Neutral Citation Number: [2025] EWHC 1097 (Comm)

Case No: CL-2015-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 08/05/2025

Between:

(1) ALTA TRADING UK LIMITED (formerly known as ARCADIA PETROLEUM LIMITED)
(2) ARCADIA ENERGY (SUISSE) SA
(3) ARCADIA ENERGY PTE. LTD. **Claimants**
(4) FARAHEAD HOLDINGS LIMITED

- and -

(1) PETER MILES BOSWORTH
(2) COLIN HURLEY
~~**(3) STEPHEN CLIVE LANGFORD GIBBONS**~~
~~**(4) MARK RICHARD LANCE**~~
(5) STEVEN KELBRICK
~~**(6) SALEM CHUCRI MOUNZER**~~
(7) ARCADIA PETROLEUM SAL OFFSHORE
(8) ARCADIA PETROLEUM LIMITED, MAURITIUS
(9) ATTOCK OIL INTERNATIONAL LIMITED, MAURITIUS
~~**(10) THE CORNHILL GROUP LIMITED**~~

Defendants

- -
- -

David Quest KC and Clarissa Jones (instructed by **Grosvenor Law LLP**) for the **Claimants**
Richard Eschwege KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First and Second Defendants**
Tom Sprange KC and **Freddie Popplewell** (instructed by **King & Spalding International LLP**) for the **Fifth and Ninth Defendants**

The Seventh and Eighth Defendants did not appear and were not represented

Hearing date: 27 February 2025
Draft judgment circulated to parties: 30 April 2025
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Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION 1
(B) BACKGROUND FACTS 2
(C) ADDITIONAL FORTIFICATION 12
(1) Principles: Damages in the Inquiry 12
(2) Principles: fortification 13
(3) CPR Part 3 16
(4) Application 20
(D) ADDITIONAL SECURITY FOR COSTS 26
(1) Principles 26
(2) Mr Bosworth/Mr Hurley's application 29
(3) Mr Kelbrick/Attock Mauritius's application 35
(E) CONCLUSIONS 36

(A) INTRODUCTION

1. On 22 January 2025 I handed down judgment, following a nine-week trial, concluding that the Claimants' claims should be dismissed and that certain counterclaims made by the First Defendant ("***Mr Bosworth***") and the Second Defendant ("***Mr Hurley***") succeeded.

2. At a consequentials hearing on 10 February 2025 I made orders:

   i) dismissing the Claimants' claims;

   ii) dismissing Mr Bosworth's counterclaim for a US$ 20 million retention bonus;

   iii) giving judgment in Mr Bosworth's favour on other counterclaims in the total sum of approximately US$ 17.8 million (including interest);

   iv) giving judgment in Mr Hurley's favour on his counterclaim for approximately US$ 5.5 million (including interest);

   v) discharging the freezing injunction against the Defendants originally granted in 2015;

   vi) (by consent) directing the Claimants to repay to Mr Bosworth/Mr Hurley (with interest) sums of £60,000 and £175,000 which they had been ordered to pay to the Claimants by way of costs by an order of Males J on 15 December 2015 and an order of Phillips J on 11 October 2016;

   vii) (by consent) directing the Claimants to repay to the Fifth Defendant ("***Mr Kelbrick***") (with interest) the sum of £69,000 which he had been

ordered to pay to the Claimants by way of costs by an order of Cockerill J on 7 December 2017;

viii) ordering the Claimants to pay to Mr Bosworth, Mr Hurley, Mr Kelbrick and the Ninth Defendant ("***Attock Mauritius***", sometimes referred to as "***AOIL***") their costs of and incidental to the proceedings, to be the subject of detailed assessment on the indemnity basis if not agreed, together with specified pre-judgment and post-judgment interest;

ix) ordering the Claimants to make payments on account of costs to Mr Bosworth/Mr Hurley of £15,728,728 (less £110,526 due from them to the Claimants under a previous costs order, giving a net payment on account of £15,618,202), and to Mr Kelbrick of £9,384,624;

x) directing that the Claimants did not have permission to make those payments on account of costs from funds held, by way of fortification and security for costs, in an account held by Grosvenor Law for the benefit of Mr Bosworth/Mr Hurley ("***the Grosvenor Law account***") and in an account held by the First Claimant ("***Alta***") with Barclays Bank PLC for the benefit of Mr Kelbrick/Attock Mauritius ("***the Barclays account***");

xi) directing that the Claimants' undertakings in damages in connection with the freezing injunction be enforced and there be an inquiry into damages ("***the Inquiry***"), to be heard at a 2-week hearing not before March 2026; and

xii) granting various related forms of relief.

3. Mr Kelbrick/Attock Mauritius now apply for further fortification, in the sum of US$ 89,045,000, of the Claimants' undertakings in damages. In addition, Mr Kelbrick/Attock Mauritius and Mr Bosworth/Mr Hurley apply for further security for costs, to cover the costs of the Inquiry.

4. For the reasons set out below, I have come to the conclusions that:

i) it would be wrong in principle, and in any event inappropriate on the facts, to order increased fortification of the Claimants' undertakings in damages now that the injunction has been discharged, including (in substance) to do so by way of an order under CPR 3.1(5);

ii) the Claimants should provide further security for costs in the sum of £3,736,451 for the benefit of Mr Bosworth/Mr Hurley; and

iii) the Claimants should provide further security for costs in the sum of £2,798,000 for the benefit of Mr Kelbrick/Attock Mauritius.

(B) BACKGROUND FACTS

5. At the outset of these proceedings, on 12 February 2015, Teare J granted the Claimants a worldwide freezing order against the Defendants covering assets

worth up to US$ 335 million. It contained the usual undertaking in damages and provision for fortification in the sum of US$ 2 million:

> "(1) If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicants will comply with any order the court may make
>
> "(2) The Applicants will within 7 days pay the sum of USD 2m into court to be held in an interest bearing account as fortification for the undertakings in paragraph (1) above."

The order was continued by an order of Flaux J of 1 July 2015.

6. Mr Kelbrick applied for further fortification in August 2020. This application was heard by Mr Peter MacDonald Eggers QC (sitting as a Deputy Judge of the High Court), who gave judgment on 30 April 2021 ([2021] EWHC 1126 (Comm)) (the "***MacDonald Eggers Judgment***"). Mr Kelbrick sought further fortification of US$ 10 million, based on loss said to have been caused by the freezing injunction of: (i) profits from oil trading activities by Attock Mauritius or Attock Dubai (one of Mr Kelbrick's other companies); and (ii) the ability to secure employment with Vitol, a leading trading house, and the potential financial rewards that Mr Kelbrick would thereby have received. Those rewards would have included potential participation in the Vitol share scheme, as to which Mr Kelbrick solicitor, Ms Walker in her 2nd witness statement dated 14 January 2021 said:

> "While the precise terms of Vitol's share scheme are highly confidential, Mr Kelbrick could likely have negotiated an interest in the scheme based on his performance. Assuming participation, the benefits would have raised Mr Kelbrick's annual earnings significantly."

Ms Walker's evidence indicated that she had discussed the matter with Mr Paul Himsworth (Managing Director of Vitol Dubai), who at that stage had estimated that Mr Kelbrick's remuneration package would also have included a sign-on bonus of US$ 300,000 to US$ 400,000, an annual salary of US$ 300,000 to US$ 400,000, and an annual bonus of between US$ 400,000 and US$ 800,000, depending on Mr Kelbrick's performance.

7. Mr Peter MacDonald Eggers QC stated:

> "Bearing in mind the sales generated by Attock Dubai prior to the grant of the injunction, I can readily see that any losses sustained by Mr Kelbrick following the injunction might be as high as US$1 million per year, which would equate with US$8-9 million for the entire period and that there is a good arguable case for such an estimate. Accordingly, if further fortification were ordered, taking into account the existing fortification in the sum of US$2 million, the further fortification would be in the sum of US$6-7 million." ([28])

However, he refused the application for further fortification on the basis that there was an insufficient risk of the Claimants not satisfying any future award of damages to Mr Kelbrick (§ 50). In doing so, he took account of the Claimants' evidence about the financial position of Alta in particular including: seven sets of annual accounts and interim accounts, showing that as at 31 December 2020 Alta had cash at bank/in hand of US$ 48.8 million; net current assets of US$ 47.3 million and an overall surplus (net assets) of US$ 53.2 million; and had made a gross profit of US$ 48.5 million, and a net profit of US$ 30.6 million, in the nine months from April to December 2020.

8. By January 2023, the Defendants took the view that this was not, or was no longer, the case. For example, Mr Bosworth/Mr Hurley's solicitor, Mr Greeno of Quinn Emanuel, explained in his 25th witness statement that:

> "On 19 December 2022, D1 and D2 became aware through a Bloomberg article in the press that C1 was in the process of winding down its business: see "*Billionaire John Fredriksen's Oil Trader Alta is Winding Down*" … The source of the article was not the Claimants, but "*three industry sources familiar with the matter*". The Claimants had sought to wind down their business without first informing the Defendants or the Court; D1/D2 only discovered the information because of the leak to the press. As I explain below, the present position is that C1's business has now wound down." (§ 22)

9. Quinn Emanuel wrote to the Claimants' solicitors, Grosvenor Law, on 4 January 2023 about the reported winding down of the Arcadia Group, including Alta (which was the only Claimant entity with an active business), and seeking further fortification. Quinn Emanuel sought agreement by the Claimants to "*ring-fence, and not distribute to shareholders or third parties, up to USD 85m in cash or cash equivalents until at least the end of 2024 (approximately the time at which judgment might first be expected)*".

10. Mr Kelbrick/Attock Mauritius's solicitors, King & Spalding, wrote in similar terms on 9 January 2023, asking the Claimants to ring-fence US$ 108.5 million "*reflecting the addition of our clients' anticipated claims to the total*": in other words, an additional US$ 23.5 million designed for the protection of Mr Kelbrick/Attock Mauritius.

11. By a letter from Grosvenor Law on 13 February 2023, the Claimants offered to provide an undertaking to the court that, until 30 days after judgment is delivered or further order: (i) Alta would maintain no less than US$ 25 million in the Barclays account; and (ii) the Fourth Claimant ("***Farahead***") would procure that US$ 50 million was held in a bank account with Nordea Bank, Norway in its name. Grosvenor Law stated that this would be "*to ensure that the Court is duly satisfied that there are sufficient cash assets for the purposes of meeting any costs awarded against the Claimants in this case following trial or any order of the Court in favour of the Defendants pursuant to the Claimants' undertaking in the Teare and Flaux Orders*". The letter continued "*We consider that this proposal will provide the Defendants with more than adequate*

fortification and security; indeed, significantly more than they could possibly be entitled to. As such, we trust this draws a line under these matters".

12. King & Spalding wrote on 20 February 2023 raising further concerns about Alta's diminishing assets. They requested, by way of counteroffer to the Claimants' proposal (which was not Defendant-specific), that security of US$ 24.5 million be held by Grosvenor Law for the benefit of Mr Kelbrick/Attock Mauritius. This amount was said to be calculated on the basis of:

> "US$ 16 million, by way of fortification of the Claimants' cross-undertaking in damages, reflecting a conservative estimate of Mr Kelbrick and/or AOIL's losses as a result of the Freezing Injunction in the sum of US$ 2 million per year from 2015-2024 less the sum of US$ 2 million already held in Court";
>
> plus:-
>
> "US$ 8.5 million, by way of conservative estimate as to Mr Kelbrick and/or AOIL's costs to trial".

It will be noted that the latter paragraph referred to Mr Kelbrick/Attock Mauritius's costs *"to trial"*.

13. Grosvenor Law's letter of 1 March 2023 in substance reiterated the Claimants' original proposal as set out in their 13 February 2023 letter (*i.e.* Alta to hold US$ 25 million in the Barclays account and Farahead to hold US$ 50 million in the Nordea account), except that it said the Claimants would now agree to hold the relevant funds in those accounts until further order of the court.

14. On 18 April 2023 Mr Kelbrick/Attock Mauritius issued an application seeking payment into court or a bank guarantee in the sum of US$ 24.5 million by way of security for their costs and fortification of the Claimants' undertaking in damages. Ms Walker's 4th witness statement, in support of the application, referred to the news of Alta winding down its business (or having already done so) as a material change of circumstances since the decision of Mr MacDonald Eggers, as well as to Farahead being a holding company incorporated out of the jurisdiction with no active business of its own. Ms Walker referred to evidence of Attock Mauritius's average net profits (of which Mr Kelbrick was entitled to a 50% share), and to her previous evidence of information from Mr Himsworth of Vitol. At §§ 50-53 she said:-

> "50. Accordingly, a reasonable estimate as to Mr Kelbrick's loss as a result of the Freezing Injunction is as follows:
>
> 50.1 between 2015-2018: US$ 6.6 million, being three years profits of US$ 2.2 million;
>
> 50.2 between 2018-2030: US$ 14.8 million, being 12 years of salary and bonus received from Vitol, absent any participation in the share scheme;

> 50.3 this gives a conservative total estimate of US$ 21.4 million therefore, even before the opportunity to participate in the Vitol share scheme is taken into account.
>
> 51. Finally, the Fifth Defendant will seek an order for interest on the sums which he would have received, but for the Freezing Injunction, over the best part of a decade, since February 2015.
>
> 52. Accordingly, should the Claimants seek to argue that the quantum of security and fortification to be provided has not already been agreed between the parties, the Fifth and Ninth Defendants will seek an order that such security and fortification be provided in the sum of US$ 35 million.
>
> 53. For the reasons set out above, the Fifth and Ninth Defendants seek an order that unless the Claimants make payment into Court, or alternatively provide a bank guarantee from a first-class London Bank in the sum of US$ 24.5 million, alternatively US$ 35 million, by way of security for the Fifth and Ninth Defendants' costs and fortification of the Claimants' cross-undertaking in damages for loss suffered by the Fifth and Ninth Defendants as a result of the Freezing Injunction, the Freezing Injunction be discharged."

15. In response to that application, the Claimants served the first witness statement of their solicitor, Mr Morrison, dated 16 May 2023. Among other things, the witness statement stated that there was no good arguable case of a risk that Mr Kelbrick/Attock Mauritius would not receive payment of any damages under the undertaking. Mr Morrison confirmed that Alta had ceased trading, but said it retained significant assets and significant net assets, exhibiting accounts and a bank statement showing US$ 56.3 million of net assets as at 31 December 2022, including US$ 46.7 million held in cash in the Barclays account. He said he had also seen draft management accounts recording net assets of US$ 60.7 million and net current assets of US$ 56.4 million as at 31 March 2023. Mr Morrison noted that Mr Bosworth/Mr Hurley had not yet made any application for further security or fortification.

16. In §§ 41-47 of his witness statement Mr Morrison recounted the correspondence since 13 February 2023, including (at § 43) making the point that *"[the Claimants'] proposal further shows (alternatively to Arcadia London's and Farahead's assets in and of themselves) that there is no risk of non-payment: the Claimants remain willing to give the undertakings set out above"*, and explained the practical advantages of holding the funds in the bank accounts proposed rather than the Court Funds Office.

17. Ms Walker replied in her 7th witness statement dated 30 May 2023, stating, among other things, reasons why none of the documents Mr Morrison had exhibited gave Mr Kelbrick comfort that an award for damages would be complied with.

18. On 8 June 2023 King & Spalding wrote saying:

> "… in an attempt to reduce the number of issues before the Court at the CMC, the Fifth and Ninth Defendants are keen to resolve the Application without the need to trouble the court at a hearing.
>
> To that end, and mindful of both:-
>
> 1. the Claimants' proposals of 13 February and 1 March 2023 that it will maintain US$ 25 million in the First Claimant's bank account held with Barclays Bank plc. in London (the "Barclays Account") until further order of the Court; and
>
> 2. paragraphs 41 to 47 of the First Witness Statement of Daniel Bradley Morrison ("Morrison 1")
>
> the Fifth and Ninth Defendants would be prepared to accept an undertaking, in the form of a consent order signed by your law firm on behalf of your clients, that the First Claimant will maintain US$ 24.5 million in the Barclays Account for the Fifth and Ninth Defendants, such sum being held, until further order of the Court, by way of (i) fortification of the Claimants' cross-undertaking in the Freezing Injunction in respect of Fifth and Ninth Defendants; and (ii) security for costs for the Fifth and Ninth Defendants' costs."

19. The application was compromised on that basis, as recorded in an order of Picken J made by consent dated 16 June 2023. It contained the following undertakings:

> "1. The First Claimant undertakes to the Court that it shall, within seven days of this Order, and until further order of the Court, hold in account number 47167722 and sort code 205540 with Barclays Bank plc (London branch) (the "Barclays Account") the sum of US$ 24.5 million, by way of fortification of the Claimants' cross-undertaking in the Freezing Injunction in favour of the Fifth and/or Ninth Defendants and by way of security for costs for the Fifth and Ninth Defendants' costs.
>
> 2. The First Claimant undertakes to the Court that until further order of the Court, the amount in the Barclays Account shall not be less than US$ 24.5 million.
>
> 3. The First Claimant undertakes to the Court that the sum of US$24.5 million held in the Barclays Account will be held free of any charge, lien or other encumbrance.
>
> 4. The Claimants undertake to the Court that if the Court later finds that the Freezing Injunction has caused loss to the Fifth and/or Ninth Defendants, and decides that the Fifth and/or Ninth Defendants should be compensated for that loss, the Claimants will comply with any order the Court may make."

and provided for the costs of the application to be costs in the case.

20. In the meantime, Quinn Emanuel wrote to Grosvenor Law on 15 June 2023 saying:

> "3. D l/D2 do not consider that it is sufficient for the Claimants to simply undertake to maintain a minimum sum in either the Barclays Account or Nordea Account for a number of reasons already articulated in correspondence. In particular, in the event of insolvency of the First and/or Fourth Claimant, the funds would not be secured and would be available for creditors - thus such an agreement cannot properly be described as security and offers no comfort to our clients. We note in this regard that the insolvency of the First and/or Fourth Claimant is certainly not beyond the realms of possibility in circumstances where the Fourth Claimant's liabilities presently exceed its assets in the sum of around USD 18 million.
>
> 4. In the circumstances, our clients would be willing to accept a payment of the remaining USD 50 million (of the c. USD 75 million which the Claimants agreed to set aside) to be paid into Court or the provision of a guarantee of that sum from a first class London bank. Should the Claimants not agree to this course of action, our clients will make an application for security and further fortification of the cross-undertaking in damages.
>
> 5. Nevertheless, and so as to ensure that our clients are adequately protected in the interim period should the Claimants refuse to provide a payment into Court / guarantee, please confirm that the Claimants will undertake to hold the USD 50 million in the Nordea Account, to the further order of the Court upon the same terms as the agreement reached with D5/D9 as to the Barclays Account."

21. Grosvenor Law replied on 23 June 2023 suggesting to Mr Bosworth/Mr Hurley that US$ 50 million might be held in a bank account on the same terms as those agreed with Mr Kelbrick/Attock Mauritius, asking them to "*please now confirm…that such an arrangement would satisfy, in full, your clients' claim that they are entitled to security for costs / fortification …*".

22. The matter remained unresolved, and on 22 December 2023 Mr Bosworth/Mr Hurley issued an application seeking £12,763,058 as security for costs and further fortification of US$ 115,922,479. The Claimants served Mr Morrison's 16th witness statement in response to the application, which among other things said:

> "12. In any event, D1 and D2's application for security is said to be founded on satisfaction of the condition set out at CPR 25.13(2)(c), that is that the Claimants and companies "*and there is reason to believe that [they] will be unable to pay the*

> *defendant's costs if ordered to do so"*. There is, simply, no reason to so believe.
>
> > (a) Firstly, I exhibit …copies of bank statements of the First Claimant's account with Barclays Bank in London (the "Barclays Account") as sent to D1/D2 and D5/D9 on 22 December 2023, and of the Fourth Claimant's account with Standard Chartered in Jersey (the "Standard Chartered Account"). These show that, notwithstanding that the Claimants have agreed to maintain a minimum credit balance of US$24.5 million in the Barclays Account for the purposes of addressing the Fifth Defendant and the Ninth Defendant's concerns as to security for costs (as recorded pursuant to a consent order formally made Mr Justice Picken dated 16 June 2023), the Claimants have readily available assets well in excess of the security for costs sought by D1 and D2. I am advised by Thorolf Aurstad, Chief Financial Officer for Seatankers, that these amounts are not encumbered. The condition at CPR 25.13(2)(c) is not satisfied and this alone is enough for the Security and Fortification Application for security for costs to fail.
> >
> > (b) Moreover I exhibit copies of:
> >
> > > (i) the latest Profit & Loss Accounts and Statement of Financial Position of the First Claimant as at 31 December 2023 …; and
> > >
> > > (ii) Unaudited Financial Statements of the Fourth Claimant as at 31 December 2023 …;
>
> 12.3 These financial documents show that (as at 31 December 2023) the First Claimant has total net assets of in excess of US$58 million … and the Fourth Claimant has total net assets in excess of US$120 million.[FN] These entities are balance sheet solvent and hold significant reserves of cash. I am further advised by Mr Aurstad that the Fourth Claimants' financial position has not deteriorated since the dates of these financial documents. In my respectful submission, there is no reason to believe that the Claimants will not be able to pay the Applicants costs of these proceedings if so ordered, and accordingly the condition at CPR 25.13(2)(c) is not satisfied. There is accordingly no basis for the Court to order security for costs in the present case."
>
> [Footnote] "Moreover as per the latest audited Financial Statements as at 31 March 2023 … the Fourth Claimant has total net assets in excess of US$109 million"

23. Quinn Emanuel's letter of 23 February 2024 stated that Mr Morrison's evidence had not advanced matters. It went on to say:

> "The Claimants have previously said that they are prepared to put up USD 50m by way of security for our clients' legal costs and as fortification for their claims under the cross-undertaking in damages.
>
> There is no sensible dispute that security of that value needs to be provided (at least).
>
> For all of your clients' complaints about delay, which ring hollow when one works through the procedural history step by step, your clients have accepted that they need to put up at least USD 50m by way of security. Moreover, there can be no suggestion of any prejudice from any delay, which is the material issue, nor any good reason why the funds already held in bank accounts could not be used as (proper, reliable) security. Indeed, we do not understand why the form of security should be contentious — unless it because our clients' fears are well-founded. …
>
> In the interests of narrowing the issues before the PTR hearing, our clients are willing to accept security in the sum of USD 50m, notwithstanding that this is far less than their losses (which they will look to recover by other means), provided the security is in a proper form.
>
> The only dispute, therefore, is about the form. We believe the Court will take our clients' view in respect of this issue, and it is also likely (given the weakness of your clients' evidence as to the quantum of the loss and as to causation) to order a far more substantial amount to be put up should a hearing be required.
>
> Please now confirm that security in the sum of USD 50m will be provided in a recognised form in this jurisdiction: a payment into Court or to your firm's client account, or a bank guarantee from a first-class London bank.
>
> Our clients are willing to compromise the application on this basis."

Quinn Emanuel stated that what mattered as regards fortification was assets within the jurisdiction, and that it was clear on the Claimants' own evidence that they did not now have sufficient assets within the jurisdiction. They referred to the risks of the Claimants disregarding their undertakings, or going into liquidation/administration, and said the documents that the Claimants had produced did not show they were solvent and were misleading in certain respects.

24. The application was compromised on the terms of a consent order of Andrew Baker J dated 12 March 2024, by which the Claimants were ordered to pay the sum of US$ 50 million into a dedicated bank account held by Grosvenor Law, *i.e.* the Grosvenor Law account, *"by way of security and fortification of the Claimants' cross-undertaking in the Freezing Injunction in favour of the First*

and/or Second Defendants and by way of security for the First and Second Defendants' costs".

25. In a recent letter dated 16 January 2025, Quinn Emanuel have said:-

> "The sum of USD 50 million was accepted as a pragmatic compromise given: (i) the Claimants' continued resistance to providing adequate security or fortification until the eve of trial (despite having accepted as early as February 2023 that security should be provided); (ii) the fact that the First Claimant began to wind down its business in December 2022, and; (iii) the fact that the evidence provided as to the Claimants' financial position suggested that they held far less (and potentially zero) by way of readily available assets than had been suggested by Mr Morrison in his witness evidence."

26. Since the consent orders of Picken J and Baker J, the Defendants say there has been further deterioration in the Claimants' available assets. In particular, as at March 2024 what appears to be Alta's sole asset was cash of US$ 42.25 million in the Barclays account. However, US$ 17.68 million has since been withdrawn, so that the balance is now US$ 24,566,474, *i.e.* only US$ 66,000 above the sum required to be held in the account as fortification/security for Mr Kelbrick/Attock Mauritius.

27. In a letter of 19 February 2025, Grosvenor Law explained that, as at 17 February 2025:-

> "a. The balance of the funds held in the First Claimant's Account with Barclays in London is USD 24,566,474.11. This remains in excess of the sums which Alta agreed to maintain in accordance with the Picken J Order. As you know, the First Claimant has been in wind down with no trading activities since 2024. Unsurprisingly as a result of that wind-down, it has incurred related winddown costs as well as ongoing costs of the business, including legal costs, tax payments and other intra-group transactions, within Farahead Holdings' Group.
>
> b. The balance of funds held in the Fourth Claimant's account with Nordea Bank in Norway is USD 99,059.55. Since June 2023, there has been a decision to cease business with Nordea Bank and balances have been transferred to other banks.
>
> c. The balance held in the Fourth Claimant's account with Standard Chartered Private Bank in Jersey is USD 1,153,020.32. Since February 2024, key transactions have included the following: USD 50 million has been transferred to this firm to be held as fortification and security for costs in respect of your clients; the outstanding loan due to Sterna Finance has been repaid (see below); and USD 17 million has been transferred to a group entity for investment purposes on behalf of Farahead Holdings (which is still available to be recalled if required).

> d. The USD 47 million outstanding loan due to Sterna Finance has been repaid further to a request from Sterna Finance which required funds for its continued operations.
>
> e. The loan receivables amount due from Arcadia Commodities Trading Limited stands at USD 18,748,273. Since February 2024, there have been loan repayments amounting to USD 6,924,000.
>
> f. Farahead has not paid the USD 68 million in guaranteed payments for the construction of three ships. These are corporate guarantees with no specific lien over Farahead's assets and, consistent with previous corporate guarantees provided by Farahead, it is not expected that they will be called upon."

28. The payments required by my order of 10 February 2025 were funded by borrowing from Sterna Finance, *i.e.* the same group company which, according to the letter quoted above, required repayment of a US$ 47 million loan in order to fund its continued operations.

(C) ADDITIONAL FORTIFICATION

(1) Principles: Damages in the Inquiry

29. The cross-undertaking in damages given by the applicant for a freezing injunction is given to the court, not to the opposing party: *F. Hoffmann-La Roche & Co v Secretary of State for Trade & Industry* [1975] AC 295, 361. Accordingly, the respondent is accorded no private cause of action by the setting aside of the injunction: he must apply for the court to enforce the undertaking. Breach (failure to pay a particular sum once ordered) is a contempt of court: *Fiona Trust v Privalov* [2016] EWHC 2163 at [7].

30. The injunction need not be the sole or exclusive cause of the loss in question but must be an effective cause: *Fiona Trust v Privalov* at [48]. Once a defendant has shown that he has suffered loss that was *prima facie* caused by the injunction, the burden passes to the claimant to show that the relevant loss would have been suffered regardless (see Grant & Mumford, *"Civil Fraud"* at § 31-038(4) and *SCF Tankers v Privalov* [2018] 1 WLR 5623, at [43]-[46]).

31. The assessment of damages is made upon the same basis as the principles for breach of contract: see *F. Hoffmann-La Roche & Co* at 361. However, these principles need to be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact: *Hone v Abbey Forwarding Ltd* [2015] Ch 309 at [38]-[44] and [63]. A defendant may rely on loss of a chance principles: see *AstraZeneca v KRKA dd Novo Mesto* [2015] EWCA Civ 484 at [12]; and *Fiona Trust v Privalov* at [55]. If a claimant has obtained an injunction fraudulently or maliciously, the court should hold him responsible for all loss directly caused by the injunction regardless of its foreseeability (as is the case in deceit): see Gee, "*Commercial Injunctions*" at § 11-048.

32. A "*liberal assessment of damages*" is appropriate, "*in the sense that the court must recognise that the assessment of damages suffered as a result of a freezing order will often be inherently imprecise*", and "*over-eager scrutiny of a defendant's evidence and minute criticism of its methodology will not be appropriate*" (*Fiona Trust v Privalov* at [50]-[51]). The fact that a defendant's evidence may be hedged with caveats (*e.g.* in relation to a speculative business venture) should not prevent a court from seeking to do its best to award compensation (Grant & Mumford at § 31-038(8)).

33. Damages for upset, stress, loss of reputation and other disruption are recoverable: see *Hone* at [109]. The court can also award interest on damages ordered on the cross-undertaking, pursuant to section 35A of the Senior Courts Act 1981 (see Gee, "*Commercial Injunctions*" at § 11-051).

(2) Principles: fortification

34. The MacDonald Eggers Judgment contains a convenient summary of the principles relating to the fortification of a cross-undertaking:

> "17. The Court has previously considered the circumstances in which such fortification should be ordered. It is ultimately a matter for the Court's discretion, but the principles which guide the exercise of that discretion are that fortification should follow if the respondent to the injunction (the applicant for fortification) can demonstrate a good arguable case (and not to any higher standard) that:
>
> (1) The respondent has suffered or will suffer a loss. For this purpose, there must be an intelligent estimate, being informed and realistic but not mathematically or scientifically precise or rigorous, of the likely amount of that loss which has been or might be suffered by the respondent to the injunction by reason of the interim injunction.
>
> (2) The making of the interim injunction is or was a cause without which the relevant loss would not have been suffered.
>
> (3) There is a sufficient level of risk of loss to require fortification, meaning that if the Court orders that the applicant for the injunction is directed to comply with its undertaking in damages and to compensate the respondent, there is a risk of the applicant for the injunction not satisfying any such order for damages."

35. Once a good arguable case has been shown, if disproving the claimed causal link requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at an interlocutory stage: see *Energy Venture Partners v Malabu Oil & Gas* [2015] 1 WLR 2309 at [54].

36. It has been held that the court cannot, or at any rate should not, require further fortification of an undertaking in damages once the relevant injunction has been

discharged. In *Commodity Ocean Transport Corp v Basford Unicorn Industries ("The Mito")* [1987] 2 Lloyd's Rep 197, a freezing order obtained without notice, and containing the usual undertaking in damages, was discharged at the on notice hearing. The defendants applied for an order that the claimants give security for the undertaking. Hirst J declined to make such an order. After reciting submissions made, essentially by way of analogy, about the jurisdiction to order security for costs, Hirst J said:

> "Mr. McClure [counsel for the defendant] submits that, just as in the case of security for costs before the enactment by the rules, and indeed on general principle, the Court has jurisdiction to make the order sought in this case. Although I have some hesitation about it, because there is no decision directly in point, I shall assume without deciding for present purposes that technically I have such jurisdiction. However, even on that assumption, and I will summarise his arguments in a moment, I am quite satisfied that it would not be correct either in principle or in the exercise of my discretion to make it."

Hirst J explained the matter thus:

> "When such security is originally sought it is sought as a condition for the grant of the injunction, in other words the plaintiff is told: "if you want this injunction you have to pay the price by fortifying the undertaking to damages". The plaintiff can then either agree or disqualify himself in obtaining the injunction.
>
> That such is the position is established by the authorities strongly relied on … most clearly, in the case of *Tucker v New Brunswick Trading Company of London*, [1890] 44 Ch. D. 249, where a very powerful Court of Appeal was dealing with a number of questions on cross-undertakings including whether another plaintiff, whose name was Lamplough, who had not sought an undertaking in the Court below, was entitled to have one extended to him in the Court of Appeal. Lord Justice Cotton stated (at p. 252) as follows:
>
> > As regards Lamplough , I am of opinion that his appeal fails; for we cannot impose on the Plaintiff any undertaking which he has not given. If a defendant applies for an undertaking, the plaintiff may decline to take any order. The Court only makes the undertaking a condition of granting an injunction; if the plaintiff refuses to give it the Court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking.
>
> Then Lord Justice Lindley, in the most trenchant language, which I find of particular assistance here, stated:
>
> > [One plaintiff] asked for an undertaking and got it. An undertaking is the price of an injunction, and if a man gets an

> injunction he must pay the price. Lamplough did not ask for an undertaking, and for anything we can tell, if he had done so the Plaintiff would have declined to take an injunction.
>
> …
>
> Mr McClure says that the plaintiff has already paid a price here when the cross undertaking was given, which is perfectly correct as far as it goes. The plaintiffs did not ever agree nor were they ever asked to pay the extra price that is the fortification of the undertaking. If they had been asked to do so, it may very well be that they would, as Lord Justice Lindley said, "have declined to take an injunction". Of course Mr McClure accepts, as he must, that the court has no power to impose an undertaking on the plaintiffs and herein I think if I were to make this order I would in essence ex post facto be imposing a conditional term to the undertaking without any knowledge one way or the other as to what the situation would have been if it had been sought by the defendant in the first place. That is something which I think is wrong in principle to do."

37. In *Thai-Lao Lignite (Thailand) v Laos* [2013] EWHC 2466 (Comm), [2013] 2 All E.R. (Comm) 883, Popplewell J cited *The Mito* and noted that it was cited with approval by Neuberger J in *Miller Brewing Company v The Mersey Docks and Harbour Company* [2005] EWHC Ch 1606, [2004] FSR 5 at [49]. Popplewell J stated that, so far as his experience went, *The Mito* reflected the settled practice of the Commercial Court since then. He continued:

> "45. The Court cannot require a claimant to give an undertaking. When fortification of a cross undertaking is required, it is not imposed by an order of the court that it must be given. It is part of the undertaking offered by a claimant, and the grant of the order is conditional upon the undertaking being complied with. This is reflected in the standard wording of the Commercial Court freezing order. Requiring fortification is an adjunct to the undertaking offered by a claimant, and is only "required" in the sense of being the price which the claimant will have to pay if he wants his order to operate in futuro. The fortification now sought by the Central Bank is an adjunct to the undertaking originally voluntarily given by the Claimants, and to attach a fortification requirement to such undertaking now, after the Central Bank accounts have been removed from the scope of the Freezing Order, would be in substance to impose upon the Claimants an undertaking they did not give. Moreover it would be to impose a retrospective burden upon the Claimants whilst at the same time depriving them of the opportunity of considering whether to assume that burden as the price of obtaining the Freezing Order over the Central Bank accounts."

38. In *Napp Pharmaceutical Holdings v Dr Reddy's Laboratories (UK)* [2019] EWHC 1009 (Pat), Henry Carr J refused an application to fortify an undertaking

given in respect of an interim injunction that was subsequently discharged by the Court of Appeal, holding that the court had no jurisdiction to do so. He stated:

> "6. The first question is, in circumstances where the injunction has been discharged, whether there is jurisdiction to grant fortification for the cross-undertaking in damages. The leading textbooks on the subject suggest not. As Sir David Bean says in his textbook *Injunctions,* 13th edition, at 307:
>
> > "It is too late to apply for security to fortify an undertaking in damages when the relevant interim injunction has been discharged."
>
> The authorities cited in support of that proposition include *Commodity Ocean Transport v Basford Unicorn Industries ('The Mito')*, to which I will shortly return.
>
> 7. The proposition of law set out in that textbook, which is also supported by *Clerk & Lindsell on Torts* at paragraphs 29-48, was considered and the relevant authorities were set out by Popplewell J in *Thai-Lao Lignite (Thailand) Co., Ltd. v Government of the Lao People's Democratic Republic* [2013] 2 All E.R (Comm) 883, at paragraphs 43-45:
>
> …
>
> 10. … The starting point is that the court has no power to order a party to give a cross-undertaking in damages. A cross-undertaking in damages is the price that a claimant is willing to pay in return for the grant of an injunction. Once the injunction has been discharged, there is no price that is worth paying because the claimant is not asking for the injunction to continue. In my view, it follows that an application for fortification of a cross-undertaking needs to be made whilst the injunction in respect of which it is given is continuing. This is not inequitable, since the court will not order security for damages, and fortification of the cross-undertaking does not amount to such an order. As Popplewell J said in *Thai-Lao Lignite* (supra), *"[r]equiring fortification is an adjunct to the undertaking offered by a claimant, and is only 'required' in the sense of being the price which the claimant will have to pay if he wants his order to operate in futuro ."* It follows that there is no jurisdiction to grant this application."

39. Gee, "*Commercial Injunctions*" at § 11-0303, citing *Napp,* states that once the injunction has been discharged, fortification cannot be ordered.

(3) CPR Part 3

40. CPR 3.1(5) to (6A) provide:

> "(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.
>
> (6) When exercising its power under paragraph (5) the court must have regard to—
>
> (a) the amount in dispute; and
>
> (b) the costs which the parties have incurred or which they may incur.
>
> (6A) Where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings."

41. White Book note 3.1.16 states that *"[i]n the case of claimants, an order under r.3.1(5) significantly broadens the court's powers to order security for costs (as to which, see generally CPR Pt 25 Section II). As to defendants and defendants to counterclaims they may be ordered to give security for costs and also for any money remedy claimed against them."*

42. The White Book also notes that the circumstances in which it is appropriate to order a party to pay a sum of money into court are limited, citing *Olatawura v Abiloye* [2002] EWCA Civ 998; [2003] 1 W.L.R. 275. The Court of Appeal in that case affirmed an order for security for costs made against a claimant in circumstances where none of the grounds set out in CPR Part 25 Section II applied. The court said this:

> "18. The first [of principle] is clearly this: is there indeed now jurisdiction under the CPR to make orders which are tantamount to orders for security for costs outside the provisions of Part 25, Section II?
>
> 19. In my judgment the answer to this question is a clear "Yes". The individual rules which I have already set out above admit of no other possible conclusion …
>
> …
>
> 21. I pass, therefore, to the more difficult second question which arises on this appeal: what should be the court's approach to the exercise of its wider new jurisdiction to order security for costs and, more narrowly, was such an order properly made in the particular circumstances of this case?
>
> 22. The first point to be made is I think this. Before ordering security for costs in any case (i e whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. …

> 23. Assume, then, that in a given case the court concludes that an order for security would not unfairly deprive the party concerned of his ability to litigate the dispute. Should such an order then be made? ...
>
> 24. Now, it is clear, the court has an altogether wider discretion to ensure that justice can be done in any particular case. Obviously relevant considerations, besides the ability of the person concerned to pay, will be (a) his conduct of the proceedings (including in particular his compliance or otherwise with any applicable rule, practice direction or protocol), and (b) the apparent strength of his case (be it claim or defence). And these considerations, of course, are expressly reflected in the new rules governing the court's power to order payment into court: rule 3.1(5) dealing expressly with compliance, rule 24 with the probabilities or otherwise of success.
>
> 25. That, however, is by no means to say that the court should ordinarily penalise breaches of the rules and the like by making orders for payment into court under rule 3.1(5). Quite the contrary. The one case drawn to our attention in which this question has been considered-Buckley J's judgment in *Mealey Horgan plc v Horgan* The Times, 6 July 1999, to which reference is made in paragraph 3.1.5 of Civil Procedure , Spring 2002, vol 1— held that it would be inappropriate to order a defendant to give security as a penalty for failure to serve witness statements in time when that had prejudiced neither the trial nor the claimant. Buckley J suggested, however, that such an order might be appropriate if
>
> > "there is a history of repeated breach of timetables or of court orders or if there is something in the conduct of the party which gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection."
>
> That seems to me to point the way admirably: a party only becomes amenable to an adverse order for security under rule 3.1(5) (or perhaps 3.1(2)(m)) once he can be seen either to be regularly flouting proper court procedures (which must inevitably inflate the costs of the proceedings) or otherwise to be demonstrating a want of good faith-good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in accordance with the overriding objective."

It will be noted that the latter sentence refers to the overriding objective.

43. In *Ali v Hudson* [2003] EWCA Civ 1793, the Court of Appeal set aside an order that, because of the appellant's delay, stayed an appeal pending the provision of security for the costs of the appeal. The court cited *Olawatura* and said:

> "Those principles show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows: (i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal; (ii) in any event, (a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and (b) an order will not be appropriate in every case where a party has a weak case. The weakness of the party's case will ordinarily be relevant only where he has no real prospect of succeeding."

44. CPR 3.1(6A) provides that where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings. However, the only case cited to me where CPR 3.1(5) was used to require a payment other than in respect of costs was Akenhead J's decision in *Lazari v London & Newcastle (Camden) Ltd* [2013] EWHC 97 (TCC). There a defendant building developer, which had belatedly admitted liability for defects in a flat, was ordered to pay £30,000 into court under r.3.1(5) and former r.25.7 (interim payments) (now r.25.20), given that it had failed to comply with the rules of court and the overriding objective. Akenhead J quoted from *Olatawura* and a dictum of Moore-Bick LJ in *Huscroft v P&O Ferries Ltd* [2010] EWCA Civ 1483 (a case primarily about the power in CPR 3.1(3) to impose conditions, but in which the court also made reference to r. 3.1(5)), in these terms:

> "17. In both *Olatawura v Abiloye* and *Ali v Hudson* the court appears to have been concentrating primarily on the court's power to order a payment into court under rule 3.1(5), although it may be fair to say that in neither case was it at pains to draw a clear distinction between the two rules. However, they are distinct and directed to different situations. In particular, rule 3.1(3) is deliberately drafted in quite general terms and I think that this court should be reluctant to lay down any hard and fast rules about the circumstances or manner in which the power can be exercised. … However, two matters seem to me to provide support for the view that the power to attach conditions to an order is intended, as Mr. Myerson submitted, to enable the court to exercise a degree of control over the future conduct of the litigation. The first is the existence of rule 3.1(5), which is clearly intended to give the court power to punish a party who without good reason fails to comply with the established procedural code, including the pre-action protocols. Although such an order may well have a beneficial influence on the future conduct of the litigation, it is directed more to what has gone on in the past than

> what will go on in the future. To that extent it is quite different in nature from a condition of the kind contemplated by rule 3.1(3) which, combined with a sanction for failure to comply, usually of a stringent nature, is designed to control the future conduct of the party on whom it is imposed. …."

Akenhead J noted that the wide case management powers conferred by CPR Part 3 *"are not as such given so as to punish a party, save in the context of CPR r.3.1(5), where often the court will want to secure the smooth running of the case in the future to discourage the types of default which have occurred in the past."* (§ 25(b)). On the facts, he referred to various instances of non-compliance by the defendant with CPR rules and the overriding objective, and said:

> "33. The case is crying out to be resolved by mediation or some other settlement process. The relatively small payment into court which I propose to order should concentrate the minds of the parties at least as part of the background to any such process. ...
>
> 34. In my view, on the available information, a payment into court by L&N of £30,000 will encourage the parties to start serious settlement discussions and to concentrate minds about economic, timely and effective compliance with all the outstanding orders between now and trial in June 2013."

45. To the extent relevant, CPR r. 3.1(7) provides that "*[a] power of the court under these Rules to make an order includes a power to vary or revoke the order*". In *Tibbles v SIG Plc* [2012] 1 W.L.R. 2591, Rix LJ stated that the *"primary circumstances"* in which to exercise the discretion in that provision are *"(a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated"* ([39]).

(4) Application

46. Mr Kelbrick/Attock Mauritius submit that the Claimants have failed to comply with rules and Practice Directions (including the overriding objective, which CPR 1.3 requires the parties to help the court to further) and have conducted this litigation with a lack of good faith, so as to justify the exercise of the power under CPR r. 3.1(5).

47. First, they submit that the Claimants obtained the injunction improperly and in breach of their duties of full and frank disclosure and fair presentation.

i) The injunction was predicated on two key concealment allegations, *i.e.* that Mr Bosworth had told Farahead that the Arcadia Group had ceased regular trading activities in West Africa in 2009 and that Arcadia Lebanon had become dormant in late 2008, both of which I held to be wholly unsustainable (Judgment §§ 528 and 925). The allegations were unsupported by the Claimants' own documents and ultimately also their witness evidence given at trial.

ii) The application for the injunction misrepresented the position in relation to GEPVTN, where I found Mr Adams' affidavit statement that Farahead was "*not aware at the time that GEPVTN had received payments from Arcadia Lebanon*", and Mr Hannas' evidence about it at trial, to have been untrue.

iii) The Claimants did not disclose or present fairly to the court, when obtaining the injunction, that Attock Mauritius had a term contract with NNPC since at least 2001 (as one of the Claimants' documents showed); had been given counterparty approval from Mitsui in 2005 (after Mr Kelbrick had been employed by Arcadia London, long before he acquired Attock Mauritius, and before the 144 Transactions); started selling cargoes to Alta in December 2005 (again prior to the 144 Transactions); and continued to feature on the Arcadia Group's approved and assessed counterparty list during the relevant period. These were material matters, because it was central to the obtaining of the injunction that Attock Mauritius was said to be a "*shadow*" company and an "*illegitimate*" entity which was wrongfully "*inserted*" into transactions (Adams Affidavit § 150.2; Claimants' skeleton argument on the injunction § 3.3).

48. Secondly, they say the Claimants dishonestly resisted Mr Kelbrick's application to discharge the injunction in 2017. The Claimants asserted that the Arcadia Group would have contracted directly with national oil companies such as NNPC and GEPetrol, whereas at trial, as I found, "*Mr Fredriksen agreed in cross-examination that purchases from NOCs involved potential risks concerning bribery and corruption. As to how that would affect his business dealings, he said that personally he would not deal directly with a NOC*" (Judgment § 928). The discharge application was also improperly resisted because the Claimants maintained, as they had when obtaining the injunction, that there had been a representation in 2009 to Farahead that Arcadia Group was not engaged in regular ongoing West African trading. Further, Mr Kelbrick/Attock Mauritius highlight the fact that the Claimants agreed, at the consequentials hearing in February 2025, to repay the costs of Mr Kelbrick's application to discharge the injunction (which order Mr Kelbrick had sought on the basis that the injunction had been dishonestly maintained).

49. Thirdly, I held that the Claimants' officer and witness Mr Hannas had "*destroyed relevant, potentially highly relevant, documents during the course of the litigation*" (Judgment § 54).

50. Fourthly, the Claimants' evidence in support of their claims was in part untruthful, including on material matters. I held that Mr Hannas gave "*untruthful*" evidence about the Hannas Note and about GEPVTN.

51. Fifthly, the Claimants sought to pressurise Mr Bosworth to settle by threatening a private prosecution against him (writing directly to him without copying Quinn Emanuel, his solicitors).

52. Sixthly, Mr Kelbrick/Attock Mauritius say the Claimants failed to disclose the Hannas Note, an obviously highly relevant document, until they did so

inadvertently, falsely claiming privilege in it, and then threatening to injunct Quinn Emanuel from acting as a result.

53. Seventhly, the Claimants repeatedly and improperly advanced unpleaded allegations, including of dishonesty and criminality (Judgment §§ 819 and 991).

54. Mr Kelbrick/Attock Mauritius submit that these matters are hallmarks of litigation conducted with a want of good faith (in the sense of litigating a claim as economically and expeditiously as reasonably possible in accordance with the overriding objective), so as to engage CPR r. 3.1(5); and involved breaches of at least CPR rule 1.1, rule 1.3, PD 57AD § 3.1(1), rule 32.14, rule 16.4 (1)(e) and PD16 § 8.2.

55. As to the law, Mr Kelbrick/Attock Mauritius rely on CPR Part 3. They submit that, strictly speaking, the principles relating to applications to fortify are not engaged, albeit in assessing the inadequacy of the present security and the risk of non-satisfaction the principles governing fortification applications may be relevant. They note that there was no consideration of CPR 3.1(5) (in particular) in *Thai-Lao Lignite (Thailand)* or *Napp*. If relevant, they say *Napp* was wrong to hold that *The Mito* indicated that the court lacked jurisdiction to grant fortification (or further fortification) following the discharge of the injunction: as quoted in § 36 above, Hirst J in fact stated that he was willing to assume, without deciding, that he did have jurisdiction to make such an order. Mr Kelbrick/Attock Mauritius submit that, aside from the lack of consideration of CPR Part 3, those cases are distinguishable on the basis that no suggestion was made in them that the injunctions had been obtained dishonestly or that the claimants had committed serious misconduct of the kind that occurred in the present case. They further submit that there is no evidence in the present case that, had the Claimants been required to provide additional fortification while the injunction remained in force, they would have chosen to let it be discharged.

56. To the extent that it might be necessary to show a material change of circumstances since Mr Kelbrick/Attock Mauritius obtained further fortification in 2023, they say they can do so for the following reasons.

    i) The Claimants' asset position has changed, as noted above.

    ii) There is now evidence of the value of the Vitol share scheme (which there had not been previously) and new and further evidence from Mr Himsworth and Mr Greenslade of Vitol about the remuneration of Mr Kelbrick's putative Vitol Dubai role. The overall effect of this, according to Ms Walker's witness statements in support of the present application, is that the true loss caused to Mr Kelbrick by the injunction appears to have been in excess of US$ 100 million, comprising (a) the US$ 21.4 million based on losses to the business of Attock Mauritius and/or Attock Dubai and based on 12 years of salary and bonus from Vitol, plus (b) US$ 84 million from Vitol's share scheme. In addition, Mr Kelbrick would be entitled to interest on those amounts for substantial periods of time, depending on whether Mr Kelbrick would have joined Vitol Dubai in 2016 or 2018 (and depending on whether simple or compound interest is applied), calculated as ranging from US$

8 million to US$ 15.6 million. The new evidence from Mr Himsworth also confirms the significance of the injunction, as distinct from the proceedings, to the loss of the opportunity to work for Vitol.

iii) My positive findings in the Judgment about Mr Kelbrick's role, abilities and value significantly increase the strength of his loss claim in the Inquiry.

iv) My findings in the Judgment also erode Mr Kelbrick/Attock Mauritius's confidence that the Claimants will comply with any cross-undertaking.

v) There has been a further reduction in the Claimants' assets, by virtue of the sums owed pursuant to Mr Bosworth/Mr Hurley's successful counterclaims. Mr Kelbrick/Attock Mauritius note that Mr Peter MacDonald Eggers KC said: *"[t]here may be a change in circumstances justifying an order for fortification where such an order was not warranted in the past"* (Judgment § 32(3)), giving the example of asset depletion.

57. I am unable to accept those submissions.

58. As preliminary matters, the Claimants object, first, that Mr Kelbrick/Attock Mauritius's present application was not made on the basis of CPR 3.1(5) or, hence, on the basis that the Claimants had breached multiple provisions of the CPR and Practice Directions. The application notice stated the reasons for the application to be those set out in Ms Walker's 13th witness statement. The witness statement premised the application on the inadequacy of the secured amount and material changes in circumstances since the Picken J order (namely evidence as to the Vitol share scheme, depletion of the Claimants' assets, my findings in the substantive judgment having eroded confidence that the undertaking will be complied with, and the Claimants' financial exposures to Mr Bosworth/Mr Hurley). As a result, the Claimants say, they did not have a fair opportunity to respond to the case now put in Mr Kelbrick/Attock Mauritius's skeleton argument and at the hearing.

59. Although Mr Kelbrick/Attock Mauritius submitted that the Claimants were well able to deal with the points made, there is some force in the Claimants' complaint. Realistically, given the findings in my substantive judgment, it is evident that the Claimants did fail to comply with rules in relation to disclosure and document preservation, and with the overriding objective, probably including their duties of full and fair presentation when seeking and maintaining the injunction. Nonetheless, it is appropriate to exercise a degree of caution when considering the wholesale attack made on behalf of Mr Kelbrick/Attock Mauritius at the hearing unforeshadowed in the application notice and evidence.

60. Secondly, the Claimants object to the witness statement of Mr Himsworth, dated 18 February 2025, purportedly served by way of reply evidence, on the basis that it was in substance not reply evidence and they therefore had no fair opportunity to address it. There is some force in this point too. Mr Kelbrick/Attock Mauritius submitted that it was reply evidence because Mr Morrison, in his witness statement for the Claimants (also dated 18 February

2025), had said no evidence had been produced from Vitol direct. However, the Himsworth statement had evidently been pre-prepared and was served only some 40 minutes after Mr Morrison's evidence.

61. As to the law, I do not consider the Claimants' reliance on *Thai-Lao Lignite (Thailand)* and *Napp* to be relevantly undermined by the point that Hirst J in *The Mito* was willing to assume, without deciding, that the court had jurisdiction to make the order sought. It was clearly Hirst J's view that it would have been wrong in principle to make such an order, even if the court had jurisdiction to do so. Further, the point made by Popplewell J in *Thai-Lao Lignite (Thailand)* is, with respect, a cogent one. The court cannot require a claimant to give an undertaking: the claimant chooses to give one (or not to give one) as the price of the injunction it is seeking. The fortification is an adjunct to the undertaking, and to require increased fortification after the injunction has been discharged would be in substance to impose on the Claimants an undertaking they did not give.

62. I do not accept Mr Kelbrick/Attock Mauritius's suggestion that the Claimants cannot rely on the principles set out in the cases summarised above unless they can show that, if required to put up additional fortification while the injunction remained in force, they would have chosen instead for it to be discharged. The point about deprivation of choice is only one of the bases for the reasoning in the case law. The other – and in my view probably the more fundamental one – is that (as Popplewell J put it in *Thai-Lao Lignite (Thailand)*), an order for additional fortification after the injunction has been discharged would in substance impose upon the Claimants an undertaking they did not give.

63. In all the circumstances, I am not persuaded that it would be appropriate to require increased fortification by means of an order under CPR 3.1(5).

64. First, to do so would run contrary to the principles set out in *The Mito*, *Thai-Lao Lignite (Thailand)* and *Napp* summarised above. It would in substance amount to an order for fortification in circumstances where those cases hold that the court cannot properly make such an order. I do not find persuasive Mr Kelbrick/Attock Mauritius's point that those cases are not engaged because: (i) CPR 3.1(5) was not considered; and (ii) the pre-conditions for an order under CPR 3.15(5), namely failure without good reason to comply with a rule, Practice Direction or a relevant pre-action protocol, were not held to be present, still less that the claimants there had not obtained or maintained the injunctions dishonestly. It is likely that breaches of rules or Practice Directions could be shown in many cases where an injunction is held to have been wrongly granted. Deployment of CPR 3.1(5) would significantly cut across the principle that the court cannot require a party to give an undertaking (or, hence, to provide or increase fortification). That would particularly be the case if – as Mr Kelbrick/Attock Mauritius submit in the present application – failure to make a fair presentation when obtaining the injunction can itself be the relevant rule breach.

65. Secondly, some of the most serious of the alleged breaches by the Claimants are more naturally considered, not primarily as rule or Practice Direction breaches, but as breaches of more general duties which attract other sanctions or remedies.

Perhaps the most important and pertinent one is failure to make a full and fair presentation (including one which involves no misrepresentation, especially no dishonest misrepresentation) when seeking/maintaining an injunction. It is true that, as Mr Kelbrick/Attock Mauritius point out, CPR 1.3 imposes duties on parties to help the court further the overriding objective. Whether that makes it a rule or Practice Direction breach for a party to fail to make a full and fair presentation seems to me debatable. In any event, the full and fair presentation duty is, fundamentally, an important duty arising at common law and/or in equity, which is independent of the provisions of any specific CPR rule or Practice Direction, and which carries well-established sanctions for breach.

66. Thirdly, the general thrust of the case law considering CPR 3.1(5), summarised in §§ 41-44 above, is that the provision is designed to be a tool to discourage the non-compliance with proper procedures and the overriding objective, and to ensure the smooth running of the litigation in the future. It serves to protect the opposing party from being put to trouble and cost by such conduct. That is no doubt why rule 3.1(5) is usually exercised by requiring a payment intended to cover costs (albeit, as rule 3.15(6A) makes clear, the sum will then stand as security for any sum payable by the defaulting party). *Lazari* appears to be a rare example of an order to pay a sum reflecting the substantive claim against the defaulting party, and in that case it is clear from Akenhead J's judgment that he made such an order with the purpose of ensuring better conduct in future and concentrating minds with a view to settlement. In that sense there was a logical nexus between the past breaches and the requirement to pay money into court. I am not convinced that such a nexus exists in the present case. For example, it may well be the case that the Claimants, during the course of the litigation, breached rules and Practice Directions (*e.g.* PD 57AD) by the destruction of documents (in particular, Mr Hannas's notebooks) and the late disclosure of the Hannas Note. However, although one might speculate about how the litigation would have proceeded absent those events, it is not clear that they enabled the Claimants to obtain/maintain the injunction in circumstances where they would not otherwise have done so.

67. Even if those breaches did so enable the injunction to be obtained/maintained, it is questionable whether an order requiring payment into account of a large sum reflecting Mr Kelbrick/Attock Mauritius's substantive damages claims under the Inquiry would be a logical response to those past breaches. The same applies to such breaches as may have been committed in connection with obtaining and maintaining the injunction. Such an order would not really aim to control the Claimants' conduct. In reality, it would amount to an additional sanction for past breaches, over and above that already imposed by my decision to award the costs of the proceedings on the indemnity basis, other 'sanctions' that might have been imposed for documentary breaches (such as the drawing of adverse inferences) and the Claimants' liability under the undertaking in damages.

68. For all of these reasons, I do not consider that it would be proper or appropriate to order further fortification pursuant to CPR 3.1(5) (or at all).

(D) ADDITIONAL SECURITY FOR COSTS

(1) Principles

69. Pursuant to CPR r. 25.13, the court may order security under CPR r.25.12 if: (i) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (ii) one or more of the conditions in CPR r.25.13(2) is satisfied. CPR r.25.13(2)(c) applies where the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if it is ordered to do so.

70. The court assesses what the claimant may be expected to have available to pay at the time of judgment in the form of cash or other readily realisable assets: White Book note 25.13.12. The court makes an evaluation on the totality of the evidence: *Sarpd Oil International v. Addax Energy* [2016] EWCA Civ. 120 at [19].

71. Where there are foreign and domestic co-claimants, the court will consider whether any of the claimants has funds within the jurisdiction which are sufficient to meet any liability for costs: CPR 25.13.9, citing *Slazengers v Seaspeed Ferries* [1988] 1 W.L.R. 221.

72. CPR 25.13.2 states that "*it is normally unjust to make an order for security of costs in favour of either party if to do so would merely give that party security for the costs of the claim or counterclaim he is raising*", citing *Anglo Irish Asset Finance v Flood* [2011] EWCA Civ 799 at [20]. (See also *Hutchinson Telephone (UK) v Ultimate Response* [1993] B.C.L.C. 307, emphasising the need to consider what is substantially the position of each party.) A policy consideration behind this approach to security for the costs of cross-claims is the undesirability of creating one-sided litigation: CPR 25.13.2.

73. However, when there is an inquiry under a cross-undertaking, the person making the claim under the inquiry remains the defendant for the purposes of the proceedings: the application under the undertaking is part of the *"working out of [the] original claim for injunction": JSC Karat-1 v. Tugushev* [2021] EWHC 743 (Comm), [2021] 4 WLR 66 at [38] (refusing security for costs in favour of a claimant on the receiving end of an inquiry into damages arising out of a worldwide freezing order he obtained which was later set aside). Cockerill J in *Karat-1* followed *C T Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd* [1994] BCC 713, where the Court of Appeal made clear that, for security for costs purposes, the claimant meant the claimant in the proceedings as a whole; that a party making an application in proceedings did not thereby become a claimant; and (per Millett LJ) that:

> "As for the defendant, it has had no choice in the matter. It has done nothing beyond reacting to the steps which the plaintiff has taken against it. The plaintiff brought the proceedings; the defendant has been compelled to defend them. The plaintiff obtained an injunction against it which the defendant claims ought not to have been granted; the defendant has obtained its discharge. The defendant claims that the existence of the

> injunction caused it loss; it seeks to recover the loss. It seeks only to be restored, so far as compensation can achieve it, to the position it was in before the proceedings began. The defendant must counter-attack to recover ground lost by an earlier defeat, but it makes no territorial claim of its own; it cannot fairly be described as an aggressor." (p.728).

By the same logic, the court must have power to order security for costs against a claimant even in respect of an inquiry into damages due to the defendant: and the Claimants in the present application did not submit that the court lacked jurisdiction to make such an order, though they did submit that the risk of one-sided litigation was a factor against doing so.

74. Where there has been a previous security for costs order, to make a further order for security for costs it is necessary that there should have been a material change of circumstance: *Excalibur Ventures v. Texas Keystone* [2013] EWHC 4278 (Comm) at [77]; *Republic of Djibouti v. Boreh* [2016] EWHC 1035 (Comm) at [26]; *Stokors SA v. IG Markets Ltd* [2012] EWHC 1684 (Comm) at [30]. The same principle applies if the previous order is made with or without the consent of the parties: *Republic of Kazakhstan v. Istil* [2006] 1 WLR 596 at [32]. An order for indemnity costs and interest thereon may be one such material change such as to justify further security: *Excalibur* at [78]-[79].

75. Where there has been a prior order for security for costs by agreement, the court will also take into account the following points.

i) The order may evidence a contract between the parties: *Holyoake v Candy* [2016] EWHC 3065 (Ch); [2016] 6 Costs L.R. 1157 at [19] (some of the reasoning in which, quoted below, applies to interim applications in general, such as applications for injunctions).

ii) As that decision shows (also at [19]), whether there is a contract, and what the terms were, depends on how the court construes the relevant documents, including the parties' communications.

iii) In any event, in such circumstances, a good reason is needed to reopen the matter. This is the case "*if the respondent accepts, without the matter having to be argued, that the case for an injunction is made out, or, which comes to the same thing, gives an undertaking*". The position may be different if a prior undertaking was given on a temporary basis pending further investigation: see *Holyoake* (above) at [26]. Generally speaking, a party cannot reopen matters "*unless he has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter*". See *Holyoake* (above) at [46], citing *Chanel v F W Woolworth & Co* [1981] 1 W.L.R. 485.

iv) The court will consider whether the parties' previous agreement was made on the basis that there could be no further application for security (as opposed to only if there was a material change in circumstances). If so, the court will only order further security in "*wholly exceptional*

> *circumstances*": see *Republic of Kazakhstan v Istil Group* [2005] EWCA Civ 1468; [2006] 1 W.L.R. 596 at [34]-[35].

76. An alternative to ordering additional security post-judgment is to award a payment on account of costs which reflects any increase in the defendant's costs compared with those previously estimated (for example because they are awarded their costs on an indemnity basis): CPR 25.12.20.

77. The court can grant security in respect of assessment proceedings: *MAN Nutzfahrzeuge AG v. Freightliner & Ors* [2007] EWHC 247 (QB).

78. An application for security for costs should be made promptly, as soon as the facts justifying the order are known: CPR 25.12.6. Delay in making an application is relevant to the court's exercise of its discretion, as explained by Mr Richard Millett KC sitting as a Deputy Judge of the High Court in *Hniazdzilau v Vajgel* [2015] EWHC 1582 (Ch) at [28] (cited with approval by Marcus Smith J in *Santina v Rare Art (London)* [2023] EWHC 807 (Ch) at [26]):-

> "28. Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see *CPR 25.12.6*). The question of delay must be assessed at the moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in Prince Radu of *Hohernzollern v Houston* [2006] EWCA Civ 1575 (cited at White Book p 823–4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it…."

79. As regards the quantum of security, the 'balance of prejudice' is in favour of the defendants: *Excalibur* at [90]. An under-secured defendant will be unable to recover the balance of the costs which is unsecured whereas, if the defendant is not subsequently awarded costs, or if too much security is given, the claimant may suffer only the cost of having to put up security, or the excess amount of security, as the case may be: *Pisante v. Logothetis* [2020] EWHC 3332 (Comm) at [88] following *Excalibur Ventures v. Texas Keystone* [2012] EWHC 975 (QB).

80. It is unnecessary to establish a link between the particular change of circumstance relied upon and additional costs for which security is sought. If a material change of circumstance is established, the Court may recalculate afresh the totality of the sum to allow: see *Stokors SA* at [29]-[30]:-

> "29. Mr Nash QC, on behalf of the Claimants, submitted it was necessary for the Defendant to link the particular change of circumstances to the items of additional cost which went to make up the figure of £725,000. He submitted it was not sufficient for the Defendant simply firstly to point to a general change in circumstances which justified some further security and then to justify the further security by reference to the amount which had been incurred or which was indicated would be incurred. Mr Nash QC submitted it was necessary to identify what change had caused what increase and to link any particular increase to a material change.
>
> 30. I disagree. The rationale behind requiring a material change of circumstance is the policy of the courts that generally, in interlocutory matters, one does not have two bites of the cherry. If, however, it is established, as I find it to be in this case, there has been a material change of circumstance which justifies the court looking again at the amount of costs which have been incurred in relation to the disclosure exercise, then because the court is concerned ultimately in awarding security to award such further security as is just, the court can look in the round at the totality of the cost of the exercise"

81. Finally, an unless order is part of the court's case management armoury and should be deployed only if in accordance with the overriding objective, including the need for proportionality: see White Book note 3.1.14.7. In deciding whether or not to make an unless order based on non-compliance with an order to provide security for costs, the principles set out in *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 (Comm), [2017] 5 Costs L.R. 877 at [26] are relevant (per *Aramco Trading Fujairah v Gulf Petrochem* [2021] EWHC 2650 (Comm) at [18] – a case which was concerned with the strike out of a defence). These include: (i) the need to keep carefully in mind the policy behind the order in question, in this case the order for security for costs; and (ii) the need to consider all the relevant circumstances, including the availability of alternative means of enforcing any costs orders.

(2) Mr Bosworth/Mr Hurley's application

82. Mr Bosworth/Mr Hurley seek additional security in the following sums: (i) £1,461,808.75 (detailed assessment of trial costs); and (ii) £2,274,642.50 (Inquiry costs), making a total of £3,736,451.25. Those figures are 85% of their estimated costs of those stages of the case, viz £1,719,775 for the detailed assessment and £2,676,050 for the Inquiry, making a total of £4,395,825.

83. The Claimants submit that, looking at the background to the Picken J and Baker J Orders, it is clear that (at the very least) the Claimants believed they were agreeing to these measures on the basis that this would draw a line, in the sense that there could be no further applications of this kind. That view is said to be consistent with the letters from Grosvenor Law to the Defendants of 13 February and 23 June 2023 referred to in §§ 11 and 21 above, and the terms in which those orders are made: referring only to "*security for costs*", indicating

that this security was intended to cover the entirety of the Defendants' costs of the proceedings. Following *Kazakhstan v Istil*, as a matter of justice, this should raise the threshold for reopening these matters such that the court should do so only if the circumstances are wholly exceptional. I do not accept that submission. Although the possibility of a detailed assessment always existed in principle, and the possibility of an Inquiry was the premise of fortification of the undertaking, there is no indication that the parties had in mind costs which the Defendants might incur after the end of trial or that any of the costs estimates were understood by any party to include detailed assessment or Inquiry costs. Mr Bosworth/Mr Hurley's evidence indicated that they were seeking security for their costs "*to trial*" (heading to Annex 1 to Greeno 25th witness statement). Nor is there any coherent basis for suggesting that the parties contractually agreed that there could be no further application for security for costs.

84. Mr Bosworth and Mr Hurley say there have been material changes of circumstances since March 2024 when they accepted the ringfencing of US$ 50 million as fortification of the undertakings in damages and security for costs. They submit as follows.

i) First, the Claimants have depleted their assets within the jurisdiction, and have given no proper explanation of why they did so, nor identified their other assets. As at March 2024, Alta's sole asset was cash in the Barclays account standing at US$ 42.25 million. The Claimants have since then stripped that account of US$ 17.68 million, so that its balance is now US$ 24,566,474, only US$ 66,000 above the sum required to be held in the account as fortification for Mr Kelbrick/Attock Mauritius.

ii) The Claimants have given no proper or transparent explanation, let alone one in evidence, as to why so much cash was removed. Grosvenor Law's 19 February 2025 letter refers (inconsistently) both to the costs of the Alta wind-down "*as well as ongoing costs of the business, including legal costs, tax payments and other intra-group transactions, with Farahead Holdings Group".* The letter gives no specifics, and its contents cannot be reconciled with Alta's audited accounts as at 31 March 2024. Those accounts were prepared on the basis that Alta was not a going concern and recorded Alta's liabilities that were *"expected to materialise".* The accounts made no reference to further wind-down costs, and 'related party transactions' (Note 22) were minimal. It is not understood how, on any proper basis, Alta could be making intra-group transactions at a time during 2024 while awaiting judgment and a potential judgment debtor to Mr Bosworth/Mr Hurley.

iii) Secondly, the Claimants have also depleted their assets outside the jurisdiction. In January 2024 Farahead had US$ 111 million in cash in a Jersey account (outside the jurisdiction). The Claimants now say that the balance in the Jersey account, as at 17 February 2025, is US$ 1,153,020.32. The Claimants give no adequate explanation as to what has happened to the other US$ 110 million. They say that US$ 50 million was moved to the Grosvenor Account to be held as security and US$ 47 million was used to repay a loan owed to a related Fredriksen company, Sterna Finance Limited. The Claimants also say that US$ 17

million was transferred (on an unknown date) to an unnamed group entity for "*investment purposes*".

iv) Further, in June 2023, Mr Morrison's 3rd witness statement referred to US$ 54 million held in Farahead's account with Nordea in Norway, and the Claimants offered to hold that amount as security. The 19 February 2025 letter says the balance in that account is only US$ 99,059 and that "*since June 2023, there had been a decision*" to cease business with Nordea and the "*balances have been transferred to other banks*", which are not identified. Mr Morrison's 16th witness statement, in February 2024, made no reference to the Nordea account. In a letter of 5 March 2024, the Claimants referred to a Farahead facility in Singapore, but their letter of 19 February 2025 is silent about any such facility. Farahead's financial statements referred to US$ 18.7 million loan receivable from a Farahead subsidiary, Arcadia Commodities Trading Limited. However, Mr Greeno's evidence noted that that was a dormant company based in the Cayman Islands. Mr Greeno also noted that Farahead had issued payment guarantees of US$ 68 million in respect of ship construction projects that could fall due in September 2024: contingent liabilities which did not appear in Farahead's 2023 accounts. According to the 19 February 2025 letter, the guarantees remain in place.

v) Thirdly, Mr Bosworth/Mr Hurley's actual costs to the end of trial are higher than their estimated figure when the Claimants gave security in March 2024. They applied for security of £12.7 million, but their estimated total costs of the proceedings (with interest) are £19,660,910. Mr Bosworth/Mr Hurley say their costs increased and were driven up by the Claimants' unreasonable conduct throughout 2024 in the lead-up to, and during, the trial. These included: (a) the 'alternative claim' that the Claimants sought to introduce weeks before trial (see the Annex to my substantive Judgment); and (b) the Claimants' multiple rounds of late disclosure (including over 2000 documents produced during the course of the trial).

vi) Fourthly, the fact that Mr Bosworth/Mr Hurley will now recover their costs of the proceedings on the indemnity basis is a material change from the provision of security in March 2024: *Excalibur* at [77]. The assessment process will be lengthy and complex.

vii) Fifthly, the court has decided to enforce the cross-undertaking. There will therefore be an Inquiry, in which Mr Bosworth/Mr Hurley will incur further costs. When they applied for security in 2023/24, they provided an estimate of their costs up to the end of the trial, not beyond. It would have been premature for them to have applied for any costs of the Inquiry (or the costs of detailed assessment) at any earlier stage: cf. *Republic of Djibouti v. Boreh* at [25], where Flaux J stated that it would have been premature to have applied, two years before trial, for security for costs in respect of a success fee payable in the event of 100% success in the litigation.

viii) Sixthly, in December 2024 Mr Fredriksen was reported to have left the jurisdiction together with his Seatankers business, as a result (according to Mr Morrison's 17th witness statement) of changes in the UK tax system. It is reasonable to assume that the Claimants will seek to remove other assets from this jurisdiction.

85. The Claimants submit that the first and second of these matters – depletion of the Claimants assets in and outside the jurisdiction – do not amount to a material change of circumstances. At the time when the Defendants sought and obtained security in 2023/24, it was already known that only Alta had assets in the jurisdiction, that Alta was winding down and that the Claimants would not be prevented from disposing of assets other than those which they agreed to hold in the Grosvenor Law and Barclays accounts: and it was foreseeable that they might in fact do so. The depletion of Farahead's assets was in large part (as to US$ 50 million) in order to place money in the Grosvenor Law account and (as to US$ 47 million) to repay a loan to Sterna Finance. The Farahead accounts (as at 31 March 2023), which the Defendants had when they took security for costs, showed that Farahead had a US$ 47 million loan debt to Sterna that was repayable on demand. In any event, the main focus when security for costs was previously given was naturally on Alta's assets in the jurisdiction.

86. Though I see some force in those points, I do not think they provide a complete answer. The fact that an event was foreseeable does not necessarily mean that there is no material change of circumstances if it in fact occurs (and *Excalibur* at [77] specifically makes the point that the change does not need be unforeseeable; see also *Republic of Djibouti v. Boreh* at [26]). Probably most significantly, there was no particular reason to believe that, having drawn attention to its availability as an asset in the context of the security applications, the Claimants would then deplete Alta's bank balance in the jurisdiction, including by unspecified intra-group transactions, in the way that actually occurred.

87. As to the sixth point (Mr Fredriksen's departure from the UK), this does not directly affect the Claimants, and insofar as it could indirectly presage asset depletion, it is unclear what remaining assets in the jurisdiction could be affected. Indeed, the Claimants accept that they no longer have liquid assets in the jurisdiction over and above the Grosvenor Law and Barclays accounts.

88. The third, fourth and fifth factors need to be considered together: Mr Bosworth/Mr Hurley's costs to trial having increased significantly, the order for costs on the indemnity basis, and the fact that an inquiry into damages is now to take place. The Claimants point out that when Mr Bosworth/Mr Hurley applied for fortification and security, they sought £12,763,058 as security for costs and further fortification of US$ 115,922,479. They now seek a further £3,736,451 as security for the costs of the detailed assessment and the Inquiry. However, the Claimants have recently paid £15,618,202 on account of Mr Bosworth/Mr Hurley's costs to the end of trial. The Claimants say Mr Bosworth/Mr Hurley's net exposure in costs has therefore reduced from £12.7 million to £5 million of future costs, so there is no material adverse change of circumstances since security was provided.

89. As a preliminary point, I note that the more relevant figure is in fact higher than £5 million. Mr Bosworth/Mr Hurley's total claimed costs to trial are £19,660,910. After deduction of the net payment on account of £15,618,202 the balance claimed is £4,042,708. Their estimated costs of the detailed assessment and the Inquiry total £4,395,825. Added together, those figures give a total potential costs exposure of £8,438,533, albeit those numbers of course assume 100% recovery.

90. In 2023/24, Mr Bosworth and Mr Hurley sought £12,763,058 as security for costs (equivalent to about US$ 16.2 million at the then prevailing rates) and further fortification of US$ 115,922,479, making a total of about US$ 132.1 million. However, they compromised their application at a much lower figure, US$ 50 million, *i.e*. about 37.8% of the amount sought. The Claimants' submission is, in effect, that Mr Bosworth/Mr Hurley cannot complain of a material adverse change if they are no more under-secured, or in fact slightly less under-secured, now than they were then. They still have the same amount of security for costs, but their costs exposure is now lower.

91. The difficulty with that approach is that it overlooks fundamental changes in the landscape of these proceedings. When they agreed the US$ 50 million figure in early 2024, Mr Bosworth/Mr Hurley were in the midst of fraught and litigation of uncertain outcome which was no doubt very hard to fund (as illustrated by the fact that, as emerged at the consequentials hearing, Quinn Emanuel extended credit to them over a large part of the litigation). Now, however, they have succeeded at trial, and the court has ordered costs against the Claimants on the indemnity basis. That victory has come at a high cost, significantly higher than was estimated in early 2024, and no doubt at least in part due to the Claimants' conduct of the litigation: both in the respects which led to the indemnity costs order and the ill-fated purported amendments which the Claimants advanced in spring 2024 which I disallowed at trial (see the Annex to my substantive Judgment). In these circumstances, Mr Bosworth/Mr Hurley have a much better claim to be properly secured than was the case when they agreed to accept the US$ 50 million. Further, once there has been a material change of circumstances (here, both the depletion of Alta's assets and the developments in the litigation referred to above), the court is entitled to view matters afresh: see *Stokors* (§ 80 above).

92. In these circumstances, it is in my view appropriate and fair for the Claimants to provide additional security for costs to Mr Bosworth and Mr Hurley, to cover the estimated costs of the detailed assessment and the Inquiry, both of which are new sets of costs not previously taken into account. It is true that, when security was agreed in 2024, it was foreseeable that there might be a detailed assessment in due course and that there might be an Inquiry into damages: indeed, the possibility of an Inquiry was the premise of the agreed fortification. However, I agree with Mr Bosworth/Mr Hurley that it would have been premature to have applied long before trial for security for the costs of a detailed assessment or an Inquiry into damages. That is also in my view the answer to the Claimants' complaint that security for costs should be refused on the ground of delay.

93. Mr Bosworth/Mr Hurley do not seek additional security in respect of their costs to the end of trial, so it is relevant to consider to what extent the security already

in place might be said to include any surplus that could stand as security for the costs of the detailed assessment and the Inquiry. The US$ 50 million was not in fact allocated as between fortification and security for costs. There is no particular part of that sum which must be regarded as earmarked for security for costs, particularly in circumstances where the total sum of US$ 50 million is less than Mr Bosworth/Mr Hurley's estimates, both original and current, of the damages due to them on the Inquiry.

94. Another way of looking at the matter might be to pro-rate the US$ 50 million as between fortification and security for costs in the proportions indicated in Mr Bosworth/Mr Hurley's original application. The security for costs they sought, equivalent to about US$ 16.2 million, was about 12.3% of the total of about US$ 132.1 million sought. One might therefore contemplate that 12.3% of the US$ 50 million, *i.e.* US$ 6.15 million represents security for costs. At today's exchange rate, the unrecovered balance of their claimed costs to the end of trial, £4,042,708, is equivalent to around US$ 5.4 million. On that basis, at least US$ 750,000 (US$ 6.15 million less US$ 5.4 million) of the US$ 50 million could be regarded as available as security for the costs of the detailed assessment and the Inquiry.

95. However, on balance I am inclined not to regard that sum as available to cover costs. Despite the hypothetical calculation I have just set out, the fact remains that the US$ 50 million was not subdivided between fortification and security for costs. The reality is that Mr Bosworth/Mr Hurley's actual loss claims are by themselves well in excess of US$ 50 million. Mr Bosworth/Mr Hurley have not sought additional fortification, and I have concluded on Mr Kelbrick/Attock Mauritius's application that it would be wrong to make such an order anyway. It does not follow, however, that I am required to treat any particular part of the global sum of US$ 50 million as available to cover outstanding costs liabilities, and in the circumstances I decline to do so. I shall therefore not assume that any of the US$ 50 million will be available to cover Mr Bosworth/Mr Hurley's costs of the detailed assessment or the Inquiry.

96. As to quantum of those estimated costs, the Claimants do not take issue with the Inquiry costs, but submit that at £1,719,775 Mr Bosworth/Mr Hurley's estimated costs of the detailed assessment are too high. They are about three times higher than Mr Kelbrick/Attock Mauritius's estimated detailed assessment costs, and include about £930,000 for the preparation of the bill of costs alone. However, as Mr Bosworth/Mr Hurley point out, given the complexity and ten-year time span of these proceedings, the assessment process is bound to be lengthy. Mr Bosworth/Mr Hurley have provided a summary breakdown of the estimate for the various phases, based on costs specialist input. It will take many months to prepare the bill of costs, and a full hearing may itself take 8-12 weeks. It cannot be assumed that costs will be agreed. In all the circumstances, I do not consider these estimated costs to be excessive.

97. Taking into account all the foregoing matters, I have concluded that the Claimants should be required to provide security for Mr Bosworth/Mr Hurley's costs of the detailed assessment and the Inquiry, and that they should be secured at the level of 85% of the estimated costs, as sought. I do not assume that these costs will necessarily be recoverable on the indemnity basis, though Mr

Bosworth/Mr Hurley may well have a good argument that they should be (as part of the costs of the proceedings as a whole); but nonetheless consider 85% to be the appropriate figure. I bear in mind that both the detailed assessment and the Inquiry will be substantial exercises, and that the Inquiry has already been listed for what will in substance be a two-week trial next March. Additional security should therefore be provided in the total sum of £3,736,451.

98. I shall not make that order in 'unless' form. It is unnecessary, and would be disproportionate, to do so. In the event of default in compliance, the matter can be brought back to court for consideration of the appropriate course, and the order should accordingly include liberty to apply.

(3) Mr Kelbrick/Attock Mauritius's application

99. Mr Kelbrick/Attock Mauritius's estimated future costs are £465,175 for the detailed assessment and £2,826,570 for the Inquiry, making a total of £3,291,745. They seek further security of 85% of that sum *i.e.* approximately £2,798,000.

100. As noted earlier, Mr Kelbrick/Attock Mauritius in February 2023 asked for US$ 24.5 million, calculated as US$ 16 million fortification and US$ 8.5 million costs "*to trial*". Their application evidence in April 2023 indicated that Mr Kelbrick's loss caused by the injunction had now been calculated as totalling US$ 21.4 million, such that (including interest and security for costs) they would seek US$ 35 million in total unless the previous figure of US$ 24.5 million had already been agreed. The application was compromised on the basis of a figure of US$ 24.5 million, which the order did not allocate as between fortification and security.

101. Broadly similar considerations apply as to Mr Bosworth/Mr Hurley's security for costs application. However, the Claimants submit that there is an important difference, because unlike Mr Bosworth and Mr Hurley, Mr Kelbrick/Attock Mauritius did not apply for a higher figure than the US$ 24.5 million they obtained. Further, even based on their April 2023 increased estimate of Mr Kelbrick's loss due to the undertaking, they never sought more than US$ 21.4 million by way of fortification (excluding interest, I would add). The Claimants say that even if US$ 21.4 million of the US$ 24.5 million is allocated to fortification, the remaining US$ 3.1 million is sufficient to provide security for Mr Kelbrick/Attock Mauritius's future costs (*e.g.* it is higher than the amount of additional security for costs that Mr Kelbrick/Attock Mauritius are now seeking). In addition, the Claimants take issue with the evidence about alleged loss of benefits under the Vitol share scheme, noting that it is based on a number of assumptions that might not have been valid (including that Mr Kelbrick would have remained at Vitol long enough to receive all the share scheme benefits claimed, bearing in mind *inter alia* the 7-year benefit deferral period built into the scheme).

102. Though I see some force in those submissions, I do not consider them to be sufficient reason to refuse to order additional security. First, the US$ 24.5 million was not in fact split into separate amounts for fortification and security for costs. The evidence available now indicates that Mr Kelbrick/Attock

Mauritius's actual loss claims are for well in excess of US$ 24.5 million. Even if one were to discount the Vitol share scheme element entirely, once interest (even simple interest) is added to the other claims the loss exceeds that figure.

103. Secondly, the findings in my substantive Judgment about Mr Kelbrick's capabilities, contacts and experience increase the likelihood of his making a recovery in the Inquiry, since they potentially lend support to his case that he would, but for the injunction, have been able to find other lucrative work. That in itself is a material change of circumstances since security was previously agreed. It is also a material change of circumstances that Mr Kelbrick/Attock Mauritius have now succeeded in the litigation and the court has ordered a detailed assessment of their costs and an Inquiry into damages, both representing new sets of costs not previous contemplated or provided for.

104. Although I have concluded that it would be wrong to order additional fortification, that does not mean that I am required to treat any particular part of the global sum of US$ 24.5 million as available to cover outstanding costs liabilities. I shall therefore not assume that any of the US$ 24.5 million will be available to cover Mr Kelbrick/Attock Mauritius's costs of the detailed assessment or the Inquiry.

105. In all the circumstances, I consider that additional security should be provided for Mr Kelbrick/Attock Mauritius's costs of the detailed assessment and the Inquiry, and that it should be at the level of 85% of the estimated costs put forward. I repeat my comments in § 97 above about the Inquiry being a substantial piece of litigation in itself. Additional security should therefore be provided in the sum of £2,798,000. As with Mr Bosworth/Mr Hurley, I shall not make the order in 'unless' form.

(E) CONCLUSIONS

106. Mr Kelbrick/Attock Mauritius's application for further fortification must be dismissed. The applications for additional security for costs will be allowed. I shall hear counsel as to the precise form of relief.

107. I am grateful for all the advocates' clear and persuasive written and oral submissions.