Neutral Citation Number: [2024] EWHC 695 (KB)

Case No: QB-2022-002405 and others

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KINGS BENCH DIVISION

Rolls Building
Fetter Lane
London
EC4A 1NL

Monday 25 March 2024

Before:

MRS JUSTICE COCKERILL DBE

MR JUSTICE CONSTABLE

- -

Between:

VARIOUS CLAIMANTS

Claimants

- and -

MERCEDES-BENZ GROUP AG AND OTHERS
VOLKSWAGEN AG AND OTHERS
DR ING HCF PORSCHE AG AND OTHERS
AND OTHERS

Defendants

- -
- -

Representation: see Appendix 1

Hearing dates: 11,12,13,14,15 March 2024

- -

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.

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 25 March 2024 at 10:30

Cockerill and Constable JJ:

INTRODUCTION

1. This is a judgment written jointly by the two judges appointed by the President of the King's Bench Division ("PKBD") to manage the NOx Emissions Group Litigation. Since the Pan NOx hearing and judgment handed down by the PKBD, the two Managing Judges, and Senior Master Cook on 11 December 2023 ([2023] EWHC 3173 (KB)), there has been one further Progress CMC, and a number of bi-weekly progress update meetings to ensure the preparation for a 5- day CMC was not derailed. Whilst a number of *ex tempore* rulings were delivered during the course of the CMC dealing with the determination of suitable directions, only two discrete applications gave rise to issues of law which required a reserved judgment. That judgment has, with the permission of the PKBD, been prepared jointly.

2. At the outset, the Managing Judges wish to thank the parties, their solicitors and the enormous number of counsel, for the way in which they have demonstrated a very significant degree of co-operation in the preparation for and conduct of the 5 day CMC. The scale of the hearing can be discerned from the representation list attached to the judgment. The live hearing was attended by over 100 legal and client representatives. Others attended in an overflow court, with another 96 attendees and groups of attendees joining remotely.

3. The parties' constructive approach permitted the Managing Judges to grapple effectively with the determination of what the Court considers to be the best route to facilitate the fair resolution of the greatest number of issues which divide the parties in the most efficient way and at the earliest feasible time. The conduct of all parties was a model of the approach necessary to permit focused case-management of pan-GLO litigation and will, no doubt, need to be maintained for litigation of this scale to continue to progress smoothly through the Courts.

THE CPR 31.22 APPLICATION

Background

4. This is an application by the Mercedes Defendants for an order under CPR 31.22(2) "*prohibiting the collateral use of certain documents that have been disclosed by them even where those documents are or have been read to or by the court, or referred to, at a hearing which has been held in public*" ("the 31.22 Application"). The order sought is an interim order: sought until final determination of all claims in the the Mercedes-Benz NOx Emissions Group Litigation, or such other time as the Court considers appropriate.

5. The effect of such an order would be that – whether referred to in open court or not - the documents can be used for the purposes of this litigation but not otherwise. The consequences of that include non-disclosure of such documents to the public.

6. This application is made in respect of four categories of documents which the Mercedes Defendants are obliged to disclose to the Claimants but which they consider should not be available for collateral use, i.e. for use beyond these proceedings: (i) Recall

Decisions, (ii) KBA Appeal Decisions, (iii) AES/BES Documents which are part of the annexes and enclosures to Voluntary Update Decisions, and (iv) other annexes and enclosures to Type Approval Decisions.

7. These documents had previously been disclosed into a Confidentiality Ring Order ("CRO"). They were then subject to an earlier application ("the De-designation Application") by the Claimants to remove them from the scope of the CRO. The Mercedes Defendants opposed their de-designation on the basis that the documents were confidential and/or contained confidential information. The Court held in the De-designation Judgment ([2024] EWHC 190 (KB)) per Cockerill J that all but one of the documents did not contain any confidential information and were therefore non-confidential. In relation to one document referred to as "the AES/BES Document", the Court held that the Mercedes Defendants could indicate any information said to be confidential but that treating the whole document as confidential was wrong. We understand that the parties are still in dispute about which portions of that document are confidential. That is emblematic of the strength of feeling on both sides in relation to document disclosure issues.

8. The Mercedes Defendants maintain that these documents may not be confidential but nevertheless contain sensitive commercial information to which they are entitled to protection on the basis that their publication is not necessary for open justice.

The Law

9. The basic rule under CPR 31.22 is that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed unless it comes within one of the exceptions in CPR 31.22(1) – agreement, specific court permission or being *"read to or by the court, or referred to, at a hearing which has been held in public*". This exception reflects the fundamental open justice principle.

10. Rule 31.22(2) states:

> "(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

11. The Court of Appeal's decision in *Lilly Icos Ltd v Pfizer Ltd (No. 2)* [2002] WLR 2253 is the leading applicable authority on the application of r 31.22(2). Both parties agree that *Lilly Icos* stands for the following propositions:

    1) The starting point is the principle of open justice, and very good reasons are required to depart from the normal rule of publicity;

    2) When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of public scrutiny of the trial process. The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible or substantially possible to understand the trial and the judgment without access to a particular document, though in particular cases the centrality of the document to the trial is a factor to be placed in the balance;

3) The court must have in mind any "chilling" effect of an order upon the interests of third parties;

4) The court will require specific reasons why a party would be damaged by the publication of a document. Those reasons will in appropriate cases be weighed in light of the considerations in paragraph 11(2) above. Simple assertions of confidentiality and damage which will be done by publication are insufficient even if supported by both parties.

Discussion

12. The Mercedes Defendants have identified three reasons in support of the 31.22 Application:

1) The documents contain commercially sensitive material which is not generally available;

2) There is a real risk of harm to the Mercedes Defendants, including the risk of exploitation and loss of confidential status in other jurisdictions (specifically Germany) if collateral use of the documents is permitted;

3) The court cannot at this stage conclude that the principle of open justice requires that the documents be publicly available. The time for that assessment is after trial. An order under r 31.22(2) will not interfere with the running of these proceedings.

13. The main arguments pursued were essentially the first two of these.

Commercially Sensitive Material

14. At the centre of the 31.22 Application is the Mercedes Defendants' submission that publication of these documents could cause harm to its commercial interests through (mis)use of sensitive commercial information by competitors and imitators. It is said that collateral use "*could lead to exploitation by its competitors (or other persons interested in imitating Mercedes-Benz's vehicles or their components) of technical and other commercially sensitive information*", which include "*all manufacturers (even those with a longstanding presence in the diesel vehicles market)*". The parallel between these arguments and those advanced in the De-designation Application is striking. They were largely advanced by reference to the same evidence which Cockerill J had essentially rejected in the De-designation Judgment. It was therefore unsurprising that the Claimants contended that this was a naked attempt to go behind that judgment.

15. The submission for the Mercedes Defendants was that there was no "cutting across" in that it does not follow from the Court's conclusion that a very high degree of protection (a CRO) was unwarranted, that Mercedes is entitled to no protection whatsoever.

16. The essential problem with this aspect of the argument is similar to that which the Court found in the De-designation Judgment, namely the reliance on blanket assertions of commercial sensitivity in respect of all the information in all the documents – particularly in the light of the conclusions reached about the contents of those documents in that judgment. The burden is on the Mercedes Defendants to justify restricting publication of particular documents by reference to specific reasons. It was

stated in the De-designation Judgment that "*the court will expect a designation of confidential material within such documents to be very carefully considered, and for it to be limited to that which is truly required*".

17. While the Mercedes Defendants are right to submit that the test for confidentiality and that under r 31.22(2) are not the same (particularly that the test is not one of "necessity") and the Court should not "read across" its conclusions in the De-designation Judgment, the importance of the principle of open justice means that the clear indication given then would at least have formed an appropriate starting point for this application. It is consistent with the requirement for specific reasons in respect of particular documents.

18. It was particularly surprising to find that this application was made in such broad terms as regards the Recall Decisions, which are likely to be fundamental to the argument at trial and hence to play a key role in the understanding of any observer. Mr Bennett does not engage with the role of the decisions and the points highlighted in the De-designation judgment. He simply states that the Recall Decisions "*do include details of certain elements of the emissions control systems in Mercedes-Benz vehicles that are no longer in use*", but that they also contain information about systems currently in use. This is a manifestly inadequate basis for saying that the whole of any Recall Decision should not be publicly available.

19. Nor was there any real attempt to engage with the effect of the iniquity rule. The iniquity rule means that *"[o]therwise valid claims to confidentiality can be displaced on account of the public interest in the information entering the public domain on the basis that it reveals serious wrongdoing*". The Court held in the De-designation Judgment that "*most if not all Recall Decisions … amount to findings by the regulator that the Defendants have used impermissible defeat devices*" such that the iniquity rule applies. It would seem to follow that the Mercedes Defendants cannot sensibly maintain the 31.22 Application in relation to emissions strategies which have been deemed impermissible.

20. The same applies to the KBA Appeal Decisions, which deal with the same subject matter as the corresponding Recall Decision.

21. If there were any force in this application as regards the commercial sensitivity aspect it would seem to lie with the arguments on the AES/BES Documents and other annexes and enclosures of a similar nature. The Mercedes Defendants' arguments that these documents may well be of marginal or no relevance at trial have some force. Concerns as to tactical use of such documents in open court to engage CPR 31.21 are also well understood.

22. However the 31.22 Application is made on the basis of all of these documents in full and concerns, as to collateral use need to be justified to permit a deviation from the open justice principle. As the Court held in the De-designation Judgment, much of the information in these documents is anodyne or already in the public domain. Regardless of the probable marginal trial relevance of these documents, that material cannot realistically be subject to an order under r 33.22(2). If there is any true issue here, the same approach which was ordered in relation to the De-designation Application must apply: the document must be properly reviewed for commercial sensitivity to enable the balance between future relevance and sensitivity to be performed. On that basis, the

collateral use of such information might be prohibited, but open justice requires that the restriction go no further than that and is not ordered without that process being done.

23. This is the more so against the background where the Mercedes Defendants have to date displayed "*a very acute sense of commercial sensitivity*" about all matters that might be of direct – or indirect - interest and benefit to other vehicle producers. And yet this application has not been so limited, but brought on a precautionary basis, with the one very limited conclusion as to confidentiality deployed to justify a blanket order covering not just that document, but 19 others which have been found not to be confidential.

24. So, as with the De-designation Application, the Mercedes Defendants have adopted a broad-brush approach in seeking to prevent publication of entire categories of documents, and we conclude that the 31.22 Application fails for essentially the same reasons. The principle of open justice demands that documents read or referred to in a public hearing be available to the public unless there are good reasons otherwise. The Mercedes Defendants have failed to persuade us that, as regards the materials that are the subject of this application, there are such good reasons.

25. This is not to say that such an application will always be hopeless. A genuine justified concern about collateral use of specific material whose commercial sensitivity is properly made clear could be justified – particularly if the role of that material at trial were dubious. There may also be some force in restricting publication of truly sensitive details of extant systems which are not already in the public domain. However, any such application must be properly particularised and evidenced. Paragraphs 64 to 68 of the De-designation Judgment apply with equal force here.

<u>The German position on confidentiality</u>

26. Both in written submissions and the hearing, Mr Blakeley stressed the status of these documents as confidential in other jurisdictions, particularly in Germany, where the Mercedes Defendants are said to be facing claims similar to those in these proceedings. Mr Bennett, solicitor for the Mercedes Defendants, likewise asserts in his witness statement that "*all of the Documents are confidential as a matter of German law*" and the "*civil courts in Germany have not successfully enforced any obligation to disclose the Documents in Germany*". The argument is therefore that this Court should take steps to align itself with that approach.

27. One exception to the default position on confidentiality in Germany is a recent decision of the Schleswig Administrative Court which dismissed a challenge by the Mercedes Defendants to the KBA's willingness to provide some of the Recall Decisions and a KBA Appeal Decision to applicants in Germany. The Mercedes Defendants are appealing that judgment and Mr Blakeley therefore says that this court should make at least an interim order under r 31.22(2) as to do otherwise would frustrate the pending appeal against the German decision.

28. So far as this latter point is concerned, without sight of the judgment of the Schleswig Administrative Court, it is difficult for the court to assess the impact of that decision. This is not a criticism of the Mercedes Defendants: they say that the decision has not been published. It is however hard to see why this should have an impact on the analysis here. The German proceedings are distinct from and not relevant to the claims

here. This court is not bound by the outcome of that appeal, whatever it may be. There appears to be no basis for an English court to, in effect, give precedence to a foreign decision which is not part of English proceedings.

29. So far as the wider point is concerned, the confidential status of documents in other jurisdictions may in principle be taken into account, but the weight given to that factor must depend on the circumstances of the case and the jurisdiction in question. In this case, Mr Bennett's evidence simply seems to be that litigants in Germany are not entitled to disclosure of most of the documents covered by this application.

30. It is entirely understood that, this being the case, the Mercedes Defendants find this court's approach to confidentiality and disclosure to be uncongenial. But those are the rules which apply in this court, to all litigants - domestic or international. It cannot sensibly be the case that an English court engaging with claims made against some of the same defendants in England is obliged to restrict the principle of open justice (which is the starting point, as all parties accept) by reference to purported confidentiality protections in foreign jurisdictions.

Other arguments

31. In the light of those conclusions the other points prayed in aid cannot really move the dial. There would need to be some stronger evidence giving rise to a concern as to sensitivity to engage the argument that importance at trial could not be decided at this stage, justifying an interim order pending trial. Arguments as to non-interference with the running of proceedings likewise cannot be allowed to impede open justice without some basis.

32. Nor is there any real basis for saying that this approach cuts across the information sharing regime. What is in focus here is the use of documents not in preparation for a far-off trial, but actual deployment in court for the purposes of trial. Any gratuitous deployment of documents for tactical reasons (as appears to be part of the concern underpinning this application) can be dealt with if and when the situation arises.

Conclusion

33. For the reasons given above, the CPR 31.22 Application fails.

THE FUNDING DISCLOSURE APPLICATION

INTRODUCTION

34. Pogust Goodhead is a firm of solicitors which acts for the majority of all the Claimants in the NOx Emissions Group Litigation ("the PG Claimants"). A number of the Defendants, through separate applications, seek from the PG Claimants information as to their funding position. Initially cast as information regarding the basis of funding and its terms, the draft Order now before us seeks a copy of all agreements for finance,

credit or funding (including a "Credit Agreement" referred to in a document called the Security Agreement, referred to further below), or documents which explain the terms on which funding has been provided to Pogust Goodhead or the distribution (directly or indirectly) of the recoveries of damages or costs within the NOx Emissions Group Litigation by Gramercy PG (UK) Holdings ("Gramercy") (or related companies) and/or North Wall Capital LLC ("the Funders"). The Defendants are considering making an application under CPR 25.14(2)(b) for security for costs against the Funders.

35. CPR 25.14 states:

> " (1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person 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) One or more of the conditions in paragraph (2) applies.
>
> (2) The conditions are that the person-
>
> …
>
> b) Has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and
>
> Is a person against whom a costs order may be made."

36. Mr Bacon KC, who made the principal submissions on behalf of all the Defendants, contends that the Court has the jurisdiction to make orders ancillary to the relief available under CPR 25.14(2)(b), and it should exercise its discretion to require the PG Claimants to provide the information sought. Mr Williams KC resists the application, on the basis that no order could properly be made in the present circumstances under CPR 25.14(2)(b) and that as such no ancillary power can exist.

The Law

37. As pointed out by Hildyard J at [18] in *RBS Rights Issue Litigation* [2017] 1 WLR 463, CPR 25.14 plugs what was previously a gap in the rules (which are intended to be comprehensive) to enable a defendant to obtain an order for security for costs against someone other than the claimant if the court is satisfied, "*having regard to all the circumstances of the case, that it is just to make such an order*". CPR 25.14(2)(b) sets out the second of two criteria pursuant to which an order may be made, together with the requirement that the person is a person against whom a costs order may be made.

38. Hildyard J observed:

> "19 …Of particular relevance in assessing whether an interlocutory order against a non-party under CPR r 25.14(2)(b) to secure a contingent liability pursuant to section 51 is appropriate and just will be: (1) whether it is sufficiently clear that the non-party is to be treated as having in effect become in all but name a real party

> motivated to participate by its commercial interest in the litigation… (3) whether there is a sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made;
>
> 20 As to (1) in para 19 above, amongst the important considerations in play is as to the reasons and motivation for the funder's involvement. In particular, the court will seek to ascertain whether the funder has become engaged by way of business with a view to profiting from an action in which it otherwise has no interest, or whether it is what is sometimes called a "pure funder", acting altruistically to enable access to justice and what it perceives to be a worthwhile case to be adjudicated.
>
> 21 There will of course be variations within the spectrum".

39. Snowden J (as he was then) in *In the Matter of Hellas Telecommunications (Luxembourg)* [2017] EWHC 3465 (Ch), made clear that there is a power in the court, whether described as an inherent power or a power which is implicit in CPR 25.14, to make orders so as to enable an effective application under CPR 25.14 to be made, and that such jurisdiction exists notwithstanding that there is no pre-existing costs order against any party in the proceedings. This follows from the very existence of CPR 25.14 which expressly permits an order for security for costs to be made against a third party before any determination of the merits of the dispute. See also *Reeves v Sprecher* [2009] 1 Costs LR 1 [2007] EWHC 3226 (Ch), in which the power was confirmed by Rattee J, relying upon *AJ Bekhor & Co v Bilton* [1981] QB 923 per Ackner LJ at 942, cited by Potter LJ in *Abraham v Thompson* [1997] 4 All ER 362.

40. In *Hellas*, Snowden J made clear that the Court must consider whether there are grounds upon which an application under CPR 25.14 might properly be made and whether such an application would have a realistic prospect of success. Hildyard J similarly held in *In re RBS Rights Issue Litigation* [2017] 1 WLR 3539 that the applicant must, at least, demonstrate that its putative application for security is a real possibility on realistic grounds, and not one simply posited as a possibility for some tactical purpose without any real intention of pursuing it.

41. In *Topalsson GmbH v Rolls Royce Motor Cars Ltd* [2024] EWHC 297, Constable J identified (in the context of a potential non-party costs order under s.51 following trial) that whether an order should be made is clearly a matter in the discretion of the court and will turn on the particular facts. The Court observed at [11] that the breadth of available ancillary orders in the context of information sought in order to advance a non-party costs order was considered in *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 3442 (Comm). The applicant in that case sought the identity of all individuals, companies or other entities which had provided funding since a particular date, the amount of such funding in each case, the terms on which such funding was provided, the extent of each such party's involvement in the conduct of the action, and the nature and extent of that party's interest (financial or otherwise) in the outcome of the action. The order was granted by Flaux J (as he then was) on the basis that it was unsatisfactory that the court should determine the application without more than the mere disclosure of the names of funders or that the applicant should seek to join funders, against whom it later transpired there was no basis to consider a non-party

costs order. In *Stati v Kazakhstan* [2019] 5 WLUK 275 a similar order was made by Cockerill J. In *RBS*, as indeed in *Automotive*, the purpose of disclosure was to inform the question of whether a CPR 25.14 application would be made.

42. Mr Williams did not dispute, therefore, that the court has a power to compel a Claimant to identify any third-party funder that, at least arguably, satisfies the jurisdictional threshold in CPR 25.14(2)(b). In his written submissions, however, Mr Williams relied upon *Reeves* in support of the proposition that once the identity of the funder is known, there is nothing more for the Claimants to provide. In *Reeves*, the Court declined to require a copy of the funding agreement to be provided prior to the joining of the funder to the litigation for the purposes of costs, in circumstances where it was accepted by the Claimant that its funder was a party to which CPR25.14(2)(b) applied. Mr Bacon is right that this is obviously materially different to the present case on one level, because the Claimants deny that the Funders have contributed or agreed to contribute to the Claimant's costs in return for a share of any money or property which the Claimants may recover in the proceedings, for the purposes of CPR25.14(2)(b). It is this denial that the Defendants seek to challenge by having sight of the terms upon which the Funders provide their funds to Pogust Goodhead. However, *Reeves* is nevertheless a case which raises the question, notwithstanding the different circumstances in *Reeves* and those before us, whether it would ever be appropriate to order disclosure against a non-party without having either joined that party and/or given that party the opportunity to make submissions. Neither party grappled to any significant degree with this question in their oral or written submissions. Nor was there any discrete consideration of the related issue of whether the material and information sought is material which the Claimants (as opposed to Pogust Goodhead and the Funders) can provide.

43. Mr Williams concentrated rather more upon the line of authority which establishes that section 51(1) and (3) of the Senior Courts Act 1981 do not confer jurisdiction to make an order for costs against legal representatives when acting as legal representatives. Solicitors are not generally a person against whom a costs order may be made, in the words of CPR 25.14(2). See *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736, 743 H, per Rose LJ (as she was then), and *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056, 1067 F, in which Lord Woolf MR said:

> "… it must now be taken to be in the public interest, and should be recognised as such, for counsel and solicitors to act under a CFA. There are no grounds for treating the party who is or has been represented under a CFA differently from any other party. The same is true of their lawyers…
>
> What we intend to make clear is that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting. In addition, whether or not CFAs are properly the subject of professional privilege, they are not normally required to be disclosed."

44. The basis of the policy is access to justice, as explained in *Heron v TNT* [2014] 1 WLR1277, and confirmed by the Court of Appeal:

> "As to the suggestion [that the solicitors] stood to gain a substantial financial benefit from the case (both in terms of profit costs and a

> success fee), this is undoubtedly true in the sense that any solicitor engaged on a CFA has an interest in the outcome of the case. If the submission [is] that this of itself will render a solicitor liable to a… non-party costs order, it is simply contrary to the public policy that parties, and in particular, impecunious parties, should have access to justice when they do not have the means to fund litigation themselves. There must be additional factors before an order can be appropriate."

45. Moreover, the payment of disbursements, without more, does not incur any potential liability to an adverse costs order against the solicitor (see *Flatman v Germany* [2013] 1 WLR 2676).

The Evidence

46. The Claimants rely upon the evidence of Mr Thomas Goodhead, who is the Global Managing Partner at Pogust Goodhead.

47. The pertinent evidence from Mr Goodhead is as follows:

> "… I confirm in respect of each and every one of the Litigations that:
>
> (i) Pogust Goodhead acts for each of its clients pursuant to a Conditional Fee Agreement ("CFA") within the meaning of section 58 of the Courts and Legal Services Act 1990; and
>
> (ii) There is no agreement between Pogust Goodhead's clients and any third-party funder, pursuant to which a third-party funder has contributed or agreed to contribute to Pogust Goodhead's clients' costs in return for a share of any money or property which they may recover in the Litigations, or at all.
>
> …
>
> **Pogust Goodhead's funding arrangements with third parties**
>
> 12. … This firm's funding is provided by way of a secured loan in the form of a corporate debt facility of $552.5 million (the "Funding") provided by Gramercy PG (UK) Holdings Ltd ("Gramercy UK") with Gramercy Funds Management LLC ("Gramercy LLC") acting as the investment manager for the debt facility. The Funding operates as a corporate debt facility whereby Pogust Goodhead makes regular drawdowns on an agreed cash flow basis which is subject to change. The funding is provided by Gramercy UK on a business-to-business basis to fund the operating expenditure of Pogust Goodhead. I confirm that the Funding is provided on the basis of a debt facility alone and does not involve equity investment.
>
> 13. Pogust Goodhead acts as a solicitor for clients in litigation. The Funding provides working capital which is used for all aspects of

> Pogust Goodhead's work, including to use across its entire portfolio of cases and also in relation to its operating expenses. While it is of course true that a successful outcome in any of the cases on which Pogust Goodhead is instructed will assist Pogust Goodhead in repaying Gramercy UK, Gramercy UK must be repaid irrespective of the outcome of any of the Litigations relevant to the Applications.
>
> 14. Pogust Goodhead's clients are not party to any agreement between Pogust Goodhead and Gramercy UK or Gramercy LLC. No agreement or relationship exists or has ever existed between Gramercy UK or Gramercy LLC (or any previous funder) and Pogust Goodhead's clients. Pogust Goodhead's clients have no obligation to pay Gramercy UK, nor does Gramercy UK have any obligation to pay Pogust Goodhead's clients' costs.
>
> 15. As one would expect, Gramercy UK has put in place such security as would be appropriate for funding of the kind and scale provided, such as a charge over the firm's assets. This does not alter the position that Gramercy UK has not entered into any agreement with Pogust Goodhead's clients.'
>
> …
>
> 19. Finally, the Vauxhall Defendants have cited in their Application, and the Mercedes Defendants have cited in correspondence, a quotation by me that features in an article published in the Lawyer on 21 February 2024 which those Defendants say is inconsistent with this firm's funding arrangements outlined above. The quotation is as follows: "*we [Pogust Goodhead] receive a certain percentage of our costs, and the funder [Gramercy] gets the other percentage.*" Herbert Smith Freehills LLP on behalf of the Mercedes Defendants assert that this indicates the funding arrangement with Gramercy is tantamount to a damages-based agreement. That is incorrect. The quotation merely describes at high- level, in a way that is intended to be intelligible for lay-persons, the way in which the corporate debt facility with Gramercy is repaid by this firm once it has recovered its costs in the ordinary course pursuant to its CFA with its clients. Again, Gramercy does not have any entitlement to a share of our clients' costs or damages. Rather, it has rights to repayment, via a sweep mechanism, of its advance out of income received by Pogust Goodhead, including income that results from cases successfully litigated under CFAs."

The Parties' Submissions

48. The Defendants contend that there is a dispute as to whether the funding provided by the Funders to Pogust Goodhead is such that the Funders satisfy the CPR 25.14(2)(b) test. It is contended that that dispute is a factual and legal one, and that the Court is entitled to have sight of the funding agreement(s) in order to determine that question.

49. The Claimants argue that the starting point is the inability of the Defendants to obtain a non-party costs order against solicitors who fund cases via CFAs. Firms that provide legal services on full CFAs require capitalisation. It is not legitimate, however, to seek information about or in due course security from entities which provide a "solicitors' firm" with its working capital. Mr Williams characterises the Defendants as seeking to swerve the prohibition on getting security from solicitors who are acting on CFAs by getting the security instead from those who finance practices so they can provide the CFAs in the first place. It is, say the Claimants, Pogust Goodhead who are funding the litigation, not the Funders; the Funders are funding Pogust Goodhead and not the Claimants. People who lend money to solicitors in the scenario of a no win no fee agreement are not "*contributing to the claimants' costs*" for the purposes of the first limb of the test. The whole point of the arrangement is that the claimants have no liability to pay their solicitors until the case is decided and at that point their liability is contingent upon outcome and is subject to the condition precedent encapsulated in the formulation ""no win no fee"". It is not a case where the claimants are incurring costs and someone else is financing them. They are simply not incurring costs and will not have a liability for costs unless they win. Mr Williams also argues that repayment to the lenders from the proceeds, either in terms of damages or costs, is not a right to share in the Claimants' recoveries so as to trigger the second limb. There is no reasonable prospect, therefore, of any successful application for security against the Funders and in these circumstances, there is no ancillary power to order disclosure of any agreement. Thus, Mr Williams accepted that if the Court needs to consider how any practice funding agreement is to be construed, it is necessary for the Court to see the agreement. However, the argument he advances as to the inappropriateness of seeking security against the funder of solicitors carrying out CFA work is not dependent, he says, on understanding the terms.

50. Mr Williams also argues that, in any event, an application for security based upon perceived inadequacy of the ATE insurance provision is unfounded in circumstances where ATE insurance would be provided as the litigation is progressed and so it is not possible to compare the predicted level of the Defendants' costs at the end of the claim with the level of ATE insurance now.

Discussion

51. The question of whether a non-party has contributed or agreed to contribute to a Claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings is – simply looking at the words involved – a question of substance, and not form.

52. Thus, to the extent that it was suggested that the court's power under CPR 25.14 is limited to those in a direct contractual relationship with the claimants, there seems to be no good reason for such a limitation; though as noted above there may be questions about the Claimants' ability to answer questions or make disclosure where the target is a person not in a contractual relationship with the claimants. It would seem wrong in principle that the power could be defeated simply by inserting a vehicle in between the claimant and the funder.

53. Turning then to the substance, the Claimants' claims can only be advanced, self-evidently, because of the provision of funding during the progression of the litigation.

That funding is provided directly to Pogust Goodhead by the Funders, rather than to the Claimants and from the Claimants to Pogust Goodhead by way of fees. It is unrealistic, however, to suggest that this routing of funds is, in and of itself, sufficient to mean that the arrangements can in no circumstances amount to "*contributing or agreeing to contribute to*" the claimant's costs for the purposes of the first limb of rule 25.14(2)(b).Whether security for costs might be ordered against a funder will turn on an analysis of, amongst other things, whether there is a sufficient link between the funding and the costs for which recovery is sought (as indicated by Hildyard J in the passage quoted above). Such a link may or may not exist, but it is not answered determinatively simply by looking at whether the funding is provided *directly* to the Claimants.

54. It may well be that the appropriate characterisation of the funding mechanism in the present case is, as Mr Williams says, merely the provision of working capital to a solicitors' firm, akin to a secured bank overdraft, the effect of which is to permit a solicitor to offer CFAs. However, if the arrangement should more properly be objectively regarded as, in substance, a vehicle through which commercial lenders are seeking to fund litigation from which they take a share of the recovery, this is precisely the type of non-party against whom rule 25.14(2)(b) was intended to bite, in support of the general policy that it would be unjust for a funder who purchases a stake in an action for a commercial motive to be protected from all liability for the costs of the opposing party if the funded party fails in the action. As Hildyard J said in *RBS*, the range of funding arrangements will sit on a spectrum. Where a particular arrangement is on that spectrum is a question of fact, and, in our judgment, where such a question arises it is one which can only be ascertained in substance by examining the arrangements in question.

55. Given Mr Goodhead's own characterisation of the role of Gramercy dealt with in paragraph 19 of his statement above, and the existence of a direct link in the Security Agreement (publicly available from Companies House) between a charge entered into in favour of Gramercy and the receivables which would include damages and costs recovered in this litigation, the Defendants' contention that the Funders *may* fall within the terms of CPR 25.14(2)(b) is, on the evidence before us presently, more than fanciful or speculative. This weighs in favour of disclosure.

56. As to the second limb of Mr Williams' argument, it is true that pursuant to the CFA, the Claimants have no present liability to pay any costs. It does not, in our judgment, follow from this statement that the Claimants are not in a real sense incurring costs. There will be a Costs Management hearing shortly at which the costs the claimants anticipate incurring through the course of the litigation will be investigated and a Costs Budget will be set. The Claimants will plainly not be submitting a costs budget which reflects that no costs are planned to be incurred. The fact that the Claimants' liabilities to pay Pogust Goodhead are contingent upon sums being awarded to it by way of either damages or costs does not, therefore, mean that there are no "Claimant's costs" for the purposes of 25.14(2). Many of the provisions of the CPR would be undermined in cases run on CFAs if Mr Williams' argument was correct.

57. However, we have also reflected upon the contention advanced as a third limb to Mr Williams' submission, namely that the application is redundant in circumstances where the Claimants intend to ensure that sufficient ATE insurance will be in place so that the Defendants are not left exposed. Mr Williams says that little can be derived from what the Defendants say is the gulf between the extent of known levels of ATE insurance

and the sums the Defendants are likely to incur, in circumstances where it is often not generally necessary to provide security through to the end of trial at an early stage: security may be increased as costs increase, and so with ATE insurance. There is some force in this. In this context, it is relevant that the amount of costs to be budgeted and a crystallisation of the sums against which security may be sought will soon come to a head.

58. There is to be a 3-day costs management in June at which costs budgets will be fixed for stages through to the Spring of 2026. We have given an indication above as to our provisional view as to the *potential* disclosability of the terms of a funding agreement, in light of the importance of considering for the purposes of CPR 25.14(2)(b) the substance, and not just the form, of the funding arrangement. However, on the basis of *Reeves*, we have some concern that (i) the application as presently structured may elide the knowledge position of the Claimants (the formal target of the application) and that of Pogust Goodhead and (ii) in any event it may be premature to do so without considering submissions from the party against whom the security for costs application would be made and from whom the disclosure is, in reality, sought in circumstances where it appears to be accepted that no application would be made against Pogust Goodhead itself.

Conclusion

59. In the circumstances, we decline to order disclosure of Pogust Goodhead's funding agreement, but instead consider that it will be appropriate to revisit the issue relatively shortly, to the extent it is pursued. That will be after (a) budgets through to 2025 have been fixed and (b) the Claimants have had the opportunity to make good on Mr Williams' clear submissions that, in light of the Claimants' purported intentions with regard to the provision of ATE insurance, the question of security against Gramercy would be rendered redundant. To the extent that the application is pursued, any Funders against whom disclosure is sought will have to be joined/in attendance to advance submissions.

APPENDIX 1: REPRESENTATION

Claimant Lead Firms	Claimant Counsel	Chambers
- Pogust Goodhead - Leigh Day - Keller Postman - Milberg London LLP - Hausfeld	Oliver Campbell KC	Henderson
	Daniel Oudkerk KC	Essex Court
	Thomas de la Mare KC	Blackstone
	Adam Kramer KC	3 Verulam Buildings
	Ben Williams KC (Costs)	4 New Square
	Gareth Shires	Exchange
	Rachel Tandy	Henderson
	Joanna Buckley	Matrix
	Kate Boakes	Matrix
	Simon Teasdale (Costs)	4 New Square

Case	Claimant Other Firms	Claimant Counsel	Chambers
P/C	Johnson Law Group	**Stephen Nathan KC**	Blackstone
Vauxhall	Bond Turner	**Ben Williams KC (Costs)**	4 New Square
		Simon Teasdale (Costs)	4 New Sqaure

Case	Defendant firms	Defendant Counsel	Chambers
Mercedes	HSF	Malcolm Sheehan KC	Henderson
		James Purnell	Henderson
		Richard Blakeley	Brick Court
		Lia Moses	Henderson

		Jonathan Scott	Brick Court
		Jamie Carpenter KC (Costs)	Hailsham
		Imran Benson (Costs)	Hailsham
Ford	Hogan Lovells	Neil Moody KC	2 Temple Gardens
		Sonia Nolten KC	2 Temple Gardens
		George Peretz KC	Monckton
		Benjamin Phelps	2 Temple Gardens
		Nicola Greaney KC (Costs)	39 Essex
		Matthew Waszak (Costs)	4 New Square
Renault Nissan	Signature Litigation (Renault)	Alexander Antelme KC	Crown Office
		Toby Riley-Smith KC	Henderson
		David Myhill	Crown Office
		Frederick Simpson	Crown Office
		Joshua Munro (Costs)	Hailsham
	Hogan Lovells (Nissan)	Stephen Auld KC	One Essex Court
		Anneli Howard KC	Monckton
		James Williams	Henderson
		Simon Gilson	One Essex Court
	Taylor Wessing (Nissan ADs)	Rebecca Keating (attending only if required)	4 Pump Court
P/C	Kennedys	Leigh-Ann Mulcahy KC (Pan NOx issues and ALGLO issue)	Fountain Court
		Catherine Gibaud KC	3 Verulam Buildings
		Meghann McTague	2 Temple Gardens

		Nicholas Bacon KC (Costs)	4 New Square
FCA/ Suzuki	Kennedys (FCA)	Leigh-Ann Mulcahy KC (Pan NOx issues)	Fountain Court
		Simon Atrill KC (ALGLO issue)	Fountain Court
		Nicholas Bacon KC (Costs)	4 New Square
	Hogan Lovells (Suzuki)	Charles Dougherty KC	2 Temple Gardens
		Ruth Kennedy	11KBW
VW2	Freshfields (VW)	Laurence Rabinowitz KC	One Essex Court
		Prashant Popat KC	Henderson
		Kathleen Donnelly KC	Henderson
		Thomas Evans	Henderson
		Celia Oldham	Henderson
		Nicholas Bacon KC (Costs)	4 New Square
		Thomas Evans (Costs)	Henderson
	Hogan Lovells (Porsche)	Geraint Webb KC	Henderson
BMW	Hogan Lovells (BMW)	Charles Dougherty KC	2 Temple Gardens
		Thomas Fairclough	2 Temple Gardens
	Addleshaw Goddard (AD)	N/A	N/A
Volvo	DLA Piper (Volvo)	Peter De Verneuil Smith KC	3 Verulam Buildings
		Douglas Paine	One Essex Court
	DWF (Santander Consumer (UK) Plc)	N/A	N/A
	Linklaters (Lex Autolease)	Simon Popplewell	Gough Square
JLR	CMS (JLR)	Andrew Kinnier KC	Henderson
		Judith Ayling KC	39 Essex
		James White	Henderson

	Linklaters (Black Horse Ltd, Lex Autolease Ltd)	Simon Popplewell	Gough Square
Vauxhall	Cleary Gottlieb Steen & Hamilton	Leigh-Ann Mulcahy KC (Pan NOx issues)	Fountain Court
		Charlotte Tan (Vauxhall only issues)	Brick Court
		Nicholas Bacon KC (Costs)	4 New Square
Mazda	Hogan Lovells	Stephen Auld KC	One Essex Court
		Noel Dilworth	Henderson
Toyota	HSF	Neil Kitchener KC	One Essex Court
		Sophie Weber	One Essex Court
Hyundai-Kia	Quinn Emanuel	Douglas Paine	One Essex Court