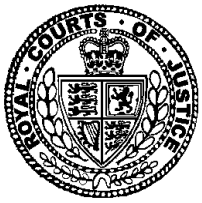

Neutral Citation Number: [2024] EWHC 297 (TCC)

Case No: HT-2020-000334

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PROPERTY AND BUSINESS COURTS

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2024

Before :

MR JUSTICE CONSTABLE

- -

Between :

Topalsson GmbH

Claimant

- and -

Rolls Royce Motor Cars Limited

Defendant

- -
- -

Gideon Shirazi (instructed by Cooke Young & Keidan) for the Claimant
Iain Munro (instructed by Clarkslegal LLP) for the Defendant

Hearing date : 9 February 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 16:00 on Tuesday 13th February 2024.

Mr Justice Constable:

IntroductionS

1. The Defendant, Rolls Royce Motor Cars Limited ('RRMC') has applied for funding information (the "Funding Disclosure Application") in support of its application for a non-party costs order (the "Non-Party Costs Application") under s. 51 of the Senior Courts Act 1981 against Kubilay Topal the founder, managing director and majority shareholder of the Claimant, Topalsson GmbH ('Topalsson'), and potentially other funders.

2. Two sets of disputes between Topalsson and RRMC have progressed through the English courts.

3. First, a trial concerning claims and counterclaims for damages arising out of the termination of the agreement between RRMC and Topalsson for the development and supply of digital twin software for a new car configurator ('the Termination Trial'). Following a trial in late 2022, by a judgment handed down on 12 July 2023, ([2023] EWHC 1765 (TCC)) O'Farrell J held that RRMC's termination was lawful and awarded it €5m in damages plus interest. A costs order was made requiring, in broad terms, Topalsson to pay 90% of RRMC's costs and over £1.2m on account (the 'Costs Order'). The sums remain unpaid, with interest presently accruing. Topalsson says that this is because its insurers (Hiscox) have wrongfully failed to indemnify it for the judgment sum, and that Topalsson is pursuing Hiscox in ongoing German court proceedings. Permission to appeal against judgment in the Termination Trial was refused by O'Farrell J. There is an outstanding appeal and stay application in the Court of Appeal, the determination of which Topalsson has presently requested be delayed.

4. Second, an anti-suit injunction in which RRMC sought to restrain Topalsson from bringing IP infringement proceedings in the USA. The USA proceedings were discontinued against RMCC. An application for a permanent anti-suit injunction was dismissed by Waksman J, and Topalsson secured an order for the majority of its costs. This order was set off against the costs owed by Topalsson to RRMC by the Costs Order, but it is not in dispute that there remains in excess of £1m presently owing on account in favour of RRMC arising out of the Termination Trial.

5. RRMC relies upon the Tenth and Twelfth witness statements of solicitor Emma Butcher in support of its application. Topalsson relies upon the Seventh witness statement of Mr Topal. Topalsson resists the Funding Disclosure Application based on: (i) prematurity; (ii) the Non-Party Costs Application is inherently unlikely to succeed; (iii) the '*severe consequences*' for Topalsson in Germany should it be made to comply with the order sought; and (iv) various points about the scope of the draft Order.

6. The draft Order seeks the following:

> *'The Claimant shall, by 4pm on [ ], serve a witness statement verified by a statement of truth addressing the identity and source of the Claimant's funding of*

the litigation, together with all relevant documents evidencing such funding. The Claimant's witness statement shall include:

a. *The identity and address of any individual, company or entity which provided loan finance to the Claimant relevant to the Claimant's funding of these proceedings between [22 April 2020] and [31 October 2023];*

b. *The identity and address of any individual, company or entity which provided the Claimant with funding between [22 April 2020] and [31 October 2023] that has been used in whole or part on these proceedings, or otherwise enabled Topalsson to pursue them;*

c. *Details of any guarantees provided by the Claimant's director in relation to any loan or funding arrangement under (a) or (b) above;*

d. *In relation to each loan or funding arrangement under (a) or (b) above:*

i. *the amount of the loan or funding;*
ii. *the terms on which such loan or funding was provided;*
iii. *the extent of each lender or funder's involvement in the conduct of the action;*
iv. *the nature and extent of each lender or funder's interest (financial or otherwise) in the outcome of the action.*'

Privacy

7. Reference was made in the Tenth witness statement of Ms Butcher and in Mr Topal's responsive witness statement to the contents of documents containing confidential commercial information and certain issues ongoing in Germany which themselves are not, and should not at least presently be, in the public domain. There was an unopposed application that the entire application before me be heard in private. I did not accede to this, as to have done so would have been contrary to the principles of open justice. I did accept that those aspects of the application which adverted to the confidential aspects of information or the matters ongoing in Germany, was to be held in private. In the end, it was necessary to do so for about one minute. I do make an order, as Waksman J did in the context of the anti-suit injunction he dealt with, that a non-party shall not be entitled to obtain a copy of the relevant witness statements and skeleton arguments from the Court file without the permission of the Court, pursuant to CPR 5.4C(4) (and in respect of any such application by a non-party, the parties have liberty to make representations in reply).

8. It has not been necessary to refer to any confidential information in this judgment. The confidential information was largely tangential to the matters I have had to consider on this application.

The Applicable Principles

9. Section 51 of the Senior Courts Act 1981 empowers the court to make costs orders against non-parties to proceedings.

10. It is not in dispute that, as a matter of principle, where a power exists to grant a remedy, there is, inherent in that power, the power to make ancillary orders to make the remedy effective (Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd [2003] EWHC 1381 (Comm) at §7 per Morison J).

11. Whether an order should be made is clearly a matter in the discretion of the court and will turn on the particular facts. The breadth of available ancillary orders in the context of information sought in order to advance a non-party costs order was considered in Automotive Latch Systems Ltd v Honeywell International Inc [2008] EWHC 3442 (Comm). The applicant in that case sought the identity of all individuals, companies or other entities which had provided funding since a particular date, the amount of such funding in each case, the terms on which such funding was provided, the extent of each such party's involvement in the conduct of the action, and the nature and extent of that party's interest (financial or otherwise) in the outcome of the action. The order was granted by Flaux J (as he then was) on the basis that it was unsatisfactory that the court should determine the application without more than the mere disclosure of the names of funders or that the applicant should seek to join funders, against whom it later transpired there was no basis to consider a non-party costs order. In Stati v Kazakhstan [2019] 5 WLUK 275 by Cockerill J, a similar order was made.

12. Further guidance is found in Thomson v Berkhamsted Collegiate School [2009] EWHC 2374 (QB) (endorsed by the Court of Appeal in Flatman v Germany [2013] EWCA Civ 278 at [48ff]). The most relevant of Blake J's observations for the purposes of the application before me are as follows:

> '*17. Before considering whether it is necessary to make the orders the defendant seeks, or any orders, the court needs to consider when a third party costs order is likely to be made in cases of this sort. If the case is weak it is inherently improbable that an order would be made. Alternatively, if it is so overwhelming it seems unlikely that ancillary orders for disclosure, inspection cross-examination of otherwise will be considered really necessary.*
>
> *18. ... From this learning I deduce the following general principles of potential relevance to the present case:*
> *i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.*
>
> *...*
> *iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders, as described at the case of Hamilton v Al-Fayed No. 2 [2002] EWCA Civ 665 reported [2003] QB 117 at [40], will not normally have the discretion exercised against them. That definition of "pure funders" means those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business and in no way seek to control its course.*
> *...*

> *vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs. For that reason the inherent strength of the application is always a relevant factor.*
>
> *Relevant considerations in the present application*
> *19. In considering whether, in the light of the particular facts and issues in the case, disclosure is necessary for the fair determination of the application I conclude that I should consider:*
> *i) The strength of the application as it now appears unassisted by disclosure;*
> *ii) The potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue;*
> *iii) Whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege;*
> *iv) Whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances.'*

13. Mr Shirazi, on behalf of Topalsson, submitted that the first stage is for the Court to consider whether an application for third party costs is '*likely to succeed*'. I disagree for two reasons.

14. First, it forms no part of the test for the applicant to demonstrate that the potential or impending application for a non-party costs order is '*likely to succeed*'. Indeed, as Blake J indicated at [17] quoted above, where the future application is, on the face of it, *overwhelmingly* likely to succeed this may be a situation in which disclosure is unnecessary and so will not be ordered. At the other end of the scale, an application for disclosure may well be refused if, on the basis of the material before the court, the impending application is inherently weak or fanciful. Providing the applicant can show that its future application is not inherently weak or fanciful, the court will be slow to undertake any further assessment of the merits of the future application.

15. Second, there are circumstances (not relevant to the application before Blake J) where the very purpose of an application for disclosure of funding related information may be to determine the existence, identity and potential relevance of funders. In this sort of application, it would generally be premature to consider whether there was a real prospect that any such application under section 51 would succeed (unless, for example, there was no basis to consider the existence of any third party funding, or risk that the cost order would not be met by the party to the litigation). In *Automotive Latch*, Flaux J made clear in terms that none of the relevant potential non-parties were before the court and nothing that he said on the application for disclosure was or was intended to pre-empt any consideration the court might have to give at a later date as to the appropriateness or otherwise of making any order under section 51. As set out above, one of the reasons for requiring the provision of information in that case was to avoid the costs of making of an application against a party which may be doomed in due course to fail. The very fact that (i) an application against a particular funder may *not*

succeed and (ii) disclosure is necessary to consider whether that may or may not be right, can justify, as it did in Automotive Latch, exercising the Court's discretion in favour of disclosure. Reference to the relevance of '*the inherent strength*' of the future non-party costs order, as referred to by Blake J in the passage above, must therefore be considered in the context of the application before him.

16. In all cases, the Court will go on to consider the likely value of the documents sought to the exercise the Court will undertake, whether there are reasons that the documents cannot or should not be provided, proportionality and any other matters relevant to the exercise of its discretion and the overall justice of the order sought.

17. In the present case, RRMC has an identified target for its Non-Party Costs Application (namely Mr Topal). However, it also submits that there is reason to believe that Topalsson may have had other funding sources, as to which it has limited or no information. In light of the foregoing, it is right that I consider in relation to the application which is specific to Mr Topal whether it is inherently weak or fanciful. It is not possible to ask the question in the same way in relation to the other potential funders. The preliminary focus in the latter context is, instead, whether there is a rational basis for the court to conclude that such other non-party funder or funders may exist in respect of which a non-party funding application might properly be made.

Prematurity of the Application

18. The costs judgment in favour of RRMC is currently the subject of an outstanding stay application before the Court of Appeal, and which may be dealt with 'any day'. If that application succeeds, Mr Shirazi submitted, no third party costs order could possibly be made at this stage. It was argued that, as such, the application for disclosure should be resolved only after that stay application has been resolved, identifying a risk that the application for disclosure may have (unidentified) 'collateral impact'.

19. I do not regard the application before me as premature, or one that the Court should adjourn. First, as Mr Munro, counsel for RRMC, points out by reference to the judgment of Jackson LJ in Loson & Anr v Brett Stack & Anr [2016] EWCA Civ 610, costs liability does not need to be finally determined for the Court to make a non-party costs order. Second, whilst the timing of the application in the context of the overall state of litigation is of course a factor which goes to the exercise of discretion, it does not in this case constitute a good reason why disclosure of the funding arrangements for the litigation should not be given in circumstances where at present (a) there is not in fact a stay in place in relation to the Costs Order and (b) the Costs Order is outstanding, and has been for some time.

20. Mr Munro's written submissions contained considerable material urging upon the Court the conclusion that Topalsson's grounds of appeal were hopeless. However, it would be wrong for me to form any view as to the merits of the appeal, and it is not necessary for me to do so in order to determine, as I do, that the application should be not dismissed or adjourned because it is 'premature'. There is nothing to be gained from waiting. Moreover, if the disclosure provided undermines the prospective contention that Mr Topal can be considered 'the real party' to the litigation and/or no other relevant funders exist, such that it becomes clear that the section 51 application would be unsuccessful, this only serves to minimise the impact on Court resources in the future.

Merits of the Prospective Third Party Costs Order

21. The prospective application in relation to Mr Topal is not inherently weak or fanciful.

22. Mr Topal is the founder, CEO and (now) majority shareholder of Topalsson, the company which bears his name. At the time the litigation was instigated, he was the sole shareholder. However, I bear fully in mind that this of itself may be insufficient. This is clear from the following authorities:

(1) Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39; [2004] 1 W.L.R. 2807 at [25(3)] in which Lord Brown of Eaton-Under-Heywood said:

> '*(1) 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. 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 …*
>
> *…*
>
> *(3) 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*.'

(2) DNA Productions (Europe) Ltd v Manoukian [2008] EWHC 2627 (Ch), in which Evans-Lombe J held at [6]:

> '*(i) The fundamental contrast is between a director who* bona fide *pursues unsuccessful litigation in the name of the company for the benefit of the company, but where the company cannot pay the order for costs against it, for the benefit of its creditors, and where the director in question is the real litigant in the sense that the court can be satisfied that without his initiative and finance the litigation would not have been pursued by the company, and who stood, albeit with others including creditors, to benefit materially from its success.*
>
> *(ii) The decision whether or not to make a non-party order for costs is essentially a matter of discretion for the court to be exercised on a review of all the facts of the case and the conduct of the proceedings. …*'

(3) Goknur Gida Maddaleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanati AS v Aytacli [2021] EWCA Civ 1037, in which Coulson LJ set out the following guidance:

> '*a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case …*

> *b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as 'the real party to the litigation' …*
>
> *c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare …, s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes … . Such an order does not impinge on the principle of limited liability …*
>
> *d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party … . But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the 'real party', and could justly be made the subject of a s.51 order …*
>
> *e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case …*
>
> *f) If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation …*
>
> *g) Such impropriety or bad faith will need to be of a serious nature … and … would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.'*

23. Whilst there is no impropriety alleged against Mr Topal, I accept on the evidence before me that there is nothing inherently weak in the submission, in respect of which I of course form no firm view, that Mr Topal has controlled this litigation in a manner which can be said to set him apart from the ordinary company director. Mr Munro's submission that Mr Topal stood to benefit most from the proceedings as Topalsson's majority shareholder is likely to be right on the present evidence, and there are arguable grounds to consider that Topalsson is a vehicle for Mr Topal's personal ambitions and his own perception of his reputation. As Topalsson' Counsel stated at the PTR for the Termination Trial '*Although it is a corporate claimant, it is very much [Mr Topal's] company and it's very much a dispute in which he has considerable personal interest*'.

24. Neither is it fanciful, on the evidence, to conclude that Topalsson could not finance these proceedings by itself, and Mr Topal himself confirms the existence of external support. I accept the material before me establishes that there are at least reasonable grounds to consider the existence of other funders upon which Topalsson and the continued pursuit of the Termination Trial may have been dependant. RRMC has identified specifically Hiscox (Topalsson's insurer) and Venturica UG, a company which invested in Topalsson, after proceedings commenced in return for a minority (15%) stake. Moreover, the existence of investment in or financing of Topalsson is evidenced by the confidentiality agreement produced by Mr Topal (although the name of the investor has been redacted). There is no necessary inconsistency between the focus on Mr Topal and the concern to understand the extent of other funding. There may be more than one 'real party' to the litigation.

25. To the extent, therefore, it has been necessary to consider the inherent strength of the future application, against both Mr Topal and other potential non-party funders, I consider that RRMC's application passes the threshold.

26. More, the evidence before me suggests that the information sought is likely to elucidate considerations highly probative of the exercise of the Court's discretion in due course. Whilst, if my understanding of the history of the litigation between RRMC and Topalsson is correct, there is a depressingly real risk that an order requiring disclosure may provoke a side alley of satellite litigation around compliance, the result of proper compliance with the order would not cause 'diminishing returns', but a proper and transparent basis upon which the Court can fairly judge the Non-Party Costs Application in due course.

'Impossibility' of Performance and Impact on third parties

27. Although headed as 'impossibility' in Topalsson's written submissions, there is plainly nothing impossible about compliance with the order sought, and impossibility was not, in fact, argued. Instead, Mr Topal gives evidence that Topalsson and its investors entered into confidentiality agreements, breach of which caused by a requirement to give the sought information or disclosure would lead to serious consequences for Topalsson in Germany in terms of exposure to criminal and civil sanctions.

28. Before turning to the evidential basis upon which Mr Topal makes these points, it is necessary to consider the legal framework within which such a submission sits. In the context of compliance with foreign legal obligations, Mr Munro relies upon the following passage from *Matthews & Malek on Disclosure*, (6th Edn at 8-26) which states:

> '*The court may take into account, in deciding whether to order disclosure, the fact that compliance with the order would or might entail a breach of foreign law. But to make the objection good, it must be shown that the foreign law concerned forbids, not merely disclosing the contents of the relevant documents, but their very existence. If it is only the former, the objection is left to the stage of inspection. It will also need to be shown that the foreign law concerned contains no exception for legal proceedings, and that it is not just a text, or an empty vessel, but is regularly enforced, so that the threat to the party is real. Even so, the court has a discretion and, on the basis that English litigation is to be played according to*

English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this ground. More often than not where foreign law is raised as an objection, any threat of a sanction abroad against the disclosing party is found to be more illusory than real, especially when comity consideration may be expected to influence the foreign state'

29. This passage (in an earlier edition) was cited with approval in Bank Mellatt v HM Treasury [2019] EWCA Civ 449, in which the Court of Appeal considered the tension which can arise between the English law requirement for the inspection of documents and the provisions of foreign law in the home country of the litigant. The over-riding principle was summarised in paragraph 3, which Gross LJ stated that '*where such a tension arises, it is for the Court to balance the conflicting considerations: the constraints of foreign law on the one hand, and the need for the documents in question to ensure a fair disposal of the action in this jurisdiction, on the other*'. That case concerned an order made by the High Court requiring an Iranian party to produce documents in unredacted form but subject to various confidentiality provisions. It was common ground that the production of the Iranian documents covered by the order would constitute a breach of Iranian law. Having considered the relevant authorities, Gross LJ provided the guidance which might be succinctly summarised as follows:

(1) An English court (where matters of disclosure are matters for its procedural law) has jurisdiction, in its discretion, to order disclosure, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.

(2) An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, but it is not precluded from doing so.

(3) In exercising its discretion, the court should:

  (a) weigh, on the one hand, the real – in the sense of actual - risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings.

  (b) consider fashioning the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

30. In terms of compliance with contractual confidentiality clauses which may give rise to civil actions (whether foreign or domestic), the position is correctly summarised in *Zuckerman on Civil Procedure* (4th Edn at 15-129):

'*Neither a party nor a non-party is entitled to invoke privacy or an obligation of confidentiality as a reason for refusing disclosure of documents or providing information, if it is required in the legal process. At the same time, however, the court is not bound to ignore the effect that an order for disclosure may have on a person's privacy or on their right to maintain certain information as confidential. On the contrary, the court must accord protection to the interests of privacy and confidentiality to the extent that it can be done without compromising the administration of justice.*'

31. In support of the concerns he raises, Mr Topal appends a statement from Dr Maren Mönchmeyer of Graf von Westphalen 'GvW', who purports to provide an opinion about the effect of Topalsson giving the sought information and disclosure in light of the terms of a confidentiality agreement which is appended to the statement, and about which Mr Topal also gives evidence ('the Confidentiality Agreement'). There is a single Confidentiality Agreement, relating to a single investor. Mr Topal's evidence is entirely vague as to whether this particular Confidentiality Agreement was entered into with anyone else. There is also no evidence that Mr Topal himself would be bound by any such agreement with Topalsson in relation to funding he provided, and it seems somewhat improbable that even if he had, Mr Topal would sue Topalsson if it breached the agreement by compliance with a Court Order. The 'serious consequences' point cannot, on any view, apply to the application for disclosure and information insofar as it relates to Mr Topal (RRMC's primary focus).

32. Mr Munro's submissions as to the evidential value of Dr Mönchmeyer's statement, on its face, have some force. There is no identification of Dr Mönchmeyer's expertise to give a relevant expert opinion and there is no appropriate statement of truth. This may be contrasted with the responsive opinion of Dr Andrea G Thürauf, who states that he is a lawyer licensed to practice in Germany, specialising in intellectual property and data protection law both on a national and international level, and whose statement is signed with a statement of truth. Were it necessary for me to do so, I would prefer the evidence of Dr Thürauf to the extent that a relevant conflict of opinion existed.

33. However, putting these points to one side and taking Dr Mönchmeyer's statement at face value, the support to Mr Topal's evidence as to the existence of any real risk to Topalsson of criminal or civil proceedings were it to be required to provide the information sought is, at best, extremely limited in any event:

    (1) Insofar as criminal prosecution is concerned, Dr Mönchmeyer only says a '*violation of [the relevant trade secrets legislation] might even be a criminal offence … however only subject to further requirements*'. The '*further requirements*' are not explained or considered. Moreover, there is no evidence whatsoever before me of the actual risk of criminal proceedings which, as is made clear in the authorities set out above, is crucial.

    (2) As for the civil proceedings, Dr Mönchmeyer says that there is '*at least a risk*' or '*at least a certain risk*' of damages for contractual breach or trade secrets legislation. Mr Topal gives evidence that '*a breach of any of the Confidentiality Agreements could lead to the imposition of a minimum penalty of EUR 5million*'. However, this statement is not supported by any German law opinion. Dr Mönchmeyer does not address clause 6.1 (which is the clause which purports to be an agreement by the parties to pay a 'reasonable' penalty of €5m for any and every instance of an intentional or negligent breach of the Confidentiality Agreement) at all. Instead, rather than supporting the contention that such a penalty clause would be enforceable under German law, Dr Mönchmeyer instead refers specifically to the risk as one of 'damages'. However, it is not easy to conceive of what loss would be caused to a funder by Topalsson complying with the order sought, particularly in circumstances where the information disclosed remains confidential to the parties in this litigation and its use is limited to the litigation. Save for the possibility of nominal damages, no potential types of loss

which could in any real sense sound in a damages claim have been identified, whether by Dr Mönchmeyer, or indeed, anyone else on behalf of Topalsson.

(3) Whilst Dr Mönchmeyer also opines that '*disclosure might be in conflict with data protection law*', there is no evidence, again, of an actual rather than illusory risk or what the consequences are if the risk eventuated. Dr Mönchmeyer does not identify any cases where there has been an action for a breach of GDPR following provision of information in accordance with a court order (into a confidentiality ring).

34. Even taking this evidence at its highest, and without consideration of the responsive opinion from Dr Andreas G. Thürauf relied upon by RRMC, this information is wholly insufficient to persuade me that there is any actual, as opposed to theoretical, risk that either criminal or meaningful civil proceedings would be brought should Topalsson be required to provide the type of disclosure sought (the precise breadth of which is considered further below). Moreover, such risk as may exist can be managed appropriately by the imposition of appropriate confidentiality provisions to ensure that the information provided remains confidential to the court and the parties, and (as would be the case anyway) used only for the purposes of the Non-Party Costs Application. If remaining risk exists at all (which I conclude on the evidence before me does not), it would be minimal and significantly outweighed in the balancing exercise by the importance of the information to the ability of the Court justly to dispose of the impending Non-Party Costs Application.

35. I do not consider that it is appropriate to require RRMC to give any undertaking in damages to Topalsson in light of my conclusions as to a risk. No authority was advanced to suggest an undertaking in damages would be appropriate in circumstances where a court orders that the importance of the provision of information or documents to litigation outweighs any risk of an action for breach against the disclosing party, and none is referred to in the authorities or texts considered above. There are good reasons to suppose that, having reached the conclusion it does on the balancing exercise, it would not, as a matter of principle, be appropriate for a court to require an undertaking from the party seeking disclosure. However, if there was to be a case to test that question as a matter of principle, in light of my conclusions as to risk as set out above, this is plainly not that case.

36. I consider that, considering all the circumstances of this case, it is appropriate in order that RRMC's Non-Party Costs Order application is dealt with, in due course, both efficiently and fairly, for Topalsson to provide information and/or disclosure relating to the funding of the Termination Trial to the extent considered in the following section, and that the provision of the information/disclosure shall (at least in the first instance) be provided into the existing confidentiality ring.

Breadth of the Order

37. A number of points of dispute exist between the parties in respect of the draft Order sought (set out in the Introduction above).

38. There is a debate about the correct starting and end dates. The starting date should be the date of termination, namely 22 April 2020. It should not be the commencement of

litigation, as argued by Mr Shirazi, because in the short window between April and November 2020, there was pre-action correspondence and a mediation, and the question of funding of the litigation is likely to have been a live one.

39. The end date should be 31 October 2023. The litigation (by way of appeal) is ongoing and the funding question is likely to remain live.

40. Subject to these points, the wording proposed in relation to orders at (a) and (b), relating to the identity of providers of loan finance or funding, is granted as sought.

41. Sub-paragraph (d) as sought by RRMC largely echoes the wording of the order granted by Flaux J in Automotive Latch.

42. Mr Shirazi argued that the phrase 'nature and extent' is unclear, and as such renders the order unenforceable (and he submitted, as he was bound to, that the same logic applied to the order of Flaux J in Automotive Latch). In my view, the phrase has a clear meaning, particularly when considered in context of the purpose of the order. It was not unclear in the mind of Flaux J, and it is not unclear in mine. I therefore order (d) in the terms sought (I do not amend it to add 'nature' into (iii), as requested orally by Mr Munro).

43. Whilst arguably, sub-paragraph (d) is wide enough to include the subject matter of (c), I accept that in the context of this case, clarity is to be preferred and I also order (c) in the terms sought.

Costs

44. Topalsson sought an order that, by way of analogy with pre-action disclosure against a non-party pursuant to CPR 46.1, the applicant should now be ordered to bear the costs of the application and of complying with the order. This is plainly not the right approach: if the non-party costs order succeeds against one or more people or institutions, the Court will have determined by definition that that person or institution is the 'real party' to the ligation, and the analogy falls apart. If the application fails, it may be that at that point the analogy remains a good one. Costs of complying with the order are to be reserved.

45. In terms of costs of the application, these are to be paid by Topalsson. I do not consider that these costs ought to be reserved: the disclosure application stands alone from ultimate success or failure of the Non-Party Costs Application, in the way interlocutory battles often do in broader litigation. As Mr Shirazi was at pains to point out in a slightly different context, as things stand, the non-parties have not been represented at this hearing, and it is not the non-parties who have fought the disclosure application or incurred any costs. Topalsson could have acceded to RRMC's requests for information, but it resisted the application and lost. The costs will be summarily assessed by me on the papers, and I will leave it to Counsel to agree the form and timing of short written submissions in that regard, as well as agreeing the finalised wording of the confidentiality order to be perfected, for approval.