; (ii) the importance of the case; and (iii) the complexity of the issues.*
- (e). the quantification of security is an objective assessment to be carried out by the Court as best it can, based on the available evidence and information.*
- (f). although quantification of an order for security for costs is necessarily "broad-brush", the Court must interrogate the estimates of incurred and future costs provided by the applicant. This interrogation will (emphasis added by the GHF Parties):*

*“...not nearly approximate to a detailed assessment of costs, but it will be similar to a summary assessment or a costs budgeting exercise. To this end, it is incumbent on the applicant to provide a sufficiently detailed breakdown of costs in support of its application to satisfy the Court that the amount of security which will be ordered will provide the necessary protection to the applicant and avoid any unnecessary prejudice to the respondent. **In the event that a sufficiently detailed***



breakdown is before the Court, in order to ensure that the security ordered provides the necessary protection to the applicant, the Court should resolve any doubt in favour of the applicant. However, if there is no sufficiently detailed breakdown of costs before the Court, any uncertainty arising from the inadequate breakdown should be resolved in favour of the respondent.”

- (g). *an allowance should be made for any reduction of costs which would be made in an eventual assessment of costs.*
- (h). *the applicant bears the burden of satisfying the Court that the quantum sought is in accordance with the above principles.”*

28. The basis on which the GHF Parties’ figure of US\$4,643,620.44 had been calculated was explained by Mr Lewis in Lewis 2. Mr Lewis exhibited a costs schedule which he had instructed the GHF Parties’ Cayman attorneys, Walkers, to prepare and which provided an overview of the GHF Parties’ estimated legal costs and disbursements up until the conclusion of the trial in the Plaintiff’s proceedings. Mr Lewis confirmed that he had reviewed the schedule, which he considered to be accurate and the best estimate of the costs of the proceedings that could be provided at this stage. He explained the methodology which had been applied in preparing the schedule, which can be summarised as follows:

- (a). the GHF Parties calculated their (estimated) total attorney and counsel costs in the sum of US\$4,253,178.38. To do so, they first considered the various steps that needed to be completed before trial and identified eight phases: pleadings, directions and case management hearings; discovery, witness statements, experts, trial preparation, the trial and general correspondence.
- (b). for each phase they estimated how many hours of time would reasonably need to be spent on that particular phase, by reference to further work streams falling within each phase, by attorneys of varying levels of seniority and by leading and junior counsel.
- (c). they then multiplied the total hours by the hourly rates stipulated in Practice Direction No 1/2011 at [3].
- (d). they also calculated their (estimated) disbursements in the sum of US\$1,666,395.58. In calculating the disbursements, the GHF Parties applied certain assumptions, which were explained in the costs schedule.



- (e). they then added together the estimated total attorney and counsel costs in the sum of US\$4,253,178.38 and the estimated disbursements in the sum of US\$1,666,395.58, giving a total of US\$5,919,574. Mr Lewis, in Lewis 4 at [18] – [28] said that he considered this to be “*overly conservative*”.
- (f). to calculate what the GHF Parties may reasonably be expected to recover by way of a costs order, assuming recovery on the standard basis, they first applied a 30 percent reduction to the total attorney and counsel costs, reflecting the estimated reduction of costs which would be made in an eventual assessment of costs on the standard basis (the total estimated recoverable attorney costs were calculated at US\$2,977,224.86) and then added the estimated disbursements - which are not required by either Practice Direction No 1/2001 or Practice Direction No 1/2011 (the *Practice Directions*), to be discounted - in the sum of US\$1,666,395.58, to produce the total of US\$4,643,620.44.
- (g). on this basis, the amount attributable to each of the eight phases (for the discounted recoverable costs of US\$2,977,224.86) was as follows:
 - (i) pleadings: US\$243,924.10.
 - (ii) directions and case management hearings: US\$68,784.80.
 - (iii) discovery: US\$1,325,873.50.
 - (iv) witness statements: US\$241,313.28.
 - (v) experts: US\$97,431.69.
 - (vi) trial preparation: US\$597,686.25.
 - (vii) the trial: US\$505,636.25.
 - (viii) general correspondence: US\$125,207.25.

29. The GHF Parties submitted that their estimated costs were reasonable and proportionate to the matters in issue having regard to, (i) the amount of money involved; (ii) the importance of the case; and (iii) the complexity of the issues, as to which:



- (a). the Plaintiff seeks damages in the sum of US\$267 million and (as yet unparticularised) damages for (also as yet unparticularised) consequential losses.
 - (b). the Plaintiff seeks restitution and/or equitable compensation in the sum of approximately US\$108 million from the Third Defendant and/or proprietary remedies over the amount of approximately US\$108 million.
 - (c). the Plaintiff's statement of claim raises a very large number of (contested) issues of fact covering a lengthy period, which the GHF Parties consider to be the period between June 2015 and April 2019.
 - (d). very serious (and contested) allegations of fraudulent conduct have been made against the GHF Parties, both as regards their alleged participation in a "systematic fraud" on investors in the GHF Fund and as regards their alleged participation in the fraud allegedly practised on the Plaintiff.
 - (e). seven causes of action are advanced against the GHF Parties, as noted above.
 - (f). each of the seven causes of action advanced against the GHF Parties or the Third Defendant are factually and legally complex, albeit each to varying degrees, and each raise (on the GHF Parties' case) issues of Cayman Islands and UAE law.
30. On the question of the form of the security or the manner in which it should be given to the GHF Parties, the GHF Parties argued that cash or a bank guarantee should be provided. They considered that the undertaking offered by the Plaintiff, which I discuss further below, was not security and should not affect the Court's decision on whether to grant security. The undertaking failed to provide the GHF Parties with "real security" since DLA has opined that, "enforcement of such a contract is unlikely to be a straightforward task in the UAE", and that there could well be, "protracted litigation involved in the enforcement of any such undertaking".

The parties' submissions – the Fourth Defendant

31. The Fourth Defendant supported the GHF Parties' submissions with some differences of emphasis and reliance on the evidence of its own witnesses, in particular the evidence of Mr Fox. In particular, the Fourth Defendant emphasised that the Court had a broadly based discretion under O.23, r.1(1)(a) to order security for costs whenever in all the circumstances of



the case it was “*just*” to do. The real risk of a costs order not being enforced in the relevant foreign jurisdictions was not the only or necessarily the dominant consideration. In the present case, there was a real risk of non-enforcement but there were also significant other factors which weighed strongly in favour of making an order for security for costs.

32. The Fourth Defendant made two other preliminary points:

(a). as the Chief Justice stated in *Barclays Private Bank & Trust (Cayman)* (1998 CILR 313 at page 321):

“The case law suggests that although it is a matter of discretion, it is the usual ordinary or general rule of practice of the court to require a foreign plaintiff to give security for costs, because it is ordinarily just to do so”.

(b). the focal concern of the modern case law was not to ensure that a plaintiff was seldom required to provide security or that orders for security were only exceptionally made but to ensure that such orders were not imposed in an arbitrary or discriminatory manner (see the Chief Justice’s judgment in *AHAB v SICL* at [15]). There was also a concern to avoid unreasonable burdens upon defendants in the context of security of costs and discrimination in favour of foreign plaintiffs: *AHAB v SICL* at [21].

33. The Fourth Defendant submitted that the evidence showed that there was a real risk that it would be unable to enforce a costs order against the Plaintiff:

(a). the Fourth Defendant also proceeded on the assumed basis that the Plaintiff’s assets (or at least his appreciable assets) were held in the (onshore) UAE so that it would be necessary for it to enforce a costs order in the UAE.

(b). the Fourth Defendant relied on Fox 1 and Fox 2.

(c). it submitted that Mr Fox was well qualified to opine on applicable UAE law and the real world, practical prospects of a Cayman costs order being enforced by the onshore UAE courts there. He was the managing partner of the DWF Dubai Office, Middle East Head of Dispute Resolution for DWF, a practitioner registered by the Dubai Legal Affairs Department, a Part I and II registered practitioner in the DIFC Courts and someone who had practised in the UAE for more than thirteen years. DWF are the UAE attorneys acting for the Fourth Defendant. It was evident from Mr Fox's affidavits, the



Fourth Defendant submitted, that he had considerable experience and knowledge of the enforcement of foreign judgments in the UAE.

- (d). Mr Fox was licensed as a legal consultant in the Emirate of Dubai and authorised to practice and advise on Dubai law, save that he was not authorised to plead and represent parties before the Dubai courts. To supplement his evidence, he arranged for drafts of Fox 1 and Fox 2 to be reviewed by a local lawyer, Sultan Hadif Al Owais, who is a UAE national who did have rights of audience before the onshore UAE Courts and was a native Arabic speaker. Sultan Hadif Al Owais agreed with the legal views expressed therein.
- (e). Mr Fox had concluded that there were “*significant and probably very significant hurdles to enforcement of a Cayman Costs Judgment in the UAE*”. Indeed, he was “*unaware of any instances where a Cayman Islands judgment or order has been successfully enforced in onshore UAE courts*”. In addition, the Regulations had been promulgated only recently and remained “*largely untested*”.
- (f). on the reciprocity condition, Mr Fox had agreed with Mr Al Aidarous that it was still possible for a party seeking enforcement of a foreign judgment to establish reciprocity by reference to the law of the issuing state that established mutuality; however, he was unaware of any case in which that approach had succeeded. Furthermore, he had exhibited a copy of a judgment of the Dubai Court of Cassation (the highest Court in that Emirate – Case No 269/2005) in which the UAE court declined to enforce an English judgment due to lack of reciprocity (the English laws on enforcement of foreign judgments were regarded as insufficient for this purpose). The absence of a written judgment in *Credit Agricole v AHAB* (which the Fourth Defendant understood to be a default judgment) meant that it could not be relied on in proceedings before the UAE courts.
- (g). on the exclusive jurisdiction issue, Mr Fox had noted in Fox 1 that the jurisdiction of the UAE Courts was governed by articles 20 to 24 of the Civil Procedure Law, which provided for jurisdiction of the UAE Courts in defined circumstances. He said that while the term “*exclusive*” jurisdiction was not used in these articles, they were to be considered mandatory since they were deemed to be matters of “*public order*” so that any agreement regarding jurisdiction that was contrary to the articles was void. In Fox 2, he summarised his views as follows:



“... it is my position that the UAE courts derive [their] exclusive jurisdiction pursuant to the provisions of international jurisdiction contained in the Civil Procedure Code and in particular Articles 20-24. Case law, as cited in Fox 1, confirms that in respect of these Articles the UAE Courts have based their authority and jurisdiction on territoriality which they consider to be a matter of “public order””.

(h). Mr Fox had, in Fox 1, provided extracts from the case law referred to in the passage from Fox 2 quoted above. I set about below three representative extracts out of the six judgments Mr Fox relied on (including his underlining):

(i). Union Supreme Court Case No.145/Judicial Year 20 349:

"It is a general principle of private international law that the basic rule with regard to the authority of the courts of the UAE is territoriality in the sense that the doing of Justice is a matter of public interest carried out by the State within the limits that will achieve that interest, through its national Judiciary which the UAE regards, to the exclusion of foreign judiciaries, as the fit body to achieve that aim. The international jurisdiction vested in the judiciary of the UAE is thus a matter of public order as it is connected with the sovereignty of the State. It may not be waived in connection with disputes having a foreign element, and transferred to the jurisdiction of a foreign judiciary, save exceptionally and within the tightest limits, when the interests of Justice so require, and in order to ensure the smooth progress of Justice, as is the case in actions relating to land. If the land is located abroad, then the UAE courts will not have Jurisdiction over it, regardless of the parties to the dispute or the subject matter or origin of the obligation. Jurisdiction to try such an action will be vested in the court of the area where the land is located, in order to save effort in proceedings and costs. So far as concerns personal actions for the obtaining of a personal right, these are not regarded as actions in rem, and those considerations that would apply in allowing Jurisdiction to a foreign court in respect of land do not apply in respect of such actions, under the provisions of articles 20 and 21 of the Law of Civil Procedures".

(ii). Union Supreme Court Case No.732/Judicial Year 24:

"Articles 20 and 21 of the Law of Civil Procedures show that the international Jurisdiction of the UAE courts is a matter of authority related to the sovereignty of the State over its own national territory, and no agreement to the contrary will be valid as this is a matter of public order. In the present case, the agreement was for the chartering of aircraft between Ashqabad and Abu Dhabi. That means that part of the agreement was to be performed within the UAE, and therefore the courts of the UAE have Jurisdiction".

(iii). Abu Dhabi Court of Cassation Case no. 6101 Judicial Year 2:



"The provisions of articles 20 and 21(3) of the Law of Civil Procedures is that, as a general rule, the authority of the judiciary of the United Arab Emirates is territorial, because the instrument of justice is a matter of public interest and is exercised by the state for all persons who reside within its borders, and such interest is achieved by the national judiciary within the limits that the state sees fit - excluding foreign judiciaries - to achieve such objectives in its own territory".

- (i). Mr Al Aidarous had expressed the view that the exclusive jurisdiction of the UAE courts was limited to disputes concerning real estate in the UAE and motions to set aside domestic UAE arbitration awards. However, the basis for this conclusion was unclear. No provisions of the Civil Procedure Law (Code) had been identified and Mr Al Aidarous had not engaged with the decisions identified by Mr Fox. The Fourth Defendant submitted that Mr Al Aidarous' conclusions were insufficiently reasoned to be relied on.
- (j). in Fox 2, Mr Fox said that it was irrelevant that these cases pre-dated the passing and coming into force of the Regulations since the Regulations did not amend any of the provisions in the Civil Procedure Law (or Code) concerning the UAE courts' jurisdiction including articles 20-24. The Regulations did repeal and replace article 235 which previously dealt with the enforcement of foreign judgments. Mr Fox said that while it was his understanding that the Regulations were implemented primarily to modernise and make more efficient the court process, he had seen no evidence that this was the main reason for the introduction of the Regulations. The Regulations in his opinion may signal a shift to a more permissive enforcement regime but they remained largely untested.
- (k). Mr Fox considered that an attempt by a foreign court to impose an obligation on an individual, such as the Plaintiff, based in the UAE (who may also be a UAE national) to pay the costs of legal proceedings taking place in a foreign court may be seen by the UAE courts as offending UAE public order, so that enforcement of a costs judgment would be precluded by article 85(2) E. He had never seen a standalone costs order made by the UAE courts and although these courts are somewhat familiar with costs orders in the context of the enforcement of arbitration awards, he had experience of cases in which the UAE court had refused to enforce that part of a foreign award that related to the award of attorney's fees.
- (l). Mr Fox also noted that there had been previous proceedings in the UAE courts involving the Plaintiff and two former Abraaj executives directly related to the first two



Loans. Mr Fox considered that there was therefore a risk that the orders and judgments in the prior proceedings might give rise to a bar on enforcement of a Cayman costs order (an issue not addressed by Mr Al Aidarous).

- (m). Mr Fox agreed with DLA that it was unlikely that the Fourth Defendant would be able to enforce a Cayman costs order in the DIFC with the aim of then enforcing the DIFC judgment in the UAE onshore courts against the Plaintiff's onshore assets. He noted that Mr Al Aidarous had disagreed with this view and had said that "*there is no legal restriction on the enforcement of DIFC Court judgments by the onshore Dubai Courts*". However, even Mr Al Aidarous had conceded that this is "*not entirely straightforward*", and it was to be noted that Sir Richard Field when sitting as a Justice of the DIFC court had said that the Joint Judicial Committee (established to determine jurisdictional disputes between the Dubai Courts and the DIFC Court) was "*hostile to conduit enforcement*" (see *Tavira v Re-Point Ventures* [2017] DIFC CFI 026, 17 December 2017, at [55]).
 - (n). Mr Al Aidarous' evidence did not establish that any of Mr Fox's concerns were without substance, still less that all lacked any real foundation. Furthermore, the entirely untested nature of the Regulations showed that this Court is plainly in the territory of real risk of unenforceability on objectively justifiable grounds. Things would be different if there was a clear track record of the UAE court enforcing Cayman costs orders, but the Plaintiff and his advisers could not point to one.
34. The Fourth Defendant relied on the following circumstances as establishing that it was just for security to be ordered in some amount:
- (a). there were no reasons to depart from the ordinary or general rule of practice relied on by the Fourth Defendant (see above). The security for costs application was made on the assumption that the Plaintiff would be unsuccessful at trial and would be ordered to pay costs. The Plaintiff had declined to identify any significant assets in the Cayman Islands available to meet a substantial costs order and this had raised the question of how and from where the Fourth Defendant's costs will be paid. The Plaintiff's asset position (assumed without particulars to be restricted to the UAE) was entirely opaque. There was no guarantee that assets would remain in the UAE for the duration of the proceedings. No roadmap or comfort of any description had been provided by the Plaintiff as to how the Fourth Defendant would be able to recover its costs. The Plaintiff appeared to want to rely on his reputation and standing but the security for costs

jurisdiction existed to ensure that a defendant should not have to rely on reputation and honour. While it was only a small part of the picture, there was a real risk that enforcement may not be possible in the UAE and that in the event that the Plaintiff wanted to resist enforcement in the UAE, he would have multiple arguments in his favour, any one of which would be fatal to making the Fourth Defendant whole. In the circumstances, the balance of justice favoured requiring the Plaintiff to protect the Fourth Defendant's position. If the Plaintiff was successful, he would suffer no prejudice save for a restriction on the use of funds for the period of the proceedings – and no prejudice whatsoever if an acceptable bank guarantee was provided. There was no suggestion that the grant of security would stifle his claim or be oppressive. There was no basis for saying that the Plaintiff's application had been late or delayed. The Plaintiff had made much of his wealth and reputation, and he would therefore not suffer any prejudice by being required to put up the funds to which he claims to have easy access.

- (b). the potential difficulties facing the Fourth Defendant in the UAE pointed strongly to the grant of security. The Plaintiff had brought very substantial claims against the Fourth Defendant. The Fourth Defendant will undoubtedly incur significant further costs in defending those claims. In the event Mr Jafar succeeds, the Fourth Defendant will likely be liable for the Plaintiff's costs, and those costs will be easily recoverable. However, if the Plaintiff loses, there was a real risk that the Fourth Defendant would be unable to recover its substantial costs of these complex and substantial proceedings.
- (c). furthermore, the Fourth Defendant submitted, if the Plaintiff's claim fails, the Court may well conclude and make a finding, when deciding to dismiss the claim, that the Plaintiff had deliberately given false evidence and brought what amounted to a knowingly false claim. The Plaintiff's claim may fail because the Court finds that all (or at least some) of the representations were not made or that the Plaintiff already had knowledge of the falsity of the alleged representations or because the Plaintiff had ample knowledge of the falsity of the alleged misrepresentations well before 30 April 2019. If the Court makes any of these findings, there was a substantial chance that it would also find that the Plaintiff had given false evidence.

35. As regards quantum, the Fourth Defendant sought security for its costs in the sum of US\$6.2m. The basis on which this sum had been calculated was explained in a document dated 22 April 2021, entitled "*Fourth Defendant's Costs Estimate*", paragraphs 36 to 48 of Hayward 2 and



paragraph 11 of Hayward 3. The Fourth Defendant's Costs Estimate had been prepared by Ogier on Mr Hayward's instructions. In summary, the explanation was as follows:

- (a). the Fourth Defendant's Costs Estimate set out the Fourth Defendant's costs up to 31 March 2020 and thereafter up to and after trial. Ogier also identified eight categories of costs but the categories they used were slightly different from those used by Walkers. They were: pleadings; initial procedural matters; discovery (production and review of discovered documents); factual witness evidence; expert witness evidence; trial preparation; trial and post-trial work.
- (b). the costs to 31 March 2020 were in total US\$1,349,344.25 comprising costs for Ogier of US\$985,691.36, costs of the Fourth Defendant's UAE legal expert and forensic advice of US\$140,100.90 and disbursements of US\$223,551.99.
- (c). estimates for each category were as follows (with Ogier's estimate being denominated in US\$ and Leading Counsel's in pounds sterling and with separate estimates for each of Ogier's five fee earners being provided):
 - (i). pleadings: Ogier 180,388.50 – Counsel: 33,750.00
 - (ii). initial procedural matters: Ogier 173,588.50 – Counsel 16,875.00
 - (iii). discovery: Ogier 1,229,117.50 – Counsel 60,750.00
 - (iv). factual witnesses: Ogier 267,082.50 – Counsel 50,625.00
 - (v). expert witnesses: Ogier 112,713.25 – Counsel 23,625.00
 - (vi). trial preparation: Ogier 526,940.00 – Counsel 185,625.00
 - (vii). trial: Ogier 474,680.00 – Counsel 148,500.00
 - (viii). post-trial: Ogier 250,295.00 – Counsel 67,500.00
- (d). Mr Hayward provided in Hayward 2 a brief explanation of the basis on which each estimate had been made and noted the following with respect to discovery:

“This estimate assumes that the volume of documents to be reviewed by Ogier will be in the 10s of terabytes and that at least three levels of review will be required. Even with the use of an e-discovery platform this will require manual review and identification of relevant and privileged documents. It will also require high level Partner and Leading Counsel supervision. Leading Counsel would also review documents of particular relevance or importance to the issues in dispute. The work will include sourcing all discoverable documents, preparing and agreeing on search terms, coordination with document review service providers and undertaking the review on any e-discovery platform, any necessary document translations and redactions, finalising the list of documents in accordance with GCR Order 24, and the logistics of service of the documents. The estimate also includes the costs of inspection, the reviewing and considering documents produced by the other parties on discovery and further factual enquiries or requests for further discovery, or specific discovery, as the case may be after having inspected, reviewed and considered the other sides' documents ...”.

- (e). in Hayward 3, Mr Hayward responded to the challenges made by Mr Stueck in Stueck 1. The Fourth Defendant said that contrary to Mr Stueck’s assertion, it *had* taken into account when preparing its estimate, the Related Claims and had made efforts to ensure that the estimate was limited only to the costs of defending the Plaintiff’s claim.
- (f). the Fourth Defendant argued that the Court will normally resolve any dispute about quantum in favour of the applicant for security and relied on the following statement by Mr Justice Popplewell in *Stokors* at [8] and [9] (and endorsed by the CJ in *AHAB v SICL* at [49]) (underlining added by the Fourth Defendant):

“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 to be on the one hand too high, or on the other hand too low. If a defendant is under-secured, the likelihood is that that 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 cost 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”.



- (g). adopting this approach, security was sought within litigation concerning substantial sums – in excess of US\$250 million – involving complex issues of fact (including the difficult reconstruction of events within the Abraaj Group as a result of the Plaintiff’s pleaded case on its inner-workings) and law (both the law of the Cayman Islands and that of the UAE), much of which was disputed. The Fourth Defendant had made a careful and prudent estimate of its likely costs which the Court could and should rely on.
- (h). the Court should order security in the amount of 90% of the estimated costs as there was a reasonable possibility of indemnity costs being ordered in the event that the Plaintiff’s claim failed. The Court was not being asked to make any adverse findings against the Plaintiff at this stage but rather to recognise and take into account the fact that there are special factors in this case which mean that an order on the indemnity basis against the Plaintiff as a failed plaintiff is potentially available to the Fourth Defendant.
- (i). the Fourth Defendant noted that while under English law, a failed plea of fraud almost inevitably leads to the award of indemnity costs (at least absent some countervailing factor) this is not the position in this jurisdiction, as was stated by Justice Richards in *Traded Life Policies v Jeremy Leach* (unreported, 26 January 2021) where she observed at [105]:
- “...the matter is still a discretionary one. It does not appear that without more, an allegation of fraud which does not succeed must inevitably give rise to an award of indemnity costs such that an award of security for costs must be calculated on that basis”.*
- (j). the Fourth Defendant submitted that Justice Richards’ dictum recognised that indemnity costs *may* be awarded if an allegation of fraud fails, and security *may* be calculated on that basis (or at least factoring in the possible award of indemnity costs).
- (k). in the present case, there was a realistic prospect of an award of indemnity costs if the Plaintiff’s fails in his claim. The reasons for this included – but were not limited to – the pursuit of an allegation of deceit and conspiracy to use fraudulent misrepresentations. Beyond the *possible* award of indemnity costs due to the failure of an allegation of fraud, the Fourth Defendant relied on various matters. First, that if the Plaintiff fails on the alleged misrepresentations, it was unlikely to be because his claim was founded on a mistaken recollection. It was more likely to be because his evidence

was not honestly given as to his communications with Mr Naqvi. Given how lightly documented those communications were, there was a serious possibility that this Court will find that, even if the Plaintiff was not fully apprised of all fraudulent conduct with the Abraaj group, he was aware of the Group's financial difficulties or position in such a way as to render his case that he was misled by Mr Naqvi to be a case not put forward honestly and in good faith. Secondly, there was already prima facie evidence that the Plaintiff was putting forward a dishonest case. The remittance information for each of the Loans had stated "*INVESTMENTS*". When the Fourth Defendant had raised this with the Plaintiff, he, through his legal advisers, had stated that he "*had no involvement and was completely unaware of that request or ... compliance with it.*" However, the First Defendant had subsequently disclosed an email communication in which Mr Naqvi requested that the remittance information mention "*investments*" – this being "*important*" – to which the Plaintiff was privy. That contemporaneous request was carried out. The Fourth Defendant says that it is inconceivable that this was done other than upon the instructions of the Plaintiff. Thirdly, the Plaintiff's case had already undergone significant and problematic developments and serious inconsistencies already existed between the Plaintiff's pre-action correspondence, the contemporaneous documents, and the Plaintiff's statement of claim and Amended Reply to the Fourth Defendant's Defence.

36. As regards the form of the security, the normal and normally just position required payment into Court but the equivalent protection from a bank guarantee from a first-class reputable bank was often substituted. This approach should be followed in this case. The Fourth Defendant agreed with the GHF Parties that the Plaintiff's proposed draft contractual undertaking was wholly inadequate. It provided the Plaintiff with a continuing opportunity to resist enforcement by taking points in the UAE courts such as conflict with another judgment and public order. Mr Stueck had asserted that he had been informed by Mr Al Aidarous that "*there should be no difficulties in principle or in practice*" in enforcing the undertaking in the UAE but had failed to explain how this was the case, and Mr Al Aidarous had not addressed the issue in his report. Furthermore, the Fourth Defendant would still have to litigate in the UAE courts, and this will take time, and no provision was made for the costs of the UAE court claim, which might be limited to a sum of less than US\$1,000.



The parties' submissions – the Plaintiff

37. The Plaintiff noted that he was being asked put up over US\$10 million by way of security and that the cost of so doing could be considered by comparing the interest which he will receive on the security deposit (0.05%) with a conservative weighted average cost of capital of, say, 4.5%. The difference was approximately US\$445,000 per year. The Plaintiff had sought to accommodate any legitimate concerns that the GHF Parties and the Fourth Defendant might have by offering a contractual undertaking governed by a law of their choosing and had offered to submit to the jurisdiction of one or more courts of their choice for the purposes of enforcing it. The Plaintiff had the means to provide security but the question for the Court was whether he should be required to do so as a matter of law and of justice. The GHF Parties and the Fourth Defendant had failed to make out a case to establish the jurisdiction on which any order for security might be made, let alone a case for saying that it would be just to make any such order on the facts of this case.
38. The Plaintiff did not challenge the account given by the GHF Parties and the Fourth Defendant of the legal principles to be applied by the Court when deciding whether to order security for costs, save that he challenged the Fourth Defendant's submissions as to whether and when an order for security for costs could be made by reference to an award of indemnity costs. However, the Plaintiff vigorously challenged the evidence of UAE law relied on by the GHF Parties and the Fourth Defendant, challenging its reliability, cogency and presentation and the qualifications of DLA and Mr Fox to give it. The Plaintiff also argued that even if the Court was minded to order security, it should be provided only on a phased basis and in an amount substantially less than that claimed by the GHF Parties and the Fourth Defendant, taking into account a proper apportionment of the costs to be incurred in relation to the Plaintiff's claim and the Related Claims.
39. The Plaintiff argued that he was not obliged to answer questions about his financial position and assets (there was no question that GCR O.23,r.1(1)(b) applied in this case) and that no adverse inference could be drawn from his failure to do so. He criticised the GHF Parties and the Fourth Defendant for suggesting without proper foundation that he had been improperly evasive and that his confirmation of his willingness to pay an adverse costs order should not be believed or doubted. He pointed out that security for costs was not the price that a foreign plaintiff had of necessity to pay in order to litigate in this jurisdiction. The Court had to evaluate and assess what weight to attach to the evidence. The issue for the Court was whether it was just to order security. The case law established that there needed to be a real risk on objective grounds that a costs order would not be enforceable. There had been no case whether the



jurisdiction had been exercised in the absence of such a risk. The Plaintiff submitted that mere speculation by the experts as to what could prove to be troublesome when a costs order came to be enforced was insufficient. If that were so, it would effectively reverse the burden of proof and shift it to the Plaintiff.

40. The Plaintiff submitted that, as regards the issues of UAE law, Mr Al Aidarous was the only properly qualified witness, and his evidence was clearly to be preferred to that of DLA and Mr Fox. Mr Al Aidarous was licensed to practice in the UAE Federal Courts (and the DIFC Courts since 2009) and had been in practice in the UAE for approximately 30 years. His initial years were as an in-house legal counsel at various leading financial institutions but in 1993 he entered private practice as the managing Partner of a leading local firm before establishing Al Aidarous International Legal Practice in 1998. His has experience of complex litigation and arbitration in banking, insurance, construction, corporate, commercial, and maritime matters and often sits as an arbitrator in domestic and international arbitrations. He provided a declaration as an expert witness in accordance with GCR O.38 and the FSD Users Guide confirming his independence and acknowledging that his overriding duty was to the Court.

41. The Plaintiff noted and relied on the following propositions and analysis in Mr Al Aidarous' evidence:

- (a) he disagreed that there was a real risk that a Cayman costs order would not be enforced against the Plaintiff in the UAE. In his opinion, there was no legal impediment to enforcement of such an order in the onshore UAE Courts. Article 85 of the Regulations set out a clear mechanism for doing so.
- (b) as to the reciprocity condition, Mr Al Aidarous stated as follows:

“29. *In practice, reciprocity can be established simply by demonstrating to the onshore UAE Courts that the conditions for enforcing a foreign judgement stipulated in the law of the issuing jurisdiction are the same as those prescribed under UAE law, more precisely, the conditions stated under Article 85 of the [Regulations]. In other words, what needs to be established is that the law of the jurisdiction of the judgment to be enforced should not be more burdensome than UAE law.*

30. *In this respect, establishing the foreign law before the UAE Courts is considered by the UAE Courts as a factual issue where the applicant who seeks to enforce the foreign judgment can and should discharge such burden of proof by producing evidence of the law of the issuing jurisdiction to the UAE Court.*

.....

32. *Accordingly, in deciding an application for enforcement of a foreign judgment, the UAE Courts will be satisfied if it is established that the requirements for enforcing foreign judgments under the laws of the issuing jurisdiction are similar to those stipulated under UAE law. However, the UAE Courts will not consider whether or not the courts in the issuing jurisdiction have actually enforced UAE Court judgments, and vice versa is correct, i.e., if it is established before the UAE Court that the law of the issuing jurisdiction imposes requirements for enforcing foreign judgments (including UAE judgments) that are more burdensome than those prescribed under UAE laws, the UAE Courts will not enforce the foreign judgment simply because the courts in the issuing jurisdiction have enforced UAE Court judgments”.*

(c). as to the issue of what was meant in article 85(2) A by “*exclusive jurisdiction*” and when that article would preclude enforcement of a foreign judgment, Mr Al Aidarous said as follows (underlining added):

“17. *As part of the efforts designed to attract foreign investment and ensure investor confidence, in 2018 the UAE reformed the requirements for the recognition and enforcement of foreign judgments by issuing the Cabinet Resolution, which replaced the provisions of Article 235 (2)(a) of the CPC by the provisions of Article 85(2)(a) of the said resolution. This reform has, and was intended to, change the law previously in place in order to facilitate the enforcement of foreign judgments to the degree necessary for foreign investors to have real certainty that the judgments of foreign courts could be enforced in the UAE.*”

.....

19. *Whereas historically enforcement of a foreign judgment could only be ordered after it was verified that the relevant UAE Courts did not have jurisdiction, after the change in the law it must be demonstrated that the relevant UAE Courts have exclusive jurisdiction. This is a major change that has lifted one of the main obstacles to the enforcement of foreign judgements.*

20. *The amendment has had a notable effect in practice. Prior to the resolution, enforcement of foreign judgments was relatively rare. As I explain at paragraph 50 below, I am aware that, since the change in the law, many orders for the enforcement of foreign judgments have been issued by the onshore UAE Courts using the simplified procedure I refer to at paragraph 49 below (although the information which I am able to obtain about those orders is very limited).*

.....



34.1 The matters which fall within the UAE Courts exclusive jurisdiction concern issues such as disputes over real estate located in the UAE and motions to set aside arbitration awards where the seat of the arbitration was within the UAE” UAE

- (d). Mr Al Aidarous considered that Mr Fox was wrong to rely on article 24 of the Civil Procedure Law (which said that any agreement to contract out of the rules on international jurisdiction was void). Articles 20-23 of the Civil Procedure Law were concerned with the question of whether the UAE courts had jurisdiction and the effect of article 24 was that the onshore UAE courts could still take jurisdiction even where the parties had agreed that it did not have jurisdiction. It did not mean that, if the UAE court had and assumed jurisdiction under articles 20-23, it followed that the UAE Court was to be understood as having exclusive jurisdiction for the purposes of article 85 (to the exclusion of a foreign court such that any judgment of a foreign court seized of the dispute would be unenforceable).
- (e). the Regulations had significantly eased the procedure for recognition of a foreign judgment. In the past recognition of a foreign judgment entailed filing a full-fledged civil action before the Court of First Instance against payment of a maximum fee of AED 40,000 and involved a trial that could last for a couple of months and be escalated to the Court of Appeal and Court of Cassation, taking sometimes a couple of years. However, under the new regime enforcement could be made by a simple application made to the Execution Judge who may issue an order, after satisfying himself that the requirements of article 85 are met, within just a few days.
- (f). while Mr Al Aidarous had acknowledged that due to restrictions on what was publicly available, it had been difficult to obtain court documentation on foreign judgments enforced under the new regime, he had spoken to colleagues and was aware that dozens of orders had been issued to recognise and enforce foreign judgments under the new regime (and he had obtained some examples of the documentation in such cases).
- (g). Mr Al Aidarous failed to understand Mr Fox’s concern that a Cayman costs order would not be enforced simply because it might include an award for interest. Although interest is prohibited pursuant to Islamic principles, the Union Supreme Court had permitted interest as this was a necessity in the absence of fully developed Islamic banking and financial products in the UAE, an interpretation which had been confirmed by several rulings of the Union Supreme Court, Dubai Court of Cassation. Indeed, hundreds of judgments had been issued by the UAE courts and most, if not all, provide



for interest pursuant to the provisions of article 76 of UAE Federal Law No. 18/1993 on Commercial Transactions. He also failed to understand the statement made in Fox 1 (at [4.26]) that establishing *res judicata* can be challenging. Mr Fox's view was based on one case dealing with the enforcement of an arbitral award under the New York Convention. All that the applicant needed to do was to establish to the UAE Execution Judge that the judgment to be enforced was final.

42. Mr Bloch QC, for the Plaintiff, was highly critical of DLA's evidence. He submitted that it was seriously flawed and not the kind of evidence which should be put before the Court. DLA had at least initially failed to identify who within their firm had prepared the DLA Advice and therefore whose evidence it was; DLA had failed to explain and demonstrate the expertise of those who had prepared the DLA Advice; had failed to show any attempt to be impartial (indeed the DLA Advice was obviously not impartial) and the DLA April Advice was both incomplete and misleading. Mr Bloch invited the Court to reject DLA's evidence in its entirety and to make it clear that such evidence had failed to meet the standard required by the GCR and this Court for expert evidence.
43. The Plaintiff accepted that in an interlocutory application for security for costs, it was not necessary for expert evidence to be in the form of an expert report, citing the judgment of Mrs Justice Moulder in *Pipia v BGEO* [2019] EWHC 325 (*Pipia*), at [25] and [30], where the learned judge had permitted reliance on a witness statement that exhibited a memorandum of law prepared by a foreign law expert. Nonetheless, he submitted that the expert giving evidence must still demonstrate that they are experts skilled in such law and cited a number of authorities on this point. He submitted that it was not enough to say that the witness in fact knows what the law is with respect to the part in dispute but instead must be able to show that he is a person who, by reason of his being generally skilled in the law of the foreign country, may be expected to know the answer to the particular question upon which information is sought. He submitted that both DLA and Mr Fox failed this test. Furthermore, their evidence was not to be relied on or should be given substantially less weight than the evidence of Mr Al Aidarous because they had failed to verify their evidence by an appropriate declaration of independence. They had failed to confirm that they were giving unbiased evidence intended to assist the Court. The Plaintiff submitted that the approach to be followed in this case had been set out by Murphy J in this Court in *Allied Investment Fund v Johnson* [1999 CILR 237] at 248, where the learned judge considered the required approach to a dispute of expert evidence in a case where there had been no cross examination of the experts:

*“I am obliged to decide whose opinions I prefer. I must decide as a question of fact. I must be careful not to try to turn myself into a Brazilian lawyer by attempting to draw my own conclusions from such of the Brazilian primary sources as are set out in the evidence. In *Compagnie d’Escomptes Financiers S.A. v. Georgian Bay Holdings Corp.* [1998 CILR N8], I indicated that in litigation in which there were various affidavits (untested by cross-examination) expressing contradictory opinions on foreign law, the court should base its choice of which evidence to accept upon a consideration of various factors including (a) the qualifications and experience of the deponent; (b) thoroughness, directness and frankness (and the extent of any equivocation) in respect of all issues; (c) cogency and logic; (d) clarity of presentation; and (e) the extent to which the opinion expressed seems to be supported by authority. I might have added to the list a consideration of whether a deponent might be too closely tied to a particular party (as with *Felmanas [Sakura’s witness]*) and concerns about a deponent who may be too adversarial (as with portions of the *Stuber* evidence [for the respondents])”.*

44. The Plaintiff submitted that the Defendants appeared to have proceeded on the premise that it was sufficient, in order for them to succeed, merely to assert a real risk of non-enforcement, even if the assertion was disputed by the Plaintiff’s evidence, because the Court, seised on an interlocutory application, was unable to hold a trial to choose between the rival experts. That, the Plaintiff submitted, was not so. It was not enough to assert arguments against enforcement and by dint of that prove a real risk of enforcement. The Court was required to find that a real risk (or not) existed on the evidence before it. The Court was not to turn itself into a UAE lawyer to do so (to adapt Murphy J’s phrase quoted above), rather it was to choose between the rival expert opinions based on the evidence before it.
45. In response, the GHF Parties and the Fourth Defendant relied on the approach taken by and dicta of Mrs Justice Moulder in *Pipia*. Her approach, following the approach set out by Lady Justice Gloster in *Bestfort*, can be seen from the following extract from her judgment (underlining added):
- “23. *It seems to me therefore that the position is set out in Bestfort and in particular at [82]: the application for security for costs is akin to an application for a freezing order and a flexible approach is required. In the circumstances of such an application it is not just or proportionate to require expert evidence to be adduced which complies with the rules on expert evidence.*
24. *As to the submission that, the standard should be set having regard to the facts, the evidence will never be tested at trial, Gloster LJ expressly acknowledged this but nevertheless endorsed a flexible test based on the risk and not the likelihood of the defendant being unable to enforce a costs order.*
25. *Accordingly, in my view this court can have regard to the evidence in the witness statements of Mr Swain including the memoranda of Professor Kereselidze exhibited to the witness statements. This conclusion seems to me*

to be reinforced by the dicta in the recent decision of the Court of Appeal in *Danilina* ...

26. *It was submitted for the claimant that the court must consider the evidence before this court and not the evidence before the court in Bestfort.*

27. *Counsel for the defendant submitted that it was open to the court to rely on the evidence which is set out in the judgment in Bestfort at [45]. Counsel for the defendant relied on the decision of Patricia Robertson QC (sitting as a Judge of the High Court) in *JSC BTA Bank v Ablyazov and Khrapunov* [2018] EWHC 1368 (Comm) at [19] [“However, this Court can take into account the substance of the underlying evidence as set out in prior judgments (such as the contents of documents or the evidence of witnesses), giving this such weight as is appropriate (and on the basis that it is entirely open to Mr Khrapunov to challenge that evidence and adduce other evidence).”]*

....

29. *It seems to me that in its judgment at [45] the Court of Appeal [in Bestfort] made clear findings about the evidence before it and whilst this court has to consider all the circumstances of this case, given the test is one of “risk” and the flexible approach advocated by Gloster LJ, the court should take into account the findings set out in Bestfort whilst also having regard to the evidence submitted in this case, including the evidence in opposition of Mr Adeishvili.*

30. *In my view therefore, the indications given by the Commercial Court Guide are correct that evidence on this type of interlocutory hearing can be given by witness statements and does not have to comply with Part 35, although the court will still need to be satisfied having regard to the totality of the evidence before the court, that the evidence is sufficient to establish the risk of non-enforcement.*

...

40. *Gloster LJ in Bestfort concurred with the proposition that as on a freezing injunction where a claimant has to adduce “solid evidence of risk of dissipation by the defendant” to support his assertion, nevertheless “since each case depends on its own facts, it is impossible to lay down any general guidelines on satisfying this evidential burden”. At [77] Gloster LJ said: “Obviously there must be a proper basis for considering that such obstacles may exist...but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement will depend on the circumstances of the case.”*

41. *There is inherent uncertainty in this type of application but the court cannot resolve the disputed issues as to Georgian law. In my view the defendant has adduced sufficient evidence by the evidence of Professor Kereselidze to show that on objectively justified grounds relating to obstacles to enforcement, there is a real risk that the defendant will not be in a position to enforce an order for costs against the claimant”.*

46. The Plaintiff submitted that the DLA April Advice had completely failed to draw the Court’s attention or refer to the fact that article 85(2)A required that the UAE courts had *exclusive*



jurisdiction. This was, the Plaintiff submitted, an inexcusable omission, for which, inexcusably, no apology had been made in the DLA June Advice. Mr Atherton QC, for the GHF Parties, had argued that the DLA April Advice had not been misleading or incorrect since it had referred to the Regulations and DLA was obviously aware of the terms of article 85(2)A. They had simply concluded, as they explained in the DLA June Advice, that the reference to “*exclusive*” was not significant and did not result in a change in the law. Mr Bloch QC submitted that this explanation was inadequate. DLA had repeatedly paraphrased the condition set out in article 85(2)A and had repeatedly referred to the need to show that the onshore courts did not have “*jurisdiction*”. As a minimum, proper disclosure and fair presentation required DLA to identify and discuss the meaning of “*exclusive*”.

47. The Plaintiff submitted that there were various other serious deficiencies in the DLA Advice:
- (a) the DLA April Advice had asserted (as noted above) that the conditions in article 85(2) were “*notoriously difficult to satisfy*”. The word “*notoriously*” implied a matter of practice so common that one can simply take notice of it from general experience but the only evidence in support of this statement was one decision in 2009 and another in 1993 (nine and twenty-five years respectively before the promulgation of article 85). The evidence was therefore demonstrably insufficient to bear out DLA’s conclusions at paragraph 5.4, paragraphs 3.1 and 5.10 (“*...very low to nil...*”) and paragraph 5.8 (“*...highly likely...*”). The wording that the court had been called upon to consider in those cases was “*jurisdiction*” in article 235, not “*exclusive jurisdiction*” in article 85.
 - (b) DLA’s opinion in the DLA June Advice as to the meaning to be given to “*exclusive jurisdiction*” (which I have set out above) should be rejected. DLA accepted that “*exclusive*” was a correct translation from the Arabic text. The English word “*exclusive*” did not mean “*general*” or “*original*.” DLA had only given two reasons (at [5.7]) in support of their position, neither of which logically supported the contention that “*exclusive*” means “*general*” or “*original*.” DLA had rightly pointed out that article 85 did not purport to define “*exclusive*” and said that Mr Al Aidarous did not do so either. DLA also asserted that the jurisdiction of the UAE courts to take jurisdiction in respect of claims against UAE resident defendants, or on other grounds, persisted. But the first reason was wrong since article 85 used “*exclusive*” and so used the ordinary meaning of that word. It only failed to provide an exhaustive list of when jurisdiction was exclusive. This did not justify subverting the meaning of the words the legislature had used, particularly where it was agreed that the UAE courts “*apply the wording of the law*” ([5.10.2]). Furthermore, the fact that it might have been possible for the

Plaintiff to pursue his claims in the UAE courts did not mean that, as a matter of UAE law, those courts are the “exclusive” courts of jurisdiction. No UAE law rule had been cited to that effect, and it was not said that the Plaintiff’s claims in this Court are in breach of any UAE law. In any case, the jurisdiction of the UAE court in respect of a claim against a UAE resident might well persist, but these proceedings involved a claim by a UAE resident, the Plaintiff, and not a claim against a UAE resident defendant. Article 31(1) was irrelevant for this reason.

- (c) DLA (and Mr Fox) had accepted that the policy objective behind the reforms made by the Regulations had been to effect a significant change but if their evidence was correct then the Regulations would have completely failed to achieve their objective. They would have achieved nothing.

48. The Plaintiff invited the Court to take into account the decision of Nicola Davies J (as she then was) in the English High Court case in *Al Nehayan v Kent* [2016] EWHC 623, decided before the Regulations came into force. There the learned Judge was not satisfied on the expert evidence of the then UAE law, namely article 235 of the Civil Procedure Law, that there was a real risk of non-enforcement of an English costs order in Abu Dhabi to warrant an order for full security, as opposed to security to cover only the additional costs of enforcement of the costs order in the UAE. This was so notwithstanding “*the difficulties*” identified by the foreign law expert in terms of the arguments that might be raised in the UAE. The expert evidence denied (i) a practice of reciprocity (said to mean a practice of mutual recognition) and asserted (ii) that the UAE court would have jurisdiction over a claim for a costs order (even though not over the claim) because the respondent/claimant (and would be judgment debtor) was resident in the UAE and thus the UAE court would have jurisdiction based on the fact of residence (despite any costs order in the claim being a matter for the English court in the exercise of its costs jurisdiction). The case showed, the Plaintiff submitted, that even prior to the Regulations the English court was not prepared to grant full security, as opposed to only the additional cost of enforcement in circumstances similar to the present case. Nicola Davies J had held as follows at [27]-[28] (underlining added by me):

“The report of Dr Al Mulla provides illustrative detail of the difficulties of pursuing a claim for enforcement of a foreign judgment in the courts of the UAE. Striking is the fact that Dr Al Mulla is not aware of any case where it has been established to the satisfaction of the UAE courts that reciprocity exists between the UAE and the courts of England and Wales so as to permit enforcement of such judgments in the UAE courts. Concerning also is the opinion of Dr Al Mulla in respect of Article 235 (2) when he stated that the main impediment to enforcement is that the UAE courts do not recognise a

foreign judgment in circumstances where they would otherwise have jurisdiction over the matter, be it the substantive issue or the more limited matter of costs. Dr Al Mulla in his detailed and considered report, concludes that there is a significant risk that the UAE courts would hold that they have jurisdiction against any claim over the claimant in the English proceedings including any claim for costs and on that basis alone would refuse to recognise or enforce any costs order pursuant to Article 235.

This court does not seek to minimise the knowledge and experience of Dr Al Mulla. What he is highlighting are the difficulties which the defendant could encounter in seeking to pursue a prescribed legal process identified within the rules of the courts of the UAE. Nowhere in the report does he state that the defendant could not successfully obtain enforcement of a judgment or costs order. In my view the identified difficulties would be better protected by a security for costs order tailored to the additional costs which the defendant would incur in pursuing these matters in the courts of the UAE”.

49. The Plaintiff submitted that the decision in *Hirbodan* was irrelevant. The application had been unopposed, and the deputy Judge had awarded security on the basis of the one-sided evidence of non-enforceability of costs orders in the UAE that was before him (and it was impossible to work out from the brief reports of that case what that evidence was). The deputy judge therefore appears to have proceeded on a one-sided and erroneous understanding as to what reciprocity means in this context.
50. As regards Mr Fox’s evidence, the Plaintiff submitted that Mr Al Aidarous’ evidence was to be preferred on the points in dispute and added as follows:
- (a). Mr Fox had given a different answer from DLA as to why the UAE court had jurisdiction with respect to the Plaintiff’s claims and why that jurisdiction was said to be exclusive. Mr Fox had said that articles 20 to 24 provided rules of international jurisdiction for the UAE courts, i.e. rules for jurisdiction in claims involving a foreign element; the Plaintiff could have pursued his claim in the UAE courts under one or other of those jurisdictional rules and the decisions of the Union Supreme Court in judicial years 20 to 25 (i.e. 2000 to 2009) defined those rules as mandatory rules, i.e. which, if applicable to a case before the UAE court, could not be waived or contracted out of and jurisdiction transferred to a foreign court (save exceptionally). This approach was flawed because it conflated the meaning of “*exclusive jurisdiction*” for the purpose of article 85 with the inability of the UAE court, if its international jurisdiction was invoked in a case before it, to decline that jurisdiction in favour of a foreign court.



(b). none of the decisions cited by Mr Fox dealt with article 85 and no source of UAE law had been identified by him that stated or held that a claim that could have been heard in the UAE (but was in fact heard in a foreign court) could not be enforced in the UAE. That, the Plaintiff submitted, was the proposition essential to Mr Fox’s view, and he was unable to derive it from the decisions he cited or provide other supporting authority. The inability of the UAE courts to stay or decline jurisdiction in favour of a foreign court, if the international jurisdiction of that court should be invoked, did not mean that the UAE court should treat its own jurisdiction as “*exclusive*” if the dispute had already been litigated to judgment in the foreign court and a party sought to enforce that judgment in the UAE. Such enforcement involved no conflict with a rule that the UAE court could not decline jurisdiction if the same case had been pursued before it. Indeed, enforcement of the foreign judgment would bar any new suit before it because enforcement recognised the final and binding nature of the foreign judgment between the parties.

51. The Plaintiff rejected the criticisms of and challenges to the merits of his claim made by the GHF Parties and the Fourth Defendant. He argued that these in fact highlighted the problems with their Defences to the action. He submitted that there were four main points relied on by the GHF Parties and the Fourth Defendant to show the flaws in and weaknesses of the claim and submitted that the GHF Parties and the Fourth Defendant were unable to establish proper grounds for such criticisms and challenges:

(a). first, it was said that the Plaintiff was unable to establish that the GHF Parties and the Fourth Defendant were liable for Mr Naqvi’s actions or that Mr Naqvi’s knowledge and intentions were to be attributed to them. The GHF Parties and the Fourth Defendant argue that they were the victims and not the perpetrators of the fraud. But, said the Plaintiff, there was a proper basis for claiming that Mr Naqvi was in control and indeed the First Defendant had now admitted that this was the case. Their disowning of Mr Naqvi and disavowal of his critical role in decision making for the GHF Parties and the Fourth Defendant were not credible. While the First Defendant had admitted that Mr Naqvi acted for it, the GHF Parties and the Fourth Defendant denied that Mr Naqvi had acted for the GHF Fund or APEF IV notwithstanding that he was the maestro of the First Defendant and AIML and took the important decisions in connection with the Abraaj funds. The GHF Parties and the Fourth Defendant contended that the GHF Fund and APEF IV had nothing to do with the deceitful procuring of the Plaintiff’s monies. But, the Plaintiff argued, the deceitful procuring of those monies was effected for the benefit of the GHF Fund and APEF IV, and it was those entities that received the funds

wrongfully taken from the Plaintiff (the Plaintiff further argued that it had been the need to plug the gaps in the GHF Fund's and APEF IV's finances that motivated Mr Naqvi to target and lie to the Plaintiff). Mr Naqvi had run the Abraaj Group and the funds that it managed with the aid of a small group of executive underlings. Whether acting alone or with other members of the Abraaj Leadership, he had controlled the Defendants, either directly or by suborning the acts of the entities and individuals that occupied official positions in respect of the Defendants.

- (b). secondly, the GHF Parties and the Fourth Defendant has asserted that the Plaintiff's case was insufficiently particularised and was too vague. But, the Plaintiff argued, his claim was based on the factual claim that everything which had been said to have been done by the GHF Parties and the Fourth Defendant had been done by or based on a decision taken by Mr Naqvi. Once the GHF Parties and the Fourth Defendant had access to the full range of documents to be produced on discovery, they will see the strength of the Plaintiff's claims and be obliged to admit the critical facts which show that Mr Naqvi was indeed in control and acting for them, as the First Defendant, which already had access to all the relevant documents, had now done. It was clear that the First Defendant took the same position as the Plaintiff on the facts relevant to Mr Naqvi's involvement and his control, save as to how to describe the position of those closest to Mr Naqvi, who performed the acts he initiated.
- (c). thirdly, the GHF Parties and the Fourth Defendant alleged that the Plaintiff had not been misled when he advanced the Loans since he knew that the Abraaj Group was in financial difficulty. But, the Plaintiff argued, while a leveraged private equity group such as the Abraaj Group might be as vulnerable to a run on its confidence as a bank, such runs could be triggered by unfounded rumours just as surely as they could be triggered by well-founded rumours and the fact that Mr Naqvi was ultimately unable to weather the storm did not mean that the account he had given to the Plaintiff as to how it had arisen was a lie. The knowing falsity of the misappropriations from APEF IV and the GHF Fund, and therefore of the bad faith and dishonest dealings with investors' funds, only emerged with the release of the United States SEC's Summary of Allegations against Mr Naqvi in April 2019 and, further, with the US Department of Justice's Superseding Indictment in May 2019.
- (d). fourthly, the GHF Parties and the Fourth Defendant contend that, even if they were otherwise liable for the fraud perpetrated on the Plaintiff, it was too late for the Plaintiff to complain of it. The GHF Parties and the Fourth Defendant assert that the Plaintiff



should have sought to rescind the Loans for fraud, the Plaintiff argued without any concrete evidence and based on nothing more than market rumours and a run on the confidence of the Abraaj Group for which those rumours were, for all the Plaintiff knew, responsible. On this approach, the Plaintiff had either to abandon any chance of recovering any further monies under the Loans precipitously or, in effect, to forgive the fraud that had put him in this predicament in the first place. The Plaintiff argued that this was and could not be the correct approach. It would result in the rules of election and waiver of tort serving as a fraudster's charter.

52. Mr Stueck in his evidence said that the Plaintiff did not intend to be obstructive and would be prepared to provide a contractual undertaking to the GHF Parties and the Fourth Defendant in the appropriate form to pay the amount of a properly obtained costs order. He confirmed that he had been informed by Mr Al Aidarous that there should be no difficulties in principle or in practice with enforcing before the UAE courts such a contract if governed by the relevant Emirati law and containing a choice of court clause in which the parties submitted to the jurisdiction of the UAE courts. Subsequently, on 11 June 2021, the Plaintiff's Cayman attorneys (Nelsons) sent to the Cayman attorneys for the GHF Parties (Walkers) and the Fourth Defendant (Ogier) a draft contractual undertaking to pay the amount payable in accordance with any costs order made by this Court, to be governed by the laws of the Emirate of Sharjah and subject to the exclusive jurisdiction of the courts of the Emirate. Both the GHF Parties and the Fourth Defendant considered the contract to be an inadequate answer to their security for costs application and said that they would not withdraw their applications in return for execution of such a contract. On 27 June, Nelsons sent Walkers and Ogier a draft of a unilateral undertaking in the form of a deed poll to be executed by the Plaintiff and containing a similar covenant to pay the costs awarded by this Court. This was to be governed by the laws of the UAE.
53. The Plaintiff submitted that if the Court was persuaded that it was just to make an order for security for costs, the order should provide for the giving of security in phases and that at this stage the Court should only order security to cover the Defendants' actual costs to date together with the estimated cost of proceedings to the end of the discovery process. The Plaintiff argued that if the Court was prepared to proceed on this basis, it would need, before determining the amount of the security to be provided, further evidence from the GHF Parties and the Fourth Defendant as to how they had determined which part of their estimated future costs were to be allocated to the Plaintiff's proceedings rather than the Related Claims. While they had assured the Plaintiff that the allocation of actual costs reflects time recorded to each separate set of proceedings (and the Plaintiff accepted that assurance for the purpose of this hearing), no explanation had been given as to how future costs have been apportioned (if at all). This was

an important point since the Plaintiff should only be required to provide security for costs of the Plaintiff's claim.

54. As regards the basis for assessing the amount of any security, the Plaintiff agreed with and accepted the GHF Parties' approach. If the Court was minded to award security, it should be based on an estimate of costs on the standard basis. The Plaintiff submitted that the GHF Parties' proposal that 70% of such estimated costs was too high and that 60% was more appropriate. However, the Plaintiff challenged the Fourth Defendant's basis of assessment and its application for 90% of its estimated costs. The Plaintiff argued that there was no rule that a real or reasonable prospect of indemnity costs required the assessment of security for costs in a higher amount; that there was no rule that a fraud claim, if it should fail to be proven at trial, required costs to be awarded to the successful party on the indemnity basis and that, in any event, 90% was far too high a percentage to be applied to the estimated costs.
55. The Plaintiff relied on the judgments in *Stokors*. In that case, there were two orders for security. David Steel J had made an order for security based on 60% of costs, actual and estimated and subsequently Popplewell J had rejected the asserted entitlement to 80% of costs, actual and estimated (at [29]-[30]). Popplewell J had held at [31], of his judgment as follows:

"I turn, therefore, to the next question which is how much of the £725,000 should be awarded by way of further security. It requires a discount because that figure represents the costs as between solicitor and client and it is bound to be reduced on an assessment. Mr Downes QC submitted that because this was a case in which there was a real prospect of indemnity costs, it should only be discounted by 80 per cent. He submitted the claim was speculative and weak and was one in which there was at least a real prospect of an award of indemnity costs. I am not satisfied on the material he has put before me that I can reach any such conclusion. This seems to me to be a paradigm case in which the court cannot go into the merits of the case. It should be treated as a case in which security for costs should be awarded upon the hypothesis that if the Defendant succeeds, it will be awarded its costs on a standard basis".

56. In the Court of Appeal, Tomlinson LJ (with whom Lewison and Munby LJ agreed) endorsed the approach of Popplewell J (at [42]) and said that (emphasis added by the Plaintiff):

*"Furthermore, I cannot for my part understand on what basis it is contended that the judge would necessarily have ordered security in the sum of £580,000, or 80 per cent of that sought, had he thought that the balance of prejudice did favour the defendant, as would ordinarily be the case. **The only basis for seeking 80 per cent of the estimate to which the judge referred in his judgment was the suggestion that the defendant might recover indemnity costs.** For what it is worth, I have never heard of security for costs being awarded on a more generous basis for that reason, but in any event the judge*

here decisively rejected that suggestion at paragraph 31 of his judgment. He concluded that there was no material before him which would justify such an approach. Rightly, as I think, he declined to go into the merits of the case when considering what was the appropriate quantum of an order for security for costs, and in my judgment, we should certainly not go down the path which the judge himself declined to tread”.

57. The Plaintiff accepted that in *Danilina* at first instance ([2018] EWHC 2503), Teare J had awarded security for costs in an amount that reflected a reasonable prospect of indemnity costs at the end of the day. He explained that his order did not involve an examination of the merits (because he necessarily assumed the failure of the claim) and that it was justified in the circumstances because, on the facts alleged, the claimant’s asserted proprietary claims to the “family assets” of her former partner were claims that were likely to fail (if they failed) because the claimant was lying, rather than merely being mistaken in her recollection. Teare J ordered security for costs based on 75% of the costs claimed (which the Plaintiff noted was much lower than the 90% claimed by the Fourth Defendant). The Plaintiff submitted that there was nothing in this case to suggest that the Plaintiff’s account of events was necessarily false, even if his claim should fail. The principal positive defences taken by the GHF Parties, and the Fourth Defendants related to attribution, affirmation by reason of acts said to have been done with notice of wrongdoing within the Abraaj Group and legal defences in terms of double actionability or as to the beneficial ownership of funds. The Plaintiff also accepted that in *Re Ingenious Litigation* [2020] EWHC 235 (Ch.) Nugee J had ordered security for costs based on 75% of the costs claimed (again, not 90%) because the particulars alleged deceit and unlawful means conspiracy. However, in *Phones 4U Ltd (in Administration) v EE Ltd* [2020] EWHC 1943 (Ch) Roth J declined to follow the approach of Nugee J in *Ingenious*. Roth J said as follows at [24]-[25] (emphasis added by the Plaintiff):

“24. Counsel for the defendants here emphasised the words used by the judges in those two cases: “a reasonable possibility” that indemnity costs will be ordered (Teare J); and “the possibility of indemnity costs [is] a real one” (Nugee J). But in my judgment, it is important not to read the words used in *Danilina* and *Ingenious* as if they were a statutory test. Mr Pickford QC, for EE, indeed submitted that the question should be whether the court is “able to strike out a contention that [the defendants] may be able to obtain indemnity costs in the future, or is that simply not arguable”. I reject that submission, which in my judgment puts the threshold much too low. Moreover, if the judgments in *Danilina* and *Ingenious* are to be interpreted as expressing a general test for such a higher level of security as being simply that there is “a real possibility” or “reasonable possibility” of an ultimate award of indemnity costs, I respectfully disagree with them. I am fortified in that view by the judgment of the Court of Appeal in *Stokors*... In that case, the defendants sought an order for security at a high percentage of their costs on the basis that the claimants were



making serious allegations of dishonest conduct against professional men, which could have the outcome of ruining their careers. Upholding the judge's refusal to order security at that higher level [the judgment of Tomlinson LJ that I already referred to was then quoted].

Tomlinson LJ was of course the judge who at first instance had summarised the principles governing an award of costs on an indemnity basis in Three Rivers. I note that the judgment in Stokors was apparently not cited in either Danilina or Ingenious.

25. ***Moreover, I think that there are various reasons here why the main claim by P4U could fail other than by a conclusion that there was no collusion between the defendants”.***
58. The Plaintiff noted that Roth J (at [25]-[26]) had then considered the causation and other defences in that case which meant that the claim “*could*” fail despite the claimant’s version of events being accepted as true or the claimant having established collusion on the part of the defendants. In these circumstances, he declined to assess the amount of security on the footing of indemnity costs. The Plaintiff submitted that Roth J’s approach, which followed that in *Stokors*, was the correct approach and should be followed. The Plaintiff also argued that it was implicit in Roth J’s analysis in that there was no rule that a fraud claim, if it should fail to be proven at trial, required costs to be awarded to the successful party on the indemnity basis. The Plaintiff noted that the facts pleaded and relied on in his statement of claim were derived from the criminal indictments in the United States issued by the Department of Justice against the Abraaj Leadership and the report of the Dubai Financial Services Authority into the failure of Abraaj Capital Limited, a company within the Abraaj Group incorporated in the DIFC. He also argued that the Fourth Defendant had to a substantial extent admitted the facts of misappropriation from APEF IV pleaded by reference to Department of Justice’s indictment and the report of the Dubai Financial Services Authority although it contended that it was a victim, rather a perpetrator with respect to the misappropriation of its investors’ monies. In light of the admissions already made as to the misappropriation of investors’ monies, the criminal indictments issued by the US Department of Justice and the guilty pleas already entered in those proceedings, the Plaintiff’s claim could not (and certainly not at this time) be said to fulfil any of the relevant criteria.
59. As regards quantum, the Plaintiff relied on the challenges to the estimates of the GHF Parties and the Fourth Defendant set out in Stueck 1 at [17] and [24] – [31]. Mr Stueck claimed that the GHF Parties’ costs schedule included estimates that were inadequately explained, and which appeared to be excessive or disproportionate. His main points can be summarised as follows:



- (a). the costs schedule failed to explain what costs had been incurred to date.
- (b). in relation to discovery, the GHF Parties expected their legal team to undertake 4,000 hours of work with respect to discovery, which equated to approximately two years of chargeable time at eight hours per day. They also estimated that they would incur a further US\$1 million of disbursements on discovery, being their own costs in the disclosure exercise with respect to "*technical support, and document management, review and analysis*". The GHF Parties had failed to explain what work this would comprise, or why it was necessary or proportionate where an estimated 4,000 hours of lawyer time had already been provided for in relation to the same exercise. The GHF Parties had also said that they also expected to incur US\$600,000 in respect of a third-party professional service provider to host a data room for discovery. That was more than six times the estimate that the Fourth Defendant had provided (namely US\$90,000) and had resulted in a total estimated costs for the disclosure phase of US\$3.5 million. But, since the main work streams identified by Mr Lewis involved the preparation and review of the GHF Parties' documents and it appeared that the vast majority of relevant documents were in the control of the First Defendant's joint official liquidators, not the GHF Parties, the amount of the estimated costs was very surprising and hard to justify. Mr Lewis (in Lewis 2 at [48]) and Mr Hayward had assumed a review of "*tens of millions of documents*" but this did not reflect the emerging consensus that the First Defendant's proposal as to the process for managing the discovery of its documents should be adopted; the admissions that had been made (principally, by the First Defendant and the Fourth Defendant) as to the misappropriation of investors monies, and the fact the Plaintiff's case did not require him to prove "*each*" and every misappropriation of investors' monies from funds within the Abraaj Group prior to the making of the Loans; the fact that none of the Defendants has positively denied the factual content of the matters alleged by the Department of Justice and the fact that the GHF Parties and the Fourth Defendants had repeatedly said that they hold few documents of their own (which the First Defendant does not also hold). The Plaintiff also argued that there was an issue as to whether the GHF Parties were trying to recover the internal costs of managing the litigation since FFP was also acting as the claims manager on behalf of the GHF Parties. The costs schedule included an estimate of US\$1m for FFP, a very significant proportion of the estimated costs. The Plaintiff said that FFP was effectively Walkers' instructing client in these proceedings and pointed out that a client's internal costs of managing litigation were not recoverable as inter-partes costs.



- (c). as regards witness evidence, the GHF Parties had estimated 555 hours (US\$344,733) in relation to witness evidence, including in respect of their own witnesses of fact. But Mr Lewis has not explained what assumption had been made as to how many witness statements the GHF Parties intended or would need to adduce.
- (d). as regards trial preparation and attendance at the trial, the GHF Parties had estimated that they will incur 1,325 hours (US\$853,838), including 250 hours for each of Leading Counsel and Junior Counsel. Assuming that Counsel dedicated 10 hours per day to trial preparation, that was equivalent to five working weeks of Counsel's time preparing for the proceedings relating to the Plaintiff's claim alone. They had also estimated US\$722,338 (equivalent to 1,050 hours) during a ten-to-fifteen-day trial, with Leading Counsel, Junior Counsel and the Walkers associate involved being expected to incur 250 hours each. Assuming the trial is listed for a period of ten days, that would amount to twenty-five hours a day each, which would obviously be impossible. Even assuming a fifteen-day trial, that would still amount to over sixteen hours a day each for Leading Counsel, Junior Counsel and the associate concerned.

Discussion and decision – should the Court make an order for security for costs?

Real and serious risk that a costs order will not be enforced?

60. In light of the authorities cited and discussed above, and the fact that in this case it is accepted that the non-resident jurisdictional threshold is satisfied, the two key questions for the Court are (a) whether the GHF Parties and the Fourth Defendant have shown that there are objectively justified grounds for concluding there are obstacles to or burdens on the enforcement of a costs order against the Plaintiff, such that there is a real and serious risk of non-enforcement and (ii) whether if there are such real risks, it is just in the circumstances to order security.
61. I deal first with the real risk of non-enforcement issue and note, in particular, the following dicta in the authorities (with my underlining):
- (a). Hamblen LJ in *Danilina* (at [52]):

“Some of the authorities refer to difficulties of enforcement. Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of “substantial obstacles” is directed. The obstacles need to be sufficiently

substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the “substantial obstacles” required for there to be a real risk of non-enforcement“.

(b). Gloster LJ in *Bestfort*:

“48. So I approach the question raised by this appeal on the basis that the principles and approach should be simple and clear and that any application should not be over-burdened by technical and semantic arguments relating to the construction of the ‘threshold’ test for the making of an order or its application.

.....

76. (iii). Moreover, in paragraph 63 of his judgment [in *Nasser*] ... where Mance LJ expressly states what must be shown by way of evidence if the discretion is to be exercised, he formulates the test as follows: ‘there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden ...’ (My emphasis). That articulation does not require evidence that such obstacles do indeed exist; on the contrary, it simply requires ‘a proper basis for considering that’ they might exist.

77. In my judgment, 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 claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously, there must be ‘a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden’ but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master’s approach that the appropriate test was one of ‘likelihood’, which involved demonstrating that it was ‘more likely than not’ (i.e. an over 50% likelihood), or ‘likely on the balance of probabilities’, that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility...”

.....

85. [In his judgment in *Texuna Gross J* at [23(ix)] said as follows]:

“Satellite litigation is undesirable so that in some cases the Court will no doubt be content to take notice of obvious realities or to draw common-sense inferences, without formal evidence. But, ordinarily, even if the Court is minded to take a broad brush, common-sense approach, it will be necessary for the applicant at least to show some evidential basis for the conclusion that there would be a realistic risk of additional obstacles or burdens in the way of enforcement in a country

outside the zone; it will be recollected that Nasser, at [63], precludes the Court from making any inflexible, generalised assumption”.

Gross J’s approach appears to me to be one that is eminently sensible and reflects what in my experience is the approach habitually taken by judges and masters in this area.

.....

88. *Accordingly, in my judgment David Richards J should have allowed the appeal against the Master’s refusal to make an order for security in favour of the appellants, on the basis that the Master applied the wrong test. The evidence which I have summarised above clearly showed, notwithstanding the respondents’ expert evidence to the contrary, a real and serious risk that an order for costs might not be enforced in Georgia.*

(c). Moulder J in *Pipia*:

“41. *There is inherent uncertainty in this type of application, but the court cannot resolve the disputed issues as to Georgian law. In my view the defendant has adduced sufficient evidence by the evidence of Professor Kereselidze to show that on objectively justified grounds relating to obstacles to enforcement, there is a real risk that the defendant will not be in a position to enforce an order for costs against the claimant”.*

(d). Mangatal J in *Worthing*:

“[the applicant must show a] “real risk ... as opposed to fanciful risk” [and did not] “have to show more than a real risk that enforcement might fail or be much more problematic”.

62. Accordingly, the applicant must at least show some evidential basis for the conclusion that there would be a realistic risk of obstacles or burdens in the way of enforcement. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. The Court must be satisfied that there is a proper basis for considering that such obstacles might exist. There must be a real and serious risk or possibility. The Court must carefully review the evidence but where there is disputed evidence, particularly expert evidence, the Court cannot be expected on an interlocutory application without cross-examination to resolve the points in dispute. It is open to the Court even where the Plaintiff produces evidence to the contrary to conclude that the evidence properly evaluated and taken as a whole, shows that there is a real and serious risk of non-enforcement. I therefore do not accept the Plaintiff’s submission that the Court is required to choose between the rival expert opinions based on the evidence before it and rely on and give weight to the views of only one of the experts.

63. In my view, the expert evidence taken as whole demonstrates that there is a material, and probably substantial, uncertainty as to the interpretation that will be given by the UAE courts to the key parts of article 85(2) of the Regulations. There are also serious doubts as to whether the reciprocity test in article 85(1) of the Regulations will be treated as satisfied by the UAE courts. There is no clear decision of a UAE court or a particularised example of a case in which a UAE court has recognised and enforced a costs judgment of a common law court pursuant to the Regulations. There is no decision of a UAE court in which the court's approach to the interpretation of the Regulations, in particular as to the meaning of "*exclusive jurisdiction*" in article 85(2), is set out and explained. There is no other authoritative guidance as to the proper approach to the construction of the Regulations and that term. The combined evidence of DLA and Mr Fox showed that those with substantial experience of practising in the area considered that past and recent experience demonstrated that there were realistic and substantial risks of non-enforcement. In my view, even after taking into account the fact that DLA and Mr Fox are partial witnesses (since they act for the GHF Parties and the Fourth Defendant respectively) and giving due weight to the opinion of Mr Al Aidarous (and recognising that the changes to the substantive and procedural law enacted by the Regulations appear to be intended to make the enforcement of foreign judgments easier, as Mr Al Aidarous opines), the evidence of DLA and Mr Fox is sufficient to show that there is a real and serious risk that a costs order might not be enforced in the UAE.
64. Mr Al Aidarous considered that the purpose of the Regulations had been to make it easier to enforce foreign judgments and was aware, anecdotally based heavily on accounts from his colleagues, that dozens of orders had been issued to recognise and enforce foreign judgments under the new regime. But he acknowledged the difficulty he had in evidencing this and in obtaining further details and particulars. Furthermore, as I discuss below, he was unable to provide a convincing explanation of how the reference in article 85(2) to "*exclusive*" jurisdiction was to be understood or would be interpreted. Mr Fox was of the view that while the Regulations *may* signal a shift to a more permissive enforcement regime in the UAE, there were serious risks because they remained largely untested, and the approach of the UAE courts had generally been, and in his experience remained, hostile or at least slow to permit enforcement of foreign judgments of common law courts in the absence of a treaty. He was unaware of any instances where a Cayman Islands judgment or order had been successfully enforced in onshore UAE courts. DLA were of the same opinion. While, as I shall briefly explain below, I found the evidence of both DLA and to a lesser extent Mr Fox to be unconvincing in parts, I consider that their opinions show, in a way that Mr Al Aidarous' opinion was unable to undermine, substantial and serious uncertainty and doubts as to whether a Cayman costs order in this case would be enforced by the UAE courts.

65. Mr Al Aidarous is clearly well qualified, and his single report was clear, concise, and addressed all the key issues. But it was subject to the limitations I have just identified and failed to provide an explanation of what the UAE courts would decide was meant by “*exclusive jurisdiction*.” Indeed, none of the experts was able to provide such an explanation. It seems to me that Mr Al Aidarous was right to challenge the logic of Mr Fox’s argument based on articles 20-23 and article 24 of the Civil Procedure Law. It does not follow without more that just because the UAE courts could and would assume jurisdiction under articles 20-23 in respect of the claim against the Plaintiff for the costs of the Cayman proceedings that they would also treat the case as being one of *exclusive* jurisdiction for the purposes of article 85 such that a judgment of this Court would not be enforced. Mr Fox’s argument was based on the UAE law principle (which I suspect reflects the approach of many civil law systems) that where the local court was given jurisdiction over the dispute it was required and could not decline to deal with the case. There was no possibility of a stay on *forum non conveniens* grounds. But I do not see how this principle involves or implies such an approach to the construction of article 85(2)A and Mr Fox did not indicate that or explain why it did. What is needed in this context is an account of the approach of the UAE courts to interpreting article 85(2)A and the meaning to be given in that context to “*exclusive*.” What is the policy rationale underpinning that article? Presumably, the UAE courts are expected to decide which types of case are so significant for the UAE and engage important local interests such that the judgments in foreign proceedings in such cases should not be recognised or enforced. None of the experts was able to provide any real assistance on this issue. Mr Al Aidarous’ comment that, “*The matters which fall within the UAE Courts exclusive jurisdiction concern issues such as disputes over real estate located in the UAE and motions to set aside arbitration awards where the seat of the arbitration was within the UAE*” involved a conclusion without a justification or supporting reasoning. Having said that, it seems to me that Mr Fox’s conclusions based on his considerable practical experience, are to be given considerable weight and are not to be regarded as neutralised or undermined by Mr Al Aidarous’ evidence.
66. I agree with the Plaintiff that the DLA April Advice was incomplete to a material extent and that it should have at least drawn to the Court’s attention the reference to exclusive jurisdiction in article 85(2)A and the issue to which the language of the article gave rise (particularly when DLA relied on authorities that pre-dated the introduction of article 85(2)A and its new language). No satisfactory explanation was provided as to why this had not been done. This does not do DLA credit. However, the issue was clearly and directly addressed in the DLA June Advice and, subject to the comments I have already made, I do not consider that it is necessary or appropriate to criticise DLA further in the manner suggested by the Plaintiff. The DLA Advice, taken together, dealt with the issue (the interpretation and effect of article 85(2)A in an



adequate manner. I also do not agree that Mr Al Aidarous was the only properly qualified witness. As is set out and explained above, both the DLA team who prepared and took responsibility for the DLA Advice and Mr Fox have sufficient local law qualifications, expertise, and experience to demonstrate that they were qualified and, by reason of their being generally skilled in UAE law, could be expected to know the answer to the question on which the Court needed expert evidence. I do however accept that the fact that DLA and Mr Fox are advisers to the GHF Parties and the Fourth Defendant respectively, while Mr Al Aidarous was an independent expert, is to be taken into account when considering what weight to give to their evidence and views. But I do not regard this as determinative or a sufficient basis for substantially discounting the evidence given by DLA and Mr Fox and for preferring Mr Al Aidarous' evidence. I do give his evidence particular weight but still consider that it needs to be tested and judged by the quality and cogency of his analysis and the contrary evidence given by DLA and Mr Fox.

67. As Gloster LJ had concluded in *Bestfort*, the Court can conclude that there is a real risk even where the expert evidence was contested (“*The evidence which I have summarised above clearly showed, notwithstanding the respondents’ expert evidence to the contrary, a real and serious risk that an order for costs might not be enforced in Georgia.*”). Recognising that the burden of proof is on the GHF Parties and the Fourth Defendant, the question is whether the GHF Parties’ and the Fourth Defendant’s evidence that there is a real and serious risk (based on substantial obstacles to enforcement) can be treated as undermined and flawed in material respects by the Plaintiff’s evidence such that the Court can conclude and be satisfied, based on all the evidence presented, that there is no real risk of serious obstacles to enforcement. In the present case, I am not so satisfied.
68. In my view the decision of Mr Rainey QC in *Hirbodan* is consistent with my conclusion and my decision is consistent with the approach adopted and the decision of the English Court of Appeal in *Bestfort* and of Mrs Justice Moulder in *Pipia*. I recognise that the fact that the application in *Hirbodan* was unopposed substantially weakens the weight to be attached to the decision but despite that it remains in my view of some weight and assistance. I have taken into account the judgment of Nicola Davies J (as she then was) in *Al Nehayan v Kent* but note that she concluded that on the evidence before her, the defendant’s expert did not say that the defendant would be unable to obtain enforcement of a judgment or costs order. In the present case, DLA’s and Mr Fox’s evidence does, while identifying difficulties, conclude that there is a real risk of non-enforcement. In any event, as the authorities I have discussed recognise, ultimately each case must be judged and determined by reference to its own facts and the expert evidence presented and other decisions therefore provide only limited guidance.

69. I must make it clear that my conclusions as to the content and effect of UAE law involve no criticism and are not intended to show any disrespect to the judges or the courts of the UAE, or to its legal system, or a challenge to the reforms which have been recently introduced. The outcome of proceedings like these may well change when the UAE courts have the opportunity to give judgments interpreting and expressing their views on the Regulations and the new regime so as to make the position in the UAE clear. I would add that a number of the UAE Judges are, with me, members of the Standing International Forum of Commercial Courts and have in that context demonstrated a willingness to engage in international discussion and cooperation.

Discretion

70. I have concluded that in all the circumstances, it is just to order the Plaintiff to provide security for costs and that I should exercise my discretion to grant the GHF Parties' and the Fourth Defendant's applications. In addition to my conclusion that the GHF Parties and the Fourth Defendant have shown a real risk of non-enforcement, and after having carefully considered the parties submissions, as summarised above and the various factors to be taken into account, as set out above, I give weight in particular to the following additional matters:

- (a). it seems to me that, as the Fourth Defendant submitted, the balance of prejudice is firmly in favour of the GHF Parties and the Fourth Defendant. The prejudice to these parties resulting from the failure to award security for costs is substantially greater than that suffered by the Plaintiff in being required to provide it.
- (b). the Plaintiff has declined to provide details of the location of his assets and to show that he has valuable assets in jurisdictions against which a costs order could clearly be enforced. It is a matter for him whether or not he does so but if he decides not to provide such information, whatever the anecdotal narrative may be as to his private wealth, he must accept that in substantial, complex, and lengthy litigation such as this, he is putting the defendants at substantial risk which the Court will take into account and to which it will attach considerable weight on a security for costs application. These proceedings have focussed on the enforceability of a costs order in the UAE, and the GHF Parties and the Fourth Defendant have been prepared to proceed on the assumption that the Plaintiff has and will retain valuable assets in the UAE but in the absence of any information as to the nature and value of assets located there, a risk remains that any assets there will be insufficient to cover a large costs order.

- (c). the Plaintiff argued that he will suffer real prejudice because of the cost (or opportunity cost) of having to put up security. He said that the cost of US\$10 million of security could be considered by comparing the interest which he would receive on the security deposit (0.05%) with a conservative weighted average cost of capital of 4.5%, which resulted in a difference of approximately US\$445,000 per year. I am not in a position to judge whether this very large sum represents a realistic assessment of the real loss which the Plaintiff may suffer but I do accept and take into account that putting up substantial security will involve a material cost. However, I have to balance that against the risks incurred by and risk of prejudice to the GHF Parties and the Fourth Defendant. I would also note that on the Plaintiff's own case, he is well able to afford the cost of giving security and such cost will not stifle or inhibit his conduct of these proceedings.
- (d). I have taken into account the Plaintiff's offer to provide a contractual undertaking by way of contract or deed poll to be governed by the laws of the Emirate of Sharjah and subject to the exclusive jurisdiction of the courts of the Emirate. While Mr Stueck confirmed, as I have noted, that he had been informed by Mr Al Aidarous that there *should* be no difficulties in principle or in practice with enforcing before the UAE Courts such an undertaking if governed by the relevant Emirati law and containing a choice of court clause in which the parties submitted to the jurisdiction of the UAE Courts, Mr Al Aidarous did not deal with the issue in his evidence. I can see that the undertaking *should* give the GHF Parties and the Fourth Defendant rights enforceable in the UAE, but the evidence as to the extent to which there would be obstacles to enforcement is incomplete and, in any event, it seems to me that in all the circumstances leaving the GHF Parties and the Fourth Defendant with only such an undertaking would not provide them with adequate protection against the risks they face in this case.
- (e). I do not consider that I am in a position at this stage of the proceedings to form a clear view of the Plaintiff's prospects of success. I have reviewed carefully the arguments made by the parties as to the basis for and weaknesses of the Plaintiff's claims and the extent to which they are based on his own undocumented assertions. But it seems to me that it would be premature to form a view on the Plaintiff's prospects of success or the grounds on which his claims might fail. As I have noted above, as was pointed out in *Danilina* (at [69]), for the purpose of a security for costs application the Court should not go into the merits of the claim in any detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure as regards the plaintiff's case. In my view, having carefully considered the parties' submissions, I do not consider that it can be clearly demonstrated that there is a high degree of probability of



success or failure. I therefore do not consider that the outcome of the security for costs applications can be affected by questions relating to the merits of the claim.

Quantum

71. As Moulder J held in *Pipia*:

“Given the conclusion that the defendant has shown a real risk, the defendant is entitled to security for the full amount: [Danilina] at [64]:

“In my judgment, once it has been established that there are “substantial obstacles” sufficient to create a real risk of non-enforcement, the starting point is that the defendant should have security for the entirety of the costs and there is no room for discounting the security figure by grading the risk using a sliding scale approach””.

72. I note and consider that I should follow the approach of Popplewell J in *Stokers*, at [7], [8] and [9] which has, as I have noted, been followed by the Chief Justice in *AHAB v SICL*. The Court must have regard to the balance of prejudice and will generally accept that the financial impact of *“getting it wrong in the defendant’s favour is usually less, indeed usually much less, compared with the financial impact of getting it wrong in the claimant’s favour. That factor ... is usually the reason for resolving any doubts in favour of a defendant rather than a claimant.”* Furthermore, *“It is necessary to approach the evidence about the amount of costs which have and will be incurred, and their reasonableness or otherwise, on a robust basis and applying a broad-brush”*.

73. In my view, this is as a case in which security for costs should be awarded upon the hypothesis that if the GHF Parties and the Fourth Defendant succeed, they will be awarded their costs on a standard basis. I consider the approach of Roth J *Phones 4U Ltd (in Administration) v EE Ltd* to be preferred and propose to follow it. I note that the Fourth Defendant said that the Court was not being asked to make any adverse findings against the Plaintiff at this stage but rather to recognise and take into account the fact that there were special factors which meant that an order for costs on the indemnity basis against the Plaintiff *is potentially available* to the Fourth Defendant. I do not accept that even if I were in a position to form a reliable view on the possibility or prospects of a costs order on the indemnity basis being made, that the mere possibility of such an award would be sufficient to justify an increase in the amount to be paid by way of security. In any event, I am not in a position to form a view at this stage as to the likelihood of there being an award of costs on the indemnity basis after the trial (in the same way that Popplewell J in *Stokers* at [31] was, *“not satisfied on the material ... before [him] ...*



that [he could] reach [the] conclusion [that there was a real prospect of indemnity costs]”). Nor am I in a position to form a reliable view on the prospects of the other aggravating factors relied on by the Fourth Defendant coming about, such as the likelihood of it being shown that the Plaintiff’s evidence was not honestly given as to his communications with Mr Naqvi. I therefore reject the Fourth Defendant’s arguments on this point.

74. I consider that in all the circumstances, the proper approach is to award security for costs for 70% (a) of the actual costs up to the date of the hearing of these applications and (b) of the estimated costs of the GHF Parties and the Fourth Defendant (subject to the adjustments made below) up to the conclusion of the discovery process, with the GHF Parties and the Fourth Defendant being given liberty to apply thereafter for further security to cover the period up to and after the trial (and liberty for all parties to apply for an adjustment to the amount of costs allocated to discovery after the arrangements for discovery have been settled):

- (a). the Plaintiff accepted that the security for costs awarded should cover costs to date.
- (b). as regards the estimated costs put in evidence by the GHF Parties and the Fourth Defendant, I consider that they were carefully and properly prepared according to an appropriate methodology, were adequate for these applications and represent the legal teams’ best estimates at this stage of their likely future fees.
- (c). but some of the estimates appear to me speculative, in significant measure because at this stage it is very difficult to be clear and precise as to the extent of the work involved in the later stages of the proceedings. I note for example, and accept, the concerns expressed by the Plaintiff, which I have summarised above, regarding witness evidence. The GHF Parties had estimated 555 hours (US\$344,733) without explaining what assumption had been made as to how many witness statements the GHF Parties intended or would need to adduce and before having a clear sense of the witness evidence of the other parties. Furthermore, at this stage it seems to me to be impossible to form a clear view as to the number of expert witnesses and the cost of preparing expert reports, and the likely length of the trial and therefore the costs of the trial.
- (d). difficulties also arise in relation to the estimates for discovery. It seems to me that the concerns expressed by the Plaintiff on this issue also have some substance. This is particularly the case since the mode and process for conducting discovery remains to be settled and is currently subject to further discussion among the parties based on a proposal put forward by the First Defendant, who appears to be in possession of

virtually all the main documents and data (which is very substantial). It seems to me that reliable estimates can only be produced once the arrangements for discovery have been settled. For present purposes, I consider that it is reasonable to attribute US\$1 million to estimated discovery costs for each of (i) the GHF Parties and (ii) the Fourth Defendant. However, I will give the parties liberty to apply for an adjustment of this sum after the arrangements for discovery have been settled and the level of work involved has become clearer.

- (e). I note the Plaintiff's concerns regarding whether the costs estimates have properly and fairly apportioned costs as between these proceedings and the Related Claims. However, I also note and give weight to the assurances given by the GHF Parties and the Fourth Defendant that they have based their estimates only on the costs to be incurred in these proceedings and I also note that the Plaintiff has accepted these assurances for the purpose of these applications. It seems to me that no further explanations or adjustments are required at this stage since they can if necessary be required and provided on future applications with respect to the cost estimates relating to the post-discovery stages in the proceedings (and on any further applications to adjust the estimate I have currently established for discovery).
- (f). the 70% figure proposed by the GHF Parties seems to me to be reasonable in the circumstances (and obviously includes the adjustment needed to adjust figures based on the costs as between solicitor and client which are bound to be reduced on an assessment).
- (g). as regards the GHF Parties' disbursements, I consider that in light of the uncertainty over the discovery process and the issues raised by the Plaintiff concerning the position of FFP, the amount to be attributable to forensic advice (from FFP or others) should be US\$750,000 (rather than US\$1 million), which represents the same estimate as had been provided by Alvarez & Marsal for the Fourth Defendant so that the total for disbursements becomes US\$1,416,395.28 (being US\$750,000 plus US\$666,395.28).

75. Accordingly, the amount of the security for costs for the GHF Parties will be 70% of the amount of their time costs and disbursements to the date of the hearing, which they will need to put in evidence, plus (assuming my calculations are correct) estimated future time costs of US\$1,012,708.90 (assuming that no adjustments are required to take account of the ability to include actual costs to the date of the hearing) plus estimated future disbursements of US\$1,416,395.28. The estimated time costs comprise:



- (a) pleadings: US\$243,924.10 (which is 70% of the total estimated sum).
- (b) directions and case management hearings: US\$68,784.80 (which is 70% of the total estimated sum).
- (c) discovery: US\$1 million x 70% = US\$700,000.

76. The amount of the security for costs for the Fourth Defendant will be (once again assuming my calculations are correct):

- (a) US\$944,540.97 being 70% of US\$1,349,344.25 representing time costs to 31 March 2021 together with 70% of the Fourth Defendant's further time costs up to the date of the hearing (which it will need to incur to put in evidence) plus disbursements of US\$223,551.99 together with further disbursements to the date of the hearing.
- (b) estimated time costs comprising US\$947,783.90 and £35,437.50 (once again, assuming that no adjustments are required to take account of the ability to include actual costs to the date of the hearing):
 - (i) pleadings: Ogier US\$180,388.50 x 70% = US\$126,271.95 and Counsel £33,750.00 x 70% = £23,625.
 - (ii) initial procedural matters: Ogier US\$173,588.50 x 70% = US\$121,511.95 and Counsel £16,875.00 x 70% = £11,812.50.
 - (iii) discovery: US\$1 million x 70% = US\$700,000.
- (c) estimated disbursements: US\$1,546,444.16.

77. The GHF Parties will need to put in evidence details of their time costs and disbursements to the date of the hearing and confirm that their estimated time costs and disbursements for the items covered by the order for security have not changed as a result of being permitted to obtain security for their actual time costs and disbursements to the date of the hearing (or if they have been changed, they will need to put their revised estimates with a brief explanation in evidence). The Fourth Defendant will need to put in evidence its updated figures for its time costs and disbursements to the date of the hearing and also confirm that its estimated time costs and disbursements for the items covered by the order for security have not changed as a result of

being permitted to obtain security for their actual time costs and disbursements to the date of the hearing (or if they have been changed, they will need to put their revised estimates with a brief explanation in evidence). Both the GHF Parties and the Fourth Defendant should do so within 14 days of the date on which this judgment is handed down and the Plaintiff will have 7 days in which to raise any issues concerning the GHF Parties actual costs and disbursements or the Fourth Defendant's updated actual costs and disbursements to the date of the hearing (I do not expect any issues to be raised unless material or resulting from obvious errors).

78. The Plaintiff should provide security in the form of cash paid into Court or by way a bank guarantee from a first-class reputable bank (based or with a branch in this jurisdiction) acceptable to the GHF Parties and the Fourth Defendant. The security should be provided within 14 days of the expiry of the 7-day period for queries or objections by the Plaintiff I have just mentioned.
79. If there are consequential matters that need to be dealt with in light of this judgment, I propose to deal with these on the papers. I would invite the parties' counsel to seek to agree any consequential matters following distribution of this judgment in draft and if agreement cannot be reached and there are matters which need to be raised with the Court, I would invite counsel to set out their respective positions in writing for my review and determination.



THE HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT