Neutral Citation Number: [2023] EWHC 1112 (Comm)

Case No: CL-2021-000321

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

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

Date: 11/05/2023

Before :

CHRISTOPHER HANCOCK KC
Sitting as a judge of the High Court

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Between :

(1) STEENBOK NEWCO 10 SARL **(2) IBEX RETAIL INVESTMENTS LIMITED**	**Claimant**
- and -	
(1) FORMAL HOLDINGS LIMITED **(2) MR MALCOLM KING** **(3) MR NICHOLAS KING**	**Defendant**

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Andrew Dinsmore (instructed by **RPC**) for the **Claimants**
Bobby Friedman and **Tara Taylor** (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 29 March 2023, followed by written submissions filed on 5 April 2023, 14 April 2023 and 19 April 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 14:00 on Thursday 11 May 2023.

CHRISTOPHER HANCOCK KC:

Introduction.

1. This was an application for an uplift in the amount of security for costs to be awarded to the Defendants. I heard argument on the questions of principle in this matter on 29 March 2023. The application was made in the light of paragraph 2 of the Order of Robin Knowles J dated 30 June 2022, which provided that "*The amount(s) and date(s) for payment of any further security (including in respect of matters not referred to in the Precedent H, where the assumptions underlying the Precedent H prove to be incorrect, or if there are material changes in the litigation) shall be determined by the Court in the absence of agreement….*".

2. On that earlier occasion, I decided that, on the true construction of the Order of Robin Knowles J dated 30 June 2022, the Defendants were correct in their contention that the Order envisaged that there would be an uplift in security if there were matters not provided for in the Schedule provided to the Court at that time, or where the assumptions underlying that Schedule proved to be incorrect, or if there had been a material change in circumstances after that date. My decision on that occasion was reflected in the recital agreed between the parties in the Order submitted to the Court following the CMC (the "**CMC Order**"). I left over, in view of lack of time, considerations of the amount of the Uplift, and questions of costs.

3. The sums agreed by the Claimants to be paid pursuant to the original Security Order were a little under £4.5 million. The Defendants now seek an Uplift of £1,743,883.59 (the "**Uplift**"). That Uplift represents (1) 60% of the headline uplift in the Defendants' costs if the higher hourly rates for DLA Piper UK LLP ("**DLA**") are applied, on a headline uplift figure of £2,906,472.65; or (2) 69.93% of the Defendants' costs if DLA's previous (old) hourly rates are retained (on a headline uplift figure of £2,493,930.20). On either basis, the Defendants submit that this figure is more than justified. The reason for referencing this latter set of figures is that I indicated my provisional view on the previous occasion that a decision by the Defendants' solicitors to increase their hourly rates did not justify a further award of security. I address this question in more detail below.

4. My starting point in relation to the question of the amount of security is the wording of the CPR itself. CPR Part 25.13(1) states that: "The court may make an order for security for costs under rule 25.12 if – (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order". In this regard, and in the light of the lengthy and detailed submissions made by both parties in writing, I set out in this judgment the considerations I have taken into account in deciding how to exercise my discretion in this regard. I deal with matters in the following order:

(1) The correct basis for assessment – standard or indemnity costs?

(2) The general approach to be adopted.

(3) The question of rates.

(4) The question of prejudice.

(5) Individual stages of the litigation.

The basis for assessment.

5. I start with the correct basis for assessment of costs, and thus the correct starting point in an application for security. The Defendants rely on the statement in *Re Ingenious Litigation* [2020] EWHC 235 (Ch), where it was held at [100] that, "*the appropriate percentage in a case where there is a realistic prospect of indemnity costs is 75%*".

6. As for costs on the standard basis, *Re Ingenious* stated that, "*65% or 2/3 is more typical"*. In *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) at [17], the range of 60-70% was said to be appropriate for standard basis costs.

7. The Defendants submitted that in this case there is clearly a realistic prospect of indemnity costs. The Claimants make extremely wide-ranging allegations of fraud, of the utmost seriousness, against the Defendants. They say that *Re Ingenious* makes clear at [92] that, "*to accuse people of fraud or dishonesty is a high-risk strategy, and if such allegations are made but not established, that can certainly in my judgment be a factor justifying indemnity costs* [following trial], *whether the claimants have lied or not. Of course it is not an automatic consequence as all the relevant circumstances as they appear after trial have to be taken into account, but it is certainly a highly material consideration"*. At [93], the Court noted that the causes of action "*at the forefront"* were "*fraudulent misrepresentation and deceit"*, and held at [94] that "*This in my judgment certainly makes the possibility of indemnity costs a real one*".

8. The starting point is, therefore, the Defendants say, that the Defendants are entitled to 75% of the headline amount of the Uplift. However, acting conservatively, the Defendants have sought a figure of 60% of the total costs - or a little under 70% of the headline costs if the increased hourly rates of DLA are stripped out. On either basis, therefore, the Defendants are well within the level that should be permitted of 75%. The full Uplift should, therefore, be awarded.

9. The Claimants, for their part, argue that it is misplaced for the Defendants to assume that they will receive indemnity costs: it is clearly wrong to suggest that in every fraud case, indemnity costs are awarded. It will always depend on the full circumstances at the end of trial, including the basis on which such a claim was brought and the conduct of the litigation. They submit that there has been no application to strike out, and that it was for this reason, that the Defendants previously accepted a 60% percentage.

10. As to the authorities, the Claimants rely on the following statements of principle:

(1) *Stokors*, §5 and *Vald Nielsen v Baldorino* [2017] EWHC 1033 (Comm), §13, are clear that the appropriate amount is that likely to be awarded on a standard basis.

(2) *Re Ingenious* [2020] EWHC 235 (Ch) and *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) were expressly rejected in *Tulip Trading Limited v Bitcoin Association for Bsv* [2022] EWHC 141 (Ch):

   (a) At §14, Master Clark noted that Roth J in *Phones4U Ltd (in administration) v EE Ltd* [2020] Costs L.R. 1065 had rejected at §23 that *Danilina* and *Ingenious* express a general test for a higher level security as being simply that there is a "*real possibility*" or "*reasonable possibility*" of an ultimate award of indemnity costs. She noted that *Stokors SA v IG Markets* [2012] EWCA Civ 1706, §30 was not cited

in either case, where Tomlinson LJ supported Popplewell J's conclusion at first instance that simply bringing a fraud claim was not a sufficient basis to assume indemnity costs for the purposes of quantifying the uplift.

(b) Indeed, at *Stokors SA v IG Markets* [2012] EWCA Civ 1706, §42 Tomlinson noted that "*The only basis for seeking 80 per cent of the estimate to which the judge referred in his judgment was the suggestion that the defendant might recover indemnity costs. For what it is worth, I have never heard of security for costs being awarded on a more generous basis for that reason, but in any event the judge here decisively rejected that suggestion at paragraph 31 of his judgment. He concluded that there was no material before him which would justify such an approach. Rightly, as I think, he declined to go into the merits of the case when considering what was the appropriate quantum of an order for security for costs, and in my judgment we should certainly not go down the path which the judge himself declined to tread*."

(c) At §18, Master Clark noted that "*the approach urged by the defendants would require me to consider the merits of the claim, without having heard any detailed argument on them, and where the judge hearing the Jurisdiction Applications will be required to carry out that task. It would in my judgment be wrong in principle for me to do so. Whether, if the defendants succeed, they will be entitled to indemnity costs will depend upon the basis of that success, and will be a matter for the Judge*."

(d) The Master continued at §19 that "*I am not willing therefore to determine the amount of security to be ordered in the defendants' favour on the basis that it would be assessed on the indemnity basis.*"

11. Taking these authorities together, the Claimants submit that it is wrong to suggest that 75% is the "*starting point*" in this case. Rather, the Court must assess all of the circumstances of the case to reach a conclusion on the most likely costs award following trial. They argue that the appropriate percentage figure here is that originally claimed, namely 60%.

12. In my judgment, the safest course is to assume that costs will be assessed on the standard basis, that being the likelihood, particularly since the only effect of an order for indemnity costs is to reverse the burden of proof on reasonableness and avoid the need for an inquiry into proportionality, which is an inquiry unlikely to be relevant in a case of this sort.

13. In these circumstances, I also accept that Claimants' submission that the correct percentage, on a broad brush basis, is 60%.

The general approach to be adopted.

14. Turning to the details of the costs, it would not be appropriate, say the Defendants, for the Court to inquire any further into the specifics of the additional costs, as both *Danilina* and *Ingenious* make clear; rather, a broad-brush approach is to be applied in relation to quantum and an overall percentage is to be applied. Otherwise, the Court would be undertaking, in effect, a detailed assessment, which is not appropriate on a security application. That is particularly so because (as *Mayr v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3093 (Comm) at [24]-[27] makes clear in relation to the principles on security that apply generally): (1) the approach to be taken by the Court is, of necessity, broad-brush;

(2) the Court must have in mind the degree of prejudice to the parties if the defendant is under or over secured.

15. Further, the Defendants submit, any doubts are usually to be resolved in favour of the defendant.

16. For their part, the Claimants submitted as follows:

(1) The Court will be readily familiar with the correct approach to uplifting security. Whilst there is not (technically) to be a detailed assessment, the Defendants are misplaced to suggest that the Court cannot look at the individual tranches at all. Under CPR 25.13(1)(a), the court's discretion to award security is to award an amount which it considers just, having regard to all the circumstances of the case: *Stokors v IG Markets Limited* [2012] EWHC 1684 (Comm), §5.

(2) The appropriate amount will generally be the sum which the court considers the applicant would be likely to recover in a detailed assessment if awarded its costs on a standard basis following the trial: *Stokors v IG Markets Limited* [2012] EWHC 1684 (Comm), §5.

(3) The court does need to look at the matter in the round and consider the amount which the parties will be likely to recover in detailed assessment and it bears in mind that the test which will be applied on a detailed assessment is whether the costs are reasonably and proportionately incurred: *Mayr*, §23. On such an application, what the defendant will recover on an assessment are such costs as are reasonably and proportionately incurred having regard in particular to the factors which are set out in CPR 44.5(3): *Stokors*, §6.

17. As will be apparent from what I have already said, I accept that my task is to examine the amount claimed and determine whether it would be fair to award that amount in the round. I do not accept the submission that it is not necessary for me to look at why costs have increased. In my judgment, the underlying consideration remains what is just and fair to the parties. The Court, in making its previous order, did not surrender its discretion in this regard. It remains necessary to ask, where there are changes in the assumptions, whether they are reasonable.

Prejudice to the Claimants.

18. Next, the Claimants argue that they will be prejudiced by having to provide further security since they will thereby be out of pocket until the end of the litigation. The Defendants, for their part, deny that this is relevant. In my judgment, the correct approach is that set out in *Pisante v Logothetis* [2020] EWHC 3332 (Comm) by Henshaw J, which is summarised at paragraph 25.12.7 of the White Book, when he said that the Court could take into account the balance of prejudice, but that the balance would normally be tipped in the favour of the Defendants, since an under-secured Defendant will suffer greater prejudice than a Claimant who is required to provide too much security.

19. The Defendants made further specific points as to why the degree of prejudice claimed by the Claimants was based on misconceptions. Thus, for example, they argued that prejudice should be based on the cost of borrowing, not inflation, and that cost would be for borrowing outside the UK in view of the fact that the Claimants were outside the UK. I do

not feel that it is necessary for me to deal with these points in detail, since I am satisfied that the prejudice to the Defendants in not receiving security does indeed outweigh any prejudice to the Claimants.

Rates.

20. I turn next to the question of rates. The Defendants submitted as follows:

(1) Because the percentage figure adopted was so conservative, the same figure for security is appropriate, with or without the increase in rates.

(2) Second, even if that were not right, if the Court were to inquire into the detail of the hourly rates charged, that would be contrary to the authorities, which make clear that the Court should not take steps that are better suited to a detailed assessment. Indeed, that is why *Re Ingenious* says that 75% should be permitted: it makes allowance for the fact that on a detailed assessment certain items will not be permitted. It would, in fact, be double counting, to cut down the total sum sought to 75% (or another percentage) and then to apply a further reduction for rates.

(3) Third, this is reinforced by the fact that CPR part 3.15 – which applies in the harsher context of costs budgeting where, unlike in a security application, matters are not to be determined giving the benefit of the doubt to the defendants – makes clear that "*it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget*."

(4) Fourth, the Defendants argue that this increase in rates is justified by recent inflation.

(5) Fifth, the Court has determined that the correct test is that as contended for by the Defendants under the Security Order. That does not require a material change in circumstances. On any view, the higher rate is one or both of i) a matter not referred to in the Precedent H, or ii) an assumption in the Precedent H (as to the charging rate) which has proved to be incorrect.

(6) Sixth, in any event, this would be a material change: due to a change in circumstances, the Defendants can only obtain the legal services at a higher price. That is not the Defendants' fault and is something over which the Defendants have no control.

(7) Seventh, were it otherwise, then the Defendants would be left exposed. As *Mayr* makes clear, the balance of prejudice requires the Court to determine any uncertainty in the Defendants' favour, given the obvious prejudice to the Defendants in being under-secured.

21. I do not accept these submissions. In brief, my reasons are as follows:

(1) The first point involves a confusion of thought. The fact that the same result flows whichever rates are employed is because the Defendants have mixed apples (indemnity costs at the old rate) and pears (standard costs at the new rate).

(2) As to the second point, again, I do not accept this. Although I am not to inquire into the detail of the rates, it is clear that, having chosen to put this schedule before me, the Defendants wish me to look at the reasonableness of the assumptions leading to the amounts now claimed.

(3) Turning to the reference to the costs budgeting regime, in my view, the exercise that I am engaged in is of a different and broader type. I do not accept that this is a valid analogy. As I have noted, my task is to try to forecast, on a broad-brush basis, what the Defendants might expect to receive on a detailed assessment, and then make allowances for the fact that the case may settle or that items may be disallowed.

(4) As to the fourth point, and the reference to the change in rates being justified by inflation, then this may or may not be the case. I have no evidence of any general change in solicitors' rates due to inflation, and what will be recoverable will be the reasonable costs of defending the litigation, which are not necessarily the costs of defending the litigation using these particular solicitors. In addition, of course, any such change would only be applicable to the future expenditure.

(5) I can deal with the fifth and sixth points together. I do not accept that any change in the assumptions underlying the budget put before Knowles J would lead to an automatic uplift, nor did I determine this at the earlier hearing. I determined earlier that an uplift was possible, in the light of the wording of the order. The question now is how much of an uplift. The question of the appropriate rate was dealt with in the earlier order, so the first limb of Knowles J's order is not satisfied. As to the second limb of the order, the assumption made earlier was that a reasonable City of London rate would be charged, and the rates put forward fulfilled this test. I have no reason to believe, having seen no evidence of any general change in rates, that this assumption has been falsified. Nor do I take the view that there has been a material change in circumstances within the meaning of the order, which I would interpret in the same manner as the cases put before me, such as *Stokors* and *Vald Nielsen*.

(6) Finally, I do not think that the *Mayr* case is of assistance. That case establishes the proposition that where there is doubt as to whether costs will be incurred, that doubt should be resolved in favour of the Defendant to avoid under-securing. I do not think that this is a question of the resolution of a doubt. The Defendants' argument in truth is that they should recover what they are paying out to their solicitors because otherwise they will be out of pocket. However, any party that employs a solicitor whose rates are found to be in excess of the amounts necessary to defend the case on a reasonable and proportionate basis will be out of pocket.

22. In summary, it does not seem to me that the intention behind Robin Knowles J's order was to enable the Defendants to come back to Court whenever their solicitors increased their rates. I would test it in this way. If this was the only change in this litigation, would I have increased the amount of security? In my judgment the answer is clearly not. This is not a change of the type that the order was intended to cater for.

The individual stages in the litigation.

23. I turn then to the submissions as to the individual stages in the litigation. I make clear that I am not engaging in a costs budgeting exercise, and that my reason for looking at these matters in turn is because they assist in analysing the justifiability of the claim for extra security.

Tranche 1: Issue/Statements of Case, CMC, Disclosure, ADR.

24. Under this head, the Defendants seek an increase of £430,314.81. The increase sought is 60% of the headline rates including DLA's increased rates, and around 73% if they are stripped out.
25. I start with the changes in the pleadings. The Defendants submit that these can be seen most obviously in the very substantial increases in the length of the pleadings, with the pleadings in orange in the table below post-dating the 2022 Precedent H. I note that the page numbers are based on the clean versions of the pleadings and therefore are the length of the pleading excluding struck through text (and hence represent the real increases in length).

Statement of Case	**Page length [approximate]**
Particulars of Claim	25
Amended Particulars of Claim	25
Re-Amended Particulars of Claim	46
Defence	36
Amended Defence	39
Re-Amended Defence of D1 and D2	62
Re-Amended Defence of D3	56
Reply	38
Amended Reply	38
Re-Amended Reply to D1 and D2 Re-Amended Defence	28
Re-Amended Reply to D3 Re-Amended Defence	26
Total pleading length pre- 2022 Precedent H	**99**
Total pleading length now	**136 or 218 if D1/D2 and D3's pleadings are considered separately**

26. The Defendants say that, even excluding the fact that there are now two sets of Defences and Replies, the pleadings have increased in length by some 36%. Taking into account the two sets of Defences and Replies, the total length has more than doubled. In addition, since the 2022 Precedent H was served, the following steps have taken place:

(1) The Claimants agreed to pay the Defendants' costs in relation to €38 million of abandoned claims.

(2) The Claimants responded to RFIs from the Defendants, on 17 June 2022. This response ran to 34 pages and raised substantial new matters.

(3) The Amended Particulars of Claim were served on 5 August 2022, raising new foreign law and factual issues.

(4) The Defendants responded to a second RFI on 18 August 2022. The responses ran to 26 pages and also raised new matters.

(5) The Amended Reply was served on 30 September 2022.

(6) On 16 December 2022, the Claimants served the extensive Re-Amended Particulars of Claim, which pleaded out the foreign law claims in detail, in separate annexes, based on the alleged specific factual position. In addition, the Claimants set out for the first

time in the Particulars of Claim in Appendix 3 the employees that they alleged relied on the alleged deceit to process the Payments.

(7) The Claimants then provided a further RFI response on 22 December 2022. Amongst other matters, this provided new factual information, and included new arguments in relation to detailed accounting matters.

(8) The Defendants were then required to respond to further RFIs from the Claimants, providing their responses on 27 January 2023. The Claimants have instigated further correspondence in relation to these responses since then.

(9) The Defendants were then required to serve Re-Amended Defences. The changes made were extremely substantial. The amendments also required very substantial input from foreign lawyers (privilege not being waived).

(10) On 17 February 2023, the Claimants provided a further RFI Response (pursuant to the order of Jacobs J). Further correspondence followed as the response was defective, and further information was then provided in correspondence by the Claimants.

(11) On 28 February 2023, Re-Amended Replies were served. These contained extensive new factual allegations and raised substantial new arguments under foreign law.

(12) On 30 January 2023, the Claimants proposed their case management directions for the first time. This was the first occasion on which either party suggested that there should be either (1) supplemental witness statements; or (2) supplemental expert reports (in addition to joint statements). The Defendants responded on 10 February 2023, pragmatically agreeing to these proposals; having on 3 February 2022 suggested an increased trial estimate of 7 weeks, including 1 week of pre-reading, which the Claimants agreed (on 7 February 2023), with the parties jointly seeking a trial listing on that basis on 8 February 2023.

27. It is suggested that I made some comment at the earlier hearing that incurred costs should be treated differently to costs yet to be incurred. I have to say that I do not recall this, save that I indicated the point might be relevant in relation to rates. In any event, I made no decision on the point, and had not heard argument, and therefore approach the matter afresh.

28. The Defendants submit that there is no principled basis on which incurred costs should not be included or treated differently.

29. The only basis for such a suggestion, they say, is at paragraph 8 of the Claimants' skeleton which asserts: "*Delay in bringing the application is a ground for limiting security to future costs: Axnoller Events Limited v Nihal Mohammed [2021] EWHC 2640 (Ch), §§38-42"*. The Defendants say that that suggestion is wrong, for a number of reasons.

(1) There has been no delay at all. As Appendix 1 paragraph 10 of the Commercial Court Guide states, "*First applications for security for costs should not be made later than at the Case Management Conference*." The Uplift Application was issued in time for it to be heard at the first CMC; and, in any event, was not a first application. Moreover, pleadings only closed on 28 February 2023, a matter of weeks before the Uplift Application was issued.

(2) It is not enough to show mere delay. [38] of *Axnoller* refers to the *RBS Rights Litigation* case, which makes clear that, "*The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action… the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial"* (emphasis added). There is no suggestion that this is the case here. The position is confirmed by *Giaquinto v ITI* [2022] EWHC 973 (QB) at [10], where an argument as to delay was again rejected in the absence of prejudice.

30. Therefore, the Defendants submit, there is no basis to limit the Uplift in respect of incurred costs. The Defendants argue that the Claimants do not suggest that the circumstances noted above arise, and have chosen not to respond to the position on the case law. The basis suggested by the Claimants for this failure to respond is insupportable, say the Defendants – as the Court made clear, (and as indeed is made clear from the Defendants' Submissions) - the Court did *not* decide the point about incurred costs. The Court had not yet been addressed on the case law, which, as set out in the Defendants' Submissions, makes very clear that the incurred costs cannot be excluded, because the Claimants do not, even on their own case, meet the test on the case law.

31. I accept the Defendants' submissions in this regard, having now reviewed the case law and on the basis of fuller argument.

32. Turning to the question of the amount of the uplift, the Defendants argue, and I accept, that there can be no sensible dispute that the pleadings phase has been far more extensive than envisaged. This is clear from the table above.

33. In opposition, the Defendants argue that the Claimants make a different point, which is to say that the additional complexity was "*entirely due to the Defendants' conduct*". The Defendants argue that this point is both irrelevant and wrong.

(1) It is irrelevant because, say the Defendants, the premise of a security order is to cover the scenario in which the Claimants have to pay the Defendants' costs. The Claimants cannot seek to escape security by suggesting that they will not be ordered to pay the Defendants' costs. It is also well established that, as stated in White Book 25.13.1.2, "*in respect of security for costs the parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure*". Finally, as the authorities set out above make clear, the Court cannot and should not now seek to go into the minutiae of the procedural back and forth that has led to the phase being much more extensive. That would be a matter for detailed assessment.

(2) The Claimants' complaints are also wrong, say the Defendants, as a matter of fact. To give a couple of obvious examples, the 2022 Precedent H made no allowance for any future counsel time. Yet, since that time, the Defendants have had to amend in response to amendments from the Claimants, to produce Amended Defences, and then very substantial Re-Amended Defences. The Claimants have been ordered to pay the Defendants' costs of and occasioned by the Amended Defences and Re-Amended Defences. Yet the Claimants would have it that there is no security for the same even though the Claimants will definitely be required to make payment to the Defendants come what may. The 2022 Precedent H envisaged the Claimants asking one RFI and

the Defendants asking two. In fact, the Claimants have asked three, and the Defendants four, in other words more than doubling the work and making the prior assumptions incorrect. The Defendants did not know how many RFIs the Claimants would ask of them. The Defendants also had not had sight of the Claimants' pleadings and so could not know what RFIs it would need to ask. Yet, again, the Claimants suggest the Defendants should not be secured for the costs of this work. The Claimants maintained that none of the claims were time barred for a number of months in correspondence. They also refused to pay the Defendants' costs of these claims. Eventually, in August 2022, they agreed to strike through their claims in respect of Payments 1 to 8 (as defined in the pleadings), with a value of €38 million, and pay costs, not just of the amendments, but also of the abandoned claims themselves.

34. The increased costs therefore, on the Defendants' case, all fall squarely within the changes permitted by the Security Order. I accept this submission.

35. As to the CMC phase, the Defendants seek an uplift of £16,767.10 to the previously budgeted £189,947.00 in respect of the CMC. This has predominantly been caused by the complexities caused by the Claimants' significant amendments to their pleadings. Those amendments led (1) to the adjournment of the original CMC in September 2022 (unsurprisingly leading to more work in the meantime); and (2) have resulted in the issues being more complex. For example, following the amendments to the pleadings, a substantial number of additional issues were added to section 1 of the DRD, causing significant additional work.

36. The Claimants argue that Tranche 1 of the agreed security (in the amount of £1,075,577.29) has already been paid. This covers the statements of case and CMC phases. I have already dealt with the submission that I have decided against the Claimants on this point. In relation to the suggestion that this tranche has been paid, I am not sure that I follow this point. If what is being said is that the first tranche of the security ordered by Robin Knowles J has been paid, this may or may not be the case. However, the question for me would seem to me to be whether the payment made suffices to cover all the costs which I take the view are likely to be recoverable on a standard assessment. My understanding is that it is said that this is not the case, and I so hold.

37. Overall, my conclusion is that a further amount of 60% of the additional sum claimed on the basis of DLA's old rates should be awarded. I believe that this would be about £351,049.62, but I would be grateful if my arithmetic could be checked.

Tranche 2: Witness Statements and Experts

38. The increase sought in relation to this tranche is a total of £473,709.78, being a total increase of 40% on the sum previously ordered. The increase sought is 60% of the headline increase including DLA's increased rates, and around 71% of the headline increase if they are stripped out. The Defendants argue that the reasons for the increases in costs are readily obvious and justified.

39. In the case of witness statements:

(1) There will now be an additional round of witness statements which were not budgeted for in the 2022 Precedent H. That falls squarely within the amendments permitted under the Security Order.

(2) There has also been an increase in the number of witnesses: the Claimants now estimate (in their Case Management Information Sheet) four witnesses, whereas the 2022 Precedent H assumed two.

(3) For the reasons set out above, there are now more extensive factual issues to be covered, given the expansion in the pleadings and substantial RFI responses on both sides.

40. The Defendants note that the Claimants' skeleton did not take issue with the quantum claimed.

41. The position is said to be similar with expert reports:

(1) There will now be supplemental reports, which will add substantially to the work.

(2) The issues for the experts have developed and become substantially more complicated.

(3) The detailed arguments concerning the forensic accounting reconciliation were also substantially undeveloped at the time of the 2022 Precedent H. They have now been set out in the pleadings and in the subsequent RFI responses.

(4) In the light of these matters, the Defendants have now obtained estimates from the experts. Unsurprisingly, they are significantly higher than the previously-budgeted figure.

42. As with witness statements, the Claimants' skeleton did not take issue with the quantum sought.

43. Therefore, the Defendants say, for Tranche 2, the full increase of £473,709.78 should be permitted.

44. Turning to the Claimants' submissions on witness statements, they argue that:

(1) The original estimates were, again, very generous based on five witnesses (the identities of which, other than the Kings, remain a mystery).

(2) The Defendants have failed to explain how they have gone from assuming that no supplemental witness statements would be required to now stating that they will have to spend an additional £187,575.00 on such statements. There has been no material change in the factual issues that justifies such an extensive increase: the Claimants have introduced very limited new factual points but rather just re-structured their pleading (at the Defendants' insistence) so that parts of the Reply have moved to the Particulars of Claim. Whilst a little more detail has been provided in the RFI Responses, the core factual basis for the claim is the same as when the original Precedent H was filed.

(3) It is entirely unclear what, if anything, Mr Nicholas King will say given that his defence is that he simply knew nothing about any of the allegations. One would expect that to be a very short statement with no supplemental required.

(4) There has been a total failure to explain the disbursements of £265,000 for Counsel's fees on the witness statements. PD57AC on witness statements is clear that the process is to be one of question and answer with the witness with the usual practice being that this is undertaken primarily by the solicitors, with limited involvement of Counsel.

(5) The Claimants were not asked how many witnesses they were calling before the Defendants filed their Precedent H. This falls squarely within the Defendants' unilateral assumptions that should be taken into account when deciding the appropriate uplift.

45. In response, the Defendants say that:

(1) In accordance with the standard pre-trial timetable at Appendix 4 of the Commercial Court Guide, they assumed there would not be supplemental witness statements, that the Claimants then requested that there be supplemental witness statements and the Defendants agreed to that proposal, in accordance with the overriding objective.

(2) Whilst the Claimants suggest that there has been no material change in the issues to be addressed, the Defendants deny this, as I have noted.

(3) Although the Claimants assert that Nicholas King will only give "*a very short statement with no supplemental required*", the Defendants retort that this is unlikely when he is accused of a c.€100m fraud.

(4) The Claimants questioned the substantial involvement of counsel in the preparation of witness statements. The Defendants contended that it is, for obvious reasons, to be expected that counsel will be substantively involved in the preparation of witness statements.

(5) The submission that the Defendants should have known how many witnesses the Claimants would be calling is a submission which the Defendants say is unreal.

46. I have concluded that, applying a broad brush approach, the assumptions made by the Defendants should generally be adopted. My only caveat is as to the involvement of counsel in the preparation of witness statements, particularly since I accept the submission that, in the light of the Commercial Court practice, counsel should not have significant involvement in this stage of the litigation. I will reflect this in the amount I am prepared to order across the board in relation to this tranche.

47. As to expert reports, the Claimants say that:

(1) It is simply false to say that the expert issues have become more complex: (i) the Claimants have dropped their reliance on provisions of foreign law thereby narrowing the areas to consider, (ii) the Claimants have provided further detail on their foreign law arguments in Annexes A and B which has narrowed the Claimants' arguments on these points, (iii) the questions for the experts are clear and well defined, and (iv) there is to be a sequential exchange of expert reports such that the Defendants' experts will have very targeted arguments to address.

(2) The fact that the Defendants failed to consider that supplemental expert reports might be required is another example of their unilateral, and unreasonable, assumptions. This cannot justify an uplift.

(3) The Defendants' drafted their original Precedent H without obtaining any quotations from experts. It is shocking that they requested a Court order for the payment of millions of pounds into Court apparently based on figures plucked out of the air.

48. In response to this, the Defendants:

(1) Deny that expert reports have not become more complex and argue that the Claimants have not grappled with the relevant paragraph of their submissions.

(2) Assert that their assumptions were based on the figures actually incurred in relation to similar (unrelated) proceedings. They say that the reasons why the figures have gone up is because of (1) the increased complexity, as shown by the very substantially expanded foreign law cases and the increased scope of the forensic accounting evidence; and (2) the supplemental expert reports demanded by the Claimants.

49. Viewing matters on the broad-brush basis I have described, I have concluded that an appropriate uplift in relation to these matters is £375,000.

Tranche 3: Trial Prep and Trial (and the PTR)

50. The increase sought is a total of £839,859.00, being a total increase of 38% (or 44% if the trial and trial prep phases alone are considered) on the previous amount of security. The increase sought is 60% of the headline rates including DLA's increased rates, and around 67% if they are stripped out.

51. These additional sums are sought in circumstances where the parties have agreed that the trial of these proceedings will require seven weeks (including a week of judicial pre-reading) instead of the previously-budgeted four weeks i.e. an increase of at least 50% in trial time.

52. In relation to the quantum of these costs, the Claimants submit that I should reduce each of them by 50%. As to trial / trial prep, I was invited to bear in mind that:

(1) The original estimates were very generous in being at the outskirts of what might be regarded as proportionate and reasonable;

(2) The week of judicial reading time will not increase the costs;

(3) There is not an exact, linear relationship between the length of trial and the preparations (i.e. costs) involved. There will be an irreducible core of preparation that will be required regardless of whether the trial is four or six weeks. It does not follow from the fact that trial is 50% longer that a 44% increase is appropriate. Rather, when combined with the other factors above, it is respectfully submitted that a 22% increase is appropriate such that the uplifted amount is reduced by 50%; and

(4) This accords with the fact that the Court has held that its task is not to analyse the link between the material change and the uplifted costs requested; rather, it is to analyse the amount that the Defendant would be likely to obtain in a detailed assessment on a standard basis following trial.

53. The Defendants responded by arguing that:

(1) The suggestion that they have based their increased costs on the fact that there is a seven-week trial (including the pre-reading week) is incorrect, and that the increase is based on there being an (at least) 50% increase in the time in Court, which there is. The trial estimate has increased from four weeks (including pre-reading time) to six weeks (excluding one week of pre-reading time).

(2) The Claimants do not in fact engage forensically with the figures at all, presumably because there is no possible basis to criticise them.

54. I have concluded that an increase of £700,000 is justified under this head, to reflect the possibility that the trial will go short and that the matter may settle. In particular, I am of the view that a six week trial in the Commercial Court in this day and age is not usual, and that it is likely that the parties ought to be able to reduce the ambit of the dispute if proper attention is paid to this going forward.

55. I should deal with a few other matters which are put forward by the Claimants, on a more general basis.

(1) First, the Claimants submit that the costs are unreasonable and disproportionate generally. In support of this submission they pray in aid the level of costs in comparison to damages; the fact that all three Defendants have the same lawyers; the fact that the same causes of action arise in relation to all three Defendants; the fact that the claim only relates to 17 payments, of which eight are time barred; the fact that there are limited witnesses, some of whose evidence is likely to be short; the fact that expert evidence is well defined; and the fact that the trial is only six weeks. In my judgment, given the gravity of the accusations and the amounts in issue, proportionality is unlikely to play a significant part in the assessment exercise. The suggestion that a total costs bill of a little over £9 million is disproportionate and unreasonable because it represents "*almost 10% of the total damages claim"* is unsupported by authority, and, unfortunately, not out of the ordinary. I note, as the Defendants have, that the Claimants do not dispute that their own costs are of the same order (or greater) than Ds' costs. Overall, I reject this criticism.

(2) Secondly, the Claimants, as I have noted, have submitted on various occasions that the original estimates were unreasonably small, and that the Defendants should be held to these estimates. I have sought to deal with those assertions as they have become relevant. However, overall, it seems to me that this approach is misguided. It is clear from the terms of the original order that the Court anticipated that the matter might have to be revisited as time went by, and that this reflected a realisation that the original estimates were just that – estimates.

(3) Thirdly, the Claimants have suggested that the tranches should be reduced by 50%, without really any detailed argument in support of this suggestion other than the points made in relation to the individual tranches. The Defendants say that the suggested reduction is misleading, since there is an attempt to seek to strip out DLA's updated rates, then cut the headline costs by 40%, and then cut them by a further 50%, i.e. a reduction of over 70%. I accept the Defendants' submission that this multiple deduction is unjustified.

The terms of the order.

56. There is a further dispute between the parties as to the form of the order, on which I did not hear argument at the oral hearing. The Defendants seek an order that varies Robin Knowles J's Order, which has the effect of thereby preserving the remainder of that Order including the wording that permits them to come back for more security again.

57. The Defendants say that the Security Order sets out clearly the circumstances in which the quantum may be revisited. The Court has already ruled on the construction of the Security Order. The Claimants now seek to vary the order made by Robin Knowles J, based on the parties' consent order, so as to curtail the circumstances in which there can be further changes to the quantum of security. They say that that is entirely impermissible, particularly since no application has been made by the Claimants to vary the Order made by Robin Knowles J.

58. I accept that this is a matter which should be argued fully if it is to be argued. Certainly my understanding was that I was being asked to rule on the amount of security now justified on a final basis, rather than making yet another interim ruling. I am not prepared to make an order on such an interim basis without full argument. If the parties can agree a form of words which leaves open this question, then I am fully open to such a wording. However, notwithstanding the exchange of correspondence that has taken place since the hearing, I take the view that this is an important issue which deserves a full airing, and I would require oral argument (limited to an hour) in this regard before making any final ruling.

Costs.

59. There is no dispute between the parties that the Defendants are entitled to the costs of this application. In relation to quantum, the costs of the Uplift Application are £72,437.28, which the Defendants submit should be awarded in full.

60. However, the Claimants submit that they should not be required to pay the full costs, for the following reasons:

(1) The Claimants lost on the unusual wording of Security Order, §2 which they, subjectively, did not understand took this case out of the case law on 'material change of circumstances', in circumstances in which the Defendants' uplifts were based on the fact that the Defendants made unreasonable and unilateral assumptions in their original application (sometimes not based on any quotations at all). It was therefore entirely reasonable for the Claimants to resist this application.

(2) The point of construction consumed a very limited amount of the time spent on this application.

(3) The sums claimed by the Defendants are unreasonable and disproportionate. The Claimants were entirely justified in fighting the application to reduce the figures claimed. In particular, the Claimants should win on their arguments that increased rates and incurred costs should not be included. This has reduced the total available uplift by £591,292.70.

(4) It is misleading for the Defendants to suggest that the correspondence after the hearing was unnecessary. In that correspondence, the Claimants simply asked for a revised Precedent H to reflect the uplift for rates being removed. That has now been produced such that the correspondence was clearly necessary.

(5) These submissions were only necessary because the oral hearing ran short.

61. I can deal with these submissions briefly.

(1) The subjective understanding of the Claimants is, in my judgment, irrelevant to the question of costs. The fact of the matter is that they lost on the application, and costs therefore should follow the event.

(2) Although the question of construction involved limited argument, the uplift argument took the best part of half a day, even without questions of quantum. This is not an appropriate case for a costs of issues order.

(3) I have rejected the assertion that the costs claimed were disproportionate and unreasonable.

(4) I do not think it appropriate to delve into the detail of the post hearing correspondence.

(5) The submissions were necessary because the hearing ran short. However, overall, the fact remains that the Defendants were successful almost across the board.

62. I have therefore concluded that I should award costs in the sum of £65,000. A small reduction is justified because, in my view, the hearing would have been concluded more rapidly had it been argued more economically.