

Defendants Standard Chartered Trust (Guernsey) Limited – In Liquidation and Songbird Limited – In Liquidation, have applied, pursuant to Rules 50 and 82 of the Royal Court Civil Rules 2007 and/or in the inherent jurisdiction of the court for the Plaintiffs to be ordered to pay further security for the Defendants’ costs of and occasioned by the Plaintiffs’ action up to and including trial by lodging the sum of £860,887.90 with the Greffe within 14 days and if not so provided that the Plaintiffs’ actions should be dismissed without further Order.

**[2022]GRC071**

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**Between:**

- (1) **AHMED KAZAZ**  
(2) **SHEILA KAZAZ**  
(3) **HANNAH KAZAZ**  
(4) **LANA KAZAZ**  
(5) **ASK ONE LIMITED**  
(6) **HAIDER ABDUL RIDHA KAREEM AL-KAWAZ**  
(AS TRUSTEE OF THE ASK TRUST)  
(7) **ARI FAROOQ ABDULWALID**  
(AS TRUSTEE OF THE ASK TRUST)

**Plaintiffs/  
Respondents**

**-And-**

- (1) **STANDARD CHARTERED TRUST (GUERNSEY)  
LIMITED  
– IN LIQUIDATION**  
(2) **SONGBIRD LIMITED  
– IN LIQUIDATION**

**Defendants/  
Applicants**

**Security for Costs Judgment**

**Hearing date: 12<sup>th</sup> April 2022**

**Judgment handed down: 28<sup>th</sup> April 2022**

**Before: Jessica E Roland, Deputy Bailiff**

**Counsel for the Plaintiffs/Respondents: Advocate J P Greenfield**  
**Counsel for the Defendants/Applicants: Advocate A C Williams**

**Cases, texts & legislation referred to:**  
The Civil Procedure Rules “The White Book”

Republic of Kazakhstan v Instil Group Inc [2005] EWCA Civ 1468  
Stokers SA v IG Markets Limited [2012] EWHC 1684 (Com)  
Al-Koronky Mohammed and Time Life Entertainment Group Limited v Damien Lewis [2005] EWCA 1688 (QB)  
Chernukhin v Danilina [2019] 1 WLR 758 (2018)  
Re Ingenious Litigation [2020] EWHC 235 (Ch).  
The Royal Court Civil Rules 2007  
Jefcoate and Jefcoate v Spread Trustee Limited et al (Royal Court 31/2012))

## Background

1. In this matter the Defendants Standard Chartered Trust (Guernsey) Limited – In Liquidation and Songbird Limited – In Liquidation, have applied, pursuant to Rules 50 and 82 of the Royal Court Civil Rules 2007 (“RCCR 2007”) and/or in the inherent jurisdiction of the court for the Plaintiffs to be ordered to pay further security for the Defendants’ costs of and occasioned by the Plaintiffs’ action up to and including trial by lodging the sum of £860,887.90 with the Greffe within 14 days and if not so provided that the Plaintiffs’ actions should be dismissed without further Order. In support of their application, the Defendants have filed a revised schedule (the “Revised Schedule”) calculating the costs to trial on an indemnity basis and on a recoverable basis. This replaced the Original Schedule (the “the Original Schedule”) which had been used as the basis for a previous agreement for security for costs as set out in more detail below.
2. The Plaintiffs tabled their cause against the Defendants on 5 June 2020. In brief summary, the Plaintiffs claim that the First Defendant breached its fiduciary duties owed to the beneficiaries of the SAHL Trust and the ASK Trust and the Second Defendant has breached its duties as a director of the companies underlying the ASK Trust. The Defendants deny the claims set out in the Plaintiffs’ cause and have tabled a counterclaim. Following disclosure, the Plaintiffs are seeking to amend the cause to which the Defendants have no objection however there is disagreement about how the costs of the amendment to the defences should be borne. As the Plaintiffs had foreshadowed their amendments prior to exchange of witness statements, the statements take into account the draft amended cause.
3. The Plaintiffs have previously paid the sum of £132,500 over three tranches as security for costs. The basis for that agreement is set out in correspondence dated 26 August 2020 and the 2 September 2020 with the Defendants’ agreement to the payment of the sum in three instalments on the 4 September 2020 (together the “Original Agreement”). The Original Agreement was made with the following conditions: that the Defendants reserve their rights in relation to seeking additional security for costs at a later date if so advised, including in relation to the stages of the proceedings, not included within the security sum; their rights at a relevant juncture to seek uplifts to any hourly rate; and the right to seek the costs of the proceedings from the Plaintiffs on an indemnity basis. It was agreed that the amount which had already been paid as security for costs covered the period up to the exchange of lay witness evidence (which has happened) and was based on calculations on the recoverable rate.
4. The Defendants, by their application, seek to increase the amount already paid for the period over which the security for costs was agreed, to receive further security for costs up to and including the trial and to receive the security calculated on an indemnity basis.
5. The Plaintiffs accept that this is a case where security for costs of some amount will be ordered, the gateways provided in Part 25 of the Civil Procedure Rules of England and Wales (the “*White Book*”) having been met. As well as confirming this in the hearing, they accepted this principle by agreeing to make the previous payment. They also accept that the Original Agreement was up until the exchange of witness statements and that it was envisaged that the Defendants would seek a further sum to cover the costs of the trial and preparation for it which would include a

pre-trial review and expert evidence (which, subject court approval, both parties consider is necessary). However, they dispute the amounts sought and the increase for the stages already provided for. Given how the sums were calculated, prior to agreement on a final figure, it has been accepted by the Plaintiffs that the costs should not be calculated on the cost of enforcement, but on a percentage of the recoverable costs. It is not disputed that the Plaintiffs have not provided any information on their assets which are worldwide.

6. The Plaintiffs and the Defendants filed skeleton arguments. Affidavits were filed by Mr Jarrad Knoetze dated 26 November 2021 and Mr Naushid Mithani dated 21 January 2022 on behalf of the Defendants and two affidavits of Mr Ahmed Kazzaz the First Plaintiff dated 23 December 2021 and 6 April 2022 respectively.

## **The Law**

7. There was no dispute that security for costs may be ordered pursuant to Rules 50 and 82 of the Royal Court Civil Rules 2007 (“RCCR”). Rule 82 provides a wide discretion to the court in an application for security for costs, providing
  - (1) *The Court may, in any action-*
    - (b) *order any party to give security for costs in such amount, on such terms and in such manner,*
  - as it thinks just.*
  - (2) *An order under paragraph (1)(b) for the giving of security for costs may provide that –*
    - (a) *the proceedings shall be stayed until the security is given, and*
    - (b) *if the security is not given within such time as may be specified in the order, the proceedings may be dismissed by order of the Court.*
8. In addition, the Court has an inherent jurisdiction to regulate its own procedure to ensure that it deals with cases justly, which is also reflected in the overriding objective set out in rule 1 of the Royal Court Civil Rules.
9. In security for costs applications this court generally follows the guidance set out in the *White Book* and relevant English authorities. In considering ordering further security where the parties have previously come to an agreement on security for costs it is necessary to consider what the parties had agreed. A defendant seeking an increase in the sum previously allowed must justify the further sum by reference to a material change of circumstances. (see *Republic of Kazakhstan v Instil Group Inc [2005] EWCA Civ 1468*). However, the defendant is not required to prove that all of the increase sought can be linked to those material changes (*Stokers SA v IG Markets Ltd [2012] EWHC 1684 (Comm)*).

## **Brief summary of the submissions**

10. It is not disputed that the Defendants specifically reserved their rights to seek additional security for costs if so advised both in addition to the stages of proceedings that have already been provided for and for the stages still to come. It is therefore necessary for me to consider whether or not there is a material change in circumstances, which justifies an order for security for costs in relation to the stages already covered by the previous agreement.
11. The Defendants rely on a number of factors which they say amount to a material change of circumstances. First that the Plaintiffs are to apply to amend their cause necessitating another round of pleadings which was not previously envisaged. Second, the Defendants rely on what

they say was a more complex and more expensive disclosure exercise than was originally envisaged. They say that this was in part as a result of the Plaintiffs' failure to actively engage with the Defendants on search parameters and terms, despite being ordered to do so. The Plaintiffs failure to engage meaningfully with the Defendants meant the Defendants were required to review significantly more documents than otherwise would have been required if the Plaintiffs had complied properly with the court order. At the time of the Original Schedule, the Defendants were not in receipt of all the documentation which formed the pool of disclosure from the various custodians employed by the First Defendant and Standard Chartered Bank. ("SCB"). The increased costs of the disclosure exercise are included in the Revised Schedule.

12. In relation to the increased costs of disclosure, the Defendants rely on the case of *Stokers SA v IG Markets Limited* (*ibid*) where the High Court in England and Wales found that where the cost of the disclosure exercise exceeded the amount initially envisaged, this could constitute a material change in circumstances for the purposes of seeking a variation of security for the costs paid.
13. In oral argument, the Defendants also relied on the failure by the First and Second Plaintiffs in similar proceedings in Singapore to pay costs orders. These were made following the First and Second Plaintiffs' loss at first instance and appeal of claims against SCB and various officers of SCB (the "Singapore Proceedings"). As set out in detail in the affidavit of Jarrad Knoetze dated 26 November 2021, the First and Second Plaintiffs of the Guernsey proceedings were the First and Second Plaintiffs of the Singapore Proceedings. After the First and Second Plaintiffs lost the Singapore Proceedings, cost judgments were made on 31 August 2020 with respect to the first instance decision and the 13 July 2020 with respect to the failed appeal (the "Singapore Costs Orders"). Due to non-payment of the Singapore Costs Orders, SCB obtained a worldwide freezing injunction dated 3 November 2021 against the First and Second Plaintiffs in the Dubai International Financial Centre Courts ("the DIFC Courts") as the First and Second Plaintiffs are domiciled in Dubai. Following the Freezing Order, SCB commenced proceedings in the DIFC Courts to enforce the Singapore Costs Orders against the First and Second Plaintiffs. The First and Second Plaintiffs admitted liability to pay the Singapore Costs Orders and were ordered to pay them in three instalments on 24<sup>th</sup> December 2021, 24<sup>th</sup> January 2022 and 24<sup>th</sup> February 2022. By the time of the security for costs hearing on 12<sup>th</sup> April 2022, the parties were able to confirm that these payments had been made. However, the Freezing Order remains in place as there is still an outstanding issue of the costs of the Freezing Order itself to be resolved.
14. This not only goes to a material change of circumstances which occurred after the original agreement was made, submit the Defendants, but it also goes to the exercise of my discretion on the amount of security. This, the Defendants argue, is evidence that the Plaintiffs will avoid paying costs and therefore I should order security for costs on an indemnity basis for the period already provided for by the Original Agreement and for the remainder to the proceedings.
15. In the exercise of my discretion on the amount, the Defendants submit that I also should take into account the merits of the Guernsey proceedings (relying on *AL-Koronky v Time Life Entertainment Group Ltd* [2005] EWCA 1688). On a comparison of the pleadings, they submit, the Guernsey proceeding are largely a re-run of the Singapore Proceedings which failed and therefore this is a case almost certain to fail. I should look closely at the merits of the claim in the consideration of the amount, and the lack of merits should mean that indemnity costs is the appropriate level to calculate security. The fact that the Defendants have not sought to strike out the claim is not a bar to an order based on indemnity costs where this is an attempt to relitigate a failed claim in another jurisdiction. In the exercise of my discretion, I should also not ignore the fact that the First Plaintiff is a convicted fraudster and that there is no evidence from the Plaintiffs as to assets.

16. As I have set out above, the Plaintiffs do not oppose the making of further security for costs in principle for the stages of the proceedings to come but argue that there are no proper grounds for a revaluation of the stages for which security has already agreed upon and paid. Further the normal approach is that calculations for security for costs are based on recoverable rates (see *Jefcoate and Jefcoate v Spread Trustee Limited et al (Royal Court 31/2012)*). The burden is on the Defendants to persuade the court that a higher rate should be used and there is no proper basis for the security for costs to be calculated on an indemnity basis.
17. The Plaintiffs submit it is wrong to characterise the Guernsey proceedings and the Singapore Proceedings as the same. The parties are not the same. The third to seventh Plaintiffs nor the Defendants were not involved in the Singapore Proceedings. The claims are not the same in the Guernsey proceedings as those that were made in the Singapore Proceedings. The Guernsey proceedings are based on breach of trust claims and a failure to act in the best interests of the beneficiaries, therefore the duties owed to the Plaintiffs and allegedly breached are not the same as those that were relied on in the Singapore Proceedings. The Defendants have not, despite the conviction with which they argued the lack of merits in this application, attempted to strike-out the Guernsey pleadings in circumstances where on the basis of their calculations for indemnity costs, they will spend almost £1 million going to trial. Further there is no substantial obstacle for enforcement as demonstrated by the successful enforcement action in Dubai against the First and Second Plaintiffs in the Singapore Proceedings. In relation to the Singapore Proceedings, it is not accepted by the First Plaintiff that he was trying to avoid payment and that as set out in his affidavits, his understanding was that he and SCB were in negotiations when SCB took this unnecessary step. The Freezing Order was unwarranted and used to put pressure on the First Plaintiff in the Guernsey Proceedings and this application for security. In any event the Singapore Costs Orders have been paid. In accordance with the agreement for security for costs in this jurisdiction agreed between these Plaintiffs and these Defendants for these proceedings, the amounts have been paid.
18. The Plaintiffs do not accept that the disclosure exercise can warrant a material change of circumstances and do not accept that they failed to cooperate. Advocate Greenfield submitted that this sort of claim will always lead to the institutional defendant bearing the lion share of the disclosure exercise as they are the holders of the relevant documentation, and this should have been anticipated by the Defendants. Further the amendment to the pleadings should not be considered a material change as it was only as a result of the disclosure by the Defendants of internal documents that the Plaintiffs had not previously had access to that the amendment became necessary.
19. The Original Schedule contained excessive figures and the agreement that was concluded was approximately 50 % of the amounts provided in the Original Schedule calculated on a recoverable basis for the stages up to exchange of witness statements. An example of this excess is the provision of 45 hours of time for preparation and attendance at a CMC for lawyers at partner, senior associate and associate level. The Plaintiffs argue that the sums calculated by the Defendants for security for costs payable in the Revised Schedule have exacerbated that excess and without justification. This is particularly the case when comparing it to other matters that were considerably more complex and lengthier (for example *Jefcoate and Jefcoate v Spread Trustee Limited et al (Royal Court 31/2012)*). The number of lawyers, the time to be spent and the rates claimed for non-Guernsey advocates provided for in the Revised Schedule are all excessive. In oral submissions Advocate Greenfield provided alternative figures for the forthcoming stages.

## Discussion

20. I am not persuaded that either the Plaintiffs' wish to amend the cause (as a consequence of receiving disclosure from the Defendants), or the disclosure exercise itself, are sufficient grounds to be considered a material change in the particular circumstances of this case.

However, the circumstances behind the obtaining of the Freezing Order are significant. At the time of the Original Agreement the First and Second Plaintiffs had lost the Singapore Proceedings and the Singapore Costs Orders were made almost contemporaneously with the agreement. Now, unlike when the Original Agreement was made, there is a history of the First and Second Plaintiffs not paying costs orders until enforcement action was taken. In exercising its discretion on security for costs, the court may take into account the balance of prejudice: a comparison between the harm the applicant would suffer if too little security is given and the harm the claims would suffer if the amount secured is too high (See the *White Book* 25.12.7 and *Stokers SA v IG Markets Limited* [2012] EWHC 1684 (Com) paragraph 8). The non-payment of the Singapore Costs Orders which led to the Freezing Order is, in my view, a material change in circumstance which I should take into account as it goes directly to the assessment of risk of harm to the Defendants. Even though the First Plaintiff has submitted and put in evidence protests that obtaining the Freezing Order by SCB was tactical and unnecessary, it was not until enforcement action was obtained that the Singapore Costs Orders were paid. I consider that it is appropriate I take this into account in balancing the prejudice and the harm that the Defendants' will suffer if the amount of security is too little. No argument was made that I should consider the position of any of the other Plaintiffs. I am therefore prepared to consider ordering additional security for the stages of proceedings covered by the Original Agreement.

21. Given the Plaintiffs' recognition that it was always anticipated by the parties that there would be a further amount sought for the remainder of the litigation, it is not necessary for me to consider any material change of circumstances for this element of the application but rather to focus on the exercise of my discretion as to the amount that should be ordered.
22. The discretion of the court is wide enough to include an order for security for costs based on a calculation at an indemnity costs rate. The *White Book* at paragraph 25.12.7.1 shows that English judges are not agreed as to when this should be ordered, although Nugee J ordered security of 75 % where there was a "*realistic prospect of indemnity costs*" in *Re Ingenious Litigation* [2020] EWHC 235 (Ch). In *Chernukhin v Danilina* [2019] 1 WLR 758 (2018) Hamblen LJ sends out a clear warning about when to consider arguments on merits at paragraph 69:

*"the position is correctly summarised in the notes to the Civil Procedure 2018 vol 1 p836 para 25.13.1 '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'."*

23. I am not persuaded that the Defendants have shown that this is a case where there is a "*realistic prospect*" that costs may be awarded on an indemnity basis to the Defendants even if they are successful in their defence and counterclaim nor shown "*a high degree of probability of success or failure*". There are clearly similar facts in the Singapore Proceedings as in the Guernsey proceedings, nevertheless, it cannot be ignored that the parties are not the same (in fact the First and Second Plaintiffs are the only parties common to both proceedings) and that unlike the Singapore proceedings, the Guernsey proceedings are based on breach of trust claims. Thus, I do not consider that the Guernsey proceedings can be viewed as re-litigation nor that because of the failure of the First and Second Plaintiffs in their claim in the Singapore Proceedings that this means that the Guernsey Proceedings necessarily lack merit. Therefore, I have concluded that I should not consider the merits of the case further. Nor do I consider that the circumstances which led to the Freezing Order being obtained mean that I should exercise my discretion to award costs on an indemnity rather than recoverable rate. Therefore, I am not prepared to exercise my discretion on the basis that the security for costs should be on the indemnity basis. It is therefore necessary for me to consider the application based on recoverable rates.

24. When considering the amounts to be ordered I have used the Revised Schedule, noting the comments in Mayr v CMS Cameron McKenna Nabarro Olswang LLP [2018] EWHC 3093 (Comm) in the *White Book* at 25.12.13 that:

*“..The overall purpose of giving security for costs is to protect the defendant and that purpose can only be achieved if the court considers the overall figures on the basis of the up to date estimate before the court.”*

25. However, I have considerable sympathy with the comments of Advocate Greenfield about the amount of costs that the Defendants have included in the Revised Schedule on a recoverable basis. What was referred in Jefcoate as “*the luxury of duplication*” is a feature of the Revised Schedule (as it was with the Original Schedule) with costs being sought for three levels of lawyer for each stage at partner, senior associate, and associate level (although only the partner can conduct the necessary advocacy in the Royal Court as the only Guernsey qualified member of the team). There is also a very generous provision for the amount of time for each stage of the process as well as high rates for non-Guernsey advocates. The comments of Deputy Bailiff McMahon as he was then, in Jefcoate apply equally to this case:

*“I accept that team-working is part and parcel of modern legal practice. However, I am also conscious of the need for a costs judge to be alive to the possibility that some of the work for which a client is billed (and in respect of which recoverable costs are sought) will be duplication and so not recoverable from a paying party if those costs are subjected to detailed taxation. The best I can do in these circumstances is to take a reasonably broad brush approach to the costs as set out in the schedule prepared.”*

26. There is no hard and fast rule about the calculation nor the amount, if any, of percentage discount to apply. In the figures I have provided below I have taken into account a discount having regard to the uncertainties of litigation, the principles of recovery of costs on a recoverable basis and a robust and broad brush approach having looked at the breakdowns provided in the Revised Schedule and the challenges to the figures by the Plaintiffs.
27. Therefore, taking all the circumstances into account I will allow a further sum of security of £70,000 for the period up to the exchange of lay witness statements i.e., the period covered by the Original Agreement. This must be paid within 14 days of this judgment being formally handed down and the proceedings to be dismissed in default of payment. In relation to expert evidence, I will allow a further £50,000 including the disbursement for the expert fees if expert evidence is ordered. The trigger for payment of this amount must be built into any order in relation to expert evidence, including that in default of payment the proceedings will be dismissed. In relation to the PTR, preparation for trial and the trial itself I will allow the sum of £80,000.00. Trial dates are currently being discussed with an aim for the Autumn of this year with a PTR before the end of July, therefore this final tranche of security must be paid by 1 July 2022 with proceedings being dismissed in default of payment.

## **Conclusion**

28. The total security to be payable for these proceedings including the amounts already paid under the Original Agreement and presuming the application for expert evidence will be made, is £332,500.00 payable as set out more particularly above. In relation to the costs order for the security for costs, if there is no agreement as to the appropriate costs order, this can be listed for determination at a mutually convenient interlocutory court.