Neutral Citation Number: [2020] EWHC 3402 (QB)

Case No: F90CF081

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 15/12/2020

Before:

HIS HONOUR JUDGE JARMAN QC
sitting as a judge of High Court

Between:

HUGH JAMES INVOLEGAL LLP (as assignee of Transform Medical Group CS Limited)	**Claimant**
- and -	
(1) BERRYMANS LACE MAWER LLP	**Defendants**
(2) MR JONATHAN WAITE QC	

Mr Paul Mitchell QC and Mr Christopher Boardman QC (instructed by **Hugh James**) for the **claimant**
Mr Ben Hubble QC and Mr Nicholas Broomfield (instructed by **Mills and Reeve LLP**) for the **first defendant**
Ms Anneliese Day QC (instructed by **DAC Beachcroft LLP**) for the **second defendant**

Hearing dates: 15 and 16 November 20

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. I have to deal with applications by the defendants in these proceedings for summary judgment and for the claim to be struck out as an abuse of process, or alternatively for security for costs.

2. In the proceedings the claimant (Involegal) as assignee of Transform Medical Group CS Ltd (Transform) claims that the first defendant solicitors (BLM) and the second defendant Queen's Counsel (Mr Waite), whom it instructed, gave negligent advice in litigation brought by a large group of women who were fitted by Transform with non-medical grade silicone breast implants manufactured by Poly Implant Prothèse SA (PIP). In essence, it is alleged that the defendants negligently advised Transform not to inform Hugh James, the lead firm of solicitors acting for the claimants in that litigation, that Transform was not insured against the claims of some of those claimants (the uninsured claims and uninsured claimants respectively).

3. Such information was voluntarily disclosed by Transform to Hugh James on 26 June 2014, with the hearing of the claims set for October 2014. However, the uninsured claimants did not then discontinue their claims, as such discontinuance would have rendered them liable to pay Transform's costs. Instead, they pursued their claims to judgment in the hope that they could obtain non-party costs orders against Transform's insurers, Travelers Insurance Company Ltd (Travelers). Such orders were obtained at first instance and upheld in the Court of Appeal, but overturned in a decision of the Supreme Court (*Travelers Insurance Co Ltd v XYZ* [2019] UKSC 48).

4. Transform went into administration on 30 June 2015 and joint administrators (the administrators) were appointed as of that date. Judgments were eventually obtained against it in 2016 by the uninsured claimants for damages (totalling some £6 million) and costs (totalling some £11 million). The judgments remain unsatisfied.

5. Hugh James asked BLM in May 2012 about the insurance position of Transform in respect of the claims against it. BLM, with confirmatory advice from Mr Waite, advised Transform that it need not disclose what that position was. It is Involegal's case that such advice was negligent, and that had Hugh James been told then of the position with the uninsured claims, such claimants would not have registered under the group litigation order made on 17 April 2012 or would have sought to have their claims stayed. Instead, Transform had to deal with the uninsured claims. Involegal says that as a result Transform ceased trading, entered administration, had the judgments entered against it and has suffered loss of the value of that company and losses in the sum of the judgments on the uninsured claims.

6. By a deed of assignment executed on 30 August 2018 (the assignment), the administrators assigned Transform's cause of action against the defendants to Involegal. That is a limited liability partnership incorporated in 2010 to provide outsourced volume legal services to banks and building societies, and its members are the equity partners in Hugh James. The two partnerships are separately registered with and regulated by the Solicitors Regulation Authority. Annexed to the assignment is a declaration of trust (the trust) which provides that Involegal will hold and distribute the balance of any net recoveries in the present claims against BLM and Mr Waite.

7. The effect of the assignment and trust is that after payment of Involegal's costs to Hugh James in acting on its behalf in pursuing the assigned claims against BLM and Mr Waite and fixed sums to the administrators as consideration for the assignment, any balance would be paid to the uninsured claimants by way of damages and to Hugh James in respect of unpaid costs incurred in respect these claims.

8. According to the witness statement dated 29 October 2020 of Involegal's chief executive, Mathew Tossell, in these proceedings, the main purposes for which Involegal agreed to enter into the assignment, were to provide a route whereby the uninsured claimants and Hugh James may be able to make some recovery in respect of the unsatisfied judgments for damages and costs against Transform and to enable Transform's claims to be pursued against BLM and Mr Waite where otherwise they would not have been, having regard to Transform's administration. Mr Tossell states that Involegal's direct interest in the assignment is therefore as trustee, but its members as partners in Hugh James also have a commercial interest in that the assignment may allow that firm to make some recovery of its unpaid costs.

9. The defendants seek summary judgment on the basis that the claimant has no real prospect of succeeding on the claim, within the meaning of CPR rule 24.2. It is well established that such a realistic claim is one that is more than merely arguable (see *ED & F Mann Liquid Products v Patel* [2003] EWCA Civ 472), but in assessing on a summary basis whether a claim is realistic the court should not conduct a mini-trial of the issues (see *Swain v Hillman* [2001] 1 All ER 91).

10. The first main ground on which the defendants submit that this claim does not have such a prospect is that the assignment savours of champerty and/or maintenance and is therefore invalid. The second is that there is no real prospect of establishing loss on two bases. One is that Transform was insolvent and was doomed to fail in any event, even without having to face the uninsured claims. The other is that the uninsured claimants would have continued with their clams in order to obtain judgment and seek non-party costs against Travelers, as in the event they did, or an assignment of Transform's claim against its own supplier.

11. Mr Hubble QC for BLM and Ms Day QC for Mr Waite sensibly and helpfully divided their oral submissions so that Ms Day focussed on the assignment and Mr Hubble focussed on causation, while supporting each other's submissions.

12. The principles relating to champerty and maintenance were not in dispute before me. As explained by Stuart Isaacs QC sitting as a judge of the High Court in *Casehub v Wolf Cola* [2017] 5 Cost LR 835, these are rules of public policy to prevent wanton and officious meddling by a claimant in a dispute in which they have no interest. The rationale is the protection of the integrity of the legal process.

13. By 1980 there were judicial observations to the effect that the rule prohibiting the assignment of a bare right to litigate was no longer the law. However, this was firmly rejected by the House of Lords in *Trendex Trading v Credit Suisse* [1982] AC 679. At 703H, Lord Roskill said this

> "My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Rolls [1980] Q.B. 629, 657 when he said in the instant case that " The old saying that you cannot

> assign a ' bare right to litigate' is gone." I venture to think that that still remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance."

14. Lord Wilberforce at 694C referred to the law of maintenance and champerty being laid down clearly by Danckwerts J and the Court of Appeal in *Martell v Consett Iron Co Ltd [*1955] Ch 363. That case concerned an action brought by plaintiffs as trustees for the Derwent Angling Association (DAA) who held a tenancy of fishing rights on the river, against the defendant for polluting the river. A trust company controlled by DDA gave indemnities for the plaintiffs' costs in the action. The defendant sought to stay the action on the grounds that it was being maintained by a third party which did not have a sufficient common interest in the subject matter of the action, and there was no other applicable exception which justified maintenance. Danckwerts J and the Court of Appeal rejected that submission. Jenkins LJ at page 418 observed that the range of relevant interests was potentially of great width, and at page 419 that the question is one of degree.

15. There are exceptions to this fundamental principle which have been established since the late nineteenth century. In *Seear v Lawson* (1880) 15 Ch.D. 426, Sir George Jessel MR said at 433:

> "If the trustee gets a right of action, why is he not to realise it? The proper office of the trustee is to realise the property for the sake of distributing the proceeds among creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may be disinclined to run the risk of having to pay the costs, or h may consider it undesirable to delay the winding up of the bankruptcy until the end of the litigation."

16. Thus, Chitty J in *Guy v Churchill* (1888) Ch. D 481 held that a trustee in bankruptcy was entitled to sell a right of action even to a stranger. At page 490 he said this:

> "The substance of the transaction impeached by this motion is that some creditors are to carry on the action at their own risk and expense and to take a larger share of the fruits of the action that they would otherwise have taken. These facts appear to me to take the case out of the law against maintenance and champerty."

17. The rationale for this exception was explained by Lord Hoffman giving the lead speech in *Norglen Ltd v Reeds Rain Prudential Ltd* [1999] 2 AC 1 at 11F as follows:

> "The law is traditionally hostile to the assignment of causes of action in return for a share of the proceeds…The position of

> liquidators and trustees in bankruptcy is however quite different. The courts have recognised that they often have no assets with which to fund litigation and that in such cases the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum of a share of the proceeds to someone who is willing to take the proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the courts have for the past century construed their statutory powers as placing them in a privileged position."

18. The statutory powers of trustees in bankruptcy to sell or otherwise dispose of the bankrupt's assets are now set out in paragraph 9 of Schedule 5 of the Insolvency Act 1986 (the 1986 Act) and similar powers are given to liquidators in respect of the assets of wound up companies in paragraph 6 of Schedule 4 thereof. Administrators are appointed under Schedule B1 of the 1986 Act to manage the affairs business and property of a company with the objectives of rescuing the company as a going concern, to achieve a better return for creditors than winding up, and/or realising property to make a distribution to secured or preferential creditors. The threshold conditions for administration are that the company is or is likely to become unable to pays its debts and that administration is reasonably likely to achieve the purpose of administration. By paragraph 1 of Schedule 2, administrators are also given the power to sell or otherwise dispose of the property of the company.

19. In *In re Meem SL* [2018] Bus LR, David Halpern QC sitting as a judge of the High Court, applied the exception referred to in *Norglen* to assignments of a bare cause of action by administrators appointed under such powers. At paragraph 20, he said:

> "The hearing before me proceeded on the assumption that an administrator has power to sell a bare cause of action, by way of exception to the rule against champerty…Given the similarity in the wording of an administrator's power of sale and given the desirability of an administrator being able to dispose of assets without incurring "expenditure of money which would otherwise be available for distribution among the creditors" ([1999] 1 AC 1, 12 C), in my judgment counsel were right to proceed on this assumption."

20. Reports by the administrators in the course of the administration of Transform suggest that they decided they would not pursue claims by Transform but were then approached by solicitors, which Ms Day submits are likely to be Hugh James, with a view to negotiating an assignment. It is not clear on the evidence before me why the assignment was to Involegal, although Ms Day submits that the most likely reason is that this was to allow Hugh James to act as solicitors of Involegal in pursuing the assignment claims.

21. The consideration for the assignment is set out in clause 2, by which Involegal agrees to instruct Hugh James to act for it in relation to the assigned claims and to pay to the administrators £250,000 in respect of any net recoveries over that figure and up to £5

million and 5% of any such recoveries over £5 million and to hold the balance on the terms of the trust.

22. Ms Day, with the support of Mr Hubble, submits that this arrangement does not come within the exception recognised in *Norglen*, because here the assignment is to what she called an "artificial creditor" in circumstances where Involegal's cases is that had the uninsured claimants known of the insurance position they would not have pursued their claims and so would not have recovered damages and Hugh James would not have incurred their costs. She accepts that sums of money are due to the administrators under the assignment but submits that that is a very small percentage of the potential recoveries.

23. In my judgment it is not a requirement to come within the exception referred to by Lord Hoffman that the assignment is made to creditors. It is clear from Lord Hoffman's speech that he contemplated that the assignment may be to "someone who is willing to take the proceedings in his own name" and that the benefit to the creditors was a fixed sum or share of the profits which they might not otherwise have. In the assignment in this case, there is a fixed sum, plus a percentage if the net recoveries are over £5 million. It may be that the fixed sum and the percentage are small when compared to the potential recoveries, but in my judgment the point is on the evidence that those are sums which would otherwise not be available to the creditors because the administrators would not have carried on with the proceedings. In my judgment there is a realistic prospect that the assignment will be found to come within what was contemplated by Lord Hoffman.

24. In case I am wrong about that and it is necessary, as Ms Day submits it is, to show that Involegal has a commercial interest in the assignment, I would also hold that it has a realistic prospect of establishing such an interest. It is clear that Involegal is a different legal entity to Hugh James and that Involegal itself, as opposed to its members, will not benefit from the assignment and trust even if there is a net recovery. Nevertheless, in my judgment it has a realistic prospect of establishing a sufficient interest, through its members, in seeking to recover in respect of uninsured claimants the unsatisfied judgments for damages and in respect of Hugh James the unsatisfied judgments for costs, in either case in whole or in part.

25. Accordingly, I do not grant summary judgment on this basis. Ms Day also submitted that the claim ought to be struck out as an abuse of process under CPR rule 3.4(2) on the basis that it is seeking, to use her words, a third bite of the cherry. The uninsured claimants have failed to obtain costs from Transform and then from Travelers under section 51 of the Senior Courts Act 1981 (the 1981 Act).

26. However, as Mr Mitchell QC for Involegal submits, the present claim is not another attempt by the uninsured claimants to recover damages and costs from Transform or Travelers. It is a claim by Involegal as assignee of Transform to recover damages for professional negligence from BLM and Mr Waite. Although the quantum of such losses involves consideration of what would have happened in the claims against Transform, it is a different cause of action pursued against different parties. In my judgment that is not an abuse of process and I do not strike out the claim on that basis.

27. The final basis upon which the defendants seek summary judgment is that Involegal has no realistic prospect of establishing on a financial or factual basis that Transform

would not have entered into administration and would have continued to trade had the uninsured claims not been pursued. The defendants submit that Transform was doomed in any event and that the uninsured claimants would have pursued their claims even if the insurance position would have been disclosed in 2012 instead of in 2014.

28. It is not in dispute that by 2015 Transform was financially insolvent and doomed to fail.

29. Transform's financial position in 2012 was complex and less clear. In March 2010 Health and Surgical Holdings Ltd (HSH) was incorporated to purchase Transform from the Covenant Healthcare Group. HSH borrowed about £20 million to complete the purchase, which was secured against the assets of Transform and other group companies and which Transform guaranteed.

30. Transform owned 28 clinics throughout the UK as well as two hospitals. Prior to 2010 it had been trading profitably but then started to make a loss. That year it made a loss of £349,000. In 2011 it made a loss of £352,000 and the loss in 2012 was £820,000.

31. The defendant's applications are supported by witness statements of David Gooding, a partner in Mills & Reeve LLP solicitors instructed by BLM, and adopted on behalf of Mr Waite by Ross Risby a partner in DAC Beachcroft LLP, solicitors instructed by Mr Waite. The thrust of that evidence in terms of financial causation, based on review of the contemporaneous documentation, is that Transform was insolvent and would have ceased trading or entered into administration even if the uninsured claims had not been pursued.

32. There are several witness statements filed in response to the present applications in which issue is taken with the evidence of Mr Gooding in this regard. Harvey Ainley, a director of Transform and a chartered accountant, says that the losses of profit experienced by Transform from 2010 onwards were due to reduction of turnover as a result of the recession then being experienced in the economy. He also refers to increased expenses in the period 2010-2013 due to inflation. As a key performance indicator of Transform's ability to generate cash from its operations, its EBITDA was +£1.5 million by September 2012. At the same time, the net assets shown in its balance sheet were £7.6 million.

33. By this time, Mr Ainley continues, few claimants against Transform had served schedules of information, and these were not served until March to May 2013. No provision had been made in Transform's accounts at this time in relation to liabilities arising from the litigation because of uncertainties about the likely outcome. These were noted as contingent liabilities in the accounts, with the agreement of Transform's accountants Ernst & Young.

34. In September 2014, an investor company named Aurelius Investments Ltd (Aurelius) was introduced to Transform. The managing director of Aurelius, Tristan Nagler, who is also a chartered accountant, has also filed a witness statement in response to the current applications. In it, he says that the ideal target businesses for investment by Aurelius are businesses which are well established in their own sector, but which may be underperforming and therefore offer potential for improvement and value creation. The investment model is long term.

35. Mr Nagler says that he led the due diligence on Transform and had various meetings with its management. The analysis showed that Transform had a strong reputation and brand heritage and was well regarded in the cosmetic surgery market. Its asset base and cash reserves acted as barriers to entry and positioned its business well against competitors. The analysis also showed that its recent losses had been as a result of short term factors, one of which was the PIP litigation, but which Aurelius expected to overcome by devoting proper resources to turning around its operational performance. Some other cosmetic surgery providers were not insured in respect of PIP claims and had been dissolved or liquidated.

36. The debt which was secured against Transform's assets was by now some £26 million. The expectation was that the borrowing would be restructured in due course, but not as a matter of priority. In November 2014 Aurelius paid £3.3million for the debt and acquired control of Transform's business.

37. In the months that followed, Mr Nagler says he become increasingly aware of the potential risk from the PIP litigation that Transform may face substantial liabilities for which it was not insured. Aurelius approached Turpin Barker Armstrong (TBA) for advice in early 2015, whilst still at that time focusing on improving Transform's performance and turning it around. By that time Transform was in default of the terms of the debt and/or the charge on its assets to secure the same and Aurelius was entitled to recover the loan. At this stage, Mr Nagler says that Aurelius did not have the objective of putting Transform into administration. However, within a short time of seeking such advice it became apparent that the extent of the risk of Transform's unsured liabilities in the PIP claims was very substantial and could be a multiple of the £3.3 million which Aurelius had paid to acquire the debt, and this became the most important factor in the consideration by Aurelius of its options.

38. Mr Nagler states that TBA advised that the only way Aurelius could close off the risks of the PIP claims was to put Transform into administration with a view to a pre-pack sale of its business and assets. This was achieved by selling such assets to TFHC Ltd (TFHC) a company owned by Aurelius. These were professionally valued at £2 million including equipment and stock. Goodwill was valued at £250,000. No money changed hands on the sale as the price was offset against the debt. The administrators retained Transform's cash reserves, by then about £2 million, for prescribed part distributions and the costs of the administration. TFHC continued to trade under the Transform brand, but itself entered into administration in 2019 for reasons which Mr Nagler say are of no direct relevance to Transform's position some four years earlier.

39. The senior partner of TBA and one of the administrators, Martin Armstrong, has also filed a witness statement in response to these applications. He has more than 35 years' experience as an accountant and insolvency practitioner. He also regards the PIP claims as the most significant factor adversely impacting upon Transform when he was asked to advise in early 2015. Of over 1000 PIP claims, 600 were against Transform and information provided to him at that time suggested that there could be 200-250 such claims which were not covered by Transform's insurance, with an estimated liability of about £30,000 for each uninsured claim. Transform had already spent about £120,000 on legal costs and he came to the conclusion that it did not have sufficient resources to continue to meet ongoing legal costs. He also says that he understood from Aurelius that Transform's guarantee of HSH's debt was not a concern to Aurelius because it did not reflect the value of its investment. He confirms

that a pre-pack administration was identified as the most appropriate option. He also says that the administrators were advised by solicitors with regard to the assignment and he considered that such was in the best interests of Transform, the administration, and its creditors.

40. He also says that if the uninsured claims had not been pursued against Transform after 2012, he considers that Transform would not have had to continue to spend money on legal costs and potential liabilities would have been ring fenced in the amount of the excess payment on the insured claims of £250,000. He also became joint administrator of TFHC's administration in 2019 and considers because of the very different circumstances leading to that administration it is not appropriate to draw any inferences from this as to Transform's financial position several years earlier.

41. Mr Hubble, on behalf of BLM, with the support of Ms Day for Mr Waite, submits that the financial position of Transform is clear from its contemporaneous accounts and the administrators' progress reports in the administration. The security which Transform gave for the borrowing of £20 million, later £26 million, alone made it insolvent as it far exceeded its assets, which stood at some £7 million in 2012 and some £3 million by 2015. By the time of the administration, Transform was in default in respect of this debt and so its liability had crystalised. Even putting this debt aside, unsecured liabilities exceeded assets. There was no loss of value when Transform entered administration. It was by then unable to pay its legal costs, and the administrators acknowledged that it would not be able to pay damages on the uninsured claims. No value was put on such claims, which amounted to no more than another category of liabilities which could not be met. Therefore, the administration was not caused by the uninsured claims, and nothing done by the defendants caused this liability.

42. Mr Hubble emphasises that the uninsured claims were not singled out as a cause of the administration in the subsequent progress reports of the administrators. He submits that the subsequent administration of TFHC is an indicator of the financial position of Transform prior to its administration. It is unreal to say that the liability of Transform to Aurelius is a prospective debt. It shows that Transform had no value and the balance of some £20 million remains outstanding after the administration. As Transform made no payments to the uninsured claimants, those claims cannot be causative of any loss. There is no need for expert evidence or a trial. It is obvious that Transform had no value anyway.

43. Mr Hubble relies on a report of Mr Gregory, an accountant, prepared on instructions of Hugh James on behalf of the PIP claimants in July 2013 which expressed concern about the absence of provision in Transform's financial statements of potential liabilities to such claimants. He also relies upon the judgment at first instance in *XYZ v Various Companies* [2013] EWHC 3643 (QB) of Thirlwall J, as she then was, that Transform might not be able to fund the uninsured claims to trial or to meet an award of damages or costs.

44. Mr Boardman QC, for Involegal on the issue of causation, submits that the court cannot determine at this stage that the pursuit of the uninsured claims made no difference to the financial position of Transform. It is likely that this factor did make such a difference, and the court will need to analyse at trial the evidence as to what would have happened if the threat of uninsured claims had been removed from

Transform in 2012. It is no real assistance to look at what happened in 2015 after the damage had been caused.

45. Mr Boardman submits that the fact that a company is deemed insolvent by section 123(1)(e) of the 1986 Act by showing that it is unable to pay its debts as they fall due, does not mean it is bound to fail. Subsection (2) further provides that a company is deemed unable to pay its debts if it is shown that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. Many traders, he says, come within this deeming provision from time to time but may have other options to avoid failure, such as asking creditors for time to pay.

46. Mr Boardman relies on observations in the Supreme Court in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others* [2013] UKSC 28, and in particular those of Lord Walker at paragraphs 37-38 as follows:

> "The express reference to assets and liabilities is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of the present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance-sheet insolvency…Whether or not the test of balance-sheet insolvency is satisfied must depend on the available evidence as to the circumstances of the particular case."

47. At paragraph 39, Lord Walker, citing Sir Andrew Morritt C at first instance, observed that contingent and prospective liabilities are not to be taken into account at their full face value but must be considered on all the relevant facts of the case, including when the prospective liability falls due, what assets will be available to meet it and what if any provision is made for the allocation of losses in relation to those assets.

48. In the present case, there are two contingent liabilities to be taken into account. One is the contingent liability of Transform to Aurelius as guarantor in respect of the debt and the other is the contingent liability in respect of the uninsured claims. As for the former, Mr Boardman submits that whether and to what extent that was to be taken into account in assessing its insolvency depended on a number of factors, such as whether the liability was likely to be called, if so in what amount and whether Transform would be able to negotiate a settlement. The £20 million debt was repayable over seven years with periods of grace.

49. In my judgment, having regard in particular to the evidence of Mr Nagler and Mr Armstrong, there is a realistic prospect that Involegal will succeed in establishing that the contingent liability in respect of the uninsured claims was a key factor in Aurelius' decision after taking advice from TBA in early 2015 not to continue its objective of seeking to improve Transform's performance and of turning it around. This evidence also provides a realistic prospect that Involegal can also show that the contingent liability of Transform to Aurelius, having regard to the amount of Aurelius'

investment in purchasing the debt and its objective in doing so of improving Transforms' performance in the long term, was not such a contingent liability as to mean that Transform was, in 2012, bound to fail. The undisputed fact that Transform continued to trade until 2015, and to a lesser extent that THFC continued to trade with Transform's business and assets including the Transform brand until 2019, in my judgment adds support to the case of Involegal in this regard.

50. The defendants however also submit that even if the insurance position had been disclosed in 2012 this would not have led to the uninsured claimants dropping or not pursuing claims. Such claims would have been pursued to set up an application against Travelers under section 51 of the 1981 Act. That, as observed by Lord Briggs in *Travelers v XYZ*, was an important (although not sole) reason why such claims were pursued even when it became clear they were uninsured. Moreover, the defendants submit that the uninsured claimants would have obtained judgments against Transform so that they could take assignments of Transform's claims against its suppliers of the defective implants. Finally, it is said that even if these claimants had been made aware of the insurance position in 2012 and had been advised not to join the group litigation, it is likely that at least some of them would have pursued their own individual claims.

51. The lead solicitor in Hugh James for such claimants was Mark Harvey. He has filed a witness statement in response to the defendants' applications. He says that at the hearing for a group litigation order in April 2012, leading counsel for the claimants in the course of the hearing stressed the importance of potential defendants having the means or insurance to satisfy any judgments against them and invited the potential defendants to provide clear information of that position. In June 2012 Mr Harvey wrote to each prospective defendant repeating this request and setting out questions designed to elicit their insurance position. Some responded to say they had no cover, and as a result Hugh James did not peruse claims against them. In respect of another such defendant where this position became clear in 2012, but against which some claims had already been registered, Mr Harvey applied to court to have such claims removed and orders were made to that effect early in 2013.

52. In respect of Transform, Mr Harvey says that from May 2012 onwards Hugh James corresponded extensively with its solicitors BLM, but at no time prior to June 2014 was there any indication that any of the claims were uninsured or that there was any distinction between claims in respect of which BLM was jointly instructed by Transform and Travelers, and claims in respect of which it was solely instructed by Transform. He says that the revelation in June 2014 that Transform was uninsured in respect of some of the claims, which he says by then totalled 426, came as a complete surprise. He could not understand how Travelers had been funding the costs of all claims against Transform if it was not indemnifying the uninsured claims. It would not have been in the interest of the uninsured claimants to discontinue their claims at that point as they would automatically have been liable to meet the costs of Transform and/or Travelers. Accordingly, he sought the swiftest route to judgment as a damage limitation exercise. This was hampered by the issue of proceedings under CPR Part 20 by Transform against Travelers in September 2014 in respect of coverage of some of the claims against it, which was not settled until April 2015. The hearing of the claims set for October 2014 was adjourned.

53. Mr Harvey says that had he known of the insurance position prior to the close of the group litigation register in April 2013 he would have advised potential uninsured claimants not to join the register, because that was likely to result in substantial costs being irrecoverable. He states that a section 51 application could only have resulted in recovery of costs, not damages, and that that prospect would not be a reason for the uninsured claimants to join the register in 2012 or early 2013, when their costs were much lower than in the run up to the hearing set for October 2014. The potential pursuit of Transform's suppliers by assignment would have been very expensive and speculative and risky in terms of incurring substantial irrecoverable costs.

54. Mr Hubble submits that what he called the first meaningful request to BLM for disclosure of the insurance position was not until after the closure of the register, and that Mr Harvey's evidence does not address what would have happened in respect of the uninsured claimants already on the register.

55. However, on the evidence of Mr Harvey in my judgment there is a reasonable prospect that Involegal can establish that requests for disclosure of the insurance position were made before closure of the register, and/or that applications would have been made to remove uninsured claimants from the register, as Hugh James successfully did in respect of another potential defendant who turned out to be uninsured. On the basis of Mr Harvey's evidence, there is also a real prospect of showing that most if not all of the uninsured claimants would have followed the advice which he says he would have given in 2012 or early 2013 had he then known of the insurance position.

56. Accrodingly the applications for summary judgment are dismissed.

57. That leaves the application for security for costs. This is put on the basis that Involegal is a company and there is reason to believe it will be unable to pay the defendants' costs if ordered to do so, within the meaning of CPR rule 25.13(2)(c). In such circumstances the court may make an order for security for costs if it is satisfied, having regard to all the circumstance of the case, that it is just to make such an order (rule 25.13(1)(a)).

58. It is not in dispute that the net assets of Involegal are valued at about £136,000. The combined estimated costs of BLM and Mr Waite are in the order of £1.6 million. Involegal relies upon an after the event (ATE) insurance policy which was incepted in its favour in July 2020 in respect of this claim.

59. The defendants submit that there are three fundamental problems with the ATE policy. The first is that the indemnity limit is £1.7million, and that is likely to be exceeded when Involegal's disbursements are added to the defendants' likely costs. Second, there is no cover for the defendants' costs before inception, which BLM estimate to be just under £170,000. Third, clauses 7.1 and 7.2 and Endorsement A of the ATE policy give the insurer the right to cancel the policy on various grounds, including if Involegal fails to comply with any of its obligations thereunder or on the basis of fraudulent or reckless presentation. If the insurer changes its view of the merits it can refuse to continue with the claim.

60. It was not in dispute before me that the test in determining whether such a policy provides sufficient protection for defendants, and of course the purpose of such a

policy is to cover the insured not to protect other parties, is whether there is a real risk that it will not provide sufficient protection for those other parties if the claim were to fail (see, for example, *Premier Motorauctions v Pricewaterhousecoopers* LLP [2017] EWCA Civ 1872 and *Rowe v Ingenious* [2020] EWHC 235). In the last couple of years there have been a spate of cases in the High Court where it has been held that such policies do not meet that test, especially where those which contain no protection against avoidance.

61. Mr Mitchell submits that the defendants' budgets have not yet been the subject of cost management orders. They include a total of about £120,00 in respect of the current applications, which are not likely to be recoverable should the applications fail. Mr Tossell in his witness statement confirms that Involegal will be paying its disbursements as it goes along in accordance with clause 5.2 of the ATE policy. Even if the policy is cancelled, Involegal still has cover against its legal obligation to pay any opponents' costs pursuant to clause 2.1(12). This obligation includes Involegal's contingent liability to pay costs which it may eventually be ordered to pay, which liability it incurs when becoming a party to litigation and subject to the Civil Procedure Rules (see *In re Nortel Gmbh* [2013] UKSC 52).

62. Moreover, by clause 3 of Endorsement A, the insurers promise Involegal that they will notify the defendants in the event that the policy is cancelled, thus giving the defendants an opportunity in that event to make another application for security. No one is suggesting fraud or recklessness here and Involegal, regulated as it is by the SRA, is unlikely to fail to comply with its obligations. In respect of the pre-inception costs, these should not be taken into account given that both defendants did not engage with pre-action protocols

63. I accept those submissions in respect of disbursements. Furthermore, because the defendants' applications for summary judgment have failed, I accept that much of the estimated costs, which at present have not been assessed by the court, will be diminished by the costs of those applications. On the information before me it is unlikely that the cap will prove insufficient. As for pre-inception costs, there is likely to be some reduction on assessment, especially in light of the defendants' non engagement in the pre-action protocol, although it is unrealistic to expect there to be no recovery at all. However, Involegal's current net assets are likely to be sufficient in this regard.

64. That leaves the cancellation provisions. On the particular facts of this case, in my judgment the prospect that Involegal will not comply with its obligations under the ATE policy is fanciful rather than real for the reasons submitted by Mr Mitchell. So too is the prospect of cancellation on the basis of fraud or recklessness in presentation, given that the members of Involegal are the partners of Hugh James, including Mr Harvey who was so closely connected with the cause of action which has been assigned.

65. Accordingly, in all the circumstances it is not just to make an order for security. For similar reasons, it is not just to make an order for payment into court as a condition of determining the summary judgment applications pursuant to CPR rule 24.6.

66. In conclusion the defendants' application are dismissed. I am grateful to counsel for their thorough yet focused submissions. They helpfully indicated at the end of

submissions that any consequential matters which cannot be agreed after hand down of this judgment should be determined on the basis of written submissions. I invite them to submit a draft order and any such submissions within 14 days of hand down.