IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION – COMMERCIAL COURT

Rolls Buildings
Fetter Lane
London
England
EC4A 1NL

24th December 2013

2012-FOLIO-1517

Before:

Mr Justice Christopher Clarke

BETWEEN:

Excalibur Ventures LLC

Claimants

-and-

Texas Keystone & Others

Respondents

Hearing Date: 13th December 2013

JUDGMENT (APPROVED)

JUDGMENT

LORD JUSTICE CHRISTOPHER CLARKE:

1 I now have to deal with the outstanding matters consequential on my judgment. The full terms of which have been made public today, but the concluding paragraph of which was made public on 10 September of this year. No permission is sought to appeal that judgment.

2 It is not disputed that Excalibur must pay the defendants' costs of and occasioned by the proceedings.

3 The central matter that I have to decide is whether or not those costs should be assessed on the standard or the indemnity scale. The principles on which the court makes an order for costs on an indemnity scale are well recognised. I have taken into consideration all of the authorities to which I have been referred and I do not propose to conduct an extensive review of them.

4 In **Balmoral v Borealis UK Limited** [2006] EWHC 2351 I expressed matters in this way:

> "*The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson J in* ***Three Rivers District Council v The Governor & Company of the Bank of England*** *[2006] EWHC 816. The discretion is a wide one to be*

determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must therefore be something, whether it be the conduct of the claimant or the circumstances of the case, which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of proceedings and the raising of particular allegations or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure, or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs."

5 In the **Three Rivers** case Tomlinson J as he then was pointed out that if a claimant chooses to pursue a speculative, weak, opportunistic or thin claim, he takes a high risk and can expect to pay indemnity costs if he fails. He gave examples of circumstances which took the case out of the norm as being where a claimant:

"*(a) advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time.*

(b) advances and aggressively pursues such allegations despite the lack of any foundation in the documentary evidence for those allegations and maintains the allegations without apology to the bitter end.

(c) actively seeks to court publicity for its serious allegations both before and during the trial.

(d) turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case.

(e) pursues a claim which is to put it most charitably thin, and in some respects far-fetched.

(f) pursues a claim which is irreconcilable with the contemporaneous documents.

(g) commences and pursues large scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations which it had made, only then to suffer a resounding defeat."

That seems to me to a considerable extent a summary of the present case.

6 In **European Strategic Fund Limited v Skandinaviska Enskilda Banken AB** [2012] EWHC 749, Gloster J, as she then was, awarded indemnity costs in circumstances where the claim was:

" (i) *speculative involving a high risk of failure;*

(ii) grossly exaggerated in quantum; (ii)opportunistic; (iv) conducted in a manner that has paid very little regard to proportionality or reasonableness giving rise to the incurring of substantial costs on both sides; (V) pursued on all issues at full length to the end of the trial."

That too seems to me a pretty fair summary of the present case.

7 The fact that a claimant loses a massive claim and does so badly is not of itself a reason for ordering indemnity costs. Cases involving very large sums which founder on sharp juridical rocks are not automatically outwith the norms of this court. But all depends on the circumstances. This case was in my judgment out of the norm for a considerable number of reasons.

8 The claim was essentially speculative and opportunistic. It has been advanced at great length and by the assertion of a plethora of causes of action, all of which have been maintained to the last possible moment, no doubt upon instructions. Gulf, and to a lesser degree Texas, have been put to an enormous expense in terms of legal costs and Mr Kozel has borne a heavy personal burden in dealing with it.

9 The litigation has been gargantuan in scope, involving a five month trial and 373 trial bundles. But it was based on no sound foundation in fact or law and it has met with a resounding, indeed catastrophic defeat. The fact that it

has done so arises in large measure as a result of facts and matters which were known to the Wempens before the case started. As Gloster J put it in **JP Morgan Chase v Springwell**:

> *"A party who chooses to litigate on such a wide and extravagant canvass takes the risk that if unsuccessful it may have to pay costs on an indemnity basis."*

10 That the claim merits the description I have given to it is apparent for a number of reasons. Excalibur is and always has been nothing but a nameplate for the Wempen brothers who lacked experience of the oil industry or oil finance and had no technical expertise whatever. Notwithstanding these deficiencies, Excalibur sought what would have been an enormous reward in the shape of an indirect interest in, inter alia, 30 per cent of the Shaikan oil field for what was essentially no more than the introduction of Texas and Gulf to the KRG, important though that was. It did so in circumstances where it had agreed to a bid going forward without Excalibur being a bidder, where it lacked the ability to finance its share, if it had one, and was inherently unlikely to be an acceptable partner for any financial institution, or acceptable to the Kurdistan Regional Government.

11 The claim was opportunistic. Mr Wempen bade his time until it was apparent that the field was likely to be very profitable before bringing these proceedings.

Meanwhile the defendants, and not Excalibur, had borne the risk and expense.

12 As I observed in my judgment, Mr Wempen was a man long on assertion and confidence, but short on analysis and understanding. He has pursued this litigation as if it was an act of war. He took positive salesmanship beyond the point of acceptability.

13 From the beginning of his relationship with the KRG and for a considerable time thereafter he managed to convey the thoroughly misleading impression that he had financial and other connections, until it became apparent, first to his friend and associate Mr Kinnear, and latterly to Texas and Gulf and the KRG, that he did not. It can truthfully be said that the dispute had its origins and developed as a result of Mr Wempen's misrepresentations about himself.

14 The claims put forward were an elaborate and artificial construct which, as Mr Gaisman, in my view not inaccurately, puts it, were reverse engineered from the position in which the Wempens found themselves on the facts. They were replete with defects, illogicalities and inherent improbabilities. The claims involved asserting that Gulf was a partner to the Collaboration Agreement from the outset. This was inconsistent with the clear terms of the agreement and impossible to square with the absence of any evidence

that Gulf ever authorised Texas to enter into the agreement on Gulf's behalf, or that Texas agreed to do so, and of any contemporaneous claim by Excalibur that Gulf was a party.

15 Insofar as an attempt was made to rely on apparent authority it foundered on the fact that on his own evidence Mr Eric Wempen thought that there was a question mark over whether Gulf was a party.

16 The proposition that Gulf was a party was also completely inconsistent with the attitude that Excalibur itself had taken when the question of Texas assigning an interest to Gulf arose in April and May of 2007.

17 The *alter ego* allegation, which led to requests for large amounts of documentation, which was given, was completely untenable, it being plain that Gulf and Texas were two independent companies. It was inconsistent with the documents and the idea that Gulf dominated Texas and, in particular, that Mr Kozel dominated his brother was, as I said in my judgment, bordering on the risible.

18 The case on assignment was always unclear, irreconcilable with the contemporaneous documents and in the end only supported by reliance on some passages in the cross-examination of Mr Robert Kozel with the omission of a critical passage.

19 Excalibur also claimed that although it consented to a bid being made for the Shaikan PSC by Gulf and Texas

without it, the Collaboration Agreement entitled it to an indirect interest in the oil field, even if it never became a party to a PSC, having decided not to be one. This proposition was commercially unprecedented and legally implausible. The parties had never agreed on an indirect interest, let alone what form it might take. Even if they had agreed on an indirect interest there was no way in which the court could decide how to give effect to it.

20 The implied term argument failed every test. The alternative contractual claims were contrived and fallacious in many respects. The basis for any claim to an interest in Sheikh Adi and Ber Bahr shifted, was fallacious and would, if true, have had some bizarre consequences.

21 The claim for breach of fiduciary duty faced insuperable obstacles.

22 The numerous tortious claims added considerably to the already heavy burden of what had to be addressed and

were based on factual misconceptions or incorrect legal premises.

23 The claim in deceit was such that Mr Wempen, the alleged victim, could not explain how he had been deceived.

24 What I have said is but a summary of the defects in the claims, which are dealt with at considerable length in my judgment. I have not forgotten that failure in respect of one or more causes of action is not a passport to indemnity costs, but as is apparent from my judgment, Excalibur put forward a range of bad, artificial or misconceived claims which required a great deal of expense, labour and time to refute. The scale of Excalibur's claims and of the fallacies in them springs from the fact that they were fashioned some time after the events and bore little relationship to the facts as I have found them to be, and of which the Wempens must have been aware, and to the true relationship between the parties at the time.

25 A whole swathe of evidence was directed to the assertion that there was a plan to cut Excalibur out of the Shaikan PSC. This was the product of the Wempens' cast of mind, bordering, in their own words, on paranoia. It was said in the opening to be the reason we are here.

26 The supposed timing of the plan was variously put at dates between July and November 2007. Who exactly the participants were, apart from Mr Kozel, was never clear. The supposed plan was inconsistent with a raft of internal Gulf documents and the way in which Gulf acted. It also ignored the fact that at the relevant time Gulf wanted a partner to share the costs of the exploration.

27 The claim to specific performance was subject to some five fundamental objections, of which laches was one of the most obvious.

28 It has been said that a claimant is fortunate if he wins on every point. In this case the claimant has lost on every material issue. This was more than a misfortune. It arose because of the inherent defects in the claims in the light of the true facts.

29 The quantum of the claim was also grossly exaggerated. It was put at US $ 1.65 billion, when on my findings it was at the very best only $ 3.3 million. That figure was reached without any assistance from Excalibur's own expert, who was not instructed to opine on a figure as at the date of breach. The difference arises because the lesser valuation takes the position as at the date of the breach and assumes that, contrary to my view, an indirect interest could have been modelled which would have the same effect as a direct

interest. So even on the most favourable basis that I was prepared to contemplate, but did not agree with, the damages sought were grossly exaggerated.

30 I appreciate that Excalibur was arguing for a valuation at the date of trial and that there was some basis for doing that. But the breach date rule is one clearly established, although arguably not without exception, and peculiarly apposite to meet the justice of the present case.

31 I have little doubt that Excalibur hoped that the making of a claim for specific performance or damages calculated at the date of trial would drive Gulf to settle.

32 All these spurious claims were pursued relentlessly to the bitter end. Moreover the defendants were presented with a case which changed as the difficulties in its exposition became apparent. There was a differing case on how the money would be raised. The alleged timing of the plan to cut Excalibur out changed from time to time. When the difficulties of the deceit case - which was, originally, that Dr Ashti had said that Excalibur could not participate in the PSC and that this had not been relayed - became apparent it was then said that Dr Hawrami had, somewhat implausibly, referred to indirect participation. The motive for the

fraudulent concealment also changed, see paragraph 617 of my judgment.

33 Next I must say something about the witnesses. As I said in my judgment, see paragraph 61, Mr Rex Wempen was a most unsatisfactory witness. The manner in which he gave evidence, evasively and without answering the question or staying on the point, prolonged the length of his cross-examination by days. I also found Eric Wempen to be in some material respects an untruthful witness, see paragraphs 791, 798 and 801. His contemporaneous suggestion of being unaware of the 6 December 2007 deadline was disingenuous.

34 On my findings Mr Wempen made false or misleading statements from the start to the KRG, Mr Kinnear and Mr Kozel about the standing of Excalibur and its supposed financial backers, including UBS, and the status of the IRF.

35 These lies or misleading statements about financial backers persisted to 2007. The realisation by the Wempens that they needed to fund the signature bonuses led to the creation of a false case that Excalibur could have raised the necessary funds if only it had not been obstructed by Gulf. This case, conceived in 2007 and persisted in at trial, was a strategy designed to paper over the awful fact, to use a Wempen expression, that

Excalibur had no funds and no access to any. It was in my judgment a dishonest case. There had been no such prevention.

36 This is not therefore a case where there have been understandable differences of recollection such as occur in every trial. Many of the issues in the case did not depend on whose recollection was right about a meeting attended by both sides. Much of the evidence related to matters where one side or the other, but not both, knew all the facts.

37 Next the expert evidence. I have commented in my judgment on the quality of Mr Park's evidence. No doubt it would have been difficult to find a witness who would opine that Excalibur, with no track record, no management and no money, could have raised enough to stay in the game. Mr Park tried to do so in his third report, which was a *volte-face* from the position he had taken in the joint memorandum. In that report he expressed the view that it was far more likely than not that, absent prevention, Excalibur could raise the necessary funds. That view was deeply flawed for reasons which are apparent from my judgment.

38 In relation to the topic of Vast Exploration as a presumed comparator, the report was wholly inaccurate and misleading. He wrongly stated that Western Zagros,

another supposed comparator, was a company that had no seismic data when, as he was aware, it did. His analysis of the extent to which companies had raised funds for Kurdistan on the Toronto Stock Exchange in 2007 had to be carefully unpicked.

39 These failings and others (see paragraphs 1378 to 1380 of my judgment) in an expert are outside the norm and are a factor in support of indemnity costs. They led to additional expense in the form of the need to cross-examine Mr Park and more importantly to retain the services of Mr Jull.

40 In addition Mr Park's expertise in respect of that of which he gave evidence was borderline.

41 In paragraph 1344 of my judgment I referred to a submission of Gulf and Texas, which I thought to be well-founded (see paragraph 1358), that Excalibur's case on the topic of whether Excalibur could ever have raised the money in time had changed during the course of the trial in a manner that had involved it (a) contradicting itself, and (b) developing theories which (i) were not open to it in the light of the way the case has developed and the contents of the Park/Wilkinson joint memorandum, and (ii) were unsupported by the evidence.

42 As I have already said, the deceit claim, which I deal with at paragraphs 595 and following, had all the hallmarks of a lawyer's artefact. It did not make

sense. It should not have been made if Mr Wempen could not say how he was deceived, as turned out to be the case, and it should certainly have been withdrawn when it was apparent that that was so.

43 The allegation was not, as it seems to me, satisfactorily put to Mr Kozel and when Mr Wempen gave evidence it was apparent not only that he could not say how he was deceived, but that on the correct legal test he did not rely relevantly on the representation.

44 I recognise that the deceit claim was raised in the alternative and on a hypothesis, namely that there had been the meeting at the Lanesborough Hotel, which Excalibur did not accept; and that it was raised with manifest lack of enthusiasm by Mr Picken. Nevertheless, the making of deceit claims, even in the alternative and even if of a subsidiary character, is a strategy which has important consequences for those against whom they are made.

45 Gulf places reliance on the manner in which Excalibur dealt with the letter of 24 November 2007. That letter undoubtedly called for some explanation, which Mr Kozel gave and which I have accepted. I do not say that the allegation of untruthfulness that Mr Picken made was one that he was not entitled to put, but it is

another example of a claim of dishonesty which on analysis was unpromising and which has failed: see paragraph 1307 of my judgment.

46 Mr Picken opened the case by saying that he would invite the court to conclude that the court could not safely reach the conclusion that the Kozel brothers spoke the truth. This was a direct allegation that their evidence was false, which I have rejected. In the case of Mr Kozel it was an allegation against the chief executive officer of a publicly listed company and was not surprisingly picked up in the press.

47 Excalibur's lawyers were entitled on instructions to challenge Mr Kozel's account of the meeting with Dr Ashti at the Lanesborough, at which Mr Kozel did not claim to have been present, but, as I have indicated, one of the risks of making unsuccessful allegations of untruthfulness or dishonesty in a case such as this is that they may attract indemnity costs. That it was in substance such an allegation is apparent from the fact that there is no real middle ground between the meeting having taken place on the one hand, or Mr Kozel having knowingly invented it on the other. Moreover, on my findings it was a meeting of which Mr Kozel informed Mr Wempen.

48 I have been spared sight of much of the

5,000 pages of inter solicitor correspondence. It is apparent to me, however, from what I have seen that some of the correspondence from Clifford Chance has been voluminous and interminable, in some circumstances highly aggressive and in others unacceptable in content. These have included ill-founded allegations of criminal conduct in the form of insider dealing, misleading the market and misleading the public about the relationship between Gulf and Texas. Whilst interminable and heavy-handed correspondence is becoming a perverse feature in some commercial litigation, it is not in any way to be accepted as a norm and parties whose solicitors engage in it should not be surprised if, in a case such as this, they end up paying the costs on an indemnity scale.

49 It is apparent that the Wempens themselves were in no way averse to damaging Mr Kozel personally, see the injunction to "*bury the bastard*" in the email dated 24 November 2007, paragraph 938 of my judgment. Further, it appears to me that part of the Wempen plan was to do everything that might in one way or another drive Gulf to settle.

50 It is not suggested that Clifford Chance did not act in accordance with their instructions and I infer that Excalibur was perfectly content with the belligerent

tone, volume, content and repetition of the correspondence and the war of attrition of which it formed part, and with the zeal of Mr Panayides in pursuing it.

51 I do not suggest that the approach of Gulf and its team to these proceedings has been wholly blameless and I am aware that there have been criticisms, some of them judicial, going in the opposite direction, including on occasion the award of indemnity costs. What, however, I am concerned with at this juncture is the overall approach of Excalibur to the conduct of this litigation, which is as I have described.

52 Next it is apparent to me that the approach of Excalibur has led to extravagant demands for disclosure, some of which was wholly disproportionate. Some of them were made in relation to the hopeless *alter ego* case in respect of which Excalibur contended that each and every document evidencing the relationship between Texas and the Gulf defendants was discloseable, subject to privilege, as a result of which very many documents were disclosed. Discovery was also sought of the documents in Mr Kozel's divorce proceedings in Florida and Pennsylvania.

53 The communications between Excalibur's lawyers and the Gulf legal team on occasion completely overstepped

the mark. To do him credit Mr Panayides accepts that on occasion that was so. During the course of the trial an egregious example was to be found in a particular letter of 17 January which he understandably says he regrets.

54 The question of the scale of costs is not to be determined by one letter or even more than one, but the manner in which the case against the defendants, of which the correspondence forms part, was promoted is one of the factors to be taken into account with many others in deciding where justice lies.

55 In respect of disclosure, a number of important documents were wrongly made the subject of claims to privilege: see paragraphs 936 to 938 and 1064 of my judgment. Very extensive expenditure had to be incurred by Texas in the three separate sets of 1782 proceedings brought in the United States against UBS, Robert Gordon and Prime. This produced a substantial number of highly relevant documents, particularly from Prime and UBS, which are referred to in my judgment, and some of which are listed at footnote 1 to the 12th witness statement of Mr Pearson.

56 The terms of the Prime offer of funding were particularly relevant. What these documents showed was that Prime's offer of finance was on condition that Excalibur should be on the PSC; that the Wempens had

on three occasions unsuccessfully sought to persuade Prime to drop that condition; and that what Prime had in mind was a revival of the farm-in offer put forward by Mr Patrick on 23 November 2007, which Excalibur had vehemently criticised at the time, although at the trial Prime’s offer had been described as a fine offer.

57 The UBS documents revealed that UBS was not holding back from lending support to Excalibur for want of proof of title: see the emails at paragraphs 982 and 995 to 996 of my judgment. They also showed that Eric Wempen was not authorised to request various categories of document on UBS's behalf: see paragraph 785 and 937. The exercise led to the important affidavit of Mr Pinho (see paragraph 794), and the emails to which I refer at paragraphs 1031 and 1064, which showed how the Wempens in truth appreciated the difficulties which Excalibur faced.

58 Other important emails were only obtained as a result of the 1782 proceedings, such as the "*terrible fact*" email referred to at paragraph 442 of the judgment, and the "*bury the bastard*" email at paragraph 938.

59 Excalibur intervened in the case of the UBS proceedings. A number of the documents should have been disclosed by Excalibur and the 1782 proceedings against

UBS appear to have been necessary because Clifford Chance adopted, at any rate at one stage, the position that Eric Wempen's UBS emails were not in his possession.

60 Excalibur's solicitors were those who in the first instance were responsible for the trial bundle. Initially they produced a chronological run of over 170, originally 110 lever arch files, which became the M bundles. Gulf's counsel proposed the first run of what became the H volumes, which were the ones actually used at trial. The production of this slimmed down set, if that is the right word, generated an enormous amount of correspondence. This is another example of the massive nature of these proceedings and the burdens that it imposed. What became the M bundles were unworkable and so far as the trial was concerned, largely unread.

61 The defence of this claim has been a major source of disruption to Gulf's business, quite apart from the huge legal costs, the very sizeable burden of disclosure and the effect on Mr Kozel personally. The amount claimed by Excalibur must have created by its sheer size financial uncertainty in relation to the value of Gulf and its shares. A similar albeit lesser burden must have rested on Texas.

62 Gulf contends that the litigation prevented it from

pursuing its stated aim of moving to the official list of the Stock Exchange. I cannot and do not propose to determine whether absent this litigation Gulf would have moved to the official list in either the premium or the standard segment and, if so, when. But it appears to me obvious that the litigation, which led to an emphasis of matter in the auditors' report for the year ending December 2011, was at the lowest an impediment to achieving that aim and prevented the opening of discussion with the United Kingdom listing authority.

63 Lastly I pay some regard to the enormous drain which a case of this kind imposes on the resources of the court and the court system to the prejudice of other litigants with deserving claims. Its effect has been to tie up one member of the court for the best part of a year.

64 Taking all those matters into consideration and looking at the case as a whole, including in particular the aggregation of several different factors, some of which, if they stood alone, would not cause me to make the order that I propose to make, I regard the case as one where I should order that the costs be assessed on the indemnity scale. Although that has on occasion been spoken of as a penal order, that is not its essential nature. Its effect is to alter the incidence of the

burden of proof as to the reasonableness of the costs claimed.

65 In the light of the circumstances and features that I have described I am satisfied that this case is well outside the norm and that it is entirely appropriate that the costs of both the Texas and the Gulf defendants should be assessed on the indemnity scale with a view to ensuring that they have an indemnity in respect of the costs that they have incurred, unless shown to be unreasonable.

66 Before I part from this point, I express the gratitude of the court to Mr Picken for appearing pro bono on this occasion to lay before the court material considerations to the contrary. It is no fault of his that I have reached the conclusion that I have.

67 In both cases those costs should carry interest at the rate of 1.5 per cent per annum from the date of payment of the relevant invoices until today, 13 December, that is to say the date of the judgment. There must also be an interim payment on account of those costs.

68 The appropriate order to make, as is effectively common ground, is that sums presently in court as security for costs, which in the case of Texas is a figure of £ 6.8 million and in the case of Gulf a figure

of US £ 10.7 million, should be paid out as interim payments. If any interest has accrued on those amounts, the interest should follow the principal and be paid out accordingly.

69 Both Texas and Gulf seek orders for further security for costs over and above that which has previously been granted. There have been two orders for security, the first on 14 March 2012 by Mr Justice Popplewell and the second on 15 February 2013 by me. The Funders have failed to give any indication that they will pay any of the costs that Excalibur has been ordered to pay, although it appears that they have so far financed the litigation as far as Excalibur's costs are concerned. In the case of one of them its continued existence is in some doubt and the extent to which the Funders have assets and traceable assets is unknown.

70 The need for further security is said to arise in the following way. I take Gulf first. Prior to a minor change to which I shall refer in a moment, Gulf say that their actual costs to date are £15,619,031 which together with interest makes £15,923,585.

71 Security was provided in the past on the basis of actual and estimated costs of £15,284,065, the latest estimate having been made in December 2012 and taking the matter up until after the trial.

72 On the assumption that Gulf could expect to recover 85 per cent of their costs after an assessment on the indemnity basis, which appears to me a reasonable assumption, the final recoverable costs are likely to be in the region of £13,535,047. The security given so far is £10.7 million. Hence there is an unsecured shortfall of £2,835,047.

73 In addition it is said that Gulf is likely to have to incur the costs associated with a detailed assessment, and that such a hearing could last anything up to 20 days with an estimate of £385,000 for the costs of the hearing. Security for costs is, therefore, sought in the sum of £3,220,047. That has been subject to a minor reduction on account of the fact that no application is made for permission to appeal, producing a figure for which security is sought of £3,209,210. Gulf seeks an order that Excalibur should provide further security for its costs in that amount within 14 days.

74 It also seeks an order that unless security for that sum is put up within that time limit, leave should be given to join the Funders to the proceedings for the purpose of seeking a non-party costs order against them.

75 As far as Texas is concerned, they say that their costs to date which they seek to recover are £10,244,720. Together with interest of £157,103.33, the

total sum is £10,401,823.93. Security was provided on the basis of actual and estimated costs of £9,695,945 down to 30 September of this year. On the assumption that Texas could expect to recover 85 per cent of their costs after assessment on the indemnity basis, the final recoverable costs are likely to be in the region of £8,841,550.34. The security so far given is £ 6.8 million, hence there is an unsecured shortfall of £ 2,041,550.34.

76 In addition Texas says that it is likely to have to incur the costs associated with a detailed assessment and they put those at £ 425,000 to £500,000, to the lower of which figures they apply a percentage of 85 per cent producing £361,250. That is a slightly different way of doing it to that which Gulf has adopted, but it produces a similar result. By my mathematics the total is £2,402,800.

77 In order for the court to have the power to make a further order for security for costs it is necessary that there should have been a material change in circumstances. It is not necessary to show that the change was unforeseeable. If there is a material change of circumstances the court needs to consider whether it would be just to make the order for security proposed, or any order. In my view there has been such a change.

78 My reasons are as follows. Firstly, I have now given judgment and I have now made an order for indemnity costs and for interest thereon. That means that the time between the last order and the judgment and the amount of work that has had to be done between those times has been determined. That has turned out to be more work than was expected, both in the case of Texas and in the case of Gulf. That of itself might not necessarily lead to further security.

79 Secondly, and more importantly, I have ordered that the costs be assessed on the indemnity scale, a more generous scale than that which was the basis of the previous security, and I have ordered the payment of interest. It is apparent that if costs are assessed on that scale and interest is taken into account that there is likely to be a substantial shortfall. It is also the case that there may have to be a detailed assessment. Prima facie therefore there are, as it seems to me, grounds for making such an order if it is just to do so.

80 Texas and Gulf submit that I should grant security for costs and make the order that if within 14 days security for costs is not provided, they should be at liberty to join the Funders for the purpose of seeking costs against them.

81 Excalibur submits that no such order should be made. Firstly it says that I should not order indemnity costs

and should draw the line for the whole litigation by ordering the payment out of the monies in court.

82 As is apparent, I am against Excalibur on the question of the scale of the costs. Secondly, they say that I should let the defendants do what they want, but that it is premature to order security for costs. Excalibur itself has no money, and whether the Funders are joined, whether they take part, what order is made against them and whether any assessment needs to take place are all unknown factors. The better course is to leave considerations of security for costs either to me on a subsequent occasion, or to the costs judge.

83 I have come to the conclusion that the appropriate course is to order security and to do so now, as well as ordering that if it is not provided within 14 days the defendants shall be at liberty to join the Funders and, to the extent necessary, to serve the proceedings out of the jurisdiction. In the light of the change of circumstances, that seems to me the just order now.

84 The defendants are in principle entitled to protection against inability to recover costs and the court should prima facie use its power to order security while the case is still pending.

85 If Excalibur had assets, that position would I think be tolerably clear: see *Man Nutzfahrzeuge AG v*

Freightliner & others [2007] EWHC 247 (QB). The defendants would be entitled to proceed to assessment and to have security for costs, both in respect of the amount for which they are unprotected to date, subject to questions of quantum, and in respect of the costs of assessment.

86 But it seems to me appropriate to make the order sought, even when Excalibur does not have assets. First it will signal to the Funders that unless they put Excalibur in funds they will have to face a claim that they should pay the costs. Secondly, there seems to be no advantage to the present parties in postponing until later the date when I or a costs judge should decide the question of security now when I am in possession of the relevant information now. Thirdly, as I have indicated, the defendants are prima facie entitled to proceed to assessment forthwith and it does not seem to me that the court should adopt an expedient which would hold matters up whilst the position of the Funders is determined.

87 I am also satisfied that the security should include security for the costs of the assessment. It may be that there will be no assessment, but in circumstances where security is in fact provided by the funders or others, the likelihood is, as it seems to me, that assessment may well be required.

88 As to quantum, the amounts in issue are very large. That is perhaps not wholly surprising given the huge size of the claim and they are actual figures. Attention has been drawn to the large size of counsel for Gulf's recent fees and to the shortfall, leaving aside any question of the difference between standard and indemnity costs, between the costs that were estimated when I last ordered security for costs and the costs that are put forward now. At the same time the figures for Gulf at any rate were estimated as at 1 December 2012, before the experts had given evidence and before final speeches.

89 It is also not clear to me that Clifford Chance's expenditure was any cheaper.

90 It may well be that the costs judge would reduce these actual, and, therefore, in a sense 100 per cent figures, on the grounds that they are to some extent unreasonable. That is a matter for him or her. Te 15 per cent allowance is intended to deal with that possibility. Further, the balance of prejudice, if I may use that expression, is in favour of the defendants in the sense that if the security is insufficient the defendants will lose out, but if the security is excessive it will fall to be repaid by defendants who are solvent.

91 Accordingly I propose to order security in the amounts claimed, including security in relation to the costs of detailed assessment.

92 The defendants of course must decide what course they propose now to take. Nothing in what I have decided should be treated as assuming that the court will take any particular course in relation to any one or more of the Funders. I would make the observation that if the defendants proceed to a definitive assessment without the Funders having taken part the court might not necessarily order that the Funders, if otherwise liable to do so, should pay all the assessed costs, if it thought it unjust for them in effect to be bound by an assessment to which they had not been party, but that is a matter, if at all, for another date.

93 I would invite counsel to draw up a form of order that gives effect to that which I have decided.