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4 record.

5 **IN THE COMPETITION**

Case No: 1379/5/7/20

6 **APPEAL**

7 **TRIBUNAL**

8
9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 Thursday 13th March 2025

14
15 Before:

16
17 The Honourable Mr Justice Butcher
18 Peter Anderson
19 Simon Holmes

20
21 (Sitting as a Tribunal in England and Wales)

22
23
24 BETWEEN:

25
26 **Claimant**

27
28 **Kerilee Investments Limited**

29
30 v

31 **Defendant**

32
33 **International Tin Association Ltd**

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35
36
37
38 **A P P E A R A N C E S**

39
40
41 Brian Beckett on behalf of Kerilee Investments Limited

42
43 Laura Elizabeth John and Kristina Lukacova on behalf of International Tin Association Ltd
44 (Instructed by CMS Cameron McKenna Nabarro Olswang LLP)

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Thursday, 13 March 2025

(10.30 am)

(Proceedings delayed)

(10.49 am)

MR JUSTICE BUTCHER: Some of you are joining us live stream so I'll start with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

So good morning. We have before us an application by the Claimant to vary the order for the provision for security for costs and an application by the Defendant to strike out the action. We anticipate that it is convenient that the Claimant should begin with the application to vary, and then the Defendant to make the application to strike out and answer the application to vary, and then for the Claimant to respond to the application to strike out and reply in relation to the application to vary. Does that sound sensible?

MR BECKETT: Thank you.

MR JUSTICE BUTCHER: Yes, so, Mr Beckett.

MR BECKETT: Okay. Well, our application has already been submitted and what I would like to do is to open with some background to the case if you would permit me to do so.

MR JUSTICE BUTCHER: Yes.

Submissions by MR BECKETT

MR BECKETT: The three T minerals markets concerned are very significant with an estimated traded value of some \$3 billion and an even greater downstream value over

1 the period of the alleged infringements leading up to us bringing this claim. A handful
2 of ITSCI/TIC members account for that international trade. One of them, a founding
3 member, is headquartered and listed in the UK, the others primarily in Europe. None
4 are in Africa.

5 The \$25 million we are claiming in loss and damages is a veritable drop in the ocean
6 in that market. The ITSCI programme was the dominant and, at times, in some areas,
7 the only due diligence and traceability services provider for these markets over the
8 same period. ITSCI has made that the market for due diligence services. That this
9 market for due diligence services is constrained to local levels in Africa, as asserted
10 in the Defendant's recent economic expert report, is absurd.

11 These services are provided, paid for, and used up and down the supply chain,
12 including by the likes of Apple, Samsung and others. These services are critical in
13 determining which minerals pass through the smelter and into the international
14 downstream supply chains. These smelters are a choke point in the supply chains,
15 and therefore a key point of control and influence.

16 The ITSCI programme was not derived from any altruistic belief in saving the artisan
17 miners of the African Great Lakes region. It was formed purely to ensure continued
18 access to the three T minerals needed to fuel the consumer electronics boom and to
19 offset dependence on less economically viable reserves, for example, tantalum from
20 Australia and many other strategic geopolitical forces.

21 Once again, it was formed by a handful of large international companies. ITSCI itself
22 is headquartered and controlled by the Defendant in the UK. The UK is the centre of
23 its operations and from where it provides the due diligence and traceability services to
24 an international audience. ITSCI revenues represent some 80 per cent of the
25 Defendant's revenue.

26 Our claim is unique. It is stand alone and therefore a very challenging one to bring,

1 but that does not mean that we should not do so. Aside from our own loss and
2 damages, we believe it is significant with international market-related consequences.
3 We would actually have preferred to have settled it without litigation. Instead, we have
4 been faced with constant denial, attempts to kill, whether by unrealistic market
5 definitions, costs, and the efforts of a major insurance-backed city legal team.
6 All of this said, we recognise that the merits of the case are not for detailed
7 consideration as of now. We remain totally committed to the case and doing
8 everything that we can to fund it. We have already expended significant resources in
9 funding doing so, including that our business is to invest in the development of mineral
10 resources in the developing world and to trade in the minerals derived from them. We
11 currently have in excess of £5 million invested in such projects in the D.R. Congo,
12 Uganda, Namibia and Somaliland. The Defendant should be very familiar with this
13 model and at least some of these regions, including the real challenge of operating in
14 them.
15 It is not a case that our business operations are opaque or presented in any way to
16 suit our interests, but rather that the reality of this business is that it is challenging,
17 high risk and uncertain. For example, a single delay in transporting a mineral
18 consignment to port can have a 90-day impact on revenues.
19 Since our prior submissions on security for costs made in November 2024, which led
20 to the Ruling in January 2025, our circumstances have changed and we tried to
21 communicate this possibility in January 2025, but were not permitted to do so. In its
22 Ruling, the Tribunal did acknowledge this but, as we had not at that time been able to
23 provide details, could not consider an alternative when determining the form of
24 security.
25 I will briefly describe these changes along with some details on our debtors.
26 The project in Namibia was impacted in December 2024 and January 2025 by supply

1 chain issues delaying sales exports, most specifically being export licensing issues,
2 which we anticipate will be settled in our favour by the end of March this year. This
3 has delayed sales exports and has had a material immediate negative impact on our
4 operating cash flows of some £600,000 over the next three to six months. That could
5 be less, but the funds are not available now and as was expected in our projections.
6 The project in Somaliland, where we are the majority shareholder in Sarmin Mining,
7 concerns a significant manganese, copper, nickel, tungsten and gold concession.
8 Contrary to the Defendant's understanding, we have been in negotiations with a Qatari
9 investment fund, which will see them acquire - not us acquire - them acquire a majority
10 shareholding. The transaction value is initially \$20 million, of which between \$5 and
11 \$7 million will come to us during completion as due diligence and traceability services
12 continue. Progress of that transaction has been delayed slightly by due diligence, but
13 all is positive.

14 The project in the DRC was a joint venture with Britcon, a member of ITSCI. It was
15 terminated as a result of the alleged infringements in this case. We have for some
16 eight years been seeking to recover our capital from Britcon, who chose not to engage
17 with us because we are not a scheme member.

18 In 2023, we obtained an order in the first Kinshasa case in our favour of \$942,821,
19 which was the capital element and which had been outstanding to us at that time for
20 six years. A second Kinshasa case for damages, interests and costs, now some
21 \$1.8 million, is ongoing, and, as is unfortunately often the case in the DRC, in the long
22 grass.

23 Through our lawyer in DRC, we have been pursuing these matters for some time and
24 costs as well, using all possible efforts, legal, commercial and political, without any
25 effort from the Defendant to assist their member or us in making that settlement. The
26 Defendant will be very familiar with the realities of this environment, including how

1 quickly it changes. It is now very clear that to recover any sums will require the
2 payment of bribery to the judiciary and others. So we have therefore now put any
3 recovery action on hold indefinitely for obvious reasons.

4 Our tungsten project in Uganda, KI3R Minerals Limited, has since 2023 been impacted
5 by the troubled transitional arrangements of the new Mining Act. This means
6 production has ceased whilst new conditions are negotiated with the Ministry of Mines.
7 Alongside our local management, we have a permanent representative in Uganda
8 doing this. Once resolved, production and therefore our sales can immediately
9 resume. The project was also badly impacted by COVID, which closed the mine for
10 approximately 16 months. This project is the one referred to in our correspondence
11 regarding the first security for costs when we reported signing new sales contracts,
12 which we've been unable to deliver on.

13 We are not seeking or arguing that these changes in circumstances should see
14 a return to the question of whether or not further security for costs should be ordered.

15 It is a matter of us having to provide what we can offer as security now, when the
16 security is ordered. We have no other immediate funds now and, even if we did, we
17 would also have the stark choice of closing the business (audio distortion) to fund the
18 case, which, in my opinion, I see as the same as stifling the claim.

19 I have no other cash other than what my wife and I are required to live on. We live on
20 our pensions; state pensions, that is. That is why we have to resort to offering up my
21 personal guarantee based on a UK asset. None of the other shareholders are able to
22 support the company and we have never said that they could. In fact, it will be recalled
23 that in prior submissions or correspondence, we said that the company had the
24 support of its directors, which is me and me alone.

25 In offering this, we are not shifting the risk away from us. If anything, the risk is greater,
26 particularly to me personally. The proposed asset has a market value of £1.2 million,

1 significantly greater than the security order of £575,000. Even allowing for
2 a downward valuation to take into account some negative factors, this is still going to
3 be far more than adequate for the security and any costs in realising it, if required.

4 We do not believe that these proposals would prejudice the Defendant in any way.

5 They have previously not objected to alternative forms being considered. It is also not
6 the case that this is the only security that will be held; the other being the £400,000
7 held in the CAT.

8 Now we have, over the past five to six weeks, offered to co-operate with the Defendant
9 in preparing a joint valuation at our costs and to cover the administrative costs, all of
10 which have been rejected as the Defendant appears to be hell bent on opposing this,
11 come what may. We understand that an overriding objective of the CAT and the courts
12 of the UK is to deliver justice and to be seen to be doing so. Were the Tribunal to
13 dismiss the variation application and uphold the strike out application, that would, in
14 our opinion, be to deny this and to stifle what is a very genuine claim.

15 Thank you.

16 MR JUSTICE BUTCHER: Thank you. Yes, Ms John.

17 MS JOHN: Could I begin briefly by just ensuring that all of the relevant paperwork has
18 reached the Tribunal before I launch into the detail. You should have, I hope,
19 a skeleton argument from me. There was no skeleton argument filed by the Claimant.

20 There should be: a draft order; two schedules of costs, one in respect of each
21 application; an authorities bundle from the Defendant; and two hearing bundles, one
22 open and one confined to the outer confidentiality ring. Does that all sound in order?

23 MR JUSTICE BUTCHER: Yes.

24
25 **Submissions by MS JOHN**

26 MS JOHN: Excellent. Well, let me begin then with the variation application. We've

1 heard a lot of comment to begin with from Mr Beckett about the background to the
2 claim. The Tribunal will appreciate that a great deal of what he said is contentious.
3 I'm not going to attempt to reply to it today; that's not what we are here for, but I hope
4 that it's taken as read that that does not mean for one moment that it's accepted by
5 the Defendant.

6 On the variation application, our response is twofold. The first, in summary, is that
7 there is no reason for reopening the Tribunal's Ruling because there has been no
8 material change of circumstances since that Ruling to justify reopening it.

9 The second is that, in any event, it would not be appropriate to vary the Ruling as
10 requested in all of the circumstances.

11 So I begin with the first point: no reason to reopen the Ruling. This is a threshold
12 issue. We are not proceeding this morning as if this were a fresh application for
13 security. The Tribunal has already considered our application and handed down
14 a Ruling upon it and there is clear case law which indicates that that Ruling can only
15 be reopened if there has been a material change of circumstances -- sorry, a change
16 in the circumstances on which the Ruling was based. So I'm going to start by briefly
17 turning to that case law, if the Tribunal has the authorities bundle to hand.

18 We're going to start with the Court of Appeal judgment in *Tibbles*. It's at tab 14 of the
19 bundle. Actually, perhaps I can just ask quickly for an indication. We've once again,
20 I'm afraid, got bundles where the pagination doesn't quite marry up with the PDF page
21 numbers. Is it more convenient if I give the pagination or the PDF numbers?

22 MR JUSTICE BUTCHER: I think the number at the bottom right-hand side looks quite
23 convenient, if one goes to the case, which can be done by the index at the front. It's
24 hyperlinked.

25 MS JOHN: We've got that.

26 MR JUSTICE BUTCHER: If you give me those pages, the pages at the bottom

1 right-hand corner.

2 MS JOHN: At the bottom. Yes. Okay. So we're beginning then at page 93 for Tibbles
3 and over the page on paragraph 2, we can see this was a case about varying an order,
4 in order to address costs when a claim had been reallocated between small claims
5 track and fast track. And if we scroll through to paragraph 27, we can see that the
6 Court of Appeal begins a survey of the then existing case law. And again, if we
7 continue scrolling through, I'm not going to go through a long history, but we get to
8 paragraph 39, which is on page 105, and Lord Justice Rix comments:

9 *"In my judgment, [the] jurisprudence permits the following conclusions to be drawn:"*

10 And the two I would highlight in particular are numbers (i) and (ii). And I'll just invite
11 the panel to read those to itself in a moment. (Pause)

12 MR JUSTICE BUTCHER: Yes. (Inaudible).

13 MS JOHN: So the apparently unfettered discretion is in fact curtailed for principled
14 reasons. Guidance given by the case law is that it will usually only exercise the
15 discretion normally only where there's been a material change of circumstances since
16 the order was made or where there's been a misstatement, but that's not in issue on
17 this occasion.

18 Now, that's the approach under the CPR. Just briefly, to make good the proposition
19 that we should be taking the same approach under the Tribunal's rules, if we can turn
20 to page 68, tab 11, we have a judgment from the Tribunal in a case between BT and
21 Ofcom. Let's take a moment to find the page.

22 MR JUSTICE BUTCHER: So this is BT against Ofcom, is it?

23 MS JOHN: It is, tab 11.

24 MR JUSTICE BUTCHER: Yes.

25 MS JOHN: And the relevant section begins at paragraph 72:

26 *"For its part, Ofcom's primary contention was that there was no material change of*

1 *circumstances justifying a variation of the June order."*

2 Skip to paragraph 73:

3 *"[...] Ofcom referred us to the Court of Appeal's judgment in Tibbles v SIG Plc [2012]*
4 *EWCA Civ 518, [2012] 1 WLR 2591 ("Tibbles") [...]"*

5 where Lord Justice Rix set out the relevant principles at paragraph 39. That's the
6 paragraph we've just been looking at. And then if we jump down to paragraph 76, we
7 can see the Tribunal's conclusion in that particular application:

8 *"We [...] cannot agree that the outcome of the Judgment was an unknown possibility*
9 *[...] which could amount to a material change of circumstances within the scope of the*
10 *Tibbles approach [...]"*

11 So there the Tribunal applying *Tibbles* while determining whether to exercise its
12 discretion under the Tribunal's Rules.

13 So that's the approach which we invite the Tribunal to take today. And in my
14 submission, the Claimant simply does not come even close to meeting that test. We've
15 set out the position in some detail in our skeleton argument in paragraphs 18 to 21.
16 The Claimant says its financial and commercial situation has changed, but in the
17 relevant sense, for today's purposes, it has not.

18 And I'll run briefly through the chronology. If we can go to the open hearing bundle,
19 please, and turn up page 491. It's page 502 in the PDF, if it's easier to just enter the
20 number.

21 MR JUSTICE BUTCHER: Sorry. So here, because this is such a large document --

22 MS JOHN: Yes.

23 MR JUSTICE BUTCHER: -- you say electronically that -- what should we key in,
24 page?

25 MS JOHN: 502.

26 MR JUSTICE BUTCHER: 502.

1 MS JOHN: Yes.

2 MR JUSTICE BUTCHER: Yes.

3 MS JOHN: Now, the Tribunal has seen this letter before. You'll see it's dated
4 6 January [2025]. So this is before the Tribunal's ruling, which was given on
5 10 January [2025]. Now, the Tribunal will recall that after the last CMC hearing, both
6 parties went away and made submissions in December [2024] on the quantum and
7 the timing of security. Then in January [2025], after the vacation, the Claimant came
8 back with this letter by way of follow up. And in paragraph 3, what is said is:

9 *"Were we [...] required to make payment earlier than this time, which we maintain*
10 *would [not] be reasonable or justified, we would have to consider alternate forms of*
11 *security, e.g. secured guarantees."*

12 So what we see is that even in January [2025], the Claimant was already saying it's
13 got some cash flow problems. Now, a few moments ago, Mr Beckett accepted that.
14 He said the Claimant's circumstances have changed and he said, 'We tried to
15 communicate that to the Tribunal in January [2025], but [he said] we were not
16 permitted to do so'.

17 Now, of course, that's not a correct characterisation of what happened at all. Of course
18 they were permitted to do so. The Tribunal received these submissions and it took
19 them into account. And we can see that if we turn to the Ruling itself. If we go back
20 in the same bundle to page 104.

21 MR JUSTICE BUTCHER: Can I just remind myself of the chronology?

22 MS JOHN: Yes.

23 MR JUSTICE BUTCHER: The hearing was on what date?

24 MS JOHN: That was 1 November [2024], I believe.

25 MR JUSTICE BUTCHER: 1 November [2024]. And at that point, there had been no
26 issue as to the form of security?

1 MS JOHN: Yes, that's right; everyone proceeded on the basis that it should be given
2 in cash. Indeed, at that point, the proposal from the Claimant was that it would pay
3 £200,000 in cash. I'm afraid I can't, off the top of my head, remember what date was
4 suggested, but that offer, as I recall, came in a day or two before the hearing, and so --

5 MR JUSTICE BUTCHER: Then after the hearing --

6 MS JOHN: At the hearing, Mr Beckett --

7 MR JUSTICE BUTCHER: -- we had said -- Mr Beckett accepted that in principle,
8 security should be provided.

9 MS JOHN: That's right, yes. So it was indicated that the only things that were in
10 contention were quantum and timing. At that point, Mr Beckett said that he wanted
11 more time to address those because he wanted to instruct new legal representatives
12 and take advice. So the Tribunal agreed not to determine those issues at the hearing,
13 but to give the Claimant more time to go and take advice.

14 Then the parties put written submissions in in December [2024], addressing those
15 points, in the event Mr Beckett didn't obtain new representatives; he put submissions
16 in in person. But the documents that were filed in December [2024] -- and they are in
17 the bundle; I can show the tribunal if you would like to see them -- were only addressed
18 to issues of quantum and timing.

19 Again, both parties proceeded on the basis that it was common ground that it should
20 be cash, in the same way as the initial security that was provided several years ago.
21 So this suggestion on 6 January [2025] was new. This had not been raised before.

22 (Pause)

23 MR JUSTICE BUTCHER: Yes.

24 MS JOHN: So then I was taking the Tribunal to the Ruling which was handed down
25 on 10 January [2025]. It's page 104 of the open bundle. We can see from
26 paragraph 19, the point we've just been discussing:

1 *"Prior to the [...] letter of 6 January [2025], we understood there to be agreement that*
2 *security [would] be provided by way of payment into the CAT."*

3 Then we have a record of what was said on 6 January [2025], and then we have
4 a record of our objections. We said it came too late, it was unexplained, there was no
5 evidence filed with it, and there was, of course, no concrete proposal given.

6 At paragraph 20, the Tribunal agreed with us on that. It took into consideration what
7 had been said in the 6 January [2025] letter, but it ordered nonetheless that security
8 was to be made by way of payment into the Tribunal.

9 So such difficulties as the Claimant was having in January [2025] were a circumstance
10 that the Tribunal took into account when it made this Ruling, and there is no evidence
11 that there has been a material change of circumstances since then.

12 If we turn to the Claimant's application itself, at page 1 of the open bundle. I beg your
13 pardon, page 6 on the PDF, page 1 in the numbering. This is Kerilee's application
14 letter to the Tribunal, and I'd like to take a look at paragraph 2, which, in my
15 submission, is quite telling on this point.

16 In the first sentence, we have the claim that the financial and commercial situation has
17 changed, but it continues:

18 *"It is also the case that the quantum and timing of security that has ordered was higher*
19 *and earlier than we anticipated, and had indicated in our submissions, when we*
20 *proposed that the form be a payment into the CAT. Our most recent letter of 6 January*
21 *2025 foresaw this situation, but at that time we were unable to provide details of the*
22 *alternative."*

23 That really is the truth of the matter, and indeed, it's what Mr Beckett has effectively
24 said this morning. Kerilee already knew in early January [2025] what its financial
25 situation was, and it made submissions accordingly. The Ruling was handed down
26 and Kerilee was disappointed; it didn't say what it hoped it would.

1 So after the Ruling, Mr Beckett has gone away and now put together details of an
2 alternative, which he hadn't done in January [2025].

3 Two weeks after the Ruling, Mr Beckett instructed a surveyor to conduct the valuation
4 of the property, which is now relied upon. I can show you a copy of that just to make
5 good the point, if we turn to page 73 in this bundle, we can see, top right-hand corner,
6 "*STEVENS PROPERTY*".

7 This is a copy of the valuation report and we can see the heading on this page,
8 "*Appendix IV: Copy of Instruction Lette[r]*". Because it's a photograph, it's a little bit
9 blurry. It's 20-something January [2025].

10 If we turn forward to page 76, that's got the clearest photograph, and we can see there
11 the date is 23 January [2025]. So two weeks after the 10 January [2025] Ruling. This
12 is not a material change --

13 MR JUSTICE BUTCHER: So that's 23 January [2025].

14 MS JOHN: I think so, yes. 23rd. Some of them look a little bit like 25th, 28th, but
15 23rd, I think. The Tribunal's ruling was given on the 10th.

16 Now, a short while ago, Mr Beckett gave a lot of new evidence for the first time about
17 the Claimant's situation, most of which we've not been given proper notice of. But the
18 key point for today's purposes is that none of the things he said pointed to a change
19 of circumstances between 10 January [2025], when the Ruling was handed down, and
20 26 February [2025], when the variation application was made. That's the crucial
21 window.

22 He's pointed to various things that have affected the Claimant's financial situation, and
23 that may all be right, but what he didn't identify was the change of circumstances since
24 the Tribunal's Ruling.

25 What's actually going on here, therefore, is they're really trying to have a second bite
26 of the cherry. It didn't put forward a proper proposal in early January [2025], and now

1 it's trying to remedy that. In my submission, that is a perfect example of exactly what
2 the Court of Appeal was cautioning against in *Tibbles*; the power to vary a ruling
3 cannot and should not be used in this way, because to do so, in Lord Justice Rix's
4 words, would cut against the interests of finality, not allowing a second bite of the
5 cherry, and not undermining the appeal process.

6 So in my submission, that is an end to the matter. We don't need to look at the detail
7 of the application. It's simply not appropriate to reopen the Tribunal's Ruling. But for
8 completeness, let me address the substance of the application.

9 It's not appropriate, in any event, to vary the Ruling as suggested, even if there were
10 to have been a material change of circumstances. On this question, we've referred to
11 the guidance in the High Court's judgment in *Recovery Partners*. I'll start by just
12 showing the Tribunal that judgment. If we can turn back, please, to the authorities
13 bundle.

14 MR JUSTICE BUTCHER: Yes.

15 MS JOHN: It's at tab 13, page 82 in the pagination, or 84 in the electronic document.

16 (Pause)

17 We can see in paragraph 1 that this was a case concerned with varying an order in
18 order to provide security in an alternative form. If we jump ahead to paragraph 34,
19 which begins on page 89.

20 MR JUSTICE BUTCHER: Electronically?

21 MS JOHN: Electronically, page 91.

22 MR JUSTICE BUTCHER: Okay. Yes. Paragraph?

23 MS JOHN: 34, and we'll scroll from here. So paragraph 34, we can see that it was
24 said that the simple fact there was now an alternative form of security available was
25 itself a material change of circumstances.

26 We jump ahead to paragraph 37. The Court begins to consider that, and we can see

1 halfway through paragraph 37, there's a sentence beginning, "*There is no evidence*
2 *[...]*". If we can just read from there to the end of that paragraph. (Pause)

3 MR JUSTICE BUTCHER: Right.

4 MS JOHN: So some doubts being expressed about whether that was sufficient, but
5 for that application, the Court proceeded on the basis that it was appropriate to look at
6 the merits of the application to vary.

7 Paragraph 38, it comes on to consider the substance. The Judge says:

8 "*[...] once there is a material change of circumstance the Court has a broad discretion*
9 *which should be exercised taking into account all relevant factors, but remembering*
10 *that the burden is on the party who seeks to [vary the order to establish] it is*
11 *appropriate to do so.*"

12 Paragraph 39:

13 "*I [...] reject Mr Weisselberg's proposed approach. He submitted that once there is*
14 *a material change of circumstance the question is to be approached simply as though*
15 *this were a de novo application for security. But it is not.*"

16 And then paragraph 42, the Court sets out the relevant factors. And again, I'll just
17 invite the Tribunal to read paragraph 42 to itself, rather than read it all out loud.

18 (Pause)

19 MR JUSTICE BUTCHER: Yes.

20 MS JOHN: So for today's purposes, factors (b), (c), and (d) are the relevant ones, and
21 I will take each of those in turn.

22 First of all, the quality of the security. We currently have an order for cash, which is
23 essentially as good as it gets in terms of security. The proposed alternative is
24 inherently inferior to that. What is being proposed is that Mr Beckett will give
25 a personal guarantee for the amount, and that guarantee will be secured against
26 a property asset that he's identified. That is inherently illiquid and more difficult for my

1 client to enforce, in the event it's necessary to do so.

2 Moreover, more specifically, we do have some concerns about the specific property
3 that is being proposed. I'm going to take the Tribunal to a couple of paragraphs in the
4 valuation report that has been put forward. This is back in the open bundle, and if we
5 can start at page 36, please. Electronic page 36.

6 I'm going to do a bit of jumping about, looking at the different paragraphs of this report,
7 rather than take the Tribunal through the whole thing.

8 We start at section 2, "*THE PURPOSE OF THE REPORT*". We can see that its
9 purpose is to provide a valuation for Pension Fund Assessment purposes.

10 If we jump ahead to page 48, section 6.2, there's a section, "*SUITABILITY FOR*
11 *MORTGAGE PURPOSES*", and the comment:

12 "*We have not been asked to comment on the properties [sic] suitability --*"

13 MR JUSTICE BUTCHER: Apologies, which paragraph? You've gotten a little ahead
14 of me.

15 MS JOHN: Paragraph 14. I'm sorry. 6.2 on page 48. (Pause)

16 MR JUSTICE BUTCHER: Yes.

17 MS JOHN: "*We have not been asked to comment on the properties [sic] suitability for*
18 *secured lending. This report is not to be used for any form of secured lending.*"

19 Which of course is effectively what it is being put forward today.

20 Then if we go to page 61, we can see, about half way down the page, a heading:
21 "*Market Value (vacant possession)*". The surveyor says:

22 "*We are of the opinion the current freehold, vacant possession value of the property*
23 *[...] is fairly reflected in the sum of £1.200,000 [...].*"

24 Now, if we jump back to page 44, we have a section headed, "*TENURE/TITLE*", and
25 in the first paragraph, second sentence:

26 "*[...] we have been advised that the property is freehold and subject to a series of*

1 | *tenancies.*

2 | *"We have been provided with copy leases and would advise the property is held on*
3 | *the following terms:"*

4 | Then there's a record of all the various tenancies that are currently in place. So
5 | certainly not available for vacant possession.

6 | Then if we turn to page 60, section 6.6, "*METHODOLOGY AND RATIONALE*". First
7 | subheading, "*Areas of note or concern*":

8 | *"The property is in a Flood Zone 3. This may mean it is very difficult to obtain buildings*
9 | *and contents insurance to cover this risk. This in turn will likely mean that obtaining*
10 | *a mortgage may be difficult as most mortgage lenders will not lend unless suitable*
11 | *insurance is in place."*

12 | Now that, of course, is significant for my client's purposes, because if the property
13 | cannot be mortgaged, then that makes it significantly more difficult to sell it, if it's
14 | necessary for my client to enforce against it.

15 | So pausing there, we cannot just assume, as Mr Beckett invites us and the Tribunal
16 | to do, that a proper valuation prepared for the purposes of offering security would
17 | indicate that this property offers sufficient cover for our costs. Now, Mr Beckett says,
18 | well, 'We've offered to do a proper valuation, and we invited the Defendant to join us
19 | in doing that, and it refused to do so'.

20 | Well, with respect, we really have no obligation to do so; this is Mr Beckett's
21 | application, and it's for the Claimant to discharge the burden of satisfying the Tribunal
22 | that this form of security is adequate. The burden is on it to go and get a proper report,
23 | if it wants the Tribunal to look at one. It really doesn't need us to join in that particular
24 | endeavour. The fact that we don't have a proper report is not something that should
25 | be laid at our door.

26 | Final point before we move off this, we saw that this particular report indicates

1 a valuation of £1.2 million. We also have in the bundle, as an exhibit to Mr Beckett's
2 statement, the title registers for this property. If we can turn back to page 14 in the
3 electronic documents.

4 Now, this property consists of three separate titles, all next to each other in the same
5 area. So what we have here is three title registers. I'll show you each of them. The
6 point I want to highlight is the bottom of the title register. So we can see that the first
7 of these titles last sold for £710,000 in December 2021. If we go to page 22, we have
8 the second title, and again last sold for £710,000 in December 2021. And page 30 is
9 the third title, and again last sold for £710,000 in December 2021.

10 So this property, the three titles as a bundle, apparently were purchased just over
11 three years ago and, if my understanding is correct, they were purchased collectively
12 for £2.13 million; £710,000 for each. If that's right, that means that, as of today, over
13 the course of three years, they've dropped some £1 million in value.

14 Now, that's a pretty dramatic decline, to say the least. Mr Beckett is shaking his head.
15 Well, perhaps he will correct me. Maybe the point is that all three were purchased for
16 £710,000 in December 2021. Is that correct, Mr Beckett?

17 MR BECKETT: Yes, I'm surprised you've not spotted that.

18 MS JOHN: Well, let's not argue about it. Each title records a separate sum.

19 Okay, well, if that's the case, the collective property, all three titles, were purchased
20 for £710,000 3 years ago. If that's right, the suggestion in this valuation report is that
21 the property has nearly doubled in value in three years, which seems ambitious.

22 I can't take it any further than that. We don't have a proper report. We simply note
23 with some concern that that's a dramatic increase in value, and one that certainly
24 raises a question about the reliability of this report.

25 So, for those reasons, as well as the secured guarantee being inherently inferior, there
26 are question marks over this particular property and the particular report that's being

1 | relied upon.

2 | Stepping back again, then, to the three factors that were outlined in *Recovery*
3 | *Partners*. The second, the Tribunal will recall, was the strength of the explanation that
4 | is given by the Claimant for its change of position.

5 | Now, I've already addressed that this morning. Our submission is that there has been
6 | no relevant change of position; the explanations simply don't hold water.

7 | The third factor that the High Court identified is hardship to the Claimant or stifling
8 | a genuine claim. This is where things start to become rather murky.

9 | I'll start by referring to the case law on how this is dealt with in the context of a fresh
10 | application for security, because that sets out what a claimant needs to show if it's
11 | going to satisfy a court that an order would have the effect of stifling a genuine claim.

12 | If we turn back to the authorities bundle, we're in tab 9, page 24 of the electronic
13 | document. This is the judgment in *Al-Koronky*.

14 | MR JUSTICE BUTCHER: Yes.

15 | MS JOHN: We're looking at paragraph 31. We can see the heading above it, "*The*
16 | *need to consider whether the claim will be stifled*". And halfway through the paragraph:
17 | "*I need to remember, however, that it is necessary for the Claimants to demonstrate*
18 | *the probability that their claim would be stifled. It's not something that can be assumed*
19 | *in their favour. It must turn upon the evidence. I approach the matter on the footing*
20 | *that there needs to be full, frank, clear and unequivocal evidence before I should draw*
21 | *any conclusion that a particular order will have the effect of stifling. The test is whether*
22 | *it is more likely than not.*"

23 | We've also referred to the judgment in *Keary*, which is at tab 12 of the bundle, and the
24 | relevant part begins on page 78 of the electronic bundle. I'm sorry, we seem to have
25 | a copy that doesn't have any paragraph numbers, but the relevant part begins at the
26 | bottom of the page, the final paragraph. It starts, "*The relevant principles are, in my*

1 | *judgment, the following*". Does the Tribunal have that?

2 | MR JUSTICE BUTCHER: Yes. Well, I do.

3 | MEMBER OF THE TRIBUNAL: Where is it?

4 | MR JUSTICE BUTCHER: It's on page 78 electronically.

5 | MS JOHN: So, the particular points to highlight, some of them we'll come to later, but
6 | while we've got the authority open, we'll look at them now. Paragraph 2, we have the
7 | point that: "*Parliament must have envisaged*" courts making orders for security that
8 | claimants find it difficult to comply with.

9 | Paragraph 3 refers to the balance of interests that the Court is carrying out. So, there's
10 | injustice to the Claimant if prevented from pursuing a claim:

11 | "*Against that, [we] must weigh the injustice to the defendant, if no security is ordered*
12 | *and at [the] trial the [plaintiff's] claim fails and the defendant finds himself unable to*
13 | *recover [from the plaintiff the] costs which have been incurred by him [...]."*

14 | *Et cetera*. And paragraph 6:

15 | "*Before the court refuses to order security on the ground that it would unfairly stifle*
16 | *a [valid] claim, the court must be satisfied that, in all the circumstances, it is probable*
17 | *that the claim would be stifled. [Some] cases where this can properly be inferred --"*

18 | That's not this case. And then for present purposes, it's the next paragraph that I refer
19 | to in particular:

20 | "*[...] the court should consider not only whether the plaintiff company can provide*
21 | *security out of its own resources to continue the litigation, but also whether it can raise*
22 | *the amount needed from its directors, shareholders or other backers or interested*
23 | *persons. As this is likely to be peculiarly within the knowledge of the plaintiff company,*
24 | *it is for the plaintiff to satisfy the court that it would be prevented by an order for security*
25 | *from continuing the litigation [...]."*

26 | So, applying that approach for today's purposes, has Kerilee established that it's more

1 likely than not that the claim would be stifled if the order were not to be varied? We
2 say that it hasn't. We do not have evidence that is full, frank, clear and unequivocal.
3 We've set out in our skeleton argument the many problems with the evidence that is
4 before the Tribunal today. Firstly, we have some gaps. For example, we've got no
5 evidence in respect of the other shareholders in the company, Mr Beckett's children.
6 We have no evidence of any attempts being made to borrow the money commercially.
7 We've highlighted in particular what is said in Mr Beckett's sixth witness
8 statement -- I'm just going to remind the Tribunal of that briefly; I'm not going to read
9 it out loud because we were told yesterday that this is confidential, but I'm just going
10 to pull it up and ask the Tribunal to read it to itself.

11 If we can turn to the confidential bundle and go to page 620 in the electronic document.
12 I'll ask the Tribunal just to remind itself of what's said in paragraph 9.

13 MR JUSTICE BUTCHER: Yes.

14 MS JOHN: And if you have my skeleton argument to hand I'll just ask the Tribunal to
15 remind itself of what we say about that. Again, I'm not going to read it out because it's
16 confidential, but in the skeleton argument, it's on page 10 and it's paragraph 27.2.3.

17 MR JUSTICE BUTCHER: Yes.

18 MS JOHN: We also have a gap inasmuch as we've got evidence about who the
19 Claimant's trade debtors are. That's also in Beckett 6. If we scroll back up to
20 paragraph 6 in Beckett 6 -- again, I won't read it out, this is confidential -- there's
21 a statement of who the trade debtors are and the extent of their debts.

22 But what we don't have is any explanation of the terms of those debts; no indication of
23 whether the Claimant has tried to call them in, in whole or in part; no explanation of
24 whether it is entitled to do so, and if it's not, an explanation of why.

25 So, we've got some gaps in the evidence. We've also got very little in the way of
26 supporting documentary evidence. For example, no evidence of the terms on which

1 these sums have been advanced to these trade debtors. Perhaps most importantly,
2 in the evidence, we have some contradictions. I want to refer to one in particular. I'm
3 going to take the Tribunal through the chronology of how this particular one has
4 unfolded. If we can go back to the open bundle.

5 MR JUSTICE BUTCHER: Sorry, Ms John, could you just repeat what you said about
6 what you say are the gaps with this evidence, the ones you've already mentioned?

7 MS JOHN: The gaps in the evidence. So we've got --

8 MR JUSTICE BUTCHER: On the trade debtors.

9 MS JOHN: We have no evidence of the terms on which the sums have been
10 advanced, and we've got no explanation of whether Kerilee has tried to call in those
11 debts, in whole or in part, in order to comply with the Tribunal's ruling. Now, it may be
12 that those sums have been advanced on terms that mean they just can't be called in,
13 but we don't know because we have no explanation of the terms of the debts. There's
14 a gap there.

15 So, I was in the process of taking the Tribunal onto the contradiction in the evidence
16 and, moving back to the open bundle, I'm going to start with Mr Henderson's third
17 witness statement, of which the relevant part is at page 92 of the electronic document.
18 At the bottom of 92, we've got the start of paragraph 42, which I'll just invite the tribunal
19 to read.

20 MR JUSTICE BUTCHER: Sorry, which paragraph?

21 MS JOHN: 42.

22 MR JUSTICE BUTCHER: Yes. (Pause)

23 Right.

24 MS JOHN: So, we made a very simple point, which is just that if the Claimant is in the
25 financial difficulty it's claiming to be, then it's rather difficult to see how it can take this
26 litigation forward.

1 What's interesting for today's purposes is the Claimant's response to that. So, if we
2 go first of all to page 611 in the bundle, this is the response that Kerilee filed in the
3 tribunal on Monday [10 March 2025]. This is its response to Mr Henderson's
4 statement. If we look at paragraph 9, what's said here is:

5 *"The Defendant should not draw any inferences as to our resourcing of our own team*
6 *and how we intend to progress the Claim."*

7 So here, somewhat cryptic, no explanation is provided, but the suggestion is that we're
8 drawing incorrect inferences.

9 Then, I'd like to turn to the Claimant's letter of 7 March [2025], and this is a letter that
10 it wrote to us rather than to the Tribunal. It's at page 1149 of the bundle. This is
11 a surprising letter in various respects. We can see from the title of the letter that it's
12 about the *"Defendant's Financial Position & Security for Costs"*.

13 Now, the first surprise is that we're being asked about our financial position four years
14 into the litigation. We've always been perfectly transparent that we're an SME and
15 we're run on a not for profit basis. That's in the Defence; it's been in every skeleton
16 that we've produced for the Tribunal, and our financial position is clear in our published
17 accounts. So, it's been very clear all along that the Defendant does not have a big pot
18 of cash. It certainly doesn't have £25 million.

19 But be that as it may, the Claimant has elected to proceed with the claim. It's entitled
20 to do that. Surprisingly, it now wants to start testing our financial position. Be that as
21 it may, that is the context for this letter. We get paragraph 8. This is the paragraph
22 that the Tribunal will have seen quoted in our skeleton argument.

23 *"As we have previously communicated, our costs to date were in the region of*
24 *£900,000 --"*

25 That was explained in the last CMC hearing, that number was shared with us.

26 *"-- with recent proceedings bringing this to over £1,000,000."*

1 So, since 1 November [2024], an additional £100,000 spent.

2 *"We are preparing a future costs budget for proceedings through to the end of the*
3 *Preliminary Issues Hearing."*

4 So, not to the end of the full trial, just to the end of the preliminary issues hearing.

5 *"It is expected that these too will be in the region of £800,000 to £1,000,000."*

6 Now, the second surprise here is the numbers. The Tribunal may recall that, before
7 Christmas, the Claimant was critical of the Defendant's projected costs, suggesting
8 that they were excessive and the Tribunal shouldn't accept them. The Tribunal may
9 recall that our projection was around £1.2 million, and we can actually see that the
10 Claimant anticipates something similar itself, a fact that was kept firmly under its hat
11 before the Tribunal gave its Ruling.

12 The third surprise here is the one that's important for today's purposes, which is that
13 the Claimant anticipates paying this amount. Now, against the background of having
14 failed to comply with the Ruling, that is an extraordinary statement for the Claimant to
15 be making.

16 Now, sitting here today, we can't know the truth of this. It may be that the Claimant
17 really has run out of money, and this letter is just a rather crude attempt to try and
18 exert some pressure on the Defendant. Or it may be that actually what is said here is
19 true and the Claimant can find £1 million. We don't know.

20 What we do know is that what is before the Tribunal today is contradictory. We simply
21 cannot conclude that the Claimant has produced evidence that is full, frank, clear and
22 unequivocal that the claim would be stifled if the Ruling were to stand. The evidence
23 before us, at best, is partial and unclear. At worst, it may even be dishonest, but
24 certainly we can say that the Claimant has not met the threshold test.

25 So, in my submission, the Tribunal should not be satisfied that the Claimant cannot
26 meet the Ruling as it stands. And when we step back, then look in the round, when

1 we take that together with the fact that what is being proposed is an inferior form of
2 security -- it's the form with some problems attached: the valuation report is not
3 satisfactory for the purposes for which it's put forward, and we don't have a good
4 explanation from the Claimant for why it says its circumstances have changed -- in my
5 submission, the circumstances are clear that it would not be appropriate to grant the
6 Claimant's application, even if there were to have been a material change of
7 circumstances, which there hasn't been.

8 So, for those reasons, we invite the Tribunal to dismiss the Claimant's application.

9 MR JUSTICE BUTCHER: Yes.

10 MS JOHN: I'm happy to pause there and allow Mr Beckett to reply. I think
11 I apprehended from your opening comments that you'd prefer me to continue and open
12 the strike out application?

13 MR JUSTICE BUTCHER: Well, I thought that might be the most efficient way. If you
14 say --

15 MS JOHN: Certainly.

16 MR JUSTICE BUTCHER: -- what you want to say and then Mr Beckett can reply to
17 all of it.

18 MS JOHN: Yes, by all means.

19 In the event that the variation application is refused, in my submission, the appropriate
20 next step is to strike out the claim. The Claimant is in breach of the Tribunal's ruling
21 in two respects, only one of which we've discussed so far: firstly, it's not provided the
22 security that it was directed to provide; secondly, it hasn't paid the costs of our
23 application. The Tribunal may recall that it assessed our costs as £38,000. They were
24 due to be paid by 24 January [2025]. They still have not been. In my submission,
25 a strike out is an appropriate and proportionate sanction in all of the circumstances.

26 The Tribunal had very good reason for making the Ruling that it did. I don't propose

1 to repeat all of the arguments that we made in our application for security; the Tribunal
2 may well recall some of them. Our skeleton argument is in the bundle if it would be
3 helpful to refresh your memory. It's tab 31, which is at the back of the open bundle.
4 Just very briefly to recap, this was and is a paradigm case where security is required.
5 The Claimant is millions of pounds in the red, some £5 million to £6 million. It has so
6 far found money for this litigation through Mr Beckett's good graces, as we understand
7 it. But the concern from the Defendant's perspective is what happens when Mr Beckett
8 no longer wants to keep offering that support. My client will be left high and dry.
9 Now, in this regard, our concerns have been fully vindicated by recent events. The
10 Claimant has not paid the £38,000 that the Tribunal ordered it to pay, and we've had
11 no explanation for that failure. By way of brief recap on that point, I will ask the Tribunal
12 to look again at Mr Henderson's third witness statement. I'm going to page 91 of the
13 electronic bundle.

14 We start at paragraph 33. So, on 13 January [2025], my instructing solicitors provided
15 the Claimant with bank account details. The Claimant responded on 29 January
16 [2025], which was the deadline for making the payment. Its correspondence is quoted
17 there. Essentially, it says, 'We're thinking about appealing the Tribunal's ruling, and
18 in view of that, we will not be making payment today.'

19 Paragraph 34, Mr Henderson records that my instructing solicitors responded on
20 27 January [2025], and we drew to Kerilee's attention the provisions of the Tribunal's
21 Guide, which make clear that even if the Claimant were going to appeal, that wouldn't
22 stay the Tribunal's order. They still had an obligation to pay. In any event, no appeal
23 was lodged and that letter was ignored.

24 Paragraph 35 – My instructing solicitors wrote again on 3 February [2025], this time
25 noting that the deadline to appeal had passed and chasing for a response. Again, the
26 Claimant ignored that letter.

1 Paragraph 36, he records that we chased again on 12 February [2025], and again the
2 Claimant ignored the letter.

3 As of today, that amount is still outstanding, nearly two months after the date the
4 Tribunal ordered payment by, and we have still not had the courtesy of an explanation
5 for why.

6 In my submission, it's a serious breach and it merits a serious sanction, as does, of
7 course, the failure to pay security. And, as we said in our skeleton argument, it is also
8 a neat illustration of our wider concern about what will happen down the line if we are
9 to be successful at the preliminary issues hearing. It's manifestly unfair to the
10 Defendant for the claim to be allowed to proceed in these circumstances.

11 Now, we've identified in our skeleton argument three other factors which, we say, are
12 also relevant to determining whether this is an appropriate and proportionate response
13 to the breach.

14 The first is that the Claimant has no good reason for its failure to comply. I've been
15 through that in detail already. I won't repeat it. As I've explained, the evidence
16 suggests that it could have complied, but it's simply elected not to. It prefers to make
17 the variation application and try having a second bite at the cherry.

18 Point two, if we're wrong about that, if the Claimant truly is out of money, then it's not
19 clear how it can progress the litigation anyway. And in that regard, it's important to
20 recall that for the Claimant to succeed, it not only has to get through the preliminary
21 issues hearing, it then needs to get through a full trial on liability and on quantum as
22 well. Even if it chooses not to instruct a new legal team, it still has to pay its experts.
23 It's still got to find a substantial amount of money for the preliminary issues hearing
24 and for a trial on liability and quantum.

25 The third point that we made is that this is not a case where a strike out is going to
26 defeat an obviously meritorious claim. Now, to be clear, I'm not saying to the Tribunal,

1 delve into the underlying merits of the claim and start taking a view on the shape of
2 the evidence.

3 The point is simply this: if this were to be a follow-on action, as many cases before this
4 Tribunal are, it would already be clear that the Defendant has infringed competition
5 law and that there is a good prospect of the Claimant recovering something. In the
6 context of that sort of claim, one can see that it might be disproportionate to strike out,
7 in circumstances such as we have here, a failure to pay security.

8 But this is not a follow-on action. This is a case where the Claimant still has to make
9 good on all of its underlying allegations. It's still got to establish that English law
10 applies. If it can get over that hurdle, and we say that it can't, that's why we're having
11 the preliminary issues trial, but if it can get over that, it's then got to make good the
12 conduct that it claims took place; it's got to show that that infringed English competition
13 law, and it's got to make good its suggestion that it's suffered some £25 million worth
14 of damages in consequence.

15 And the point here is simply that this is not a case where it is possible to say today
16 that the claim is obviously good, which is something one might be able to say in
17 a follow-on context. This is a case where everything is open and, to put it colloquially,
18 "up for grabs". So it's not a case where it's necessarily unfair and disproportionate to
19 allow it to fail for want of security.

20 So for all those reasons taken in the round, we do respectfully invite the tribunal to
21 strike the claim out. It's a claim that has been problematic from the word go. It's
22 occupied a disproportionate amount of the Tribunal's time. It has cost more than it
23 should. It has taken longer than it should. And we are now at the point where the
24 appropriate sanction is to draw a line and to strike it out. And for those reasons, we
25 invite the Tribunal to grant our application.

26 Sir, I do also have my alternative application under Rule 57. I'm happy to address that

1 later on, if necessary, or I don't know whether you would find it more convenient for
2 me also to address that now briefly as well.

3 MR JUSTICE BUTCHER: I think perhaps if you now address that briefly as well, so
4 that you've said everything, as it were.

5 MS JOHN: Yes, certainly. So this is an alternative application. I will start by just
6 looking briefly at the terms of Rule 57. They're in the bundle of authorities at tab 6.

7 (Pause)

8 MR JUSTICE BUTCHER: Yes.

9 MS JOHN: Towards the bottom of the page:

10 *"57(1). If any party fails to comply with any direction given in accordance with these*
11 *Rules, the Tribunal may, if it considers that the justice of the case so requires, order*
12 *that –*

13 *[...]*

14 *"(c) such party be debarred from taking any further part in the proceedings without the*
15 *permission of the Tribunal."*

16 Now, we invite the Tribunal to conclude, if the claim is not to be struck out, it is still
17 appropriate to impose some sanction on the Claimant for its noncompliance with the
18 Ruling, particularly its ongoing failure to pay our costs of the application. This is the
19 power that is available to it; Rule 57. It's exercisable where the interests of justice
20 require and the power is to bar Kerilee from further participation without permission.
21 So it's not necessarily barring *totaliter*. This Rule envisages the Tribunal exercising
22 some control over the level of ongoing participation that takes place.

23 Now, for our part, we're actually not aware of the Tribunal having exercised this
24 particular power before. We've not managed to identify any guidance in previous
25 Tribunal judgments. But simply taking it from the circumstances of the case, my
26 submission is that there is ample justification for the exercise of this power now, if the

1 claim were not to be --

2 MR JUSTICE BUTCHER: It's a bit of an odd power to exercise in the case of
3 a Claimant.

4 MS JOHN: It is, it is. We appreciate that. And it would be necessary to give some
5 thought to how the case would go forward in that event. My submission would be that
6 what we would envisage at this point is that the Claimant still be permitted to file its
7 reply expert report on 21 March [2025], as previously directed, and it would then be
8 necessary to consider at the PTR what further participation, if any, would be
9 appropriate.

10 We would have to give some thought to whether it would simply be a case of barring
11 the Claimant from producing skeletons and submissions and simply allowing its
12 witness and its expert to give their evidence to be tested on what's been put in writing,
13 or whether there would be some limited further participation appropriate. I don't have
14 today a fully fleshed out proposal in that regard, because it's something that would
15 require further, careful thought if we were to go there.

16 But what it seems to us, this provision would allow is for the Tribunal to essentially
17 exercise some control over the future participation of the Claimant. So we're not
18 suggesting that it takes no further part, no evidence is allowed to be produced and so
19 therefore summary judgment in our favour; it would just allow that to be some control
20 over what it looks like, so that we can try to prevent the sort of further chaotic conduct
21 of the litigation that we have seen so far, which is proving so time consuming and
22 resource intensive for the Defendant and indeed for the Tribunal, because this case
23 has taken far longer than it should. It's cost far more than it should and a major factor
24 in that is, yes, the chaotic nature in which it's being conducted on the other side. The
25 fact that we are here today is a perfect example of that. If the Claimant had got its act
26 together in the autumn, all of this could have been dealt with before the Tribunal gave

1 its ruling.

2 Instead, what we have is step-by-step, piecemeal, and the costs of two hearings and
3 multiple rounds of written submissions, all of which, it turns out, have been done on
4 an incomplete partial basis. (Pause)

5 Yes, so I think that's as far as I can take that particular suggestion. As I say, we would
6 envisage that the Claimant still would be allowed to put in its reply evidence on
7 21 March [2025] as directed, and then the question of any future participation, whether
8 the Claimant should be given permission, would, we think, be a matter for dealing with
9 at the PTR, and at which point we'd come back with some more developed thoughts.
10 As I say, we don't necessarily advocate this course. Our primary position is very firmly
11 that now is the time to strike the claim out. But if the Tribunal weren't quite to be
12 satisfied on that point, then this seems to us to be an appropriate and proportionate
13 alternative way of dealing with the current breaches.

14 MR JUSTICE BUTCHER: Yes.

15 MS JOHN: Unless I can assist further, I think that's everything I need to -- If I may just
16 check my emails and see whether there's anything that those instructing me want me
17 to pick up. (Pause) I don't see anything. Thank you very much.

18 MR JUSTICE BUTCHER: Peter, do you have any questions?

19 MR ANDERSON: Thank you, chair. No, I don't.

20 MR JUSTICE BUTCHER: Yes, Mr Beckett.

21

22 **Reply submissions by MR BECKETT**

23 MR BECKETT: Thank you. Thank you very much for that, Ms John.

24 Point number 1, we're not represented and so obviously, I'm clearly not able to
25 advocate. Instead, I rely on the evidence and statement that I've presented today.

26 Point number 2, our circumstances have changed considerably. We're not seeking

1 a second bite of the cherry, as Ms John puts it.

2 Number 3, whilst we cannot pay now, as I made very clear in the statement that I gave,
3 we will be in a position to pay in future.

4 Number 4, or should I say, continued on point number 3, the Defendant already has
5 in excess of \$1 million of our money for the past nine years.

6 Number 4, the valuation timing on the property was basically because of the
7 unavailability of the surveyor. Nothing more, nothing less.

8 Number 5, we proposed an independent valuation of the property for very good
9 reason, given the opportunity.

10 Point number 6, I find it extremely offensive that I am accused of being dishonest. I'm
11 certainly not dishonest. And if the case is allowed to proceed, my honesty will shine
12 through completely.

13 Point number 7, I don't accept at all that the conduct so far in the case has been
14 chaotic. Far from it.

15 It's basically all I have to say and thank you very much for listening to me.

16 MR JUSTICE BUTCHER: Yes. Thank you. Peter, do you have any questions?

17

18 **Questions from THE TRIBUNAL**

19 MR ANDERSON: Thank you, sir. Perhaps just one, Mr Beckett, if I may. The survey
20 report indicates that the rental of the property being proposed for security is of the
21 order of about £120,000 a year.

22 MR BECKETT: Yes.

23 MR ANDERSON: Please don't answer this if you think it's going to breach the
24 confidentiality position but I also understood you to say that none of that rental is
25 coming to you because you and your wife are relying on state pension as your only
26 source of income?

1 MR BECKETT: Correct.

2 MR ANDERSON: So, on the assumption that the funds are staying with the trustee of
3 the pension fund, presumably that trustee does have substantial assets beyond simply
4 the value of this property, since it would sound as though all of the rentals are simply
5 being accumulated?

6 You don't have to answer that because I appreciate it may intrude into confidentiality
7 but if you can then that might assist or you could submit an answer by email,
8 confidentially.

9 MR BECKETT: I'd like to submit an answer confidentially and I think you'll be quite
10 happy with what --

11 MR ANDERSON: Right, thank you.

12 MR BECKETT: Thank you very much for your time.

13 MR JUSTICE BUTCHER: No. Right. Thank you very much. Nothing else you want
14 to say, Mr Beckett?

15 MR BECKETT: No, thanks. I'm quite happy to cast myself at the mercy of the Tribunal.
16 Thank you.

17 MR JUSTICE BUTCHER: Right. Well, we will retire, as it were, and consider what
18 we're going to do. We will let you know when we're ready to resume. What is the
19 time? Yes. Which I hope will be before lunch, as it were.

20 MR BECKETT: Can I ask one last question, please? Does Mr Anderson require the
21 email immediately?

22 MR JUSTICE BUTCHER: I suspect --

23 MR ANDERSON: I appreciate that may take you a little time to provide it. It's probably
24 not fundamental to a resolution of the questions that we will debate. If you can provide
25 it promptly that would be generally helpful, but I recognise it may take a little time and
26 it's probably not central to our decision.

1 MR BECKETT: Thank you.

2 MR JUSTICE BUTCHER: Right. So we will now, as it were, go offline and we will let
3 you know when we're ready to resume.

4 (12.18 pm)

5 (A short break)

6 (12.48 pm)

7 MR JUSTICE BUTCHER: Yes. So we have carefully considered the arguments. We
8 intend to give our decision now. We will give more detailed reasons in writing as soon
9 as possible.

10 (12.48 pm)

11 **Ruling**

12 MR JUSTICE BUTCHER: We have not been satisfied that there has been a material
13 change in circumstances since our Ruling of 10 January 2025, and we have therefore
14 not been satisfied that it is appropriate to vary the order already made. And, in any
15 event, we are not satisfied that the variation proposed was appropriate.

16 We are of the view that the ongoing breaches merit the striking out of the action in the
17 sense that they are serious, have not been properly explained, and the Defendant is
18 seriously prejudiced. So, the remedy of a strike out would be proportionate.

19 We are, however, prepared to give the Claimant one further chance, so there will not
20 be a strike out today. We will order that, unless the sum of £575,000 is paid into the
21 CAT by 4.00pm on 21 March 2025 and the sum of £38,000 by way of costs is paid to
22 the Defendant by the same time, the action will be struck out without further order.

23 We should also say this: while we have previously allowed an application for relief
24 from sanctions, we are very unlikely to be receptive to an application for relief from the
25 sanction we have just mentioned in the absence of truly exceptional circumstances.

26

1 (12.50 pm)

2 MS JOHN: Thank you, sir. We're very grateful for that. That in that case brings us
3 on to the question of the costs of the applications. For these purposes, I'm going to
4 hand over, if she's here, to Ms Lukacova.

5

6 **Submissions by MS LUKACOVA**

7 MS LUKACOVA: Thank you. Members of the Tribunal, in circumstances where our
8 application has been successful and the Claimant's application has been
9 unsuccessful, the Defendant seeks its costs of the applications on the basis that they
10 follow the event. If the principle is agreed, then in that case, I will move on to the
11 schedules of costs that we filed yesterday.

12 The Tribunal ought to have before it two schedules of costs. One relates to our
13 application for strike out and then there's a separate schedule in respect of the
14 Claimant's application for the variation of the ruling. I would propose to look at the
15 strike out schedule of costs first on the basis that it is a bit simpler, a more natural
16 starting point. May I check that the Tribunal has that in front of it?

17 MR JUSTICE BUTCHER: Peter, do you have that?

18 MR ANDERSON: Thank you, sir, yes, I do. I have it on screen.

19 MS LUKACOVA: Thank you. So, this schedule relates to our strike out application.
20 The grand total is just over £32,000. Looking at the front page, there's a description
21 of the fee earners, in my submission standard for a case of this sort. The oversight of
22 the case sits with a partner at CMS, which is entirely appropriate, and then there is
23 a broader team, which again, in my submission is entirely appropriate for the purposes
24 of efficiency and effective delegation. So, we have one partner and then a number of
25 associates who have day-to-day conduct of the case.

26 In terms of the rates, I submit that they are reasonable, they're proportionate, and

1 they're reflective of the expertise that is necessary for a case of this nature. Then, we
2 have a breakdown of the various attendances, letters and so on and so forth. On
3 those, I wouldn't propose to take the Tribunal through every item unless Mr Beckett
4 has any particular points to take on any particular items, because the figures in
5 question are relatively modest, and in my submission all entirely reasonable.

6 So for these purposes, if the Tribunal could turn to page 4, which is where counsel's
7 fees have been set out, the Tribunal will note that, in this case, the Defendant has not
8 instructed a silk and has chosen to instruct a senior junior, supported by myself,
9 a more junior junior, and that is reflected in the figures, which in my submission are
10 entirely reasonable and proportionate and should be recovered in full.

11 Then, turning on to the final page, which is the schedule of work done on the
12 documents. Again, I do not propose to take the Tribunal through every item. I do have
13 one headline point to note, which is if we look at the breakdown and the distribution of
14 the work as between the more senior fee earners and the more junior fee earners, the
15 vast majority of the work on the documents has been done by grade C and grade D
16 fee earners. So, that's 34.8 hours out of a total of 43 and adds up to 80 per cent. That,
17 in my submission, is reflective of effective delegation.

18 Again, in respect of individual items, I do not propose to take the tribunal through every
19 one unless Mr Beckett has any specific points or unless the Tribunal has any questions
20 about anything in particular. They simply reflect the work that has been done in the
21 preparation and the running of this application.

22 On this schedule, those were my high level points.

23 MR JUSTICE BUTCHER: Yes. Now, I mean, the issue of course arises as to the
24 hourly rates and how they relate to the guideline hourly rates. This is a point which
25 actually cropped up in the assessment of the amount of costs for security for costs.

26 MS LUKACOVA: Yes, I understand there's a recent ruling that has only just come out,

1 and I'm afraid we don't have it in the bundle, but my understanding is that it has been
2 held that in certain cases where the litigation is complex, a figure as high as about
3 £700 was approved for a grade A fee earner. Now, these rates are of course higher,
4 but the guidance is just that, it is guidance, and in my submission, the rates are
5 reflective of the complexity of the litigation and the expertise that is required.

6 MR JUSTICE BUTCHER: What is that case? Is that a CAT case or is it a High Court
7 case?

8 MS LUKACOVA: It was a High Court case, I believe, but it has only just come out.

9 MR JUSTICE BUTCHER: Right.

10 MS LUKACOVA: I can get the reference.

11 MR JUSTICE BUTCHER: Because I noted that the decision of the Court of Appeal,
12 Lord Justice Males, said that the rates should essentially be the guideline hourly rates,
13 which was applied by the CAT in *Merricks v Mastercard*.

14 But this what you're talking about is obviously a more recent ruling than I had in mind.

15 MS LUKACOVA: It is from yesterday, 12 March 2025, costs judge allows £700 an
16 hour in biggest departure from guidelines. That was a bigger piece of litigation than
17 this, but the point stands that the guidelines are just that and these rates in my
18 submission are reflective of the complexity of the litigation and the expertise required.

19 MR JUSTICE BUTCHER: Right. Yes, you were going on to the other schedule,
20 I think?

21 MS LUKACOVA: Very well, yes. The other schedule relates to the Claimant's
22 application to vary the ruling. When we look at the descriptions of fee earners, there's
23 a slightly higher number of individuals on here and that is because, of course, the
24 Claimant has put forward a proposal in relation to a particular property and therefore
25 additional input was sought from a number of other individuals within the firm who are
26 not regularly part of this litigation.

1 So, Mr Henderson is the partner that we've seen on the other schedule, then Kelly
2 Heath the same, but then Alexander Tomlinson is a senior associate who I understand
3 is in the pensions department. Then, there's a list of names under item 4. Again, the
4 reason why that list is longer is because additional input was obtained from members
5 with expertise in property litigation.

6 The point is that it isn't that the team has suddenly grown; it is just that there were
7 good reasons to get additional input from others with other types of expertise.

8 In terms of attendances, again, the same points apply. They are modest; I don't
9 propose to go through every figure. I make the same observation in respect of
10 counsel's fees and fees for the hearing, which simply reflects the duration of the
11 hearing and the attendance by, I believe, two solicitors, so someone more senior and
12 then someone more junior, as is appropriate at a hearing of significance.

13 Then, turning on to the schedule of costs, again, I don't propose to take the Tribunal
14 through every item, but a similar observation applies in respect to the distribution of
15 work. So, for this schedule, if I run the same exercise I've run for the other schedule,
16 then the percentage of work being done on the documents by grade C and grade D
17 fee earners is 75 per cent. So again, I say that this is an example of effective
18 delegation.

19 In terms of the grand total that is on page 4, for this application, the grand total is just
20 over £50,000. I say that that is reflective of the work that has been done in terms of
21 the analysis of what was being proposed. There has been a number of letters, an
22 amount of work that necessarily comes with that sort of application. Of course also
23 evidence had to be prepared for the purposes of this hearing, which simply takes the
24 time that it takes. Additionally, there is also the cost of the additional input from the
25 pensions team and the property solicitors.

26 I adopt the same observations in respect of guideline rates.

1 MR JUSTICE BUTCHER: Yes. Is there anything else you want to say?

2 MS LUKACOVA: Not unless the Tribunal has any questions. Actually, I would simply
3 add that just looking at the guideline rates, certainly for London band A rate is £566
4 per hour. Now, Mr Henderson is, as I understand it, based in Edinburgh normally, but
5 he is performing the same sort of work here before the CAT and so I would additionally
6 submit that the difference isn't actually that significant and I would simply support the
7 rates that have been stated in the schedule.

8 MR JUSTICE BUTCHER: Yes. The grade -- Kelly Heath is below the London 1 rate?

9 MS LUKACOVA: It is, by £46.

10 MR JUSTICE BUTCHER: Yes. And ...

11 MS LUKACOVA: And then for grade C, the London --

12 MR JUSTICE BUTCHER: Grade C, there is quite a disparity.

13 MS LUKACOVA: It's £312 versus £420. Again, what I would say is that the Tribunal
14 can depart from the guidelines in appropriate circumstances and the disparity --

15 MR JUSTICE BUTCHER: It's £299, isn't it? It's £299.

16 MS LUKACOVA: For -- oh, yes, I see. Yes, I apologise, that is correct. I was looking
17 at the wrong figure. Yes. So, there is something of a gap, but nevertheless, I would
18 support the figures on the basis that they're appropriate to this case.

19 MR JUSTICE BUTCHER: But the grade D is actually slightly less?

20 MS LUKACOVA: Slightly less, and so I would submit that perhaps it balances itself
21 out overall. Some of them are a bit higher; some of them are a bit lower.

22 MR JUSTICE BUTCHER: Okay. Yes, thank you. Mr Beckett?

23 MR BECKETT: Yes. Well, I'm not represented, so I don't really have any further
24 comments to make. Thank you very much.

25 MR JUSTICE BUTCHER: Right. I think we will have to just have a discussion about
26 this, so we will have to go offline briefly.

1 MS LUKACOVA: Thank you.

2 (1.03 pm)

3 (A short break)

4 (1.11 pm)

5

6

Costs Ruling

7 MR JUSTICE BUTCHER: So, there are two applications for costs, one in relation to
8 the strike out application and one in relation to the Claimant's application to vary the
9 order as to the provision of security for costs. The sum said to be relevant for the
10 application for strike out is £32,870 in total. We consider that that is subject to some
11 adjustment, not least in relation to certain of the hourly rates which are in excess of
12 the guideline hourly rates. We propose to allow a sum there of £25,000.

13 In relation to the Defendant's statement of cost relating to alternative security, the sum
14 sought is £51,771. That does seem to us to be somewhat on the high side for the
15 nature of the application, also taking into account the fact that some of the hourly rates
16 are in excess of the guideline hourly rates. We propose to allow there a sum of
17 £37,500.

18 We should have said that it appears to us clearly right that the Defendant should have
19 their costs in relation to both of those applications, on which they have been
20 substantially successful.

21 We will say that the costs which we have just ordered should be paid within 28 days.

22 They do not form part of the condition which we have specified in relation to the strike
23 out application. They are separate from it.

24

25 (1.14 pm)

26 MS LUKACOVA: Thank you.

1 MR JUSTICE BUTCHER: Is there anything else?

2 MS JOHN: Thank you, sir. We will draw up a draft order for the Tribunal. We will also
3 run it past Mr Beckett for any comments he has, but I anticipate we should be able to
4 get that to you hopefully by the end of the week. Let's say by close tomorrow.

5 MR JUSTICE BUTCHER: Right. Thank you. Anything else?

6 MS JOHN: Nothing further. Thank you very much.

7 MR BECKETT: Nothing further from my side. Thank you.

8 MR JUSTICE BUTCHER: Thank you all very much.

9 (1.15 pm)

10 (The hearing concluded)

11

12

13