IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD0054 of 2009 (ASCJ)
CICA 15 of 2018

BETWEEN:

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

Plaintiff

AND:

(1) SAAD INVESTMENTS COMPANY LIMITED
(IN OFFICIAL LIQUIDATION)

(2) MAAN AL SANEA

and Others

Defendants

Appearances:	Nicholas Fox of Mourant Ozannes for the Plaintiff ("AHAB")
	Ben Valentin QC and Harriet Fear Davies instructed by Ian Lambert of Broadhurst LLC for the Thirteenth to Eighteenth Defendants ("the AWALCos").
	Shelley White of Walkers for the First, Eight, Thirtieth to Thirty-Third and Thirty-Fifth to Thirty-Seventh Defendants ("the GT Defendants").
	Tom Lowe QC instructed by William Peake, Grainne King and Niall Dodd of Harney, Westwood & Riegels for the Thirty-Fourth Defendant ("SIFCO5").
Before:	Hon. Chief Justice Anthony Smellie
Heard:	On the papers on 6th January 2022 and by hearing in chambers.
Decision Delivered:	7 April 2022
Reasons for Decision	26 April 2022

Ruling on access to security for costs

1. Following the trial of this complex action, by judgment delivered on 31 May 2018 ("the Judgment"), AHAB's claim against the Defendants was dismissed. On 6 September 2018 following a hearing as to costs, AHAB was ordered to pay the Defendants' costs of defending its claim, to be taxed if not agreed, on the indemnity basis.

2. I now have before me for determination, in the context of the Defendants seeking to recover their costs awards, a question regarding access to funds which AHAB was required during the course of the proceedings to provide as security for costs, framed as follows:

   "*Absent the agreement of all parties, is any party entitled to payment out of the funds held as security for costs in the Proceedings before the final resolution of the Proceedings against all defendants*?" (Herein referred to as "the Access to Security Question").

Background to the Access to Security Question.

3. The Defendants fall within three distinct groups of companies in liquidation, referred to conveniently and respectively as "the GT Defendants", "the AWALCos" and "SIFCO5".

4. A counterclaim brought by one set of Defendants, the GT Defendants, was also dismissed after trial on 31 May 2018, with the related costs awarded to AHAB. However, the costs of the counterclaim do not arise for consideration now.

5. On 14 June 2018, AHAB issued a Notice of Appeal against the Judgment and in May and June 2019, the Court of Appeal heard the appeal. In March 2021, the Court of Appeal indicated to the parties that it would dismiss AHAB's appeal and uphold the Judgment in so far as it dismissed AHAB's claim against the GT Defendants and the AWALCos but would order a retrial in respect of an aspect of AHAB's claim against SIFCO5. On 31

December 2021, the Court of Appeal delivered its judgment confirming those earlier indications.

6. By a series of rulings and orders given during the proceedings (the "Rulings"), this Court had ordered AHAB to provide the aforementioned security for the costs of the Defendants. The amount of security eventually ordered and provided over the course of the proceedings became USD 93.5 million, comprised of a charge over a certain property located in London, England (further explained below), cash and bank guarantees. These are the funds in respect of which the Access to Security Question has arisen ("the Funds").

7. During the pendency of the Court of Appeal's judgment, the GT Defendants and the AWALCos separately entered into settlement agreements with AHAB. Essentially, by those agreements, AHAB agreed to withdraw its appeal as it related respectively to those Defendants, in return for AHAB's liability to costs being limited to and being enforceable only as against the amounts secured by the Funds, as respectively apportioned to them and identified in the settlement agreements (the "Apportioned Amounts").

8. The GT Defendants and the AWALCos have also respectively with AHAB, proposed to enter into consent orders by which they would seek the Court's approval to allow them to have payment out of the Funds of the Apportioned Amounts, although for reasons to be explained below, the GT Defendants have not yet sought the Court's approval.

9. In the case of the GT Defendants, the Apportioned Amount would be USD 38.68 million. In the case of the AWALCos, it would be USD 29 million and that is the amount covered by their consent order entered into with AHAB and for which the AWALCos now seek the Court's approval, subject to obtaining an affirmative answer to the Access to Security Question.

10. As yet, the GT Defendants have not sought the Court's approval for their further consent orders entered into with AHAB. Their settlement agreement with AHAB takes account not only of the Apportioned Amount of USD38.68 million but also acknowledges that the

actual costs incurred by the GT Defendants are much greater, *viz:* USD 117 million plus interest for the costs to trial and USD 5.196 million plus interest for the costs of the appeal. The GT Defendants, for reasons asserted in their arguments now, have decided not to seek access to the Funds pursuant to their consent orders entered into with AHAB but to await the final outcome of all proceedings (including any retrial as between AHAB and SIFCO5 and any further appeals). While any intention to enhance their recovery at the expense of the Apportioned Amounts of the AWALCos or SIFCO5 is disavowed by the GT Defendants, given that the Funds comprise only of the definite amount identified above, that disavowal is understandably regarded with scepticism by the AWALCos and SIFCO5.

11. The AWALCos, for their part, seek to have payment out from the Funds now of the amount agreed by their consent order; viz: USD29 million which, as a term of their agreement with AHAB (but not in actuality as will be explained below), would represent 100% of the AWALCos' costs of the proceedings. By a further proposed consent order to be presented to the Court of Appeal for approval, AHAB and the AWALCos would agree that the AWALCos be paid USD3.5 million (plus interest which has accrued upon that sum as lodged with EFG Bank) pursuant to an order of the Court of Appeal of 16 November 2018, in respect of the costs of the appeal but to be included also within the Apportioned Amount of USD29 million.

12. SIFCO5 for its part supports the AWALCos' application for approval of the AWALCos/AHAB consent order.

13. The GT Defendants object to the Court's approval of the AWALCos/AHAB consent order on two main bases. The first is as they argue, that that order has been agreed by AHAB in breach of its settlement agreement with the GT Defendants[1] and so, "*as a matter of*

[1] By which inter alia, AHAB agreed that it will neither take nor authorize any step which seeks the release of any part of the Fund until such time as USD38.68 million has been paid to the GT Defendants, recognizing that their actual costs at USD117.2 million (plus interest of USD 10.2 million) at first instance and USD 5.2 million on appeal, very substantially exceeds that amount of USD38.68 million which AHAB agreed to pay as part payment of the GT Defendants' costs and that the GT Defendants' only recourse to recover their costs will be payment from the Fund (together with any additional security that AHAB may ultimately be required to provide).

propriety", should not be approved by this Court. Their second main basis for objection, is as they submit, that the Court's earlier rulings on security for costs, in particular the SIFCO5 Ruling (as discussed below), clearly demonstrate that the Funds were to be inaccessible until the end of the proceedings when all the Defendants' costs orders were finalized. Accordingly they submit that there were no settled allocations of security from the Funds during the proceedings, only notional apportionments. The GT Defendants say that although they also have a settlement agreement (already approved by this Court) and consent order with AHAB which would entitle them to access the Funds, they have been waiting for the end of the proceedings and have not sought to access the Funds although it has been more than a year since their settlement with AHAB. It would therefore be unjust they submit, for the Court to sanction the AWALCos' attempt to "*steal a march*" by agreeing to immediate access to the Funds for 100% of their agreed costs.

14. Thus, the GT Defendants seek to maintain the *status quo* in respect of the security for costs until the Court can make, at the conclusion of all proceedings, what they say would be "*a fair assessment based on the justice of the case*" as to how the Funds should be allocated to meet the respective costs. This would include any costs which may become ultimately due to SIFCO5 after conclusion of the retrial which has been ordered by the Court of Appeal. As the GT Defendants assert a creditor's interest in SIFCO5's estate, the more SIFCO5 recovers by way of costs, the more the GT Defendants would therefore hope to recover as creditor. It is said by the GT Defendants that allowing the AWALCos to take 100% of their agreed costs now, would risk irreparable harm to the GT Defendants and/or SIFCO5 (and so also their putative creditor's interest in SIFCO5) because amounts found to be due to the GT Defendants and/or SIFCO5 upon taxation, may be more than the amount of USD64.5 million (ie: USD 93.5 million minus USD 29 million) remaining after the AWALCos would get their payment out.

15. Despite the GT Defendants' position, SIFCO5 as already noted, for its part supports the AWALCos' position. This is on the basis, also relied upon by the AWALCos, that the Funds should indeed be regarded as having been apportioned to secure the costs of the

parties as identified by the Court in the Rulings by reference to evidence which they respectively provided to the Court in support of their costs estimates and which became the basis for the amounts of security ordered in response to their respective applications.

16. It is also significant that AHAB itself disagrees with the GT Defendants' stance, as set out in a letter from Mourant of 28 October 2021 :

> "*AHAB has always understood that the security for costs was allocated to the Defendants by the Honourable Chief Justice and the Court of Appeal in the specific amounts ordered and referred to in the Court's judgments handed down after each security application. AHAB has never considered that allocation to be notional. It has not been suggested during the parties' submissions, or in the detailed security judgments, that the sums ordered as security for costs might be capable of being re-allocated between the Defendants*".

17. Finally, it must be noted for setting the context, that it is also expressed to be the GT Defendants' position, that, "*for the avoidance of doubt*" should the Court prefer the AWALCos' analysis on the Access to Security Question (which I will come to set out in more detail below), then they too will follow suit on the basis of their settlement agreement with AHAB and seek immediate access to the Funds in terms of their consent order already agreed in October 2020 with AHAB, when they entered into their settlement.

18. While the Rulings were indeed expressed for the payment of security for costs by AHAB apportioned between the Defendants as aforementioned, the very first order for security was made by consent of the parties on 24 February 2011. It is the GT Defendants' submission that despite the Rulings which came subsequently, this Court's interpretation and application of the very first order (expressed in a ruling on an application by SIFCO5 ("the SIFCO5 Ruling")), had set the precedent for costs dispensations for the entire Proceedings. Paragraphs 7, 8 and 9, of that order ("the First Order") provided in terms that:

> "*7. The security shall be by way of:*
>
> *(1) security for the costs of the Defendants in liquidation up to the close of pleadings; and*

(2) fortification of AHAB's undertaking in schedule B paragraph 1 of the worldwide freezing order [("WFO")] dated 24 July 2009 (as varied) in relation to the Defendants in liquidation. [This WFO was later discharged]

8. For the avoidance of doubt, the provision of security pursuant to this order shall be without prejudice to the ability of the Defendants in liquidation to apply for further security (in any amount or form) for their costs in relation to later stages in the proceedings and/or further fortification under AHAB's undertaking referred to in paragraph 7(2).

9. There shall be liberty to apply for variation or enforcement of the terms of this order and/or in relation to the provision of security under the security schedule."

19. The referenced "*security schedule*" explains that the security then to be provided by AHAB "*shall be in the form of a first legal charge over real property located in England ["the London Property"] with an open market value of at least US$7,500,000 as evidenced by a valuation report by an independent valuer reasonably acceptable to the liquidators of the Defendants in liquidation, to be obtained by AHAB and provided (together with the instructions on which the valuation was obtained) to the liquidators of the Defendants in liquidation...*".

20. Following the making of the First Order and at an early stage in the proceedings before the close of pleadings, SIFCO5 had applied successfully to strike out AHAB's claim against it. Although that decision was eventually overturned on appeal, pending that appeal SIFCO5 had applied to recover its costs as against AHAB by way of enforcement of the charge against the London Property. The property was then the only security available to meet an order for any or all Defendants' costs. That application was refused for reasons, among others, expressed in a judgment of 16 October 2013, the aforementioned SIFCO5 Ruling[2] at [30] as follows:

> "*SIFCO 5 seeks leave to enforce its entitlement to costs against the security paid into court by AHAB when its entitlement will have been taxed and quantified. I do not regard that as an appropriate order to make now in the*

[2] Reported at 2013 (2) CILR 356.

circumstances of this case where the security was paid in as against any award of costs to which any defendant might ultimately become entitled. SIFCO 5 will be entitled to its costs when quantified but must either enforce against other assets of AHAB's (if not paid forthwith) or await the final outcome and claim pro rata when the security becomes available to be levied against by all defendants."

21. The GT Defendants rely upon that conclusion of the SIFCO5 Ruling as being determinative now also of the Access to Security Question. They submit, as already mentioned, that the SIFCO5 Ruling established the principle in this case that the security for costs was to be inaccessible until the end of the proceedings when all of the Defendants' costs orders were finalized and when the Court would be able to make a fair assessment based on the justice of the case as to how the Funds should be allocated to meet the respective Defendants' costs.

22. Primarily having regard to how the Rulings subsequent to the SIFCO5 Ruling were premised, and having regard to what appeared to me to be a fair dispensation of costs in the case, I was unable to accept the GT Defendants' argument and concluded that the answer to the Access to Security Question is "yes". I now give the reasons for my decision.

23. Before arriving at my decision and following my review of the written submissions in support of what began as an application on the papers, I determined that a hearing was necessary and raised, in an email from my secretary to the parties on 7 January 2022, three points to be addressed as follows:

> "1. *The Access to Security Question has been presented to the Court as being one primarily of principle in two respects (a) would it be proper for the Court to approve the proposed AHAB/AWALCos consent order if presented in breach of AHAB's [settlement] agreement with the GT Defendants (b) whether AHAB still has an interest in the security funds such as to allow AHAB to enter into a bi-partisan consent order for disposal of the funds (or any part of them) without the consent of all parties or a final disposition by the Court at the conclusion of all proceedings.*

The answer to the first point of principle will obviously depend upon the answer to the second as the first would involve an exercise of discretion which can only arise once we know the answer to the second.

2. *It appears however, that even if the answer to the second is in the negative, there would still remain the question whether the Court has the power to approve of a bi-partisan consent order [on costs] in circumstances where the proceedings have been entirely concluded as between the parties to it (in this instance AHAB and the AWALCos). This would appear to be so because [there is] nothing in the authorities relied upon by the GT Defendants which would establish that the security funds are vested in the Court [to the exclusion of] the paying party (AHAB) [or] suggests that the Court could not allow a party who has finally settled the dispute and agreed on the quantum of costs, to have access to what may be regarded by the Court as its fair share of the Funds before all proceedings are concluded.*

   The SIFCO5 Ruling dealing as it did with a situation where SIFCO5 sought a peremptory and opposed order, does not appear to go so far as establish that the Court does not have or retain that power over a security fund.

3. *If therefore, the Court itself is not precluded, the further question arises why it should not approve of the AHAB/AWALCos consent order? Apart from the first point of principle (which is posited above as a matter of discretion), there are obvious considerations; eg: (i) regarding a Fund of USD 93.5 million, with USD 29 million to go to the AWALCos and a minimum of USD 38.68 to go to the GT Defendants, there would remain USD 25.8 million to meet the costs of SIFCO5 if SIFCO5 ultimately succeeds [against AHAB] or to augment the GT Defendants' [costs] recovery if AHAB ultimately succeeds against SIFCO5. (ii) As the GT Defendants would press now for [approval by the Court of the] consent order they have with AHAB if the AHAB/AWALCos consent order is approved, they would have access to that much of their money (USD 38.68 million) sooner rather than later and (iii) if [SIFCO5 succeeds ultimately], in the absence of agreement, any contest over who should have the balance of USD 25.8 million would be between only themselves and [the GT Defendants] and SIFCO5, as the AWALCos could have no further claim in light of the terms of their settlement with AHAB, with the GT Defendants (thus) likely to benefit to the extent that AHAB succeeds. There may well be other considerations".*

24. Those three issues presented to the parties by the Court were helpfully summarized by Ms White as follows:

(i) Does AHAB still have an interest in the Funds such as to allow AHAB to enter into a bi-partisan consent order for disposal of the Funds (or any part of them) without the consent of all parties or a final disposition by the Court at the conclusion of the Proceedings?

(ii) Even if the answer to question (i) is 'no', does the Court have the power to approve a bi-partisan consent order for payment out of security funds in circumstances where proceedings have been entirely concluded as between the parties to that consent order?

(iii) If the Court does have that power, is there any reason why the Court should not approve the AHAB/AwalCos consent orders?

25. The three issues were presented to the parties having regard to my acceptance of certain principles from the case law which explain the status and treatment of funds held as security for costs. Indeed, the logically prior question to the Access to Security Question was – what is the status of funds held as security? I will therefore examine this issue before returning to discuss the submissions of the parties.

The status of funds held as security for costs.

26. As was recognised in the Rulings [see for instance: 2016 (2) CILR 208, 2016 (2) CILR 244 and 2017 (2) CILR 602], orders for security for costs were justified in the case and made in the exercise of the powers given the Court under Grand Court Rules Order 23. This was essentially on the basis that, in the event a defendant succeeded, there would be assets of AHAB as the unsuccessful foreign plaintiff within the jurisdiction against which the costs of defending its claim could be recovered. In the exercise of that power, AHAB as a foreign plaintiff, was not however, to be required to provide security for defendants' costs on the merely discriminatory basis of its status as a foreign plaintiff nor in such amounts as to prejudice unduly its ability to pursue its claim - further principles also recognised by the Rulings; see, in particular, 2017 (2) CILR 602.

27. Security having thus been ordered, the settled case law explains that when a party actually pays money into Court, whether as payment against a judgment or, for present purposes, as security for costs, he relinquishes access to and control over his money and the party with the benefit of the security is treated as a secured creditor to the extent of the money paid into court.

28. The first of the cases appears to be *Re Gordon, ex parte Navalchand* [1897] 2 QB 516. This was a case in which Navalchand a foreign banker ('N') sued Gordon to recover a debt of some £119. On N's application for summary judgment, Gordon obtained leave to defend but later paid £48 into court as against N's claim with a denial of liability. He also obtained an order requiring N, as N did, to pay into court some £110 by way of security for his costs of the action. Gordon was then adjudicated bankrupt. His trustee declined to be made a party to N's action or to consent to the payment out to N of the money in court and so N applied for an order for the payment out to N of the two sums. N's counsel argued that (i) as to the £48, N was a secured creditor, and (ii) as to the £110, that N was clearly entitled to have it paid out to him, as it was his money.

29. Vaughan Williams J held that N was entitled to the payment out of the £110 (subject to any deductions for costs orders in favour of Gordon which he may have obtained in interlocutory proceedings), as the £110 was indeed N's money. As to the £48, he said, at pp519-520:

> "*I am clearly of the opinion that if the proof is admitted [in Gordon's bankruptcy] or to the extent to which it is admitted, the plaintiff [N] is a secured creditor by reason of the payment into court. The money paid into court, even with a plea denying liability, has become subject to the plaintiff's claim by the act of the defendant, who thereby agrees that the sum paid in shall remain in court subject to the conditions of Ord XX11, r 6. It is not a question of execution at all, but of a conventional charge. It is in effect a conditional payment to the plaintiff. The money is to be the money of the plaintiff if he succeeds in establishing his title to it: In re Moojen (1879) 12 Ch D 26.*"

30. *Re Gordon* was affirmed by a very strong Court of Appeal 85 years later in *W A Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] 1 ALL ER 216, after review of what was until then conflicting case authorities. Goff LJ, in his concurring judgment stated as follows (at 228 e-g):

> *"It is plain that there is an established line of authority, stemming from Re Gordon, ex parte Navalchand [above], that a plaintiff is treated as a secured creditor to the extent of money paid into court, whether that money has been paid in involuntarily, ie as a condition of defending the action, or voluntarily. In particular, I am satisfied that the decision of this court in Dessau v Rowley [1916] WN 238 was made on that basis. It is true that in the judgments in that case only Phillimore LJ expressly refers to the plaintiff as a secured creditor; but I do not see how the court could have made the order it did unless it proceeded on the basis that the plaintiff was indeed a secured creditor. Ever since Re Gordon this has been regarded as established law; and, so far as I am aware, it has never been questioned. It has been treated as such in successive editions of the Supreme Court Practice, and is still treated as such in , for example, 3 Halsbury's Laws 4th edn) para 318 and Williams and Muir Hunter on Bankruptcy (19th edn, 1979) pp 55, 77"*

31. The applicability of the principle from the *Re Gordon* line of cases in the Cayman Islands must also be regarded as settled in light of the Privy Council's decision in *Cleaver and another v Delta American Reinsurance Co (in liquidation)* [2001] 2 AC 328. There it was held, inter alia, (applying *W.A Sherratt* (above)), that a creditor who had obtained before Delta Re went into liquidation a form of security by way of letter of credit conditional on establishing the validity of its claim filed against Delta Re in New York, was entitled to retain the benefit of that security irrespective of the intervening liquidation. The creditor was in substance a secured creditor because the letter of credit had been procured by Delta Re to discharge its obligation to the New York court which had ordered it to secure payment to the creditor of any amount to be awarded to it in any final judgment.

32. It is also clear from the case law that the foregoing principles apply to payment of money into court not only as a condition of leave to defend or voluntarily to limit potential liability

under a judgment (as was the £48 in *Re Gordon*) but also to fortify a cross-undertaking in damages or to provide security for another party's costs[3]. See *In re Peak Hotels and Resorts Ltd (in liquidation) Crumpler and another v Candey Ltd* [2019] 1 WLR 2145.

33. It also appears however, from dicta from the English Court of Appeal in this case of *In re Peak*, that the party making the payment into court retains its property rights in that money, although such rights are subject to the security interest of the other party or parties and the ultimate payment out of the money to one party or another (or all parties) will be dependent upon the making of a court order. At [88] Sir Colin Rimer stated as much in this regard on behalf of the Court of Appeal:

> "*In my view, therefore, the various decisions of the court that support the view that the payer retains a property interest in the money have favoured a correct and principled view. I recognise that the payment in also gives the other party a security interest in the money and that the ultimate entitlement to the money in court is subject to an exercise of the court's discretion. If I may respectfully say so, however, Oliver LJ's statement in the W A Sherratt Ltd case [1985] QB 1038 that "the money becomes subject entirely to whatever order the court may see fit to make" appears to me to be perhaps a slight overstatement of the uncertainties, if any, as to the ultimate destination of the money in court. In, for example, a case in which money is paid into court by way of security for a defendant's costs, such destination will be a simple binary choice: if the defendant wins, and recovers costs, he will be entitled to the money, or part of it; subject to that, it will be paid back to the claimant. Some cases may be more difficult, and even the seemingly easy cases might become so. But the ultimate destination of the money is not dependent upon anything akin to an unpredictable judicial lottery. In light of the outcome of the litigation, it will in most cases be obvious what payment out orders the court ought to and will make*".

34. Applying the foregoing principles from the case law to the present case, I consider that the legal position can be summarized as follows; the starting point being that in keeping with section 24(1) and (3) of the Judicature Act, the award of costs shall be in the discretion of

[3] This latter point never arose for determination in *Re Gordon* because the Plaintiff was entitled, *ex debito justitiae*, to the return of the amount of £110.

the Court and the "*Court shall have full power to determine by whom and to what extent the costs are to be paid*":

(i) Money paid into court by a plaintiff by way of security for costs ordered by the court, becomes charged with an equitable security interest in favour of the defendant(s).

(ii) If the defendant(s) succeed in the action they will become entitled to the money, subject at all times however, to the discretion of the court being exercised as to any award of costs.

(iii) Until such an award is ultimately made by order of the court, the plaintiff as the party paying in the money, also retains a limited propriety interest in the money and subject again to any order the court might make, is entitled to pledge that limited interest to a third party (as in *In re Peak*) or to a defendant to the action in which the security was paid in.

35. In the present case, this is what AHAB purports to do by way of the consent orders entered into respectively with the GT Defendants and the AWALCos. This is on the basis that they should be entitled to the Apportioned Amounts stated in those orders as discussed above and as representing the amounts which were apportioned respectively to them by the Rulings and subject also as discussed above, in the case of the GT Defendants, to any further amounts they could recover from the Funds to top up their acknowledged much greater entitlement to costs.

36. In my view the case law examined above informs the affirmative answer to the first of the three issues raised with the parties by the Court and identified at [24] above, which is whether AHAB retains a proprietary interest such as to allow it to enter into the consent orders.

37. As AHAB retains a proprietary interest in the Funds subject to those of the Defendants, there was nothing to prevent AHAB from entering into the consent order with the AWALCos (or indeed with the GT Defendants as it did in October 2020) in respect of their respective Apportioned Amounts of the Funds. This was all subject of course, to the discretion of the Court whether to approve of the consent orders.

38. The second of the three issues from [24] above goes to the jurisdiction of the Court to approve the AHAB/AWALCos consent order before the completion of the entire proceedings (ie: pending the retrial in respect of a portion of AHAB's claim against SIFCO5) but with all proceedings against the AWALCos and the GT Defendants completed.

39. It is clear from their submissions, that the GT Defendants do not dispute the power of the Court to approve of the consent orders. As much was expressly acknowledged by Ms White in her final reply submissions in response to the issues raised by the Court where, at [4] she submitted frankly and helpfully as follows:

> *As a matter of principle, a payment out order may follow determination of a party's rights viz. the Payor or some compromise or settlement of those rights: Halvanon Insurance Co. Ltd*[4]*, per Hobhouse J. at p.1130D and Multiplex*[5] *[24] per O'Farrell J: ("No doubt, in appropriate circumstances, that [i.e., payment out of the funds] could be done by way of a consent order").*
>
> *Where there are multiple Security Interest Parties, there is no authority that the GT Defendants are aware of to suggest that the Court "could not allow a [Security Interest Party] who has finally settled the dispute and agreed on the quantum of costs, to have access to what may be regarded by the Court as its fair share of the fund, before all other proceedings have been concluded [as against the other Security Interest Parties]" (per paragraph 2 of the Email).*
>
> *As such, in appropriate circumstances, the Court could properly exercise its discretion to approve a bi-partisan consent order for payment out of security for costs in a case with multiple Security Interest Parties. However, it is submitted that it is clear as a matter of natural justice that the parties interested in the fund should be given an opportunity to be heard in respect*

[4] [1988] WLR 1122.
[5] [2019] EWHC 3464 (TCC).

of the question of whether, and if so, how the Court should exercise such discretion".

40. It is of course, just that opportunity to be heard on the Access to Security Question (and taken by all the parties) that allowed Ms White to argue against the exercise of the power to approve of the AHAB/AWALCos consent order. Relying throughout on the premise that the SIFCO5 Ruling had cast the die for dispensation of costs to be allowed only after the entire proceedings are concluded by reference to the Funds as an unallocated whole, she made the following final points (taken from [5] of her final written submissions):

> *"(a) First, is that the Court should not exercise its discretion to approve the consent orders when that would facilitate a serious breach by AHAB of the GT Defendants' Settlement.*
>
> *(b) Secondly, it is not yet known what the final costs position will be as between the Defendant-groups and, therefore, the potential for causing prejudice to the GT Defendants and SIFCo5 by allowing the AwalCos to take their agreed costs at 100 cents on the dollar is significant.*
>
> *(c) Thirdly, the GT Defendants' additional costs orders are intended to 'level the playing field' between themselves and the AwalCos as regards their respective foreign lawyers' costs. The AwalCos' security was predicated on further consideration as regards foreign lawyers' costs. Such further consideration never occurred."*

41. Before addressing each of those final points in turn, I will address the impact of the SIFCO5 Ruling, in particular para. 30 as set out above. In my view, it does not support the GT Defendants' proposition. The circumstances at the time of the SIFCO5 Ruling were very different than those which appertained at the subsequent applications for security for costs. The SIFCO5 Ruling was made when the only security available was the charge over the London Property which was itself the result of a consent order entered into between all the parties. The security was in the form of a first legal charge over the London Property given to the liquidators of the Defendants jointly and severally to secure AHAB's liability under costs orders at that time amounting to USD5 million, plus any further amount of security (up to the value of the London Property then valued at USD 7.5 million) which AHAB

may have subsequently been ordered to provide. There was then no apportionment of the value of the charge as between the Defendants but as will be explained below and of some significance for present purposes, the liquidators of the Defendants did come to agree among themselves upon terms of apportionment of the value of the charge.

42. By contrast to the First Order which was made by consent, all subsequent orders for security were the result of each Defendant group's applications by way of individual summons supported by its own evidence detailing its own incurred or anticipated costs. Each group then made its own submissions to the Court as to the level of costs it had incurred or anticipated incurring. And each time the court determined an application for further security, the resulting ruling considered the situation specific to each Defendant group, addressing each group's position in detail in the Rulings and, with one material exception, ordered that AHAB provide an amount of security specific to each Defendant group (ie: the Apportioned Amounts). The one exception was a ruling given in 2015, when the Court left apportionment to the parties to agree, by ordering that the sum should be "*apportioned between the GT Defendants, the AWALCos and SIFCO5 as agreed between them or, in default of agreement, as ordered by the Court*", thereby making clear that, on that occasion also, as on all others, apportionment was still required. The Defendants did subsequently agree the apportionment.

43. It follows in my view, that the GT Defendants' argument by reliance on the SIFCO5 Ruling, that security subsequently ordered by the Rulings had been only "*notionally allocated*" would be contrary to the long and consistent history of security for costs application in the action.

44. Indeed, as indicated above, even the First Order itself had come to be the subject of apportionment as the result of an initiative by way of letter dated 8 March 2011 written on behalf of the GT Defendants (the "Apportionment Letter"). The Apportionment Letter came to set out the agreement between all the joint official liquidators of the Defendants regarding how the value of USD 5million secured by the charge over the London Property

should be apportioned in exact percentages between them and further explained that if any defendant or group of defendants had no claim at the end of the day to all or part of its share of the security then it would be allocated amongst the other defendants or groups of defendants.

45. Thus, the First Order had come, correctly in my view, to set the framework for dispensation of the Funds as well. While amounts have been ordered to be provided as apportioned by reference to the position of each group of Defendants, the Funds are meant to be a common pool from which payments would be made first by reference to the Apportioned Amounts but with reference also to any amounts which may be available where a Defendant proves to be entitled to more than its Apportioned Amount. In other words, ever since the First Order, there has been a settled expectation that a successful Defendant would be able to recover its costs *at least* as against its Apportioned Amount.

46. With that conclusion in mind, I can readily deal with the final three points made on behalf of the GT Defendants as set out above at [40].

47. First, by approving of the AWALCos/AHAB consent order, the Court would simply be recognising the settled expectations of the parties as explained above, that they would have access to at least their respective Apportioned Amount. By contrast, by their settlement with AHAB, the GT Defendants seek to enhance their ability to recover more than their Apportioned Amount. While that is understandable, they are not entitled to the Court's accommodation for doing so if that would involve unfairness to another party by allowing them to undermine the settled expectations. While the GT Defendants disavow any such intention, this is precisely what they would aim to achieve by postponing all access to the Funds until completion of all proceedings upon taxation when they would argue for a *pro rata* distribution of the Funds. They would then argue that relative to the actual total entitlements to costs on the indemnity basis and the available Funds, their entitlement should be recognised as being proportionally much greater than that of any other of the other Defendants'. That in my view, would be an unjust outcome. On the other hand, by allowing access to the Funds now rather than await the final outcome of AHAB's case

against SIFCO5, the GT Defendants will have access for top up of its recoveries, to any amount remaining after that outcome. This is as explained in the Court's email to the parties as set out above.

48. Secondly, the notion of potential prejudice to the GT Defendants and SIFCO5 by allowing the AWALCos access to their Apportioned Amount now is also disabused by the foregoing analysis. Nor is it a concern which is shared by the SIFCO5 liquidators who must therefore accept the fairness of their Apportioned Amount even if it falls short of an ultimate indemnity recovery. The same is true of the AWALCo liquidators who explain in their reply submissions that, contrary to the notion that their Apportioned Amount represents 100% of their indemnity costs (inclusive of non-admitted foreign lawyers' fees), the actual amount is USD36.46 million (exclusive of foreign lawyers' fees).

49. Thirdly, and more specifically on the issue of non-admitted foreign lawyers' fees[6], the GT Defendants argue that awaiting the final outcome would allow the Court to "*level the playing field*" because the AWALCos' security applications and hence their Apportioned Amount, included non-admitted foreign lawyers' fees and so was predicated on there having to be further consideration upon taxation, further consideration which therefore they say, has not taken place. However, as discussed immediately above, the Apportioned Amount now to be released to the AWALCos is in any event significantly less than the total amount of their actual incurred costs, even excluding non-admitted foreign lawyers' fees. By contrast, the full indemnity amounts which the GT Defendants would seek to recover on the *pro rata* basis at taxation would, on their own admission, include non-admitted foreign lawyers' fees.

50. In short, it seems that the GT Defendants wish to retain the opportunity so that if, as would be likely upon taxation, their costs figure is higher on a pro rata basis than that of the other Defendants, as compared to the security which is apportioned for each of them, they will

[6] Which are not recoverable upon taxation on the ordinary basis under the costs rules as recognized and directed by a decision in these proceedings reported at 2015 (2) CILR 338

be able to appropriate a greater sum than the approximately USD38 million specifically apportioned to them by the Court, by taking the security which has been apportioned for the benefit of the AWALCos and/or SIFCO5. That in my view would be manifestly unfair. It would also be practically unworkable given that in any event, there would be no taxation of the AWALCos' costs because that is the subject of an amount which they have already finally settled by agreement with AHAB in terms which they as parties to that agreement, were entitled to reach (just as the GT Defendants were entitled to agree with AHAB).

51. Finally, there are important further practical reasons why the GT Defendants' argument could not be accepted. These are clearly articulated on behalf of the AWALCos as follows in terms which I also accepted:

a. In the circumstances of AHAB's impecuniosity and the resultant need for each Defendant to be reliant on the security which has been lodged by way of the Funds, this would mean that none of the Defendants could conclude its dispute with AHAB or enter into a settlement agreement with any immediate effect, because they would each have to wait for the final conclusion of any taxation process pursued by other Defendants. This would have the knock on effect that no Defendant group would be able to complete their liquidation process until all Defendant groups had completed taxation. That would make no sense in a case which has already lasted for many years and taken up huge amounts of Court time.

b. Given the vast amounts of time spent by lawyers and other professionals over the many years the Proceedings have been on foot, the costs and disbursements are enormous and complex. The taxation process for each of the three Defendant groups would be almost unprecedented in its size and would be likely to last for months if not years, and to incur further significant costs to complete. The suggestion that it should be the case that the parties cannot opt to avoid that by reaching agreement with AHAB as to their costs, and as to the manner of payment of those costs, is commercially nonsensical. If of general application, it would mean that individual

parties in multi-party claims where security for costs have been lodged could never settle and achieve finality before the entire proceedings had concluded.

c. It is reasonably to be expected (given the long history of security for costs issues in this case) that the liquidators of the AWALCos have over the past 10 years, when making decisions concerning the Proceedings, proceeded on the basis that the sums specifically secured in the AWALCos' name were ultimately for the benefit of the AWALCos, and not potentially subject to some subsequent re-allocation, at the whim of the GT Defendants.

d. And, finally as regards agreements on costs reached without intervention of the Court: in February 2016, the AWALCos and SIFCO5 settled summonses for security for costs with AHAB, and SIFCO5 did the same again in June 2017, without the matter being considered substantively by the Court. If the sums which they each then agreed with AHAB are now apt to be reconsidered as part of a bigger pool, that would undermine the commercial decisions reached at the relevant times as to resolving the matter in a way which the parties each considered best protected their interests.

52. And so in summary, my decision was taken first upon the basis that the jurisdiction to allow access to the Funds at this stage before all proceedings are concluded is admitted and acknowledged. The several factors discussed above were all relevant to the exercise of discretion as to whether or not it would be fair to allow that access and on that basis I decided to approve the AWALCos/AHAB consent order.

Hon Anthony Smellie
Chief Justice

26 April 2022.