Neutral Citation Number: [2022] EWHC 3008 (Comm)

Case No: CL-2021-000412 / CL-2021-000413

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 10/11/2022

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

INVEST BANK PSC	**Claimant**
- and -	
(1) AHMAD MOHAMMED EL-HUSSEINI	**Defendants**
(2) MOHAMMED AHMAD EL-HUSSEINY	
(3) ALEXANDER AHMAD EL-HUSSEINY	
(4) ZIAD AHMAD EL-HUSSEINY	
(5) RAMZY AHMAD EL-HUSSEINY	
(6) JOAN EVA HENRY	
(7) VIRTUE TRUSTEES (SWITZERLAND) AG	
(8) GLOBAL GREEN DEVELOPMENT LIMITED	

- -
- -

MR A. GOURGEY KC and MR M. DELEHANTY
(instructed by PCB Byrne LLP) appeared on behalf of the Claimant.

MS L. HUTTON KC (instructed by Fladgate LLP)
appeared on behalf of the Second Defendant.

MR J. MATHER (instructed by Stewarts Law LLP)
appeared on behalf of the Fifth, Sixth, and Eighth Defendants.

THE FIRST, THIRD, FOURTH, AND SEVENTH DEFENDANTS
did not attend and were not represented.

Hearing dates: 10 November 2022

- -

APPROVED JUDGMENT

Judgment Approved

MR JUSTICE BRYAN:

A. INTRODUCTION

1 The parties appear before me today on the hearing of applications by the Fifth, Sixth, and Eighth Defendants ("the Stewarts Defendants") and the Second Defendant ("D2" or "Mo") for security for costs, (collectively the "Security applications"), as well as an ancillary application by the Claimant ("the Bank") that if security is refused, then funds held by way of fortification of its cross-undertaking should also be released ("the Release Application").

2 Other ancillary applications in terms of permission to rely upon various expert reports on UAE law, and as to the timing of certain evidence, have effectively fallen away in circumstances where I considered it appropriate to have regard to all the expert evidence on UAE law and all the witness evidence before me (a course which was anticipated in the written submissions). There are also case management directions to be given in relation to further applications that have been issued but which this Court directed on 4 November 2022 should not form part of this hearing given the one day time estimate for the existing applications to include judgment (email to the parties of Robin Knowles J, 4 November 2022) ("the Robin Knowles Order"). At that time, it was envisaged that the hearing would be before Robin Knowles J.

3 The Robin Knowles Order also made clear that the parties should agree a timetable sharing time between the three of them to enable the hearing and judgment to be completed within the time allocated by him (which was 09.30am to 3.45pm, with one hour break at lunchtime, i.e. a slightly extended one day overall hearing). One day pre-reading was allocated. In the event, the hearing came before me. I concurred with the directions previously given.

4 Notwithstanding the directions of Robin Knowles J, it transpired at the start of the hearing before me that the parties had not agreed the allocation of time between them, and in the event oral submissions occupied all the allotted time. I was nevertheless prepared to continue to sit to conclude the hearing.

5 There are no less than eleven factual witness statements before me (the eleventh only provided immediately before the hearing commenced, which are served in relation to the applications, as well as six expert reports on UAE law in three rounds of expert evidence, (three from Faisal Attia on behalf of the Stewarts Defendants, as also adopted on behalf of D2, and three from Tim Taylor KC on behalf of the Bank). The application bundle runs to some 2,689 pages (plus a supplemental bundle of 458 pages). It would be fair to say that neither time nor expense has been spared by any of the parties in exhaustively arguing the issues that arise before me on the security for costs applications. I confirm that I have read and given careful consideration to all the witness statements and expert evidence that has been put before me, as well as the written and oral submission of James Mather (on behalf of the Stewarts Defendants), Louise Hutton KC (on behalf of the Second Defendant), and Alan Gourgey KC (on behalf of the Bank) for which I am grateful.

B. BACKGROUND

6 For the purpose of the present applications, it is only necessary to set out an overview of the background to the claims. Like much else in the case, the parties are not *ad idem* as to the respective merits of the claims and defences, but no party is suggesting that the respective merits impact upon the exercise of discretion should jurisdiction exist (see *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609). Equally, this is not a case where it is suggested that the ordering of security for costs, if otherwise appropriate, would stifle the claim.

7 The Claimant carries on retail and corporate banking activities in the UAE and Lebanon. It claims to have judgment debts against the First Defendant ("Ahmad") arising from proceedings in Abu Dhabi. The claims were made on alleged personal guarantees given by Ahmad in connection with credit facilities granted to two UAE companies. The total alleged to be due under that judgment is circa £20 million.

8 At a very high level of summary, the Bank's case is that it was the victim of a substantial fraud by Ahmad on the Bank (and his other creditors) involving a dissipation of tens of millions of dollars of wealth (properties, businesses, and money) leaving him, it is said, as he has said in related Canadian proceedings, so I am told, "dependent upon his family to pay for his food and cigarettes".

9 The Sixth Defendant ("Joan") was formally married to Ahmad. The Fifth Defendant ("Ramzy") is one of their four sons ("the Sons") the other sons being the Second to Fourth Defendants respectively. In these proceedings, the Claimant brings primary debt claims against Ahmad seeking to sue on the UAE judgments or, alternatively, on the underlying alleged guarantees. It also pursues secondary claims variously involving the other defendants for relief relating to assets against which, directly or indirectly, the Claimant asserts an entitlement to enforce Ahmad's alleged liability.

10 . In particular, as regards the Stewarts Defendants, the reamended Particulars of Claim, claim:

(1) Declarations as to the beneficial ownership of two valuable London properties - 9 Hyde Park Garden Mews ("9HP"), and 32 Hyde Park Garden Mews ("32HP") whose respective legal owners are the Fifth Defendant ("Ziad") and Ramzy, including that those properties are held on trust for Joan as nominee for Ahmad;

(2) Declarations that various transactions were transactions defrauding creditors within the meaning of s.423 of the Insolvency Act 1986 and specific orders pursuant to that provision as identified below;

(3) As against Ramzy, an order is sought vesting 32HP in the Claimant, alternatively Ahmad, or alternatively for payment in the amount of the value of that property to the Bank, alternatively Ahmad;

(4) Also as against Ramzy, an order is sought vesting the shares that he holds in the Eighth Defendant ("Global Green", the shares in which are referred to as the UK shares and whose registered owners are the Sons in equal amounts) in the Bank, alternatively Ahmad, or alternatively for payment in the amount and value of those shares to the Bank, alternatively Ahmad;

(5) Also as against Ramzy, an order is sought for payment to the Bank, alternatively Ahmad, of the amount of the alleged "Medstar Transaction Benefit" being 25 per cent of the alleged transfer of US$15 million from Medstar Holdings SAL, a Lebanese company related to Ahmad. The Bank alleges that that cash was transferred to each of the Sons and is making a claim against each of them in the amount of a quarter of that sum;

(6) As against Joan, an order is sought for payment to the Bank, or alternatively Ahmad, of a sum equivalent to most of the proceeds of sale of another valuable London property, 18 Hyde Park Square ("18HP"). 18HP had been transferred to the Seventh Defendant ("Virtue") as trustee of a trust established by Ahmad as settler on 4 April 2017 for the benefit of Joan and the Sons. Virtue sold the property some months later at a fair market price to a buyer unconnected to Ahmad or his family and Virtue then transferred almost all of the net proceeds of sale to Joan; and

(7) As against Global Green, an order is sought for transfer to the Bank, or alternatively Ahmed, of shares in the company called Commodore Procurement Services FS BV ("Commodore Netherlands"), the entirety of which had been transferred to it, alternatively for payment to the Bank, alternatively Ahmad, of a sum equivalent to the value of those shares.

11 The Stewarts Defendants stress that as regards these claims, that an intent to put assets beyond the reach of creditors is alleged solely against Ahmad and not against Joan or the Sons. They point out that the Bank had originally pleaded that the transfers of 9HP, 32HP, and the UK Shares were sham transactions but subsequently conceded that, since it did not and was not in a position to allege that any of the Sons had, in receiving any of the relevant assets, any dishonest intent or shared Ahmad's purpose of defrauding creditors (in the s.423 sense), that plea was unsustainable and should be struck out (see *Invest Bank PSC v El-Husseini* [2022] EWHC 894 (Comm) at [11] - [12], a judgment of Andrew Baker J).

12 Turning to the Second Defendant (Mo), one of the sons of Ahmad, it is Mo's case that he is not close to Ahmad, that he is not in regular communication with him, and that he has very limited knowledge of his business affairs (see D2 Defence, paras 5.2, 22.3, 25).

13 The claims advanced by the claimant in the Re-amended Particulars of Claim (RAPOC) against Mo concern:

(1) The transfer to him of a 25 per cent shareholding in D8 ("the Commodore Shares") which the Claimant alleges Ahmad controlled (see RAPOC, paras 153-165); and

(2) The alleged transfer of US$15 million from Medstar Holdings SAL to the Sons ("the Alleged Medstar Transactions") (see RAPOC, paras 166-175). At the time of the attempt to transfer funds from Medstar to Mistar (see RAPOC, para 168), Mo was not a shareholder of Mistar or involved in Mistar in any way (Defence, para 42.3).

14 The relief sought in respect of the claims against Mo is:

(1) The vesting of the Commodore Shares in the Claimant, (alternatively in Ahmad), and/or for payment in the amount of the value of those shares, and (if and to the extent not reflected in the value of those shares) any benefit received by Mo by reason of, or consequent to, D8's receipt of shares in Commodore Netherlands (RAPOC, para 165 & prayer for relief para 6); and

(2) Payment of the amount of the alleged "Medstar Transaction Benefit", being 25 per cent of the alleged transfer of US$15 million from Medstar, to the Claimant, alternatively to Ahmad (RAPOC, para 175 & prayer for relief para 6A).

15 D2 also points out that the Bank does not allege that Mo acted dishonestly or that he shared Ahmad's alleged purpose of hiding assets from, or (in the s.423 sense) defrauding his creditors (see *Invest Bank* (*supra*.) at [11]).

16 D2 submits that the claims against Mo are confined and that his involvement in the substance of the underlying dispute as between the Claimant and Ahmad is limited. Mo offered in summer 2021 and January-February 2022 to transfer the Commodore Shares which Mo does not consider to have any good value (D2 Defence, para 37, 39.1; Shanks 1, para 14) to Ahmad. However, Ahmad refused to accept a transfer of the Commodore Shares until this autumn. Transfer of the Commodore Shares to Ahmad was finally executed on 7 October 2022 (D2 Defence, para 7.2) and Mo also transferred his shareholding in Mistar to D4 ("Ziad") on 11 October 2022.

17 D2's defence to the claims is that the requirements of s.423 are not satisfied and/or the Bank is not otherwise entitled to relief from him, including because:

(1) He has transferred both the Commodore Shares and his shares in Mistar to Ahmad and D4 respectively (D2 Defence, paras 27, 48);

(2) He provided consideration for the Commodore Shares which was, in fact, more than the shares were worth (D2 Defence, para 36.3); and

(3) He did not otherwise receive any benefit from the receipt of the Commodore Shares or from his shareholding in Mistar and never received any monies or other benefits from Medstar.

18 By way of riposte, the Bank says that whilst the impression may be given by the Stewarts Defendants and D2 that because the Bank does not allege dishonesty against the Stewarts Defendants and D2, those Defendants should be regarded as mere bystanders caught up in D1's asset shielding scheme, on the Bank's case, they were anything but and whilst a plea of dishonesty is not made, the Bank says that one is not required in relation to asset transfers to support a s.423 claim.

19 The Bank points out that it has amended to plead that:

(1) D5 and D6 were not mere transferees of 32HP in the sale process of 18HP respectively but participated alongside D1's other sons in broader arrangements with D1 for the transfer away from his control of all his London properties (RAPOC at para 120.5);

(2) Having received 32HP, D5 indirectly holds the beneficial interest in 32HP for D1 via D6 who has power to prevent disposal of the property (RAPOC paras 114-115). It is said that D5's and D6's involvement in such edifice is such as to have the same practical effect as if the initial transfer of 32HP to D5 had, indeed, been a sham. In analysing this claim, Andrew Baker J found that:

> "[t]here was evidence of [D6] being used as an asset-holding nominee for [D1]."
>
> (Judgment at [110]).

(3) D2 and D5 ultimately received the benefit of US$15 million from D1, which claim has been sustained by evidence of D2 and D5 deciding to and becoming directors and shareholders of a newly incorporated Lebanese company (Mistar) to which D1 had attempted to transfer the US$15 million.

20 So far as D2's transfer of his shares to Mistar (to D4), and D2's suggestion that therefore no further remedy lies against him in respect of this claim, such that the Bank has no basis for pursuing it, the Bank submits that what it is describes as its attempt to short circuit scrutiny of D2's dealings with the US$15 million/Mistar is misconceived as, first, the Bank's claim encompasses any receipt of benefit of the US$15 million and not simply by way of holding of shares in Mistar (RAPOC para 168.3 & Prayer (6B)), and, secondly, the current value of the Mistar shares will not necessarily be the value of those shares.

21 As to the relevant procedural history, the proceedings were issued on 9 July 2021 and the day before on 8 July, the Bank obtained an *ex parte* freezing injunction against Ahmad. On 12 July 2021, the Bank applied on notice for freezing relief against Ramzy and Global Green as well as other Defendants. As a matter of pragmatism, Ramzy and Global Green agreed to provide undertakings pending the return date of the on-notice application against them. Those undertakings were set out in the order of Robin Knowles J dated 23 July 2021 ("the 23 July 2021 Undertakings").

22 Each of the Stewarts Defendants, (now including Joan), again as a matter of pragmatism, gave further undertakings for the freezing of assets and the provision of information in the Order of Cockerill J dated 20 August 2021. The Stewarts Defendants subsequently consented to those undertakings remaining in place until trial or further order (see the Order of Jacobs J dated 11 January 2022 and the Order of Robin Knowles J dated 12 January 2022). On each occasion, the Claimant gave the standard cross-undertakings ("the Claimant's Undertakings").

23 On 14 October 2021, the Stewarts Defendants filed and served their Defence. The Stewarts Defendants have been provided by the Claimant with numerous iterations of their pleading, in the course of which a number of claims have either been added or abandoned. The Andrew Baker J judgment considered the substantive merits of various of these claims, in the contexts of the Claimant's amendment application and applications by Ahmad and the Third and Fourth Defendants to set aside permission to serve them out of the jurisdiction.

24 The Re-Amended Particulars of Claim dated 16 July 2022 was served in the light of the determinations in the Andrew Baker J Judgment. The Stewarts Defendants were

to serve their Amended Defence by 28 October 2022 but it is said that in view of their previous counsel team having ceased to act, as well as funding issues described, they have not yet done so and they have applied for an extension of time and are also seeking a declaration that Joan is entitled to utilise sums for the payment of legal fees.

C. APPLICABLE PRINCIPLES AS TO SECURITY FOR COSTS

25 The requirements imposed by CPR r.25.13 for the making of an order for security for costs are that:

(i) One of conditions in CPR 25.13(2) is satisfied ("the Condition Required"); and

(ii) The court is satisfied for the purpose of CPR 25.13(1)(a) that it is just to make the order ("the Discretion Requirement").

26 The particular issues arising in this case are:

1) Firstly, whether, for the purpose of meeting the Condition Requirement by reference to CPR 25.13(2)(a), there is a real risk of non-enforcement in the UAE.

2) Secondly, whether, as a further alternative basis for meeting the Condition Requirement by reference to CPR 25.13(2)(c), there is reason to believe that the Bank will be unable to pay the defendants' costs if so ordered; and

3) Thirdly, as to the Discretion Requirement:

(i) Whether an order should not be made by reason of a cash balance that the Claimant presently has with a UK bank pursuant to Nostro arrangements;

(ii) Whether an order should nonetheless not be made by reference to an allegation that the manner in which Global Green used funds to pay legal fees involved a breach of undertakings given; and

(iii) Whether the discretion is, in all the circumstances, satisfied.

C1. The condition requirement: CPR 25.13(2)(a)

27 The relevant principles are well established and common ground. They are conveniently summarised by Butcher J in *PJSC Tatneft v Bogolyubov* [2019] Costs LR 977 at [7] - [11]. If the claimant is resident (i) out of the jurisdiction and (ii) in a non-Hague Convention State then the conditions of CPR 25.13(2)(a) are satisfied and the Court, on the face of it, has a discretion to make an order for security for costs under CPR r.25.13(1).

28 However, as explained by the Court of Appeal in *Nasser v United Bank of Kuwait (Security for Costs)* [2002] 1 WLR 1868, though the court has a discretion because rule 25.13(2)(a) is met, that discretion must be exercised in a manner which is not discriminatory for the purpose of Articles 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As it was put in paragraph [62] - [64] of that case, *per* Mance LJ:

> "[62] The justification for the discretion under rules 25.13(2)(a) … in relation to individuals and companies ordinarily resident abroad is that in some – it may well be many – cases there are likely to be substantial obstacles to, or a substantial extra burden (eg of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state….
>
> [63] It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) …. is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).
>
> [64] The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases … it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. …"

29 Consideration was given to the evidential threshold which an applicant for security for costs needs to surmount in *Bestfort Developments LLP v Ras al Khaimah Investment Authority* [2016] EWCA Civ 1099. It was there held by the Court of Appeal that it is not necessary for such an applicant to show that it was more likely than not that there would be substantial obstacles to enforcement but was sufficient for it to be demonstrated that there was a real risk that it would not be in a position to enforce an order for costs. Gloster LJ said as follows:

> "[73] Contrary to Mr Millett's submissions, I do not accept there is any need for the evidence to demonstrate 'very cogent evidence of substantial difficulty in enforcing a judgment' either in the non-Convention state where a claimant is resident, or where his assets are located...
>
> ...
>
> [77] In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively

> justified grounds relating to obstacles to or the burden of enforcement', there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden' but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test was one of 'likelihood', which involved demonstrating that it was 'more likely than not' (ie an over 50% likelihood), or 'likely on the balance of probabilities', that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents....
>
> ...
>
> [79] Necessarily, at an interlocutory stage, in the absence of cross-examination and full enquiry, it may well be that the court cannot be satisfied at that time that an applicant for security has demonstrated on the balance of probabilities, that there will be substantial obstacles to enforcement, or even, in some cases, that there is a real risk of such obstacles. The judge at that stage may well not be in a position to resolve disputed issues arising on the evidence. For that reason, I am against the articulation of any hard-line, inflexible test in relation to an evidential standard based on 'likelihood'....
>
> ...
>
> [86] ... What actually suffices to justify the making of an order will depend on the evidence adduced; 'mere possibility' of obstacles to enforcement in my view will usually be insufficient to justify an order for security; but (depending on the evidence) 'real risk' will usually, but not invariably, suffice."

30 In *Re RBS Rights Issue Litigation* [2017] 1 WLR 4635, at [29] Hildyard J equated a real risk with a non-fanciful risk.

31 Further guidance as to the jurisdiction to order security for costs has been given by the Court of Appeal in *Danilina v Chernukhin* [2018] EWCA Civ 1802. At [51], Hamblen LJ (as he then was) summarised the relevant principles as follows:

> "[51] Having regard to the guidance provided by these authorities the position may be summarised as follows:

(1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR r 25.13(1) if:

> 'it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.'

(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Art.6 and 14 of the Convention: see the *Bestfort* case [2017] CP Rep 9, paras 50-51.

(4) This requires 'objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned': see *Nasser*'s case [2002] 1 WLR 1868, para 61 and the *Bestfort* case at para 51.

(5) Such grounds exist where there is a real risk of 'substantial obstacles to enforcement' or of an additional burden in terms of cost or delay: see the *Bestfort* case at para 77.

(6) The order for security should generally be tailored to cater for the relevant risk: see *Nasser*'s case at para 64.

(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for example, the orders in *De Beer*'s case [2003] 1 WLR 38 and the *Bestfort* case.

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see, for example, the order in *Nasser*'s case."

32 In *Danilina v Chernukhin*, the Court of Appeal also disapproved of an approach to the quantum of security which used a "sliding scale" as to the degree of risk that non-enforcement involves and discounted the costs figures accordingly. Hamblen LJ rejected such an approach stating:

> "[57] In principle, security should be tailored so as to provide protection against the relevant risk. On the judge's findings the relevant risk is that of non-enforcement of any costs order obtained. The purpose of ordering security in such

> circumstances is to secure the defendant against the risk of nonrecovery of those costs. Since that is the risk against which the applicant is entitled to protection, I agree with the appellants that the starting point should be that the defendant is entitled to security for the entirety of his costs.
>
> [58] As a matter of authority, this court has held in the *Bestfort* case [2017] CP Rep 9 that the appropriate 'threshold' test when considering the issue of whether there are 'substantial obstacles' to enforcement is one of real risk rather than likelihood. Various reasons are given for reaching that conclusion, including the need for a simple and clear approach to issues which will be considered at an interlocutory hearing on the basis of what 'necessarily and proportionately, will be limited evidence': at para 48.
>
> [59] ... The consequence of adopting a sliding approach is in effect to require the defendant to establish likelihood of non-enforcement (if not more) if security for the entirety of the costs is to be obtained.
>
> [60] Further, it would lead to the type of detailed evidentiary exercise which the court was keen to avoid through its decision in the *Bestfort* case. It would allow in via the back door all the evidence and evidential inquiries which the court in that case took care to shut out via the front door."

33 From these cases, the principles can be summarised as follows:

(1) In order for the court to be satisfied that it should exercise its discretion on this basis, it must ensure that discretion is being exercised in a non-discriminatory manner for the purposes of Art.6 and 14 of the ECHR (see *Bestfort* at [50] - [51] and *Danilina* at [51]);

(2) For this purpose, there must be objectively justified grounds relating to obstacles to or the burden of enforcement in the context of a particular foreign claimant or country concerned (*Bestfort* at [51]). Such grounds exist where there is a real risk of substantial obstacles to enforcement or of an additional burden in terms of costs or delay (*Bestfort* at [77]). "Real risk" does not require an evidential threshold of "likelihood on the balance of probabilities" (*Bestfort* at [74]). In *Re RBS Rights Issue Litigation* [2017] 1 WLR 4635 at [29], as I have already noted, Hildyard J equated a real with a non-fanciful risk; and

(3) The order for security should generally be tailored to cater for the relevant risks (*Danilina* at [51]) where the risk posed of non-enforcement, the defendant should usually have security for the entirety of the costs and there is room for discounting the security figure by grading the risk using a sliding scale (*Danilina* at [64]).

34 In *Tatneft, s*upra., Butcher J considered the position where there is conflicting expert evidence as to the risks of non-enforcement in a foreign jurisdiction and stated as follows at [19].

> "[19] In approaching this area of dispute, I consider it important to bear the following in mind:
>
> (1) I am concerned only to decide whether there has been shown to be a real risk of substantial obstacles to enforcement.
>
> (2) One of the reasons why the threshold was set as a real risk, rather than a likelihood, of non-enforcement was that there should be a 'simple and clear approach' (*Danilina* v *Chernukhin* [2018] EWCA Civ 1802, paras [58], [60].
>
> (3) The issues are largely ones of Russian law and practice, where the evidence is given by experts who have not been cross-examined. In the circumstances, save in clear cases in which it can be plainly seen that one or the other expert lacks qualifications or reliability, or that there is no room for serious argument, it is unlikely to be possible to prefer one expert's view on a disputed point to the other's.
>
> (4) If the court is unable to decide between the evidence of two experts as to whether there is a real risk of substantial obstacles to enforcement, that may itself lead the court to conclude that there is such a risk, because there is the possibility that the views of the expert who says that there is such a risk are correct. This sort of situation seems to be envisaged by Gloster LJ in para [81] of *Bestfort*."

35 Whilst the Court should reach its conclusion as to whether there is a real risk of substantial obstacles independently from any other judgment, findings by other judges in other cases may provide additional support for the Court's conclusion (see *Bogolyubav* at [39]). The Stewarts Defendants say this is so in the present the case referring to the judgment of Simon Rainey QC (sitting as a Deputy Judge of the High Court) in *Hirbodan Management Company, v Cummins Power Generation Limited* [2021] EWHC 3315 (Comm) at [32] - [40].

36 However, whilst I have read that case with care, I do not consider that the views expressed by the expert in the *Hirbodan* case is of any particular assistance in the present case given that the claimant did not appear, there was no opportunity to test the views expressed by the expert in that case, there was no expert called on behalf of the claimant, and there is no suggestion that matters were addressed with the same level of detail as in the three rounds of expert evidence in the present case. Accordingly, my focus must be on the expert evidence that is actually produced before me.

D. APPLICATION OF THE PRINCIPLE: CPR 25.13(2)(a)

37 It is not in dispute that the jurisdictional condition in CPR r.25.13(2)(a) is satisfied. The claimant is a UAE body corporate domiciled in Sharjah, UAE, and the UAE is not bound by the 2005 Hague Convention.

38 The relevant question, applying the above principles, is therefore whether there has been shown to be a real risk of substantial obstacles to enforcement or of an additional burden in terms of costs or delay in the UAE.

39 The putative judgment that would be subject to enforcement in this context would be a judgment in favour of the Stewarts Defendants and/or D2, individuals resident in England (that is D2 and D5) and Lebanon (D6), and the English company (D8) in proceedings brought by the Bank seeking declaratory relief in respect of beneficial ownership of English real estate and relief under an English statute entered into outside of the UAE in respect of assets located outside of the UAE.

40 The Defendants rely on the expert evidence of Mr Attia with a view to establishing that there is a real risk of non-enforcement of any award of costs in the UAE under either of the conceivably available enforcement routes, namely (i) enforcement through the DIFC Courts or (ii) onshore enforcement through the UAE Courts. Mr Taylor KC disagrees with the views expressed by Mr Attia, and the Bank submits that the various alleged obstacles to enforcement of such a judgment in the UAE as advanced by Mr Attia are fanciful. The Bank submits that this is a case where the court is in a position to determine the absence of a real risk as to enforcement without the need for cross-examination and that there are no obstacles to enforcement whether through the offshore route (enforcing the English judgment in DIFC and then enforcing the DIFC judgment in the UAE), or the onshore route (enforcing the English judgment in the UAE).

41 The task for the Court is to determine where there are *"objectively justified grounds"* of obstacles to enforcement such that there is a real risk that the Defendants may not be in a position to enforce an order for costs (*Nasser* at [61], *Bestfort* at [74]). For the reasons that I identify below, I do not consider that there are. I will consider each of the routes in turn.

42 Before doing so, I note an argument raised in the Stewarts Defendants' Skeleton argument that Mr Taylor does not go so far as to suggest that there is no real risk that enforcement would not prove to be possible but, rather, that the furthest that he goes is to opine that there are "good prospects" of successfully enforcing the putative English order (Taylor 1, para.113) it being submitted that if there are only "good prospects", this leaves a "real risk" that the enforcement would not prove to be possible. I do not consider that to be a fair reading or characterisation of Mr Taylor's evidence as a whole in which he rejects the views expressed by Mr Attia and the reasons given by him. For example, he unequivocally rejects the suggestion that there is any public policy against awards of legal costs or the enforcement of judgments awarding legal costs.

D1. Offshore Enforcement

43 A straightforward route to enforcement of the English judgment for costs would be to enforce the judgment in the DIFC and then to enforce the resulting DIFC judgment in the UAE. It is not in dispute between the experts that there is no proper basis for the

Bank to resist enforcement of an English judgment in the DIFC. Indeed, Mr Attia himself opines that "the requirements for enforcement of a judgment of the English Courts before the DIFC are straightforward" compared to the onshore enforcement route (Attia 1 at para.8.8).

44 It is common ground that as the Bank is based in Sharjah (rather than DIFC) and there is no evidence it has assets in the DIFC, it would then be necessary to enforce the DIFC judgment in the UAE via the onshore enforcement route. However, what would be being enforced in this regard at that stage would be the judgment of the DIFC not the English judgment.

45 Mr Attia submits that the Defendants' use of the offshore DIFC enforcement route could be stymied by the Bank commencing parallel proceedings in the onshore courts for declarations and that English costs judgments are not enforceable (see, in particular, Attia 1 at 8.11 - 8.23, and Attia 2 at para.5.46). I am satisfied, however, that upon analysis, the Bank could not commence the parallel proceedings envisaged by Mr Attia.

46 First, Mr Attia opines that the Bank could commence proceedings against the Defendants in the Sharjah Courts seeking a declaration that the English judgment is not enforceable. He contends that the Sharjah Court would have jurisdiction to entertain such a claim because of the operation of Art.31(1) of the UAE Civil Law. He states in Attia 1 at para.8.23 that:

> "The effect of Article 31(1) is that proceedings should be brought before the court in whose territory the **defendant** is domiciled. Given that Invest Bank is the English Judgment debtor, and further given that Invest Bank is domiciled in the Emirate of Sharjah, it is highly likely that Invest Bank would be able to establish the jurisdiction of Sharjah Courts."
>
> [emphasis added]

47 This point is obviously misconceived for the reason pointed out by the Bank. In proceedings brought by the Bank for declaratory relief, the Bank would be **the claimant**, not the defendant, and the Defendants (which would be the Stewarts Defendants and D2) are not domiciled in Sharjah or the UAE.

48 Secondly, Mr Attia opines that the Bank could commence such proceedings against the Defendants in the Dubai Courts seeking such declaratory relief but unlike his (erroneous) basis for Sharjah Court jurisdiction, he does not identify any provision under which the Dubai Courts would have jurisdiction to entertain such a claim.

49 Quite apart from failing to identify any jurisdictional basis for such parallel proceedings, there is no evidential basis to conclude that the Bank would attempt to instigate any such parallel proceedings. Very much the reverse. In this regard, Mr Taylor's evidence is that the Bank "can avoid any difficulty by contractually agreeing in advance with [the Stewarts Defendants] to the DIFC Court having jurisdiction in respect of any claim in the UAE to enforce any future English costs orders/judgment" and the Bank has offered to enter into a contractual agreement to submit to the jurisdiction of the DIFC Court for any enforcement action, but this offer has not been

taken up by the Defendants. Mr Attia opines that such agreement would be highly likely to be considered null and void in UAE law because it would be contrary, he says, to UAE rules of territorial jurisdiction. But he does not identify any such rule to which the agreement would be contrary (he refers to Art.31(1) of the UAE Civil Law but that reliance would appear to be misplaced).

50 There is no evidence before me that the Bank would seek to undertake parallel proceedings (even assuming that there was any jurisdictional basis for the same). However, in the circumstances where the Bank was willing to enter into a contractual agreement not to do so, I asked Mr Gourgey in the course of his submissions whether, consistent with this, the Bank would undertake to the court that it would not commence parallel proceedings. He took instructions in relation to that. Those instructions come from the management executive and they are prepared to make such a recommendation to the Board but the actual approval to the giving of an undertaking would have to come to the Board and the next meeting of that Board is not until next Wednesday. However, in the interim to any such Board meeting taking place, Mr Gourgey indicated that the Claimants would be prepared for there to be an order in these terms:

> "Upon the claimant agreeing to submit to the jurisdiction of the DIFC Court for the purposes of enforcement of any order for payment of costs made against it in these proceedings in favour of any of the second, fifth, sixth, or eighth defendants ('English Costs Orders') and upon the claimant confirming that it would not oppose an order restraining the claimant from commencing proceedings in the Courts of Dubai and/or Sharjah seeking declaratory relief opposing enforcement of an English costs order in the DIFC ('Onshore Opposition Proceedings') it is ordered that:
>
> The Bank shall not, until further order of the court, commence any onshore opposition proceedings..."

51 I consider that such an order is an appropriate one, and that it is appropriate, in the exercise of my discretion, to injunct the Bank in the terms which they, in fact, invite, i.e. that the Bank shall not, until further order of the court, commence any onshore opposition proceedings and I so order as part of this judgment.

52 The Bank is, of course, the Claimant in this action and has assets in England. It would be a contempt of the English Court to fail to comply with the terms of that injunction. In such circumstances, I am satisfied that there is no credible basis for submitting that the Bank would attempt to commence parallel proceedings (even had there been a jurisdictional basis for the same). In such circumstances, I am satisfied that there is no risk, still less a real risk, of obstacles, still less substantial obstacles, to enforcement of a judgment through the offshore route.

53 It is also important to recognise that what would then be sought to be enforced in the Sharjah Court or any other UAE Court is the local DIFC judgment (see Taylor 2, paras.39, 40, and 42). This does not engage the international Art.85 route and the associated issues but, rather, Art.10 of the Judicial Relations Law which, *per* Mr Attia, is to be read together with Art.13 and 71 of the 2018 exclusive regulation.

54 In such circumstances, such an enforcement of the DIFC judgment would not raise any issues under Art.85 which relates to international jurisdiction and no issue of reciprocity would arise. It could still raise any alleged public policy about enforcement of costs judgments as addressed in due course below but the distinction here is that what would be considered to be enforced is a judgment of the DIFC Court, not a judgment of the English Court. In this regard, I do not consider what Mr Attia says in his second report at para.3.23 to be in point. He there suggests that:

> "... if the Dubai Courts or Sharjah Courts would find that they have jurisdiction over the enforcement of the English Judgment, it would be very likely that the enforcement of the local DIFC Judgment would be denied."

However, what is being enforced is the local DIFC judgment, not the English judgment.

55 I was also referred to paras.8.10, 8.12, and 8.16 of Attia 1 and paras.5.14-5.15 of Attia 2. I do not consider that any of those paragraphs assist the Stewarts Defendants in circumstances where what the UAE's Court would be enforcing is a judgment of the DIFC Court which would have jurisdiction. It would not be considering the English Court judgment or whether or not it had jurisdiction.

56 I only say by way of parenthesis at this point that I consider in due course whether or not the Dubai Court or any other UAE Court would, in fact, have any jurisdiction, still less jurisdiction in relation to what ultimately are claims in relation to real and personal property in another foreign state. It would, at first blush, be surprising if the UAE Courts had any such jurisdiction and I am not satisfied, on the basis of the evidence before me, that they would, or would purport to, have any such jurisdiction.

57 I am satisfied that it has not been established that there is any real risk of obstacles to enforcement via the offshore route and then enforcement of that judgment through the onshore courts.

58 Ultimately, however, and had any of the alleged obstacles in relation to enforcement of an English judgment via the onshore courts also apply to DIFC judgments (contrary to the evidence before me), for the reasons I identify below, I do not consider there is, in any event, any real risk of substantial obstacles to enforcement through the onshore route.

D2. The Onshore Route

59 Mr Attia opines that there are three main obstacles to enforcement via the onshore enforcement route, namely:

(1) A real risk that a UAE Court will find that there is no reciprocity between the English Courts and the UAE Courts;

(2) A real risk that the UAE Courts will refuse enforcement on the basis that they have exclusive jurisdiction over the subject matter of the dispute; and

(3) A real risk that enforcement of a costs order would be considered contrary to UAE public policy.

60 As appears below, none of these bears examination. They will be considered in turn.

D2.1. Reciprocity

61 In order to enforce the English judgment via onshore enforcement in the UAE, there must be reciprocity between the English Courts and the UAE Court (Art.85(1) of the Cabinet Resolution No. 57 of 2018) on the executive regulations of the UAE Civil Procedures Law ("the 2018 Executive Regulations")).

62 The short answer to this is that it is clear that there is reciprocity and (contrary to the views expressed by Mr Attia) the same is put beyond any doubt by a recent letter of the UAE Ministry of Justice ("MOJ Letter") dated 13 September 2022 which provides that the requirement to reciprocity is met vis-à-vis the English Court by reason of the latter enforcing a UAE judgment in *Lenkor Energy Trading DMCC v Puri* [2020] EWHC 1432 (QB).

63 The letter is from the UAE Ministry of Justice and is addressed, on its face, to the Director General of the Dubai Court. It is headed "Enforcement of judgments rendered by English Courts on the Principle of Reciprocity". It provides, in material respects, as follows:

> "With reference to the subject above, and based on the Treaty between the United Arab Emirates and the United Kingdom of Great Britain and Northern Ireland on Judicial Assistance in Civil and Commercial Matters (THE 'Treaty'), and the willingness to strengthen the fruitful cooperation in legal and judicial fields.
>
> As your Excellency know, the Treaty is devoid of the clause of enforcement of foreign judgments and has referred the mechanism for enforcement procedures to the applicable domestic laws of the two countries.
>
> Further, Article (85) of the Implementing Regulations of the Civil Procedure Code amended in 2020 states that judgments and orders rendered in a foreign country may be enforced in the State under the same conditions prescribed by the law of the said country. Legislation does not require that a treaty on legal assistance be in place for enforcement of foreign judgments, and these judgments may be enforced in the State on the Principle of Reciprocity.
>
> We find that this principle is met given that English Courts have enforced a judgment rendered by Dubai Courts under a final judgment handed down by the High Court of Justice in *UK in Lenkor Energy Trading DMCC v Puri* (2020) EWHC 75 (QB) (Lenkor), which is a judicial precedent and a binding principle for all English Courts according to their judicial system.

> Accordingly, we kindly hope that, in the event of requests for the enforcement of judgments and orders rendered by the English Courts, the requisite legal steps are taken in accordance with the laws in force in both countries, in order to consolidate the principle of reciprocity initiated by the English Courts, and to ensure its continuity between the English courts and the UAE Courts."

64 It is, on its face, confirmation of the reciprocity principle being satisfied. The legal nature and status of this letter is described by Mr Taylor in his third report at paragraphs.9A and 12-18. I refer, in particular, to paragraphs.14, 16, and 18 of his report:

> "14. In order to provide the Court with this explanation and demonstrate why Mr Attia is incorrect to maintain the position that the MOJ Letter is legally irrelevant, it is necessary to add to the summary overview of the UAE legal system given at section D, paras.13-20 of My First Report by further explaining (as briefly as practicable) the scheme of the UAE Constitution, insofar as pertinent, having first identified the following key articles which establish that:
>
> (a) The UAE Federal Authorities have exclusive legislative and executive jurisdiction with respect to foreign affairs (Article 120(1)) which necessarily subsumes the question of whether a given foreign state has satisfied a requirement of reciprocity.
>
> (b) The Council of Ministers is the executive organ of the UAE, which:
>
> (i) manages federal internal and foreign affairs (Article 60).
>
> (ii) issues such regulations as may be necessary for implementing federal laws (Article 60(5)).
>
> (iii) supervises, through the competent federal and Emirate authorities, the implementation of the federal laws, decrees, decisions, and regulations (Article 60(6)) as well as the implementation of international treaties and conventions concluded by the UAE (Article 60(7)).
>
> (c) The Council of Ministers may delegate these functions to competent federal ministers or other administrative authorities (Article 60 (5)).
>
> ...
>
> 16. An unusual feature of the UAE Constitution which is easily overlooked is that:

(a) Article 120 confers both exclusive legislative and executive competence on the Union in characteristically federal matters (including foreign affairs at (1) and matters relating to the Federal Judiciary at (5)).

(b) Article 121 confers only legislative competence upon the Union whilst the competence and (where applicable) constitutional obligation of the component Emirates to implement the federal legislation by promulgating regulations is furnished via Article 125, requiring the governments of the Emirates to take the appropriate measures to implement federal laws.

...

18. What I consider follows from the foregoing analysis as to the legislative and executive competences of the relevant authorities and the constitutional and public law significance of the MOJ Letter (when properly characterised) is that:

(a) Within the Emirate of Dubai 10 , there is no relevant Federal Law impediment to enforcing foreign judgments either 'onshore' or 'offshore', and the MOJ Letter removes any doubt whatsoever that any required element of reciprocity which the Union might expect as an aspect of the UAE's foreign relations with the UK is plainly satisfied, even if the issue arises in the first place having regard to Dubai's autonomy in legislating for and regulating its own courts, which *Meydan v WCT* confirms is '*a purely internal situation*' (to borrow an EU law term).

(b) With respect to Sharjah, the issue is straightforwardly determined by the direct application of federal legislative and executive competence, because the federal courts are embedded there and the Executive Regulations as well as the MOJ Letter are binding and effective from a federal municipal public law perspective, without the need for any public international law 'gloss'. Accordingly, I consider that Mr Attia's reasons for considering the MOJ Letter to be of no effect (i.e. the author not writing as a judge, and the MOJ Letter not being a Dubai decree) are misplaced. Furthermore, the above analysis demonstrates why reciprocity does not require a treaty when article 85 of the Executive Regulations incorporates a reciprocity requirement which the UAE MOJ is constitutionally empowered to deem satisfied, thus determining the issue without need for further judicial consideration, lest there be any doubt whatsoever that *Lenkor* meets the reciprocity requirement."

65 His evidence is that it represents confirmation by the executive branch of the federal UAE government as the enforcement of a UAE judgment in England such as to satisfy the reciprocity requirement, such matters being within the competence of the executive government. I see no reason not to accept such evidence. There is no evidence in rebuttal to it, and I take note of the fact that notwithstanding the fact that Taylor 3 was only served shortly before this hearing, in other respects, the Defendants, including the Stewarts Defendants, have continued to put evidence in, as I have already noted, right up to the morning of the hearing.

66 I do not consider that it is correctly characterised by Mr Attia as *"merely a letter"* nor do I consider, given the terms of the MOJ Letter, that a judgment or judicial instrument is needed as confirmation of reciprocity, or that there is any substance in the points raised by Mr Attia (see Attia 3, paras.2.4-2.6, 2.11, and 2.13). He gives no justification or supporting evidence that reciprocity under Art.85 can only be established by way of a treaty between the UK and the UAE, by a UAE federal judgment, or by a line of consistent judgments by the UAE High Court, or a form of practice direction by the UAE High Court. Indeed, the terms of the MOJ Letter suggest to the contrary.

67 A point is also taken in the Stewarts Defendants' Skeleton argument that the letter is addressed to the Dubai Courts (only). However, it is clear, as Mr Taylor himself opines at Taylor 3, para.9(a), that the letter is setting out the principle of reciprocity for the UAE Courts (there being no argued basis for any difference between the UAE Courts).

68 I would only add that the MOJ Letter is, itself, a recognition of the consequence of the *Lenkor Energy* case, and given the existence of such a case and as noted in Mascarenhas 7, I do not see how the Bank could properly contend, in any onshore enforcement proceedings, that the reciprocity requirement was not met.

D2.2. Executive Jurisdiction

69 The Defendants submit that there is a real risk that the UAE Courts will refuse enforcement on the basis that they have exclusive jurisdiction over the subject matter of the dispute. Enforcement is only permitted via the onshore enforcement route where the UAE Courts do not have "exclusive jurisdiction" (Art.85(2) of the 2018 Executive Regulations). Such submission is based on Mr Attia's opinion that there are "compelling grounds" that the UAE Courts would find exclusive jurisdiction over the substantive dispute decided in England because the proceedings involved (at least in part) enforcement of UAE judgment debts (see Attia, para.8.4 and Attia 2, para.5.15). However, I am satisfied that Mr Attia's opinion and the Defendants' submissions on it do not bear examination.

70 Article 85(2)(a) of the 2018 Executive Regulations provides:

> "...No execution may be ordered except after the following is verified:
>
> a. The courts of the State do not have an exclusive jurisdiction over the dispute on which the judgment or order was issued and that the foreign courts that issued it have the jurisdiction over the

> same in accordance with the rules of international jurisdiction stipulated by its law..."

71 The fundamental difficulty with the Defendants' stance is that Mr Attia does not provide any credible analysis as to the basis on which the UAE Court would have **any** jurisdiction for the specific claims the Bank has brought in the English Court against the Stewarts Defendants and D2, still less that it would have "**exclusive**" jurisdiction as referred to in Art.85(2)(a).

72 The position set out in a Attia 1, para.8.5, is that because the English proceedings are, in effect, "in part" an enforcement action of the UAE judgments, the UAE Court has jurisdiction over such proceedings. I am satisfied that this is self-evidently wrong as noted by Mr Taylor at Taylor 1, para.59, because:

> "...enforcement is inherently territorial and consequently enforcement of a UAE judgment outside the UAE in a wholly different jurisdiction is clearly a matter the UAE Courts would not find they had jurisdiction over..."

73 When this matter was explored in oral argument with Mr Mather, Mr Mather could not justify before me any basis on which the UAE court would assume jurisdiction in relation to an enforcement action concerning real property in England and personal assets in England, and a claim under s.423 of the Insolvency Act, an English Act. By their very nature, all those are matters which relate to the sovereign jurisdiction of the English courts and it is inherently improbable that the UAE Court or, indeed, the court of any jurisdiction, would assume jurisdiction, still less exclusive jurisdiction, in relation to such matters which are so clearly tied to enforcement and the territory of another sovereign state.

74 Mr Attia nevertheless opined in his second report that the UAE Court had jurisdiction over claims in English proceedings under Art.21(3) on the Civil Procedures Law which provides as follows:

> "The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases:
>
> 1. If he had an elected domicile.
>
> 2. If the action is related to real estates in the state, a citizen's heritage, or an open estate therein.
>
> 3. If the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts.
>
> 4. If the action has been instigated by a wife who has a domicile in the state, against her husband who had a domicile therein.

> 5. If the action is concerned with an alimony of one of the parents or the wife or with a sequestered or with a minor, or with his next of kin or with a custody on fund or on person, in case that the claimer of the alimony, the wife, the minor or the sequestered has a residence in the state.
>
> 6. If the action is concerned with the civil status and the plaintiff is a citizen or a foreigner who has domicile in the state, provided that the defendant had not determined domicile abroad or the national law is imperatively applicable on the action.
>
> 7. If one of the defendants has a domicile or residence in the state."

75 In Attia 2, at para.5.14, it is contended that this provision is engaged because the:

> "...present English proceedings is (at least in part) relating to the Facilities and Guarantees and these are all applications which are concluded and executed in the UAE."

However, the guarantees claim is part of a dispute between the Bank and D1 only. It is not part of a claim against the other Defendants. Even against D1, it was only ever an alternative to the primary claim against him for enforcement of the UAE judgment and now that D1 has failed to serve his Defence, this alternative claim will fall away (as Mr Mascarenhas notes in his seventh statement).

76 I should add that during the course of the oral submissions before me, Mr Gourgey confirmed that, in fact, an application has been made on paper to the Commercial Court to enter judgment in default against D1 and as a consequence of that, any claim under the guarantee will be abandoned. The position, therefore, is that even in relation to D1, the proceedings no longer relate to a claim under the facilities and guarantee. The position vis-à-vis the other Defendants is even more remote.

77 I am satisfied that Art.21(3) has no application to claims by the Bank against the other defendants which are claims for declaratory relief as to the beneficial ownership of English Real Estate and for relief under s.423 of the Insolvency Act 1986. In such circumstances, and as I have already foreshadowed, I cannot see any basis for the contention that the UAE Courts would refuse enforcement of the English judgment because of any alleged operation of Art.21(3) which, on the facts of this case, and in the circumstances I have just identified, would not appear to be engaged.

78 Even were Art.21(3) engaged (and I am satisfied it is not) this would give no basis for the UAE Court to refuse enforcement unless the UAE Courts' jurisdiction over the dispute could be shown to be "exclusive" which is the express language (and requirement in Art.85(2)(a) of the 2018 Executive Regulations). The Defendants have not satisfied me that there is a real risk that that would be so.

79 The Bank's position is that Art.85(2)(a) is not engaged. Simply having jurisdiction for a dispute, in respect of which the foreign judgment was given, would not suffice. The UAE Court jurisdiction must be in nature exclusive, for example, jurisdiction for a dispute about rectifying a UAE share or a trademark register as Mr Taylor opines at para.31 of his second report, to reflect the express language of Art.85(2)(a) and its reference to "exclusive jurisdiction".

80 Mr Attia suggests that the terms "exclusive jurisdiction" and "jurisdiction" represent a "distinction without a difference" (Attia 2 at para.3.5). However, the word "exclusive" was added when Art.85 was introduced to replace any former provision which just referred to "jurisdiction" (see Taylor 1, paras.54-58). Not only did Mr Attia not initially recognise that there had been a change in the form of wording (see Attia 1, para.6.5), he offered no explanation for the wording being revised if it had, as he suggests, no effect despite the fact that Mr Taylor had taken that very important point in his second report (see para.20 of Taylor 2).

81 Mr Taylor also suggests that Mr Attia has fallen into the category error of confusing concepts of exclusive jurisdiction and mandatory jurisdiction, (i.e. jurisdiction that the UAE Court cannot refuse to exercise) (see Taylor 2 at paras.15-18). This gave rise to a debate about Mr Taylor's use of terminology (see Attia 3 at paras. 4.1-4.2) with reference to authority (see, in particular, Attia 2 at para.3.10) which Mr Taylor considers, for the reasons given by him, does not support the collapsing of the distinction between the two concepts (see Taylor 2 at paras.27-29).

82 It would unduly lengthen this judgment to go into such debate in detail. Suffice it to say that had it been relevant, I would have concluded that Mr Attia fell into this categorisation error alleged. The point is, however, academic as the language of Art.85(2)(a) is clear on its face and any jurisdiction of the UAE Court (in circumstances where I do not consider there is any jurisdiction in any event) is not, on any view, "exclusive".

D2.3. Public policy

83 The Defendants submit that there is a real risk that enforcement of a costs order would be considered contrary to UAE public policy (Art.85(2) of the Executive Regulations). This point was put at the very heart of the Defendants' case, and derives from the initial opinions expressed by Mr Attia in his first report. I regret to say that what was stated in that report is simply not correct and Mr Attia has subsequently had to modify his opinion to take account of the criticisms of his first report to allege a (different) public policy in his second report (which is no more evidenced than that alleged in his first report).

84 In Mr Attia's first report at para.8.6, what was said to be "the most important[t]" basis for refusing enforcement was that enforcing a costs award would be "wholly contrary to UAE public policy". This was based on the proposition that a successful party before the UAE Courts:

> "...will not be able to recover **any** of its lawyers' fees because UAE law does not recognise recovery of these fees outright." (emphasis added).

85 I have to say that I read and understood this to be Mr Attia saying that no sums are recoverable in respect of lawyers' fees and for any sums to be recoverable would be contrary to UAE public policy.

86 However, as became clear with the service of Mr Taylor's evidence (and as is now accepted by Mr Attia and the Defendants), domestic UAE law **does** provide for awards in respect of lawyers' fees albeit in very modest amounts and not in the sums reflecting actual sums expended (see Taylor 1 at paras.61-66). That is, I consider, very different from what Mr Attia sought to convey in his first report.

87 Furthermore, it does not follow from the fact that the amounts recoverable by way of lawyers' fees are modest that the enforcement of foreign judgments in respect of costs of lawyers is contrary to UAE public policy (as Mr Attia repeatedly asserts without providing any evidence of the same). As will be seen and as addressed below, his opinion (the rationale for the same) lies uneasily with and, indeed, is positively inconsistent with, the fact that the DIFC Courts award legal costs and the fact that the UAE courts enforce arbitral awards which contain awards of legal costs in circumstances where the New York Convention does, of course, allow refusal of enforcement on grounds of public policy (as addressed in Taylor 1, at paras.67-69).

88 Met with the evidence that domestic UAE law does provide for awards of legal fees (albeit not in sums reflecting actual sums expended), Mr Attia in his second report alleged a different public policy, namely one "against recoverability of **actual** lawyers' fees" (emphasis added) (Attia 2 at para.5.16). Mr Attia suggested that the rationale for limits on such costs awards reflected general and high-level principles of UAE law concerning access to justice and that such rationale means that there existed this (reformulated) public policy which extended beyond domestic awards (Attia 2, paras.5/22-5.30).

89 There are, I am satisfied, any number of difficulties with Mr Attia's formulation. First, and fundamentally, Mr Attia provides no support whatsoever (by way of legal provision, authority, or otherwise,) for his repeated refrain (in successive reports) that the recovery of (actual) legal fees is "strictly prohibited as a matter of UAE law" (see, for example, Attia 2 at paras.5.19 and 5.25), citing neither any provision of UAE law or any authority and failing to respond to what was said by Mr Taylor (see also what was said by Mr Taylor in Taylor 2 at paras.57-60).

90 Such prohibitions would also be entirely different from an express provision making provision for an award in respect of lawyers' fees (however modest). It does not follow at all from such provision that recoverability of actual lawyers' fees is "prohibited" (no prohibition ever having been identified), still less that there is any public policy of the type alleged or one that would extend to the prohibition or non-recognition of overseas cost judgments.

91 Not only is there a lack of evidence of any such prohibition, or any such public policy, but the alleged rationale (access to justice) does not even align with what is indisputably not contrary to public policy. For example, Mr Attia describes the amount of awards of lawyers' fees available in UAE Courts variously as "nominal", "negligible", and "symbolic" (see, for example, Attia 4 at para.3.3) but he fails to

explain, if the underlying rationale is as he alleges, why there are any awards in respect of lawyers' fees at all in the UAE.

92 It would also be a very strange public policy if the constitutional rights of access to onshore UAE Courts were expanded in scope so as to protect (insofar as the UAE Courts are able) persons litigating in courts in foreign countries but yet are not applicable to those litigating in a DIFC zone in the UAE itself (in the course of which costs awards **are** made).

93 The position in relation to the enforcement of arbitral awards containing costs orders also jars with the alleged public policy given that the evidence is that arbitral awards containing costs awards are enforced in the UAE (see Taylor 1 paras.67-68). I do not understand Mr Attia to disagree with that fact.

94 I am not convinced by Mr Attia's attempts to dismiss this as an alleged exception to his re-fashioned public policy, describing arbitration as an "exceptional" mode of dispute resolution in which parties give up a "right" to litigate in Court. He cites no authority to support the proposition that the relevant right to which the parties agreeing to arbitrate agree to give up encompasses a right to have a dispute resolved without exposure to a liability for opposing lawyers' fees (so as to justify such persons' exclusion from the protection of the alleged public policy against recovery of lawyers' fees).

95 The willingness of the UAE Courts to enforce arbitration awards containing costs, both domestic and overseas, is rather more consistent with (indeed, entirely consistent with) there being no such public policy against the recovery of costs, whether that be the costs of an arbitration award or costs in DIFC proceedings, or costs in overseas judgments that are being enforced and recognised.

96 Mr Attia's opinion would also seem to be based upon the false premise that giving up a "right" to litigate in court is necessarily connected with giving up a right to have a dispute resolved without exposure to lawyers' fees given that arbitration agreements routinely cover disputes which would otherwise be subject to the jurisdiction of the courts in which the successful parties' lawyers' fees are recoverable from the unsuccessful party. In overseas jurisdictions, for example in England and Wales, there is exposure to lawyers' fees whether a matter is arbitrated or litigated. It is difficult to see what public policy reason there could be for allowing recovery in the context of foreign arbitration awards, but not in the context of foreign judgments. Neither relates to litigation in the UAE and the UAE Courts have no difficulty enforcing costs awards in respect of overseas arbitration awards.

97 There is also, I consider, an internal consistency in Mr Attia's reasoning that finds no support in any UAE authorities. He reasons that arbitrating parties voluntarily expose themselves to adverse costs awards but, equally, a party such as the Bank, who voluntarily commences litigation in a jurisdiction such as England, and also thereby voluntarily puts itself at risk of an adverse costs award, would allegedly have the benefit of the alleged public policy but a party who voluntarily commences arbitration and so voluntarily exposes himself to the very same risk would not. That lacks any rationale that can support the alleged public policy.

98 Given the lack of any rationale or any authority for the alleged public policy, I am satisfied that the evidence of Mr Taylor reflects the true position that there is no such public policy either as originally alleged or as now refashioned by Mr Attia (see Taylor 2, para.64 and Taylor 3, paras.7(b)(i) and 9(b)(iii)). In short, there is no support for the public policy alleged by Mr Attia notwithstanding Mr Attia being given every opportunity to identify it.

99 I also asked Mr Mather whether, in the eleven witness statements before me, or the six experts' reports before me, or, indeed, anywhere in the bundle of over 2,000 pages, there was either any legislation in the form of a code of the UAE, or any authority whatsoever which supported the existence of such a public policy and Mr Mather accepted that there was no such evidence anywhere in the bundle. I consider that that, itself, also speaks volumes given the sheer volume of factual and expert evidence that is before me and the amount of expense that the parties have gone to. The position, I find myself in is that there is still no evidence whatsoever to corroborate the existence of any such alleged prohibition or any such alleged public policy. That, coupled with the fact that Mr Attia has changed his views from his first report, means that I have to be cautious about accepting the uncorroborated assertions made by Mr Attia in the course of his expert evidence.

100 The alleged public policy is also inconsistent with the recent judgment of the DIFC Court in *MAD Atelier v Axel Manes & Anor* [2022] DIFC CFI 030 (addressed by Mr Taylor) where the DIFC Court granted a judgment by way of summary judgment for a substantial sum of costs held to be payable on an indemnity basis. I am satisfied it would not have done so had there been any such alleged public policy against the award of costs and this further supports the conclusion that there is no such public policy.

101 It is clear from the *MAD* judgment that there was no argument before the judge (Sir Jeremy Cooke) that recovery of costs was contrary to public policy. Mr Attia posits a possible appeal from such judgment but that would involve an appeal on a point not even argued and Mr Taylor (who acted on behalf of the first defendant in *MAD*), made clear in Taylor 3 that he would not be placing reliance on that case or maintain the views he did if he considered that any ground of appeal asserting that enforcement of a judgment and order of the court was contrary to UAE public policy regarding recovery of lawyers' fees would have any real prospect of success (see Taylor 3 at para.20) . Nor do I consider, for the avoidance of doubt, that there is anything in *MAD* judgment which supports the views expressed by Mr Attia more generally (as to which see paragraphs 22-23 of Taylor 3).

102 The Defendants submit that it is telling that Mr Attia and Mr Taylor were unable to find any cases in which costs judgments (whether issued in England or elsewhere) have been enforced in the UAE (the point made in Attia 2 at para.5.31) but I do not consider that to be telling. Such a negative takes the argument nowhere. What I consider is telling is that Mr Attia refers to no case in which recognition of a costs judgment has been refused on the grounds of public policy and no such authority being cited or being relied upon. That is entirely consistent with there being no such public policy objection to the enforcement of foreign costs judgments (just as there is no public policy objection to the enforcement of domestic and foreign awards of costs or awards of costs in DIFC proceedings).

103 Drawing all these threads together, Mr Attia's shifting position as to the nature and scope of the supposed policy, the lack of any legislative provision or authority prohibiting or evidencing the prohibition of recovery of costs, the recognition of arbitral awards for costs (and lack of rationale for the alleged distinction in relation to arbitral awards), and the inconsistency of the position vis-à-vis the DIFC (as illustrated by the *MAD* judgment) all lead to the conclusion that there is, in fact, no such public policy and no real risk of non-enforcement of a judgment for legal costs.

104 However, on any view, the Defendants have not established before me that there is a real risk of non-enforcement of foreign judgment for legal costs. The position is also *a fortiori* in relation to the enforcement of an offshore DIFC judgment (recognising an English judgment on costs), in the onshore courts, given the apparent lack of any public policy objection to the DIFC Court itself awarding legal costs in circumstances where what is being enforced in that scenario would be the DIFC judgment, like any other DIFC judgment, including a DIFC judgment on costs of those DIFC proceedings, and would not be the enforcement or recognition of an English costs judgment.

D2.4. Conclusion: Onshore Route

105 Accordingly, in the circumstances identified above, I am satisfied there is no risk, still less a real risk, of obstacles, still less substantial obstacles, to enforcement of a judgment through the onshore route.

D3. Overall conclusion on offshore and onshore routes

106 It follows from the above that in relation to both the offshore route and the onshore route, there has not been shown to be a real risk of substantial obstacles to enforcement in the UAE.

D4. Assets in England

107 Aside from all the above matters, it would also have been relevant to the exercise of discretion that the Bank has assets in England and the Defendants have the ability to enforce an English judgment against the Bank's assets in England. The evidence before me is that the Bank has long maintained a sterling denominated Nostro account with Standard Chartered Bank in London, and that this is unencumbered with a balance typically of over £3 million (see Mascarenhas 3 at para.18). As is noted in Zuckerman on Civil Procedure (4th ed.) at para.10.322:

> "Where the claimant has substantial assets within the jurisdiction no order of security would be justified."

108 The Defendants point out that cash is a liquid asset and so the chose in action against a Standard Chartered could reduce at any time. Whilst this is true, this does not mean the existence of cash assets in England are to be ignored in the exercise of discretion - otherwise the fact that money could be moved could always be deployed as a ground for security applications against any foreign claimant with liquid assets in the jurisdiction. In reality however, the presence of assets within the jurisdiction is

relevant to discretion and arguments by reference to the inherent liquidity of an asset are, as the Bank points out, bad (see the *Re Apollinaris Co's Trade Marks* [1891] 1 (CA) *per* the Lord Chancellor Lord Halsbury at p.3).

109 I was also referred by Mr Mather to the case of *Kevorkian v Birney (No. 2)* and, in particular, a passage in the judgment of Greer LJ at p.469 letters E-F. That is a case of some antiquity which no longer reflects the circumstances in which security may be ordered (as Mr Mather in fact accepted). Rather more helpfully, Mr Gourgey referred me to [47]-[49] in *Tatneft* (*supra*.)

> "[47] As to the first, the question which I have to answer at this point, as it seems to me, remains whether there is a real risk that there will be substantial obstacles to enforcement by reason of Tatneft's residence and the location of most of its assets. If there is a real risk that the assets which it has identified within the zone will not be available or not available in sufficient amounts, and that, in consequence, enforcement will need to be attempted in Russia, then, given my conclusions as to the position in Russia, the test laid down in *Nasser* is satisfied.
>
> [48] I consider that there is a real risk that the assets within the zone will not be available, or not available in sufficient amounts, if and when there arises an issue of enforcement of a costs order. The shareholding arrangements within the Tatneft group are neither fully transparent, nor fully explained. The assets relied on are ones which might readily cease to be available, and this might happen for legitimate reasons. Moreover, this is very hard-fought litigation between parties which are on opposite sides not just of this case, but of wider issues. Looking at those realities I see no good reason to think that if there was a course of conduct which Tatneft was advised was open to it which diminished the assets which would be available to the defendants to enforce against, that course would not be taken. Indeed, the way in which every point has been taken on this application tends to suggest it would be.
>
> [49] I do not regard either *Leyvand* v *Barasch* ... as establishing any rule that, if a non-Convention resident has assets within the zone then, in the absence of a showing of lack of probity, security will not be ordered. Instead, it appears to me that the approach of Gross J in *Texuna International Ltd* v *Cairn Energy plc* [2004] EWHC 1102 (Comm), especially at [27]-[28], is one which focuses on whether, despite there being evidence of assets in a jurisdiction where enforcement will not be subject to significant obstacles, there is a real risk of there nevertheless having to be attempts to enforce in a jurisdiction where there may be substantial obstacles. Gross J's assessment is not limited to whether such risk arises from steps taken by a claimant which lacks probity to move assets out of a jurisdiction where enforcement will not be subject to substantial obstacles, though obviously a lack of probity would be highly relevant."

110 I am satisfied that the relevant test is correctly identified in those paragraphs. I am equally satisfied that there is not a real risk that the assets which have been identified in England will not be available or not available in sufficient amounts.

111 The factual scenario that is before me, on the evidence before me, is that, firstly, the Claimant is a Bank. Secondly, it performs banking obligations, one assumes around the world not least because there is evidence that it has Nostro accounts both in England and in New York. So far as England is concerned, there are regular balances roughly in the range of £3 million, although it has dipped below and back up to that level. I take Ms Hutton's point that there does not seem to be extensive trading using that bank account but the claimant is nevertheless a bank. It is also a bank which is majority owned by the Sharjah government and I consider that it is an unrealistic, if not a fanciful, suggestion that a bank, simply in order to avoid having to pay what is a relatively modest amount in relation to costs compared to the net assets of that Bank (as I shall come on to) would, as it were, cease its UK banking activities and suffer the reputational damage to the Bank that would flow from not paying a judgment. The only circumstances in which that might be a realistic scenario would be in an Armageddon type scenario whereby the Bank had ceased to be a bank, as it were, and as I shall come on to in relation to the other alterative requirement condition, there is no evidence before me to suggest that that is a realistic possibility.

112 Accordingly, I do consider that the presence of such an asset within the jurisdiction would be relevant to discretion and would strongly militate against the granting of a discretion if I had considered, contrary to the reasons that I have expressed, an appropriate case for the granting of security.

D5. Overall conclusion re: Lack of difficulty with enforcing a costs award on grounds of CPR 25.13(2)(a)

113 Quite apart from the fact that there is, in fact, no evidence that enforcement in the UAE will ever be needed (not least in the context of the potential of assets in England or elsewhere), I am satisfied, for the reasons that I have given, that none of the various bases on which the Defendants contend the UAE Court would not enforce an English costs order bear scrutiny, and in relation to both the offshore route and the onshore route, there has not been shown to be a real risk of substantial obstacles of enforcement in the UAE. In such circumstances, it would not be appropriate, in the exercise of my discretion under the relevant provision of the CPR, to order security for costs.

114 I do not consider that there would be any relevant delay in enforcement (over and above the time taken in any enforcement wherever such enforcement would take place). As to Mr Attia's opinion as to the additional costs of enforcement, namely that costs could be of the order AED 1 million (onshore) or AED 200,000 offshore (see Attia 1, paras.14.3 and 14.9), Mr Attia does not explain how he arrived at those figure and they are clearly premised on his views as to the alleged obstacles that the Bank would face, a case that I have rejected for the reasons that I have given.

115 If there are any additional costs, I consider they would be more like the figures identified by Mr Taylor (AED 75,000 (onshore at first instance) or AED 100,000 (offshore DIFC) - see Taylor 1 at paras.102-103).

116 In the time available, it was not possible for counsel to give me any precise figures but Mr Gourgey, without demure from those acting on behalf of the Defendants suggested that such costs would be in the region of £50,000. Mr Gourgey was addressing the position in relation to the Stewarts Defendants. He was not actually addressing the position in relation to Ms Hutton's client but one could assume that they would be similar to produce a total figure of around £100,000.

117 It is possible that there could, accordingly, be some modest extra unrecoverable costs of enforcement in the UAE. I consider, as indeed was suggested by the Bank, that in such circumstances, there would be no need for any separate fresh provision of security by the Bank in relation to such costs and that monies held pursuant to the Fortification Undertaking, which I understand to be around £168,000, would be more than sufficient to cover the extra costs of enforcement (as addressed in Taylor 1 at paras.102-107), and as and when there is a ruling in relation to the release of the fortification, a portion of those monies could be held back.

118 Mr Gourgey accepted that as part of what he was proposing, it would be necessary to put wording in place to show that those monies which are held, as I understand it, in a client account, in accordance with the terms of the existing order, would also have to respond as security for such costs. That is a matter of mechanics which I am satisfied the parties will be able to agree as part of agreeing the terms of the order consequential upon this judgment.

119 I do order, and for the reasons that I have given, that an amount of up to £100,000 (on the basis of £50,000 for each of D2 and the Stewarts Defendants, should be held for such purpose out of the fortification monies as security for any such costs. This may be a little bit rough and ready, but it is the best that can be done in the absence of any detailed assistance from the parties as to the precise sums involved. Of course, if it should turn out that on mature reflection, the amounts involved are greater, then there is always, of course, liberty to apply to amend the Order and the provision in relation to such security.

E. CPR 25.13(2)(c) BANK'S ABILITY TO PAY

120 The other condition relied upon by the Defendants is CPR 25.13(2)(c):

(i) The claimant as a company and there is reason to believe that it will be unable to pay the applicant's costs if ordered to do so; and

(ii) Having regard to all the circumstances of the case, it is just to make such an order.

121 The test of "reason to believe" is a matter of evaluation and does not require an applicant to show, on a balance of probabilities, that the claimant will be unable to pay the applicant's costs if ordered to do so (see *Jirehouse Capital v Beller* [2009] 1 WLR 751 at [29] per Arden LJ). However, the requirement is that there is reason to believe the claimant "**will**", not "may", be unable to pay costs (see the Supreme Court

Practice (vol.1) at para.25.13.12 and the authorities there cited). I do not understand Mr Mather or Ms Hutton, to dispute that proposition.

122 Whilst the ability of a claimant to pay costs is decided based on the evidence at the time of the application, it requires an assessment of what the claimant can and may be expected to have available for payment at or after the trial in the form of cash or other readily realisable assets (*Longstaff International v Baker & McKenzie* [2004] 1 WLR 2917 at [17]-[20] per Park J).

123 The Defendants' application based on CPR 25.13(2)(c) is an ambitious one given that it is made against a regulated bank with substantial assets.

124 The Defendants submit that the limited financial information available concerning the Bank's position shows:

(i) Very substantial losses in successive periods;

(ii) An extended and unresolved failure to comply with regulatory requirements as to capital; and

(iii) An acknowledged requirement for liquidity and capital support the existence of which, for the time being, appears to be the basis on which the management considers that the Bank will have the ability to meet its financial obligations as and when they fall due.

125 In this regard, the Defendants also refer to a witness statement from Mr Symes, made last night, but received by me very shortly before the start of this hearing, exhibiting documents contained on the Abu Dhabi Securities Exchange website giving financial information in relation to the Bank as at 30 September 2022, which I have also read and had regard to.

126 Taking the financial information as a whole, it shows:

(1) The Bank is balance sheet solvent with, as at 30 September 2022, total assets of AED 8 billion (a reduction from AED 8 .7 billion on 30 June 2022);

(2) The Bank has net assets of AED 320 million, (circa £80 million) as at 30 September 2022 (a reduction from circa £94 million as at 30 June 2022);

(3) From that, it is apparent that the security sought (in respect of any costs award) is a very small percentage of the Bank's net equity;

(4) The Bank is licensed for commercial and retail banking activity in the UAE (with customer deposits totalling AED 7.9 billion (£1.9 billion). It follows that the Central Bank is satisfied that it is appropriate for the Bank to continue to take customer deposits (something that no Central Bank would permit if it considered that there was a risk of a bank becoming insolvent).

(5) The evidence before me is that since December 2018, the Bank has had the support of financial facilities provided by the Central Bank which "have subsequently reaffirmed that it will continue to provide support to the Bank through making available liquidity facilities" and "the Government of Sharjah

committing to supporting and strengthening the Bank's capital base". Ms Hutton, in particular, recognised this was properly something that could be taken into account.

There is now significant further evidence on this in the latest material exhibited by Mr Symes. In this regard, on a page entitled "Detailed analysis of accumulated losses" there is a table dated 30 September 2022, which, as I understand it, because it is signed off on behalf of the Bank, originates from the Bank and says this under "The main reasons leading to these accumulated losses and the history":

> "The legacy issues in the Bank's non-performing loans has negatively impacted its own capability and forced it to book significant provisions. While the losses for Q3 of 2022 has reduced considerably, the recovery awaits the finalisation of the remediation plan. As a result, the accumulated losses have reached 68.2 per cent of the capital."

Then there is a heading in a box "Measures to be taken to address accumulated losses" and it states:

> "The Government of Sharjah, as the major shareholder owning 50.07 per cent of the Bank, has recognised the magnitude of the underlying issues. A capital solution is being finalised after receiving the CBUAE final approval in June 2022. The next step is to receive securities and commodities authority approval after which the plan will undergo Sharjah leadership greenlight and shareholders' approval for implementation."

Also within that material, in a document entitled "Management discussion and analysis: invest bank financial highlights for the nine-month period ended 30 September 2022", and it is stated:

> "For the bank's majority shareholder, the government of Sharjah, in close coordination with the central bank of UAE, is diligently working to strengthen the Bank's capital base through a capital solution which received the final CB UAE approval in late June 2022 and the Bank is at the final stages of getting remaining approvals to finalise the solution."

(6) An aspect of that current support is reflected in a repo agreement between the Bank and the Central Bank secured against Sharjah government sukuks (bonds) beginning in March 2021, which was rolled over into March 2022 and in respect of which the bonds will mature in March 2023. The latest information is that whilst this facility enables the Bank to draw on AED 1.6 billion in liquidity support, as 30 September 2022 the outstanding under the repo agreement was **nil**. It was AED 750 million outstanding as at 30 September 2021. So not only is that facility available at this time, it is not currently being used at least as at that date in September 2022.

127 In such circumstances, I do not consider that there is any reason to believe that the Bank would be unable to pay a costs award and the points made by the Defendants neither bear examination, nor support such a conclusion. I will consider each of them in turn.

128 Dealing first with losses, the position is that in 2020, the Bank had accumulated losses amounting to 55 per cent of its capital. However, it is clear from the evidence given in Mascarenhas 3, at para.24, that this reflected losses on historic and legacy loans as is also clear from the document relied upon by the Defendants which references this and the effect the pandemic has caused this. By the very nature, therefore, of the circumstances in which those losses were suffered, I do not consider that there is any basis for inferring that such losses would reflect a continuing trend. The evidence before me is that the losses have impacted the Bank's net equity but not its sustainability (see the statement of Mr Al Elaiq at para.6).

129 Far from there being any evidence of a trend of continuing losses, still less a trend of significant operating losses such as might be said to threaten the Bank's sustainability, for the 9 months to 30 March 2021 (i.e. at a time when the pandemic was ongoing), the Bank made a net operating **profit** of AED 34.9 million (with accumulated losses being circa 20 per cent of the capital). There was an operating loss for six months to 30 June 2022 of only circa 1 per cent of the capital (with accumulated losses being circa 37 per cent). The evidence before me is that this was mainly due to a one-off re-valuation of assets valued in Lebanese pounds due to the devaluation of the same.

130 There is nothing in the material available before me to support a conclusion that ongoing losses would threaten the ability of the Bank to pay a costs award, very much the reverse given the current net assets of the Bank (which are, of course, a key aspect of solvency).

131 Turning to the liquid asset ratio and the Bank's capital adequacy ratio, the Defendants refer to the following:

(1) The consolidated interim financial information for the three month period to 31 March 2021 (the "3/21 PWC Report") stated that the Bank's Capital Adequacy Ratio ("CAR") was, at that stage, 11.23 per cent. The regulatory minimum imposed by the UAE Central Bank at that stage was, it seems, 11.5 per cent. I should say, as Ms Hutton helpfully identified to me, that the capital adequacy ratio appears to have changed over time and is currently 13 per cent. There is also before me from the material exhibited by Mr Symes information that as at 31 September 2022, the Bank's CAR was 6.1 per cent, which is significantly below the Central Bank minimum of 13 per cent but that, of course, has to be viewed in the light of the evidence that I have just quoted whereby the support of the Central Bank continues and, indeed, is evidenced by the material that I have referred to.

(2) The consolidated interim financial information for the 6 month period 30 June 2022 (the "6/22 PWC Report") stated that the Bank's CAR was, at that time, 7.09 per cent. The 6/20 PWC Report also referred a reduction in the Bank's Eligible Liquid Asset Ratio from 19 percent in December 2021 to 10 per cent as at 30 June 2022. However, by 30 September 2022, it had risen to 11 per cent against what I understand to be a regulatory minimum of 7 per cent.

(3) The 3/21 PWC Report stated that the Bank continued "to focus on a number of initiatives to manage its liquidity and deposit balances" and also referred to liquidity support being provided by the UAE Central Bank and the government of Sharjah, its majority shareholder. Similar statements are made in the 6/22 PWC Report and reference was made to the repurchase arrangement supported by the government of Sharjah that I have already referred to.

(4) It is clear from the latest interim statement of financial position as at 30 September 2022 that there has been, as Ms Hutton identified, a considerable reduction in net equity from the position in June 2022.

132 Whilst the Defendants submit that such matters give cause for concern, I consider that any such concern has been overstated and does not call into question the Bank's ability to pay its debts as they fall due going forward. As the Bank points out, the very fact of a positive capital asset ratio demonstrates the Bank's balance sheet solvency (and that that is so whether or not that ratio falls below the regulatory standards). Secondly, as at September 2022, the Bank's liquid asset ratio was above the regulatory minimum and has increased over the previous quarter. The continued licensing of the Bank to operate demonstrates that the Central Bank is satisfied that it is appropriate to allow the Bank to continue operating at its current liquidity ratio. Importantly, in my view, there is also the latest additional information in the material as at 30 September 2022, that I have already quoted, in relation to the strengthening of the Bank's capital base through a capital solution which has already received the final CB UAE approval.

133 Turning to the question of the existing and ongoing governmental support for liquidity, Mr Mather refers me to what he characterises as the established principle where questions of cashflow solvency arise, and he refers me to an Australian authority *Chan v First Strategic Development Corporation Limited* [2015] QCA 28 at [44] where it is stated that where a company seeks to place reliance on financial support from a related party, which that party is under no continuing obligation to provide, there must be:

> "...cogent evidence which enables the court to conclude that there is such a degree of commitment on the part of the provider of the financial support to continue it, such that it can be said that at any point of time it was likely to be continued, with the result that, at any of those times, the company was able to pay its debts as and when they fell due."

134 That was a case that was not concerned with security for costs at all. It was an appeal challenging a finding by the judge below relating to claims against directors, contributions made to the insolvency of a company of which they were directors, and had nothing to do with security for costs or the relevant test for security for costs. Moreover, it is also clear that the context is completely different (see [38] and following of the judgment). It was looking at insolvency and ability to pay debts. It was a company with no assets and it was a Mr Chan who had an ability to fund it. I consider that that is completely divorced from security for costs on the facts of this case as the Bank does have assets and does have support.

135 Accordingly, even if the test in *Chan* is a relevant test as a matter of English law in relation to insolvency, as Mr Mather submitted, I am satisfied that on the facts of this case, the Bank does have such assets and does have such support. The Bank has satisfied me, on the basis of cogent evidence, that there is such a degree of commitment on the part of a provider of financial support to continue and it can be said, in my view, that at any point in time it is likely to be continued with the result that the company will be able to pay its debts as and when they fall due. I am fortified in that regard by the evidence that I have quoted in relation to the plan which has been put in place and has already received the approval of the Central Bank.

136 Ultimately, the Defendants speculate as to whether there will be continued governmental support that will continue in the future but there is no evidence before me suggesting it would not and I do not consider it incumbent upon the Bank to prove a negative, i.e. that such support would not be withdrawn in the future. Rather, it would be for the Defendants to demonstrate that there was evidence leading to the conclusion that such support would not continue.

137 Whether that is right or not, I consider that the position is exactly the same even if the burden is upon the Bank to demonstrate that which I have found it to have demonstrated. The Bank has publicly stated and identified the ongoing support of the Central Bank and the Government of Sharjah and thus, as it stated in its June 2022 statement:

> "The central bank had earlier made a public press announcement on 16 December 2018 and has subsequently reaffirmed that **it will continue to provide** support to the bank through making available liquidity facilities [emphasis added] and the government of Sharjah's commitment to support the strengthening of the Bank's capital base." (emphasis added)

138 There is now also the further information as at 30 September 2022 as to support that I have quoted above.

139 The Defendants have not adduced any evidence to suggest that this will change in the future. All that they referred to in their written submissions was one aspect of the support, the current repo facility, that would be needed to continue past March 2023 or be replaced but as noted above, that facility is not even being used (at least as at the date of the snapshot on 30 September 2022 when there was a nil balance. Even assuming, however, the premise to be correct and that there was any need for that facility, the facility has been extended before and there is no evidence before me that would support a conclusion that it would not continue or would not be replaced. I would only add that iven that the current balance on 30 September 22 was nil, it would not appear that that facility is needed, or is in any way, shape, or form vital, on a daily basis.

140 I am satisfied that the publicly available, and contemporary, documentation is entirely consistent with continued support, as is reflected in the 2022 "Preliminary Results" document in which it is publicly confirmed that "the Bank is in close coordination with the government of Sharjah and the central bank working on the overall capital solution of the Bank which is close to completion", and it is clear from the material provided to me this morning under cover of Mr Symes witness statement that I have

quoted from that this very capital solution is being carried through as reflected in the recent statements that I have quoted.

141 Equally, the evidence before me in Mascarenhas 3 at para.26, is that the Bank itself has no reason to believe that Sharjah or the Central Bank's support will be withdrawn and I see no reason not to take such evidence at face value. Indeed, in this regard I bear in mind the fact that far from being a disinterested third-party, Sharjah is, in fact, the Bank's majority shareholder. It is obvious, therefore, that it is incentivised to continue to provide support in so far as necessary having already injected the cost of providing support to date and, in such circumstances, inherently less likely to withdraw support in the future.

142 All the more so, I consider, given that Sharjah is a sovereign power and that it is a majority shareholder in a bank associated with it. The circumstances in which a state and its central bank would allow a bank of which it is the majority shareholder to go to the wall would, I consider, be an extreme scenario given the reputational damage that would follow to Sharjah itself and the losses that would be suffered by the individual investors in that bank, a bank that the Central Bank is prepared to allow to continue to trade and that the majority shareholder is prepared to continue to support.

143 In the above circumstances, I am satisfied that it has not been established that there is reason to believe that the Bank would be unable to pay their costs if ordered to do so (in fact, very much the reverse) and the condition requirement in CPR 25.13(2)(c) is not made out.

F. CONCLUSION ON THE SECURITY FOR COSTS

144 Accordingly, in the light of my conclusions on CPR 25.13(2)(a) and CPR 25.13(2)(c), the applications of the Stewarts Defendants and D2 for security for costs are dismissed.

145 The question of whether I would have ordered security for costs had I considered that CPR 25.13(2)(a) was met on the facts, or a conditional requirement under CPR 25.13(2)(c) was met on the facts, is academic given my findings, and it would have given rise to consideration of the Discretion Requirement whether it was just to make such an order.

146 If the condition requirement is met, the policy of the Court is that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation and unsuccessful litigants pay them (*Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534).

147 However, in the present case (as against the Stewarts Defendants), there are two matters raised by the Bank which it submits would have militated against the exercise of any such discretion in any event. Firstly, the Bank contends that D8 has breached an asset freezing undertaking to the court and because of this, even if threshold conditions for grant of security had been met, the court should refuse, in the exercise its discretion, to award security in favour of D8. It is said that this refusal should also extend to D5 (being the sole director of D8 who it is said necessarily will then be complicit in such breach), as well as D6 (on the basis of her being jointly represented with D5 and D8 and they having failed to delineate between each of their respective costs).

148 Secondly, the Bank contends that each of these Stewarts Defendants failed to serve amended defences by 28 October 2022 in breach of a court order. The Stewarts Defendants have an extant application for an extension of time. The bank has a counter allegation:

(i) To have the Stewarts Defendants' application struck out as abusive/defective; and

(ii) For default judgment against D5 and D6 (in respect of claims introduced by amendment/reamendment which it is said those Defendants are currently in default of defending altogether).

149 In this regard, the Bank submits that breach of other orders in the proceedings by an applicant for security for costs impacts upon the court's exercise of discretion and referred to the fact that Teare J considered this point in *JSC BTA Bank v Ablyazov* [2011] EWHC 2500 (Comm) and concluded at [70]:

> "...it must be right, in principle, for the court to consider the whether it is just and appropriate to give that party the benefit of another order of this court."

150 Mr Mather accepted that, at least where there is an established breach, that would be relevant to the exercise of jurisdiction.

151 In circumstances where the point is entirely academic in the light of my findings and decision on security for costs, I have considered whether it would be appropriate to express any views on the matters raised by the Bank. I have concluded that it would not be appropriate for me to do so in circumstances where the allegations of contempt are serious and the Bank may yet advance such points in support of a committal application (and so it may be ruled upon hereafter), and in circumstances where the applications concerning the defences are pending and will shortly be ruled upon by another judge of this court.

152 Equally, and in circumstances where the position is academic, I say nothing about the quantum of security had security been appropriate. I cannot but observe, however, that the sums incurred by all the parties to this litigation to date are eye watering given the fact that the action has not yet reached the stage of a case management conference and I have no doubt that there will be detailed scrutiny in relation to costs, not least in the context of costs budgets going forward at the case management conference.

G. FORTIFICATION OR RELEASE APPLICATION

153 The background to the Bank's provision of fortification of its cross-undertaking on the asset freezing injunction, plus undertakings of the Stewarts Defendants in response to an application of the Stewarts Defendants' which was filed but not determined, is described in Mascarenhas 3 at paras.35-39 [E/41/273-3] and Mascarenhas 5 at para.10 [E/44/310]. The fortification provided by the Bank was only in respect of the Stewarts Defendants' legal costs caused by the undertakings (see Jay at para.27 [E/39/247]). In such circumstances, it is submitted that the outcome of the Bank's Release Application should follow that of the Stewarts Defendants Security Applications.

154 It is said that this approach is supported by *Schettini v Silvestri* [2019] EWCA Civ 349. That was an appeal against an order requiring fortification of the conditions for re-granting a a freezing order, which fortification was required solely on account of legal costs in connection with the injunction (see [3]-[5]). The appellant argued that such fortification should not have been required as it is "tantamount to an order for security for costs" and that the CPR 25 criteria were not met (see [6]). Against that background, Lewison LJ, with whom Peter Jackson and Newey LJJ agreed approved, albeit obiter, at [33] the proposition advanced in *Gee on Commercial Injunctions* that while the court has jurisdiction to order the continuation of an injunction conditional on the provision of security for costs, it ought not to do so as a matter of policy if security for costs would not have been ordered under CPR 25.

155 That was the basis on which the application notice was issued for the discharge of the fortification, and the basis on which it was submitted in Mr Gourgey's Skeleton argument. However, during the course of oral argument, it became clear that, in fact, the fortification was fortification of the cross-undertakings in damages to reflect the possibility that there will be a finding hereafter, that the injunction was wrongly granted, that there would be an application to enforce the undertaking, and that damages would result which could include costs.

156 Given that is the case, the question then arises as to whether or not I should or should not maintain that fortification. Mr Gourgey refers me to the terms of the relevant consent order of Robin Knowles J of 12 January 2022 which provided, amongst other matters:

> "**AND UPON** PCB Byrne LLP ("**PCB Byrne**"), legal representatives of the Claimant, undertaking to the Court that it shall not without the consent in writing of the Stewarts Defendants or Court Order transfer the Funds received in accordance with paragraph 1 of this Order (other than to any separate client deposit account)
>
> **AND UPON** the Claimant and the Stewarts Defendants agreeing that the provision of fortification pursuant to the terms of this Order and the undertakings provided in this Order:
>
> (a) Shall be without prejudice to the Claimant's right to contend that there is no basis for fortification of the Claimant's Undertakings (either at all or in the sum provided) and that on any further application by any of the Stewarts Defendants for fortification of any of the undertakings provided to them in the Part 7 Proceedings and/or the Part 8 Proceedings and/or security for costs, the Claimant shall be entitled to contend that the Funds (or part thereof) shall be released, and if the Court does not in that event order that all of the Funds shall remain as fortification, then the Funds (or such part thereof which are not ordered to be maintained as fortification) shall forthwith be paid out to the order of the Claimant (and PCB Byrne shall be released from their undertaking to that extent)..."

157 It is clear, therefore, that the consent order expressly contemplated the possibility that there would be a reconsideration by this Court as to whether the fortification should be maintained and one of those cases need to be if there was an application for security for costs and as has occurred a cross-application to be released from the fortification.

158 Mr Mather, however, on behalf of the Stewarts Defendants, says that the application notice was predicated on the basis that the answer to whether or not there should be further fortification would depend on the outcome of the security for costs application whereas it is now clear, in fact, that the fortification was fortification of the cross-undertaking in relation to any damages, albeit represented by costs.

159 Mr Mather says that Mr Gourgey's oral application to vary that fortification, including on the basis that it is not appropriate because the Claimant is a Bank and based on the financial information that has been given there is no basis for there being fortification of that cross-undertaking, was raised for the first time by Mr Gourgey in his oral submissions before me.

160 I have some sympathy with Mr Mather in relation to that, in that he says that his client faces potential prejudice from the fact that this argument was not raised in the application notice. I consider that his client should have a fair opportunity to deal with the application, as it is now advanced, which is an application to discharge the fortification on the basis that the present case is not an appropriate case for fortification given the financial position of the Bank.

161 Accordingly, I will adjourn that application part-heard. It may be that the parties can reach a resolution amongst themselves. If not, that application will need to be relisted and reargued rather than being part-heard before me in circumstances where the matter was not fully argued before me. So if the parties cannot reach agreement on that application it will have to be ruled upon on a subsequent occasion by any judge of this Court. I say no more about that at this time.