Neutral Citation Number: [2017] EWCA Civ 1872

Case No: A3/2016/4717 & A3/2017/2602

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
THE HONOURABLE MR JUSTICE SNOWDEN
[2016] EWHC 2610 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2017

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE KITCHIN
and
THE RIGHT HONOURABLE LORD JUSTICE FLOYD

- -

Between:

1) PREMIER MOTORAUCTIONS LTD (in liquidation)	**Respondents /Claimants**
2) PREMIER MOTORAUCTIONS LEEDS LTD (in liquidation)	
- and -	
1) PRICEWATERHOUSECOOPERS LLP	**Appellants/ Defendants**
2) LLOYDS BANK PLC	

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Mr Justin Fenwick QC & Mr George Spalton (instructed by **DLA Piper UK LLP**) for the **First Appellant**
Mr Adam Zellick QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Appellant**
Mr Hugh Sims QC & Mr Jay Jagasia (instructed by **Hausfeld & Co LLP**) for the **Respondents**

Hearing date: 7th November 2017

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Approved Judgment

Lord Justice Longmore:

Introduction

1. The main question in this appeal is the extent to which the existence of After-the-Event ("ATE") insurance is relevant when the court is considering an application for security for costs sought by the defendants in a claim brought by an insolvent company in liquidation.

2. The details of the claim (much trailed in the financial press and Private Eye e.g. in its September 2015 issue) are set out by Snowden J in his judgment now reported at [2017] 2 All ER (Comm) 681. They can be summarised by saying that the business of the claimants (a car auction business in Leeds and a business selling unique registration plates for the DVLA) was in some difficulty in April 2008. Mr Keith Elliott, who owned 97% of the first claimant parent company and was managing director of both claimants ("the Companies") asked the Companies' bank, the second defendant ("the Bank") for additional facilities which the Bank provided; at the same time the Bank introduced a Mr Warnett of the first defendant ("PwC") to Mr Elliott as someone who might act as a non-executive director of the Companies. This led to PwC being engaged to conduct a review of the Companies' cash-flow needs pursuant to an engagement letter of 15th August 2008 signed by the Companies and the Bank. On 21st August 2008 PwC reported that the Companies needed an immediate cash injection of £2 million and that receipts in a DVLA Client Account should be treated as trust monies. The Bank agreed to increase the Companies' overdraft facility accordingly and decided that the monies in the DVLA Client Account could not be set-off against that overdraft.

3. Nothing then came of various proposals for further investment in the Companies or for the sale of some or all of the Companies' businesses or assets. On 22nd December 2008 two partners of PwC were appointed as administrators and the main businesses and assets of the Companies were disposed of by way of a pre-pack sale. The context of all these events is the subject of considerable dispute. The judge identified the claims now brought by the Companies in the following terms:-

> "9. The essential claim of the Companies, now acting by their joint liquidators, Messrs. Khalastchi and Atkins of Menzies LLP ("the Joint Liquidators") is that Mr Warnett was introduced to the Companies on false pretences and that he had no intention of performing a role of non-executive director. It is said that Mr Warnett was used by the Bank and PwC as part of a conspiracy to obtain an internal assessment of the Companies' affairs, to identify a fictitious need for additional finance that could then be provided by the Bank on terms that gave it effective control over the Companies and the means to force them into administration so that their business and assets could be sold at an undervalue by the administrators for the benefit of the Bank. The Companies allege that the defendants thereby breached various duties to them and conspired to cause them loss by unlawful means.

> 10. Those allegations are denied by the defendants, who contend that in reality the Companies were "run into the ground" by Mr Elliott, who mismanaged the Companies, their assets and their finances, and who drew heavily on their funds to support his own extravagant lifestyle. They contend that the allegations concerning Mr Warnett make no sense, that the need for additional finance that he identified was genuine, and that the change of treatment of the DVLA Client Account was backed up by independent legal advice and did not cause the Companies' financial difficulties. The defendants say that the allegations of conspiracy are spurious and implausible, that there were no breaches of any duties (some of which duties are in any event denied) and that the insolvency of the Companies has caused the Bank significant loss.
>
> 11. The Companies' primary loss claim is for losses estimated to total between about £45 million - £54 million. In addition to denying liability, the defendants deny this primary case as to quantum on the basis that if the Bank had not provided the additional £2 million overdraft facility the Company would not have been able to carry on trading."

4. In response to a letter before claim of September 2014, the Bank said it would be seeking security for costs. An amended claim form and particulars of claim were served on 19th June 2015 and the Companies' solicitors on 29th June 2015 notified the defendants that ATE policies of insurance had been issued to the Joint Liquidators and the Companies as co-insureds by QBE Insurance (Europe) Ltd ("QBE") for a primary and tertiary layer and by Elite Insurance Co Ltd ("Elite") for a secondary layer. (There are now 4th and 5th layers bringing the total sum insured to £5 million.) In August 2015 redacted copies of the policies were provided to the defendants; in December 2015 PwC's solicitors pointed out that the policies could be avoided for non-disclosure or misrepresentation and that they were therefore not the equivalent of payment into court or a bank guarantee or a deed of indemnity issued by an insurer. They asked for a deed of indemnity to be provided to cover their costs but the Companies have declined to procure any such deed. This refusal has led to PwC and the Bank issuing applications for security for costs on 5th and 27th April 2016 for the sums of £3.52 million and £3.69 million respectively making a total of about £7.2 million.

5. So the question of principle arises: does ATE insurance which has no anti-avoidance provisions (and other exceptions or conditions precedent to liability) constitute adequate security for costs in a case requiring such security to be given?

Jurisdiction to order Security for costs

6. CPR 25.13 relevantly provides:-

> "(1) The court may make an order for security for costs under rule 25.12 if,

> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies …
>
> (2) The conditions are:-
>
> (c) The claimant is a company … and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so."

7. In Jirehouse Capital v Beller [2009] 1 WLR 751 the Court of Appeal accepted that this test did not require the court to be satisfied on the balance of probabilities that the claimant would be unable to pay the defendant's costs. It only needed reason to believe that it would not be able to do so. Arden LJ indicated at paragraphs 33-34 that, since such non-payment of an order for costs is a future event, what the court has to do is to consider all of the circumstances and evaluate the risk of that occurring. She also indicated that it would be preferable for the court not to paraphrase the relevant words of CPR 25.13(2)(c). That observation was endorsed by Moore-Bick LJ in his judgment in the case and was subsequently repeated in SARPD Oil v Addax Energy [2016] BLR 301, where Sales LJ commented, at paragraphs 13-14:-

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

8. It is important to note that the requirement of CPR 25.13(2)(c) is a jurisdictional requirement which has to exist before the court has power to order security for costs.

Terms of the ATE insurance

9. The terms of the insurance policies (which are essentially the same for each layer) on which reliance was placed are ("the Representative" being the Insured's solicitor):-

> "2 **Exclusions**
>
> 2.1 The Insurer shall not, unless otherwise stated in this Policy, pay any claim under the Policy directly caused or attributable to
>
> 2.1.1 The Insured's failure to co-operate with or to follow the advice of the Representative;
>
> …

2.1.7 the Insured's decision to abandon or discontinue the Dispute without Insurer's Approval;

…

2.1.9 the Insured's decision to make an offer to settle or compromise the Opponent's claim for Opponent's costs without Insurer's Approval;

2.1.10 any costs assessment proceedings (or any other disputes regarding Costs following the Conclusion of the Dispute) or in relation to any costs management or budgeting procedures which take place during the Dispute;

2.1.11 the Insured's decision to reject an offer of settlement without Insurer's Approval;

2.1.12 the Insured's decision to continue the Dispute after the Insurer has informed the Representative that in their view the Insured is more likely than not to lose the Dispute, without Insurer's Approval;

…

2.1.17 any fraudulent, false or misleading representation by the Insured or the Representative.

2.1.18 Costs relating to orders for costs security;

> 2.1.18.1 directly or indirectly incurred in relation to or resulting from an application for an order for security for costs;
>
> 2.1.18.2 arising as a result of an order for security for costs;
>
> 2.1.18.3 directly or indirectly incurred in relation to or resulting from any subsequent application dealing with an order for security for costs; or
>
> 2.1.18.4 arising from an action discontinued or struck out as the result of the failure of the Insured to comply with an order for security for costs….

3. **Conditions Precedent and Warranties**

3.1 The following are conditions precedent to the Insurer's liability under this Policy:

> 3.1.1 The Proposal was made following reasonable and diligent investigation of the facts, information and evidence relevant to the Representative's assessment of

> the Insured's prospects of success in the Dispute and the Insured has included in the Proposal all matters relevant to the provision of cover under this Policy.
>
> 3.1.2 The Insured will devote such resources of finance and manpower to the Dispute as are requested by the Representative and as are necessary in order to enable the Representative to conduct the Dispute efficiently. The Insurer will not be liable for a claim under the Policy where the Dispute is abandoned, discontinued, stayed or dismissed as a result of the Insured either not having the funds to continue or not being willing to commit funds to continue the Dispute.
>
> 3.1.3 If any of the conditions precedent set out in 3.1.1 and 3.1.2 are not satisfied the Insurer will be relieved from all obligations to provide indemnity under this Policy from the outset and the Insurer may recover from the Insured any sums previously paid by the Insurer under the Policy.
>
> 3.2 The Insured warrants that the Insured will make available to the Representative all information, documents and evidence which may be relevant to the Representative's appraisal and conduct of the Dispute.
>
> 3.3 If the Insured breaches the warranty set out in clause 3.2 at any time the Insurer will be relieved of all obligation to provide any indemnity under this Policy from the date of such breach.
>
> …
>
> 4.9 The Insured will notify the Insurer as soon as reasonably practicable if any matters come to the Insured's attention which would have had a material impact on the Insurer's decision to provide cover under this Policy or the terms on which the Insurer would have provided cover under this Policy."

10. Clauses 3.2 and 4.9 (as also clause 12.4 of the Schedule to the Policy, which it is not necessary to set out) confirm that the ordinary common law principle by which the Insurer is entitled to avoid liability if the Insured makes any material non-disclosure or representation is applicable to the contract of insurance. One sometimes sees anti-avoidance clauses in ATE insurance policies pursuant to which insurers promise not to avoid or promise only to rely on any non-disclosure or misrepresentation if it is made fraudulently. But there is no such provision in the relevant policies in the present case.

11. Reliance was also placed on an endorsement in the three highest layers of the insurance which was in these terms:-

> "It shall be a condition precedent to the Insurer's liability to make payments under the policy that within 30 days of completion of the substantive part of the disclosure exercise, the Insured will obtain an opinion from Counsel on the merits of the Dispute. In the event that Counsel does not opine that the prospect of the Dispute resulting in a Successful Outcome are [sic] at least 60%, the Insurer may at its sole discretion terminate this policy. Should the Insurer terminate the policy in accordance with this provision the Insurer shall have no liability to make any payment under the policy whatsoever."

The Judgment

12. Having considered various first-instance authorities and the submissions of the parties the judge dealt with the question of principle by saying:-

> "40. … if a claimant company is insured under an ATE policy giving it contractual rights which it could enforce in the event of an adverse costs order being made, its contractual rights are the property of the company like any other asset. I therefore see no reason in principle why the existence of that policy should not be taken into account together with its other assets at the first stage when deciding whether the jurisdiction to make an order for security for costs under CPR 25.13 is engaged. That must be so where the very purpose of such a policy is to provide the means by which the claimant company "is able to pay the defendant's costs if ordered to do so".
>
> 41. Accordingly, I think that in a case in which a claimant has obtained an ATE policy specifically to cover the bringing of a claim, and relies upon it to resist an application for security for costs, the approach taken by Stuart-Smith J in paragraph 20 of Geophysical is correct. The question is not whether the ATE policy provides the same security as cash or a bank guarantee, or indeed whether the ATE policy provides the same security as might a deed of indemnity from the same or another insurer. It is whether, having regard to the terms of the ATE policy in question, the nature of the allegations in the case and all the other circumstances, there is reason to believe that the ATE policy will not respond so as to enable the defendant's costs to be paid."

13. He then dealt with the circumstances in which it was suggested that the ATE policy would not respond, in particular the risk of avoidance for non-disclosure or misrepresentation. He dealt with that in the following way:-

> "48. On the basis of the pleadings I have real doubts that the disputed evidence of Mr Elliott will be as central to the case as the defendants suggest. The case involves much more than an evidential dispute as to what went on between Mr Elliott and Mr Warnett on 11th August 2008 and notwithstanding Mr

> Elliott's central role in the affairs of the Companies, I cannot in any event imagine that the Joint Liquidators and their advisers will have placed unquestioning reliance upon him when making proposals to the insurers. I would regard it as something of a leap to conclude that if Mr Elliott's evidence was to be disbelieved or found unreliable, that would provide grounds for the insurers to avoid the policies or deny liability.
>
> 49. In that regard, I note that in Geophysical at paragraph 30, Stuart-Smith J was obviously impressed by the argument that the ATE policy had been taken out with the assistance of experienced lawyers and that the claimant would have no commercial interest in acting so as to breach its conditions. I think that the circumstances of this case justify a similar approach, and if anything point more strongly to such a conclusion.
>
> 50. In the instant case, the ATE policies taken out to cover the Companies' exposure to adverse costs orders have been arranged and the proposals to insurers have been made by the Joint Liquidators who are independent professional insolvency office-holders. They have arranged the ATE policies after having conducted an investigation into the claims against the defendants with the assistance of experienced solicitors and counsel. This level of objective professional scrutiny is likely to exceed that undertaken in cases such as Monarch Energy or Geophysical where, although the claimant companies were in financial difficulties, professional insolvency office-holders had not been appointed."

14. The judge next dealt with the questions whether Mr Elliott's knowledge could be attributed to any of the Companies and whether incurred costs would be recoverable if insurers sought to say that they were not liable under the policy. He said he was not assisted by the fact that, if insurers issued a deed of indemnity in respect of the costs of the defendants, such a deed might cost up to £1 million more than the premium and he concluded that, since the defendants had failed to satisfy him that there was reason to believe that the Companies would be unable to pay the defendants' costs, he had no jurisdiction to make an order for security.

The submissions

15. Mr Justin Fenwick QC for PwC attacked the judge's conclusion by saying that, in the absence of the ATE insurance, it was obvious that the Companies would not be able to pay the costs. That fact gave the court jurisdiction under CPR 25.13. It was then necessary to decide whether the existence of the ATE insurance was relevant and, in order so to decide, the judge should have asked himself whether such insurance gave the defendants substantially the same security as payment into court or a guarantee from a first class bank would and have answered that it obviously did not.

16. Mr Adam Zellick QC for the Bank, somewhat more fundamentally, submitted that the ATE insurance was no more than a contingent asset and could not therefore be taken

into account at all at the jurisdictional stage of considering whether there was reason to believe that the Companies would be unable to pay the defendants' costs. It might be relevant to consider it at the discretionary stage but, on the facts of this case, it could not be relied on to respond.

17. Both Mr Fenwick and Mr Zellick submitted that the judge was wrong to have regard to the Geophysical case in which Stuart-Smith J had said that ATE insurance was a central feature of parties' ability to gain access to justice. That was because the key to the question whether parties were being denied access to justice in cases of insolvent companies was whether an order to provide security for costs would stifle a genuine claim. It was not now argued that the Companies (or more accurately their funders) could not put up security for this £50 million claim or that an order for security would stifle the claim.

18. Mr Hugh Sims QC for the Companies supported the judge's reasoning and by way of respondents' notice submitted that even if there was jurisdiction to make the order, the consideration identified by the judge would make it wrong for this court to order security as a matter of discretion.

Jurisdiction to order security for costs

19. It is, in a sense, unfortunate that the court's jurisdiction to order security for costs should depend on a detailed analysis of a claimant's ATE insurance policies into which the defendants have had no input and which they have no direct right to enforce. That is particularly so when the authorities discourage investigations into the merits of the proceedings and disapprove of security for costs applications being blown up "into a large interlocutory hearing involving great expenditure of both money and time," see Porzelak v Porzelak [1987] 1 WLR 420, 423e per Sir Nicholas Browne-Wilkinson V.-C.

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

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

21. In Al-Koronky v Time-Life Entertainment Group Ltd [2006] EWCA Civ 1123; [2007] 1 Costs L.R. 57 where security was ordered against claimants resident out of the jurisdiction, Sedley LJ giving the judgment of the court said (para 35):-

> "A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.
>
> 36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective."

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

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

24. I would therefore reject the submissions of Mr Fenwick and Mr Zellick to the extent that they amounted to saying that the ATE insurance obtained by the Companies is not to be considered at all. Mr Zellick's contention (that merely because a claimant's asset is contingent that asset cannot be considered on an application for security) goes too far. If it is very probable that a contingent asset will mature before any order for costs is made, that asset cannot be excluded from consideration. It is therefore necessary to consider whether the particular ATE insurance in this case does give the defendants sufficient protection.

Sufficient Protection?

25. It is immediately apparent that the policies in this case contain no anti-avoidance provisions of the sort envisaged by Mance LJ in Nasser. The judge did not consider this a problem since he considered the prospect of avoidance for non-disclosure or misrepresentation purely theoretical. It is true that the Companies' conspiracy case involves more than a mere evidential dispute between Mr Elliott and Mr Warnett on 11th August 2008 but Mr Elliott's evidence will be central to the resolution of the key question in this case namely whether PwC and the Bank conspired together unlawfully to depress the Companies' assets and then acquire them at an undervalue.

One only has to look to the amended particulars of claim to see that they are redolent with references to what Mr Elliott was told, particularly that he was told that Mr Warnett was to be a non-executive director and a "critical friend", that a £2 million cash injection was required, that Mr Elliott was discouraged from raising capital from other sources, that he was told that monies payable to DVLA had to be segregated, that it was unnecessary to sell non-core assets and that it was necessary to produce "worst case" figures to present to the Bank (see paras 29, 34-35 and 42 of the particulars of claim together with the response to a Request for Information of para 42(i) of that pleading). These are all essential parts of the case against the defendants and depend on the evidence that Mr Elliott will give at trial. I cannot, with respect, agree with the judge when he says he has "real doubts that the disputed evidence of Mr Elliott will be as central to the case as the defendants suggest". Of course the Companies may have other hurdles to surmount before they achieve a judgment in their favour but, unless Mr Elliott is believed, they will not get to first base.

26. If Mr Elliott is not believed, the Companies will lose and be liable for the costs of PwC and the Bank. The judge said that "it was something of a leap" to conclude that disbelief of Mr Elliott on the part of a judge would provide grounds for insurers to avoid the policies.

27. Again I cannot with respect agree. Of course it does not follow that insurers would avoid but the difficulty is that neither the defendants nor the court has any information with which to judge the likelihood of such avoidance. One knows that ATE insurers do seek to avoid their policies if they consider it right to do so, see Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101 in which a successful defendant was unable to recover its costs from ATE insurers. The landscape after trial may be very different from the landscape as it appears to be at present and it is unsatisfactory to have to speculate.

28. The judge felt he could rely on the fact that the proposals to insurers were made by Joint Liquidators who are independent professional insolvency office-holders, and who investigated the claims with the assistance of experienced solicitors and counsel providing a high level of objective professional scrutiny. All this is, of course, true but the best professional advice cannot cater for cases of non-disclosure of matters which the professionals do not know.

29. Neither the defendants nor the court have been provided with the placing information put before the insurers but, even if that had been provided, it is unlikely that the court could be satisfied that the prospect of avoidance is illusory. Even at the jurisdictional stage of considering security for costs, the defendants must, as Mance LJ said in Nasser, "be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure". I cannot see that on the facts of this case these defendants have that assurance. It follows therefore that there is reason to believe that the Companies will be unable to pay the defendants' costs if ordered to do so and that the jurisdictional requirement of CPR 25.13 is satisfied.

30. It is, of course, true that the question (whether there is reason to believe that a claimant will not be able to pay a defendant's costs if ordered to do so) is a question of evaluation by the judge with which this court is reluctant to interfere. But the present case raises important questions of principle which have not been previously considered at an appellate level. Authorities at first instance go both ways but the

judgment of Snowden J reveals that there may be a tendency (I put it no higher) for judges at first instance to accept that an ATE policy can stand as security for costs. The judge was particularly impressed by remarks of Stuart-Smith J in Geophysical Service Centre v Dowell Schlumberger (ME) Inc [2013] EWHC 147 (TCC), 147 Construction LR 240 in para 15 of which he made two observations about Nasser.

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

The judge also cited para 20:-

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

31. I have no fundamental quarrel with these observations but would emphasise the words "properly drafted" and "depending on the terms of the policy in question" in these paragraphs because there was in Geophysical an anti-avoidance provision of the kind which Mance LJ envisaged in Nasser. It is set out at page 247 of the report in the following terms:-

> "8. The insurer shall not be entitled to avoid this policy for non-disclosure or misrepresentation at the time of placement except where such non-disclosure was fraudulent on your part."

Insurers could therefore avoid for fraud but not otherwise. It may not be a particularly difficult exercise for a judge to assess the likelihood of avoidance if the right to avoid is confined to fraud but, where there is no anti-avoidance clause of any kind, the exercise is very much more difficult and the defendants' need for the assurance to which Mance LJ referred is all the greater.

32. I would, however, take issue with the suggestion that access to justice has quite the relevance which Stuart-Smith J thought it had since, as Mr Fenwick and Mr Zellick

submitted, that consideration is more normally relevant to the possibility that an order for security might stifle a claim. As I have already said, that is not a point that arises in this case.

33. Like the judge I am not particularly impressed by the fact that the Companies have declined to procure a "Deed of Indemnity". If it is not a straightforward guarantee I am not sure what a Deed of Indemnity is since no draft of any such deed was put before us but, on any view, it would mean that insurers were giving up their right to avoid and their rights under the endorsement. It is enough to say that the existence of those rights give sufficient reason to believe that the Companies will not pay the defendants' costs if ordered to do so. The argument about the absence of a deed of indemnity does not take the matter much further. It is, in fact, a defined term in the insurance policy said to mean:-

> "a deed of indemnity or other instrument acceptable to the Court or Tribunal given by the Insurer in favour of the Opponent to meet the Insured's liability to meet a security for costs order."

That at least shows that insurers do sometimes issue such a document but, ironically, the phrase "Deed of Indemnity" does not appear anywhere in the policy itself. That may not be altogether surprising since Exclusion 2.1.18.1 provides that insurers will not pay any claim directly or indirectly incurred from any application for an order for security for costs, including the action being discontinued or struck out as a result of the failure of the insured to comply with an order for security for costs.

34. Since drafting this judgment, the case of Holyoake v Candy [2017] 3 WLR 1131 has come to our attention. The court was not considering whether ATE insurance could constitute security for costs but, for reasons similar to those I have already expressed, the court did consider that even an ATE insurance policy which provided for avoidance only in cases of fraud was not suitable to stand as fortification for a cross-undertaking in damages which supported an injunction of a kind analogous to a freezing injunction.

35. For the reasons given, however, I would hold that, on the facts of this case, there is jurisdiction to make an order for security for costs. The judge did not decide what he would have done, if he had had jurisdiction, although he did say that he was not persuaded that the claim would be stifled. Mr Sims submitted that we should remit the case to the judge so that he could exercise the discretion which he held he did not have. Mr Fenwick and Mr Zellick submitted that the normal course would be for this court to exercise its own discretion and that that course should be followed.

36. I agree with Mr Fenwick and Mr Zellick. It would not be right to require the parties to incur yet more time and expense on what is essentially satellite litigation. Moreover there is a date fixed for trial in April 2018 and the parties would be better employed preparing for that trial rather than making further applications on evidence which had been prepared for the original hearing.

Discretion

37. Once one is satisfied that the Companies are insolvent, that there is jurisdiction to order security for costs and that ordering security will not stifle the claim, it is normally appropriate to order security and I see no reason not to do so in this case. As long ago as 1878, when section 69 of the Companies Act 1862 was in virtually the same terms as the present CPR 25.13, this court thought that it was more or less axiomatic that in these circumstances security should be ordered, see Northampton Coal Iron and Waggon Company v Midland Waggon Company (1878) 7 Ch.D 500 as followed by Pure Spirit Company v Fowler (1890) 25 QBD 235. I would follow this lead, especially in circumstances where the Bank has already lost about £5 million by way of irrecoverable loan from the Companies which will remain irrecoverable even if the Bank wins its case. Unless security is ordered, there will be no level playing field, as the Companies have no reason to suppose that they will be unable to recover costs if they win.

38. There remains the question of the amount of security which should be given.

Quantum

39. It is a sad reflection of the number of appeals waiting to be heard in this court that this interlocutory appeal has taken more than a year to be listed since the date when Snowden J gave judgment. No doubt further costs have been incurred meanwhile. Nevertheless we ought to ask ourselves what order he would be likely to have made. At the time the matter was before him, PwC were asking for £3,520,000 later increased to £3,920,000 being 80% of their estimate of costs to be overall incurred; the Bank was asking for 80% of £3,690,000. These are very high figures even taking into account the sums said to be at stake in the action. I consider that justice will be done at this stage by ordering security to be provided for each of the defendant's costs in the sum of £2,000,000 making £4,000,000 in all. That is not intended to rule out a further properly evidenced application if that is considered appropriate. I see no reason to assume, as the defendants would wish us to do, that it will be inevitable that, if they win, they will recover indemnity costs.

Conclusion

40. I would therefore allow this appeal and invite the parties to draw an appropriate order.

Lord Justice Kitchin:

41. I agree.

Lord Justice Floyd:

42. I also agree.