



Neutral Citation Number: [2023] EWHC 2573 (Comm)

Claim No. LM-2022-000209

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 20/10/23

Before :

John Kimbell QC
(sitting as a Deputy High Court Judge)

Between :

MY PROTECTION GURU LIMITED

Claimant/
Respondent

- and -

LIFESearch PARTNERS LIMITED

Defendant/
Applicant

Neil Cameron (instructed by Wilkin Chapman LLP) for the Claimant/Applicant
George McPherson (instructed by Michelmores LLP) for the Defendant/Respondent

Hearing date: 11 October 2023

Approved Judgment

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

.....

John Kimbell QC sitting as a Deputy High Court Judge:

Introduction

1. The Defendant (**‘LifeSearch’**) is an insurance broker. Between 2017 and 2022, the Claimant (**‘MPG’**) acted as LifeSearch’s appointed representative under three successive written agreements entered into in 2017, 2018 and 2020 respectively (**‘the Agreements’**). Under the Agreements, LifeSearch provided ‘leads’ to MPG. MPG’s job was to follow those leads up with a view to selling life insurance products. For each product sold, the relevant insurer paid a fee to LifeSearch and LifeSearch paid a commission to MPG.
2. Each of the Agreements was on materially identical terms. The 2020 Agreement defined Confidential Information as follows:

“Information in whatever form (including without limitation, in written, oral, visual or electronic form or on any magnetic or optical disk or memory and wherever located) relating to the business, customers, products, affairs, data, materials, technology, specifications, manuals, business plans, software, marketing plans, and finances of LifeSearch for the time being confidential to LifeSearch and trade secrets including, without limitation, technical data and know-how relating to the business of LifeSearch or any of its suppliers, shareholders, insurers, life customers, agents, distributors, management, business contacts, companies, aggregators and lead generators.”

3. Clause 9.3 imposed the following obligation on MPG.

“The Company shall not (except in the proper course of his duties), either during the Engagement or at any time after the Termination Date, use publish, or disclose to any third party (and shall use his best endeavours to prevent the publication or disclosure of) any Confidential Information

Clause 9.3 was subject to the proviso. It does not apply to

“any disclosure required pursuant to a statutory obligation, the order of a court of competent jurisdiction”

4. Clause 18.5 of the 2020 Agreement also contained a confidentiality clause in the following terms:

“Both Parties shall keep confidential the information contained in this agreement unless it is mutually agreed to release it.”

5. MPG and LifeSearch worked together relatively successfully under the Agreements for five years until early 2022. They then began to have a series of disputes. Both parties alleged repudiatory breach by the other of the 2020 Agreement. Both have purported to accept the other's repudiation. Furthermore, LifeSearch alleges it gave valid 6 months' notice of termination of the 2020 Agreement in May 2022. One way or another therefore the relationship and the 2020 Agreement came to an end at some time between September and November 2022.
6. MPG claims approximately £2.3 million in unpaid commission. It also claims damages for a variety of breaches of 2020 Agreement (including the final repudiatory breach). LifeSearch alleges that the agreements were varied in two crucial respects relating to the payment of commission but also counterclaims £4.5 million in the event that neither variation is found to have been valid. LifeSearch also has a separate counterclaim for damages of £347,978 in relation to MPG's alleged repudiatory breach.
7. At a case and costs management conference held on 11 October 2023, a number of applications were made and decided. This judgment is concerned with just two of them, both of which applications are by LifeSearch:
 - a. An application for costs in relation to an order ultimately made by consent under CPR 5.4C restricting access of the public to the statements of case filed in this case.
 - b. An application for security for costs

The CPR 5.4C order

8. Mr McPherson seeks a grand total of £37,105.50 in costs associated with an order made by Andrew Baker J. on 14 February 2023. He submits that the costs reserved by consent in that order go back in part to a failure by MPG to act reasonably before the issuing the claim. Mr Cameron denies that MPG behaved unreasonably in the pre-issue phase and says that Michelmores failed to raise the issue of confidentiality pre-issue on at least two occasions when they could easily have done so. He submits that no costs should be

awarded because the order ultimately obtained by consent was for the benefit of LifeSearch.

Pre-issue correspondence

9. By a five page ‘letter of claim’ sent in April 2022, Milners set out the history and nature of the relationship between MPG and LifeSearch, outlined four alleged breaches of contract and described the loss and damage as being in the region of £1.5 – 2 million. The letter also outlined the remedies MPG was seeking, enclosed the agreements referred to and some commission calculations and referred to potential expert evidence and ADR. Finally, it referred expressly to the pre-action protocol and sought a full response within 28 days.
10. In their response of 29 April 2022, on behalf of LifeSearch, Michlemores complained that the Letter of Claim lacked sufficient detail of the allegations of breach or the loss and damage. Nevertheless, the five-page letter responded to the substance of the claim and outlined what subsequently became LifeSearch’s variation case. The letter ended by inviting MPG to withdraw its claim.
11. Milners responded on 4 May 2022. They rejected the suggestion that the letter of claim was inadequate and threatened an application for pre-action disclosure.
12. Michelmores re-iterated their position on 6 May 2022 that the letter of claim was inadequate and refused to supply any pre-action disclosure.
13. On 26 August 2022, Milners sent to LifeSearch a further detailed letter containing a list of further breaches and re-iterating that it was MPG’s intention to seek damages and other remedies.

14. By a further letter dated 30 August 2022, Milners said “Our client intends to seek damages and other remedies from you.” A copy of the letter was emailed to Michelmores the following day and Michelmores were asked if they were instructed to accept service on behalf of LifeSearch.
15. By 1 September 2022 at the latest, it ought to have been clear to Michelmores that MPG considered that they had a claim for unpaid commission and damages which they were preparing to issue and serve.
16. LifeSearch responded to Milners’ letter of 30 August 2022 on 21 September 2022. Michelmores disputed that any of the alleged breaches were repudiatory and instead accepting the 30 August letter 2022 as indicating an intention no longer to be bound and terminating the 2020 Agreement with immediate effect.
17. Before the letter dated 21 September was received, Milners had in fact issued the claim form on 16 September 2022. The claim form was accompanied by the Particulars of Claim.
18. It is not clear when the issued claim form and Particulars of Claim was served on LifeSearch but Michelmores acknowledged service on 10 October 2022.
19. In a covering letter to the court sent on 10 October 2022, Michelmores made an informal application under CPR 5.4C(4) for an order that no non-party be permitted to inspect or obtain copies of the Particulars of Claim, its appendices, the acknowledgement of service and their application letter. The letter said this:

“The Claimant includes within its Particulars of Claim and accompanying Appendices to those Particulars, wholesale quotations from our client’s contractual terms which apply to the relationship with the Claimant and this dispute. Our client is, as a result, extremely concerned about confidentiality as the terms quoted and referred to in the Particulars of Claim, as they are based

on those on which our client relies in its contractual relationships with its other Appointed Representatives. It is with a view to the commercially sensitive nature of those contractual terms that the Claimant agreed to be bound by obligations of confidentiality in the contract. Our client is therefore concerned that, by not issuing the Particulars of Claim under seal (notwithstanding the obligations of confidentiality that the Claimant owes to our client under the contract), there is a risk that the details of our client's contractual terms could enter the public arena.”

20. Milners’ response was to ask the Court by letter to reject what it referred to as a “quasi application”. The letter said that MPG were concerned that LifeSearch was “attempting to hide the [commission] dispute and the allegations against them”. They suggested that they would respond further if a ‘proper’ application was made. In fact, by proceeding as they did, Michelmores were correctly following the guidance given by Collins J in R(On the application of Corner House Research) v BAE Systems Plc [2008] EWHC 246 (Admin); [2008] C.P. Rep. 20.

21. Milners’ response was copied to Michelmores but I have not seen any further correspondence before an email was sent on 8 November 2022 by HHJ Pelling KC in the following terms:

“I direct that until further order a non-party may not obtain a copy of (i) the Particulars of Claim, (ii) the Appendices accompanying the Particulars of Claim, (iii) the Acknowledgement of Service or (iv) the letter which accompanies the Acknowledgement of Service, in whole or in part to any third parties, without the Court's prior permission being sought. Liberty to the claimant to apply to vary or discharge this order providing any such application is made by no later than 4pm 7 days after service of this order on it. Please ask the defendant's solicitors to draw up an order in these terms for approval and sealing.”

22. An order was drawn up on the terms directed.

23. On 15 November 2022, Milners applied to set aside the order made by HHJ Pelling KC.

24. I have not seen the evidence filed in response to that application by LifeSearch but on 10 February 2023, Michelmores filed its own application. In that application, Michelmores

informed the court that the parties had agreed a form of order by consent in the following terms:

- a. The Claimant's application dated 15 November 2022 to set aside the order of HHJ Pelling dated 24 November 2022 to be discontinued with no order as to costs;
 - b. Paragraph 1 of the of the Order of HHJ Pelling KC dated 24 November 2022 to be varied to also include reference to the Defence and Counterclaim, the Reply and Defence to Counterclaim and the Reply to the Defence to Counterclaim (in terms agreed in the parties' signed Consent Order);
 - c. Redacted copies of all statements of case (which shall be agreed by the parties and filed at Court within the timeframes set out in the draft Consent Order) to be the only versions that can be provided to non-parties of the proceedings; and
 - d. Unredacted copies of all statements of case, including all exhibits, to be held under seal and only available to the Court and the parties to these proceedings.
25. The witness statement filed in support of the application stated that:
- a. The Parties did not agree whether MPG's proposed application (to set aside the order of 15 November) would have been successful;
 - b. To save the Court and parties from the disproportionate time and cost of dealing with a contested application, the parties have agreed a consent order;
 - c. Redactions (to be agreed) are sufficient to preserve the confidentiality of any information necessary to protect the legitimate and genuine business interests of the Defendant;
26. Mr Justice Andrew Baker made an order on the agreed terms on 14 February 2023 (**‘the February Consent Order’**):
1. The Claimant's application dated 15 November 2022 (sealed by the Court on 16 November 2022) seeking to set aside the Order of HHJ Pelling KC is discontinued with no order as to costs.

2. All unredacted pleadings, including all exhibits, that have been filed in these proceedings as at the date of this Order, or which may be filed thereafter, shall be held under seal and only available to the Court and the parties to these proceedings.

3. Numbered paragraph 1 of the Order of HHJ Pelling KC dated 24 November 2022 made pursuant to CPR 5.4C(4) is varied so that it reads as follows (additional wording underlined):

"Pursuant to CPR 5.4C(4), a non-party may not obtain a copy of (i) the particulars of claim, (ii) the appendices accompanying the Particulars of claim, (iii) the acknowledgement of service or

(iv) the letter which accompanies the acknowledgement of service, (v) the Defence and Counterclaim, (vi) the Reply and Defence to Counterclaim and (vii) any Reply to the Defence to Counterclaim, if any, such that confidentiality applies to these statements of case as agreed between the parties in whole or in part to any third parties, without the court's prior permission being sought, until further order."

4. Redacted copies of all statements of case shall be agreed by the parties and filed at Court as set out in paragraphs 4.1 to 4.4 below. The agreed redacted versions so filed shall be the only versions provided to non-parties to the proceedings pursuant to CPR 5.4C(4)(c) in the event that requests for copies of statements of case are made by non-parties - absent a Court order to the contrary pursuant to the provisions set forth at numbered paragraph 1 of the Order of HHJ Pelling KC dated 24 November 2022, as amended by paragraph 3 above.

- 4.1 The Claimant shall file an agreed redacted copy of its Particulars of Claim by 4.00pm on 10 February 2023;
- 4.2 The Defendant shall file an agreed redacted copy of its Defence and Counterclaim by 4.00pm on 10 February 2023;
- 4.3 The Claimant shall file and serve an agreed redacted copy of its Reply to Defence and its Defence to Counterclaim by 4.00pm on 10 February 2023; and
- 4.4 The Defendant shall file and serve an agreed redacted copy of its Reply to Part 20 Defence (if any) by 4pm on 3 March 2023, or five business days after the Reply to Part 20 Defence is otherwise due to be filed and served, whichever is the latter.

5. Costs reserved to be determined and assessed if awarded to either party summarily at the first Costs and Case Management Conference."

27. Mr McPherson bases his application for costs on the words “costs reserved” in paragraph 5 of the February Consent Order. The total sum of £37,105.50 claimed as per a costs schedule dated 9 October 2023 is broken down into three parts:
- a. Part 1: Considering and preparing the Defendant's application dated 11 October 2022. Grand total £2,224.50
 - b. Part 2: Considering the Claimant's application dated 15 November 2022. Grand total £5,263
 - c. Part 3: Considering and preparing the Defendant's application dated 10 February 2023. Grand total £29,618
28. The first issue is the construction of the February Consent Order. Mr McPherson submits that the only costs excluded from the “costs reserved” provision in paragraph 5 are MPG’s costs of its application to set aside and that paragraph 5 of the order reserved all other costs, including the costs of what in substance amounted to the joint application of 10 February by the parties for a consent order.
29. In my judgment, Mr McPherson’s interpretation of the consent order is strained and rather artificial. It involves reading paragraph 1 very narrowly and paragraph 5 very widely. What he is contending for is a reading of paragraph 1 under which ‘no order as to costs’ means no order as to costs of MPG’s own costs of making the application with all other costs reserved including all LifeSearch’s costs of dealing with MPG’s application. However, I read the no order as to costs provision in paragraph 1 as extending beyond the costs incurred by the Claimant in making its application to the costs of LifeSearch in responding to that application. I would also read it as including the application for the consent order which compromised the original set aside application.

In other words, MPG's application was discontinued on the terms of the later joint application with no order as to costs of or occasioned by it. I would read the main target of the 'costs reserved' wording to be the costs of carrying out the redaction procedure in paragraph 4.

30. Although I have not seen all the correspondence between the parties since the lodging of MPG's application to set aside, I cannot see there was any need for LifeSearch to issue their own application to inform the court that MPG's earlier application to set aside the order had been compromised. The information contained in the 10 February 2023 application notice and the witness statement of Emily Edwards could just as easily have been set out in a letter to the court informing the court that the parties had reached a compromise under which rather than being completely set aside, the order would be varied to allow third parties to access the statements of case albeit in redacted form.
31. In substance, both parties had therefore succeeded to some extent and MPG's application to set aside was withdrawn on the basis of there being no order to costs (as I read it) for either side in relation to that application as compromised. The result of that reading is that the only costs reserved by paragraph 5 are: the costs involved in carrying out the process set out in paragraph 4. It would be natural to reserve those to the CCMC. The process of agreeing what redactions were really necessary may have become a matter of dispute and carrying out redactions to all the statements of case would itself take some time, all of which time had to be accounted for.
32. I would therefore dismiss parts 2 and 3 of LifeSearch's application for costs because the costs of considering and responding to MPG's application and of informing the court of the agreed compromise are, in my judgment, as a matter of construction encompassed

within the ‘no order’ provision in paragraph 1 of the February Consent Order. I will return to the pre-application costs below.

33. However, if I were wrong about that and paragraph 5 was intended to keep alive all costs other than those incurred by MPG in respect of their own application, I would in any event reach the same result as to costs as a matter of discretion, for the following reasons:
- a. The basic principle underlying CPR 5.4C is the constitutional principle of open justice.
 - b. The general rule under CPR 5.4C(a) is that there should be free access to all statements of case with no categories automatically carved out including quotes from confidential commercial documents.
 - c. The principle of open justice and public access to statements of case may be restricted where a party or a person identified in a statement of case provides a good reason to deny public access by way of an application. However, the court will ensure that the derogation is the minimum necessary: R (on the application of the Duke of Sussex) v the SSHD [2022] EWHC 682 (Admin) at [7] and [13].
 - d. Given the nature of the dispute, it was reasonable and necessary under CPR 16.4 for MPG to plead and properly particularise their case as to what the commission arrangements were between themselves and LifeSearch in 2007 – 2022 and why commission was still due. The act of drafting and filing the claim form and particulars of claim, in my judgment, both fell within the proviso to clause 9.3 of the 2020 Agreement.

- e. It was not unreasonable for LifeSearch to seek an order barring all access as a temporary holding measure pending further court order given the agreed confidentiality provision in clause 18.5 in the 2020 Agreement.
- f. It was not unreasonable for MPG to take the view that a blanket bar to access to the entirety of pleadings was disproportionate and unjustified. It was therefore not unreasonable for them to apply to have the original blanket access bar order set aside.
- g. The parties' compromise reached was a sensible balance of the rival interests of transparency / open justice on the one hand and confidentiality on the other. Neither of the extreme positions (i.e. continuation of the seal on the entirety of the pleadings or no restriction at all) prevailed.
- h. The application and end result were ultimately mainly for the benefit of LifeSearch rather than MPG. What ultimately occurred was that LifeSearch justified a limited exception to the principle of open justice and MPG ultimately consented. The starting point for documents falling under CPR 5.4C(1)(a) in my view is that it is for the party for whose benefit the exceptional order is sought to have to pay for the costs of and associated with the application.
- i. A 'no order' order in respect of the costs of both parties in getting from an interim complete bar to the ultimate agreed position of using redactions is the just order to make as it most accurately reflects the ultimate result of the Claimant's application, resolved as it was by an agreed position without a hearing.

34. That leaves the costs claimed in Part 1 of the schedule of costs. These fall outside the purview of the consent order because they predate the Claimant's application of 15 November. Mr McPherson's main submission is that the costs of considering and preparing the application to court on 11 October were caused by an unreasonable failure by MPG to comply with the pre-action protocol rules.
35. I am not persuaded that MPG were at fault or acted unreasonably for the following reasons:
- a. The letter of claim, whilst not perfect in every respect, put LifeSearch on notice that there was a claim in the offing about underpaid commission and damages. In the course of the subsequent correspondence between the parties culminating in the email of 31 August 2022 seeking confirmation that Michelmores were instructed to accept service, the parties set out their respective positions in broad but adequate terms and in a way which reflected the subsequent pleaded cases.
 - b. Whilst the details of the commission levels were under clause 18.5 clearly confidential and may have been commercially sensitive, MPG were obliged to plead their case fully by CPR rule 16.4.
 - c. Whilst the commission levels and terms of the Agreements were confidential it is unrealistic to put them in the same category as a secret chemical formula or trade secret. Virtually every time charterparty, for example, has a confidentiality clause but it is not standard practice in the Commercial Court either to provisionally seal claims for damages for breach of such charterparties or insist to have redactions. Under CPR 5.4C the onus is on the party or person claiming that access should be restricted to apply for an order.

- d. It is noteworthy that at no stage during the period of correspondence between April and end of August did Michelmores put down a marker that any claim in court would need some sort of order under CPR 5.4C. They had plenty of time to do so and mentioned confidential information but did not say they would apply under CPR5.4C or suggest that redactions would be needed. Following receipt of the question of whether they were authorised to accept service on 31 August Michelmores had two weeks to raise the issue of confidentially or redactions before issue but did not do so.
- e. It was not unreasonable for MPG to file pleadings containing references to the historic contractual arrangements between the parties and leave it to LifeSearch to decide to take advice and decide (at their own cost) whether the details in the statements of case were of sufficient sensitivity as to justify an application for an order under CPR 5.4C.

36. For all those reasons, the costs for considering and preparing the application are in my judgment for LifeSearch alone to bear. So, the appropriate order for this part of the costs is also ‘no order’.

(b) The application for security for costs

37. LifeSearch applied for security for costs by a notice of application dated 9 February 2023. The application was supported by a witness statement by Charles Courtenay of the same date.

38. The witness statement stated that:

- a. The total sum of the incurred and estimated costs of defending the claim was around £1 million.

- b. MPG's accounts suggested that that the company was not in a strong financial position with total assets of only £161,631 and total debts of £139,152 of which £87,743 was due for repayment before 21 July 2022.
 - c. In light of all the information available in the event that the claim failed MPG would be unable to pay LifeSearch's reasonable costs and therefore CPR 25.13(1)(a) gateway was satisfied
39. The application was listed to be heard on 19 May 2023.
40. The response of MPG to this application was to file an application seeking an adjournment of the application to the first costs and case management conference. Four days before the hearing of the application for security, MPG filed a witness statement of David Richardson. In that witness statement he accepted that the MPG is "not in a healthy financial position" but submitted that:
 - a. MPG's poor financial position was brought about "directly as a result of the Defendant's conduct which ultimately led to the Claimant issuing proceedings".
 - b. The Court should have significant regard to the merits of the claim which the Claimant believes to be very strong.
 - c. An order for security will stifle the claim.
 - d. The sums claimed in costs are "ludicrous and grossly excessive".
41. At the hearing on 19 May 2023, according to the note of the hearing which I have seen which has not been challenged:

- a. It was accepted that MPG is impecunious relative to the costs likely to be incurred in the litigation but is solvent.
 - b. It was accepted that the Court cannot determine the merits either way.
 - c. MPG sought a provision to be made for it to offer ATE insurance in lieu of cash security.
42. HHJ Pelling KC dismissed the application to adjourn. MPG was ordered to pay £25,438.75 into court by 9 June 2023. The purpose of this order was to give LifeSearch security for the costs of preparing for the costs and case management conference. HHJ Pelling KC also gave both parties permission to serve any further evidence in relation to the security for costs application. The order did not make any express provision for ATE insurance to be provided in lieu of further security. The order was complied with by MPG.
43. Following the hearing. MPG filed a further witness statement by Mr Richardson on 16 June 2023. In that statement, Mr Richardson stated that MPG is “in the process and indeed close to obtaining an ATE insurance policy, with applicable anti-avoidance provision”. Mr Richardson repeated the assertion that if an order were granted for the sort of sum sought by LifeSearch the claim would be stifled and that LifeSearch’s costs estimates were excessive.
44. LifeSearch served a witness statement in response by Mr Roberts on 13 July 2023. In response to the allegation of stifling, he said this at paragraph 15:

“It is denied that an Order for security for costs will stifle the claim. The Claimant has provided very limited evidence to establish that funds are not, and could not, be made available to it in order to satisfy an order for security, particularly when funds appear to have been made available to it to satisfy the order for the

Defendant's costs and the security ordered by paragraphs 2 and 14 of the SFC Order.”

45. Although the order of HHJ Pelling KC had not made provision for any further statement in response from MPG, a further witness statement was in fact served on 4 October. In this witness statement, Mr Richardson did not say any more about any ATE insurance policy, or MPG’s ability or otherwise to fund the litigation or satisfy any further order for security for costs. Instead, he chose to make a number of critical comments about LifeSearch’s counterclaim.
46. In his skeleton argument lodged on 9 October 2023, Mr Cameron for MPG accepted that:
 - a. MPG is impecunious relative to the costs likely to be incurred by LifeSearch
 - b. The CPR rule 25.13(2)(c) gateway is prima facie satisfied.
47. Mr Cameron accordingly accepted that the Court had a discretion as to whether or not to order further security but ought not to so because of two main reasons:
 - a. Any substantial order for security for costs will stifle the claim.
 - b. MPG’s financial circumstances are a consequence of the subject matter dispute.
48. Mr Cameron’s skeleton also stated that MPG had now been offered an appropriate ATE policy. However, the skeleton asserted that the policy involves “a substantial premium to be paid as a single lump sum” and that MPG “still hopes to secure a policy with better terms”. No further details were provided and the assertions were not supported by any evidence.
49. In his skeleton, Mr McPherson set out the following seven points of principle, none of which were challenged by Mr Cameron in his oral submissions and which I accept:

- a. First (burden of proof): to satisfy CPR 25.13(2)(c) does not require D to show on the balance of probabilities that C ‘will be unable to pay’, only that there is evidence supporting a reason to believe this is the case: Sarpd Oil v Addax [2016] EWCA Civ 120 (Sales LJ [12]-[13]).
- b. Second (ATE): the fact that a claimant has obtained legal expenses insurance (usually an after the event, “ATE” policy) can in principle be taken into account on the question whether the Court should make an order for security for costs: Premier Motorauctions Ltd v PricewaterhouseCoopers LLP [2017] EWCA Civ 1872.
- c. Third (stifling) if a claimant objects to an order for security on the grounds that it would prevent the continuance of the claim, the burden lies on the claimant to show, on the balance of probabilities, that it would stifle the claim. That requires full and frank disclosure from the claimant in relation to its inability to provide security itself or obtain assistance in doing so; see Gama Aviation (UK) Ltd v Talaveras Petroleum Trading DMCC [2019] EWCA Civ 119 (Males LJ [62]-[63]):

‘62. ...the evidence...falls far short of what is required to discharge the burden on the [respondent] to establish that funds would not be made available to it, whether by its owner or by some other closely associated person, in order to enable it to satisfy a condition of payment. It consists of nothing more than assertion as to inability to make the payment. The court has been provided with no material, such as the defendant’s latest accounts (despite the reference to those accounts being audited), with which to assess “the underlying realities of the company’s financial position”. There is no evidence from the owner of the company. There is no evidence at all about the defendant’s relationship with its owner, including the extent to which he is supporting and has supported the defendant financially...

...

63. In effect the court is being asked to accept the defendant's case at face value, which is precisely what Lord Wilson said in *Goldtrail*¹ at [24] that it should not do.'

- d. Fourth (merits): on a security for costs application, the Court should not go into the merits of the case unless it can clearly be demonstrated one way or another that there is a high probability of success or failure: Chernukhin v Danilina [2018] EWCA Civ 1802 (Hamblen LJ [69]-[70]).
- e. Fifth (quantum): The quantum of security, manner in which it is given and the time within which it must be given is a matter for the Court: CPR 25.12(3). The relevant principles which inform the Court's approach are set out in Pisante v Logothetis [2020] EWHC 3332 (Comm) (Henshaw J [88]). The question of quantum is a discretionary matter having regard to all the circumstances including:
 - i. whether to apply a percentage discount (based on the possibility of early settlement and/or successful challenge on detailed assessment of the costs claimed);
 - ii. the 'balance of prejudice' (comparing the harm suffered by the defendant if too little security is given versus the harm to the claimant if the amount secured is too high); and
 - iii. the amount the claimant is likely to be able to raise.
- f. Sixth (costs budgets): the applicant's costs budget is a relevant reference point from which to work out the amount of the applicant's costs to be provided by way of security: see Sarpd Oil v Addax [2016] EWCA Civ 120 at [49]-[50].
- g. (Seventh) (staging of security): the directions as to the manner and time within which security must be given which are most frequently used are an Order for a specified sum to be paid into court by a specified date. If the amount of security is large, payment may be staged over two or more specified dates so as to give the respondent time to raise security in an orderly fashion: Chemistree Homecare Ltd v Teva Pharmaceuticals Ltd [2011] EWHC 2979 (Ch) (Briggs J [36]).

¹ i.e. Goldtrail Travel Ltd v Aydin [2017] UKSC 57.

50. On the evidence, Mr McPherson’s principal submission was that nothing has changed since the hearing of 19 May. In particular, he submitted that no further details have been forthcoming as to why the claim would be stifled, still less full and frank evidence on that point. On the contrary, the order had been complied with on time albeit without the source of the money paid into court being revealed.
51. Notwithstanding the criticisms made by Mr Richardson in his 4 October witness statement about LifeSearch’s counterclaim, Mr Cameron did not seek to persuade me that the merits were so clear on either the claim or the counterclaim that this should have any bearing on the application. He was correct in my judgment to take this course.
52. Mr Cameron otherwise sought the dismissal of the application or that it be adjourned to allow an ATE insurance policy to be entered into for the reasons given in his skeleton. His main submission was that the claim would be stifled. In support of his submission seeking an adjournment of the application, he submitted orally that it was only once the costs budget had been finalised that MPG would be in a better position to go into the ATE market with a firm figure for the potential costs exposure.
53. In my judgment, MPG’s evidence fell woefully short of the full and frank evidence essentially for the same reasons as given by Males LJ in Gama Aviation (UK) Ltd v Talaveras Petroleum Trading DMCC [2019] EWCA Civ 119 [62]-[63]. Despite being given an opportunity to do so by HHJ Pelling KC, no attempt was made by MPG to address by evidence a stifling case. They therefore failed to meet the following test: (with emphasis added): “The claimant will need to show that it cannot provide security and cannot obtain appropriate assistance to do so.” per Lord Wilson in Goldtrail Travel Ltd v Aydin [2017] UKSC 57. I was provided with no information about the financial state of MPG’s shareholders or directors.

54. Far from being satisfied that the effect of an order of security for costs would on the balance of probabilities prevent the claim continuing, by the conclusion of the hearing I was left with the firm impression to the opposite effect for the following reasons:

- a. I had no reason to doubt what Mr Cameron had said in his skeleton, namely that MPG already had an appropriate ATE policy available to them which would meet LifeSearch's concerns about costs.
- b. MPG had made a tactical decision to wait to see what order for security the court might make so that they could decide whether to provide security out of resources potentially available to them or to continue to go down the ATE policy route.
- c. There was nothing in the pre-action correspondence to suggest that MPG had any doubts about whether it could pursue the claim or any financial constraints in doing so. MPG instructed solicitors and counsel to settle a detailed claim in the full knowledge of MPG's financial position and pursued the claim vigorously. Its largest asset by far is the sum allegedly owed by LifeSearch so a decision must have been made that this could and should be pursued.
- d. When the last order was made it was met without any delay from undisclosed sources.

55. I am also not convinced that this is a case where no order should be made because it is the conduct of the Defendant which has created the impecuniosity. LifeSearch's position is that has paid all of the commission which is due to MPG. MPG says it has been underpaid. The merits or otherwise of those two contentions is not sufficiently clear in

either direction (as Mr Cameron accepted) that it should have any bearing on the exercise of the court's discretion.

56. In summary, I therefore accept Mr McPherson's principal submission that in relation to stifling the court is in essentially the same position as the court was in on 19 May, save for the assertion that an ATE policy is now available if MPG wants it. In my judgment therefore, in all the circumstances, it is an appropriate case to make a further order. This will put MPG to its election of whether to pay money into court or to enter into a suitable ATE policy.

57. The total figure which I consider appropriate to take for the purpose of giving security is £575,147. This is arrived at by taking: (a) 50% of LifeSearch's incurred costs and (b) 90% of LifeSearch's budgeted costs as per the costs set out in the updated Precedent H dated 13 October 2023. In light of MPG's precarious financial position, it is in my judgment appropriate to stage the payments as follows:

- a. First tranche payment (17 November 2023): £288,497
- b. Second tranche payment (1 April 2024): £76,500
- c. Third tranche payment (1 August 2024): £210,150

58. As to the form of the order, I am not persuaded that there is any reason to depart from the form of order used by HHJ Pelling KC previously in this case. Mr McPherson sought an order that any third party paying any tranche of the security order be obliged to identify itself. Whilst I accept that the court has an inherent power to order a party to proceedings or the solicitors on the record to disclose the names of any third party financing litigation – see Abraham v Thomson [1997] 4 All ER 362 and Raiffeisen Zentralbank Osterreich AG v Crosseas Shipping Ltd [2003] EWHC 1381 (Comm), that power is only usually

exercisable only at a later stage when unsecured costs have in fact been incurred (most commonly after trial) when a defendant wishes to make an application for a third party costs order.

59. Special rules apply if there is an assignment or litigation funding agreement in existence – see Reeves v Sprecher [2009] 1 Costs LR 1 and Wall v Royal Bank of Scotland [2016] EWHC 2460. But there is nothing to suggest that either exception applies here. I was not shown any authority suggesting that it was now standard practice to require identification as part and parcel of a standard security for costs order. If LifeSearch wish to pursue this point, they should do so in correspondence first and then by separate application.
60. I have asked the parties to draw up an order to reflect this judgment.