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Case No: HT-2021-000478

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date : 01/07/2022

Before :
VERONIQUE BUEHRLEN Q.C.
(Sitting as a Deputy High Court Judge)

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Between :

INNOVATE PHARMACEUTICALS LIMITED	**Claimant**
- and –	
UNIVERSITY OF PORTSMOUTH HIGHER EDUCATION CORPORATION	**Defendant**

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Thomas Roe Q.C. and Katharine Bailey (instructed by JMW Solicitors LLP) for the **Claimant**
Clare Dixon Q.C. (instructed by Eversheds Sutherland (International) LLP) for the **Defendant**

Hearing date: 14 June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archive. The date and time for hand-down is deemed to be Friday 1 July 2022 at 10.30am

VERONIQUE BUEHRLEN Q.C. (Sitting as a Deputy High Court Judge)

1. This is an application dated 18 November 2021 brought by the Defendant for security for costs pursuant to CPR rule 25.13.

The Parties

2. The Claimant is a pharmaceutical company whose work includes the development of drugs for the treatment of cancer. The Claimant is a small company owned by 3 individuals, a scientist, a medical doctor and a lawyer. The Claimant has developed a drug known as IP1876B ("the Drug"), which is a form of liquid aspirin, which it hoped and still hopes to licence to pharmaceutical companies. The Defendant is a university, an institution that carries out medical research and a centre of excellence for research into brain cancer.

The Factual Background to the Dispute

3. The dispute arises out of a written agreement dated 7 July 2016 by which the Claimant hired the Defendant to conduct a Research Programme into the properties of the Drug in the context of the treatment of brain tumours ("the Contract"). The Research Programme was to be undertaken under the direction of Dr Richard Hill, a researcher then employed by the Defendant. The purpose of the Contract, according to the Claimant, was to put itself in a position in which it could demonstrate (such as to a pharmaceutical company) the properties and potential uses of the Drug by reference to a credible and reliable set of research results.

4. The Claimant's case is that Dr Hill made a number of false representations in respect of the results of the Research Programme, *firstly* orally and in text messages and emails sent to the Defendant in August 2018 and *secondly* in a scientific paper about the methods and results of the Research Programme published in a scientific journal known as Cancer Letters on 28 August 2019 ("the Paper"). The Paper was entitled:

> "*IP1867B" suppresses the insulin-like growth factor 1 receptor (IGF1R) ablating epidermal growth factor receptor inhibitor resistance in adult high grade gliomas*"

5. In short, the representations were to the effect that the data obtained from the Research Programme showed that the Drug suppressed resistance to Epidermal Growth Factor Receptor ("EGFR") inhibitors. The significance of this is that a drug that reduced a tumour cell's ability to develop resistance to EGFR inhibitors would potentially enable much more effective cancer treatment. An associated press release reflects the claim in layman's terms: "Shrinking brain tumours with liquid aspirin".

6. Issues were raised in relation to the Paper following publication and a Corrigendum was issued by Cancer Letters in October 2019. This made two corrections to figures / images set out in the Paper but stated that the corrections did not alter the conclusions of the Paper. I refer to the Paper together with the Corrigendum as "the Cancer Letters Paper".

The Cancer Letters Paper included (i) photographs taken with microscopes of laboratory grown cell cultures to which various drugs (including the Drug) were said to have been applied; and (ii) annotated photographs of "blots" said to have been generated by analysis of various samples. I understand that a "blot" is a little like a Covid-19 lateral flow test. A sample is applied, and marks appear that are indicative of the presence or absence of certain substances in the sample.

7. In about September 2019, shortly after publication of the Paper, the Defendant commenced an investigation into research misconduct on the part of Dr Hill. A preliminary investigation led to the appointment by the Defendant of a disciplinary panel to undertake a formal investigation. In early 2020 the disciplinary panel found Dr Hill guilty of "*research misconduct*". "*Research misconduct*", is a term defined in the Defendant's "*Procedure for the Investigation of Allegations of Misconduct in Research*". It comprises any breach of the UK Research Integrity Office's Code of Practice or of "*accepted procedures that seriously deviate[s] from those that are commonly expected within the academic and scientific communities for proposing, conducting or reporting research*". A copy of a draft of the Disciplinary Panel's report (provided by Dr Hill to the Claimant) includes criticisms of the material set out in the Cancer Letters Paper including findings that the text description did not match the data and issues with the blots presented in the Paper.

8. By letter dated 11 March 2020, the Defendant informed Cancer Letters that it had investigated allegations that Dr Hill had been engaged in research misconduct in relation to the Cancer Letters Paper and that as a result Dr Hill had been found guilty of research misconduct in relation to research involved in the Cancer Letters Paper.

9. On 25 March 2021, Cancer Letters issued a Retraction Notice of the Cancer Letters Paper stating that the retraction was "*at the request of the Editor-in-Chief due to concerns regarding the legitimacy of images and data presented in the paper*". The Notice stated that the Corrigendum had also been found to contain errors and went on to set out Cancer Letters' specific concerns.

The Parties' Respective Cases

10. In short, it is the Claimant's case that Dr Hill knowingly misrepresented the results of the Research Programme in breach of the Defendant's obligations under the Contract and/or did so negligently. It is alleged that: (i) the Defendant failed to exercise reasonable skill and care to ensure the accuracy of the work performed and the information given contrary to clause 11.1 of the Contract; and/or (ii) the Defendant did not uphold the highest standards of business ethics in the performance of its responsibilities or adhere to the general principles of honesty, fairness and integrity in all its dealings contrary to clause 18.1 of the Contract. It is alleged that as a result of the misstatements in the Cancer Letters Paper, Cancer Letters retracted the article, the Research Programme was discredited and rendered worthless, and the reputation of the Drug tarnished by association. In turn, it is alleged that the Claimant has suffered loss and damage including

the cost of undertaking a fresh research programme into the properties and efficacy of the Drug and a diminution in the value of the Claimant's patent in the Drug.

11. It is the Defendant's case that Dr Hill's statements were correct based on the data generated by the Research Programme i.e. that the data does support the conclusion that the Drug suppresses resistance to EGFR inhibitors. It is denied that Dr Hill acted negligently and/or fraudulently and denied that the Defendant is in breach of contract. It is said that there are answers to the criticisms made of the Cancer Letters Paper and it is suggested that the Claimant may have had something to do with the retraction of the Cancer Letters Paper. Further, the Defendant relies on various express exclusion and limitation of loss clauses set out in the Contract which, if upheld, would limit any damages recoverable by the Claimant (save in the event of fraud) to £1 million.

The Application for Security for Costs ("the Application")

12. The Application was issued on 18 November 2021. It was due to be heard before me at the CCMC on 24 May 2022. It had to be adjourned both because the number of issues that had to be addressed at the CCMC occupied most of the time allocated to the hearing and because the Claimant sought an adjournment of the Application pending the outcome of an application it had made for After The Event ("ATE") insurance. Following the CCMC, the Claimant provided a copy of an ATE Policy issued to it by AmTrust Europe ("the Insurer") on 8 June 2022. The policy was provided under cover of an email from a Trainee Solicitor at JMW Solicitors LLP (the solicitors instructed by the Claimant) dated 9 June 2022.

13. In support of the Application, the Defendant relied on the Second, Third and Fourth witness statements of Mr James Hyde, a Partner with Eversheds Sutherland (International) LLP (the Defendant's solicitors) and the First and Second witness statements of Ms Claire Dunning, the Defendant's in-house University Solicitor with principal responsibility for the conduct of this litigation on behalf of the Defendant. The Claimant relied upon the Third and Fourth witness statements of Mr Partington, a Partner with JMW Solicitors LLP.

14. CPR rule 25.13 provides:

> *(1) The court may make an order for security for costs under rule 25.12 if –*
> *(a) It is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and*
> *(b) (i) one or more of the conditions in paragraph (2) applies, or*
> *...*
> *(2) The Conditions are - ...*
> *(c) The claimant is a company or other body ... and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so ...*

15. It is common ground that, subject to the adequacy of the security afforded by the ATE Policy, the Claimant will not be able to pay the Defendant's costs if ordered to do so. Two questions therefore arise:

(i) *Firstly*, whether the existence of the ATE Policy is sufficient to overcome the fact that without it the Claimant will be unable to pay the Defendant's costs if ordered to do so; if not then the jurisdictional threshold for an order for costs will have been met; and

(ii) *Secondly*, if the ATE Policy is not sufficient whether, having regard to all the circumstances of the case, it is just to make an order.

The ATE Policy

16. Several relevant authorities were drawn to my attention by the Defendant. In short, it is now well recognised that an ATE Policy can be taken into account when determining whether an order for costs should be made: *Premier Motorauctions Ltd (in liquidation) & Anr v PricewaterhouseCoopers LLP* [2018] 1 WLR 2955, CA. However, citing Mance LJ in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1898 (albeit obiter), the Defendant is "*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*". Since an appropriately worded ATE Policy can be an answer to an application for security for costs, it is necessary to consider the clauses of this particular policy to determine whether it does afford the Defendant sufficient protection.

17. The first point to note is that the ATE Policy does not contain an anti-avoidance provision. Without such a clause, it cannot be said that the policy could not be avoided for misrepresentation or non-disclosure. Further:

(i) Clause 2 of the Policy sets out events, upon the occurrence of which, Insurers will not pay any claim under the Policy. For instance, the Insurer is entitled to refuse to pay claims that are caused or contributed to by (a) any material delay or default caused by the Claimant (clause 2.1.2), (b) any failure by the Claimant to comply with the pre-action protocol, a Court Order or the CPR (clause 2.1.3), (c) the Claimant being unable to fund its solicitor's fees and/or disbursements, and (d) the Claimant taking certain steps in the case without "Case Manager Approval". There are therefore several circumstances in which the Insurer would be entitled to avoid paying a claim. Nor are these risks illusionary as the Claimant submitted. For instance, the Claimant's Cost Budget envisages some £134,000 being required to obtain the necessary expert reports (on both liability and quantum) but there was no evidence before the Court as to how those disbursements are to be met by the Claimant which might in turn impact both how the litigation was conducted and its outcome. Further, whilst what has happened in relation to the conduct of the case in the past will not necessarily dictate what will happen in the future, it is correct (as the Defendant submits) that the Claimant has not always complied with the CPR and the rules of the TCC Guide such as in relation to the filing of its evidence in reply to this Application. The Application was filed on 18 November 2021, yet the Claimant did not file its evidence until 18 May 2022 i.e. 6 months later and 3 days prior to the CCMC at which the Application was due to be heard.

(ii) Clause 3 of the Policy sets out a series of conditions precedent to the Insurer's liability and clause 3.2 provides that the Insurer's liability will be "*suspended from the time of the breach until the time when the breach is remedied (if it is capable of being remedied)*" and that meanwhile, the Insurer "*will have no liability to pay any claim under the Policy that is attributable to something happening during the period when our liability is suspended*". One of those conditions precedent is that the Claimant should have made available to its Solicitor "*all information, documents and evidence [it] [has] that may be relevant to [the Claimant's] Solicitor's appraisal of the prospects of success and conduct of the Litigation*". No evidence has been filed by the Claimant in relation to the Proposal or information provided. It is therefore impossible to assess whether the conditions precedent in respect of the Proposal have been met or whether continuing conditions (such as the obligation to make available all information, documents and evidence which may be relevant to the Claimant's solicitors' ongoing appraisal and conduct of the litigation) will be met.

(iii) Clause 6.2 of the Policy entitles the Insurer to cancel the ATE Policy with immediate effect from the date of the breach, in the event of a breach of any of the conditions set out at clause 4. Those conditions are extensive. Clause 4.2 imposes an obligation on the Claimant to instruct its Solicitors to act according to a whole series of obligations. There is no evidence that that has been done. Further, by clause 4.3 the Claimant is required:

> "*… throughout the Litigation [to]*
> *4.3.1 act as a reasonably prudent uninsured litigant with the objective of achieving the best outcome;*
> *4.3.2 provide all information, evidence and documents requested by Your Solicitor and deal promptly and diligently with all requests by Your Solicitor to provide statements of truth, witness statements and to search for disclosable documents;*
> *4.3.3 respond within 7 days to any request for information by or communication from the Case Manager;*
> *4.3.4 comply with all advice given by Your Solicitor;*
> *4.3.5 not make, accept, not accept or reject any offer to settle or compromise the Litigation without first applying for, and obtaining, Case Manager's Approval;*
> *4.3.6 co-operate with Your Solicitor in the conduct of the Litigation;*
> *4.3.7 not change Your Solicitor or case to retain legal representation without the prior written consent of the Case Manager, such consent not to be unreasonably withheld or delayed; and*
> *4.3.8 at Our request, provide the Case Manager with access to audit all files and information relating to the Litigation, which are under Your control, and whether held by You and/or Your Solicitor or any other party, and you will instruct Your Solicitor to provide the Case Manager with access to any such files and information*."

> The Insurer's ability to cancel the ATE Policy with immediate effect from the date of a breach of any of these conditions significantly undermines the adequacy of the security that the ATE Policy might otherwise provide.

18. There are several other reasons why the ATE Policy does not in my judgment provide adequate security for the Defendant's costs. As regards inception and maintenance of the ATE Policy, no evidence has been produced by the Claimant as to the amount of the premium payable or as to how it is proposed that it will be paid. All that can be ascertained is that the premium is contingent and that it is payable in stages in accordance with what is termed a Successful Outcome. However, all information in relation to the Stages and what constitutes a Successful Outcome has been redacted from the Schedule to the Policy. No assurance (let alone undertaking) has been given that the ATE Policy will not be cancelled during the 14-day cooling off period.

19. Further, the Defendant rightly submits that the ambit of the cover is not clear. The definition of "Litigation" refers to the proceedings specified in paragraph 2 of the Schedule to the ATE Policy which in turn refers to these proceedings but goes on to say "*limited to the claims as disclosed in the proposal*". The proposal not having been disclosed by the Claimant, it is not possible to know whether all the claims in the proceedings fall within the ATE Policy. The Defendant also points out that clause 15 of the ATE Policy is an average clause meaning that if the Defendant's costs are greater than the sum insured (which is based on the Defendant's approved Costs Budget), the amount payable under the ATE Policy will reduce proportionately. It may be that the potential effect of this average clause could be addressed in the event of the Defendant's Costs Budget needing to be revised, but I consider that it remains a relevant factor when considering the scope of the cover afforded at the present time.

20. I also note that the Claimant has not provided the Court with any evidence on which to determine the likelihood of the Insurer seeking to avoid the ATE Policy. There is no evidence as to how the Proposal was prepared and what it includes, as to whether the Claimant has instructed its Solicitors as required by clause 4.2 of the ATE Policy or assurance from the Claimant that it will comply with the obligations imposed on it by the ATE Policy.

21. In my judgment it is plain that this ATE Policy could be avoided for misrepresentation or non-disclosure and that there are numerous circumstances in which the ATE Policy could be suspended or cancelled or a claim not paid. It follows that the ATE Policy does not provide the Defendant with adequate security. There is therefore reason to believe that the Claimant would be unable to pay the Defendant's costs if ordered to do so meaning that the jurisdictional requirement of CPR rule 25.13(2)(c) has been met. Accordingly, it is necessary to determine whether, having regard to all the circumstances of the case, it is just to make an order for security for costs (as envisaged by CPR rule 25.13(1)(a)).

22. I pause here to refer to the fact that shortly before the hearing of the Application commenced, the Claimant provided the Defendant and the Court with a document

entitled "AmTrust Europe Limited (AmTrust) DOI Application process and procedure Annex to letter dated 8 June 2022" which referred to an application by the Defendant for a deed of indemnity in support of the ATE Policy in favour of the Defendant. The document made clear that it was not an offer to issue an indemnity. It was accompanied by a specimen deed of indemnity. However, there was no opportunity for the Defendant to consider the scope of the potential indemnity. Nor was it necessary to do so because in the event that an order for security was made, it would remain open to the Claimant to make an application for that security to be varied on the basis of a material change of circumstances, should the Insurer subsequently agree to provide an indemnity in favour of the Defendant.

All the Circumstances of the Case

(1) The merits

23. It is common ground that in respect of security for costs the parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure: *Danilina v Chernukhin* [2019] 1 WLR 758 at paragraphs 69-70 approving paragraph 25.13.1 of the Civil Procedure 2018, Vol 1 and the judgment of Sir Nicolas Browne-Wilkinson V.C. in *Porzelack K.G. v Porzelack (UK) Ltd* [1987] 1 WLR 420. At paragraph 25.13.1.2 of the White Book, the decisions in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 at 540, CA and *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123 at [24] are relied upon for the proposition that a claimant will not be required to provide security for costs where, at the time of the application, the claim appears highly likely to succeed. However, it seems to me that on proper application of CPR rule 25.13(1) the Court must still have regard to all the circumstances of the case in order to determine whether it is just to make an order, and not solely as to whether there is a high probability of the claimant making good its claim.

24. Neither party was able to provide me with any case law as to what a high degree of probability of success entails in this context. Miss Dixon Q.C. pointed me to paragraph 4 of Appendix 10 of the Commercial Court Guide which provides that "*It is usually only in those cases where it can be shown without detailed investigation of evidence or law that the claim is certain or almost certain to succeed or fail that the merits will be taken into consideration*". However, we are not in the Commercial Court and with the greatest of respect to the drafters of the Commercial Court Guide I do not think that a high degree of probability of success equates to "*certain or almost certain to succeed*". All the same it is certainly a high threshold. One that I have equated with highly likely to succeed or fail.

25. I am also very mindful of the fact that an application for security for costs is not a forum for a detailed investigation into the merits of a case. However, the enquiry into the merits of the present case is not a complex or difficult one.

26. It is the Claimant's case that it can clearly be demonstrated that it is highly likely to succeed at least on part of its claim. In short, the Claimant submits that:

    (i) The Defendant was hired, together with Dr Hill as principal investigator, to conduct a research programme into the Drug;

    (ii) The Defendant expressly agreed to exercise reasonable care and skill to ensure the accuracy of the work performed and any information given (clause 11.1 of the Contract) and to adhere to the general principles of honesty, fairness and integrity in all its dealings (clause 18.1 of the Contract);

    (iii) In breach of those obligations and/or of a tortious duty of care owed by the Defendant to the Claimant, Dr Hill (for whose conduct the Defendant is vicariously liable) misrepresented the outcome of the Research Programme in the Summer of 2018 and he and several other academics employed by the Defendant published a paper in Cancer Letters in August 2019 that was replete with misleading claims about what the data from the study of the Drug showed; the Defendant itself found Dr Hill guilty of research misconduct in respect of the Cancer Letters Paper;

    (iv) The Cancer Letters Paper was retracted by Cancer Letters which published a statement explaining why the claims made about the Drug in the Paper could not be substantiated based on the data to which it referred; and

    (v) As a result, the results of the study cannot be relied upon and will not be taken seriously by anyone in the pharmaceutical industry and the study has to be redone, at an estimated cost of some US$3.5 million.

27. The propositions in sub-paragraphs (i), (ii) and (iv) above are to all intents and purposes common ground.

28. However, the Defendant submits that the Claimant has not clearly demonstrated a high degree of probability of success on the basis that:

    (i) At the time the August 2018 representations were made by Dr Hill they were correct and based upon data generated from the Research Programme;

    (ii) As regards the Cancer Letters Paper:

        (a) On proper construction of the Contract, publication was contemplated by the Contract, but the contractual obligations imposed upon the Defendant related to the research only;

        (b) The retraction of the Cancer Letters Paper alone is not sufficient to establish a breach of contract and/or negligence on the part of the Defendant. That relies upon (a) the reasons for the retraction being correct; and (b) insofar as any are correct that they themselves justified the article being retracted;

        (c) The Defendant has adduced evidence challenging whether the reasons for the retraction are correct and can be relied upon. In particular, the Defendant relies on the fact that:

(1) The Investigation into Dr Hill's conduct was not originally concerned with the Cancer Letters Paper; as a result it is said that Dr Hill did not have the opportunity to comment on the criticisms made of the paper; and

(2) There are answers to many of the criticisms made of the Cancer Letters Paper by the Disciplinary Panel;

(d) The retraction of the Cancer Letters Paper "*may have been prompted or at the request of the Claimant*" impacting the causation of the Claimant's loss.

29. I have come to the conclusion that this is one of those relatively rare cases where a brief consideration of the merits of the claim leads to the clear conclusion that there is a high degree of probability that part of the claim will succeed. I say part of the claim because the Defendant has several contractual limitation and exclusion of loss defences, which if effective will exclude the Defendant's liability other than for negligence or fraud, limit the nature of the losses recoverable and cap any loss recoverable for breach of contract or negligence to £1 million. However, for present purposes the Claimant need only show that it has a high probability of establishing a breach of contract / negligence on the part of the Defendant such as would entitle it to recover £1 million in damages.

30. The Defendant's first submission is that at the time the August 2018 representations were made by Dr Hill they were correct and based upon data generated from the Research Programme. There is no evidential support for that assertion on the part of the Defendant and to date the Defendant has not produced the data it relies upon to make good that assertion. The Claimant also submits that it is most unlikely to be true since if Dr Hill had data showing that the Drug had the properties claimed for it, he would have deployed that data in the Cancer Letters Paper rather than relying on data that did not show that the Drug had the properties it was said to have. It seems to me that there is considerable force in Mr Roe Q.C.'s submission on this point. As matters currently stand there is no more than a bare assertion on the part of the Defendant that the August 2018 representations were correct.

31. However, it is not clear to me how the Claimant says that its losses were caused by the August 2018 representations. Accordingly, I have not come to any conclusion as to the merits of the Claimant's case (at this stage of the proceedings) in so far as it is based on the August 2018 representations. I therefore turn to the Claimant's case in relation to the Cancer Letters Paper.

32. The Defendant's first submission in relation to the Cancer Letters Paper is that on proper interpretation of the Contract, the Defendant's contractual obligations did not extend to published material. I find it very difficult to see how the Defendant could escape liability on the grounds that its contractual obligations did not extend to the publication by its agents of the results or purported results of the Research Programme. Clause 11.1 makes clear that the Defendant would use all reasonable skill and care to ensure the accuracy "*of the work performed and any information given*". It seems to me that it is highly likely that construing the Contract, the Court would conclude that "*any information given*"

included the publication of the results of the Research Programme not least given both the wording of clause 11.1 and the fact that publication of the results of the Research Programme was expressly contemplated by clause 5.1 of the Contract in order to comply with the Defendant's "University policy" and charitable status.

33. Further, clause 18.1 of the Contract imposes an obligation on the Defendant to "*adhere to the general principles of honesty, fairness and integrity in all its dealings*". All the Defendant's dealings must include the publication of the results of the Research Programme envisaged at clause 5.1 of the Contract. Nor does the Defendant's construction argument address the Claimant's alternative case that the Defendant owed the Claimant a tortious duty of care to exercise reasonable care and skill to ensure the accuracy of the work performed and any information given.

34. I have therefore concluded that it is highly unlikely that the Defendant will be able to establish that the obligations it owed the Claimant were limited to the conduct of the research and did not extend to the publication of the results of that research by Dr Hill and others in its employment.

35. Secondly, the Defendant submits that the retraction of the Cancer Letters Paper alone is not sufficient to establish breach of contract or negligence on the part of the Defendant in relation to the information that was contained in the Paper. I agree. The Claimant will have to show that the information provided in the Cancer Letters Paper was false. However, the real problem for the Defendant is that there is very strong evidence, produced by or on behalf of the Defendant itself, that statements made in the Cancer Letters Paper were false and (at least) negligently made.

36. The allegations of research misconduct brought against Dr Hill were investigated by a disciplinary panel appointed by the Defendant made up of a number of eminent academics namely: Dr Mernagh, the Chair of the Panel and the head of the Defendant's School of Biological Sciences; Professor Allan, Professor of Cell Biology at the University of Manchester; and Professor Mahadevan, a Fellow in Biochemistry at Trinity College Oxford ("the Disciplinary Panel"). A copy of a late draft of their report (the final report has not been disclosed by the Defendant) was provided by Dr Hill to the Claimant in 2020 and has been exhibited to the fourth witness statement of Mr Partington filed on behalf of the Claimant.

37. This 25-page report records the investigations and findings made by the Disciplinary Panel at a meeting on 21 January 2020. These included:

    (i) A finding by Professor Allan that "*there were multiple instances of careless work that, whether deliberate or accidental, were negligent*";

    (ii) Agreement on the part of Professor Mahadevan that "*there were numerous known errors evident in several papers, which had been published over a number of years*" and his conclusion that: "*Overall, the persistent flouting of the standards of scientific publishing over a period clearly constitutes misconduct in research*";

(iii) Agreement on the part of Dr Mernagh that "*the volume and nature of the errors and the occurrence over a sustained period constituted research misconduct because there were too many for these to be considered momentary lapses of concentration*"; and

(iv) A finding that "*there were sufficient instances of negligence and uncorrected errors to demonstrate research misconduct*".

38. Annex A of the Report consisted of a report of the outcome of a Preliminary Investigation into allegations of research misconduct against Dr Hill dated 17 September 2019 and included a letter from Dr Hill responding to the then allegations. Annex B to the Report consisted of a detailed report prepared by the Disciplinary Panel which specifically addressed two papers, one of which was the Cancer Letters Paper. The issues raised and conclusions recorded in Annex B in relation to the Cancer Letters Paper are very damming as to the contents of the Paper. They start by identifying allegations made in relation to the paper including those addressed in the Corrigendum. Albeit noting that even in relation to the Corrigendum, the correct information was not provided stating that "*In both the original and corrected figure, the full EGFR blots provided do not match those cropped and used in figure 5i*" and that "*What is particularly worrying is that the blot used for Fig. 5i came from cell line samples from a completely different set of experiments, and not from mouse tumours from mice*".

39. Annex B then went on to raise several additional issues in relation to the Cancer Letters Paper, stating:

> "*I The text description of results does not match the data. For example, on p32, final paragraph: "… there was considerable reduction of IGF1R, IL6R and EGFR protein expression post-IP1867B treatment in all our aHGG cells (Fig, 4D). This is not true for SEBTA-003, where EGFR levels went up, and IGFR1 remained the same (i.e. undetectable). On p34, and the top of p36, again the text description does not match the data in the figures.*
> *II The blots in Fig. 4 d and g show quite different behaviour for total EGFR in the UP-029 and SEBTA-003 cell lines. At the very least, this highlights problems with reproducibility. The blot for IL6R is very poor quality.*
> *III The blots for Fig. 4d have different sample orders in the left vs right panels. Really? From the same experiment, run at the same time?*
> *IV The text on page 36 states that six mice were used per group, but the data in Fig. 5b and 5i show only 3 mice*."

40. All of these matters are relied upon by the Claimant to make good its case that Dr Hill misrepresented the results of the Research Programme in the Cancer Letters Paper.

41. Further, the Defendant then wrote to Cancer Letters on 11 March 2020 in relation to the Cancer Letters Paper stating:

> "*The University has investigated the allegations in accordance with its Procedure for the Investigation of Allegations of Misconduct in Research. As a result of a detailed and thorough investigation, including an investigation by experts in the field who were external to the University of Portsmouth, we have concluded that Dr*

Hill was guilty of research misconduct in relation to the research involved in the paper cited above"

42. This letter therefore confirmed that the Defendant had undertaken a detailed and thorough investigation, including an investigation by experts external to the Defendant and that the investigation had concluded that Dr Hill was guilty of research misconduct in relation to the Cancer Letters Paper. To this then also fall to be added the conclusions of Cancer Letters set out in the Retraction Notice which states:

> "*Upon our separate investigation, it has been determined that the paper headline relies on showing that there was considerable reduction of IGF1R, IL6R and EGFR post treatment of cell lines. During review, it was determined that this cannot be concluded from the presented data. For example, in SEBTA-003 the EFGR levels go up and there is no difference in GFR1. It is apparent from Fig. 4d that in the SEBTA-003 cell line the EGFR level does not go down, which is stated in the Results section on page 32, it is rather going up. The data for IGFR1 are inconclusive and there are concerns regarding the blot. The general implications would be that the affects of the drug IP1867B does not seem to be the same for all tested cell lines, and this should have been discussed in detail by the authors …*"

43. Given the evidence of two separate investigations, the most significant of which emanates from the Defendant's own "*detailed and thorough investigation*", Mr Roe Q.C. is correct in my view when he submits that the Defendant has a mountain to climb if it is to persuade the Court at trial that the findings made by the Disciplinary Panel, the members of which were all experts, were not correct i.e. that the Cancer Letters Paper did not misstate the results of the Research Programme.

44. All the same, is there any reason to conclude that the Defendant might succeed in challenging those findings at trial? The Defendant makes two points. *Firstly*, the Defendant submits that the investigation was not originally concerned with the Cancer Letters Paper and that accordingly Dr Hill did not have an opportunity to comment upon the Disciplinary Panel's findings in respect of it. However, in my judgment that is most unlikely to assist the Defendant. The investigation undertaken by the Disciplinary Panel did specifically include a detailed review of the Cancer Letters Paper by an eminent panel of academics and it is only the initial allegations considered by the Defendant's Screening Panel that did not include the Paper. Further, the draft Report records Dr Hill being asked whether he wished "*to formally respond to questions about the Portsmouth papers*" but that he was happy for his explanations given in interview to stand. The draft Report also records that "*to ensure adherence to the principles of natural justice, it was agreed that Dr Hill would be informed of the panel's conclusion and invited to provide any comments on the factual accuracy of the document within a specified timescale*" and that this opportunity should be offered to Dr Hill before the Defendant contacted the relevant journal editors *"(as per item 90(iv) of the University Research Misconduct Procedure)*". The Defendant did not write to Cancer Letters until 11 March 2020, presumably because as noted in the report Dr Hill was first informed of the panel's conclusions and invited to provide his comments. Be that as it may, whether Dr Hill had an opportunity to respond to the Disciplinary Panel's criticisms of the Cancer Letters Paper or not does not detract

from the findings that were made by both the Disciplinary Panel and Cancer Letters in relation to the contents of the paper.

45. *Secondly*, the Defendant submits that the retraction of the Cancer Letters Paper alone is not sufficient to establish a breach of the Contract and/or negligence. I agree. The retraction needs to have been caused by genuine concerns as to the legitimacy of the contents of the Paper. I also accept that the Claimant will have to establish that the contents of the Cancer Letters Paper were misleading. However, it does not follow that a determination of the likely outcome of that enquiry cannot be reached at this stage of the litigation on the basis of the material placed before the Court. It is not a question of waiting to see whether something might turn up in expert evidence, for instance, that might enable to the Defendant to go behind the findings of the three academics on its own Disciplinary Panel.

46. *Thirdly*, the Defendant submits that there are answers to many of the criticisms made of the Cancer Letters Paper by the Disciplinary Panel and relies on paragraph 15 of the Second Witness Statement of Ms Claire Dunning in support of the Application. Ms Dunning states that "*the Defendant has undertaken some investigations into the pleaded allegations, by those who are qualified to do so*" (the pleaded allegations of falsity reiterating the Disciplinary Panel's findings) and that as a consequence of those investigations she is able to make a number of comments on the alleged misrepresentations contained in the Cancer Letters Paper. However, those comments cannot in my judgment be given any evidential weight. Ms Dunning openly recognises that she is not qualified to give evidence on the allegations herself. Ms Dunning is not an academic or scientist with any personal knowledge of the veracity of the statements made in the Cancer Letters Paper. Further whilst she refers to "*some investigations into the pleaded allegations*" Ms Dunning provides no information whatsoever as to what those investigations have consisted of, nor even as to who has provided her with the comments. Miss Dixon Q.C. suggested that the comments are the result of conversations with potential experts. However, there cannot have been any detailed expert consideration of the issues since no expert costs had been incurred by the Defendant at the time of the CCMC. Yet, the Defendant wishes to rely on this material to contradict the findings of the very Disciplinary Panel that it appointed to undertake the Investigation. A Disciplinary Panel that (as noted above) was made up of several eminent academics, themselves experts, including the Defendant's own head of its School of Biological Sciences.

47. Further, a review of the comments themselves reveals that there are no answers provided to several of the key criticisms made of the Cancer Letters Paper. For instance, paragraphs 15(b) and 15(c) of the draft Amended Particulars of Claim are concerned with the allegation that the blots at Fig 5(i) of the Cancer Letters Paper described with reference to "*in vivo treatment*" did not derive from samples taken from mice, did not match the full EFGR blot contained in the data and were used in the Paper as evidence of quite different things. Ms Dunning states that the disclosure will show that the Claimant was aware, pre-publication, of challenges around procuring mouse data and

that Dr Hill had previously raised concerns and provided relevant data. However, that does not explain representing data as emanating from in vivo experiments when it did not, how the figure in 5(i) did not match the full EFGR blot contained in the underlying data or how the same photograph came to be used to demonstrate very different things. Nor is there anything to rebut the Disciplinary Panel's conclusion that the text description of the results in the Cancer Letters Paper did not match the data. In other words, the blots do not support the conclusion that there was a "*considerable reduction of IGF1R, IL6R and EGFR protein expression post-IP1867B treatment*" and the data did not "*raise the interesting hypothesis that IP 1867B treatment could complement EGFR inhibitors*" as claimed in the Cancer Letters Paper.

48. I have therefore concluded that on the material produced by the Defendant at this time, the Defendant is highly unlikely to succeed in rebutting the evidence and findings of its own Disciplinary Panel in respect of the contents of the Cancer Letters Paper.

49. *Fourthly*, the Defendant submits that the Claimant may not make out its case on causation of loss because "*it appears*" that the retraction of the Paper by Cancer letters may have been prompted or at the request of the Claimant and that it is "*at least probable*" that the Claimant caused the paper to be retracted. The Defendant relied on 3 matters: (i) The fact that in a letter dated 12 January 2022, JMW Solicitors referred to Mr Cohen (one of the Claimant's shareholders) as having spoken to Cancer Letters by telephone in February 2021, that is the month before Cancer Letters retracted the Paper on 25 March 2021; (ii) an email in February 2021 from Cancer Letters to Dr Hill stating that Cancer Letters "*received correspondence from a reader of Cancer Letters who has expressed concerns at the accuracy of images and data presented*"; and (iii) the retraction published by Cancer Letters allegedly using wording that is "*extremely similar to the wording of the report of the Investigation*" which the Claimant had been given by Dr Hill.

50. In my judgment, the Defendant was here clutching at straws. The matters it relies upon do not begin to establish a case that the Claimant caused Cancer Letters to retract the Cancer Letters Paper. *Firstly*, the Defendant itself expected Cancer Letters to retract the Paper stating in the draft Report produced by the Disciplinary Panel that "*[i]t was the role of the journal editor to liaise with the authors and to retract the paper until such time as any corrections were received and the paper was judged by them to be suitable for publication*". *Secondly*, the fact that Mr Cohen had a telephone conversation with Cancer Papers in the month preceding the retraction is not evidence of any interference on the part of the Claimant. It is hardly surprising that those impacted by the retraction might either be contacted by Cancer Letters or that they would want to know if the Paper was going to be retracted.

51. *Thirdly*, one cannot infer from an email sent by Cancer Letters to Dr Hill referring to a reader of Cancer Letters that the reader was the Claimant. Indeed, as a result of an error in preparing the exhibit to Ms Dunning's second witness statement (understandable given the short timescale in which the witness statement had to be produced), the email exhibited at paragraph 25 of the statement was in fact a different email. This one dated 12 February 2021 from Cancer Letters to Dr Hill stating that they had "*received two more*

messages this morning regarding your paper which adds to our findings that misconduct took place and the scientific integrity of the paper is questionable. As more concerns and allegations are raised, it is clear to us that this paper cannot stand and we will move forward with the retraction in the coming days". There is no basis on the information before me to link any of these readers to the Claimant.

52. *Fourthly*, I have reviewed the wording of the Retraction Notice against the Defendant's Disciplinary Panel's reports and whilst the issues referred to in the Retraction Notice are the same as issues raised by the Disciplinary Panel the wording is not "*extremely similar*". On the contrary, the wording is very different.

53. There was no other basis on which the Defendant sought to persuade the Court that the Claimant did not have a high probability of establishing its claim for breach of contract / negligence such as would entitle it to damages in the sum of (at least) £1 million. It is not difficult to see how the retraction of the Cancer Letters Paper and findings of the Disciplinary Panel would have discredited the Research Programme. There was no suggestion that the cost of undertaking a fresh Research Programme would not exceed the £1 million potential liability cap and, in that context, the Defendant has produced an "Indicative Pricing Proposal" from Covance Preclinical Oncology of Ann Arbor, Michigan in the United States estimating the cost of repeating the Research Programme at US$3.5 million.

54. In my judgment everything therefore points to the fact that there is a high degree of probability that the Claimant will make good a claim for at least £1 million against the Defendant on the basis of the material before the Court at this time.

(2) Other factors

55. The Defendant urged the Court to take into account three further factors when considering all the circumstances of the case under CPR rule 25.13(1)(a). The first was that the Defendant is a public body funding its own defence using public funds. Secondly, the Defendant is critical of the Claimant's conduct of the proceedings to date. Thirdly, the Defendant points to the fact that the Claimant has not sought to rely on any case that the action would be stifled.

56. I do not consider the fact that the Defendant is a publicly funded institution relevant to the need to do justice between the Parties. It seems to me that a publicly funded Defendant is entitled to the same consideration as a privately funded Defendant on an application for security for costs. On the other hand, I do consider the Defendant's conduct of the litigation to date to be relevant. The Defendant relies on the fact that the Claimant allegedly did not provide a protocol compliant letter of claim, ought not to have identified the claim in the first instance as a "*non-money claim*" (resulting in the payment of a significantly lower Court issuing fee until subsequently corrected) and was five days late in paying an adverse costs order. At least two of these issues appear to have been connected to the Claimant's lack of funds. However, be that as it may, in my judgment these matters are not nearly sufficient to tip the balance in favour of making an order for security for costs.

57. I do however consider that there is considerable force in the Defendant's submission that the Claimant does not rely on an argument that the claim(s) would be stifled were an order for costs made. The Defendant pointed to the fact that, based on the Claimant's costs budget, it was able to fund significant costs including the recent instruction of Leading and Junior Counsel. However, Mr Roe Q.C. informed the Court that this was not correct and that he, his junior and instructing solicitors were all acting on full CFAs. The Defendant also pointed to the fact that the Claimant had made statements to the effect that it had the means of raising significant funds. However, those statements were made in the context of raising significant funds to accelerate the research in August and September 2018 i.e. at the time of Dr Hill's representations to the effect that the Drug would reduce a tumour cell's ability to develop resistance to EGFR inhibitors. That is very different to having to raise significant sums to fund litigation.

58. I am also conscious that whilst the Claimant does not seek to rely on a case that the action will be stifled, the sums that the Claimant would be required to raise in order to meet an order for security for costs, totalling some £1.3 million are significant and an order for security for costs is likely to be a considerable burden for the Claimant. There is very little information available as to the means of the 3 individual shareholders. However, what information there is suggests that raising such a sum would not be an easy task. I say that mindful of the fact that the Defendant's searches have identified the fact that one of the shareholders does have assets in the form of property in the United States.

Conclusion

59. Weighing all these factors together but being particularly mindful of the fact that there is in my judgment a high probability that the Claimant will succeed on part of its claim, I have concluded that it would not be just to make an order for security in this instance. The Application for security is therefore dismissed and I would be grateful if the parties could draw up an order accordingly.

Costs

60. As regards the costs of the Application, unless agreed I direct that the Parties may make short written submissions on costs to be provided to the Court by 5pm on 6 July 2022.