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Case No: In Claims entered in the Group Register
HC-2013-000484 and others

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2017

Before:

THE HONOURABLE MR JUSTICE HILDYARD

THE RBS RIGHTS ISSUE LITIGATION

Jonathan Nash QC, Peter de Verneuil Smith and Ian Higgins (instructed by **Signature Litigation LLP**) for the **SG Group of Claimants**
David Railton QC, David Murray and **Natasha Bennett** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing date: Thursday 23rd February 2017
Supplemental submissions in writing on Tuesday 28th February 2017

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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.

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THE HONOURABLE MR JUSTICE HILDYARD

The Hon. Mr Justice Hildyard:

Subject matter of this judgment

1. This judgment concerns an issue in the RBS Rights Issue Litigation as to the circumstances in which the Court may require disclosure of the names of commercial funders, and the details of any ATE insurance, in advance of a threatened application for security for costs when a trial is imminent.

2. The first trial on the basic questions of liability ("Trial 1") in these complex and long-running proceedings, which are the subject of a Group Litigation Order ("the GLO"), is due to commence on 8 May 2017.

3. Trial 1 has been considerably reduced in scope since the Defendants reached full and final settlements in December 2016 ("the December Settlements") with (effectively) all of the claimants in the proceedings save for the SG Group ("the Settling Claimants"). However, the proceedings remain complex, with a time estimate presently of 12 weeks.

The magnitude of the relevant costs and the Claimants' exposure

4. The estimated costs of the proceedings are very considerable: the Defendants' costs alone thus far exceed £100 million (of which some £6.5 million has been incurred in relation to the claim against the directors joined as individual defendants, "the Director Defendants"); and the Defendants' current estimate is that they will incur approximately £25 million from the date of the settlement to the end of Trial 1. The SG Group Claimants ("the Claimants") are adamant that these costs are so unreasonable and disproportionate that only about 50-60% would be recoverable on a detailed assessment: but even on that basis the figures would remain very large. The Claimants' costs so far exceed some £20 million (exclusive of VAT), though an element of this amount is subject to CFA arrangements and not all amounts have yet been billed to the Claimants.

5. Further to the GLO and pursuant to an Order made at the third Case Management Conference in the matter, dated 12 February 2014, each Claimant would be severally (but not jointly) liable for a share of the costs incurred by the Defendants if an award of costs is made against them, *pro rata* to the amounts of their individual subscriptions in the rights issue which is the subject matter of the proceedings.

6. For the period prior to the December Settlements the costs exposure was spread in this way across the claimants in all the participating groups bringing claims under the GLO. The groups and their constituent claimants who entered into the December Settlements (the Settling Claimants) remain liable *pro rata* for the costs of the proceedings against the first of the Defendants, the Royal Bank of Scotland Group plc ("RBS plc"). The remaining Claimants are contingently liable (if ultimately an adverse costs order is made against them) for about 23% of past costs referable to the claim against RBS plc itself prior to the December Settlements.

7. However, after the December Settlements, the Claimants are now solely liable for the adverse costs of the proceedings from the settlement date until the end of the case, as well as 100% of the adverse costs of the claims brought against the Director Defendants (which were never pursued by any of the Settling Claimants, save for the MdR Group Claimants for the period between October 2015 to January 2016).

8. It is the magnitude of the Claimants' exposure; an increasing uncertainty as to how any order for adverse costs could be met and enforced in light of contradictory statements made on behalf of the Claimants as to their ATE cover; the apparent deficiency of at least the latter; and, in particular, the fact that following the December Settlements the Claimants are alone responsible for the funding of the claim and any adverse costs, that the Defendants now pray in aid as the reasons, catalyst and justification for the present application.

The Defendants' Application

9. That application is dated 7 February 2017. By their Application Notice, the Defendants (who were represented by Mr David Railton QC, leading Mr David Murray and Ms Natasha Bennett) seek an order requiring the Claimants to provide:

    i) The names and addresses of any third parties who, by virtue of having contributed or agreed to contribute to the Claimants' costs of these proceedings in return for a share of any recovery that the Claimants may make, fall within *CPR 25.14(2)(b)*.

    ii) Either (i) a copy of any ATE insurance policy held by the Claimants (redacted to conceal privileged material, if any), or alternatively (ii) confirmation that neither the Claimants nor any persons falling within *CPR 25.14(2)(b)* will seek to rely upon such a policy in opposition to any application for security for costs.

Summary of the Defendants' contentions

10. The Defendants present the relief they seek as being narrow in scope: and they submit that it is the preliminary step necessary to enable them to consider whether to issue an application for security for costs, either against the Claimants' funders (under *CPR 25.14*) or against one or more of the Claimants (under *CPR 25.12* and *25.13*).

11. More particularly, they contend that they are unable to make any meaningful assessment as to whether such an application is worth pursuing (and, importantly, against whom any application should be made) in the absence of information as to the Claimants' ATE arrangements (if any) and the Claimants' funders, which the Claimants have consistently refused to provide.

12. As to the jurisdiction they seek to invoke, the Defendants base their application for information in respect of the Claimants' third party funders on the court's inherent jurisdiction ancillary to *CPR 25.14;* and their application for an order requiring disclosure of ATE policies (unless the Claimants confirm that neither they nor their litigation funders will rely on ATE insurance in response to an application for security for costs) on the Court's case management powers pursuant to *CPR 3.1(2)(m).*

13. They justify both applications in the name of efficient case management and the "cards on the table" approach to modern litigation; and they rely on the limited scope of their application in support of the proposition that there is unlikely to be any prejudice to the Claimants in complying.

Summary of the Claimants' contentions in answer

14. The Claimants, represented by Mr Jonathan Nash QC, leading Mr Peter de Verneuil Smith and Mr Ian Higgins, accept none of this. They contend that unless and until it is clear that the Defendants not only (a) have the settled intention to apply for security for costs unless provided with a suitable ATE policy but also (b) have some realistic prospect of success in such an application, the Court should dismiss the application for details about the funders.

15. As regards both limbs of the application, the Claimants contend that delay is fatal. They submit that there has been no such fundamental change in circumstances as to warrant an application now when previously the Defendants appear to have been content not to seek any security; that in reality it is most unlikely that the Defendants would proceed with an application for security which would have to be very limited in its scope as well as almost certain to fail; and that the present application is a transparent but objectionable tactic to distract and destabilise the Claimants in their preparation for imminent trial.

16. More particularly as to the first limb of the application, the Claimants submit that the Defendants are seeking to extract information from the Claimants to support an uncertain application which can already be seen to be hopeless, not least because it is far too late to require security for costs in view of the failure previously to make any such application and the imminence now of trial; and that the first limb should be rejected accordingly.

17. As to the second limb, the Claimants contend that the application for disclosure of the ATE policy (absent a confirmation it would not be relied on in answer to an application for security for costs), should be dismissed likewise on the ground that it is sought to be justified by reference to an application for security for costs which is hopeless.

18. Additionally, the Claimants submit that unless and until they or their funders choose to rely on the ATE policy in answer to an application for security, if and when actually made, the Court has no jurisdiction to compel such disclosure. They submit that though it is a premise of the Defendants' application (as regards both its limbs) that their intentions are as yet uncertain they seek to put the Claimants to an election which should only be required to be made if and when they are confronted with an actual application with a real prospect of success; that the Defendants' approach "puts the cart before the horse"; and that there is no proper basis for prying into the Claimants' funding arrangements in this way.

19. The Claimants further support their objections on the basis that any ATE policy is not relevant to the adjudication of any substantive issue in the action and is, moreover, privileged. They cite *A.J. Bekhor & Co Ltd v Bilton* [1981] 1 QB 923 to remind me that the Court "can only do what it has power or jurisdiction to do" (*per* Stephenson

LJ at 951B) and that neither supposed efficiency nor some general incantation of "cards on the table" can itself be a source of jurisdiction.

20. I address each limb of the application in turn before expressing conclusions in the round.

The first limb of the Application: information about the funders

21. As previously indicated, the mainspring of the Defendants' application for information in respect of the Claimants' third party funder(s) is their contention that without this information it is impossible for them to consider and (if so advised) to make an application for security for costs (including against those third party funders themselves), thereby frustrating the Court's jurisdiction under *CPR 25.14* to make orders for security against such persons.

22. *CPR 25.14* provides as follows:

> "(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 –
>
> (a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
>
> (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."

23. As Sir Donald Rattee noted in *Reeves v Sprecher* [2007] EWHC 3226, the power of the Court to order security to be given by non-parties was incorporated into the CPR as ancillary to the provisions of section 51 of the Supreme Court Act 1981 (as it then was, now the Senior Courts Act). These provisions give the Court power to make an order for costs against a non-party to the proceedings in which the costs have been incurred: and that is a power which is frequently invoked against a third party who has financed the conduct of that litigation.

24. Section 51 of the Senior Courts Act 1981 provides as follows:

> "Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

25. It is not necessary to show (on an application under *CPR 25.14*) that the Court *would* make an order at the end of the trial against a professional funder under section 51, although the making of such an order would be the ordinary course. As Lord Brown of Eaton-under-Heywood held, giving the judgment of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Ltd v Todd* [2004] 1 WLR 2807 at 2815:

> "Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, **justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.** The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is **'the real party' to the litigation**, a concept repeatedly invoked throughout the jurisprudence …"[1] (Emphasis added)

26. In the present case, it is not disputed that (a) the Claimants are being financed or financially supported by commercial third party funders which (b) have some measure of control over and/or prospect of benefit from the proceedings as the price of such support. Nor is it disputed that to bring the *CPR 25.14* jurisdiction to bear against it the funder would have to be joined as a party, and that the funder would then have an opportunity to make its own representations on the question of whether security should be ordered.

27. In *Reeves v Sprecher*, the defendant was seeking in its application certain information in relation to the funder and the funding arrangements, as well as disclosure of the funding agreement itself. While the judge declined to order disclosure of the funding agreement (on the basis that that was an issue which should be determined only after joinder and once the funder had had its opportunity to make its own representations on the question of whether such disclosure should be ordered), the judge held (at paragraph 23) that:

> "In my judgment, it must be right that the Court has, as a power **necessarily inherent** in CPR 25.14, the power to order disclosure to the defendant in proceedings the identity and address of any third party who has entered into an agreement to fund the prosecution of the action against the defendant within the terms of CPR 25.14". (Emphasis added)

28. Sir Donald Rattee's approach in *Reeves v Sprecher* was recently adopted by Andrew Baker QC (then sitting as a deputy High Court judge, now Andrew Baker J) in *Wall v Royal Bank of Scotland plc* [2016] EWHC 2460 (Comm).

29. In that case, RBS plc believed that the claim was being funded by a third party in return for a stake in the claim and, with a view to seeking security for costs from any such third party funder, applied for an order, pursuant to *CPR 25.14*, that the claimant provide the name and address of any third parties who were funding the litigation and confirm whether they fell within *CPR 25.14(2)(b)*. The claimant refused to provide any of the information sought, and also refused to confirm whether he had third party

[1] Endorsed by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] EWCA Civ 1144 at para 1.

funding at all. As well as seeking to rely upon Article 8 ECHR, the claimant argued that it was so clear that no order for security for costs would be made (because of his ATE insurance arrangements, details of which had been disclosed), that the court should not be troubled by RBS plc's inability to pursue an application for security under *CPR 25.14* without the information sought.[2]

30. Andrew Baker QC granted the order sought by RBS plc requiring the claimant to provide the name and address of any third party funder and also to confirm whether any such funder fell within *CPR r 25.14(2)(b)*. He concluded that (see paragraph 26):

> "(i) Where there is good reason to believe that a claimant has funding falling within CPR r 25.14(2)(b), the court thereby has power to grant a remedy by way of security for costs against the funder(s) in question. (ii) For an application to be made for the court to exercise that power, it is necessary to identify the funder(s) in question against whom any application will be made. (iii) Where the defendant does not know that identity, but the claimant does, ordering the claimant to reveal it to the defendant is doing no more than making an order that is necessary to make effective the primary power (to grant a security for costs remedy under CPR r 25.14). (iv) The court therefore **has the power** to grant the present application." (Emphasis added).

31. I note that these authorities and the analysis in each chimes with the statement of Ackner LJ (as he then was) in *AJ Bekhor & Co Ltd v Bilton* at 942H that

> "where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective."

32. The jurisdiction or power of the Court to order disclosure about third party funders thus seems to me to be clear: and indeed I did not understand the Claimants substantially to dispute it. As already foreshadowed, the basis of the Claimants' opposition was, rather, that the Court should not exercise its discretion to make such an order before trial since (a) any future application for security for costs against a funder was not certain to eventuate and (b) if it did, it would have no real prospect of success.

33. As to (a) above, I am not persuaded that the Court should require to be satisfied, as a condition of making an order disclosing details as to the funder(s), that the applicants have unequivocally determined to bring an application for security for costs once the details are revealed.

34. Such a test would be inimical to the sensible application of the jurisdiction which not only serves to thwart any attempt by a defendant to obtain security against the claimant's third party funder under CPR 25.14, simply by refusing to provide details of the funder's identity, but also to enable an applicant properly to consider the merits of an application against the particular funder concerned having regard to its position, whereabouts and substance. Furthermore, such a test would be difficult to apply since it calls for what is likely to be speculation as to true and settled intent, whereas such issues are seldom black and white.

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[2] See paragraphs 8 and 9 of the judgment which summarise the parties' arguments.

35. I agree, however, 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. This is one part, of the more general requirement (as I consider there to be) that the court must be persuaded that there is good reason for departing from the more usual course of only making an order for disclosure of funders if the occasion for exercise of jurisdiction under section 51 of the Senior Courts Act 1981 has actually arisen.

36. Another part of that general requirement is that (as the Defendants accepted) the putative application for security for costs must be demonstrated to have (at least) a realistic prospect of success, and not be merely speculative or fanciful.

37. The Claimants in this case submit that the putative application is fanciful or bound to fail on three grounds. First, they contend that it must be shown that there are grounds for an assumption that a third party costs order would be likely to be made at the end of trial if a costs order is made against the Claimants; and that no such assumption should be made unless it is demonstrated that the claimant cannot or will not pay. Secondly, they submit that an application for security would be doomed to failure at this stage of the proceedings since such an application ought to give any claimant a real opportunity either to provide security or limit its costs by withdrawing its claim, and (given the stage and huge amounts already expended or committed) cannot realistically do so. Thirdly, they contend that, if security for costs were ordered against a funder, but not paid, it would be wrong for a claim to be stayed as the Claimants would not be responsible for the funder's actions/inactions: they submit that "it would be wrong in principle for the court to make an order by which Cs' claim would be stayed unless a funder complied with the order to give security".

38. The Claimants elaborated the first of these arguments, which goes to the jurisdiction of the court to order funders to be joined and to pay costs at the end of the day, by characterising the court's power to impose liability on third parties as "by its nature exceptional", contending that accordingly it is necessary first to demonstrate that the claimants of record cannot or will not pay.

39. The Claimants sought to buttress the argument with the contention that there is no basis on which to assume that any third party costs order would be made at the end of trial, "unless (at minimum) in respect of costs which were not paid (or not likely to be paid) by any particular C". They further sought to characterise any argument that funders stand in the front-line as a matter of general application as "a very significant new principle which would affect the conduct of litigation funding and GLOs" and as "also wrong in principle".

40. There is, however, nothing in section 51 to stipulate or even suggest that the liability of third parties is secondary or in any way dependent on the position of the other parties: the discretion is not circumscribed in such a way. To the extent that the Claimants seek to argue that the liability of funders in respect of costs awarded against the claimants at the end of proceedings is by its nature secondary they are, in my judgment, plainly mistaken. The Court of Appeal has dismissed that argument as having "simply no substance": see *per* Waller LJ in *Nordstern Allgemeine Versicherungs AG v Internav Ltd* [1999] 2 Ll Rep 139 at 155.

41. In oral argument, Mr Nash QC, on behalf of the Claimants, modified (he might say, refined) the argument and submitted that "whether it's right and proper to make an order requiring them to pay first before the funders came to be exposed would be a highly relevant consideration to the court in considering whether or not to make a section 51 order". He submitted that an order against non-parties would always be exceptional.

42. Whilst I would agree up to a point, Lord Brown of Eaton-Under-Heywood, giving the judgment of the Privy Council explained in the *Dymocks* case (at para.25) explained that:

> "Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction, and that there will often be a number of different considerations in play, some militating in favour of an order, some against."

43. As Lord Brown also explained (see paragraph 25 of his judgment, cited above), where the non-party funder substantially controls or funds the litigation and is acting in its own commercial interest for gain, it is not unjust for it to be treated as a "real party". Whilst Lord Brown emphasised that it is an "immutable principle that the jurisdiction must be exercised justly" (see para. 61 of his judgment) and each case turns and must be determined on its own facts, the overall effect, in my view, is that such a funder has no legitimate expectation that it will be treated any differently than another real party beyond that inherent in the requirement that the jurisdiction is discretionary and must be exercised justly: and in the absence of distinguishing circumstances, that may well include being treated as co-ordinately liable with all other parties.

44. Indeed, in the context of a group litigation order, where the proceedings are often likely only to be made possible by funders, and where commercial funders stand to gain very considerable financial returns if the case succeeds, often far greater than any individual claimant, there is good reason to assume that enforcement may be directed first against the funders; and *a fortiori* where (as here, and as is usual) the GLO has resulted in several liability for costs, making enforcement against individual claimants awkward, at best. To that extent, they stand in the front-line.

45. This should not come as a surprise: such orders are by no means unusual, as follows from the legal analysis that funders are "real parties" for the purposes of costs and the economic reality that they are likely to provide the nearest, deepest pockets.

46. Nor indeed should it come as any real surprise to commercial funders that their exposure may occasion an application for security for costs. The market is a sophisticated one, and the participants in it can be expected to be fully cognisant of the risks of participating if they cannot offer the asset backing and the ease of enforcement if the adventure fails.

47. Of course, and remembering always the "immutable principle" (see above) the Court will be careful in exercising the broad discretion conferred on it; and there may be

cases where the funded party may be considered the first recourse or that for some other reason (including some concrete encouragement leading a funder reasonably to believe that no such application would be made, as to which see below) it would not be right to impose front line liability on the funder. But I cannot accept the Claimants' suggestion that this recourse is contrary to principle, and I would be surprised if this analysis, based on a Court of Appeal case decided more than a decade ago, were materially to affect the conduct of litigation funding and GLOs.

48. I am further supported in this approach by very recent authority. In a Note provided to me after the hearing by the Defendants I was referred to a case management decision by Nugee J in *Sharp v Blank* [2017] EWHC 141 (Ch), a group action brought by shareholders in Lloyds Banking Group against the company and its directors in relation to Lloyds' acquisition of HBOS in 2008. In the course of his judgment directing costs management Nugee J noted that the commercial funders standing behind the claimants had already been required to provide security for costs under *CPR 25.14*, and that they might have to provide more security because it had become apparent that the claimants' ATE cover was insufficient for the defendants' estimated costs to the end of the trial. The case supports my view that commercial funders are routinely in the front line; and my assumption that neither this, nor the possibility of being required to provide security, is likely to come as much of a surprise.

49. In my judgment, the twin defects of the Claimants' approach are to treat funders as third parties for the relevant purpose, and to ignore the fact that ease of recourse is a material consideration especially where the difficulties of enforcement against multiple claimants have been compounded by the usual order for several liability under a GLO.

50. The second of the Claimants' arguments in this context focuses more particularly, and to my mind more profitably, on the ambit of the discretion to order security for costs, the usual form of order, and the relevance of delay in seeking such an order. I address first what I consider to be applicable factors relevant to the exercise of what is (it is common ground) a discretionary jurisdiction. I then address the competing factual submissions.

51. An application for security for costs may be made at any stage of the proceedings: the rules do not specify any time limit or cut-off point: and see *CPR 25.12.6*. Having said that, the notes to the rule make clear that:

> "Delay in making the application is one of the circumstances to which the court will have regard when exercising the discretion to grant security. The court may refuse to order security if the delay has deprived the claimant of time to collect the security, if it has led the claimant to act to their detriment, or may cause them hardship in the future conduct of the action. In other circumstances delay may deprive the applicant for security of some or all of the costs already incurred in the proceedings, security being given for future costs only".

52. The usual form of order and the sanction it prescribes of a stay until security is given and ultimately either an 'unless' order or (in the Commercial Court) a hearing to put the paying party to their election whether to offer security or have the claim be

dismissed (see *CPR 25.12.10*) serves to re-emphasise that an order for security is intended, not to stifle claims, but to give a claimant a choice as to whether to put up security and continue with their action or withdraw the claim (see *CPR 25.12.8*). As Waller LJ emphasised in *(Prince) Radu v Houston & Anr* [2006] EWCA Civ 1575

> "That choice is meant to be a proper choice…The making of an order for security is not intended to be a weapon by which a defendant can obtain a speedy summary judgment without a trial."

53. The later the application the less real the choice, and the more restricted the opportunity to find the means to enable it: and see *In the matter of Bennett Invest Ltd* [2015] EWHC 1582 (Ch) at para. 28 (Richard Millett QC). The lateness of an application may also give rise to an inference of misuse of the procedure as an instrument of oppression.

54. The Defendants accept that delay is a factor the court will take into account when exercising its discretion, but they submit that it is by no means determinative, and, if a real concern, may be accommodated by a modified form of order. Mr Railton QC gave as an example the approach in *Warren v Marsden* [2014] EWHC 4410 (Comm) where an application for security against a claimant was made three months before the date fixed for the trial, in an action which had commenced 2 years and 3 months before the hearing of the application. Teare J held that the material being relied upon to support the application had been available for "a very long time" (see paragraph 20 of his judgment) and that the application could have been made at the commencement of the action rather than shortly before trial. However (see paragraph 21 *ibid.*) he nevertheless granted security (albeit limited to future costs).

55. Further, the Defendants contend that a slightly different analysis in relation to choice is required in the context of an application against commercial funders. In that context, the choice in question is likely in real economic terms to be that of the funders, rather than the (funded) Claimants, and the issue becomes whether at the relevant stage at which the application is made it is fair to make the funders choose. That may depend on whether the funders themselves have the comfort of the Claimants having ATE cover which may be provided as security; and if not, whether it may fairly be said that the funders took the (in effect, self-insured) risk that their own status and financial position might not be considered sufficient to make security unnecessary.

56. Mr Nash sought to counter this argument on the basis that (a) ultimately the choice should be the Claimants' since it is the impact on them which should be the focus; (b) in any event, funders should not be confronted with a choice which would in effect require them to choose whether to lose the (by this time) considerable amounts of money they had put up in the past or bear the additional costs of obtaining security for a hazard into the future; and (c) that is especially so where delay may have created a false sense of security that no application would be a serious risk.

57. Turning to the facts in the present case, the Claimants understandably stress that the fact (which is not disputed) that third party funding was sought has been known by the Defendants since July 2015. It is now more than eighteen months since the involvement of a funder was announced and during that time the Defendants have not

sought to engage with the Claimants as to the terms of such funding, still less suggested that they might seek security for costs. In his Note after the hearing, Mr Nash stated that "Cs have arranged their budgeting and financial planning without any provision for the payment of security"; and the Hobson's choice offered would give rise to real prejudice.

58. The Claimants depicted the Defendants' suggestion now that they might well seek an order for security for costs as a change in tack which could not be justified by reference to any real change of circumstances. The "key question", the Claimants submitted, was whether the Defendants had any convincing case as to why they had not applied for security at an earlier date. Mr Nash submitted that neither emerging uncertainty as to position as to funding, nor the level and nature of ATE cover, nor again the increase in exposure, provided one.

59. As to ATE and funding, the Claimants submitted that the Defendants had never previously suggested that the uncertainties were such as to merit an application for security. The GLO and provision for several liability only had been made without a condition as to either ATE cover or funding; and as to the funders' legitimate expectations, in that same Note Mr Nash contended that "A funder coming into these proceedings in July 2015…would have understood that Ds were not seeking security for costs (it being 17 months since the GLO Costs Order was made)".

60. On the other hand, looking at the position and expectations of the Defendants, Mr Nash contended that although the Defendants maintained that they had been "assuaged" as to both by public statements in 2013 and 2014 on behalf of the SG Group that cover was in place, there had been statements later, in mid-2015, from Mr Graham Huntley ("Mr Huntley", one of the partners with conduct of the matter in the Claimants' solicitors, Signature Litigation LLP), making it clear that ATE was still being discussed and negotiated. Nothing had really changed objectively to justify a change in tack.

61. As to the changing adverse costs exposure in arithmetical terms, the Defendants had had, before the December Settlement, an unsecured position as against the SG Group (the remaining Claimants) of some £35 million: and they had been prepared to accept an overall unsecured position of £150 million (taking all Claimants into account). There had been an estimated increase of some £16 million in exposure as against the remaining Claimants; but Mr Nash urged on me that it could not plausibly be said that:

> "an increase of that order can be regarded as changing the whole aspect of the case and indeed an increase of £16 million against the SG Group where they were prepared to run an unsecured exposure of £35 million does not, in our submission, amount to an increase which is of such a different order that they can say a previous decision not to pursue security has changed, because the numbers have changed".

62. Mr Nash urged me to consider the reasons now advanced for the change in tack with "a healthy degree of scepticism". He contended that in reality the applications, both existing and presaged, were prompted by tactical considerations. He submitted:

> "…the court should not close its eyes to the fact that there is a great tactical benefit to the defendants in raising these issues now and potentially pursuing these security for costs applications even if ultimately they don't succeed (a) because of the distraction and work that will be required to field them and (b), if they were able to persuade you to grant security, at a very late stage they would be putting enormous pressure on our group in circumstances where the choice is either pay up, or see many millions of pounds and many years of investment disappear".

63. Against this, the Defendants submit that the timing of the proposed application is not as a result of delay or tactical change of tack on the part of the Defendants but rather due to a fundamental change in circumstances caused by the December Settlements,[3] the abandonment by the Claimants of many of their claims (though the Claimants may say that this was as a necessary consequence of the December Settlements since preparation in respect of them was being dealt with by the Settling Claimants as part of a proportionate division of work between all the Claimants prior to then) and, "perhaps most importantly, the recent suggestion that the Claimants do not in fact – and contrary to the Claimants' previously publicly stated position – have sufficient ATE cover in place to meet an adverse costs order". These factors are said not only to explain the "delay" and the Defendants' change of stance as to whether security is required, but also to demonstrate the real likelihood of an adverse costs order being made against the Claimants, especially in relation to the abandonment of claims.

64. The Defendants also point to the recent emergence of the fact (revealed in the fourth witness statement of Mr Huntley dated 15 February 2017) that funding arrangements concluded in mid-2015 with Hunnewell Partners (UK) LLP ("Hunnewell"), described simply as "an investment firm", have been "replaced by agreement with further funding arrangements with Hunnewell Partners (BVI) Limited, which were entered into on 30 November 2015, for commercial reasons which are of course confidential and in any event of no relevance to the present application." The Defendants note that the financial resources of Hunnewell Partners (BVI) Limited (and that of any other third party funders the Claimants may have) are presently unknown;[4] the Claimants notably have not provided any information or assurances as to the ability of Hunnewell Partners (BVI) Limited to meet any adverse costs order that might be made. Hunnewell Partners (BVI) Limited, for which Signature Litigation LLP do not act, is incorporated in the BVI, and limited information as to its financial position is publicly available.

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[3] There was a suggestion in Mr Huntley's witness statement that the Defendants should not be allowed to pray in aid the settlement with the Settling Claimants because this change of circumstances was brought about by "*the Defendants' deliberate decision to negotiate only with certain groups*". However, the SG Group has accepted that the Defendants were entitled to reach a settlement that excluded the SG Group; and it is to be noted that it was also accepted that the agreements and protocols between the various Claimant groups deliberately did not restrict any group's ability to settle without reference to the other groups.

[4] The accounts of Hunnewell Partners (BVI) Limited are not publicly available. However, the accounts of Hunnewell Partners (UK) LLP, who (according to Mr Huntley) were the Claimants' original funders, demonstrate that such funders may be lightly capitalised: its annual accounts showed its total assets as at the end of the last financial year to be just over £500,000.

65. Turning to my assessment of these competing contentions, as it seems to me, these points, if made in an application for security for costs in a time frame which afforded sufficient real choice to the relevant respondents, would certainly not be fanciful. The inconsistency of the Claimants' statements, their apparent unreliability, the opaqueness of such limited information as they have been prepared to share, and the sudden revelation that the only named funder is overseas are unsettling and invite suspicion that all is not as it should be. Further, I tend to agree that the December Settlements were both a watershed and the occasion for a rather changed risk profile as well as arithmetically increased exposure.

66. Even taking into account the tactical considerations, which may well also inform the Defendants' approach, I do not think that the evidence is such as to warrant the conclusion that any application (including one against the funders) would be improper and its prospects fanciful, subject always to the question whether (as the Claimants do in terms submit) it founders on "the unanswerable point that it's just too late…"

67. In my view, the critical question for present purposes is whether, even if in other circumstances security might be ordered, were an application to be made now, it is already clear beyond sensible argument that an order (a) would not provide any fair, real choice to the respondents to it; and (b) cannot properly be accommodated within the existing trial timetable without unjust disruption to the Claimants. This is a high hurdle.

68. I agree with Mr Railton that the reality of the choice to be assessed is that implicitly offered to the funders; but I also agree with Mr Nash that the Court will bear in mind the impact on the Claimants in assessing whether it is just to require security as well as the legitimate expectations of the funders themselves.

69. As indicated previously, when considering the issue of whether an order now would allow for any real choice I need to assess the effect of a prospective order in terms of (a) whether it can be said without reservation that at this stage the funders would have no appropriate and real choice and (b) whether the impact of any choice would plainly and obviously be unjust to the Claimants so as to make any order correspondingly (and equally plainly and obviously) unjust.

70. As to (a), in my view, the court's working assumption (though open to contradiction) is likely to be that the funders were aware of their exposure and proceeded either on the basis of their own strength or on the basis of ATE cover available to meet adverse costs. If they were not, it may be said that, as commercial funders aiming for profit they have only themselves to blame. They may, in all the circumstances, have rated the risk a low one; but I do not think I should accept as matters presently stand that they were entitled to assume that none existed.

71. As it seems to me it may well be arguable that in reality the funders' choice was made when they agreed funding; and if they are confronted now either with the consequences of that choice or the consequences of overlooking it they cannot complain of its unfairness, or its unreality. That militates against the choice inevitably being thought to be meaningless.

72. Moreover, it also seems to me to be arguable that commercial funders providing (it is assumed) multi-million pound funds for multi-million pound gain should have ready access to funds to provide by way of security if they proceeded without other cover.

73. I am not persuaded, therefore, that it is plain and obvious that the funders would necessarily be confronted unfairly with an unreal choice, even if it is particularly unwelcome at this stage of the proceedings.

74. I also bear in mind the argument suggested in *Wall v Royal Bank of Scotland plc* [2017] 4 WLR 2 (also in the context of an application for details about funders prior to a prospective application for security for costs) and recorded by Andrew Baker QC at para. 41 as follows:

> "On an application against a claimant, the court must balance the defendant's desire to be paid its costs if it succeeds in the litigation against the fact that an impecunious claimant may be deprived of access to the court if security is required. RBS will submit…that the position is different in an application against a third party funder buying a stake in the claim or its proceeds: the application is then not against an impecunious claimant seeking to vindicate rights, but against a professional entity seeking to profit from the litigation of others and likely to be well able to secure the defendant's costs."

75. As to (b) in paragraph [69] above, whilst the impact of any prevarication by the funders, and even more so, actual delay or failure to demonstrate adequate security, would impact very severely on the Claimants, the fact remains that the December Settlements were a watershed, and it is arguable that the decision to continue the proceedings alone involved a different risk profile for all concerned, including for the funders in relation to security for costs, especially costs going forward (as distinct from past costs).

76. I have considered carefully the detailed reasons given in Mr Huntley's fourth witness statement (in paragraph 17(c)) as to why (in his words) "it is simply not viable for the trial date to be kept and an order for security to be determined and enforced." The logistical difficulties there adumbrated seem to me to be substantial and onerous. However, they are largely based on the assumption that the application would be directed primarily against the claimants themselves rather than the funders and thus call for "a monumental logistical task" (as he describes it) of interviewing claimants with a view to establishing their means.

77. In fact, I understand the Defendants to have disclaimed any intention to proceed against individual retail claimants: and I would expect (and as presently advised require) any application to be limited to funders. As the Defendants pointed out, the Claimants would not be being asked to raise any money: it would be the third party funder(s) who would have to raise the money for security. As to the burden of opposing, the Claimants' solicitors have confirmed that they do not represent Hunnewell Partners (BVI) Limited. I accept that any application, even if limited to the funders, would as a practical matter involve and distract the Claimants to some degree: but (mainly because the evidence is directed towards an application against

the Claimants themselves) the extent to which it would do so is not, to my mind, clear.

78. Moreover, as the Defendants reminded me, they are not at this stage actually seeking security; they are merely asking for information which would enable them to consider (and if so advised to make) such an application. I accept that this is a more limited and modest request. In that context, I agree it is not therefore appropriate for the Court to be drawn into a detailed analysis as to whether security would be granted were an application to be made (and in any event it is not possible to do so meaningfully in circumstances where the identity, location and financial resources of the third party funder(s) are unknown).

79. That leaves for consideration under this heading the Claimants' third and last point, that since the Claimants "would not be responsible for the funder's actions/inactions" it follows that "it would be wrong in principle for the court to make an order by which Cs' claim would be stayed unless a funder complied with the order to give security".

80. I can be brief: the point seems to me to be a facet or elaboration of the submission that the Court should take careful account of the impact on the Claimants of any order against the funders. The point seems to me well made to that extent; but it does not justify the conclusion that an order would in all circumstances and necessarily be wrong in principle.

81. I would add that, in the circumstances of this case, such transparency might also assist the Court (see paragraphs [128] to [133] below) in its management of the GLO.

82. I can therefore summarise my conclusions on the first limb of the Defendants' application as follows:

(1) I would not consider an application against individual claimants to be viable or capable of fairly being accommodated.

(2) My present overall assessment is that an application against the funders for security for costs, even if limited to costs post-December 2016, would face difficult hurdles and time constraints; and more transparency and reassurance as to their standing, even if not complete, might well tip any balance firmly against any further order.

(3) I therefore offer no encouragement to an application. I consider that the Court would be reluctant to accede if further consideration showed it to imperil the trial or its fair preparation, and which might be entirely unnecessary if the funders are substantial or suitable ATE insurance is in place.

(4) But I do not feel able to say that it is so unrealistic or hopeless that the Defendants should not be afforded some opportunity to test these matters by limited disclosure, especially given the change to funders offshore (which, it has also occurred to me, may not be subject or party to any Code of Conduct such as was promulgated by the Association of Litigation Funders in November 2011 and encouraged and ultimately approved by Jackson LJ).

(5) I shall, therefore, accede to the requests in part 1 (paragraphs (1) and (2)) of the Application Notice.

(6) I will hear short submissions as to whether there are any reasons why any financial statements on which the Claimants or their advisers have relied in assessing the worth of the funders' commitment should not also be exhibited.

(7) I would still hope that the position revealed will finally tell against any application. But if not I would intend to manage any application very carefully, and reserve the right to deal with it summarily if at that time it seems to me hopeless, disproportionate or simply incapable of being fairly accommodated without disrupting the trial and preparation for it; or if the Claimants do have and determine to disclose ATE cover and it provides a satisfactory answer.

The second limb of the Application: for disclosure of any ATE policy or policies

83. I turn to the second limb of the Defendants' application, seeking disclosure of any ATE insurance policy held by the Claimants or alternatively confirmation that neither the Claimants nor any person falling within *CPR 25.14(2)* will seek to rely on such a policy in opposition to any application for security for costs.

84. Again the Defendants' primary justification for seeking this relief is that it is required to enable them to be able to make an informed decision as to whether to apply for security for costs, and to prevent a potentially pointless application were it to transpire that the Claimants do in fact have adequate ATE cover in place.

85. In the latter context, they accept that if the Claimants have adequate ATE cover for the Defendants' costs (the Claimants' share of which is currently estimated to be at least £50m), then it may be that the Defendants would feel they are adequately protected, without the need for security for costs either from the Claimants or their third party funders. Indeed, they accept that cases such as *Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc* [2013] EWHC 147 (TCC) demonstrate that an adequate ATE policy is in any event likely to be treated as a complete answer to a security for costs application against a corporate claimant.

86. However, they contend that in order to be able to make an informed decision as to whether to apply for security for costs, and to prevent a potentially pointless application were it to transpire that the Claimants do in fact have adequate ATE cover in place, the Defendants need to know now whether the Claimants have ATE cover and if so, the level of cover and its terms. Alternatively, if the Claimants and any third party funders are not intending to rely on the existence of ATE cover to thwart any security for costs application, a simple confirmation that that is the case would achieve the same goal.

The question of jurisdiction

87. The Defendants submit that the Court has the power to make an order requiring disclosure of ATE policies under *CPR 3.1(2)(m)*, which states as follows:

> "Except where these Rules provide otherwise, the court may take any other step or make any other order for the purpose of managing the case and furthering the over-riding objective."

88. They go on to submit that the order sought in relation to the Claimants' ATE arrangements clearly falls within this category since it is designed to avoid the potential waste of time and costs that would be caused were an application for security for costs to be prepared and made, only for it to transpire that such an application was unnecessary due to the existence of adequate ATE cover; that such an order would be a more efficient means of managing the proceedings and would be more consistent with the "cards on the table" approach to modern litigation and the over-riding objective; and that there are no rules elsewhere in the CPR which provide that no such order should be made.

89. In support of these submissions Mr Railton principally relied on a decision of Coulson J, sitting in the Technology and Construction Court, in *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC).

90. In that case the defendant sought disclosure of the claimants' ATE policy (in a case where a GLO had been made) pursuant to (i) *CPR 31.14* on the basis that the ATE policy had been mentioned in two witness statements relied on by the claimants in support of the GLO, and/or (ii) *CPR 3, and/or CPR 18 and/or CPR 19* (the Court's general case management powers). Coulson J held that the ATE policy was disclosable under *CPR 31.14*, and that was sufficient to determine the application. However, in case he was wrong he also considered the application pursuant to the Court's case management powers, and held that it would be a proper application of those powers to require disclosure (see paragraphs 54 to 60), unless there was a specific part of the *CPR* which prevented it, which he concluded there was not (see paragraphs 61 to 65).

91. Mr Railton also cited *XYZ* v *Various* [2014] 2 Costs LO 197. In that case, proceeding under a group litigation order, Thirlwall J (as she then was) held that *CPR 3.1.2(m)* gave the Court power to order a defendant to provide a witness statement setting out whether there was adequate insurance to fund the defendant's participation in the litigation to the completion of trial and the conclusion of any appeal, thereby enabling the Court to manage the litigation on the basis of adequate information. It is however, important to note the context in which she did so, and the limit of the relief she gave.

92. Thirlwall J had previously made a series of case management directions designed to enable the trial of three issues in four sample cases which were devised to lead to the resolution of the whole of the group litigation. The chosen cases all involved Transform as defendant. After these directions were made, serious concerns had surfaced as to the financial position of Transform, not only in terms of its prospects of meeting claims but also in terms of its potential collapse before or at the time of trial. Thirlwall J considered on the evidence that, without funding and insurance Transform might well not be able to fund the litigation to trial. Its collapse would put in jeopardy all the case management directions previously given. Yet Transform refused to state more than that it had insurance to cover funding, to meet any order for damages and to meet any adverse cost order, without specifying the terms or amount of cover.

93. Thirlwall J concluded that she should require Transform to provide a witness statement setting out whether it had insurance adequate to fund its participation to the completion of the trial and the conclusion of any appeal. If it did, the earlier directions could stand; if not they would require to be substantially revised. The statements

would furnish the Court with the information necessary to determine how the litigation should proceed. That was plainly within her case management powers.

94. She declined, however, to make any order requiring Transform to provide evidence as to whether it had cover to enable it to meet any order for damages or costs award against it. Such evidence would go to the ability of the claimants to enforce judgment; and she was quite satisfied (see para. 35) that

> "Whether or not the claimants will be able to enforce judgment is not a matter which affects case management."

95. Unless disclosure of the ATE insurance policy can be shown to be required for some purpose other than for determining the prospect of enforcement (anticipated difficulties in respect of which is the usual, perhaps invariable, reason for seeking security for costs), the *XYZ* case seems to me to be largely against the Defendants, as indeed Mr Nash submitted on behalf of the Claimants.

96. Mr Nash relied principally on a decision of the Senior Master in the Queen's Bench, namely *Arroyo v BP Exploration Co (Colombia) Ltd* [2010] EWHC 1643 (QB) ("the *Arroyo* case"), which, conversely, Mr Railton characterised as anomalous and erroneous.

97. The *Arroyo* case concerned a claim under a group litigation order brought by non-resident Colombian peasant farmers, who (it was common ground) could not have brought the case at all without the benefit of ATE insurance (and, presumably, funding). The nature of the claim is not expressly identified in the judgment, but it seems likely (from its title and the fact that the defendant was BP Exploration Company (Colombia) Limited, "BP Colombia") that it concerned either some industrial accident or environmental issue relating to the Ocensa Pipeline in Colombia.

98. The Senior Master's judgment considers the application by BP Colombia (at a Case Management Conference) for disclosure of the ATE policy or policies. The application was made on the basis that BP Colombia had a legitimate interest in knowing the nature and extent of cover so as to be in a position to make informed choices in the litigation (as in *Henry v BBC* [2006] 1 All ER 154 (see *per* Gray J at para. 23 of his judgment)). By the time of the application it was clear that adverse costs would be likely to exceed the claimants' stated cover (see para. 12) and BP Colombia also appears (from para. 13 of the judgment) to have argued that the circumstances left a suspicion that the claimants' solicitors claim of cover of £1.8 million was misleading.

99. The Senior Master considered a series of authorities, and, in particular, Coulson J's decision in *Barr v Biffa Waste* (*supra*); but (having explained in para. 66 that he was not bound by that case when exercising the jurisdiction of the High Court) he determined not to follow that earlier authority, pointing out also that Coulson J's decision was primarily founded upon *CPR 31.14* and that the alternative basis for his decision relying on *CPR 3.1* was *obiter.*

100. I am content to adopt the description of the Senior Master's conclusions provided in the Claimants' Skeleton argument in this case, as follows:

(1)*CPR 3.1* does not refer to disclosure but to case management, and the catch-all provision cannot be used where the CPR contains a detailed codification of the power to order disclosure (*CPR 31*) and the information which parties must give about funding arrangements (*CPR 44.15*). (See para. 55a).

(2)*CPR 31* does not confer the power to order disclosure because the documents are not relevant to the pleaded issues (referring to *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056 (CA) at 1076F). (See para. 54).

(3)*CPR 18.1* only applies to matters which are "*in dispute*" in the proceedings, and ATE insurance is not. (See para. 55b-c).

(4)The ATE policy pre-dated the Jackson reforms, such that *CPR 44.15* (now revoked) provided that certain details of an ATE policy had to be disclosed if the ATE premium was to be claimed by a successful claimant. The court concluded that there was no relevant unfairness to the defendants, since a party funded by insurance which pre-dates the claim, or which decides not to claim its ATE premium, is under no obligation to declare it (see para. 38, 48, 52).

(5)There was authority that courts would not order disclosure of liability insurance which was in place before the claim arose (*West London Pipeline & Storage Ltd v Total UK Ltd* [2008] Lloyd's Rep IR 688 (Comm)). In the subsequent case of *Barr v Biffa* [2010] 3 Costs LR 291; [2009] EWHC 1033 (TCC), Coulson J drew a distinction between pre-existing liability insurance and ATE insurance, on the basis that in certain cases a claim may only be able to go forward if there is ATE insurance in place. In *Arroyo*, the court held that the distinction was doubtful. Some cases may be dependent on pre-existing liability insurance in order to go ahead. (See para. 68-70).

(6)If there were an application for security for costs, the Claimants would not be compelled to disclose the policy – the court would simply proceed on the basis of the details given (or on the assumption that there were no assets available) (see para. 73).

101. To my mind, the Senior Master's approach, and his essential reason in departing from the earlier decisions of the High Court I have referred to, is captured in the following extracts from paras. 51, 52 and 55 of his judgment:

> "The overriding objective was in my judgment not intended to suggest that the Court should exercise case management powers to require a party to disclose what financial arrangements it has in place to pay or its financial ability to pay, an order for costs. It seems to me that if that were intended by the rules of court there would have to be specific provision to that effect. Mr Layton rightly submits that the Defendant differs from the opponent of a conventionally funded party in only one respect: namely, that it may be called upon to pay enhanced costs. So, the CPR entitle it to know that it will face

> such a claim: that is the effect of CPR 44.15. Where there is a failure in notification, the opponent will be protected from that claim: that is the effect of CPR 44.3B. In all other respects, the opposing party will be in the same position as any other litigant. That in effect, is the level of the playing field in all litigation and that, in effect, is why CPR 44.15 does not provide for the disclosure of the additional information which the Defendant seeks…
>
> …
>
> All that the existence of ATE arrangements adds to the case is that it gives these Claimants access to a fund, in contractually prescribed circumstances, which they would not otherwise have. But there is no more reason for the Claimants to give disclosure of the details of their insurance fund in an ATE case than there would be for them to give disclosure of the funds in their savings accounts, or the funds available from non-ATE insurers. That sort of disclosure is unavailable…
>
> …
>
> CPR 3.1 simply states the court's general powers of case management. None of them relates to disclosure. While there is a catch-all power to make any order necessary to further the overriding objective, there can be no resort to this power where the CPR already contains a detailed codification of both the power to order disclosure (CPR 31) and the information which parties must give about funding arrangements (CPR 44.15)."

102. Thus, primarily on the basis that the specific powers confined the general, the Senior Master departed from both Gray J's decision in *Henry v BBC* (supra) and Coulson J's decision in *Barr v Biffa* not only on the issues as to the extent of the case management powers conferred by *CPR 3.1* but also on the issues of (a) relevance (where he relied on the decision of David Steel J in the *West London Pipeline* case) and (b) privilege as they applied to disclosure of an ATE policy.

103. The decision in the *Arroyo* case is cogently presented; and in many circumstances there may well be no scope or warrant for resort to what he termed the "catch-all power" to supplement other specific rules. But, in my view, the absolute proposition the Senior Master appeared to espouse is not correct. I cannot agree with the Senior Master that *CPR 3.1* is so confined.

104. I have no doubt that in an appropriate case, exemplified by the *XYZ* case and subject to the limitations apparent from Thirlwall J's decision as explained above-), the Court's case management powers under *CPR 3.1* do extend to requiring disclosure of an ATE policy when its disclosure is necessary to enable the Court proportionately and efficiently to exercise its case management function.

105. I do not agree that this jurisdiction is excluded by *CPR 44.15* (which, as noted above, has in any event since been revoked), *CPR 31* or any other provision of the *CPR*.

Although *CPR 3.1* is stated to apply "except where these Rules provide otherwise", in my view the Court should not be quick to cut down the general power of case management by reference to other provisions directed to other matters. A sufficient control is provided, as in the *XYZ* case, by being careful to apply the case management power only to what is genuinely a case management issue, rather than by reference to some general mantra, be it "cards on the table" or the like.

106. In that regard, I do not think that David Steel J's decision in the *West London Pipe Line* case is authority to the contrary. That case concerned an application for disclosure of a policy for the purposes of "assessing the prospects of an effective recovery", which was said to concern case management on the basis that it might affect the appropriate share of the court's resources to be allocated to it. That is the sort of justification rightly, to my mind, rejected in the *XYZ* case. Stripped of any plausible case management justification, the only other justification was a bare recourse to the modern approach described as being 'cards on the table'. Steel J (again rightly, in my view) did not accept it, and determined that the only remaining basis for disclosure was *CPR 31* which was inapplicable, since the material in question was not relevant to an issue in the action.

107. It also follows that I do not disagree with the Senior Master's further conclusion that an ATE policy is unlikely to be disclosable under *CPR 18.1* (see para. 55b.), nor his reasoning (which indeed appears to me to be sound) that only material which relates to matters 'in dispute' falls within that provision, and ATE provisions are not (usually at least) the subject of the dispute.

108. However, that does not, to my mind, answer the question whether such a policy may be required by the Court to be disclosed; and, especially perhaps because, as did Coulson J in *Barr v Biffa* (albeit on possibly somewhat different grounds), I take a different view than did the Senior Master as to the true ambit of the *West London Pipeline* case: I do not agree with the Senior Master that *CPR 18.1* excludes any power in the Court to do so, even where that is expedient and necessary for the purposes of case management.

109. Thus, I accept that generally an ATE policy, which does not impact on the issues in the case now that the premium can no longer be recovered as part of a costs award, will not be relevant. However, there may well be exceptions: for example, where the ATE policy has been deployed in the course of the proceedings whereby to influence or impact on a decision (procedural or otherwise) such as it has been in the present case (see below). That is especially likely, as it seems to me, in the context of group litigation where the considerable benefit to claimants of several liability has been obtained. More generally, I would add that, to my mind, the court will in such a context tend to be more amenable to such disclosure as the price of the other benefits, and to ensure that claimants themselves have transparency.

110. As to the issues of privilege which the Senior Master also addressed, Mr Railton submitted that they should not arise in this case, since the relief sought is for either voluntary disclosure (in which case no issue of privilege would arise) or disclaimer of relevance (in which case no disclosure is sought). Nevertheless, and also since the issue was argued and Mr Nash sought to rely on privilege as a further reason why he should not be required to make any such choice now, I think it appropriate to state my own views, which again differ from the Senior Master's.

111. Put shortly, I cannot agree with the Senior Master's conclusion (contrary to the previous decisions) that an ATE policy is privileged from disclosure on the ground that the policy and communications antecedent to its finalisation must be for the dominant purpose of conducting litigation, and thus attracts litigation privilege; and in my view the Senior Master's general proposition that such a policy also attracts legal advice privilege because "it is likely to reflect legal advice given as to prospects and tactics" (see para. 67) is too broadly stated.

112. In my view, it is unlikely that privilege attaches to an ATE policy as such on either ground (litigation or advice), except to the extent (as conceded by leading counsel for the applicant in *Barr v Biffa*) that parts of a policy (such as, possibly, the amount of premium, as in *Barr v Biffa*) may attract legal advice privilege and require redaction on the basis that the relevant part might allow the reader to work out what legal advice had been given (see *Barr v Biffa* at para. 48).

113. Accordingly, and despite the fact that the *Arroyo* case is the latest cited, and thus in strictness the one I should follow unless convinced it is wrong, I prefer (with all respect to the then Senior Master) to follow the earlier decisions to which I have referred.

Applicability of the jurisdiction on the facts

114. On the basis of my view of the relevant legal parameters, the first question becomes, therefore, whether on true analysis the Defendants are seeking to invoke a case management power in aid of the proportionate, expeditious and efficient management of the proceedings; or whether they are in reality seeking disclosure with a view to enforcement or some other objective not amounting to case management in the proper sense (reflecting the distinction drawn in the *XYZ* case).

115. The Defendants, as applicants, submit that the disclosure of the ATE policy which they seek is to enable the Court to ensure that time and resource is not committed to an application for security for costs if there is an ATE policy in place which, when produced, is on terms which plainly 'torpedo' the application. Efficient case management, Mr Railton contends, requires that the 'torpedo' be either revealed now, or its use disclaimed. He submits that although of course the ultimate objective from the point of view of the Defendants is to have the information to consider whether or not to bring an application for security for costs, which relates to enforcement, the immediate question simply goes to the timing of the revelation or disclaimer of the 'torpedo', which should be regarded as relating to efficient case management.

116. The Claimants, on the other hand, in addition to relying on the *Arroyo* case, emphasise not only that the ultimate objective reveals the true character of the application as in effect going to enforcement, but also that its premise is that the Claimants should be required immediately to make a decision whether to reveal the ATE policy or policies or disclaim reliance for that purpose as if there was already on foot an application which in truth may never be brought and the content of which is not yet stated nor its strength or otherwise revealed. This was to "put the cart before the horse".

117. Further, the Claimants in effect submitted that the two-stage approach propounded by the Defendants should not disguise its true purpose; and the approval of such a two-

stage approach would drive a coach and horses through the distinction between case management matters and enforcement matters that Thirlwall J had correctly identified and observed in the *XYZ* case.

118. Mr Nash also made clear that the position as regards ATE cover is not finalised yet: and that the decision called for is oppressive and premature. Put another way: although dressed up as case management, the true nature of the application is to assist in the enforcement of any order for costs awarded to the Defendants, which (as stated in the *XYZ* case) is "not a matter which affects case management", and would be oppressive and unfairly destabilising in its effect. He reminded me again of the likely tactical considerations and realities.

Exercise of discretion

119. I have explained why I do not think that ATE policies are by their nature privileged, although some appropriate redactions may be justified and necessary to preserve legal advice privilege.

120. Whilst I agree that such polices do not usually fall within the ordinary ambit of disclosure under *CPR Part 31,* I would consider the Claimants' previous deployment of the ATE cover they asserted was in place whereby first to encourage the court to make a GLO and provisions under it for several and not joint liability for costs, and then to justify the SG Group's continued status as a lead group, make it difficult for the Claimants to argue that the ATE policy or policies are entirely irrelevant in the context of case management. The Claimants are not like ordinary litigants whose funding arrangements are a private matter: they have put forward those arrangements to obtain procedural advantages.

121. Even so, however, I have concluded that, in the circumstances as they appear at present, it would not be appropriate to exercise the case management powers I consider are available to me, but which should be carefully exercised when unusual intrusion is sought, to require the Claimants either to disclose or disclaim deployment at this stage of their ATE policy or policies in the context of a future application for security of costs, if ever made.

122. In my judgment, there is some force in the Claimants' contention that this limb of the application is to some extent in contrived clothing. It is said to be a matter of case management, rather than going to enforcement, because it would flush out a possible defence to an application, and assist the Defendants whether to bring it at all. But the case management characterisation and rationale is still ancillary to enforcement; and the true or at least primary objective is demonstrated by the form of order sought, which is premised not on the documents being needed for case management purposes, but only that there are efficiencies in making the Claimants determine now their defence to an uncertain application for security which may not be pursued anyway and further or alternatively may be demonstrated (by reference, for example, to the position of the funders) to be unwarranted. I do not think it would be right to exercise case management powers to put the Claimants to an election in respect of a potential application for security for costs to which there may well be other answers, and to which the ATE policy may not be a complete answer anyway.

123. In the latter context, it seems to me likely that disclosure of the ATE policy or policies would almost inevitably lead to collateral issues as to the terms and scope of the policies: in the circumstances as they presently stand, I do not consider it would be right or consistent with the overriding objective to make an order which would almost inevitably occasion such a potentially distracting satellite dispute, which would endanger and not facilitate the Part 1 trial.

124. That conclusion is further supported, in my view, by the fact that the only arguable application would be against the funders: and it will be at least partly their decision ultimately whether to disclose the ATE cover, a decision which will no doubt be influenced according to their own financial position and standing, as well as the strength of the arguments advanced by the Defendants when making the application.

125. I have taken into account, of course, that it is better to save costs than rely on compensation for costs incurred by way of a costs order. But the fact also remains, as Mr Nash said and accepted, that an order for costs may be used as a sanction if in the event the Claimants or their funders cause unnecessary costs by not revealing the 'torpedo' at an early stage.

126. Subject to one point, therefore, I propose to refuse the relief sought in the second limb of the Defendants' application.

A further important point

127. The one further point to which I have alluded above is this: although I have concluded that I should not accede to the second limb of the Defendants' application, I remain concerned about the position as to the SG Group's ATE cover, especially in the context of what individual claimants have been told or may perceive the position to be. I have been increasingly troubled by the inconsistency of statements made with respect to the ATE cover for these proceedings; and other statements (at least one plainly inaccurate) have apparently been made, unapproved and indeed without the knowledge of the Claimants' solicitors.

128. Indeed, I have also become concerned whether there is sufficient funding, especially given the likelihood that members of the Action Group are likely to have signed up on the basis of there being adequate funding, but the contrasting statements by Mr Huntley in his recent witness statements that more is needed. Plainly there could be serious consequences to the Claimants themselves if there is any gap or shortfall in funding, as there would be in the case of ATE cover. The Court, in managing the proceedings, has an interest in ensuring that its own resources (and thus the public purse) are not wasted unnecessarily and (in the context of a GLO especially) in having some assurance (subject, of course, to protection of privilege) that the basis of participation has been fairly and fully represented.

129. The focus of these concerns is not recoverability of costs from the Defendants' point of view, rather it is as to the basis on which (a) existing claimants are, since the December Settlements, participating, and (even now, after the apparent expiry of the primary limitation period) further claimants are being invited to participate under the GLO and (b) the court is proceeding, given earlier assurances given as to ATE cover and the funding arrangements in place.

130. The correspondence between the SG Group and actual and potential claimants which I have been shown reveals a somewhat unsettling uncertainty as to what such claimants may perceive their exposure to be, and thus as to the basis on which they are proceeding since the December Settlements.

131. As for the Court itself, whilst acknowledging that neither the GLO, nor the order under that umbrella for several and not joint liability for costs, expressly stipulated cover to be a condition, the clear impression imparted was that both adequate funding and ATE cover were and would remain in place. The Court has case-managed the proceedings accordingly.

132. The December Settlements were, as I have said, a watershed, and almost inevitably required a review of the case as a whole, including its funding: time for that was sought by the Claimants and granted (by way of a short stay). It is discomfiting that so little, and no concrete, information has been provided as regards the basis on which, in point of both fact and perception, the claim is proceeding, beyond an assurance through Counsel that some (otherwise unspecified) ATE cover is in place, and that what I take to be the main funder is now an offshore entity of which no details have been provided or seem to be available.

133. It may be that the fact of my expression of concern will promote sufficient enquiry by claimants to encourage the SG Group to address the matter from their point of view. But in light of the concerns I have expressed I think it appropriate and necessary that there should be more transparency as to the funding position and ATE cover. I do not wish to promote an interrogation, or by a side-wind encourage further satellite applications. But after this judgment is formally handed down, I would invite submissions as to what else might, in a reasonably confined way, be done or directed further to address these concerns.

Postscript

134. On 3 March 2017, as I was completing this judgment in draft, Counsel for the Claimants provided me with a copy of a recent decision by Thirlwall LJ, sitting as a judge of the High Court in a further (perhaps final) episode of the *XYZ* litigation, concerning a claim for third party costs against insurers, and involving the disclosure of insurance policy details (though not ATE cover): *XYZ v Travelers Insurance Company Ltd* [2017] EWHC 287 (QB). That decision also refers (see paragraph 23) to the decision of the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, where there is a history of the development of the law in respect of section 51, with references to the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.

135. Counsel did not contend that *XYZ v Travelers* (or any of these decisions) was directly relevant to the disposition of the present application but thought it right that I should be made aware of it given the citation of and reliance on the earlier instalment also heard by Thirlwall LJ.

136. Although grateful to counsel for drawing the authority and its references to earlier authority to my attention, I agree that there is nothing in it (or the cases to which it refers) to alter my analysis or determination of the present application.

137. On the contrary, I consider that the approach in both *XYZ v Travelers* and *Deutsche Bank AG v Sebastian Holdings Inc* confirms and reinforces the proposition that as regards section 51 itself "the only immutable principle is that the discretion must be exercised justly" and that guidelines in earlier cases (such as were suggested by the Court of Appeal in the earlier days of the jurisdiction in *Symphony Group Plc v Hodgson* [1994] QB 179) are no more than that, and each case turns on its own facts.

138. I would note, however, that in *XYZ v Travelers* Thirlwall LJ (in ordering Travelers to pay the applicants' costs) attached importance to the fact that the applicants would not have brought or continued the claims without funding from Travelers, and that Travelers became interested with a view to very considerable benefit. That chimes with what appears to be the position in this case, as is likely to be so in many GLOs. There is no rule, nor any mandatory guideline: but the potential reward for commercial funders may well come at some risk, including that of adverse costs exposure, and the requirement in a proper case to furnish security in the meantime.