Neutral Citation Number: [2021] EWHC 2695 (Comm)

Case No: CL-2020-000686

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

CHRISTOPHER HANCOCK
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

URE ENERGY LIMITED	**Claimant**
- and -	
NOTTING HILL GENESIS	**Defendant**

- -
- -

Hugh Sims QC and James Wibberley (instructed by **Burges Salmon**) for the **Claimant.**
David Lord QC and Daria Gleyze (instructed by **Devonshires**) for the **Defendant.**

Hearing dates: 14 May 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHRISTOPHER HANCOCK SITTING AS A JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 08 October 2021 at 14:00."

Christopher Hancock QC :

Introduction and background.

1. This is an application for security for costs, dated 16 March 2021, whereby the Defendant seeks an order that the Claimant provide security for the Defendant's costs up to and including the CCMC, in the sum of £100,000.

2. The claim arises from a contract dated 29 September 2017 ("the Contract") under which the Claimant was required to supply electricity to the Defendant over a four-year period at fixed rates. The Contract had initially been a tender process for a long term contract ("the Long-Term Contract"), with the Claimant being the only bidder. However, the Defendant's procurement terms provided that the Defendant did not bind itself to enter into any contract with the selected bidder.

3. As the Long-Term Contract was only outlined in the broadest terms in the tender, it could not be entered into immediately. Therefore, the parties entered into the Contract so that the Claimant could start supplying energy to the Defendant.

4. The Contract was originally entered into between the Claimant and a housing provider called Genesis Housing Association Limited ("Genesis"). In July 2017, some 3 months before the tender processes, it is asserted by the Defendant that it had been publicly announced that Genesis would merge with Notting Hill Housing (another housing provider), to form what is now the Defendant ("the Amalgamation").

5. The Defendant contends that the progress and details of the Amalgamation discussions were made public in the following months, with an email dated 22 March 2018 being circulated to the contractors of Genesis to inform them that the Amalgamation would be effective on 4 April 2018 and inviting them to discuss any concerns or issues they had with it. The email confirmed that, upon Amalgamation, all contracts would be transferred over to the new entity, namely the Defendant. The Defendant asserts that the Claimant received the email and raised no objections.

6. The Contract provided that the Defendant would make monthly payments in arrears to the Claimant for the energy provided. There is a dispute between the parties as to whether this provision was varied to require payments in advance. In any event, it is common ground that, throughout the term of the Contract, the Defendant did make payments in advance to the Claimant.

7. As of August 2017, it is asserted that the Claimant confirmed that the Defendant had credits of £93,507.77 due to overpayments to the Claimant. It is also asserted that as of 12 October 2018, the Claimant confirmed the Defendant's calculation that the Defendant's "exposure" (being credits with the Claimant plus payments made by the Defendant on account) was £256,802.90.

8. In or around September 2018, Mr Jameson, previously procurement director, left his employment with the Defendant, and a Mr Carey, Head of Corporate and Professional Services, took an active role in relation to the Contract and the negotiations of the Long-Term Contract. Mr Carey sought to enforce payment in arrears as per the original terms of the Contract, asked that the overpayments under the Contract be credited back to the Defendant and terminated the Long-Term Contract negotiations.

Termination of the Contract.

9. By letter dated 31 October 2018, Mr Ensor on behalf of the Claimant purported to terminate the Contract with immediate effect, by reason of the termination of the Long-Term Contract negotiations, which the Defendant asserts that Mr Ensor attributed to the change in personnel following the Amalgamation. Mr Ensor also mentioned alleged difficulties in accessing meters (which it said put the Defendant in breach of clause 6.3) but linked those to the Amalgamation as well. Mr Ensor sought £3.9 million in liquidated damages under clause 10.5 of the Contract.

10. By letter dated 2 November 2018, the Claimant purported to withdraw its letter of termination of 31 October 2018 and instead requested that the Defendant remedy the alleged breach of clause 6.3 within 10 days.

11. By letter dated 7 November 2018, the Claimant's solicitors notified the Defendant that the Contract would terminate in any event at 4 pm on 14 November 2018 by reason of the Amalgamation, which they said had not been approved by the Claimant in advance. As a result, the Claimant's solicitors demanded £3.9 million as liquidated damages under clause 10.5 of the Contract. The Claimant's solicitors also mentioned the alleged breach of clause 6.3 and reminded the Defendant that it was given 10 days to remedy it (which at that stage had not expired).

12. By letter dated 14 November 2018 (sent after 4 pm), the Defendant indicated that the Claimant's purported termination was in repudiatory breach of contract, as, among others, the Claimant had affirmed the Contract following the Amalgamation. The Defendant purported to accept the Claimant's repudiation of the Contract.

13. The Claimant issued the present proceedings on 19 October 2020, with Particulars of Claim dated 19 February 2021.

The provisions of CPR Part 25.

14. CPR 25.13(1) provides for a two-stage test: (i) a jurisdictional stage and (ii) a discretionary element.

> "(1) The court may make an order for security for costs under 25.12 if-
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies; or
>
> (ii) an enactment permits the court to require security for costs."

15. The Application seeks an order for security for costs under CPR 25.13(2)(c), namely where "*the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*".

Jurisdiction.

16. In *SARPD Oil v Addax Energy* [2016] EWCA Civ 120, the Court of Appeal referred to the earlier decision in *Jirehouse Capital v Beller* [2009] 1 WLR 751 and commented that:-

> "13. It follows that it is not sufficient for the court to be left in doubt about a claimant's ability to pay the defendant's costs if the claimant loses. Nor it is sufficient as the first instance judge in Jirehouse had done to paraphrase the wording of the rule by saying that there was a sufficient danger that the claimants would not be able to pay such costs. The court must simply have reason to believe that the claimant will not be able to pay them.
>
> 14. That is, as Arden LJ said, a matter of evaluation …."

17. Mr Sims QC, for the Claimant, did not seek to challenge this statement of general principle, which I accept. The insolvency or impecuniosity of the Claimant was not disputed. By 31 July 2019 it had negative funds in excess of £1m, and it has ceased to trade and may need to enter into a CVA to preserve its position pending resolution of this claim. In these circumstances, Mr Sims QC was content to accept, before me, that, despite the existence of an ATE insurance, of which I will say more later, I had jurisdiction to order security. He reserved the right to revisit this if the matter came before the Court on a further application. Mr Lord QC was prepared to proceed on this basis.

Discretion.

18. It follows that the issue before me is whether, as a matter of discretion, I should order security. In this regard, the Claimant submits that I should not, since:

    1) The claim has merit, and the Court should not seek to conduct a mini-trial at this stage;

    2) The Claimant has taken out an ATE insurance, and this gives the Defendant sufficient security, particularly since the insurers have agreed in principle to make the cover available to the Defendant;

    3) The Claimant's shareholders are not prepared to fund the litigation and funding cannot be procured so that the claim will be stifled if an order is made;

    4) The Claimant's financial situation has been caused by the Defendant's wrongdoing;

    5) The Defendant has a counterclaim based on essentially the same facts and it would be unjust to allow the counterclaim to continue without security whilst requiring security from the claimant.

19. The Defendant submits that I should order security, since:

    1) The claim is not made bona fide;

2) The claim has no reasonable prospect of success;

3) There has been no payment in;

4) There has been no admission of liability;

5) The ATE insurance does not have anti-avoidance provisions and thus does not give adequate security;

6) The unwillingness of shareholders and others to fund the litigation militates in favour of the grant of security;

7) It is clearly not the case that the Claimant's financial situation is due to the Defendant since the Claimant has always been insolvent;

8) The Defendant is willing to agree to discontinue its counterclaim if the claim does not proceed.

20. This latter list of relevant factors is essentially based on the decision of the Court of Appeal in *Sir Lindsay Parkinson & Co v. Triplan* [1973] QB 609. I deal with each of these matters in turn, beginning with questions relating to the merits.

The merits of the claim.

21. In my judgment, it is not appropriate for me to seek to look at the merits of the claim in detail. I take the view that the claim is not hopeless; nor is it bound to succeed. In such circumstances, now is not the time to review the merits: see for example *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (CA); Commercial Court Guide, at Appendix 10, paragraph 4.

Impecuniosity caused by breach?

22. I turn next to the allegation that the financial state of the Claimant is due to the breach of which it complains. The Defendant contended that this was not possible, since the Claimant was at all times insolvent. The Claimant's riposte was that, as with many new ventures, this contract was a loss leader, with investment made at the outset which would be made up over time, but that this had been prevented from happening due to the Defendant's breach.

23. In my judgment, for the same reasons as it is inappropriate to go into the merits of the claim in any but the clearest case, it is inappropriate to investigate this type of argument on an application such as the present one. I agree in this connection with the observations of Marcus Smith J in *Absolute Living Developments (In liquidation) v DS7 Limited & Others* [2018] EWHC 1432 (Ch), where he said that:

> "15. Again, there may well be something in this contention, but the same reasoning that I applied in relation to the first factor applies to this third factor. In a straightforward case, where the merits can easily be discerned and stated, it is likely also that the reason for the claimant's want of means will similarly be clear. But in a case as complex as this one, I do not consider that I can

> appropriately conclude that the fact that the Claimant is now in liquidation is down to the Defendants' breach of duty as alleged by the Claimant. If, of course, the various payments at issue in this case were made legitimately, then I do not consider that it could properly be said that the Claimant's want of means was brought about by the Defendants' conduct."

The relevance of the counterclaim.

24. The presence of a counterclaim might also have been a material consideration, though in its evidence in reply (the point having been raised by the Claimant in its evidence in response) the Defendant has confirmed it would undertake not to proceed with the counterclaim if an order were made so this point becomes of little relevance.

Stifling the claim.

The Claimant's submissions.

25. Under this head, the Claimant contended that:

1) Where a claimant is likely to be forced to abandon a claim with real prospects the court is entitled to refuse to make an order: see *Aquila Design (GRB) Products Ltd v Cornhill Insurance Plc* [1988] BCLC 134 CA.

2) In this connection, it is sufficient for a claimant to show there is a probability that it will not be able to pursue a claim if security is ordered, and the test is not one of certainty: see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263, CA.

3) In the corporate context the Court must consider not only whether the company is unable to pay but also whether it is likely to be able to raise the money from other sources, for example directors, shareholders or other potential funders; see *Keary Developments Ltd v Tarmac Construction Ltd*, ref supra.

4) However if evidence is adduced showing that a shareholder is not willing to fund, then the Court should not take into account whether they could do so: see *Goldtrail Travel Ltd v Aydin* [2017] UKSC 57, where, as summarised in the headnote, the Supreme Court decided that:

> "a condition on the grant of permission to appeal which would probably have the effect of stifling an appeal, in the sense of preventing the appellant from bringing or continuing it, should not be imposed; that, where a company which appeared to have no realisable assets of its own with which to satisfy an award of damages against it claimed that the imposition of such a condition would have that effect but the respondent alleged that the company had access to the resources of others, the court had to determine whether the company had established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy such a condition;

> that such test fell to be applied without examination of whether the circumstances were "exceptional" and required the taking of proper account of the parties' distinct legal personalities; but that the court ought not to take at face value any refutation by the company that the necessary funds would be made available to it, but rather was to judge the probable availability of the funds by reference to the underlying realities of the company's financial position, looking at all aspects of its relationship with its owner including the extent to which he had previously been, and was currently, directing its affairs and providing financial support".

26. The above case law was considered and approved, in the context of a claim brought by an insolvent company, by Marcus Smith J in *Absolute Living Developments (In liquidation) v DS7 Limited & Others*, ref supra, at [22]-[24], where it was emphasised that the court is primarily focussed on the company's ability and it will be slow to criticise third parties for being unwilling to contribute funds and will not tend to second guess whether creditors could fund a claim in circumstances where a company has become insolvent.

27. Applying these principles to this case, the Claimant submitted that it is clear that the order sought would be oppressive and the likelihood on the evidence before the court was that if made it would stifle the claim:

    1) Firstly, it was not in issue that the Claimant would be unable to pay a costs order in favour of the Defendant if ordered to do so following trial.

    2) Secondly, the shareholders, or indirect shareholders, and directors, or former directors, on the evidence, either cannot or will not fund the claim.

    3) Thirdly, the creditors are highly unlikely to pay the required monies either, as the evidence makes clear.

    4) Fourthly, existing sources of indirect support – from the lawyers and ATE providers will not yield a solution.

    5) Fifthly, the commercial dynamics and maximum value of the claim and the cost of funding are such that third party funding, beyond the current ATE policy, is not an option, as is stated by the Claimant's solicitor.

<u>The Defendant's submissions.</u>

28. Conversely, the Defendants submitted that it is insufficient for the Claimant simply to allege that it would be deterred from pursuing its claim by an order for security for costs:

> "The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security…By making the exercise of discretion… conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the

> order might be made in respect of a plaintiff company that would find difficulty in providing security…"

(*Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC) at paragraph 13, citing *Keary Developments Ltd v Tarmac Construction Ltd*, ref supra).

29. It is instead, the Defendants contended, for the Claimant to demonstrate that it cannot raise the necessary funds for security for costs, either by itself or through third parties:

> "The court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it will be prevented by an order of the security from continuing the litigation."

(*Michael Phillips* ref supra at paragraph 13, citing *Keary Developments Ltd v Tarmac Construction Ltd*).

30. The position was explained in *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 at paragraph 31:-

> "An important consideration, especially having regard to the need to equality of arms under the CPR and the Claimants' rights of access to justice under Article 6 of the European Convention, is whether the order sought or indeed any order for security for costs will have the effect of stifling their claim. That is a major factor in the present case, I need to remember, however, that it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not."

31. To similar effect were the comments of Knowles J in *GL v PM* [2018] EWHC 3502 (QB) at paragraph 34:

> "Where a party opposes the making of an order for security or seeks to limit the amount of security by reason of their impecuniosity, the onus is on them to put proper and sufficient evidence before the court and that, in doing so, they should make full and frank disclosure. This approach is derived from the principle set out in the House of Lords decision in *MV Yorke Motors v Edwards* [1982] 1 WLR 444, 449-450, where Lord Diplock emphasised the need for sufficient and proper evidence by observing that, for example, the existence of a legal aid certificate with a nil contribution would not amount to sufficient

> evidence. Lord Diplock observed that the party claiming impecuniosity and consequential stifling of the claim must demonstrate, not that security would be difficult to meet, but that security would be 'impossible to fulfil'."

32. Therefore, "*where a respondent opposes the making of an order for security or seeks to limit the amount of security by reason of their own impecuniosity, the onus is upon them to put proper and sufficient evidence before the court, and in doing so, they should make full and frank disclosure (MV Yorke Motors (A Firm) v Edwards [1982] 1 W.L.R. 444; [1982] 1 All E.R. 1024, HL). If they give an incomplete or misleading account of their resources, the court may, in exercising its discretion, set an amount which represents the court's best estimate of what they can afford*".

33. In this case, it is said that the Claimant has alleged that it is unable to raise funds to provide any security. However, it has provided only very general assertions about its resources and the availability of funding from other parties.

34. The Defendant's position was that the Claimant has failed to prove its inability to provide security:

    1) The Claimant has not provided any evidence of attempts to obtain a commercial loan or funding from litigation funders. Mr Cripps appears to imply that the Claimant has not even sought a loan.

    2) The Claimant has not provided any particulars of the Claimant's creditors, other than a list of names. It is unknown what amounts and in respect of what liability they are owed.

    3) The Claimant claims that it has contacted all its creditors to ask them for support, but the evidence provided does not show who has been contacted. Only 2 out of 20 alleged creditors have replied. The Claimant has not provided any evidence of chasing emails or correspondence.

    4) The Claimant has not provided any details of the Claimant's backers or funders and of any attempts to contact them. The Claimant has not provided any confirmation that there are no such backers or funders either.

    5) It is said that the Claimant's directors and/or shareholders, being Messrs Cripps, Coombs and Ensor, are "*unwilling or unable to make a payment into Court on URE's behalf*", as opposed to being simply "*unable*" to do so. If the Claimant is unwilling to provide security when such is required, then it is right that its claim should be struck out.

    6) As for the alleged inability to provide funding, none of Messrs Cripps, Coombs or Ensor has provided particulars and/or evidence of their income and liabilities, despite being expressly asked to do so by the Defendant.

    7) The Defendant's own Internet research has revealed the following, which indicates that the Claimant's directors and shareholders are persons of some means and experienced businesspeople:

a) Mr Cripps appears to live in an 8-bedroom property estimated at £2.6 million;

b) Mr Cripps' likely salary, based on his statement that he is an associate partner at Ernst & Young, is around £137,000 to £191,000 per year;

c) Mr Coombs is reported in the press to be "*a prolific businessman*", and "*a director of dozens of companies*";

d) Mr Coombs is registered as the person with significant control and the majority shareholder of Vectorcide International Ltd, whose latest accounts show shareholder funds of £2.5 million.

8) It is inherently implausible that, if the claim was as strong as the Claimant contends it is, the Claimant would not find litigation funders.

35. In the circumstances, the Claimant has failed to overcome the burden that it does not have the means (or could not find the means) to provide security for costs in the full amount requested by the Defendant, which at this stage is £100,000 (alternatively pay the premium for a suitable Deed of Indemnity that would guarantee the payment of the Defendant's costs and could not be set aside or proved worthless, unlike the ATE insurance I consider below).

Discussion and conclusions.

36. It is clear that the underlying principles are not really in dispute between the parties. The question for me is whether I am satisfied on the evidence before me that, on the balance of probabilities, the making of an order for security in the amount that is sought will stifle the claim, because the company will not be able to find the money to meet that security.

37. Here, I have concluded that the evidence is not sufficiently complete to enable me to draw this conclusion, and that the Claimant, on whom the burden must lie, has therefore not established on the current evidence that its claim would be stifled in the event that an order for security is made. I reach this conclusion for the following reasons:

1) I have no reason to doubt the evidence of Mr Burnette that it is not possible to obtain litigation funding or loan funding for the claim.

2) This leaves in effect the shareholders of the company and the creditors of the company. I deal first with the shareholders;

a) Mr Ensor is a bankrupt and there is no suggestion that he is able to provide funding.

b) The clear evidence of Mr Cripps is that he either cannot or will not fund the litigation. Although the Defendant attacked this evidence on the basis that there was some evidence that Mr Cripps had substantial income and assets, I do not feel able to effectively disbelieve Mr Cripps. Moreover, even if Mr Cripps has assets, the fact that he does not wish to use up those assets in relation to this claim would mean that the company – with

whose finances I am concerned, as is emphasised by the decision in *Goldtrail*, is unable to find the funding.

c) The position of Mr Coombs is more unsatisfactory, simply because I only have second hand evidence here. Nevertheless, that evidence does indicate that Mr Coombs does not have funds and would thus not be able to fund the action and, again, it is with the company that I must be concerned.

3) That leaves, in essence, the creditors. It is in this regard that I take the view that the evidence is unsatisfactory, for the following reasons:

a) The starting point is that this action is primarily, at least, for the benefit of the creditors, since it represents the only asset that the company has and is thus the only likely source of income with which to repay creditors.

b) In those circumstances, as the Defendant pointed out, it might be expected that the creditors would provide funding, as part of the CVA which I was told was in anticipation, in order to enable the company's only asset to be recognised.

c) Despite this, the evidence from creditors was very limited. Although an email had been sent to the creditors in relation to the possibility of providing funding, the term of that email suggested that the response should be negative. Moreover, I was only shown two responses. I think it is impossible for me to conclude that, on a fuller approach to creditors, which was not couched in negative terms, inviting the creditors to refuse funding, that funding might not be provided.

38. Overall, therefore, I have concluded that on the basis of the current evidence – and I emphasise that I can only work on the basis of the evidence before me – the Claimant, on whom the burden rests, has not satisfied me that an order for security would stifle the claim.

The ATE policy.

39. Finally, I turn to the ATE policy.

The Defendant's submissions.

40. The Defendant accepts that, in principle, a court can take into account an ATE policy when deciding whether it should order security for costs, but in doing so it should consider the terms of the policy in question, with the guiding principle being whether it gives "sufficient protection" to the Defendant so that there is no reason to believe that the Defendant would be out of pocket if the Claimant is ordered to pay its costs (see *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872 at paragraphs 19-22), where the Court of Appeal said this:

> "19. It is, in a sense, unfortunate that the court's jurisdiction to order security for costs should depend on a detailed analysis of a

claimant's ATE insurance policies into which the defendants have had no input and which they have no direct right to enforce. That is particularly so when the authorities discourage investigations into the merits of the proceedings and disapprove of security for costs applications being blown up "into a large interlocutory hearing involving great expenditure of both money and time": see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 , 423E, per Sir Nicolas Browne-Wilkinson V-C.

20. But I fear that such analysis is inevitable. There is little appellate authority on the topic but such as there is does support the proposition that an appropriately framed ATE insurance policy can in theory be an answer to an application for security. In para 60 of *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 , in which the claimant was resident abroad and security was refused on other grounds, Mance LJ with whom Simon Brown LJ agreed said in an obiter passage:

'The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere.'

21. In *Al-Koronky v Time-Life Entertainment Group Ltd* [2007] 1 Costs LR 57 where security was ordered against claimants resident out of the jurisdiction, Sedley LJ giving the judgment of the court said:

'35. A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.'

'36 In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective.'

> 22. These authorities do not in terms touch on the question of jurisdiction but do give credence to Mr Sims's submissions that ATE insurance can, in principle, be taken into account at any rate if it gives the defendant "sufficient protection" to use Sedley LJ's words. If it does give that sufficient protection, then there will not be "reason to believe" that the company will be unable to pay the defendant's costs if ordered to do so and there will therefore be no jurisdiction to make an order."

41. It is contended that the burden is on the Claimant to satisfy the Court that the ATE Policy provides adequate security, and it must show that the policy cannot be readily avoided:

> "It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs."

(*Michael Phillips* ref supra [2010] EWHC 834 (TCC) at paragraph 18).

42. Where an ATE policy contains no anti-avoidance provisions of the kind referred to above, the Defendant argues that the Court does not attempt to speculate as to whether or not the insurer will avoid liability: see *Premier Motorauctions* ref supra at paragraph 27:

> "27. Again I cannot with respect agree. Of course it does not follow that insurers would avoid but the difficulty is that neither the defendants nor the court has any information with which to judge the likelihood of such avoidance. One knows that ATE insurers do seek to avoid their policies if they consider it right to do so: see *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc* [2011] Lloyd's Rep IR 101 in which a successful defendant was unable to recover its costs from ATE insurers. The landscape after trial may be very different from the landscape as it appears to be at present and it is unsatisfactory to have to speculate."

43. The Defendant further contends that even where a court is provided with the placing information put before the insurers, it is unlikely that a court will be able to be satisfied that the prospect of avoidance is "*illusory*", with the result that there will remain reason to believe that the company will be unable to pay the defendant's costs if ordered to do so: see *Premier Motorauctions* ref supra at 29, where the Court of Appeal said that:

> "even if that had been provided, it is unlikely that the court could be satisfied that the prospect of avoidance is illusory. Even at the jurisdictional stage of considering security for costs, the defendants must, as Mance LJ said in the *Nasser case* [2002] 1 WLR 1868 , para 60, "be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure".

44. In considering an insurer's ability to avoid coverage for non-disclosure of material facts, it is argued that it is not fruitful for a court to speculate on what amount to material facts, but

> "matters found within disclosure or matters that subsequently emerge through witness evidence could easily be relied upon by the insurer as material facts which had not been disclosed to it prior to inception of the policy and which could give rise to avoidance":

see *Lewis Thermal Ltd v Cleveland Cable Company Ltd* [2018] EWHC 2654 at paragraph 36.

45. The Defendants also point out that a further example of where an ATE policy does not provide adequate security is where there is a risk of insolvency of the claimant "s*o that the funds, effectively, go to his creditors and are not available for the defendant's costs*", particularly where there is no deed or guarantee from the insurer to the defendant, the Contracts (Rights of Third Parties) Act 1999 is excluded or the policy provides that someone who is not a party to the insurance contract has no right to enforce any term of the policy, giving rise to a real risk that the defendant (who cannot make a direct claim under the policy) could become an unsecured creditor in respect of its outstanding costs (see *Lewis* ref supra at paragraphs 20, 22).

46. Turning to the facts of this case, it is contended that the ATE Policy plainly does not provide sufficient protection to the Defendant:

1) Clause 2 of the ATE policy contains a large number of exclusions, all outside of the Defendant's control, which would entitle the insurers to refuse to pay any claim "*caused or attributable to*" those exclusions. These include:

    a) The Claimant's failure to co-operate with or follow its lawyers' advice;

    b) Any material delay or default caused by the Claimant or its lawyers;

    c) Any failure by the Claimant or its lawyers to comply with PAPs, orders or the CPR;

    d) The Claimant's inability to fund the Claimant's own disbursements or legal costs. This is particularly relevant where the terms of the CFAs have been requested but the Defendant has refused to provide them. In the premises, it is not known in what circumstances the Claimant's lawyers will be entitled to cease acting. This would leave the Claimant, on its own evidence, unable to comply with funding its own disbursements and legal costs;

    e) The Defendant's application for security for costs;

    f) A very wide range of actions which the Claimant may take in the litigation (such as making or opposing applications or continuing the litigation against advice) without prior written approval by the insurers' case manager. This exemption is noteworthy, the Defendant has no

means of knowing or verifying if the Claimant's every action in the proceedings was pre-approved by the insurer's case manager.

2) Clause 3 of the ATE policy sets out several conditions precedent to liability, which include obligations in respect to the Claimant's original proposal and ongoing obligations of disclosure. This clause provides, inter alia, that the policy is automatically suspended (with no liability for the insurer) for periods where there are failures to disclose material facts. The circumstances in which the Claimant obtained this policy and the Claimant's continued compliance with its disclosure obligations towards its insurer are matters outside of the knowledge and control of Defendant.

3) Clause 4 contains further (and wide-ranging) obligations for the Claimant to keep its insurer appraised of developments in the litigation and of ongoing assessment of prospects of success and to manage and/or conduct the case in certain ways (for example, to always oppose summary assessment of the Defendant's costs). Clause 6.2 of the ATE policy allows the insurer to cancel the policy with immediate effect from the date of any breach under clause 4.

4) Clause 11 excludes rights under the Contracts (Rights of Third Parties) Act 1999 so that the Defendant does not have a direct right against the insurer and would be reliant on the Claimant putting a claim to the insurer.

5) Clause 12 provides for the policy to be cancelled "from the outset", with the entitlement for the insurer to recover all payments already made, in the event of a finding of fraud or dishonesty against the Claimant (if the Claimant made a claim which is "dishonest in any way"). The Defendant alleges that it has serious concerns regarding the honesty of the Claimant via Mr Ensor who established the Claimant, and is now an undischarged bankrupt who has been registered as a company director while being barred from doing so by reason of his bankruptcy. It was further argued that his evidence as to what transpired at a meeting of 13 September 2017, prior to the written contract being entered into, would be key, so that there was a real risk that the action might fail because of a finding that he had been dishonest.

6) Clause 15 subjects the policy to a pro-rata condition of average. The insured liability of opponents' costs is £500,000 whereas the Defendant's estimated costs are, it is asserted, in excess of £1,000,000.

47. The Defendant has requested a Deed of Indemnity, but none has been provided. In his evidence, Mr Cripps states that the Claimant could not afford to pay the premium for a Deed of Indemnity and that its directors or shareholders are "*unwilling or unable*" (emphasis added) to provide monies.

48. The Claimant has suggested that its insurer would provide an endorsement to the ATE Policy to allay concerns in relation to monies for its costs being paid to the Claimant and then going to the Claimant's other creditors. A draft endorsement was exhibited to Mr Cripps' statement but, to date, it was said that no signed endorsement has been provided to the Defendant. I was however informed at the hearing that this endorsement has now been agreed.

49. In summary, the Defendant submitted that, as can be seen from the above, the ATE Policy can be cancelled for a variety of reasons, both prospectively and retrospectively, from the Claimant's failure to comply with orders or fund its own legal costs and disbursements, to the Claimant's omissions in disclosing information to its insurer and decisions to carry on with the litigation without prior approval by the insurer, and to the Claimant being found to have been in any way dishonest at trial.

The Claimant's submissions.

50. For its part, the Claimant submits that the existence of the ATE policy shows that it is acting responsibly in relation to the Defendant's costs and that there is no real risk of the policy not responding. Thus, it has obtained cover from AmTrust (AmTrust Europe Ltd) an A-rated insurer, with a policy which provides cover up to £500,000 for adverse costs. It has also obtained the agreement in principle of AmTrust for the draft endorsement to be made (an agreement which, as I have stated, I was told has been confirmed), which will confirm that which is obvious: that the Claimant's solicitors would, in the event of an adverse cost order being made against the Claimant to which cover responds, pay the monies to the Defendant. The Claimant argues that it has made clear that it cannot afford to pay for a deed of indemnity.

51. It is said that *Premier Motorauctions* can be distinguished from this case because:

    1) The risk of avoidance in *Premier Motorauctions* was far more likely. The policy in *Premier Motorauctions* was subject to the Marine Insurance Act 1906 (the "1906 Act"); the ATE Policy is subject to the Insurance Act 2015 (the "2015 Act"). The 1906 Act was replaced by the 2015 Act because it was widely considered too insurer-friendly in that insurers could avoid liability too easily. Under the 2015 Act :

        a) The remedy for an insured's non-disclosure now depends on the nature of the breach. Before avoiding the contract, an insurer must first establish whether the non-disclosure was deliberate and second, whether it would have entered into the contract but for the non-disclosure; and

        b) A breach of warranty by the insured no longer automatically discharges the insurer's liability, and the insurer now remains liable for acts arising before the breach of warranty occurred and after it has been remedied;

        c) Even if there has been a non-disclosure (which is denied), avoidance does not automatically follow.

    2) In *Premier Motorauctions*, the evidence of one individual was central to the conspiracy element of the Claimant's case. If the Judge rejected that evidence, the Claimant's case would not get off the ground and there was some discussion as to whether the insurer could avoid cover in that situation (although no definitive conclusion was reached). This claim, in contrast, will turn primarily on an analysis of the Contract and other documents. There will be evidence from at least two witnesses, with the key witness evidence from a former employee of the Claimant with no vested interest in the success or otherwise of the claim. The fate of the Defendant's costs does not rest on the account of one witness

with a strong connection to the claim. The suggestion that the meeting of 13 September 2017 will be crucial is misconceived.

3) In contrast to *Premier Motorauctions*, there is little mystery over how the landscape observed by AmTrust after trial will vary from the landscape at present. AmTrust provided the ATE Policy knowing that the Claimant was impecunious.

52. ATE policies remain of relevance, and in some cases decisive relevance, when it comes to the exercise of discretion: the prevailing modern practice is to treat them as providing security commensurate with a broad assessment of the likelihood of there being an avoidance or other problem with recovery under the insurance. Thus, in *Bailey v GlaxoSmithKline UK Ltd* [2018] 4 WLR 7 (Foskett J), the judge said this, at paragraphs 63 to 71 and 79:

> "63. The debate at the hearing of the application was overtaken by the decision in *Premier Motorauctions* (see para 7 above).
>
> 64. I have received detailed written submissions from the defendant and MLS about the effect of the decision and about its impact on the present application. I propose to deal with these matters relatively briefly.
>
> 65. The focus of the *Premier Motorauctions* case was to determine whether the ATE policy in place for the claimant in that litigation provided "sufficient protection" to the defendant in relation to costs in the event of the claimant's case failing. The Court of Appeal recognised (at para 20) "that an appropriately framed ATE insurance policy can in theory be an answer to an application for security", but equally confirmed (as Mance LJ had said in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 WLR 1868 , para 60) that a defendant would be "entitled to some assurance as to the scope of the [ATE] cover [and] that it was not liable to be avoided for misrepresentation or non-disclosure": para 29.
>
> 66. In *Nasser* the grounds upon which the insurer could avoid the policy for non-disclosure or misrepresentation were restricted to a situation where the "non-disclosure was fraudulent". As Longmore LJ said in relation to that provision in *Premier Motorauctions* , at para 31:
>
> 'Insurers could therefore avoid for fraud but not otherwise. It may not be a particularly difficult exercise for a judge to assess the likelihood of avoidance if the right to avoid is confined to fraud but, where there is no anti-avoidance clause of any kind, the exercise is very much more difficult and the defendants' need for the assurance to which Mance LJ referred is all the greater'
>
> 67. In *Premier Motorauctions* the Court of Appeal held that, on the facts, the defendants could not receive the required

reassurance and that the prospect of avoidance was not "illusory": para 29.

68. In the present case there is no anti-avoidance clause in the insurance contract. Whilst that of itself does not preclude the efficacy of the ATE policy in this case, it does bring into play Longmore LJ's observation referred to at para 66 above. Furthermore, the defendant draws attention to certain provisions in the contract (a redacted version of which has been disclosed), including the following: (a) clause 3.1.1 is a condition precedent to the insurer's liability under the policy, namely, that the proposal "was made following reasonable and diligent investigation of the facts, information and evidence relevant to [the claimants'] solicitors' assessment of success in the litigation" and that the claimants "have included in [their] proposal all matters relevant to the provision of cover under this policy"; (b) clause 3.1.2 is also a condition precedent under the policy which requires "[the claimants'] solicitors [to] have prepared (and … disclosed in the proposal) a reasoned estimate of the costs of [the claimants] and [the defendant]; (c) clause 5.2 permits cancellation if the insured failed to meet the obligations in clause 4 concerning the conduct of the litigation including clause 4.1.6 which requires the claimants' solicitors to inform the insurer "as soon as reasonably practicable of any change in [the solicitors'] appraisal of [the] prospects of success in the litigation".

69. A copy of the proposal has not been disclosed (doubtless for good reason) and it is not, therefore, possible to evaluate the statements made to the insurers on behalf of the claimants by their solicitors about the prospects of success and/or in respect of the costs assessments and thus to determine whether they were accurate or complete. I have previously expressed concern that the claimants' legal team appear to have had an unrealistic appreciation of the likely level of damages, assuming liability is established (see [2016] EWHC 1975 (QB) at [7]--[20]), and that an unrealistic attempt was made to expand the scope of the forthcoming trial (see [2017] EWHC 377 (QB) at [20]--[24]). The apparently less than wholly accurate way in which certain things about the funding of the litigation (see paras 23--43 above) have been expressed leads to a sense of unease about how watertight everything is within the claimants' camp even though I accept Mr Carpenter's point that no one within FL or within the group of claimants would have any interest in obtaining a worthless ATE policy. Equally, there has been no hint that the ATE insurers have as yet felt that there are grounds for avoiding the cover and it is to be observed that a fair amount of the "loose" talk to which I have referred was some while ago.

70. However, for the reasons foreshadowed in the preceding paragraph, I do not think it is possible to discount as illusory the

> prospect of the avoidance of the ATE insurance cover at some stage. Since it is not an issue that arises at the jurisdiction stage (as it did in *Premier Motorauctions*), the issue is to what extent can or should it be reflected in the discretionary, balancing exercise. The defendant argues that I should "disregard (alternatively … give limited weight to), the existence of the … ATE policy when exercising [my] discretion as to the appropriate quantum of security to be ordered." MLS (supported by the claimants) contends that I "should conclude that the ATE policy gives [the defendant] sufficient protection in relation to £750,000 of its costs" or, alternatively, that I
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> 'should ascribe some value to the policy as part of the exercise of discretion [and if] … there is some risk [of avoidance], then [I should] reduce the amount of security which [I] might otherwise order by an amount below £750,000 to reflect those contingencies.'
>
> 71. It appears to be recognised by all sides in the case that this is another area where a broad discretionary exercise is called for. For my part, I can see no other alternative. I will return to that exercise when I have reviewed briefly the costs structure around which the defendant submits that I should carry out this exercise….
>
> … 79. MLS argues that the whole of the £750,000 under the ATE policy should be deducted; the defendant says that none of it should be deducted. Given the considerations to which I referred above (see paras 68--69) I consider that the risk of the ATE policy being avoided at some stage can be reflected by deducting two-thirds of the sum of £750,000 (namely, £500,000) from the amount of security otherwise to be provided. This reflects my assessment that it is more likely that the policy will remain intact and remain available for the payment of part of the defendant's costs if the defendant is successful, but that there is a more than minimal risk that it will not remain intact."

53. In that case, the ATE Policy was assessed as providing adequate security for 2/3 of its face value. This approach was followed more recently by Nugee J (as he then was) sitting at first instance in *Rowe and other v Ingenious Media Holdings plc and others* (which went to the Court of Appeal on other grounds, without that aspect of the judgment being subject to any challenge or criticism): see [2021] EWCA Civ 29 at paragraph 11, where it is stated that:

> "11. The Judge gave a further written reasoned judgment on 10 February 2020 ("the February Judgment"), in which he determined that Therium should provide security for costs. He rejected Therium's arguments that there was no real risk that an order for costs against it under s. 51 of the Senior Courts Act 1981 would not be met, for the reasons he had articulated in his

> oral judgment in November. Therium had argued that three sources would be sufficient to meet any such liability, namely Therium's own resources, the ATE policies taken out by the Claimants and the resources of individual Claimants. As to Therium's own resources, the two relevant Therium companies were Jersey cell companies and no financial information was provided in respect of them or any other member of the Therium group. In relation to the ATE policies, he held that there was a real risk that they would not respond in full, but treated a proportion of the cover as amenable to enforcement of a costs order against the Funded Stewarts Claimants, so as to reduce the amount of security he would order. He determined that the shortfall for which Therium should provide security was a total of £3.95m (split £1.85m in favour of the Ingenious Defendants; £600,000 for HSBC; £950,000 for UBS; and £550,000 SRLV). The sums were subsequently varied by paragraph 3 of a consent order dated 13 July 2020 to a total of £2.69 million."

54. Applying this approach, I was invited to note the following points when assessing what percentage deduction, if any, should be applied to the cover limit of £500k:

    1) Firstly, there is and can be no argument that AmTrust is good for the money.

    2) Secondly, any concern that the money would not be paid to the Defendant is illusory but the Claimant has confirmed it will procure an endorsement from AmTrust if this is considered necessary. As I have stated, I was told at the hearing that this had been done. It has now been provided to NHG.

    3) Thirdly, any avoidance or cancellation risk is also illusory – the Claimant is represented by experienced solicitors and counsel who have consulted with AmTrust at all times and will continue to do so.

    4) Fourthly, any alleged avoidance or cancellation risk based on alleged reliance on Mr Ensor is clutching at straws – no sensible counsel or insurer relies heavily on oral testimony, and it can be readily seen that the issues in this case are likely to involve consideration of a mixture of contemporaneous documentation, legal principle and with oral evidence likely providing only a modest role at trial.

    5) Fifthly, in most of the reported cases the courts have in these circumstances assessed the policies as having (cf *Bailey* ref supra) value commensurate with a high percentage – that would easily cover the sum suggested by the Defendant on this application.

Discussion and conclusion.

55. The starting point, in my judgment, is the fact that, despite the existence of the ATE insurance, I have jurisdiction to grant security, but that I am entitled to take the ATE insurance into account in the exercise of my discretion. Although Mr Lord QC at one stage tried to suggest that the insurance was only relevant to jurisdiction, in my view it is clear that this is not the case. This is apparent from the *Premier Motorauctions* case itself, where the Court of Appeal, at paragraph 23, said:

> "23. Since it will be inevitable that the question whether ATE insurance gives sufficient protection to the defendant has to be decided at the discretionary stage in any event, it will not perhaps be too troubling to have to determine the question at the jurisdiction stage."

56. In addition, the cases of *Bailey and Rowe*, cited above, support the above conclusion.

57. The question that I have to address under this head is what, on the basis of the current facts, the risk is that the policy will in fact not provide sufficient protection to the Defendant. The answer given in the earlier cases is that if appropriate allowance can be made to reflect the risk that the policy will not respond, then security may be reduced to take account of the existence of the policy. In this case, the question is whether, at a time when a limited amount of security is sought, the risk that the policy will not respond is one which militates against the grant of any security at the current time.

58. I have concluded that, on balance, the insurance currently in place does provide adequate security for present purposes, but that this conclusion will need to be revisited at the stage of the CCMC, in conjunction with consideration of any applications that may be made for summary determination (both parties having indicated that they are thinking of such applications), and in conjunction with a more informed consideration of the likely costs of the action.

59. My reasons for concluding that no security should currently be ordered are as follows:

    1) I accept that, under the 2015 Act, as regards avoidance properly so called, the position is materially different from that which appertained under the 1906 Act, with the result that it is likely to be far more difficult for the insurer to avoid for non-disclosure.

    2) However, as Mr Lord QC rightly pointed out, the terms of the insurance provide ample room for the insurers to refuse to respond to a claim in appropriate circumstances. Thus, clause 2 provides that claims due to certain causes are not covered, including, by way of example, claims due to an inability to fund an order for security for costs, and claims due to negligence of the Claimant's solicitors or failures to follow advice; that certain terms are to constitute suspensory conditions precedent, such that insurers' liability is suspended from the time of breach until the time of remedy, if a remedy is possible; clause 4 provides for a number of general conditions, in the main relating to cooperating with insurers and keeping insurers informed of the progress of the claim and its prospects of success, breach of which entitles the insurers to cancel the insurance with effect from the date of the breach; and clause 12 providing for the ability of insurers to refuse to pay in the event of a finding of dishonesty on the part of the Claimant. The risk that the Claimant may commit a breach of these terms leading to an entitlement to cancel the policy has to be weighed up.

    3) In my judgment, there are a number of indications suggesting that the policy will not fail to respond.

a) The litigation is being conducted on the basis of CFAs, meaning that it is in the interests of the lawyers and the Claimant to ensure a successful outcome.

b) I was told that the premium for the ATE insurance was wholly deferred, so that insurers would also wish a successful outcome.

c) It is in the best interests of the Claimant to ensure that the steps necessary to preserve the sanctity of the policy are taken during the litigation.

d) The initial presentation was made by the legal team, as I understand it, or at least with the assistance of the legal representatives. Hence it is more likely that that presentation will have been accurate and fair.

e) Insurers are, as I understand it, being kept fully informed of the progress of the litigation.

f) Insurers have agreed to the loss payee clause, so that the Defendant, whilst not a party to the insurance, has the benefit of any payout under the policy. If there is any doubt as to the existence of that loss payee clause, then I would make it (and do make it) a condition of refusal of security that a draft acceptable to the Court is produced and executed.

60. In these circumstances, in my judgment, the correct approach for me to adopt is that advocated by Foskett J and Nugee J, namely to discount the amount of security ordered to take appropriate account of the value of the ATE insurance, bearing in mind the possibility that there may be termination or cancellation, but bearing in mind also the commercial likelihood that this may happen, in the light of the various parties' respective interests in the litigation.

61. In this case, I would regard the insurance as providing sufficient security to cover the sum of £100,000 claimed in respect of the Defendant's costs in the limited period between now and the CCMC. Whether or not it would provide further security is not something that I need to consider now. As I have indicated, then, in my judgment, this question (together with the issue of security more generally) should be revisited at the CCMC when the Court will have a fuller picture both of the shape of the litigation and of the likely recoverable costs of that litigation. Since the Court will be concerned with disclosure lists and costs budgeting, these are issues which will have to be grappled with then.

Overall conclusions.

62. For the reasons set out above, whilst I have concluded that I have jurisdiction to order security for costs, then, in the exercise of my undoubted discretion, I have decided that this is not at present an appropriate case for such. As I have indicated, however, in my view this is an issue which should be revisited at the CCMC, when the Court will be in a better position to take a more rounded and informed view on the issue.

63. I am grateful to Counsel and their teams for the interesting argument. I would be grateful if the necessary order could be agreed and put before me. Insofar as there is

argument on consequential matters, I will deal with that on the basis of written submissions.