Neutral Citation Number: [2017] EWHC 1217 (Ch)

Case No: HC-2013-000484 AND OTHERS

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 23/05/2017

Before:

THE HONOURABLE MR JUSTICE HILDYARD

THE RBS RIGHTS ISSUE LITIGATION

David Railton QC, David Murray and Natasha Bennett (instructed by **Herbert Smith Freehills LLP**) for the **Defendants/Applicants**

Jonathan Adkin QC (instructed by **Hausfeld & Co LLP**) for the **First Respondent**
David Head QC (instructed by **K & L Gates LLP**) for the **Second Respondent**

Hearing date: Wednesday 3rd May 2017

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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.

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THE HONOURABLE MR JUSTICE HILDYARD

The Hon. Mr Justice Hildyard:

Subject matter of this judgment

1. In these long-running proceedings, which are being managed under a Group Litigation Order ("GLO"), the Defendants now seek security for costs pursuant to *CPR 25.14(2)(b)* against the Respondents. The Respondents have been identified pursuant to my judgment dated 9 March 2017 [2017] EWHC 463 (Ch) ("my March 2017 judgment") as having provided funds to assist the Claimants in their claims against RBS and its then directors.

2. The persons so identified are Hunnewell Partners (BVI) Limited ("Hunnewell BVI") and a Manx company called London and Northern Capital Partners Limited ("LNCP").

3. The substantive claims in the proceedings relate to what the Claimants contend were untrue and misleading statements in, and improper omissions from, a prospectus issued in respect of a rights issue of RBS shares in 2008.

4. The applications now before me for adjudication were made by Application Notices dated 16 March 2017 against Hunnewell BVI and 17 March against LNCP.

5. Both applications are made on the basis that Hunnewell BVI and LNCP, though not substantive parties, are persons who as funders of the Claimants' litigation costs may be liable pursuant to section 51 of the Senior Courts Act 1981 ("Section 51") in respect of any order against the Claimants for adverse costs which may be made upon conclusion of the proceedings. I addressed some of the principles applicable in my March 2017 judgment.

6. Both funders are outside the jurisdiction. I gave permission to serve out on 23 March 2017. No jurisdictional challenge is made.

7. The amount of security sought by the Defendants was originally £15.25 million; but following recent developments (and in particular, settlements reached with certain of the Claimants) it is now sought in the reduced sum of £11.6 million.

8. Both applications are opposed, not least on the ground that they are too late. Certainly the applications have been made, though earlier notified, close to the eve of trial, now listed to begin on 22 May 2017 (with pre-reading from 8 May). The Respondents have described the timing of the applications as "oppressive", and as necessitating, because of their proximity to the commencement of the Trial, a compressed timetable which the Respondent funders have complained has caused them "significant difficulties". Both have nevertheless opposed the applications against them on their merits.

9. The Defendants have appeared by Mr David Railton QC, Mr David Murray and Ms Natasha Bennett. Hunnewell BVI has appeared by Mr Jonathan Adkin QC. LNCP has appeared by Mr David Head QC. I am grateful to Counsel and their respective teams for their helpful submissions.

Background

10. The background to the applications can be summarised as follows:

(1) In December 2016 the Defendants reached a full and final settlement ("the December Settlements") with effectively all of the then claimants in the proceedings save for the claimants in the SG Group (referred to interchangeably as "the SG Claimants" or the "SG Group"). Following a request from the SG Group, the proceedings were stayed until 11 January 2017. Since the stay, the SG Claimants have served Re-Amended Particulars of Claim which significantly reduce the scope of the action, which nevertheless remains a complex and substantial one.

(2) As a result of the December Settlements, and as the only remaining claimants, the SG Claimants became solely liable in respect of an order for payment of the Defendants' costs of the proceedings from the date of the December Settlements until the end of the case. These are considerable: the Defendants' estimate is that they will have incurred approximately £25 million from the date of the December Settlements to the end of Trial 1. In relation to the costs incurred prior to the December Settlements, the SG Claimants remained liable for 100% of the adverse costs of the claims brought against the individual Director Defendants and a *pro rata* share (approximately 23%) of the costs of the claim against the Defendants.

(3) As I noted in my March 2017 judgment (in para. 65), those developments represented a "watershed" in the proceedings and altered the profile of the risk relating to recovery of any costs order in favour of the Defendants if their defence ultimately succeeds.

(4) Although the SG Claimants contend that there are also tactical considerations at work which in reality have prompted this application, this altered risk, along with confirmation from the SG Group that it required further ATE insurance, prompted

the Defendants to focus on whether to make a security for costs application (and if so against whom).

(5) Accordingly, the Defendants applied for an order (i) that the SG Claimants provide the names and addresses of any third parties who, by virtue of having contributed or agreed to contribute to the costs of the proceedings in return for a share of any recovery, fall within *CPR 25.14(2)(b)*, and (ii) that a copy of any ATE insurance policy held by the SG Claimants be supplied, or alternatively the Claimants confirm that neither the SG Claimants nor any persons falling within *CPR 25.14(2)(b)* would seek to rely upon such policy in opposition to any application for security for costs. The application was the prelude to a threatened application for security for costs.

(6) As indicated above, my judgment on the Defendants' application was formally delivered (after pre-circulation in the usual way) on 9 March 2017. The element of the application seeking disclosure of any ATE policy was dismissed, but the element seeking the identification of funders who would fall within *CPR 25.14(2)(b)* was granted. In granting that part of the application, I expressly stated that I intended to give no encouragement to any subsequent application for security, and I observed at paragraphs 82(2) and (3) of my March 2017 judgment as follows:

"(2) My present overall assessment is that an application against the funders for security for costs, even if limited to costs post-December 2016, would face difficult hurdles and time constraints; and more transparency and reassurance as to their standing, even if not complete, might well tip any balance firmly against any further order.

(3) I therefore offer no encouragement to an application. I consider the Court would be reluctant to accede if further consideration showed it to imperil the trial or its fair preparation, and which might be entirely unnecessary if the funders are substantial or suitable ATE insurance is in place."

(7) Following the making of the Order, the SG Group disclosed through their solicitors the identity of their funders: Hunnewell BVI, LNCP and Manx Capital Partners Limited ("Manx"). Shortly after this information was obtained by the Defendants, the Defendants issued the present applications for security for costs against Hunnewell BVI and LNCP.

(8) Since the applications were issued and the initial round of evidence was exchanged, there has been a further significant development in the litigation. Around 42% by claim value of the SG Claimants have now settled their claims against the Defendants ("the April Settlements"). As a result of these April Settlements, the remaining SG Claimants became solely liable for the adverse costs of the proceedings from 27 April 2017 to the end of Trial 1 (estimated to be £10.9 million), and remain liable for (i) 58% of the adverse costs incurred

between the December Settlements and 27 April 2017 (namely £8.4 million), and (ii) 58% of the SG Group's share of the adverse costs incurred by the Defendants prior to the December Settlements (namely £16.2 million). The total potential adverse costs liability of the remaining SG Claimants is therefore estimated to be around £35.5 million. These figures are all exclusive of VAT.

(9) Thus, a consequence of the April Settlements is that the costs liability of the settling Claimants in the SG Group has been resolved, but that the costs liability of the remaining SG Claimants remains at large. This has resulted in the Defendants seeking security in the reduced sum of £11.6 million, to reflect the fact that pursuant to the April Settlements, any adverse costs attributable to the settling Claimants up to 26 April 2017 are excluded from the SG Group's adverse costs exposure.

(10) A further and important consequence of the April Settlements is that they will result in substantial payments being received on behalf of those settling Claimants by the funders. Hunnewell BVI will be entitled to receive a portion which (it is accepted) exceeds the security sought and which also exceeds the amount in which Hunnewell BVI has funded the litigation. The amount must therefore exceed some £15.5 million. Similarly, LNCP will be entitled to receive something over £5 million, which also exceeds the amounts it has funded. I understand that actual payment of these amounts is likely to be made some time in June or July 2017.

The jurisdiction of the Court and principles guiding the exercise of discretion

11. There is no real dispute, and in any event in my judgment there is no real doubt, as to the jurisdiction of the Court to make an order for security for costs in both applications notwithstanding that the Respondents are not substantive parties to the proceedings. That is by reason of the combined effect of Section 51 and *CPR 25.14(2)(b)*.

12. Section 51 provides:

"(1)Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in-

(a) the civil division of the Court of Appeal;
(b) the High Court, and
(c) any county court,
shall be in the discretion of the court.

(2)Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings...

> *(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.*"

13. Prior to the House of Lords decision in *Aiden Shipping v Interbulk* [1986] 2 WLR 1051 it was thought that Section 51 (and its predecessors) contained an implied limitation restricting its application to parties in the proceedings. But in *Aiden Shipping* Lord Goff put an end that assumption. He said this (at 1061):

> "*In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But, as the facts of the present case show, that is not always so...It is surely consistent with the interests of justice that, in such a case, the court's jurisdiction to make a global order for costs relating to both sets of proceedings should not be fettered by the imposition of an implied limitation upon that Jurisdiction."*

14. As to the exercise of the jurisdiction, the authorities emphasise that the exercise of the discretion under Section 51 is fact-specific, and that the cases in this area can provide general guidance only. In *Petromec v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038 Laws LJ stated at paragraph 19:

> *"....the exercise of this jurisdiction becomes over complicated by reference to authority. Indeed I think it has become overburdened. Section 51 confers a discretion not confined by specific limitations. While the learning is, with respect, important in indicating the kind of considerations upon which the court will focus, it must not be treated as a rule-book."*

15. Similar observations were made in *Dymocks Franchise v Todd & ors* [2004] 1 WLR 2807 (PC) (see below). In *Deutsche Bank v Sebastian Holdings* [2016] 4 WLR 17 Moore Bick LJ referred (in his "postscript" at paragraphs 61 to 62) to *Petromec* and *Dymocks* and stated that the

> *"…only immutable principle is that the discretion must be exercised justly".*

16. It has been held in a number of cases that orders for costs against non-parties are "exceptional"; but, as recorded in paragraph 42 of my March 2017 judgment, this is less of a restriction than might at first be thought. To quote again from Lord Brown of Eaton-under-Heywood in the *Dymocks* case (at [25]):

> "*Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the*

> *ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against."*

17. Thus it is a truism, but an important one, that every case must be considered on its facts; but in my view, a case with multiple claimants seeking to vindicate their rights under a GLO and who have been accorded by Court order the considerable benefit of several and not joint liability for costs will be likely to be considered 'exceptional'. In such a case, the defendant(s) will almost inevitably be put to exceptional difficulty in enforcing any costs order in their favour if they obtain one at the end of the day.

Jurisdiction to order Security for Costs against non-party

18. *CPR25.14* plugs what was previously a gap in the rules (which are intended to be comprehensive) to enable a defendant to obtain an order for security for costs against someone other than the claimant if the court is satisfied, "having regard to all the circumstances of the case, that it is just to make such an order" and that other person has either (a) assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him (see *CPR25.14(2)(a)*) or (b) contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings (see *CPR25.14(2)(b)*), and "is a person against whom a costs order may be made" (see *CPR25.14(2)*): and see also paragraphs 21 to 23 of my March 2017 judgment.

19. The potential exposure of litigation funders to orders for costs against them at the end of the day does not, of course, of itself mean that an order for security for costs should be granted. At such an interlocutory stage the court must assess not only whether it is sufficiently clear that the criteria for the potential imposition of liability are fulfilled, but also whether there is a sufficient basis for interlocutory intervention. Of particular relevance in assessing whether an interlocutory order against a non-party under *CPR 25.14(2)(b)* to secure a contingent liability pursuant to Section 51 is appropriate and just will be

    (1) Whether it is sufficiently clear that the non-party is to be treated as having in effect become in all but name a real party motivated to participate by its commercial interest in the litigation;

    (2) Whether there is a real risk of non-payment such that security against the contingent liability should be granted;

(3) Whether there is a sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made;

(4) Whether a risk of liability for costs has sufficiently been brought home to the non-party, either by express warning, or by reference to what a person in its position should be taken to appreciate as to the inherent risks;

(5) Whether there are factors, including for example, delay in the making of an application for security or likely adverse effects such as to tip the overall balance against making an order.

20. As to (1) in paragraph [19] above, amongst the important considerations in play is as to the reasons and motivation for the funder's involvement. In particular, the Court will seek to ascertain whether the funder has become engaged by way of business with a view to profiting from an action in which it otherwise has no interest, or whether it is what is sometimes called a "pure funder", acting altruistically to enable access to justice and what it perceives to be a worthwhile case to be adjudicated.

21. There will of course be variations within that spectrum (as indeed is illustrated by the rather different positions of the two Respondents in this case).

22. Commercial litigation funding carried on as a business for profit is likely to be addressed differently than gratuitous support offered on a one-off basis in respect of a particular cause or matter in which the funder seeks to support a party which could not otherwise vindicate its position in a genuine case. In the former case, the policy is likely to be to visit the consequences and costs of a commercial venture on the adventurer. In the latter case, policy may favour facilitating the funding of such claims. The availability (or not) of After the Event insurance cover ("ATE cover") may also affect the approach.

23. An example of the application of the policy in favour of supporting access to justice is provided by *Hamilton v Al-Fayed (No.2)* [2003] QB 1175, where interested parties had provided a fighting fund to Mr Hamilton anticipating the return of their money if he was successful. Simon Brown LJ (as he then was) observed (at paragraph 47):

> "*By the same token that Phillips LJ in the* Murphy *case* [1997] 1 WLR 1591 *found legal expenses insurance to be in the public interest…so too in my judgment the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to relatives moved by natural affection but rather should extend to anyone—not least those responding to a fund-raising campaign—*

> *whose contribution (whether described as charitable, philanthropic, altruistic or merely sympathetic) is animated by a wish to ensure that a genuine dispute is not lost by default (or, as concerned Lord Portsmouth here, inadequately contested).*"

24. That contrasts with the position where the funding party is in the business of funding litigation and is (or appears to be) motivated not by solicitude for the cause but by its own prospective financial benefit. In *Dymocks* (above), Lord (Simon) Brown stated (at paragraphs 25-29):

> *"Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation…*
>
> *…*
>
> *In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests."*

25. In the context of professional litigation funders, the leading case is *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055 (CA). Lord Phillips stated as follows at [38] – [41]:

> *"While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event...In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not*

> *deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.*
> ...
> *The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.*
> ***We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided**. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit."* (Emphasis added)

26. As indicated, there is a fairly broad spectrum of types of funders, with the risk of exposure to a Section 51 order and the provision of security for costs moving from minimal to considerable or even likely according to type and circumstance. For example, the funder may exact a commercial return in the event of success, but yet be funding as a friend or a sympathiser, motivated by the cause or related interests, and involved only on a one-off basis.

27. There is neither any definite dividing line nor any hard and fast rule as to what characteristics or circumstances will determine liability. Once again, the Court must, with due regard to the fact that 'exceptional orders' require particular caution, investigate and weigh each case on its facts.

28. In the context of an application for security for costs against a third party funder, a further need for caution is implicit in the double-layered nature of the contingent liability pursuant to Section 51 for which security is sought. At this stage, it cannot be known whether any Section 51 order will be justified: the occasion for an application pursuant to Section 51 and for the exercise of the discretion the section confers is when the Court determines liability for costs generally, usually at the end of the proceedings (see *per* Potter LJ in *Abraham v Thompson* [1997] 4 All ER 362 at 368d). Thus, in the case of a non-party funder, of course, the double contingency is satisfied

only if (a) an order for costs is made against the funded party at the end of the day and (b) the Court is persuaded at that stage that it is in all the circumstances just for that non-party to be made liable for any such costs, and, if so, in what amount.

29. As to (2) in paragraph [19] above, the Respondents submitted, and I accept, that the security for costs regime exists to protect defendants against the risk that a costs award in their favour would go unsatisfied.[1] An order for security is ordinarily therefore only appropriate where such a real, and not fanciful, risk exists.

30. A not unusual difficulty of assessing the risk is that the defendant and/or funder is resident or incorporated in a foreign country which does not require or enable public filing or inspection of accounts, so that the financial position of the relevant respondent will be opaque unless the respondent chooses to be more forthcoming.

31. To address this not uncommon potential problem the Court has, as in other similar circumstances, made clear that it may rely on the inferences to be drawn from "deliberate reticence". As stated by Sales LJ (at paragraph 19) in a single judgment of the Court of Appeal to which all members of the Court agreed in *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120:

> *"But even if deliberate reticence on the part of a respondent is not a breach of CPR Pt 1.3 a court can and should take account of deliberate reticence as part of the overall picture. Any evaluation has to be made on the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it. If, therefore, there were to be a practice of the Commercial Court (as to which we cannot express a view from our own experience) that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, our view is that the practice is a sound one and, as Lewison LJ noted, it is an important point of practice which should either be upheld or rejected at appellate level. We would uphold it."*

32. The Respondent funders suggest that the Defendants must first prove that that there is a genuine risk of non-payment of an adverse costs order by the remaining SG Claimants, before they can seek security from a third party funder. The Defendants submit that "that proposition simply is wrong as a matter of law".

[1] See *The White Book 2017,* Vol 1 para 25.12.2.

33. I agree with the Defendants that the wording of *CPR 25.14* does not limit the power of the Court to order security against a non-party to circumstances where it is first shown that there is a risk of non-payment by the claimant. If it had been the intention to impose such a condition on the relief provided for by *CPR 25.14*, one would expect that to have been stated in the wording of the rule (in a similar way as has been done in *CPR 25.13(2)(c)*).

34. Furthermore, I accept the Defendants' analysis that (a) Section 51 orders can be made against non-parties whether or not the claimant is able to pay an adverse costs order himself/herself and (b) *CPR 25.14* is ancillary to the Court's jurisdiction to make costs orders against non-parties under Section 51. If the Court is persuaded that a Section 51 costs order is likely to be made against Hunnewell BVI and LNCP, and that there is a real risk that they may be unable or unwilling to pay, it may well be just and appropriate to make an order under *CPR 25.14* to ensure that, when the time comes, there will be funds available to meet such an order.

35. I do not accept, however, the Defendants' submission that "whether the Remaining SG Claimants would be able to meet an adverse costs order, were one to be made against them, is entirely irrelevant". That submission assumes a compartmentalised approach; whereas, in my view, the Court must ultimately consider the matter in the round, even if it must initially divide the issues for the purpose of analysis. The question in the round in this context, as it seems to me, is whether there is a real risk that an order for costs in the Defendants' favour will not be paid: and that is a relevant consideration in assessing both whether a Section 51 order is sufficiently likely and whether security should be ordered in respect of that contingent liability. It is part of the overall assessment of the justice of the case.

36. As to (3) in paragraph [19] above, whereas it does not seem to me to be necessary or usually possible to establish strict causation in the sense that costs sought against a third party were incurred as a result of the third party's exceptional conduct in providing funding, an order against a non-party is not by way of fine; and the applicant will need to show at least some causal link between the non-party's conduct and costs incurred. In *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, Morritt LJ (as he then was) stated at 241:

> *"[Counsel] submitted that the proper question was "but for the exceptional circumstances would the costs sought have been incurred". I do not accept that submission. I accept that the costs claimed must have been caused to some extent by the non-party against whom the order is sought otherwise it is hard to envisage any circumstance in which it could be just to order the non-party to pay them. But I do not see why they must be caused by all the factors which render the case exceptional. For example, one of the factors likely to be*

present in most, if not all, cases where an order [under s. 51] is made is that the litigation was for the benefit of the non-party; but that is no reason to require that all the costs were incurred in obtaining that benefit."

37. In *Byrne v Sefton Health Authority* [2002] 1 WLR 775, Chadwick LJ stated as follows at [35]:

> *"…it cannot be right to make an order under s. 51(3) of the 1981 Act unless the court is satisfied that the conduct of the person against whom the order is to be made has been causative of the costs which have been incurred by the person seeking the order. There must be a sufficient causal link between the person who is to pay the costs and the incurring of those costs. It is necessary to determine whether the conduct complained of is really an effective cause of the costs incurred."*

38. As to (4) in paragraph [19] above, at least in earlier days after the revelation in *Aiden Shipping v Interbulk* [1986] AC 965 of the jurisdiction (it having previous to that case been thought that there was an implied restriction in Section 51 and its predecessors restricting its application to parties in the proceedings), it was usually thought to be requisite that the party seeking a costs order against a non-party should warn the non-party of his intention to do so. In *Symphony v Hodgson* Balcombe LJ stated at 193:

> *"Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him."*

39. However, as the exercise of the jurisdiction has become more usual, and especially with the growth of litigation funding as a business in which funders may be assumed to know their business and its inherent risks, the requirement for express warning has gradually been diluted. Thus in *Deutsche Bank v Sebastian Holdings* [2016] 4 WLR 17 at paragraph 32 Moore-Bick LJ stated that the importance of a warning will vary from case to case and may depend on the extent to which it would have affected the course of the proceedings.

40. In my view, in the case of commercial litigation funders, the lack of an express warning is unlikely to be a particularly weighty consideration, still less determinative: it is not for the Court to protect a party from inherent business risks of which it should be well aware.

41. As to (5) in paragraph [19] above, the immutable requirement for the Court to be satisfied that any order it makes in the exercise of its jurisdiction under Section 51 and

under *CPR 25.14* would be just means that careful consideration must be given to whether there are considerations of overall justice which outweigh the reasons for making the order sought. A careful balancing exercise must be undertaken.

42. As submitted by LNCP, that exercise includes being concerned not to allow the power to order security to operate as an instrument of oppression, particularly where a defendant's failure to meet a claim might in itself have been a material cause of a claimant's impecuniosity.

43. It also means that the Court will consider, in the context of delay, cases such as *Re Bennet Invest Ltd* [2015] EWHC 1582, where per Richard Millett QC (sitting as a Deputy High Court Judge):

> "*28 Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see CPR 25.12.6). The question of delay must be assessed at moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in Prince Radu of Hohernzollern v Houston [2006] EWCA Civ 1575 (cited at White Book p 823–4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial.*

…

> *36…The later the order for security is made and the more a claimant has spent on legal costs before that date (or in any case before the application) the smaller the opportunity to the claimant to have a real choice. Here the Claimant had already invested over £150,000 in his claim even before D3 was joined, and doubtless a great deal more since, and his choice would therefore not be between putting up security as the price of continuing or else giving up, but doing so as the price of not only continuing but saving his past investment. That is inevitable when the order sought is being made so close to trial. Each case will always turn on its own facts but the absence of evidence about his means would not persuade me, if I were exercising my discretion to order security myself, that it was just to do so in all the circumstances.*"

44. Once again, however, there are no hard and fast rules. An order for security for costs can be made at any stage of the proceedings. For example, in *Warren v Marsden* [2014] EWHC 4410 (Comm) an application for security against a claimant was made

three months before the date fixed for the trial, in an action which had commenced 2 years and 3 months before the hearing of the application. Teare J held that the material being relied upon to support the application had been available for "*a very long time*" and that the application could have been made at the commencement of the action rather than shortly before trial. However he nevertheless granted security (albeit limited to future costs). Thus the balance may be struck in the context of delay by fashioning the order so as to restrict it in its application to costs from and after a later point.

45. All this serves to emphasise and illustrate that the "*…only immutable principle is that the discretion must be exercised justly*": *Deutsche Bank v Sebastian Holdings* [2016] 4 WLR 17 *per* Moore-Bick LJ (in his "postscript" at paragraphs 61 to 62).

The form of Orders sought

46. Returning to the Application Notices in this case, the form of order sought in each application was for the payment by each funder of the sum of £15.25 million into the Court Funds Office within seven days of the date of the order, and in the event of default for the Defendants to be at liberty to apply for any appropriate relief. Three points especially need to be noted in this context.

47. First, the sum sought was, as previously recorded, reduced in light of the April Settlements to £11.6 million; but that sum was initially sought by way of security from each funder. By a revised form of Order attached to their Skeleton Argument for the hearing, the Defendants further modified the amount of security sought to divide the total between Hunnewell BVI and LNCP on a 75/25 basis, so that £8.7 million is now sought from Hunnewell BVI and £2.9 million from LNCP. In each case the amount sought is now less than the funding provided: so there is no question arising as to the *"Arkin cap."*

48. Secondly, in correspondence in light of the anticipated payments to the funders due in June/July further to the April Settlements as above described, the Defendants have proposed that, rather than payments into Court, the sensible course is for each funder to agree to an arrangement (for which Signature Litigation LLP's (the SG Claimants' solicitors') agreement would also be required) whereby an amount in respect of the Defendants' costs would be either paid into Court or held in Signature Litigation LLP's client account subject to an undertaking that it be not released without the agreement of the Defendants or an order of the Court. That mechanism also reduces, perhaps removes, concern as to how any orders would be enforced.

49. Thirdly, Mr Railton QC put down a marker that in limiting, for present purposes only, their application to costs after the December watershed, and thus to the sum of £11.6 million, the Defendants should not be taken to make any concessions at all as to the appropriate amount they might in due course seek in the context of the substantive Section 51 applications from each funder in the event of the Defendants being awarded costs: he submitted that such applications would in principle extend to 100% of the costs awarded, and furthermore that the Defendants would in such circumstances argue against the application of any *Arkin cap.*

50. I turn to discuss the two applications in turn. Though it is accepted that many of the same considerations apply to both, the stronger case is against Hunnewell BVI, which is plainly a professional litigation funder, and has provided the SG Claimants in this case with considerably greater funding over a longer period.

The position in relation to Hunnewell BVI

51. Hunnewell BVI accepts that it has contributed to the SG Claimants' costs of the proceedings in return for a share of any money or property which the SG Claimants may recover, and is a person against whom a costs order may be made, thereby fulfilling the requirement of sub-paragraph (2)(b) of *CPR 25.14*.

52. However, Hunnewell BVI opposes the application against it on three principal grounds.

(1) First, Hunnewell BVI contends that it is well able to meet any award for costs; and that in any event there has been no demonstration to the contrary. It relies on the fact that the SG Claimants who have now settled their claims with the Defendants represent around 40% by value of the SG Group Claimants. This will apparently result in a substantial payment being made from which Hunnewell BVI will be entitled to receive sums that exceed the amount of security sought and also exceed the amount in which it has funded the SG Claimants. Hunnewell BVI submits that it will therefore undoubtedly have the wherewithal to meet any costs award that might be made against it at the end of trial, and there is no real risk that such an award would go unsatisfied.

(2) Second, Hunnewell BVI submits that the application has been made very late in the day, and too late to warrant any order for security now being made.

(3) Third, Hunnewell BVI submits that the quantum of the security sought, even in its reduced amount, is in any event excessive.

Hunnewell BVI's financial position

53. As its name denotes, Hunnewell BVI was incorporated and is registered in the British Virgin Islands. However, its situs offshore in the BVI is of little significance except in the context of the Defendants' inability to obtain the financial information about it which would be available if it were registered in England. A witness statement made on Hunnewell BVI's behalf on 18 April 2017 by Ms Lianne Craig, a solicitor and partner in the firm of Hausfield & Co LLP, Hunnewell BVI's solicitors ("Ms Craig's first witness statement"), exhibits advice obtained from leading BVI lawyers to the effect that an English Court's costs order can be registered in the BVI pursuant to the Reciprocal Enforcement of Judgments Act 1922 using a straightforward process, following which the order has the same force and effect as a domestic judgment.

54. The real question is as to Hunnewell BVI's financial position and its ability to satisfy a liability for costs if imposed on it.

55. A description of its business, its involvement in these proceedings and its grounds for opposing any order against it for security for costs is provided in Ms Craig's first witness statement. Ms Craig also adopts the description of Hunnewell BVI's activities given in a witness statement of Graham Huntley of Signature Litigation LLP dated 15 February 2017 ("Mr Huntley's fourth witness statement").

56. Hunnewell BVI has traded since 2012. In Ms Craig's first witness statement it is stated that

> "It has an active asset management business, alongside its litigation funding arm, which generates several million dollars of revenue per year."

57. That somewhat ambiguous statement does not make clear either which of the two businesses mentioned generates the very general quantification of revenue asserted or whether that revenue is proprietary or attributable to clients. Very little financial information is provided in respect of what Ms Craig describes as Hunnewell BVI's "wherewithal".

58. Indeed, apart from references to monies due to it as the proceeds of earlier funding of other claimants in these same proceedings who have settled with the Defendants, there is little if anything more than a general assertion by Ms Craig on instructions that Hunnewell BVI would be able to meet "a costs order in due course were it to be made following the conclusion of the trial on liability…through any combination of maturing investments and/or drawing down on existing facility arrangements and/or the utilisation of cash reserves."

59. No accounts of any description are provided, and (so I understand) none are publicly available. By way of explanation, Ms Craig's first witness statement refers to Hunnewell BVI's reluctance

> "to release highly confidential and commercially sensitive information into the public domain in circumstances where it has real, I would say justifiable, concerns about the design of an intent behind the Application".

60. The only liquid funds of which any evidence is provided are those apparently to be received by Hunnewell BVI in June/July 2017 in respect of its entitlements under its funding arrangements with those SG Claimants who settled their claims in April 2017. These are described in a second witness statement made by Ms Craig on 27 April 2017 ("Ms Craig's second witness statement") as being

> "*in excess of:* (i) the full quantum of security sought by the Defendants in the Application; and (ii) Hunnewell BVI's investment in the underlying litigation".

61. In Ms Craig's second witness statement, Hunnewell BVI's continuing refusal to produce what is described as "sensitive and confidential information about its financial standing in response to the Application" is sought to be justified on the further ground that

> "Any risk perceived by the Defendants that Hunnewell BVI would not be able to satisfy a costs order against it and concerns about its financial wherewithal are assuaged entirely by the effect of the Settlement".

62. This is a bold assertion. It would not be justified if, for example, Hunnewell BVI has debts out of which the proceeds may be made; or if it were to carry on business activities using those proceeds which are unsuccessful or result in illiquidity. There is no financial information in evidence to address either example. Unsurprisingly, therefore, the Defendants argue that an order for security should still be made, on the footing that "there is no guarantee that any sums which are anticipated to be paid into Signature's client account [i.e. the settlement sums due to Hunnewell BVI] will still be available to meet an adverse costs order in due course."

63. Counsel for Hunnewell BVI sought to neutralise this argument on the footing that it impermissibly "reverses the burden of persuasion on a security for costs application." Mr Jonathan Adkin QC elaborated on this in his skeleton argument as follows:

> "If Hunnewell were a claimant itself, to obtain an order for security on the grounds of impecuniosity the burden would be on the Defendants to show that

"*there is reason to believe that it will be unable to pay the Defendants' costs if ordered to do so*" under CPR 25.13(2)(c); and to obtain an order on the grounds of risk of evasion of a costs order the burden would be on the Defendants to show that Hunnewell had *"taken steps in relation to [its] assets that would make it difficult to enforce an order for costs against [it]"* under CPR 25.13(2)(g). There is no proper basis for reversing the burden in applications under CPR 25.14. The payment Hunnewell will receive resulting from the partial settlement of the SG Group's claims makes it plain there is good reason to believe it would have the wherewithal to meet a costs order, and the Defendants have adduced no evidence to undermine that position. Nor have the Defendants adduced any evidence to show that Hunnewell has taken steps to make it difficult to enforce a costs order against it."

64. The question therefore has become whether the evidence of prospective receipts under the settlements in June/July is sufficient to make up for the absence of any other real evidence going beyond mere assertion on instructions as to Hunnewell BVI's financial position and to ensure that the burden of persuasion rests on the Defendants.

65. In my judgment, that evidence is insufficient for that purpose. The absence of any real evidence as to Hunnewell BVI's financial position leaves the court with no way of knowing whether even quite substantial receipts will result in an available fund for payment of costs, or whether such proceeds will, as it were, go down the plughole for other creditors or unsuccessful ventures in an uncertain line of business. The resort to assertions of confidentiality and secrecy are too general and commonplace to carry conviction and persuade me that they are the true and predominant reasons for reticence.

66. The impression given of deliberate reticence has not been dispelled; the inference that the real reason for such reticence is that in truth Hunnewell BVI cannot demonstrate sufficient resources to meet an order for costs, has not been displaced by the presently available evidence; and see paragraph [31] above as to the practice of ordering the provision of security for costs in such circumstances.

67. I should add that Mr Adkin submitted that since the security for costs regime is designed to protect a defendant against the risk that a costs award in its favour would not be met, it is relevant to ask whether any costs award the Defendants obtained at the end of these proceedings would be met by the remaining SG Claimants themselves: if there is no reason to suppose that the remaining SG Claimants would fail to meet a costs award against them, there is no real risk that the Defendants would be unable to recover their costs, and no justification for requiring security from Hunnewell BVI, whose liability in costs cannot be more extensive than that of the SG Claimants. Mr Adkin submitted that in the present case the Defendants have not attempted to demonstrate that the remaining SG Claimants would fail to meet any costs award made against them at the end of the proceedings. Rather, the Defendants

complain that it would be cumbersome to enforce any costs award against the individual remaining SG Claimants: Mr Adkin submits that this complaint does not give rise to a real risk that such costs would go unsatisfied, but only (at most) that enforcement would be complicated.

68. In my judgment, and for the reasons previously stated (see paragraph [35] above), both the possible alternative recourse and the difficulties in enforcing it are to be taken into account. However, taking those matters into account I am in no doubt that the possibility of alternative recourse against a multitude of claimants, many of them abroad, does not remove the risk of non-recovery to any material degree and does not militate against an order for security for costs in the present case.

69. Whilst the order for proportionate several liability for costs was to my mind appropriate and necessary in the context of the GLO it undoubtedly alters the balance between the parties and (as it seems to me) it would be unrealistic and unjust to accentuate the imbalance by underestimating the difficulties of recovering such comparatively small sums from so many.

70. Further, I accept the Defendants' contention that they have sufficiently demonstrated that there is a risk of non-recovery in the event of an adverse costs order. In particular:

(1) It is now clear that the ATE insurance the remaining SG Claimants claimed to have in place (the terms of which remain unknown to the Defendants) is not sufficient to cover a potential adverse costs order against them (that is, the remaining SG Claimants). As matters presently stand, the individual remaining SG Claimants will therefore have to put their hands in their own pockets for the outstanding amounts not covered by ATE insurance;

(2) A proportion of the total adverse costs liability of the remaining SG Claimants (which the Defendants say is around £35.5 million) would fall upon individual retail claimants of limited means, some of whom are abroad;

(3) Whilst the Defendants have not performed a detailed analysis of the financial position of each of the remaining SG Claimants, the information which the Defendants have been provided with by Signature Litigation LLP about the individual retail members, in the course of these proceedings, indicates that there is a real risk of non-payment:

i. Mr Huntley at paragraph 28 of his second witness statement, highlighted the fact that "*many of the individuals in question are individuals with past or present modest incomes, living modestly*

and with modest savings and pensions, at best…very few of those retail investors enjoy or can possibly hope to enjoy the standard of living and security enjoyed by the professionals [involved in this litigation]…to my knowledge significant numbers of the retail Claimants have died during the course of these proceedings…"

ii. Mr Connerty of Signature Litigation LLP at paragraphs 15 and 17 of his second witness statement, confirmed that "*35% of the "retail" claimants are pensioners, 15% are now unfortunately deceased, 20% live overseas and 8% comprise what are described as blind trusts*."

71. The second ground relied on by Hunnewell BVI is that the application is "extremely late": and its lateness denies Hunnewell BVI any real choice as to whether to proceed or not having already spent so much. Mr Adkin submitted that the delay causes both Hunnewell BVI and the remaining SG Claimants real prejudice:

1) Hunnewell BVI, because it has now funded the litigation to this point (to the tune of £15.5 million), and if security were ordered at this late stage it would face an unfair choice between giving security or having the proceedings stayed and its prior funding wasted;

2) the remaining SG Claimants, because if Hunnewell BVI did not give security they would be faced with the prospect of their action being stayed on the eve of trial, with enormous wasted costs, and no meaningful opportunity to find alternative funding in the meantime. Mr Adkin submits that the delay alone would render an order for security unjust.

72. Delay in the making of an application of this nature is always a relevant consideration: but lateness does not necessarily connote unjustified delay and naturally it is important to assess any reason for lateness and its prejudicial effect in determining the weight of the factor.

73. At first sight, the delay is indeed extreme: the proceedings have been ongoing for four years; it is more than three years since the principle of several liability of the claimants under the GLO for a pro rata share was established and the difficulties of recovery were apparent;[2] and it is 21 months since the Defendants were aware that the claims were being funded, and funded by the Hunnewell Group, albeit initially (and until November 2015) by another entity in the Hunnewell Group, Hunnewell Partners (UK) LLP.

[2] At the Third CMC on 12 February 2014.

74. Hunnewell BVI contends that the delay is inexcusable; and that the two explanations offered by the Defendants cannot withstand scrutiny.

75. The explanations offered are (a) that matters have recently changed in light of the December Settlements of a large number of the non-SG Group Claimants' claims, and (b) that the Defendants' consistent understanding had been that there was adequate ATE insurance in place, and it only transpired very recently (and only as a result of Mr Huntley's second witness statement dated 18 December 2016, and the inter-solicitor correspondence in January and February 2017) that this was not so.

76. As to the effect of the settlements, Hunnewell BVI contends that the effect has been overblown. It contends that prior to the December Settlements, the SG Group amounted to about 23% of the claims against the Defendants. At that stage, the Defendants' estimated total costs to the end of trial were £146 million, of which the SG Group's share was approximately £33.6 million. That is a potential costs liability with which the Defendants were content to live, without seeking any form of security either from the SG Group Claimants or their funders. Yet the Defendants now seek security against the much lesser potential costs liability of £19.3 million which they say will be incurred by the remaining SG Group Claimants from the date of the December Settlements to the end of trial. Accordingly, Hunnewell BVI submits, the December Settlements cannot explain why the Defendants are only now seeking security against a much lesser costs liability than that with which they were content to live on a wholly unsecured basis for much of the life of the litigation. They took the risk then, and should not be allowed to offload it now.

77. As to the second justification offered by the Defendants, Hunnewell BVI contends that none of the developments in relation to ATE insurance excuse the delay; and it urges two principal points. As an initial point, Hunnewell BVI submits that ATE cover would not solve the problem which is said to be the principal motivation behind the present application – namely having to enforce against multiple individuals – since the Defendants would in any event have to enforce against those individuals if ATE cover were in place, with the individual Claimants then being able to make a claim on any ATE policy. Secondly, it is urged that it has been apparent to the Defendants since at least 23 July 2015 that the SG Group was seeking ATE cover but did not have it in place.

78. Turning to each suggested justification in turn, I accepted in my March 2017 judgment that the December Settlements were a watershed, and what I there described (at para. 65) as

> *"the occasion for a rather changed risk profile as well as arithmetically increased exposure."*

79. I accept that it is a fair point against this that the SG Group Claimants' share of the aggregate unsecured exposure prior to the December Settlements was actually in a total sum greater than the exposure for which security is sought now, even if the overall unsecured amount has increased by 53%. It is also a fair, and (to my mind) telling point that the more logical and apposite time for the Defendants to seek security for costs was when the regime for several *pro rata* liability was established: the risk stemmed from there, and yet the Defendants bore it for years without complaint; and even if an application against retail claimants might have seemed a presentationally difficult and unattractive course then, the decision not to pursue it tells against the present application.

80. The fact remains, however, that one of the effects of the December Settlements was that whereas previously many of the claimants bore a very significant personal risk in cost terms of a magnitude which would justify even disputed enforcement proceedings, the proceedings are now being pursued by a group of claimants (the remaining SG Claimants) many of whom are individual retail investors who have, comparatively, little to lose in carrying on, and whose exposure may be more theoretical than real given the expense of myriad enforcement proceedings. The overall profile of those contingently responsible for the costs going forward is very different from the profile of those proceeding as claimants before the 'watershed' of December.

Revelation of the lack of ATE cover

81. But, as I think Mr Railton accepted, none of this would probably be sufficient to justify the present application were it not for the reluctant, stuttering, and still disconcertingly opaque, revelation of the fact (as fact I take it now to be) that, contrary to the impression earlier created, there is materially inadequate ATE cover in place.

82. Although, according to the evidence of Kathryn Revitt, a director of LNCP, efforts are continuing on behalf of the remaining SG Claimants "working with experienced brokers" to "obtain ATE focussed on the Defendants' costs incurred in the period post 2 December 2016" the present position appears still to be that there is no such coverage for such period. In consequence, the Defendants are left without the straightforward recourse that they may well have expected, and in reality are likely to be dependent on establishing liability on the part of the funders, about whom (as previously noted) they have been told very little indeed (and nothing at all until my Order in March 2017).

83. Hunnewell BVI and LNCP both suggested that the lack of or shortfall in ATE cover had been apparent since July 2015, when on behalf of the SG Group John David Campbell QC had made a witness statement which had referred to "progress on ATE

cover" but by implication signalled that none was yet in place, and Mr Graham Huntley of Signature Litigation LLP had also advanced as a reason for not relegating the SG Group to the status of a 'follower group' the fact (as he presented it to be) that in that event ATE would not be available. It is the case, as Mr Railton accepted, that the position as regards ATE cover has not been quite clear, leaving the Defendants open to the argument that they should have clarified the position much earlier and should not now be heard to complain.

84. However, the fact remains that, after some want of clarity and equivocation, the impression created by the SG Group in public statements at all times until December 2016 was that such cover either was or shortly would be in place: and that is how the position has been presented to its members. Thus, as noted by the Defendants' solicitors in a letter to Signature Litigation LLP dated 31 January 2017:

(1) In his fifth witness statement dated 22nd November 2013, Mr Steven Baker of Bird & Bird (solicitors for the predecessor of the SG Group, called the 'BB Group') stated that

> *"the Action Group has always proceeded, and presented its litigation strategy to its members, on the basis that it would have adverse costs cover to cover all plausible costs liabilities. Its members have not anticipated that they might be liable for adverse costs over any adverse costs cover."*

(2) On 28 March 2014, after some doubt about coverage had been raised, the SG Group issued a press release on its website stating that it had secured a £23.5 million package of ATE and indemnity cover which would provide protection for its members against the possibility of an adverse costs order in the litigation;

(3) That statement was then repeated in further press releases on the Action Group's website on 9 April 2014 and 1 May 2014;

(4) In an article dated 1 November 2015 in the 'Herald Scotland', the SG Group was reported as having confirmed that *"it paid a multi-million premium for ATE insurance last week and has £15.5 million of funding in place"*; and

(5) Consistent with these public statements the wording of the membership forms issued by the SG Group (at least in 2016) inviting joinder made no mention of any potential liability for costs but stated that *"costs associated with any agreements made by the Group on [a member's] behalf including contingent fees, funding costs and disbursements"* could be deducted from the proceeds of the member's claim.

85. It has been suggested on behalf of the remaining SG Claimants, and the suggestion has been borrowed by the funders, that these public statements were modified or withdrawn and in any event were not made to the Defendants, who should not be able to rely on them; but the evidence for the first was not clear, and the second is not

really in point: the important thing is that the clear impression intentionally imparted (and see paragraph 131 of my March 2017 judgment) was that ATE was or shortly would be in place; and that has been revealed and now accepted not to be so.

86. As to the contention that if ATE cover were in place that would not solve the problem of having to enforce against multiple claimants since only then could a claim be made under the ATE policy, neither Counsel for Hunnewell BVI or Counsel for LNCP was really able to answer my question as to whether that was really so, and whether it was not really the case that a claim made upon the occurrence of the insured event (an adverse costs order) would be likely to be paid. For all I know, any ATE cover may, by its terms of cover, stipulate a 'pay to be paid' basis or such like. But I do not know this; and I do not think I should assume that it would, still less assume that the cover would not in reality be a significant security.

Conclusion as to Hunnewell BVI

87. In summary, it seems to me that the circumstances post-December 2016 are such that it is just to make an order against Hunnewell BVI for security for costs. As a commercial litigation funder, Hunnewell BVI (and its parent) should have been fully aware of the position in relation to ATE cover; if there was uncertainty it was their business to get to the bottom of it, or incur the risks if they chose not to do so.

88. I appreciate that such an order in effect requires Hunnewell BVI to provide something analogous to ATE cover without a commensurate premium; but that is a consequence of the risks inherent in undertaking commercial funding for a substantial potential profit without ATE cover being provided by another.

89. I shall return to the issue of quantum after discussing next the position of LNCP.

The position in relation to LNCP

90. LNCP is registered and was incorporated under the laws of the Isle of Man. It is an entity owned by or associated with the family interests of Mr Trevor Hemmings, a well-known businessman and philanthropist.

91. Seven other associated entities ("the Related Claimants"), including Manx which has also provided funding in excess of its proportionate share, are claimants in these

proceedings: they subscribed some 51.5 million shares in RBS pursuant to the rights issue of which complaint is made for approximately £103 million.

92. Neither LNCP nor Manx, who have both provided substantial funding, accepts that it is to be treated as a commercial litigation funder. It is thus necessary to consider in some detail what their role has been in the proceedings, and what their business is more generally.

93. LNCP was approached by the Action Group for funding first in early 2015 but declined to provide it. In July 2015 LNCP learned that Hunnewell Partners (UK) LLP was involved. When the Action Group approached LNCP again in late 2016, the Group indicated that its then existing funding was not sufficient to meet legal costs through to the end of Trial 1. Ms Revitt's evidence is that

> "Rather than see the action fail in this way, LNCP reluctantly indicated a preparedness to provide £5 million towards the Claimants' legal costs of the Litigation.
>
> …
>
> The Action Group offered terms which were accepted by LNCP in mid-November 2016. The detailed terms are necessarily confidential to the parties, but I consider that they are much less generous to LNCP than would be demanded by many commercial funders who may, for example, take a percentage of any recoveries made…
>
> …
>
> Shortly afterwards, the other Claimant groups settled with the Defendants. As a consequence of being the sole remaining Claimant group, the solicitors for the Action Group undertook a revision of its legal costs forecasts. This was necessary given the new landscape of the litigation. The Action Group told me that they were speaking to various parties about providing the additional funding required until the end of Trial One and asked whether the Related Claimants could organise a bridging facility pending the conclusion of other arrangements and LNCP did so.
>
> By mid March 2017, LNCP had paid in various tranches the £5 million pursuant to the terms accepted in November 2016, but had not paid anything under the bridging facility. Without wishing to go into confidential and commercially sensitive arrangements, the Action Group required additional funding on a permanent basis, and I considered that the Related Claimants were the only realistic source of funding available on terms that would be workable for the Action Group. I believed that the Related Claimants were, therefore, faced with the simple but stark choice of accepting (what we

> considered to be) a low offer by RBS, or offering to pay additional monies in respect of the Claimants' legal costs.
>
> After some discussions, the bridging facility was withdrawn and Manx offered terms which were accepted by the Action Group. Again, the detailed terms are necessarily confidential to the parties, but I can say that finance provided by Manx will be repaid if, and only of, a substantial threshold recovery has been achieved. In other words, Manx will get its money back in certain circumstances only. In those circumstances it will receive the return of capital, without any additional return or uplift.
>
> …
>
> While LNCP and Manx have committed to contribute more than would be the Related Claimants' proportionate share of costs to be paid, they have done so because of the Related Claimants' interests in the litigation. Other Claimants may be riding on their coat-tails financially, but I do not consider that transforms a litigant to being an entity in the business of commercial litigation funding."

94. The uncontradicted evidence is that neither LNCP nor Manx or any of the Related Claimants has ever been or is involved in litigation funding as a business. There is no challenge to Ms Revitt's evidence that

> "LNCP would not have dreamt of making monies available had it not been for the involvement of the Related Claimants".

95. Nor is it disputed that Ms Revitt

> "did not anticipate or expect that LNCP would thereby become liable for a non-party costs order or security for costs."

96. In these circumstances, whilst LNCP acknowledges that the Court has jurisdiction under *CPR 25.14(2)(b)*, it contends that in all the circumstances of the case (taking into account the principles and/or relevant factors identified above) it would not be just for the Court to make an order for security against it.

97. Mr Head QC on behalf of LNCP arranged his submissions in opposing any order under three headings as follows:

(1) Unlikelihood of a Section 51 order being made against LNCP in due course;
(2) No security justified or necessary at this juncture; and
(3) Quantum.

98. As to the unlikelihood of a Section 51 order ultimately being made against LNCP even if the Defendants succeed and obtain an order for costs in their favour at trial, Mr Head primarily re-presented the points made by Ms Revitt in her witness statements to the overall effect that LNCP has not in reality been acting as a commercial funder nor has its motivation been to make a profit out of another person's litigation: its involvement is to assist its Related Claimants with a view to their vindication and recovery of damages accordingly in the proceedings themselves. It cannot realistically be portrayed as intermeddling in the proceedings with a view to personal profit as if it were a party: LNCP was facilitating access to justice by substantive claimants rather than itself gaining access to justice for its own purposes (and see *Dymocks* at 2815*G*]. Mr Head submitted that

> "In other words, while perhaps not a "pure funder" case, this case is closer to Hamilton than Arkin (above)."

99. Secondly, Mr Head submitted that even if (as I suggested in my March 2017 judgment) potential liability for costs and to provide security for costs should not come as any surprise to commercial funders, that was not necessarily the case in the context of a party such as LNCP, which is not in that line of business at all. There was no reason to doubt or discount Ms Revitt's evidence that in the circumstances in which LNCP agreed to provide funding, she did not anticipate that LNCP would thereby be liable to provide security for the Defendants' costs.

100. Also in that context, no warning had been given by the Defendants of any intention to seek to pursue non-party costs orders or security for them until 23 January 2017; and even if they did not know the identity of LNCP until 10 March 2017 they had been aware of the fact of third party funding and third party funders such as Hunnewell Partners (UK) LLP since July 2015. No dog had barked; no fair warning had been given.

101. Further, having not become involved in funding until November 2016, the actions of LNCP could not really be said to have been an effective cause of the costs incurred or to be incurred by the Defendants: Mr Head submitted that it is difficult to see how the burden on the Defendants has been increased by the actions of LNCP in supporting the SG Claimants' legal costs.

102. As to his second main heading, Mr Head submitted that the requirement for security has not been demonstrated on the evidence, and that in any event the timing of the applications is oppressive.

103. It is, he submitted, for the Defendants to show that there is reason to believe that LNCP will be unable to pay the Defendants' costs if ordered to do so. That was not apparent, not least having regard to the anticipated receipt in June/July of a cash payment in excess of the monies provided by LNCP towards the SG Claimants' legal costs, and the lack of other evidence to cast doubt on LNCP's standing or ability.

104. As to lateness and prejudice:

(1) The fact of lateness is plain and obvious; the new landscape is not sufficient to excuse the change of tack; the sudden focus on the lack of ATE cover is not a basis for visiting similar liability on LNCP, which cannot be criticised for its apparent lack or any deficiency; and the application smacks of a tactical ploy to apply further pressure on the remaining SG Claimants (including the Related Claimants) to settle.

(2) As to prejudice:

a. In the case of LNCP, Ms Revitt confirmed that if security is ordered, LNCP will have to consider its position and the options available to it, inevitably involving further discussion with the remaining SG Claimants. This is hardly surprising, given that an order for security would effectively compel LNCP to provide funding beyond its current commitment, in circumstances where timing and sanctions for non-compliance remain uncertain, potentially requiring new or amended terms as between LNCP and the remaining SG Claimants, and where there is little or no time remaining before trial to carry out such discussions and/or negotiations.

b. Given the lateness of the Application against it, it is difficult to see that LNCP will have adequate time (still less a "generous time") amounting to a "proper choice" as to whether to comply with the order for security following its discussions with the remaining SG Claimants, as required in *Re Bennet Invest* (above).

c. An order will also inevitably cause substantial prejudice to the remaining SG Claimants, not least because they have already expended huge sums in this litigation (albeit not as large as those of the Defendants, as to which see below) and because the start date and/or the progress of the trial might well be threatened. There is a description in Mr Huntley's fourth witness statement of the potential prejudice likely to be suffered by the SG Claimants. The remaining SG Claimants have made clear (by their counsel at the hearing on 23 March) their desire to be heard on the question of sanctions, should that issue become relevant.

105. Mr Railton on behalf of the Defendants rejects all these points.

106. As to whether LNCP should be characterised or treated as a commercial funder, Mr Railton drew attention to the paucity of the evidence available and LNCP's apparent refusal by reference to a somewhat amorphous basis of confidentiality to disclose what its activities and arrangements actually were and are. This also enabled him to submit that the only real clue as to the terms on which LNCP had agreed to provide funding was the statement in Ms Craig's first witness statement (on instructions from and on behalf of Hunnewell BVI) that

> "the terms of its funding arrangements with the SG Group are not dissimilar to the terms of the funding arrangements between the SG Group and LNCP."

107. Mr Railton portrayed LNCP as

> "quite deliberately seeking to profit, and profit handsomely, from the claims of all the other claimants, including the now 8,650 remaining individual claimants, [comprising] 35% pensioners and 15% deceased…
> …
> So what LNCP is doing, it's not for charity, it's doing it for commercial profit. Indeed, it's doing it on an enterprise where it will already be getting back more than its stake…
>
> …the fact that it is not its regular line of business, which appears to be the position on the evidence, means only, as you would expect from a business run by a successful entrepreneur, that a good commercial opportunity to make money has been spotted."

108. As to whether LNCP should have understood the risk that it might become liable for adverse costs and for security in that regard, Mr Railton suggested that Ms Revitt's assertion to the contrary was "carefully worded" and could be read to suggest that the risk had been deliberately taken. He suggested further that LNCP must surely have taken legal advice. He reminded me of paragraphs 70 and 71 of my March 2017 judgment and my stated working assumption that such risks would be understood.

109. Mr Railton was dismissive of the point that warning should have been given, on the footing that the Defendants had only found out about LNCP in March:

> "It has simply been impossible for us to give a warning before we knew who they were and by the time we did know who they were, they were well aware of the point in any event."

110. Mr Railton was equally dismissive of Mr Head's causation argument: not only was recent authority doubtful as to whether it had to be established, but in any event causation was plainly established in the present case

> "because it is quite clear from the evidence that's been put in by LNCP that the funding from LNCP has been why the Signature group, the SG Group, has been able to and are continuing with these proceedings…That conduct has been the direct and effective cause of the costs incurred by the Defendants since December 2016…"

111. Turning to Mr Head's points under his second heading, Mr Railton emphasised that LNCP has provided no evidence of its financial position apart from its anticipation of substantial receipts (which may simply be dispersed or exceeded by liabilities), and that it cannot complain if in such circumstances of "deliberate reticence" the practice is to assume a risk and grant security.

112. As to the prejudice asserted, Mr Railton submitted that the reality was that

> (1) It is unlikely that a funding agreement would not deal with the eventuality of being required to provide security; in any event,
>
> (2) It is difficult to see how there could be relevant prejudice to LNCP in it securing the liability which it is likely to have should the Defendants succeed in these proceedings.

My assessment of the position and decision in relation to LNCP

113. In default of clarity and transparency in the evidence put forward by LNCP, Mr Railton sought to equate its position with that of Hunnewell BVI: both should be taken to be participating in the litigation to profit from the process, and each to have become a real party at interest which should bear the risks that other parties bear. Neither had chosen to demonstrate a strong financial position: and no distinction should be drawn between them, except in terms of apportioning a proper share according to a comparison of the amount of their funding (and subject to any *Arkin* cap).

114. I have been troubled by LNCP's reticence both as regards the terms of its arrangements with the SG Claimants and its own financial position, and the inference pressed by Mr Railton that disclosure would reveal both (a) terms characteristic of commercial litigation funding and (b) financial frailty such as to justify provision of security.

115. However, I have eventually concluded that such evidence as there is suggests that the positions of Hunnewell BVI and LNCP are materially and relevantly different and that they should be treated differently for the purposes of this application. Their roles and objectives are, as it seems to me on the admittedly sparse evidence before the Court, different.

116. In the case of Hunnewell BVI, potential exposure to a liability for adverse costs is an inherent risk of the business it undertakes, as it should be taken to have known in funding what, for it, is a commercial adventure in which it has no other interest. By contrast, in the case of LNCP, the evidence beyond the fact that it has contracted for an unspecified but presumably generous return on its money, is that its involvement is not in the nature of a business adventure: litigation funding is not its line of business, nor does it seem to me that its primary motivation in providing funding is to profit thereby.

117. Obviously, LNCP is not a "pure funder" (as its associated company Manx may be): it is to be inferred that it has required some commercial return as the price of its support. It may also be inferred that LNCP (or its ultimate parent or owner) has a general commercial interest in constituent companies in their group achieving recovery. But I do not think the evidence presently demonstrates sufficient grounds for a conclusion that LNCP would be treated as "the real party" to litigation to which it is otherwise a stranger but in which it has involved itself with a primary view to personal profit. In the spectrum, and in contrast to Hunnewell BVI, LNCP seems to me to be closer to a "pure funder" than a professional litigation funder.

118. The fact that LNCP (unlike Hunnewell BVI) is not in the business of litigation funding is not, of course, decisive: the funder in *Dymocks* was not in that line of business either, and yet was held to be liable; one-off commercial funding may suffice to expose the funder to liability. But the fact that it is not part of the usual business of the particular funder does bear on the question of whether that funder should be taken to be funding for commercial gain and accordingly, in the way of things, to have assumed the risks ordinarily inherent in that line of business.

119. Further, although it may ultimately and indirectly stand to gain from any success its Related Claimants may achieve in the litigation, it does not seem to me that the evidence warrants a supposition that it has sought to invest in those Related Parties simply or even primarily as litigants; nor that they are simply its proxies; nor that the interests of which it seeks vindication are in truth not so much their interests as its own.

120. Put another way, I do not think the evidence presently suggests that LNCP has identified and supported the litigation as a business opportunity; it has extracted a price, but it has sought to assist the parties it has funded to vindicate their rights for their own benefit in the apparent belief that without such assistance a deserving cause would founder. Its support is not, as it were, a self-interested and separate commercial adventure in which the litigation is a vehicle not so much for vindication as speculative profit. It seems to me that its primary motive and interest has been to assist the Related Claimants to obtain damages for their own benefit as compensation for wrong done to them and there is no sufficient evidence that its involvement in this case was primarily or even materially motivated by a wish to gain access to justice to profit from the process.

121. That assessment is, as Mr Head submitted, to some extent supported by the terms on which one of the Related Claimants, Manx, apparently provided funds (of some £10 million); that is to say, for no uplift, interest or other return, and subject to repayment only after a substantial threshold recovery.

122. There are other differences in the respective positions of Hunnewell BVI and LNCP of some relevance.

123. Some of these flow from their different lines of business. For example, whereas in the case of Hunnewell BVI, there is force in the argument that it should be taken to have appreciated the risk of liability for adverse costs and being required to provide security, since it should be assumed to know risks inherent in its own line of business, the same cannot necessarily be said (at least with the same force and certainty) of LNCP. This not being its line of business, it is perfectly possible, to my mind, that even if legal advice might have signalled the exposure at the end of the day, the possibility of an order for security for costs at this stage of the process may not even have been contemplated, let alone provided for. That is especially so given that LNCP has provided funds much later in the day, almost on the eve of trial, when the risk of an exposure to an application for security for costs may have appeared much less likely, if it was addressed at all. To impose an obligation now to provide security for an obligation it cannot be assumed to have envisaged or provided for, at such a very late stage, would not seem to me to be just.

124. For similar reasons, I do not think there is any sufficient basis for the assumption urged by Mr Railton that the funding arrangements agreed by LNCP catered in advance for such an application. On that basis, the timing of the application, and the potential for a disruptive effect on the remaining SG Claimants' case preparation (including the Related Claimants' not insubstantial claims) also militates against an order now.

125. In addition, the position of LNCP, though not entirely clear, is less opaque than in the case of Hunnewell BVI, and the reasons for its participation are obvious, whereas the sudden substitution of Hunnewell BVI in place of its English parent are unexplained. The unexplained introduction of a foreign entity accompanied by almost compete silence as to its financial position inevitably encourages suspicion. LNCP's involvement, on the other hand, is entirely explicable. The group of which the Related Claimants are part (which is based largely in the Isle of Man or Jersey and owned by or associated with the family interests of Mr Hemmings) acquired approximately 51.5 million shares in the RBS Rights Issue, the subject of the proceedings, for a price of approximately £103 million. In addition, the group had, until forced to sell to cover borrowings undertaken in order to subscribe in the rights issue, held a total of 146.5 million shares in RBS. The group's then substance and its present interest are clear.

126. As to the present position of the group, LNCP and the family interests that control them, the position is of course less clear and LNCP's reticence as to its accounts and financial position does cause concern. But there is little other reason for supposing that LNCP, which has stated it is good for the money at least to the extent of its funding if an adverse costs order were ultimately to be made against it, would prejudice the family interests that are known to own it by defaulting. It also seems to me that LNCP's reticence is more justifiable when it is regarded as more akin to a "pure funder" than a professional litigation funder.

127. Lastly, I would add two more general points. First, there does appear to me to be substance in LNCP's submission that it would be unjust for it to be treated at one and the same time both as a real party but also entirely differently from any other real party by requiring it to relieve the Defendants from the administrative and PR difficulties of recovering from other claimants simply because it has chosen to support their cause as well as the cause of the Related Claimants on terms which give it some return. Secondly, just as a director or liquidator acting in the interests of the company of which he or she is such an office-holder may be entitled to support litigation without taking on the risk of adverse costs, so too it does not seem to me that it should be or become an inherent risk of parental support in a group or looser association that the parent (or in a loose association, a quasi-parent) company should be liable for adverse costs just because it has charged for providing that support.

128. In summary and in the round, I am not persuaded that on the evidence presently before the Court there is a sufficient likelihood that at the end of the day it will be thought just to make an order under Section 51 against LNCP; nor, despite the reticence as to its financial position, that there is sufficient evidence of a risk that it would not satisfy an order made against it at the end of the day to warrant an order for security at this late stage. In those and all the circumstances I do not consider it appropriate or just to require it to provide security for costs.

Quantum

129. As I indicated at the hearing, the extraordinary (indeed, in my experience, unparalleled) amount of the costs apparently incurred in this litigation by, in particular, the Defendants has in the past caused me, and continues to cause me, very great concern.

130. That concern is exacerbated in the present context by the disparity with the SG Claimants' costs and because I suspect (although it is speculation) that the sheer size of the Defendants' costs has made difficult, if not impossible, the obtaining of comprehensive ATE cover by the SG Claimants.

131. As to the latter, the magnitude of the costs, the excess over the already huge estimates originally given, the approach of the Defendants as exemplified by the instruction of no less than 13 Counsel in addition to serried ranks of solicitors and paralegals (probably over 20) contributing to a present overall estimate of costs on the Defendants' side of nearly £129 million, must be a prohibitive context in which to seek adverse costs insurance. It is the lack of ATE cover which to a large extent has justified the application in the first place; and the revelation of it which has coloured my approach. It is important to guard against oppressing the remaining SG Claimants or their funders by making them pay for a problem that in part at least may be the consequence of what may be shown in the end to be disproportionate expenditure by the Defendants.

132. At the same time, however, it is obviously right to bear in mind that this remains a very complex and large case, though much reduced in scope and size since its review after the December Settlements. The nearly 1,000 pages of skeleton arguments that I have recently received as pre-reading for Trial illustrate this.

133. It is also right to acknowledge that the Defendants seek security only in respect of their costs from December 2016 onwards, and not for the aggregate sums expended over the long course of the proceedings. More specifically, the Defendants now seek 'only' £11.6 million, being some 60% of the costs said to be referable to the period in question. Although large by ordinary standards, the truth is that any amount now required to be secured is likely to be dwarfed by the amounts ultimately payable if the Defendants are awarded costs at trial, even if those costs are enormously discounted. There is little or no danger of any order for security in the amount sought resulting in a surplus, even if costs are ultimately awarded to the Defendants.

134. Further, and as I have previously noted, it is a matter for the client (and in the case of RBS its board of directors) to determine what it is prepared to pay its own lawyers. But costs must be proportionate to be recoverable and (unless the other side agrees the amount, which in a case such as this is unlikely) it is, of course, for the Court to adjudicate how much of the costs incurred can be recovered from the other party or parties. The following observations of Leggatt J in *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm.), which are quoted in the White Book at *CPR 44.3.3* express more felicitously my warning during the hearing that litigants are free to pay for a Rolls-Royce service but not to charge it all to the other side:

> *"…the touchstone (of reasonable and proportionate costs) is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances."*

That note continues:

> *"expenditure over and above that level would be for a party's own account and not recoverable from the other party."*

135. As to the Defendants' justification for the quantification offered, Mr Head in particular submitted that the schedule of costs provided gives "almost nothing by way of narrative", is conspicuously lacking in detail, and is "wholly inadequate". There is some force in the criticisms, as it seems to me: the detail provided is slim, especially given that the aggregate amount concerned before discount is £29,957,933.40 (over an 11-month period after completion of all the most onerous pre-trial process) and includes a sum of about £9.1 million for costs over a 3 month period immediately prior to trial (equating to approximately £750,000 per week). Such sums, if to be accepted, require particular explanation.

136. A letter dated 27 April 2017 from Signature Litigation LLP to Hausfield & Co LLP contains an analysis of the Defendants' Schedule of Costs (from which the figures given above are taken). Amongst the points made in support of the conclusion in that letter that the costs claimed "are seriously inflated" are the following:

(1) The Defendants instructed a total of 13 Counsel (including three QCs) during the period December 2016 to February 2017, compared to four (including one QC) instructed for the SG Claimants: there were three hearings. The Defendants' 132-page Amended Defence served on 10 February 2017 was signed by a total of nine Counsel. Counsel's fees for the 11-month period after December 2016 are stated to exceed £6 million.

(2) The fees for experts in giving evidence in the same period are stated to exceed £350,000.

(3) Profit costs in respect of the attendance of fee earners at trial are stated to be £5,571,500 on top of pre-trial preparation in the period after the December Settlements costed at £2,568,275.

137. That same letter also points out (though no detail is given) that Signature Litigation LLP's own aggregate costs for the three-month period after the December Settlements were in the region of £3 million (excluding VAT): that is, roughly, one-third of the Defendants' costs in the same period, notwithstanding that in that period the SG Claimants had completely to revise their pleaded case and restructure the team after the other groups (each of which had shared preparation previously) had settled.

138. Mr Murray of Counsel's efforts to justify the Defendants' figures and overall costs were valiant and resourceful. He sought, for example, with studied insouciance to justify the retention of 'just nine' Counsel for trial (compared to 13 pre-trial) on the basis that "there's obviously been a lot of accumulated knowledge on the team which we have not wanted to lose just because the case has slimmed down." He also sought to reassure me that at least "the size of the team on our side has in fact reduced." He rightly emphasised the value and complexity of the litigation, its public importance and the important reputational issues in play also: all are highly relevant (and see *CPR 44.3(5)*) in assessing proportionality in particular.

139. But the burden of persuasion in seeking to justify such costs at a stage before their ultimate disposition and precise quantification, where there is such a disparity between the costs incurred by the two sides, and where the amounts claimed do seem very high, is considerable, even in as large and complex a case as this.

140. Whilst I do not accept the submission on behalf of the funders that any security for costs order should be limited to an aggregate sum of £5.5 million (excluding VAT), which is a percentage much lower than, for example, Signature Litigation LLP were disposed to accept as reasonable in a letter just before the hearing (50%), I do not feel able to accept the Defendants' own figure as a reasonable and proportionate sum for which to require security.

141. I also consider that the fact that I have determined that LNCP should not be ordered to provide security for the reasons I have sought to state should not mean that Hunnewell BVI should, as it were, automatically be landed with what otherwise the Defendants had suggested might, as between Hunnewell BVI and LNCP, equitably be LNCP's share (25%). Or put another way: that part of the costs should, in my view, be taken to have been incurred separately from Hunnewell BVI and should not in the circumstances be treated as having been caused by it.

142. Doing the best I can in the exercise of my discretion, I propose to take as the aggregate proportionate costs figure the sum of £10 million (excluding VAT), being about 50% of the aggregate figure by reference to which the application for security is made that is, £19.3 million; and to require Hunnewell BVI to provide security for costs in respect of about 75% of that, being (in round figures, as is appropriate for a figure which by its nature cannot be exact) £7.5 million.

143. As previously indicated, I consider that the simplest and most equitable course is likely to be that such security should be provided, as indeed the Defendants have suggested, by a retention against the sums payable by the Defendants in June/July. But (as Mr Railton acknowledged) that will require the agreement of Signature Litigation LLP, and I suggest that the exact form of security should be discussed and (I would very much hope and expect) agreed for my consideration after formal delivery of this judgment.

Cross-undertaking

144. Finally, I raised in the course of Mr Railton's oral opening the question whether a cross-undertaking should be required of the Defendants. This had not been raised by the funders, but in their oral submissions after the point was raised both (unsurprisingly) supported such a condition.

145. There is plainly jurisdiction in the Court to stipulate such a condition in order to compensate the claimant in cases where no order for costs is ultimately made in favour of the applicant and against the respondent: and Mr Adkin referred me to appendix 16 of the Commercial Guide which endorses that: see *CPR 2A-186.*

146. Mr Railton, on behalf of the Defendants, submitted that no cross-undertaking should be required, for three principal reasons: first, because such an order had not been sought by the Respondents, nor therefore properly considered by the Defendants, it would be unusual and should not be imposed without full disclosure of the financial position of the funders so that its scope might be understood better; secondly, because the only purpose would be to cover any opportunity cost for the funders of not deploying the money, and there was no evidence that any such opportunity would be available, given the need for the funders to meet their future liabilities from the very same funds; and thirdly, because providing security should be regarded, at least in the absence of ATE cover, as "simply a cost of doing business in this area…part and parcel of the business, and the risk of being a funder".

147. As to the suggestion that the Defendants have not had the time or information to assess the risk of a cross-undertaking, their own argument suggests that they consider

it remote; and the Defendants will have time, of course, to consider whether to provide a cross-undertaking before this judgment is formally handed down.

148. I accept that Hunnewell BVI has not put forward any evidence as to any opportunity cost of not having funds required to be set aside by way of security: but that there may be such a cost is in the nature of business, and the fact that a particular lost opportunity is not identified or quantified does not necessarily militate against protection.

149. Thirdly, whilst the provision of security for costs may be a risk which should be anticipated by a funder, especially in the absence of ATE, I do not agree that it follows that the risk should include a business loss occasioned by the order which the court should have power to attenuate or reverse.

150. Though not common-place or inevitable, I do not think it should be considered particularly exceptional for the court to require a cross-undertaking as the price of an order for security for costs to be provided by a non-party funder before the incidence of costs has been determined. The doubly-contingent nature of the liability in respect of which security is sought seems to me just the sort of circumstance in which the court, when invited to make an interlocutory order that may cause a party loss, would wish to reserve the means of ensuring its compensation in case thereafter hindsight reveals that the order should not have been made and that such compensation would be fair and appropriate.

151. There is no hard and fast rule or settled practice: each case must be assessed on its own facts. But in this case and in all its circumstances I consider that such a condition should be imposed so that the Court has some means to review and remedy any prejudice at the end of the day.

Postscript

152. It may go without saying: but in the unusual circumstances of this case, when the parties are aware that I am in the midst of reading their very lengthy skeleton arguments exchanged at the same time as finalising this judgment, I think it may be appropriate to emphasise that nothing in this judgment should be taken to imply or indicate any (even provisional) view as to the overall merits. That is all a matter for trial, and I have been particularly concerned to exclude from my adjudication of these applications any assessment of the ultimate merits of the substantive case to ensure that it remains so.