Neutral Citation Number: [2024] EWHC 2393 (Ch)

Case No: CR-2023-004409

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 24/09/2024

Before :

ICC JUDGE MULLEN

- -

Between :

ASERTIS LTD **Claimant**

- and –

LEWIS BARRY BLOCH **Defendant**

- -
- -

Mr Ian Tucker (instructed by **APS Legal**) for the **Claimant**
Mr Cleon Catsambis (instructed by **Mishcon de Reya LLP**) for the **Defendant**

Hearing date: 21st June 2024

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on 24th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ICC JUDGE MULLEN

ICC Judge Mullen :

1. Genesis Capital (UK) Ltd ("Genesis") is a company which formed part of the Genesis Capital Group, an investment banking operation based primarily in South Africa. Genesis was wound up by the court on 31st July 2019 and Mr Paul Atkinson and Martin John Weller were appointed as joint liquidators. On 14th December 2022 the joint liquidators assigned certain claims against Mr Lewis Barry Bloch, Genesis's sole director at the relevant times, to Asertis Ltd ("Asertis"). Asertis issued proceedings against Mr Bloch on 1st June 2023, asserting a breach of the duties he owed to Genesis as its director in permitting £2,754,170.60 to be transferred from that company's bank account to a Mr Warren Friedland on 5th December 2018.

2. Those proceedings came before me for a costs and case management conference on 21st June 2024. At that hearing, I gave permission to Asertis to amend its particulars of claim and gave further directions to a trial to take place over three and a half days. The CCMC has been adjourned to 21st November 2024 to deal with, among other things, costs management and any remaining issues relating to disclosure. Both parties have filed costs budgets and updated costs budgets, Mr Bloch's providing, in the former, for a total budget of £342,172.12 and, in the latter, for £524,989.63.

3. Also listed at the CCMC was Mr Bloch's application for security for costs, dated 9th February 2024, supported by the witness statement of his solicitor, Mark Whelan. That application was opposed by Asertis, which filed the evidence of Mr Roger Dugan, a solicitor and business development director at Asertis, in answer to it. Mr Whelan made a further statement in reply and Mr Dugan filed a second statement thereafter. This is my judgment on that security for costs application.

4. In brief summary, Mr Bloch submits that there is reason to believe that Asertis will be unable to pay his costs if ordered to do so, and points to that company's accounts, which show it to be trading at a loss. Asertis rejects Mr Bloch's interpretation of the accounts and further relies upon its revolving credit facility with US Bank Trustees Limited and an "after the event" insurance policy ("the ATE Policy") that it has taken out in respect of this claim, which is supplemented by an "anti-avoidance endorsement" ("AAE"). Mr Bloch however maintains that there is insufficient information concerning the revolving credit facility and the ATE Policy, whether as modified by the AAE or otherwise, does not afford him sufficient protection and should be disregarded.

The jurisdiction to make an order for security for costs

5. The jurisdiction to make such a order for security for costs is contained in CPR 25.12 as follows:

> "(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.
>
> (Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to counterclaims or other additional claims)
>
> (2) An application for security for costs must be supported by written evidence.

> (3) Where the court makes an order for security for costs, it will –
>
> (a) determine the amount of security; and
>
> (b) direct –
>
> (i) the manner in which; and
>
> (ii) the time within which
>
> the security must be given."

6. CPR 25.13 provides, insofar as is relevant:

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

In *Jirehouse Capital v Beller* [2009] 1 WLR 751 the Court of Appeal held that the court is not required to be satisfied on the balance of probabilities that the claimant would be unable to pay the defendant's costs. It is sufficient that there is "reason to believe" that it will not be able to do so.

7. Where that condition is met, the discretion to order security arises. In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, 626G Lord Denning MR said:

> "If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters

> which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively—so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."

Asertis's financial position

8. Asertis is a company incorporated in England and Wales on 22 March 2018. Its business is that of a litigation funder and claims acquisition company. It has filed audited accounts for the financial years ending 31st December 2020 to 31st December 2022. Dormant accounts were filed for previous years.

9. The filed accounts for the year ending 31st December 2021 record that its loss for the financial year was £2,965,831, although the fair value gains on its portfolio of litigation funding cases was £5,174,917, before tax, which resulted in comprehensive post tax income for the year of £800,821. Its operating loss was £3,017,541, which consisted of a realised loss on funded cases of £349,303 and administrative expenses of £2,668,238. It did not propose paying a final dividend for that or the preceding year, which had also been loss-making, although the loss for the earlier year was £910,729. On the face of it the company's trading has worsened since 2020.

10. The accounts state that Asertis had net current assets of £2,771,165, and cash at bank of more than £2.7 million. It had loans of about £34 million secured by fixed and floating charges, the loans being repaid from the proceeds of litigation. The accounts were prepared on the "going concern" basis, which the auditors considered to be appropriate.

11. The accounts for the financial period ending 31st December 2022 show growth in litigation funding cases in progress from £35 million to £63 million, but also show a loss of £3,434,957 and total comprehensive loss of £524,693, leaving net assets of £1,564.590, including cash at bank of £922,039. The company is shown to have the benefit of a £200,000,000 revolving credit facility, although the terms of that facility are not in evidence. Those accounts were similarly prepared on a going concern basis, which the auditors similarly considered to be appropriate.

12. The correspondence between the parties and the evidence filed in response to the application does not shed any further light on Asertis's financial position. Mr Duggan's first witness statement merely exhibits the debenture in favour of US Bank Trustees Limited, but not the facility letter itself. His second witness statement corrects a typographical error in his first statement as to the level of credit available and makes some comments on the terms of the ATE Policy. No attempt is made to demonstrate Asertis's financial position beyond referring to the accounts and credit facility.

13. Asertis did however point in submission to its website, a print out of which was exhibited to Mr Duggan's witness statement, which refers to the company being funded by two investors, who are said to have assets under management of several billion euros.

I can give no weight to statements on the website and even accepting those statements to be true tells me nothing about the likelihood of funds being made available to the company in the event that it was unable to meet a costs order from its own assets.

14. Having reviewed the very limited financial information available, I consider that there is "reason to believe" that Asertis will not be able to meet an adverse costs order. It is a new company, which only began trading in 2020. It has been trading at a loss. Its assets are overwhelmingly the value of the claims that it is pursuing, the value of which is inevitably uncertain and might not necessarily be easily realisable. The trajectory shown by these limited financial statements suggests a worsening trading position and an eroding balance sheet. It would have been open for Asertis to provide a fuller and more up-to-date picture of its financial position, but it has not. There is nothing available to me to suggest that it is now trading profitably or will be so trading at the time it might be called upon to make a payment under adverse costs order following trial in May 2025 and at the conclusion of any detailed assessment of costs. Were the current pattern to continue into 2025, it may well be that its assets are reduced to the point where it is unable to meet the substantial costs award that would likely be made if it were unsuccessful in this litigation. Even assuming that the defendant's costs were to be limited on the making of a costs management order to a sum equal to those of the claimant they would still approach £300,000. That is nearly a third of the cash available to the company as at 31st December 2022 and I have not been provided with any evidence to suggest that the company's cash position has not continued to worsen in the intervening period.

15. This is not altered by the revolving credit facility. I do not have sight of the terms of that facility. I do not know whether credit can be advanced to meet adverse costs orders. Still less can I speculate as to whether advances can or would be made under its terms if, for example, the company's financial position had significantly worsened at the point at which the costs fell due.

16. That being so, I must therefore consider whether the ATE Policy affords sufficient protection to Mr Bloch. If not, I must consider whether it nonetheless offers some level of protection which might reduce the amount of any payment into court.

The approach to ATE policies in the context of security for costs applications

17. Mr Catsambis took me to a number of cases in relation to ATE policies and there was no real disagreement between the parties as to the principles. In *Michael Phillips Architects v Riklin* [2010] EWHC 834 (TCC) Akenhead J said at paragraph 18:

> "[…]What one can take from these cases, and as a matter of commercial common sense, is as follows:
>
> (a) There is no reason in principle why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.
>
> (b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.

> (c) It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.
>
> (d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the defendant."

18. There may be particular features of a policy that go to undermine the sufficiency of protection. Deficiencies highlighted in the case law include –

    i) Provisions entitling an insurer to withdraw cover if the insurer believes a claim lacks "reasonable prospects" (*Michael Phillips Architects v Riklin* at paragraph 22).

    ii) Limits on scope of coverage in relation to interim costs or incurred costs (*Giaquinto v ITI Capital Ltd* [2023] EWHC 2467 (KB) per Master Stevens at paragraphs 74 to 79).

    iii) Redaction of relevant policy terms (*Re Ingenious Litigation* [2020] EWHC 235 (Ch) per Nugee J, as he then was, at paragraphs 127(9) and 137(3)).

    iv) Potential for an ATE policy to be avoided on the grounds of fraud. An AAE may ameliorate this risk but that will depend on its terms and it may be inadequate where:

        a) the indemnity limit of the AAE is below the costs required to be secured

        b) there are limitations on the scope of the AAE, or

        c) as it was put by Gloster LJ in *Holyoake v Candy* [2017] 3 WLR 1131 at paragraph 109, there is an "objectively reasonable apprehension of avoidance".

    v) Absence of direct benefits conferred on the defendant. In this regard, Akenhead J in *Riklin* said at paragraph 30:

> "I do not see how it can be said that an insurance policy which does not provide direct benefits to the Defendants and under which they are not amongst the insured parties and which does provide for cancellation of the policy either for a large number of reasons or for no reason provides any appreciable benefit or raises any presumption or inference that the Claimant will be able to pay the Defendants' costs if ordered to do so."

19. Depending on the circumstances, these and other features may, individually or cumulatively, led to the conclusion that an ATE policy does not afford sufficient

security to a defendant. As Master Stevens put it in *Giaquinto* at paragraph 94, a "cumulation of many inferiorities" may diminish or extinguish the value of a policy.

20. An ATE policy will rarely provide the same level of security as a payment into court but, of course, it may very well be that, in the event, the policy would pay out without difficulty. All the defendant is required to show on an application such as this, however, is that there is a real, as opposed to fanciful, risk that the ATE policy will not respond in full (see *Ingenious* at paragraph 138) or, in Master Steven's words in *Giaquinto*, at paragraph 79, an "unjustifiable element of doubt about the extent of the cover". In considering whether there is such a risk the court will approach the matter with pragmatism. In *Verslot Dredging v HDI Gerling Industrie Vesicherungag A*G [2013] EWHC 658 (Comm) Christopher Clarke J, as he then was, said at paragraph 10:

> "In my view, it is necessary to take a pragmatic view or, as the Master of the Rolls expressed in *Shlaimoun & Anor v Mining Technologies International Inc* [2012] EWCA Civ 772, a realistic view. There is no magic in the provision of security from a first-class London bank. The essential question for the court in deciding on what form of security is acceptable is whether what is proposed does indeed provide real security. This it may do if it amounts to a promise which would in all likelihood be honoured, given by an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given by a truly creditworthy entity."

The ATE Policy in this case

21. The ATE Policy was entered into on 20th March 2024 and is limited to £250,000 for "opponent's costs", which are defined as:

> "Your Opponent's reasonable costs for the Litigation which You are liable to pay, including their disbursements. This does not include costs incurred in a counterclaim, unless We state otherwise in the Schedule."

The policy is modified by the AAE in respect of the first £160,000 of cover for opponent's costs. Insofar as it removes wording from the ATE Policy it provides:

> "The following paragraphs are removed from the policy wording;
>
> Paragraph 3, paragraph 4 - …
>
> Paragraph 17, - sub paragraphs, c - g; l (i); n; q
>
> Paragraph 18 (a) and (b)".

In the paragraphs below I shall set out the relevant terms of the ATE Policy and indicate the clauses that are removed by the AAE by reproducing them in italics.

22. The policy wording begins:

> "This policy and Schedule should be read carefully in conjunction with Your Retainer and should be kept in a safe place. Please ask Your Solicitor to explain any part of this policy to You if it is not clear to You."

I do not, of course, know the terms of the retainer between Asertis and its solicitors.

23. At clause 3 the policy requires the insured to provide a "fair presentation of risk" as follows:

> "In setting the terms and Premium of this insurance policy We have relied on the information You have given Us. You must take care when answering any questions we ask by ensuring that all information provided is accurate and complete.
>
> The information You have provided Us constitutes Your fair presentation of risk.
>
> A 'fair presentation of the risk' is one which discloses to Us every material circumstance which You know of or ought to know of, or gives Us sufficient information to put Us on notice that We will need to make further enquiries for the purpose of revealing those material circumstances, and which makes that disclosure in a manner which is reasonably clear and accessible to Us and in which every material representation as to a matter of fact is substantially correct and every material representation as to a matter of expectation or belief is made in good faith.
>
> A 'material circumstance' is one that would influence Our decision as to whether or not to agree to insure You and, if so, the terms of that insurance. If You are in any doubt as to whether a circumstance is material You should disclose it to Us. *If You fail to make a fair presentation of risk there are a number of remedies available to Us. If You breach the duty of fair presentation prior to entering into this insurance contract and the breach of the duty of fair presentation is deliberate or reckless, We may avoid this policy and refuse all requests for payment and if You have paid the Premium We need not return this. If the breach of the duty of fair presentation is not deliberate or reckless, Our remedy will depend upon what We would have done if You had complied with the duty of fair presentation. If We would not have entered into the contract of insurance at all, We may avoid this policy and refuse all requests for payment and will return any Premium paid. If We would have entered into the contract of insurance but on different terms from the outset (other than Premium) this policy will be treated as if it had been entered into on those different terms from the outset.*"

The right to avoid the policy for a failure to make a fair presentation of risk prior to the inception of the policy is removed in respect of the first £160,000 of cover, but it does appear to me that that is likely to be below the level of an adverse costs order against

the claimant in this case. The effect of the AAE removes the right to avoid the policy *ab initio* where the failure to disclose a material circumstance prior to entering into the contract, but it does not clearly specify what might happen if there is a failure to disclose a material circumstance during the currency of the policy. If that were to happen, it seems to me that it is at least arguable that the right to terminate the policy set out in clause 4 arises.

24. Clause 4 states:

> "If during Your Litigation Your Solicitor deems that You no longer have a greater than 50% chance of Success or We feel that You have breached the requirements of the policy, We will be entitled to cancel this policy by giving You 30 days written notice at Your last known address."

I note that this provision requires notice to be given to the insured only. On the face of it, Asertis's solicitor could "deem" the claim to have less than 50% prospects of success and notice could be given of termination of cover, without Mr Bloch's solicitors being made aware of this, or perhaps without being made aware of the cancellation of the policy in due course at all.

25. Mr Tucker referred to the decision of Mr Philip Marshall KC, sitting as a Deputy High Court Judge, in *Exporien Mining Private Limited Company v Aggreko International Projects Ltd* [2024] EWHC 1463 (Comm). In that case the deputy judge considered a similar clause (perhaps an identical one given that the case apparently concerned a policy issued by the same insurers that issued the policy in this case) and observed that:

> "The third objection does not appear to be a point of substance so long as (a) immediate notice to Aggreko was required if any such termination occurred; (b) such termination did not affect ability of Aggreko to recover its incurred costs up to the point of receipt of such notice under the Policy; and (c) no such termination could occur prior to the first case management conference."

I do not know how that was dealt with in Mr Marshall's order. For my own part I have considered whether this defect could be dealt with by a direction that any termination of the policy be notified to Mr Bloch. That would not however address the question of whether the policy would still cover costs incurred by Mr Bloch up to the point of termination, which is by no means clear on the face of the policy.

26. The clause also provides that, if the insurer "feels" that the requirements of the policy have been breached, it can be brought to an end without notice to Mr Bloch. The policy is plainly intended to be written in plain English but the scope of the power to terminate the contract is not well defined. However that may be, it does seem to me that this clause, and indeed the clauses that I discuss below, gives the insurer the broad right to terminate the policy for "a large number of reasons", which Akenhead J in *Riklin* identified as negativing any appreciable benefit to the defendant.

27. At clause 6 the policy wording provides:

> "You must not change Your Solicitor without Our prior written approval" .

The effect of breach of this clause is not set out in this clause but it would clearly amount to a breach of "the requirements of the policy" for the purposes of clause 4 and entitle the insurer to give notice of cancellation of the policy.

28. Clause 9 makes it clear that the policy does not confer any benefit on Mr Bloch which might be enforceable by him. It provides:

> "A person who is not a party to this policy has no right under the Contracts (Rights of Third Parties) Act 1999 (or any amendment or re-enactment of the Act) to enforce any term of this policy, but this does not affect any right or remedy of a third party which exists or is available, apart from the Act."

Mr Tucker submits that all this means is that there is a two stage process for payment. If a costs order is made against Asertis, it must apply to the insurer and the insurer will make a payment to Asertis, which will then be in a position to make a payment to Mr Bloch. Mr Tucker accepts that a risk that Mr Bloch would not be paid arises if Asertis were insolvent, but simply says that it is not. That risk cannot be dismissed so easily. If one accepts that there is "reason to believe" that Asertis will not be able to meet a costs order, then it follows that, if that were to prove to be so, the company may be unable to meet its liabilities more generally. That is not inevitable but it is a real risk in the circumstances that have led me to believe that there is a reason to believe that an adverse costs order might not be paid. Again, I bear in mind Akenhead J's observations about the absence of a direct benefit to the defendant undermining a policy's appreciable benefit to him.

29. Clause 14 provides:

> "We will only pay;
>
> …
>
> (b) In the event You do not Win the Litigation We will pay Your Opponent's Costs and Your Own Disbursements:
>
> (i) If a court orders You to pay Your Opponent's Costs following a judgment against You, or if
>
> (ii) You discontinue or abandon Your Litigation provided You do so with Our written authority."

30. Clause 17 sets out the circumstances in which the insurer will not pay. It provides:

> "We will not pay You or Your Solicitor;
>
> (a) if You have not signed a valid Conditional Fee Agreement or Damages Based Agreement with Your Solicitor;
>
> …

> *"(c) if You have misled, exaggerated or made a fraudulent or dishonest statement to Your Solicitor, counsel, expert or the Court or where You have failed to comply with any request for information relevant to Your case;*
>
> *(d) Where You have failed to obtain Our written authority before rejecting Your Opponent's Part 36 Offer;*
>
> *(e) Where You have failed to obtain Our written authority before accepting Your Opponent's Part 36 offer out of time;*
>
> *(f) if You have issued court proceedings without Our written authority;*
>
> *(g) any discontinuance or abandonment of the Litigation without Our prior written agreement;*
>
> (l) for any Opponent Costs or Own Disbursements;
>
> *(i) that have been incurred as a result of Your failure to co-operate with or to follow the advice of Your Solicitor including any advice to accept an offer of settlement;*
>
> (ii) incurred prior to the commencement of this policy unless We have provided prior agreement to pay these;
>
> …
>
> (m) for any Opponent's Costs where a Court has ordered You to pay on an indemnity basis to the extent that these exceed the amount which would be payable on a standard basis;
>
> *(n) if there is any delay or default on Your part in responding to Your Solicitor or providing Your Solicitor with Your instructions which prejudices Your position, or You fail to comply with any Order of the court or any aspect of the Civil Procedure Rules during the course of the Litigation.*
>
> (o) if during Your Litigation Your soliticor [*sic*] deems that You no longer have a greater than 50% chance of success;
>
> (p) any order the court may make for wasted costs or for You or Your unreasonable conduct in the Litigation;
>
> *(q) if this policy is being used to top up another legal expense insurance policy".*

In addition to the sub-clauses disapplied by the AAE, it adds one additional subclause to clause 17 as follows:

> "(rr) - (i) any Opponent Costs incurred as a result of any in filing suitable security as a result of the Defendant's application for Security of Costs"

As Mr Catsambis noted, there are a number of factors here that are entirely within Asertis's control and, in some cases, within Asertis's knowledge alone. Mr Bloch does not know if there is a valid conditional fee agreement or damages based agreement between Asertis and its solicitors. He has no control over or knowledge of any actions that might be taken which are contrary to the advice of Asertis's solicitors or of whether those solicitors "deem" the claim to have less a 50% prospect of success. This appears to be a separate right to withhold payment from that in clause 4 and does not seem to be contingent on any notice of termination having been served at all.

31. Clause 18 sets out further conditions:

> "These are the conditions of the policy that You must comply with as part of this policy. If You or Your Solicitor do not meet these conditions, We may need to reject a claim payment or a claim payment could be reduced, or in some circumstances Your policy may not be valid.
>
> …
>
> (c) You must ensure that Your Solicitor does not make any payment or agree to make any payment to Your Opponent without first obtaining Our written agreement;
>
> …
>
> (g) Upon conclusion of the Litigation You must inform Us immediately advising (a) the level of Damages awarded or agreed upon; (b) whether court proceedings were issued; and (c) which track the Litigation was allocated to;
>
> (h) You must take all reasonable measures to minimise the cost of any claim under the policy;"

Again, the performance of these conditions in is in the hands of Asertis. Mr Bloch has no knowledge of whether they have been performed, let alone any control over whether they are performed. It is true to say, as Mr Tucker submitted, that some of the conditions, such as the requirement not to change solicitor or not to agree to make a payment without prior written approval, are conditions that Asertis has no reason not to comply with, particularly where failure to do so would leave it with a liability. It is all too possible however that such a condition might simply be overlooked, or arguably not complied with, with the result that Mr Bloch would be left out of pocket until the issue had been resolved.

32. In my judgment the ATE Policy cannot be regarded as providing sufficient protection to Mr Bloch, even on the basis that the AAE applies. There is a real risk that the policy will not meet an adverse costs order in full. It offers no protection in respect of the costs incurred in the nine months before the policy was taken out, although I accept that there

is some force in the argument that Mr Bloch should have applied for security sooner, and is limited to £250,000, which at the very least raises a risk that it would be inadequate to meet Mr Bloch's costs in any event, given the level of costs disclosed by both the original and revised costs budgets filed by him. Mr Bloch has no means of enforcing it directly for his benefit, exposing him to a risk that the proceedings of the policy would not be available to him in the event of the insolvency of Asertis, and no means of policing compliance with the numerous conditions on which payment is contingent. The termination provisions provide no mechanism for informing Mr Bloch if the policy was to be brought to an end and it is not clear, as Mr Tucker seemed to accept, whether in the event of termination the insurer would remain liable to pay a sum to cover Mr Bloch's reasonable costs up until that point.

33. That being so I will direct a payment into court. Given the numerous termination provisions in the policy, and the uncertainties as to the effect of termination, I do not think I can ascribe any value to the policy so as to reduce the payment into court that I would order had it not existed. This is particularly so given the wide ambit of clause 4 and clause 17 and the potential that no opponent's costs might be payable on termination.

34. I should say that there is no suggestion before me that the claim is not bona fide or that it does not have a real, as opposed to fanciful, prospect of success. Nor has it been suggested that the making of a security of costs order will stifle the litigation. I proceed on the basis that there is no obstacle to making an order for payment into court.

Amount of security

35. Mr Catsambis seeks an order that Asertis pay 75% of Mr Bloch's budgeted costs into court. Mr Tucker notes that in *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) Teare J stated that, from his own experience, 60%-70% was more usual in a case where an order for costs on the indemnity basis is no more than speculative. Despite the criticisms of Asertis's conduct by Mr Catsambis there is no reason to think that a costs order might be made against Asertis on the indemnity basis, at least in respect of the costs of the claim as a whole. Mr Tucker asks me to make any such order conditional on Asertis not having put in place better security in the meantime. I reject that submission. Asertis has had ample time to put in place an ATE policy that addresses the criticisms made of the current policy. It would be contrary to the overriding objective to re-argue the application on the basis of a revised policy. I do not exclude the possibility that Asertis might make an application to vary the order for security in due course on the basis of a further policy, provided that it has made the required payments into court under the order that I will make.

36. Asertis's costs budget totals £295,645. Mr Bloch's amended costs budget is £524,989.63, significantly higher than the total of £342,172.12 set out in his first budget. A costs management order has not yet been made but it appears to me that the Defendant's costs are inflated. For example, I have difficulty in seeing how disclosure will cost £105,815.55 in a case concerning a single transaction that is unlikely to be document heavy, which is listed for trial for three and a half days. Trial preparation is budgeted at £101,230, and £61,925 is claimed for the trial itself on the basis of attendance by two partners, an associate and a paralegal. That again appears to be high in a case such as this.

37. Given those concerns, it seems to me that that I should not make an order now which provides for payment of fixed sums to cover the whole of the litigation. Rather it seems to me to be appropriate to provide, first, for a payment into court of a sum based on Mr

Bloch's incurred costs. I will then direct that Asertis is to pay a percentage of the costs agreed or approved on the making of a costs management order at the CCMC in November 2024 within 28 days of that CCMC. The reason for that latter direction is that, first, the judge considering the costs budgets, who might or might not be me, should be able to do so unfettered by my assessment, albeit a broad brush one, of what would be likely to be ordered to be paid on a detailed assessment. The costs management process is of course about setting budgets, but it seems to me undesirable for me, now, to arrive at a figure that may be out of kilter with a costs management order made after full argument, given the wide differences between the parties. Secondly, the majority of the estimated costs, with the exception of those related to disclosure, will fall to be incurred after the next CCMC in November 2024. There is little prejudice to the defendant in security being staged as I propose.

38. It also seems to me that, in circumstances where I have concern about the level of costs both claimed and incurred, I should be cautious as to the percentage of the incurred costs that I shall direct be paid into court. Incurred costs total £199,872.38 according to the defendant's revised costs budget. That appears to me to be high, even removing the costs attributable to the security application itself, not least when compared to the claimant's incurred costs of £97,526.57, and likely to be reduced on assessment. In my judgment a payment equal to 60% of the incurred costs would be appropriate. The parties are agreed that, once the costs attributable to the security application are removed, that sum is £101,317.31.

39. Disclosure will be at least partially complete on the handing down of this judgment. The budgeted estimated costs are £81,482.50. This does appear to me to be high and, indeed, the claimant's position is that this phase should cost less than £10,000, given that over £24,000 has already been spent. In the circumstances, I consider that I should not provide for a payment into court in respect of this sum now, but rather it should await the next CCMC when the further costs incurred and any yet to be incurred will be known.

40. In respect of disclosure and the other costs which are currently estimated in the defendant's revised costs budget I will direct that the claimant shall pay into court a sum equivalent to:

    i) 60% of those costs which were estimated at the date of the defendant's revised costs budget dated 14th June 2024 but which have been incurred as at the date of the making of the costs management order; and

    ii) 70% of the sum agreed or approved by the court in respect of estimated costs on the making of a costs management order

    within 28 days of the making of the costs management order.

41. The figure of 70% of the sum agreed or approved in respect of the estimated costs seems to me to be an appropriate figure, bearing in mind, on the one hand, the enhanced degree of scrutiny of the costs at the CCMC and, on the other, the possibility that the agreed or approved costs may not be incurred in full.

42. I will invite counsel to agree an order which reflects my directions above. The costs of the security for costs application itself simply fall to be dealt with as a matter consequential upon this judgment.