Neutral Citation Number: 2015 EWHC 461 (Ch)

Case No: HC13A03315

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th February 2015

Before :

Mark Anderson QC sitting as a Deputy Judge of the High Court

Between :

NGM SUTAINABLE DEVELOPMENTS LIMITED **Claimant**
- and -
(1) PHILLIP WALLIS
(2) LIZZANO LIMITED
(3) CASCINA LIMITED
(4) KEVIN REARDON
(5) HYDRO PROPERTIES LIMITED
(6) HYDRO PROPERTY HOLDINGS LIMITED

Defendants

- -
- -

Mr Matthew Collings QC (instructed by **Collins Solicitors**) for the **claimant**
Mr Aidan Casey (instructed directly) for the first defendant
Mr Simon Davenport QC and Mr Tom Poole (instructed by **Pinsent Masons**) for the second to sixth defendants

Hearing dates:13th, 23rd, 25th February
- -

JUDGMENT

MARK ANDERSON QC :

1. This claim is listed for a three-week trial beginning the week after next. At this late stage I have to decide whether the defendants should have security for their costs of the action in the form of an irrevocable bond or a deed of indemnity from an insurer, as they contend, or whether, as the claimant contends, the existence of a policy of insurance provided by AmTrust Europe Limited to cover

the claimant's liability for an adverse costs order (the ATE policy) renders an order for (other) security inappropriate. There is also a dispute about the level of security or insurance cover that is appropriate.

2. The principal claim is for misrepresentation and conspiracy. It is alleged that the claimant entered into an agreement for short-term finance in the belief that the defendants intended to offer long term finance to replace it. The money was needed by the claimant for the acquisition and development of flood land, exploiting a patent for floating houses. The claimant alleges that the defendants never intended to offer long-term finance (as they represented to it) but actually induced the claimant to enter the short-term agreement with the intention of using their rights under it to cut the claimant out of the opportunity altogether.

3. The claimant's case as to the defendants' actual intentions is based on inferences to be drawn from primary facts, some of which are hotly contested.

The parties and representation

4. The claimant was represented before me by Mr Matthew Collings QC instructed by Collins Solicitors ("CS"). The first defendant was represented by Mr Aidan Casey on direct instructions pursuant to the Bar public access scheme. The second to sixth defendants were represented by Mr Simon Davenport QC and Mr Tom Poole instructed by Pinsent Masons ("PM").

The proceedings and the parties' correspondence

5. The proceedings were issued against the first to fifth defendants in August 2013. The claimant was not facing any limitation difficulties and did not require any urgent relief but nevertheless issued and served the proceedings without first writing a letter before action and without complying with the Pre-Action Conduct Practice Direction. No explanation has been provided for that.

6. The claim form was accompanied by a notice of funding which revealed the existence of the ATE policy. The most recent endorsement to the policy shows a level of cover of £2,200,000 attributable to "Opponent's Costs".

7. On 10th September 2013 PM wrote to CS that the ATE policy did not meet their clients' concern that the claimant would be unable to satisfy an adverse costs order, because AmTrust might decline cover in certain circumstances. PM asked that the claimants provide an irrevocable bond from AmTrust or security in some other form.

8. On 4th November 2013 CS informed PM that the claimant did not consider that the provision of a bond was appropriate.

9. On 15th November 2013 PM asked for a copy of the insurance policy, saying that in the absence of disclosure the defendants could not be satisfied that, "in the event of avoidance, there was adequate cover to meet the costs incurred up to the date of avoidance." CS provided a copy of the policy the same day.

10. On 26th June 2014 Mr Murray Rosen QC, sitting as a deputy judge of the High Court, dismissed applications by the second to fifth defendants to have the claim struck out and for summary judgment.

11. The defendants also made applications for security for costs, not having received satisfactory proposals as to the amount of insurance cover which the claimant was to obtain. The claimant did not oppose the application in principle and offered the ATE policy as the appropriate form of security. The second to fifth defendants did not oppose that principle. The first defendant did not appear at the hearing at all, so neither did he oppose it. The sixth defendant was not a party at that stage.

12. Mr Rosen QC ordered that the claimant provide security for the second to fifth defendants' costs in the sum of £720,000 and for those of the first defendant in the sum of £80,000. The form of security, as agreed between the parties, was "written confirmation from its ATE insurer that the level of cover in respect of adverse costs has been extended" to the specified amounts. This was to cover costs up to exchange of expert evidence (which he directed to occur on or before 9th January 2015) and the defendants were given liberty to apply for additional security to cover subsequent stages. It is that application which is now before me.

13. On 21st July 2014 PM wrote a letter which was clearly aimed, amongst other things, at undermining AmTrust's support for the claim. The letter estimated the defendants' costs to trial at £2.5m, and argued that those costs were bound to be ordered against the claimant on the indemnity basis. "The reality is that your client's ATE insurer should be expecting to make a substantial adverse costs payment to our clients, potentially in the region of £2m, within the next 9 months." The letter concluded by asking for confirmation that CS would forward it to AmTrust, failing which PM would do so. The letter did not, however, question the adequacy of the ATE policy as a form of security in principle.

14. On 14th November 2014 CS and PM exchanged cost budgets down to trial. CS's costs were budgeted at £2,399,000 and PM's at £2,438,000. The first defendant's costs were around £100,000 up until June 2014, when he parted company with his then solicitors, and, having instructed Mr Casey on 9th February 2015, his costs to trial are budgeted at a further £252,000. He incurred no costs in the meantime.

15. On 18th November 2014 PM wrote to CS about the need for further security to cover the costs beyond those already secured by Mr Rosen QC's order. This letter stated that PM's clients required the further security to take the form of an irrevocable bond to be provided by AmTrust or some other entity because the risk of AmTrust refusing to pay out under the policy was unacceptable to their clients.

16. On 29th November CS replied "We fully accept that further security is required by your clients and are in discussion with providers to determine how this might best be achieved and at what level."

17. On 4th December PM pressed CS to confirm that the security would take the form of an irrevocable bond.

18. On 5th December CS asked whether an irrevocable bond was the only form of security which PM's clients would accept.

19. On 9th December PM replied without addressing that question but imposing a deadline of 10th December for the claimant's detailed proposals for security.

20. On 10th December CS repeated the question whether an irrevocable bond was the only form of security which PM's clients would accept. In reply PM repeated the stipulation for an irrevocable bond.

21. On 11th December CS wrote that the claimant would not provide an irrevocable bond but would provide security in the form of an ATE policy for an appropriate amount. In reply PM repeated the deadline of 12th December for detailed proposals.

22. On 12th December CS wrote "Our client's proposal is that further security is provided by way of adverse costs protection in a sum of £1.28m contained within an ATE policy", thus proposing insurance cover of £2,000,000 in all for the second to sixth defendants.

23. PM replied that they would take instructions and went on:

> "In the meantime, please confirm today that:
> 1 Your client's proposal of increased security cover of a further £1.28m has been agreed with AmTrust;
> 2 Your firm has no knowledge of, or reason to believe that there are, any reasons enabling AmTrust to avoid the ATE policy."

24. CS confirmed both those points in their reply the same day.

25. On 16th December CS wrote that if the second to sixth defendants' position was that only an irrevocable bond was satisfactory, then they should make an application to the court since the claimant would not agree to that.

26. On 19th December PM wrote again. This letter did not mention any requirement for an irrevocable bond. It took issue with the proposal that the level of insurance under the ATE policy be £2,000,000, demanding instead £2,200,000. It threatened an application to the court in the absence of satisfactory confirmation of AmTrust's position on providing increased cover. The letter also inquired who would fund "any adverse costs order made in our clients' favour over and above the AmTrust cover."

27. On 22nd December CS confirmed that cover had been extended to £2,100,000, split £2,000,000 for the second to sixth defendants, £80,000 for the first defendant and £20,000 spare.

28. On the same day PM wrote a long letter setting out in detail the reasons why the claim was bound to fail. It invited discontinuance and sought confirmation that the letter would be forwarded to Amtrust, on the ground that its content "has a direct impact on AMTrust's own internal decision making with respect to ongoing funding." The second to sixth defendants were continuing their strategy of attempting to persuade AmTrust to terminate cover, or perhaps at least to refuse to extend cover to the amount which the defendants were demanding. Later that day, PM sent an email asking for written confirmation of the level of cover under the ATE policy "in order that we may take instructions on this proposal". A copy of the policy schedule was provided on 29th December.

29. PM's correspondence of 22nd December was the last on the subject of insurance and security for costs until 23rd January 2015 when PM wrote a long letter setting out a detailed argument as to why the cover provided by the ATE policy was not adequate in principle as security and renewing the demand for security in the form of a bond. That letter was met with a detailed response on 28th January setting out the claimant's position as to why a bond was not appropriate.

30. This application by the second to sixth defendants was issued on 3rd February and the first defendant's application on 10th February. The defendants argue that the ATE policy does not provide adequate security because the policy may be avoided or cancelled by the insurer in a number of circumstances over which the defendants have no control. The first defendant invokes the additional argument that the defendants are not sure of receiving the money even if the insurers do pay it to the claimant.

31. I also have to decide the amount of security. The second to sixth defendants estimate that their total costs to judgment will be £2,438,000 and seek security in the sum of £2,200,000. The first defendant's estimate is £252,000 for costs incurred between 9th February and the end of the trial. He seeks security of £210,000 in addition to the £80,000 already covered by Mr Rosen QC's order.

The claimant offers security in the form of the ATE policy in the sums of £1,280,000 and £120,000 respectively, in addition to the £720,000 and £80,000 already required by Mr Rosen QC's order. By the fourth endorsement dated 12th February 2015 cover of that level, £2,200,000 in total, is already in place.

The law

32. The relevant provisions of the Civil Procedure Rules are as follows:

"25.12

(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it will –

(a) determine the amount of security; and

(b) direct –

(i) the manner in which; and

(ii) the time within which

the security must be given."

25.13

(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 . . .

(ii) an enactment permits the court to require security for costs.

(2) The conditions are –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;

(c) 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;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;
(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;
(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

33. The provision upon which the defendants rely here as giving the court a discretion to order security is 25.13(2)(c). It is common ground that the claimant is insolvent and (but for the ATE policy) would not be able to pay the defendants' costs. The claimant concedes that it should maintain ATE insurance up to a limit of £2,200,000 in total. It argues that there is no reason to believe that it will be unable to pay the defendants' costs, so that no order for security should be made so long as the policy remains in force.

34. The meaning of the words "there is reason to believe that it will be unable to pay the defendant's costs" has been considered in a number of cases. In **Jirehouse Capital v Beller** [2009] 1 WLR 751 Arden LJ, with whom the other members of the court agreed, rejected a submission that "reason to believe" required a finding on the balance of probabilities, and went on to consider whether "reason to believe" that something will be the state of affairs was the same as "significant danger" of it being so. She concluded that it was not always the same and that it was safer to rely on the words of the rule than an alternative "significant danger" test:

"Since the event in question (non-payment of an order for costs) is a future one, what the court has to do is to evaluate the risk, or the danger, of that event occurring. That said, however, there may be contexts in which a test of significant danger does produce a different result from "reason to believe" and so it would be much safer to use the statutory words in future."

35. In that case no question of an ATE policy fell to be considered. However there are a number of cases in which the issue before me has been discussed and I shall set out some of the dicta which were drawn to my attention.

36. In **Nasser v United Bank of Kuwait** [2001] EWCA Civ 556 Mance LJ said this:

> "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."

37. In **Aoun v Bahri** [2002] EWCA Civ 1390 Tuckey LJ made the following observation:

> "Traditionally, security was provided by payment into court or solicitors' undertakings. Nowadays bank guarantees are the norm, provided they are from first class banks. Other forms of security are not ruled out, but they must be copper bottomed — in the sense that they can be enforced in a simple and straight forward way — otherwise the purpose of ordering security is defeated."

38. In **Belco Trading v Kondo** [2008] EWCA Civ 205 Longmore LJ observed (though in the context of an application for permission to appeal which raised no issue under CPR 25.13(2)(c), only under 25.12(3)(b)(i)) that "it is most unlikely that any standard form of ATE insurance could provide a suitable alternative to the standard forms of order for security for costs".

39. In **Phillips Architects Ltd v Riklin** [2010] EWHC 834 (TCC) Akenhead J reviewed the authorities and said:

"[18] These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the Defendant in circumstances where security for costs should be provided by the Claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:

(a) There is no reason in principle why an ATE insurance policy which covers the Claimant's liability to pay the Defendant's costs, subject to its terms, could not provide some or some element of security for the Defendant's costs. It can provide sufficient protection.

(b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the Defendant, and because the promise to pay under the policy will be to the Claimant.

(c) 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.

(d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the Defendant.£

40. Akenhead J then reviewed the terms of the policy in that case and concluded:

"[30] It is accepted, that, subject to any issues raised by the ATE Insurance, there is reason to believe that the Claimant will be unable to pay the Defendants' costs if ordered to do so, for the purposes of CPR Pt 25.13 (1) and

(2). It is argued that, in the light of the ATE insurance and given that the burden of establishing that the Claimant will be unable to pay the Defendants' costs is on the Defendants, the Defendants have not established the threshold necessary to give the court jurisdiction and discretion to order security for costs. That argument must fail in my view at least in the circumstances of the ATE Insurance in this case. I do not see how it can be said that an insurance policy which does not provide direct benefits to the Defendants and under which they are not amongst the insured parties and which does provide for cancellation of the policy either for a large number of reasons or for no reason provides any appreciable benefit or raises any presumption or inference that the Claimant will be able to pay the Defendants' costs if ordered to do so.

[31] It follows from the above that I am satisfied that the Defendants have established the necessary threshold to give the court jurisdiction to order security for costs."

41. In **Geophysical Service Centre v Dowell Schlumberger (ME) Inc** [2013] EWHC 147 (TCC) Stuart-Smith J adopted Akenhead J's summary of the authorities (subject to one qualification about paragraph 18(d)). Of Mance LJ's dicta in **Nasser**, Stuart-Smith J said:

"First of all, Mance LJ was there commenting in the abstract, since there was not in fact an ATE policy in existence. Second, Nasser dates from 2001 when the ATE market was considerably less mature than it is now. It must be recognised both that the market is now more mature and that Brit, who provided the insurance which is going to be considered in this case, is to be regarded as a reputable insurer within the market. It is also to be recognised in my judgment that the funding of litigation by ATE policies is, and has for some years now, been a central feature of the ability of parties to gain access to justice. In the absence of evidence to the contrary, the court's starting position should be that a properly drafted ATE policy provided by a substantial and reputable insurer is a reliable source of litigation funding."

42. Stuart-Smith J went on to consider Akenhead J's paragraph 18(c) and said this:

"[19] In my judgment, this inevitably requires the court to form a view at this stage on the meaning of the policy and on how readily it may be avoided legitimately and contractually, and also to form a view of the likelihood of circumstances arising which will enable the policy to be readily, legitimately and contractually avoided.

[20] Ultimately, on an application such as this, the question is not whether the assurance provided by an ATE policy is better security than cash or its equivalent, but whether there is reason to believe that the Claimant will be unable to pay the Defendant's costs despite the existence of the ATE policy. It must now be recognised, in my judgment, that depending upon the terms of the policy in question, an ATE policy may suffice so that the court is not satisfied that there is reason to believe that the Claimant will be unable to pay the Defendant's costs."

43. As that observation implies, it is the claimant's actual or potential insolvency which provides the "reason to believe" that the claimant will be unable to pay. The question is whether the insurance displaces that reason for that belief. As Stuart-Smith J observed, where the policy contains the usual provisions which entitle the insurer to refuse to pay out in certain circumstances, there will nevertheless be no reason to believe that the claimant will be unable to pay the defendant's costs if the prospect of such a refusal is merely a theoretical possibility. There is always a theoretical possibility that a claimant will become unable to pay a defendant's costs. Even where the claimant is solvent and trading profitably, things can unexpectedly change and sometimes quite rapidly. But Rule 25.12 is not engaged in such cases because a theoretical possibility of insolvency is not a reason to believe that it will happen. The same goes for the theoretical possibility of loss of insurance cover. I therefore reject the submission in Mr Davenport's and Mr Poole's skeleton (§33) that there is reason to believe something if it is "at least within the realms of possibility."

44. With those considerations in mind I turn to the policy in this case.

The policy

45. The policy provides insurance against the claimant's liability for the defendants' costs of the "Litigation", which is a defined term. In common with most others, it contains provisions enabling the insurer to cancel the cover or to refuse payment.

46. The terms most heavily relied upon are as follows:

What Is Covered

1.1 We shall pay Your Insured Liability in the Litigation up to the Maximum Limit shown In the Schedule.

What Is not Covered

2.1 We will not, unless stated otherwise In this Policy, pay any claim under this Policy caused by or attributable to:

2.1.1 Your failure to co-operate with or to follow the advice of Your Solicitor;

2.1.2 any material delay or default caused by You, Your Solicitor or any other legal representative appointed to act on Your behalf;

2.1.3 any failure by You, Your Solicitor or any other legal representative appointed to act on Your behalf to comply with a pre-action protocol or with an Order of the Court or the CPR during the Litigation;

. . .

Conditions Precedent and Warranties

3.1 The following are conditions precedent to Our liability under this Policy:

3.1.1 Your Proposal was made following reasonable and diligent Investigation of the facts, information and evidence relevant to Your Solicitor's assessment of success in the Litigation and you have included in Your Proposal all matters relevant to the provision of cover under the Policy.

. . .

3.2 You warrant that You will make available to Your Solicitor all information, documents and evidence which may be relevant to Your Solicitor's appraisal and conduct of the Litigation.

3.3 If any of the conditions precedent set out in clause 3.1 are not satisfied We will be relieved from all obligation to provide Indemnity under this Policy from the outset and We may recover from You any sums previously paid by Us under the Policy. If You breach the warranty set out In clause 3.2 at any time We will be relieved of all obligation to provide any indemnity under this Policy from the date of such breach

General Conditions

4.3 You will throughout the Litigation:

4.3.1 act as a reasonably prudent uninsured litigant with the objective of achieving the best outcome;

. . .

4.3.5 provide all information, evidence and documents requested by Your Solicitor to comply with these instructions and deal promptly and diligently with all requests by Your Solicitor to provide statements of truth, witness statements and to search for disclosable documents;

. . .

4.3.9 co-operate with Your Solicitor In the conduct of the Litigation.

Ending this policy

6.1 We may cancel this Policy with Immediate effect if:

6.1.1 You breach any of the conditions set out In section 4;

6.2 If We cancel this Policy pursuant to clause 6.1 above, We will not pay the Insured Liability incurred after the date of cancellation and You may liable to pay the Premium in accordance with clause 7. For the avoidance of doubt the Contingent Premium payable in such circumstances will be calculated in accordance with Clause 7.3 as if a Successful Outcome had been achieved at the date of cancellation.

Dishonest and fraudulent claims

11.1 If You make any claim which is fraudulent or dishonest in any way, this Policy shall be cancelled from the outset and all rights that You have under this Policy shall be forfeited. We shall be entitled to recover any payments we have previously made.

47. There was also an endorsement (9) to the policy schedule:

This policy has been issued subject to the receipt of the required expert reports and a copy of the Particulars of Claim. Upon receipt of these the Scheme Manager will assess the Prospects of Success. Should these no longer reached the required level then at Insurers absolute discretion the Policy will be cancelled ab initio.

48. The defendants contend that these provisions, together with certain indicia provided by the manner in which the litigation has been conducted, suggest that there is plentiful reason to doubt that the policy will actually meet an order for costs in the defendants' favour. They say that despite the existence of the policy, there remains a reason to believe that the claimant will be unable to pay their costs if ordered to do so.

The submissions

49. Mr Davenport QC's first submission, adopted also by Mr Casey, was based on what the defendants would have as the utter hopelessness of the claim and the vanishing prospect of establishing any significant quantum. PM's correspondence has repeatedly asserted that position and it is said that CS's responses have been inadequate. The defendants also rely on the fact that this claim was issued and served without a letter before action and therefore in breach of the Practice Direction. Mr Davenport submitted that all this shows that the claimant and its solicitors have brought inadequate judgment and attention to detail to bear on this case and that that has increased the risk that the policy conditions, and in particular clause 3.1.1, have been breached.

50. I reject that submission. I cannot form so clear a view of the merits of this claim as to enable me to conclude that the claimant's investigation of its prospects must, or even might, have been inadequate. I was (rightly) not shown the expert

evidence relied on by the defendants as undermining the claim on the issue of quantum. The fact that CS declined to answer long letters with equally long letters does not betoken a failure to undertake a reasonable and diligent investigation or conduct of the claim. The omission to comply with the Practice Direction was startling and has not been explained but the particulars of claim were settled by leading counsel and do not suggest a want of reasonable and diligent investigation.

51. Moreover AmTrust has recently increased the level of cover under the policy to £2,200,000, and in making the decision to do so would have been able to take account of all the points made in PM's letters mentioned in paragraphs 13 and 28 above.

52. I also take into account CS's express and unqualified confirmations in their letter of 12th December 2014. I do not believe that a solicitor in CS's position would take the risk of giving such personal confirmations without a very high degree of confidence that there was no reason to believe that there was any reason for AmTrust to avoid the ATE policy.

53. These recent events (the increase in cover despite PM's letters, and the assurance given by CS) make the risk of withdrawal of cover under clause 3 somewhat less than it might have been when the matter was before Mr Rosen QC, when the defendants took no objection to the ATE policy as a form of security.

54. I cannot conclude on this material that there is any reason to believe that clause 3.1.1 or 3.2 has been breached.

55. Neither does clause 2 assist the defendants. That clause excludes payment of claims caused by the relevant conduct. The defendants' position is that this claim is hopeless and doomed to failure on its merits, and that the claimant is for that reason facing an order for indemnity costs. On that basis it is difficult to see how the claimant may become liable for costs due to some failure in the conduct of the litigation or as a result of the omission to comply with the protocol.

56. The defendants also rely on clauses 4 and 6.1.1. I agree that clause 4 imposes wide responsibilities, some of which may be inadvertently breached. I bear in mind Akenhead J's words that "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". However the level of cover has recently been increased and it must be inferred that the insurers are content with matters, at least as they currently know them to be. Moreover the trial is imminent and there remains very little time left for a breach of clause 4 to occur. The claimant and its lawyers (whose fees depend wholly or partially on the success of the claim) have every interest in making sure that the requirements of the policy are observed to the letter. In my view a risk of cancellation of the policy under clause 6.1 is theoretical only. Moreover, although the point is not free from doubt, I think that clause 6.2 means that cancellation of the policy would not result in loss of cover for costs incurred to the date of cancellation. Therefore clauses 4 and 6 do not provide reason to believe that cover for costs already incurred will be lost.

57. AmTrust's attitude to Endorsement 9 to the policy schedule was explained in an email from Ms Maria James on 20th February. She says that its requirements have been satisfied and that it no longer has any relevance or application. That reassurance disposes of any concern arising from that endorsement. Though AmTrust is not before the court, that email was written knowing that it was for use in court and I cannot conceive of circumstances in which AmTrust would want to resile from it.

58. Mr Davenport QC and Mr Casey next rely on clause 11.1. They submit that "claim" refers to or includes the claim made by the claimant against the defendants. I would myself construe the clause to refer to claims made under the policy, and not to dishonesty in the Litigation (which is the defined term which I would have expected to see in clause 11.1 if it meant what the defendants say). For example it would apply to a claim for indemnity against an award of interlocutory costs if the claimant did not give a truthful explanation of how the order came to be made. However even absent clause 11.1, if one or more of the claimant's directors was found to have given dishonest evidence, that might well defeat the claimant's entitlement to cover under the general law on the ground

that the same dishonest evidence featured in the insurance proposal which therefore fell foul of the requirement of utmost good faith.

59. I was taken by Mr Casey to the parties' pleaded factual allegations about what happened at certain important meetings after the contract had been signed which, according to the claimant, provide evidence that the defendants had all along intended to exclude it from the final deal. He pointed out that the rival versions of these meetings are sharply different. So they are, but that is usually the case in a contested trial. Although the court may find that one or more of the witnesses gave deliberately untruthful evidence, this is not a case where such a finding will be necessary in order to resolve the issues. The issues are not of that type. A finding of dishonesty is possible, but there is no reason to believe that such a finding will be made.

60. Mr Davenport QC took me to evidence contained in the claimant's witness statements which he says is flatly contradicted by disclosed emails. At paragraph 145 of his second witness statement, Mr Ostbye-Strom says that the claimant began to look for alternative funding partners following a meeting at the beginning of February, some three weeks after the contract had been made. Mr Davenport contrasted that with an email of 26th January from the claimant's solicitor which discussed a strategy involving other funders. He says that the contents of the email demonstrate the dishonesty of the contents of the witness statement. I have not heard cross-examination and would not wish to prejudge this issue, but the strategy discussed in the email appears to me to be reflected in paragraph 143 of the same witness statement. The email was itself disclosed by the claimant before the witness statement was made. Doing the best that I can at this stage nothing in this material gives me reason to believe that a finding of dishonesty will be made. It might be and I certainly do not exclude it. But at this stage I have no reason to believe that it will.

61. The next reason advanced for believing that the insurance will not answer the defendants' needs is that its proceeds may fall into the claimant's insolvent estate, and that the defendants will have to share it with other unsecured creditors. It is no answer to this that the defendants could obtain a third party debt order under CPR Part 72. The sum due to the claimant under the policy

would not be a debt, as Mr Casey pointed out in reliance on **F&K Jabbour v Custodian of Israeli Absentee Property** [1954] 1 WLR 139 and other authorities. Neither does it assist the claimant that the insurer's usual practice is to pay the money to the insured's solicitors, which was Mr Collings QC's first reaction to this concern. A liquidator would be entitled to the money unless it was properly secured.

62. However at the resumed hearing Mr Collings QC offered the following undertakings on behalf of the claimant:

(i) to agree forthwith with AmTrust Europe Limited ("AmTrust") (and insofar as possible forthwith to instruct AmTrust) that any monies to which it may become entitled under Policy Number 126199201308 ("the Policy") in respect of the Second to Sixth Defendants' costs be paid direct to their solicitors Pinsent Mason's LLP

(ii) likewise to agree with and instruct AmTrust that any monies to which it may become so entitled in respect of the Defendants' costs (and which have not been dealt with in accordance with (i) above) be paid to its solicitors

(iii) to give immediate instructions to its solicitors that any such monies be paid to the First Defendant and the Second to Sixth Defendants as the case may be

(iv) to use its best endeavours to recover any such monies from AmTrust and

(v) not to revoke the said agreement or instructions or to give any contrary instructions

(vi) forthwith to execute a simple form of equitable assignment in a form to be agreed of its contingent right to the insurance proceeds.

63. So far as I can tell, and neither Mr Davenport nor Mr Casey submitted otherwise, these undertakings would provide a complete answer to any competing claims to the proceeds of the insurance. If they are given, they will result in there being no reason to believe that the insurance proceeds are at risk in this way. I therefore propose to accept the undertakings and give liberty to

apply to me informally by email if the terms of the equitable charge cannot be agreed.

64. In my judgment, for the reasons I have tried to explain (and subject to the limit of cover discussed below) there is no reason to believe that the claimant will be unable to pay the defendants' costs if ordered to do so.

65. That means that the jurisdictional threshold of CPR 25.13(2)(c) is not crossed and that I must dismiss the claim for security for costs. No discretion arises. However the absence of any reason to believe that the claimant will be unable to pay the defendants' costs depends on the existence of the insurance policy and the undertakings offered. Mr Colllings QC has offered on behalf of the claimant, and I accept, an undertaking that the claimant will forthwith inform the defendants if the policy is cancelled or if the claimant or its solicitor receives information giving reason to believe that it will be cancelled. Thereupon the defendants will have liberty to apply to the court upon informal notice to the claimant.

66. This is an unusual case where the boundary is somewhat blurred between dismissing the claim for security (on the ground that the ATE policy and the undertakings displace the requisite reason to believe), and ordering limited security in the form of the policy and the undertakings. Since my order at least comes very close to being an order for security of this latter type, and since I heard full argument about it, I shall explain how I would have exercised my discretion if I had found it to exist.

67. The first matter which I would have taken into account in exercising a discretion would have been the degree of risk that the insurance policy would not provide the claimant with an indemnity from which the defendants would benefit. The larger that risk, the more likely it is that I would have ordered that security be provided in the form of a bond. I therefore cannot say which way my decision would have gone if I had assessed the risk differently. Different degrees of risk would have produced different results. However I can and shall explain how I would have exercised the discretion on the assumption that my assessment of the magnitude of the risk (a theoretical possibility and no more than that) is correct, but that, contrary to my decision and that of Stuart-Smith J in

Geophysical, a risk of that magnitude *does* confer a discretion under CPR 25.13(2)(c).

68. The following are the factors which I would have regarded as important.

69. This application was made very late. The application by the second to sixth defendants was issued on 3rd February, 5 weeks before the trial, with a time estimate of 3 hours. The first defendant's application was made on 10th February with a time estimate of 2 hours. In the event Mr Davenport QC and Mr Casey between them took a day to open their applications so the hearing had to be adjourned part heard to 23rd February, two weeks before the start of the trial. In my judgment the application should have been made prospectively before the end of 2014. I consider that PM were right in their letter of 18th November to press for a swift agreement about security, were right in their letter of 27th November to impose a deadline of 9th January for the security to be in place and were right in their subsequent letters to threaten to issue the application by 12th December if satisfactory proposals had not been received. Having been explicitly invited by CS's letter of 16th December to issue an application, the defendants did not do so until 3rd February.

70. I accept Mr Davenport's submission that I should not exercise my discretion to impose a mere sanction for delay, and would not have done so. However I consider it inevitable that an application for security for costs, made unexpectedly just over a month before a three-week trial, would have a very deleterious practical effect. Dealing with the application itself must have been difficult enough. If I were now actually to accede to the application and order security in the form of a bond, the pressure which that order would inevitably bring to bear on the claimant would be all the greater for its lateness. First, it would absorb the attention of its solicitors and counsel when they should be preparing for trial, and second the curtailed timescale for obtaining the security would inhibit the claimant from finding the best deal and would increase the risk that it will not find any deal at all.

71. The need for promptness in making the application was all the greater for the fact that it involved an unheralded change of position. The gist of PM's letter of 15th November 2013 was that if the ATE policy was not disclosed, the defendants

would require comfort in the form of an irrevocable bond. CS provided a copy and thereafter PM did not renew its request for a bond. To an objective observer, the second to fifth defendants adopted the position that the ATE policy was adequate as security.

72. PM wrote on 28th February 2014 to request that the claimant increase the level of insurance to meet the increasing costs of the litigation but again made no mention of any requirement for a bond. Before Mr Rosen QC in June 2014, the adequacy of the ATE policy as a form of security was not challenged. The second to fifth (and later sixth) defendants' position, and the first defendant's acquiescence in it, remained unaltered until PM's letter of 18th November suggesting that a bond was now necessary. That was the first time that the need for such a bond had been raised since 15th November 2013. PM did press this demand for a bond in subsequent correspondence but on 12th December CS provided confirmation that they knew of no reason to believe that there existed any reasons for AmTrust to avoid the policy. That appears to have been accepted as satisfactory reassurance by the second to sixth defendants because PM's letter of 19th December did not mention any requirement for an irrevocable bond but took issue only about the level of cover under the ATE policy. It threatened an application to the court in the absence of satisfactory confirmation of increased cover and asked who would fund any costs order made in the defendants' favour over and above the insurance cover. Thus the letter clearly accepted that the ATE policy was appropriate security to the extent of its limit of cover. That letter also has to be read in the light of CS's letter of 16th December which had made clear that a bond would not be provided and invited an application to the court if it was the defendants' position that a bond was required. No such application was made. Instead PM's correspondence dealt with the level of cover under the ATE policy.

73. In my judgment this correspondence again signalled acceptance by the relevant defendants that the ATE policy would be acceptable security. It was not until the long letter of 23rd January that that position changed.

74. In my judgment this delay has not been adequately explained. Mr Kirwin of PM says in his second witness statement that the defendants were under pressure to

deal with expert evidence. That may be so, but is not a good reason for issuing this application 6 days before the PTR, and 5 weeks before trial and at a time when the claimant was itself facing a deadline to serve expert evidence.

75. The delay is also relevant because its result was that in January and almost all of February the defendants have been proceeding to trial with no security in place beyond the ATE policy. If the claimant were to discontinue the proceedings as the defendants have repeatedly argued it should, they would have no security beyond the policy (the limit of which was increased on 22nd December to £2,100,000). The lack of urgency to obtain some alternative and better security suggests that the concern expressed by the defendants is not a pressing one. That conclusion fits with the apparent acceptance of the policy as adequate security in late 2013, in June 2104 and again in December 2014.

76. It also seems to me to reduce the potential for injustice to leave the defendants with a form of security with which they were content until shortly before the trial. I do not accept Mr Davenport's submission that the increase in costs between June 2014 and February 2015 makes a significant difference to the assessment of the risk. If a policy with cover of £720,000 is adequate security for £720,000, then the same policy with cover of £2,000,000 is adequate security for £2,000,000. Moreover the defendants were sufficiently confident that this was a hopeless claim to apply for summary judgment, so if they now believe that the hopelessness of the claim might provide the insurers with grounds for avoiding the policy, that must also have been the position last June. I appreciate that some of the evidence now invoked only emerged after that hearing but that is not enough to persuade me that the change of position has been explained adequately. Indeed I note that there is no evidence from the defendants or their solicitors which actually provides any explanation for the change of position. I have only Mr Davenport's submissions.

77. In summary, having tried very hard to persuade the insurers to withdraw cover, and having failed, the defendants now argue that there is reason to believe that cover will be withdrawn or avoided anyway. They have left it very late to make that argument and no satisfactory reason has been given for the change of position or for the delay in adopting it.

78. Against these considerations is the fact that the claimant has chosen not to be forthcoming with information about who is funding this litigation. The defendants have suggested that notwithstanding the favourable funding arrangements which the claimant has been able to negotiate with its lawyers and with AmTrust, it has still incurred some £468,000 of disbursements. The claimant has refused to deny or confirm that figure and so for present purposes I would accept it. The claimant has also refused to say how it has been raised, whilst nevertheless running the argument that the claim would be stifled if an order for security in the form of a bond were made.

79. I would reject without hesitation any claim that an order for security in the form of a bond would stifle the claim. The claimant's own evidence, though only adduced at a very late stage after considerable pressure, is that such a bond would usually cost £220,000 from AmTrust but that evidence is unsatisfactory since it does not even purport to relate to the actual circumstances of this case. But even if the bond did cost that much, I am by no means satisfied that the claimant could not raise it. I found paragraph 4 of Mr Ostbye-Strom's 4th witness statement particularly unhelpful in its selective reporting of communications between the claimant's shareholders.

80. At the close of the hearing Mr Collings QC said that if security was ordered in the form of a bond, the action would not proceed. He accepted, therefore, that if I made such an order, it would be pointless for me to allow time for compliance. From that I accept that such an order would bring the action to an end, but that would be because the claimant's backers choose not to buy the bond, not that they could not do so.

81. If I had perceived the risk of non-payment under the policy to have been so great as to give reason to believe that the claimant would not be able to meet an order for costs, this lack of openness on the part of the claimant would have weighed very heavily in the scales. However if I had a discretion to exercise based on the perception of the risk which I have actually formed, I would have made the same order as I propose to make anyway. The claimant did not need to allege that the claim would be stifled in order to resist the application for security in the form of a bond. A claimant is entitled to take its stand on a sound ATE policy. The fact

that its backers could (on the balance of probabilities inferred from a lack of evidence to the contrary) afford to put up alternative security is not conclusive and where, as here,

- there is a sound ATE policy in place;
- the risk of its avoidance is merely theoretical;
- the defendants accepted that policy as adequate security until shortly before making a late application;

I would not have been satisfied, having regard to all the circumstances of the case, that it is just to make an order for security in the form of a bond.

Amounts of the insurance cover

82. Mr Rosen QC ordered that insurance cover be maintained for 80 per cent of the defendant's estimated costs. I see no reason to make a different provision. Although the parties have exchanged costs budgets, these have not been approved by the court. It is most unusual for litigants to recover more than 80 per cent of their full bill on detailed assessment.

83. I was invited by the claimant to say that the first defendant's costs are excessive. I cannot conduct a form of assessment at this stage. The lateness of the application does at least mean that the amount of the first defendant's actual costs is known with some degree of certainty and it is £252,000. If that is too much, that is a matter for assessment. The claimant must provide insurance cover of £210,000 for the first defendant's costs and £2,000,000 for those of the other defendants. Mr Collings QC offered an undertaking by the claimant to procure such cover which I accept in dismissing the application for security by the first defendant.