

2. The Defendants also then reported that they were preparing their estimates for costs to be incurred during the trial, and would seek to agree them with AHAB. In the event that agreement had not been reached, the Court would be invited to determine the application for security to cover the trial at the Pre-Trial Review (“PTR”).
3. As events transpired, agreement was not reached and so upon the PTR coming on before me on 12-13 April 2013, I was presented with summonses by the Defendants for resolution of the matter.
4. The requirement that AHAB as a foreign plaintiff having no assets in this jurisdiction against which an award of costs might be enforced, should provide security for the Defendants’ costs is, as explained above, settled. The applicable legal principles were discussed and applied in previous judgments of this court and indeed in previous judgments delivered in this case. See AHAB v SICL et al FSD 054 of 2009 judgment delivered on 15 November 2013 (the “November 2013 Judgment”) and FSD 054 of 2009 judgment delivered on 1 November 2015 (“the November 2015 Judgment”) in which the principles as they arose for peculiar application in a case of the scale, scope and complexity of this one, were discussed.
5. At its core, it is accepted that the setting of security for costs is a discretionary exercise to be undertaken by the judge necessarily applying a “broad brush”. The objective is to arrive at a fair and realistic, not necessarily a precise or generous, estimate of the costs to be incurred by the Defendants for the trial.
6. The Defendants’ applications by summons are supported by affidavits from their respective Joint Official Liquidators (“JOLs”), explaining the headings of costs as set out in Schedules to the Summons. The Schedules have all been prepared on the same basis, each recognizing that, if to be taxed on the standard basis pursuant to Order 62 of the



Grand Court Rules, costs would be recoverable at no more than 70% of the actual expenditure. They begin with a summary using that of the GT Defendants as a first example:

SUMMARY OF SECURITY REQUIRED BY THE GT DEFENDANTS AHAB TRIAL COSTS				
SECURITY REQUIRED (TRIAL PERIOD ONLY)	TOTAL HOURS	TOTAL COST (USD)	ALLOCATION OF COSTS TO COUNTERCLAIMS (USD)	AMOUNT CLAIMED (USD)
Opening arguments	1,200	768,000	132,000	636,000
AHAB's witnesses	3,840	2,457,600	105,600	2,352,000
Additional working days - AHAB's witnesses	1,920	1,228,800	52,800	1,176,000
The Defendants' witnesses	1,920	1,228,800	264,000	964,800
Additional working days - Defendants' witnesses	800	512,000	110,000	402,000
Expert evidence	1,920	1,228,800	52,800	1,176,000
Additional working days - Expert evidence	800	512,000	22,000	490,000
Overrun	1,200	768,000	33,000	735,000
Preparation of closing arguments	2,400	1,536,000	264,000	1,272,000
Work on oral closings	720	482,400	74,880	407,520
Oral arguments	2,160	1,464,000	249,600	1,214,400
Total time costs	18,880	12,186,400	1,360,680	10,825,720
Total time costs less 30% (assume 70% recovery)	13,216	8,530,480	952,476	7,578,004
GT Defendants Disbursements		3,826,744	53,296	3,773,448
Total recoverable costs and disbursements		12,357,224	1,005,772	11,351,452



7. A major difference to note between the GT Defendants' estimates and those of the other Defendants, relates to the GT Defendants' counterclaim to which they attribute \$1,005,772 of the recoverable costs and disbursements. This is then deducted in their Schedule from the total of \$12,357,224 as shown above, to reflect the fact that as plaintiffs on the counter-claim, they are not entitled to security for costs of its prosecution. The total sum remaining – \$11,351,452 – is thus the sum of security sought. This is a primary issue which I address here.
8. Given the magnitude and complexity of the counter-claim for some \$6 billion, I am compelled to conclude that the amount allocated to it, representing less than 10% of the overall cost estimates for the trial, is far too conservative. An amount representing at least 20% would, in my view, be more fairly representative and consistent with the apportionment which I earlier applied to the costs of this counterclaim in the November 2013 Judgment, at paragraph 103. That is the allocation I now make.
9. I also note in this regard, that a second senior silk in the person of Mr. Phillips QC has been engaged for the GT Defendants' litigation team, with primary responsibility for presenting their counter-claim being reposed in him. This must be reflected in the costs attributable to the counterclaim.
10. The amount to be allocated to the counter-claim will therefore be reflected in a deduction of 20%, as explained further below. With the counter-claim accounted for in that way, the rest of the costs, I accept as Mr. Phillips submits, should be treated with by distinguishing between the Time Costs and Disbursements.
11. One reason for this which I recognize, is that at this stage of the proceedings, the JOLs can be expected to have arrived at their estimates of disbursements with somewhat more precision than might be attained in estimating Time Costs.



12. Time Costs are, moreover in my view, as prone as ever to be influenced by the JOLs' inclination, as prudent custodians, to err on the side of protecting their liquidation estates with the largest possible buffer. Here I note in particular, Mr. Quest's criticism of the common approach of all the JOLs to the estimation of man hours to be spent by their entire litigation teams in the process of the trial.
13. In this regard, the Time Costs have been estimated on the basis that each litigation team – two comprising 10 lawyers and one of 7 or 8 lawyers – will be fully engaged for 10 hours each day for the entire length of the trial. This – notwithstanding that significantly smaller teams will actually be in the courtroom – is explained on the basis of all the support work that will have to be going on outside the courtroom, to support the lawyers who will actually be in court.
14. This I regard as a too generously cautious approach on the part of the JOLs. That is not the approach which I am called upon to take being mindful not only of the Defendants' interests but also of the need not to impose an unfairly onerous burden on the Plaintiff.
15. For such reasons, I applied a discount of 20% to the overall estimates for Time Costs when making an earlier award of security for costs in this matter. See the November 2013 Judgment at paragraph 99. That is the discount I apply now to the overall Time Costs (before the discount for the counter-claim time costs) for the same reasons. A discount of 10% will also be applied to the estimate for Disbursements taking the same philosophical view of the JOLs' likely approach but also taking into account the likely somewhat more precise outcome than with Time Costs. There must however also be an allocation of 20% of the Disbursement to the Counterclaim consistent with the approach to allocation of time costs. The award of security for the trial for the GT Defendants therefore becomes:



TIME COSTS

\$8,530,480	
<u>- 1,706,096</u>	(20% general discount)
6,824,384	
<u>- 1,364,877</u>	(20% allocation to counterclaim)
\$5,459,507	

DISBURSEMENTS

\$3,826,744	
<u>- 382,674</u>	(10% discount)
3,444,070	
<u>- 688,814</u>	(20% allocation to counterclaim)
2,755,256	
<u>+ 5,459,507</u>	
8,214,763	(Total Time Costs and Disbursements allowed by way of award of security for costs of the trial)

16. The AWALCos JOLs' summary is as follows:

SUMMARY OF SECURITY REQUIRED BY THE AWALCOS AHAB TRIAL COSTS			
Security required - 18 July - 24 February 2017	Total hours	Total cost (US\$)	
Opening Arguments	1,200	663,480	
AHAB's witnesses	3,840	2,123,136	
Additional working days - AHAB's witnesses	1,920	1,061,568	
The Defendants' witnesses	1,920	1,061,568	
Additional working days - The Defendants' witnesses	800	442,320	
Expert evidence	1,920	1,061,568	
Additional working days - Expert evidence	800	442,320	
Overrun	1,200	663,480	
Preparation of closing arguments	2,400	1,326,960	
Work on oral closings	816	452,040	
Oral arguments	2,400	1,326,960	
	19,216	\$10,625,400	Total time costs
	13,451	\$7,437,780	Less 30% (assume 70% recovery)
Defendants - Disbursements		1,570,000	
		\$9,007,780	Total recoverable time costs and disbursements



17. I adopt the same approach to the estimates for Time Costs and Disbursements for the AWALCOs as follows:

TIME COSTS

\$7,437,780	
<u>- 1,487,556</u>	(20% general discount)
\$5,950,224	

DISBURSEMENTS

\$1,570,000	
<u>- 157,000</u>	(10% discount)
1,413,000	
<u>+ 5,950,224</u>	
\$7,363,224	(Total Time Costs and Disbursements)
	allowed for the award of security for costs of the trial)

18. The SIFCO5 JOLs' summary is as follows:

SUMMARY OF SECURITY REQUIRED BY SIFCO5 5 - AHAB TRIAL COSTS		
Security required - 18 July - 24 February 2017	Total hours	Total cost (US\$)
Opening Arguments	900	496,800
AHAB's witnesses	2,880	1,589,760
Additional working days - AHAB's witnesses	1,440	794,880
The Defendants' witnesses	1,440	794,880
Additional working days - The Defendants' witnesses	600	331,200
Expert evidence	1,440	794,880
Additional working days - Expert evidence	600	331,200
Overrun	900	496,800
Preparation of closing arguments	1,800	993,600
Work on oral closings	636	356,640
Oral arguments	1,800	993,600
	14,436	\$7,974,240
	10,105	\$5,581,968
Defendants – Disbursements		2,462,000
		\$8,043,968
		Total time costs
		Less 30% (assume 70% recovery)
		Total recoverable time costs and disbursements



19. I adopt the same approach to the SIFCO 5 claim except for the disbursements to which I apply a 30% discount with the following results. The larger discount applied to disbursements for SIFCO5 is the result of my not being satisfied in the first place, that it should incur such significantly greater disbursements than the AWALCos, even while the GT Defendants' disbursements are understandably higher than that of either because of costs they will assume for technical support for the trial which will be available to all parties. (See again the November 2015 Judgment, para. 62 et seq).

TIME COSTS

\$5,581,968	
<u>- 1,116,394</u>	(20% general discount)
\$4,465,574	


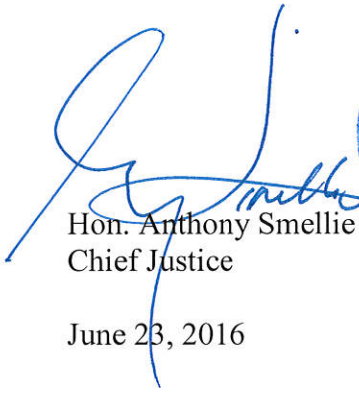
DISBURSEMENTS

\$2,462,000	
<u>- 738,600</u>	(30% discount)
1,723,400	
<u>+ 4,465,574</u>	
\$6,188,974	(Total Time Costs and Disbursements) allowed for the award of security for costs of the trial)

20. This then results in AHAB being required to provide a further combined sum of \$21,766,961 as security for the costs of the Defendants for the trial. AHAB will be allowed and required to provide this further security in tranches, either by cash or by way of bank guarantee(s) to be issued by a Class A bank (or banks) as before.
21. There will be two equal tranches for payment respectively for each set of Defendants in keeping with the judgment, on 1st July 2016 and 1st November 2016 (to be held in escrow pending the outcome of the trial and taxation if so ordered).



22. This brings the total owed for security for costs to cover to the end of the trial of this case, to USD73,766,961.



Hon. Anthony Smellie
Chief Justice

June 23, 2016