Neutral Citation Number: [2023] EWHC 850(Ch)

Case No:CR-2021-000718

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (CHANCERY DIVISION)
IN THE MATTER OF SPRING MEDIA INVESTMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
London
EC4A 1NL

Date: 20 April 2023

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

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Between :

SAXON WOODS INVESTMENTS LIMITED
(a company incorporated under the laws of the Bahamas)

Petitioner

-and-

(1) FRANCESCO COSTA
(2) FAR EAST MEDIA HOLDINGS PTE LIMITED
(a company incorporated under the laws of Singapore)
(3) GROSVENOR INVESTMENT PROJECT LIMITED
(4) HDO HOLDING LIMITED
(5) BAY CAPITAL INVESTMENTS LIMITED
(a company incorporated under the laws of Mauritius)
(6) KHATTAR HOLDINGS PRIVATE LIMITED
(a company incorporated under the laws of Singapore)
(7) SIMON POWELL
(8) SPRING MEDIA INVESTMENTS LIMITED

Respondents

Mr Jack Rivett (instructed by Stephenson Harwood) for the Petitioner
Mr Richard Hill KC and Ms Hassell-Hart (instructed by Joseph Hage Aaronson LLP) for the First Respondent

Hearing date: 21 and 27 February 2023

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JUDGMENT

Introduction

1. On 20 January 2023, the Petitioner issued an application seeking to vary the order made by me on 9 December 2022 in relation to an application seeking security for costs. At that hearing, I directed that the Petitioner provide security for the First Respondent's costs of the proceedings by paying into the Court Funds Office the sum of £1,348,910 by 6 January 2023. That sum took into account, applying a discount, of the existence of the ATE policy which the Petitioner had. Various extensions were agreed between the parties as to the date for paying into Court. Mr Rivett, acting on behalf of the Petitioner, invites me to vary that order effectively replacing the payment of £1,348,910 by the ATE policy with its anti-avoidance endorsement which its Insurer has agreed in principle to provide. The application is opposed by the First Respondent. Various grounds of opposition are raised and I will deal with each in turn.

Background

2. In summary, Spring Media Investments Limited (the Company) is the holding company for a group of companies which provide creative services on a fee basis model to existing fashion brands as well as beauty and luxury brands. The Petitioner

owns a minority shareholding in the Company. The First Respondent is a director and Chairman of the Company who is alleged to have a substantial indirect interest via the Second to Fourth Respondents. The Second to Seventh Respondents are the other shareholders who have taken no part in these proceedings. The dispute arises under the terms of the shareholders agreement between the Petitioner and the First Respondent. The Petitioner asserts that the Company is in breach of the terms of the shareholders agreement and that the First Respondent is exclusively and/or principally responsible for the Company's breach of contract. This relates to the conduct of the exit process (being the sale of the Company) as defined and described in the agreement. It is also alleged that the conduct of the First Respondent is in breach of his duties owed to the Company. All the above is denied by the First Respondent who also makes some serious allegations as against Mr Loy, a former director of the Company, as well as, it is alleged, the controlling mind of the Petitioner. The First Respondent alleges that it was Mr Loy who is in breach of the duties owed to the Company by his actions in failing to disclose, and/or misleading the Company in relation to certain potential purchasers and the alleged proposed arrangements he was making with them which were not known to the Company.

3. The above is a very brief summary and it is not supposed to be comprehensive or create any impression about the merits or otherwise of the petition and the defence. I deal below in more detail with the amended points of defence as this will be important in assessing what the ATE policy and anti-avoidance endorsement covers and whether there is a real risk relating to the insurer seeking to avoid on grounds of fraud etc.

Is the Petitioner entitled to make the application ?

4. Mr Hill, on behalf of the First Respondent, focussed heavily in his submissions on this point. He submitted that effectively what the Petitioner was seeking by its application was to be able to have a re-hearing. He relied upon well established cases, in particular, *Chanel Ltd v FW Woolworth & Co ltd [1981] 1 WLR 485.* Effectively this sets out the principle that a party is not entitled to a rehearing of an interlocutory matter unless there has been some significant change in circumstances or he has become aware of facts which he could not reasonably have known or found out before. He submitted that the issue of an anti-avoidance endorsement should have been before the court on 9 December 2022. He submitted that there had been no change of circumstances and accordingly the Petitioner was not entitled to seek to reopen the issue and seek a variation.

5. Both parties took me to the case of *Recovery Partners GB Ltd v Rukadze [2018] 1 WLR 1640*, a decision of Mr Nicholas Vineall KC. Briefly, undertakings had been provided by solicitors acting on behalf of the claimants in response to a threatened security for costs application. The claimants thereafter obtained an ATE insurance policy under which the insurer unconditionally and irrevocably undertook to pay the defendants any sums payable pursuant to an order in respect of the claim which finally determined the claimants' liability for the defendants' costs. The claimants also agreed to endorse the policy to ensure all monies thereunder would be paid to the defendants' solicitors directly and a deed of charge was executed in favour of the defendants.

6. The claimants applied to court, seeking an order permitting the undertakings to be released in exchange for the provision of security for the same costs by way of the deed of indemnity and the ATE insurance policy. The claimants sought the substitution but did not argue that they would suffer hardship or prejudice if their solicitors continued to hold the sum of money, nor that they were prejudiced from pursuing their claim.

7. The Judge refused the application but held that (1) where a party had previously provided an undertaking in lieu of an order for security for costs, the application to substitute this undertaking by another form of security required there to be a material change of circumstances, (2) the court thereafter had a broad discretion to decide whether or not the substitution should be effected, (3) the court did not approach the matter as if there was a de novo application for security and therefore the court's approach was not as if it was considering whether the security being offered was an acceptable form of security. Other factors may well be relevant, such as how long the old security had been in place, whether the costs secured had already been incurred, the extent of the difference between the old and new form of security, the strength of the explanation for the claimant's change of position and whether declining the substitution would cause hardship or prejudice to the claimant or inhibit its ability to pursue its claim. Taking all these factors into account, including that the security offered was an acceptable form of security, the Judge declined to order the substitution as it appeared that the substitution was sought not on grounds of hardship or prejudice but as a matter of preference.

8. The claim itself concerned allegations by the claimants of breaches of duty by the first to third defendants arising out of the alleged diversion of opportunity to provide lucrative services to the family of Arkadi Patarkatsishvili, the deceased Georgian billionaire. The allegations against some of the defendants included an allegation of improper diversion of the work recovering Mr Patarkatsishvili's assets. The security which was offered consisted of both a deed of indemnity as well as the ATE insurance policy. Accordingly, the Judge did not have to consider issues relating to the adequacy of the ATE policy and any issues relating to risk that the insurers would seek to avoid the policy on grounds of fraud or nondisclosure. There is no deed of indemnity being offered in the case before me.

9. The relevant passages in the judgment are as follows:-

'17. On an application for security for costs the court has a wide discretion not only as to whether, and in what sum, such security should be provided, but also as to the means by which it should be provided. Mr Tom Weisselberg QC for the claimants submitted, by analogy with Rosengrens Ltd v Safe Deposit Centres Ltd (Practice Note) [1984] 1 WLR 1334 (which was a case of security pending an appeal) that if, on an application for security, two different forms of security would provide equal protection to the defendant, the court should, all else being equal, order the form which is least onerous to the claimant. I accept that submission.'

'20. It is therefore now clearly established that the existence of ATE insurance can provide an answer to a security for costs application, and that the relevant question is whether the policy provides ""sufficient protection"'.

'36. Nothing in the wording of the undertakings gives any clue as to the

circumstances in which, or basis on which, the parties intended that the undertaking might be released. In those circumstances I agree that there has to be a material change of circumstance in order to engage the court's discretion in relation to a possible release of the undertaking.'

10. The change of circumstances relied upon in *Recovery Partners* was simply that the claimants were now offering the ATE policy and the deed of indemnity by way of security. As the Judge stated, all that has changed is that the claimants now have available to them a different way of providing security and they would prefer it by this alternative mechanism. He stated:

'There was no evidence as to whether they could have provided the security by this alternative method at an earlier stage had they been minded to do so. I therefore have some doubt as to whether there has in fact been a material change of circumstance of the sort necessary at the threshold stage to permit consideration of an application for a release of undertaking, but since the defendants were content to proceed on the assumption that there has been, I will proceed on the same basis, without deciding the point'(paragraph 37).

'42. In my view, and remembering that the burden is on the party seeking release from an undertaking, the factors which might be material on an application of the present type, and which do arise and are material in this case, include the following: (a) how long the old security has been in place and whether the costs which it secured have already been incurred; (b) the extent of the difference (if any) between the quality of the old security and the quality of the new security; (c) the strength of the explanation given for the claimant's change of position; (d) in particular, whether or not, and if so to what extent, declining to permit the change would cause hardship or prejudice to the claimant or inhibit its ability to pursue its claim.'

11. The background to the hearing before me on 9 December 2022 is of importance to be able to consider whether the Petitioner is entitled to make this application by way of a change in circumstance or whether as Mr Hill submits, the Petitioner should not be entitled to seek to re-open the hearing and its outcome.

12. The application for security for costs was issued some time ago, being on 27 October 2021. Solicitors for the Petitioner indicated on 5 January 2022 that if the Petitioner was to provide security for costs, it would be prepared to do so by way of an anti-avoidance endorsement to its ATE Policy. The solicitors also pointed out that the current ATE policy provided protection already, even if discounted and therefore there was no urgency in dealing with the security issue before determination of issues of costs management.

13. According to Ms Quierin, a partner in the firm of solicitors acting on behalf of the Petitioner and set out in her witness statement dated 20 January 2023 in support of the current application, there was thereafter no mention of the issue of security for costs until November 2022. At that time, the case management conference had been listed for 9 December 2022. By letter dated 28 November 2022, the First Respondent's solicitors asked the Petitioner's solicitors for the proposed wording of the anti-avoidance endorsement. Ms Quierin states that she approached the insurers on this issue.

14. Then by letter dated 5 December 2022, being four days before the hearing in court, the First Respondent's solicitors served the First Respondent's application seeking to re-amend his Points of Defence in order to raise allegations of dishonesty. The defence had no such allegation before these proposed amendments. On the next day, an 18 page letter was served alleging dishonesty on the part of Mr Loy. The letter attached a large bundle of documents said to evidence the alleged dishonesty. That letter also asked whether the funders had been made aware of the matters now alleged and invited the Petitioner to abandon its claim.

15. As Ms Quierin sets out in her witness statement, the application and the letter were provided to the Insurers. By the time of the hearing a few days later, the Insurers had not authorised Ms Quierin to provide a draft of a proposed anti-avoidance endorsement. I pause here to say that this is unsurprising. Having considered the proposed amendments, it is in my judgment clear that the Insurers would have needed some time to consider these serious allegations being made as well as to consider the lengthy letter and the documentation which was also included as evidence of the allegations. Ms Quierin states that the Insurer did provide a draft endorsement on 8 December 2022 (the day before the hearing) but the Insurer did not authorise the solicitors to rely upon this draft as the Insurer had not by then had an opportunity to consider the substance of the allegations now being made and the effect on the merits of the Petition. Therefore, at the hearing before me on 9 December 2022, no draft endorsement was provided either to the court or to the First Respondent.

16. Accordingly, Mr Rivett submits that the current application is a change of circumstance in that the anti-avoidance endorsement was not available to the Petitioner at the hearing on 9 December 2022 because of the new serious allegations being made by the First Respondent, which were only served a few days before the hearing date. Mr Rivett also submitted that the evidence provided by Ms Quierin relating to the Petitioner's inability to meet the cash sum which I ordered on 9 December 2022 had not been placed before the Court because the Petitioner believed (I assume on legal advice) that the Court would accept, as at least part of the security necessary, the Petitioner's shares in the Company which it asserted

were of significant value. I rejected the ability of the Petitioner to provide security by relying upon the shares in the company essentially on illiquidity grounds.

17. Mr Hill submits that there is no change in circumstances. He submits that the Petitioner had ample time to be able to obtain the relevant draft endorsement and that it had failed to do so. Even before the letter dated 28 November 2022 sent from the First Respondent's solicitors seeking sight of the proposed wording, the Petitioner had failed to provide any draft endorsement. He also relied on the fact that the draft endorsement was not provided to the court when it could have been on 9 December 2022. Additionally, he submitted that the inability to be able to meet the cash payment ordered could have been raised at the hearing on 9 December and therefore this was not a matter which could be relied upon now. He also invited me to consider that the Petitioner had been made aware of the serous allegations earlier than the letters dated 4 and 5 December 2022 so there had been time for the Petitioner to obtain the relevant endorsement from the Insurer.

18. On the last point above, I have considered the letter dated 22 November 2022 relied upon by Mr Hill in this respect. In my judgment, that letter does not assist him. The letter relates to what the First Respondent's solicitors consider are deficiencies in the disclosure provided by the Petitioner. The letter states expressly at paragraph 2, *'The purpose of this letter is to raise and seek to resolve with you the various deficiencies identified in your client's disclosure to date.'* The letter was, in my judgment, clearly not written on the basis that the matters raised therein would form the basis of serious new allegations which were then to be set out in an application to re-amend the Points of Defence. The letter also asserted that the Petitioner's

pleaded case was unsustainable and bound to fail. The letter also invited the Petitioner to withdraw its case.

19. I do not accept that this letter constituted notice that the First Respondent would seek to apply to re-amend its defence to add some serious allegations relating to dishonesty. I also do not accept Mr Hill's submissions that in some way the draft endorsement should have been made available to the court on 9 December 2022. In my judgment, due to the timing of the service by the First Respondent's application to re-amend coupled with the lengthy letter and documents in support, the Petitioner found itself unable to produce the endorsement which it had in draft. The Insurer had clearly not given the Petitioner authority to release the draft and seek to rely upon it. Even if an earlier draft anti-avoidance endorsement had been produced (something Mr Hill submitted could have been done) the proposed amendment was such that no earlier draft could have been properly relied upon by the Petitioner until the Insurer had been provided with an opportunity to consider the new serious allegations made. By reason of the timing of the production to the Petitioner of the proposed amendment alongside the application to amend, the Insurer clearly had not had time to consider the same. This is clear from the evidence of Ms Quierin. So even if the draft which was in the hands of Ms Quierin had been produced, it would have not been capable of being relied upon because it clearly would have been produced before consideration by the Insurer of the amendments to the Points of Defence. Equally, any draft which could have been served at some earlier stage would not have been capable of being relied upon because of the argument which would arise that the proposed amendments altered the nature of the defence and the allegations being made against Mr Loy.

20. In my judgment, due to the timing of the service of the application to re-amend and the lengthy letter by the First Respondent, the Petitioner was unable to rely upon an anti-avoidance endorsement at the hearing on 9 December 2022. No draft anti-avoidance endorsement was before me and I do not accept, in so far as this was Mr Hill's submission, that the Petitioner and his solicitors should have produced the draft in their hands despite the clear lack of authority from the Insurer to produce the draft then in the hands of the solicitors.

21. The whole point of the anti-avoidance endorsement was to enable reliance upon the same based upon the pleaded case. That case was now subject to a drastic change on the side of the First Respondent by reason of the serious allegations being made. The Petitioner had at the time of the hearing an inability to be able to rely on the draft endorsement as well as not knowing if the Insurer would still be willing to produce the anti-avoidance endorsement once it had considered the amendments proposed and the evidence relied thereupon.

22. Even if the draft endorsement held by Ms Quierin had been served prior to the hearing upon the First Respondent, the service of the serious allegations contained in the proposed amendments would have rendered the anti-avoidance endorsement of doubtful value. This is because the defence sought to raise new and serious allegations of dishonesty which clearly would have a bearing on the factual matrix and as well as what the Insurer was aware of relating to the pleaded case.

23. In my judgment, the Petitioner has established a change of circumstances. It had been unable to provide the draft endorsement at the hearing by reason of the new serious allegations. I should add that I do not consider that the Insurer should have

been able to deal with these issues by the time of the hearing. Any endorsement which would have been served prior to the hearing would also not have been capable of being relied upon by reason of the draft amendment and the serious allegations contained therein. The anti-avoidance endorsement has now been agreed in principle by the Insurers who have been provided with a proper opportunity to consider the amended case and the serious allegations.

24. As to the prejudice which would be suffered by the Petitioner if the variation is not granted, I do not accept Mr Hill's submission that it is too late for this issue to be raised. The evidence of Ms Quierin set out that the Petitioner expected to be able to rely upon the value of its shares in the Company. It was also clear that it had sought to obtain an anti-avoidance endorsement but due to the actions of the First Respondent in serving its amendment so close to the hearing, it had been unable to produce the endorsement. I do take into account the fact that even if there had been no proposed amendment, the Petitioner had left it very late to produce the endorsement. That meant it ran the risk of there being an adjournment with the costs being paid by it. Had the anti-avoidance endorsement been provided the day before hearing and the First Respondent had complained about its lateness, I consider that the First Respondent would have been entitled to seek to adjourn the hearing with an order for wasted costs in his favour. That risk is not the same as being deprived of an ability to deal with the serious allegations and to ensure the Insurer was aware of them in providing the anti-avoidance endorsement. Once the proposed amendment and application was served, it was not possible to produce the endorsement as I have set out above. The evidence of prejudice is relevant to the application before me. As I am satisfied as to the change of circumstances, then it

seems to me that I am also entitled to take into account the evidence produced as to stifling and inability to meet the security order currently in place if I were to reject the anti-avoidance endorsement. That is part of the application before me which has succeeded in establishing change of circumstance. Whilst Mr Hill asserted that the evidence of the inability of the Petitioner to raise the necessary funds is weak and far too general, I am not prepared to reject Ms Quierin's evidence on this matter. It states that the funder has not agreed to fund the current security order. It also states that Mr Loy is unable to realise the sums necessary and his wealth is tied up in the Company as well as in other nascent business interests.

25. In making this decision, I do not in any way adopt the assertion made by the Petitioner's solicitors that there was some deliberate conduct on the part of the First Respondent's solicitors in not serving the application to amend and the draft amended pleading as well as the lengthy letter and evidence in support until shortly before the hearing on 9 December 2022. I note that any such deliberate conduct is denied by the solicitors. It makes no difference to my judgment on this matter because, for whatever reason, the application, amended pleading and evidence in support were served so close to the hearing that this created the inability of the Petitioner to be able to deal with the matter with the Insurers. That was a matter beyond the Petitioner's control and, as I have already set out above, its effect was that even if it had already obtained an anti-avoidance endorsement, that would have been obtained without consideration of the new serious allegations being made.

26. Having determined that on the evidence, there is a change of circumstance, I turn to the proposed variation and in particular whether it offers sufficient protection. I

will then deal with other factors which I need to take into account, including those types of factors highlighted by the Judge at paragraph 42 of the judgment in *Recovery Partners*. Both parties, in reliance upon *Recovery Partners* accept that I have a wide discretion as to what sum or security should be provided and the means to be provided. However that case also demonstrates that the hearing before me is not a rehearing.

The proposed variation – does the ATE policy and the anti-avoidance endorsement ('the AA endorsement') provide sufficient protection

27. The starting point is *Premier Motorauctions Ltd v Pricewhaterhouse Coopers llp [2018] 1 WLR 2955 CA* which sets out as follows:-

19. It is, in a sense, unfortunate that the court's jurisdiction to order security for costs should depend on a detailed analysis of a claimant's ATE insurance policies into which the defendants have had no input and which they have no direct right to enforce. That is particularly so when the authorities discourage investigations into the merits of the proceedings and disapprove of security for costs applications being blown up ""into a large interlocutory hearing involving great expenditure of both money and time": see Porzelack KG v Porzelack (UK) Ltd *[1987] 1 WLR 420, 423E, per Sir Nicolas Browne-Wilkinson V-C.*

20. But I fear that such analysis is inevitable. There is little appellate authority on the topic but such as there is does support the proposition that an appropriately framed ATE insurance policy can in theory be an answer to an application for security. In para 60 of Nasser v United Bank of Kuwait *[2002] 1 WLR 1868, in which the claimant was resident abroad and security was refused on other grounds, Mance LJ with whom Simon Brown LJ agreed said in an obiter passage:*

> *""The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere.""*

22. In Al-Koronky v Time-Life Entertainment Group Ltd [2007] 1 Costs LR 57 where security was ordered against claimants resident out of the jurisdiction, Sedley LJ giving the judgment of the court said:

*""*35. *A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.*
*""*36 *In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffecrtive.""*

22.These authorities do not in terms touch on the question of jurisdiction but do give credence to Mr Sims's submissions that ATE insurance can, in principle, be taken into account at any rate if it gives the defendant ""sufficient protection"" to use Sedley LJ's words. If it does give that sufficient protection, then there will not be ""reason to believe"" that the company will be unable to pay the defendant's costs if ordered to do so and be no jurisdiction to make an order.

28. So the question is whether the policy with the AA endorsement provides sufficient protection. On the facts in *Premier Motorauctions*, the Court of Appeal determined that the policy did not provide sufficient protection. There remained the prospect of avoidance for non-disclosure or misrepresentation and, in contradiction with the first instance judge, the Court of Appeal did not consider that this risk was theoretical. It considered that the evidence of Mr Elliott was central to the resolution of the key question, being whether PwC and the Bank conspired together unlawfully to depress the Companies' assets and then acquire them at an undervalue. The Court of Appeal referred to the amended particulars of claim which it stated was 'redolent with what Mr Elliott was told'. Accordingly, the Court of Appeal disagreed with the first instance judge who had concluded that he had real doubts that that the disputed evidence of Mr Elliott will be as central to the case as the defendants suggested. The Court of Appeal considered that if Mr Elliott is not

believed, the Company would lose and be liable for the costs of PwC and the Bank. Again, disagreeing with the first instance Judge, the Court of Appeal stated that it did not share the conclusion of the first instance judge that 'it was something of a leap' to conclude that disbelief of Mr Elliott on the part of the judge would provide grounds for the insurers to avoid the policies.

29. Mr Justice Snowden had felt that he could rely on the fact that the proposals to the insurers were made by joint liquidators who are independent professional insolvency office holders and who investigated the claims with the assistance of experienced solicitors and counsel, which he considered provided a high level of objective professional scrutiny. Lord Justice Longmore observed that this did not in itself cater for cases of non-disclosure of matters which professionals do not know about. Neither the defendants or the court had been provided with the placing information put before the insurers, but Lord Justice Longmore observed, even if that had been provided, the court could not be satisfied that the prospects of avoidance were illusory. The court must, *'be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure'*. The Court of Appeal were not satisfied on the facts of the case before them that the defendants had that assurance.

30. In my judgment, it is clearly established that an ATE insurance policy can provide sufficient protection. It is clear that the construction of the terms and wording of the policy will be important, but also, as clearly demonstrated by *Premier Motorauctions*, the pleaded case and what issues arise will also need to be carefully considered. In many cases, an ATE policy has been offered by way of security with

an express anti-avoidance endorsement which is designed, to deal with specific concerns which have arisen and can be seen in the case law. For example, a provision which allows the relevant defendant the ability to enforce the terms of the policy and/or endorsement directly is commonly inserted. Restricting the ability of the insurer to avoid the policy is another example. Both of these types of measures are to be found in the anti-avoidance endorsement in the case before me. That of course is not sufficient, but such provisions do go some way towards the issue of sufficient protection. The real issue in this case is whether the policy and AA endorsement provides sufficient protection in relation to the risk of avoidance for fraudulent and/or reckless non-disclosure or misrepresentation.

31. Mr Rivett submits that, properly construed, the policy and the AA endorsement do provide sufficient protection. He also relies on the pleaded case to demonstrate that, unlike in the *Premier Motorauctions*, on the facts of the pleaded case before me, the risk is in any event illusory or fanciful. Mr Hill submits that the construction of the policy and the AA endorsement does not exclude avoidance for fraudulent presentation of the risk, being avoidance or cancellation of the policy on the grounds of fraud. Mr Hill submitted that the policy and the AA endorsement do not provide sufficient protection and left the Insurer being still entitled to avoid the policy in the event of reckless or fraudulent non-disclosure. He added that there is some doubt that such a clause could properly exclude such a liability in any event and that in the case, the risk is neither illusory or fanciful.

32. Mr Rivett relied upon *Geophysical Service Centre Vo v Dowell Schlumberger (MR) Inc [2013] EWHC 147 (TCC)* as setting out what the Court needs to consider.

Paragraphs 18 and 19 set out (quoting from Mr Justice Akenhead in *Michael Phillips Architects Limited v Riklin (2010) EWHC 834)* as follows:-

Turning to Mr Justice Akenhead's summary of principles at paragraph 18(c) of Riklin, *he said,*

"It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs."

19. In my judgment, this inevitably requires the court to form a view at this stage on the meaning of the policy and on how readily it may be avoided legitimately and contractually, and also to form a view of the likelihood of circumstances arising which will enable the policy to be readily, legitimately and contractually avoided.'

33. In summary the Court needs to be satisfied, when reliance is placed on an ATE insurance policy, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs. This requires the court to form a view at this stage on (1) the meaning of the policy, and (2) on how readily it may be avoided legitimately and contractually, and (3) to form a view of the likelihood of circumstances arising which will enable the policy to be readily, legitimately and contractually avoided.

34. Both parties relied upon a decision of Mrs Justice O'Farrell, *Lewis Thermal Ltd v Cleveland Cable Company ltd [2018] EWHC 2654* and *[2018] 6 Costs LO 759.* This was a breach of contract claim by the Claimant, which included a fraudulent

misrepresentation claim being that in relation to the cables to be supplied, the defendant made false representations as to the types and standards of the cables supplied. According to their pleaded case, the Claimant averred that the defective cables resulted in damage to its reputation and goodwill, damaging its standing with a third party and resulting in a loss of business. So the fraudulent misrepresentation claim was central in the claim.

35. The terms of the policy in that case contained no protection for third parties and also contained an express exclusion where the insured or appointed representative has failed to disclose material facts and also, '*8.15,"Fraud, where the insured or the appointed representative has made any fraudulent, false or misleading representation"*. There was also an issue relating to the solvency of the Claimant, an issue which is not relevant in the current case because the policy and AA endorsement expressly provide an entitlement to the First Respondent to enforce the policy directly and receive payment.

36. In paragraphs 35 and 36, the Judge concluded that the ATE policy did not provide adequate security for the defendant's costs. She stated as follows:-

35. First of all, cl.8 contains general exclusions that include at 8.6 the legal action being abandoned, discontinued, stayed or dismissed as a result of the claimant either not having the funds to continue or not being willing to commit funds to continue the action. That might result in an exclusion of liability because although the claimant has the benefit of no-win-no-fee arrangements with its solicitors, it does still have to fund disbursements with are relatively significant in terms of, at least, experts reports. Therefore, there must be a risk that those costs cannot be found and as a result, the claimant is forced to abandon the claim.

36. Secondly, at cl.8.7 the non-disclosure provision could give rise to an avoidance of liability on the part of the insurer because it is in relatively wide terms. It is where the insured (that is the claimant) or the appointed representative (that is the solicitors) have failed to disclose material facts. It perhaps is not fruitful for the

court to speculate on what might amount to material facts but, no doubt, matters found within disclosure or matters that subsequently emerge through the witness evidence could easily be relied upon by the insurer as material facts which had not been disclosed to it prior to inception of the policy and which could give rise to avoidance on the grounds of non-disclosure under cl.8.7.

37. *Thirdly, at 8.15 there is the potential for the insurer to avoid the policy where there has been any fraudulent, false or misleading representation. It is my considered view that where a claim, as in this case, raises serious allegations of fraud by way of fraudulent misrepresentation which are stated in terms by the defendant to be unjustified, it is very likely that there will be allegations of dishonesty made against the witnesses on both sides. In those circumstances, it is not beyond the realm of possibility that a finding might be made that one of the witnesses has misled the court in its evidence. If that were to be the case, it would give rise to an argument by the insurer that there was a misleading representation entitling it to avoid liability under 8.15.*

38. Fourthly, cl.13.6 provides in terms that the insurance does not confer or create any right enforceable under the Contracts (Rights of Third Parties Act) 1999. As a result of this, the defendant does not have a direct right of claim against the insurer in respect of its costs. As such, it is dependent on the claimant putting forward an appropriate claim to the insurer in respect of the defendant's costs. In the absence of such a claim which, as Mr. Hickey has reminded the court, would be by a dormant company, with no activity or assets, whose only purpose is to pursue this litigation, then the defendant would be left without a remedy against the insurer.
39. Fifthly, cl.13.21 provides that the insurer may terminate the policy if the insured fails to observe any material term of the policy or if the insured becomes bankrupt or insolvent during the period of insurance. In the event of termination by the insurer, the insurer will not be liable for any claim under this policy. As a result of that, if the claimant is unable to meet the disbursements required and as a result becomes bankrupt or insolvent, then the insurer will not be liable for any claim by the defendant under the policy. Those issues raise risks that are real and not fanciful, and they are risks that the defendant should not have to take.'

37. I have set out the entirety of the reasons provided by the Judge as to why, in her judgment, the ATE policy was not sufficient protection. Mr Hill relied heavily on the third reason set out above. I accept of course that the Judge's view in the case before her was that it is very likely that allegations of dishonesty will be made against witnesses in both sides and in those circumstances, '*it is not beyond the realm of possibility that a finding might be made that one of the witnesses has misled the court*

in its evidence. If that were to be the case, it would give rise to an argument by the insurer that there was a misleading representation entitling it to avoid liability under 8.15'. In my judgment, the *Lewis Thermal* case provides a useful example of the application of the legal principles to the facts of a case before the Judge. However, each case will depend on the terms of the policy (including here the AA endorsement) as well as the pleaded case and other matters which are peculiar to the case. To that extent, it is difficult to extract much from the third reason provided by the learned judge in isolation from the others she set out in some detail. All of them together led to her determination about adequacy.

38. Mr Hill relied on *Holyoake v Candy [2018] Ch 297* where the Court of Appeal considered the claimant's obligation to provide fortification of its cross-undertaking in damages and costs in relation to an injunction. The anti-avoidance endorsement was held by the Court of Appeal not to be sufficient to provide protection the defendants required as fortification in respect of the undertaking. Before turning to the passages relied upon by Mr Hill, it is important to place this case into its factual context. The claimants brought a claim for unlawful means conspiracy alleging that following a long running campaign of threats, abuse, intimidation and blackmail, the claimants had been forced to enter into a series of agreements which were disadvantageous to them. A notification injunction had been sought by the claimants against the defendants which had been granted by the Court. At a later hearing an order was made for the claimants to provide fortification for their cross undertaking in damages, "in a form reasonably satisfactory" to the defendants. This was held by the Court of Appeal to be an objective test namely whether the defendants could properly form the view that the proposed fortification was satisfactory. The Court of Appeal held that this would not be the case if a person in the position of the defendants might reasonably apprehend that there was a risk that the insurer might seek to avoid the policy.

39. The defendants identified two arguments by which the insurer might seek to deny liability in this situation, suggesting that the policy was thereby rendered objectively unsatisfactory: (i) The terms of the policy did not expressly preclude the insurer from avoiding for fraud; therefore, the insurer would be entitled to do so, and (ii) even if the policy terms purported to do so, an insurer's right to avoid the contract for fraud of the insured could not be restricted, as a matter of public policy.

40. Mr Hill expressly referred me to paragraphs 93 – 97 which I set out here:-

'93. The defendants submitted that there was, at the very least, a real possibility of the insurer succeeding on one or both of the above arguments. In this context Mr Adam submitted that: (i) The policy did not expressly and unambiguously exclude the insurer's right to avoid for fraud, as would be necessary. The context in which the policy was entered into could not transform it into a policy which included a promise to pay even if there had been fraud on the part of the insured in procuring the policy. (ii) HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349 stood for the proposition that a party cannot contract out of the consequences of his own fraud. Even if the policy had unambiguously excluded the insurer's right to avoid for fraud, therefore, that would be ineffective.

94. On the other hand, the claimants submitted that there was no real prospect of an insurer succeeding on either argument. Mr Stewart submitted that: (i) The only sensible construction of the policy, read in the relevant context, was that it did exclude the right to avoid for fraud. (ii) It was clear, following Patel v Mirza [2017] AC 467, that there was no general prohibition as suggested by the defendants. Any principle of public policy was to the effect that the insured party could itself not benefit-which would not constitute a barrier to the defendants recovering from the insurer.

95. It was common ground that certain principles were relevant to the construction of clauses said to exclude remedies arising for fraud. Those were

articulated in HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349, para 16 by Lord Bingham of Cornhill who said:

> *""it is in my opinion plain beyond argument that if a party to a written contract seeks to exclude the ordinary consequences of fraudulent or dishonest misrepresentation or deceit by his agent, acting as such, inducing the making of the contract, such intention must be expressed in clear and unmistakable terms on the face of the contract. The decision of the House in S Pearson & Son Ltd v Dublin Corpn [1907] AC 351 does at least make plain that general language will not be construed to relieve a principal of liability for the fraud of an agent: see in particular the speeches of Lord Loreburn LC at p 354, Lord Ashbourne at p 360 and Lord Atkinson at p 365. General words, however comprehensive the legal analyst might find them to be, will not serve: the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make.""*

Lord Hoffman was of the same view, at para 68:

> *"The next question is whether the words relieve Chase from liability to avoidance of the contract or damages in cases in which the misrepresentation by its agent has been fraudulent or avoidance in cases in which the non-disclosure has been dishonest. Here again I agree with Rix LJ that fraud is quite different from negligence: 'Parties contract with one another in the expectation of honest dealing", particularly in an insurance context. I think that in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly. As Lord Loreburn LC said of the exempting clauses in S Pearson & Son Ltd v Dublin Corpn [1907] AC 351, 354, 'They contemplate honesty on both sides and protect only against honest mistakes."*

Thus clear and specific wording is required to exclude remedies arising from dishonesty or fraud, on the assumption that it is, in principle, possible to do so.

96. I therefore accept Mr Adam's submission that there is (at a minimum) a real risk of the insurer properly arguing that as a matter of construction it would be under no liability in the case of fraud by the insured in placing the policy for. The argument would run as follows:

(1) *The starting point is that the insurer can avoid for misrepresentation or fraud in the usual way. The only clause in the policy which arguably prevents this is clause 4.9.*

(2) *Neither limb of clause 4.9 clearly or expressly excludes the insurer's rights to avoid for fraud of the insured: (a) Clause 4.9(i) excludes the insurers' rights to deny liability ""on any grounds whatsoever". These are general words of the type contemplated in HIH Casualty and General Insurance Ltd v Chase Manhattan Bank by Lord Bingham, not express words as envisaged by Lord Hoffmann. (b) Clause 4.9(ii) reserves the right of the insurer to recover from the insured in certain circumstances. But it does not in terms purport to limit the rights of the insurer to avoid for fraud at all.*

(3) *Clause 4.18, which expressly preserves both parties' rights in respect of any statements made fraudulently or dishonestly, puts beyond doubt the fact that the insurer's rights in relation to fraud have not been clearly excluded.*

(4) *The relevant context is insufficient to dislodge the need for clear and express words in respect of an exclusion of remedies for fraud: (a) The title of the policy, and the fact that it appends the 29 April notification injunction do not inform the point. (b) Whilst it is true that the proceedings to which the policy relates involve allegations of fraud against the claimants, this is of little relevance given that clause 4.18 is an entire agreement clause. In any event, this could only be of contextual relevance in ascertaining the effect of the terms. (c) Whilst clause 4.9(ii) does contemplate the possibility of situations where the insurer ""has"" to pay, notwithstanding breach of condition or loss arising out of fraud, this falls far short of providing that the fraud of the insured in procuring the policy is one such situation. Indeed, the clause is premised on there being some other basis for the obligation: the clause is only relevant ""In the event that"" the insurer is liable. (d) The removal of what had been clause*

3.1 is largely irrelevant. The removal of clauses is, at its very highest, an unsafe guide to construction of the policy as agreed. In any event, clause 3.1 only provided that the insurer would not be liable if the loss arose out of the fraud or dishonesty of the insured. This does not deal with fraud in relation to the placement of the policy.

97 The overall thrust of Mr Stewart"s submissions was that the function of the policy was for the insurer to pay out even if the insured had procured the policy fraudulently, but in that case to allow the insurer then to recover from the insured. But in my judgment it is realistically arguable that, despite Sir Terence Etherton C"s indication of what would be required to render the policy a reasonably satisfactory form of fortification, the revised terms of the policy have not made the position clear.'

41. In my judgment, the above sets out an application of the principles in these types of cases as well as providing the general principles themselves. The terms of the policy need to be really clear in order for the Court to be satisfied that they cover the non-disclosure on the grounds of fraud. In *Holyoake v Candey*, clause 4.18 the policy expressly preserved both parties' rights in respect of any statements made fraudulently or dishonestly. As Lady Justice stated, this puts beyond doubt the fact that the insurer's rights in relation to fraud have not been clearly excluded. Her ladyship also considered the use of the words, in clause 4.9(i) which excludes the insurer's right to deny liability "on any ground whatsoever" as being general words of the type contemplated in *HIH Casualty* rather than being express words as envisaged by Lord Hoffmann. The passages underlined in the quotation above are my underlinings as I shall return to those matters.

42. I do not read these paragraphs as requiring any special wording or even that the words 'fraud' or 'dishonesty' need to be used. I agree with Mr Rivett on this point.

However, it is the case that the words used must not be of a general nature (example above). The language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make. Those are Lord Bingham's words set out above and I have them very much in mind when I turn to the wording and terms of the anti-avoidance endorsement in the case before me.

43. Additionally, it is also necessary to turn to the passages which relate to the second issue raised, being that of public policy. Lady Justice Gloster considered the cases in support of a wider public policy formulation and a narrower formulation. As to the former, this is based on the principle that a party cannot contract that he shall not be liable for his own fraud (paragraphs 98 -99 of the Judgment). This relied upon the statements of both Lord Bingham and Lord Hoffmann in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349*. The narrower view, more recently set out in the Supreme Court case of *Patel v Mirza [2017] AC 467* as well as *Hardy v Motor Insurance Bureau [1964] 2 QB 745*, is that no person can claim an indemnity or reparation for his own wilful and culpable crime, but if the relevant policy of insurance comes into the hands of persons not affected by the disability, then that person can enforce the policy according to its terms (*Hardy v Motor Insurance Bureau*). In *Patel v Mirza*, the Supreme Court set out a policy based approach to the public policy rule relating to illegality. As Lord Toulson JSC stated in *Patel*, there is a need to take into account the purpose of a statutory context in applying the rule regarding illegality. On this basis, the claimants submitted that it was relevant to take into account policy factors in determining the scope of the rule in relation to fraud and that this strongly militated in favour of enabling an innocent third party to benefit, despite the fraud

of the insured. Effectively, there is no public interest which prevents a third party from enforcing the contract or policy in issue.

44. Lady Justice Gloster expressly left open which of the two approaches was to be preferred as to the consequences of contracting out of the consequences of fraud but concluded that there was at least a real prospect that on the hypothesis that the claimant loses the action and is found to have been dishonest, the insurer could properly argue that there is a rule of public policy which would entitle it to avoid on the grounds of the insured's fraud, regardless of the policy terms. She stated, (paragraph 368), '*This gives rise to an objectively reasonable appreciation of risk such as to render the policy an unsatisfactory form of fortification'.*

45. At paragraph 107 and 108, her Ladyship stated,

107.In my judgment it is not appropriate to rule out the possibility of an insurance policy being adequate fortification, even in a case where allegations of fraud were being made against a claimant. For example, it might be thought that a policy which in clear and specific terms waived the duty of disclosure altogether, coupled with an equally clear term and representation by the insurer that it would not avoid for fraud of the insured in presentation of the risk (or any other ground), would be good fortification, notwithstanding any principle of so-called public policy.

108 I consider this approach to accord with first instance decisions concerning the use of ATE insurance policies to provide security for costs. In that context, the possibility of insurance policies has been accepted: see Coulson J's review and summary of the relevant authorities in Harlequin Property (SVG) Ltd v Wilkins Kennedy *(2015) 160 Con LR 143, paras 11–20. However an insurance policy will not suffice in circumstances where an insurer*

can or may legitimately be able to avoid liability for fraud; see e g per Akenhead J in Michael Phillips Architects Ltd v Riklin *[2010] BLR 569, paras 18(c), 26 and per Akenhead J in* McLennan Architects Ltd v Jones *[2014] TCLR 6.*

46. I have already set out above paragraph 18 (c) of *Riklin* and the other references take the matter no further. Mr Rivett relied on the case of *Maranello Rosso Limited v Lohomji BV and others [2021] EWHC 2452 (Ch)* (first instance and *CA [2022] EWCA Civ 1667*). The case raised the issue of whether an agreement for the settlement of all claims between the parties (whether known or not known to them at the time) had the effect of compromising claims in fraud and dishonesty notwithstanding that claims of that nature were not expressly mentioned in the agreement. That case is also authority for Mr Rivett's submission that express words releasing claims based on fraud or dishonesty are not necessary. The Court of Appeal dismissed the appeal holding that the first instance judge had full regard for the 'cautionary principle' being that in the absence of express words one will not readily conclude that a reasonable person would understand a release to refer to fraud or dishonesty claims. At paragraph 58(iii), Lord Justice Phillips stated :-

The Judge had full regard to the "cautionary principle", reflected in his recognition in [117] that, in the absence of express words one will not readily conclude that a reasonable person would understand a release to refer to fraud or dishonesty claims. His reference in that paragraph to the words of the release being "unequivocal and unambiguous" and evincing a plain intention to omit nothing and leave no loopholes was not the sole justification for his decision, but was the second of three reasons for rejecting the submission that the absence of express words was determinative against the release of claims in fraud. The first reason was that the absence of express words was not determinative given that he had already reached the conclusion, on ordinary principles of construction, that fraud was included in the release (see [116]), and that there was no rule of law that it should be determinative. The third was that the release was framed in terms of subject matter, further explaining why express words

were not necessary to incorporate claims in fraud. Again, that third reason was expressed to be an element in the Judge's overall assessment, not a determinative factor.'

47. At paragraph 43, his Lordship considered *Satyam Computer Services v Unpaid Systems Ltd [2008] DWCA (Civ) 487*. That case considered whether claims based on the forgery of documents would have been released by a settlement agreement had that agreement covered claims arising from the agreement pursuant to which the documents were issued. Lord Justice Lawrence Collins, noting the House of Lords case of *BCCI v Ali* held that there were no special rules of interpretation applicable to a general release, which was to be construed in the same way as any other contract, and he referred to the view of Lord Justice Moore Bick in *MAN Neufahrzeuge AG v Ernst & Young [2005] EWHC 2347* that the release in that case did not apply to claims based on fraud because neither party had the possibility of fraud in mind, and fraud was a thing apart because the parties contract with one another in the expectation of honest dealing. Lord Justice Phillips then stated,

'I agree with the Judge's understanding, expressed at [94] and [97], that neither Moore-Bick LJ nor Lawrence Collins LJ was suggesting any departure from the application of the ordinary principles of contractual construction in the case of fraud claims. Rather, consistently with those principles, they recognised that part of the commercial context to be taken into account was that parties would generally proceed on the basis of honest dealing and would not readily release unknown claims in respect of the fraud of their counterparty. Both decisions reflect that the specific release under consideration did not demonstrate an intention to settle claims in fraud. As the claims in Satyam were based on the fact that assignments had been forged, the release would have only been effective in respect of such claims if express words had been used: that should not be read as support (even obiter) for the proposition that express words are always or even generally required to release a claim in fraud.'

48. So, Mr Rivett submits that as part of the factual background, the parties knew of the allegations of dishonesty which had been made against Mr Loy in the amended pleadings. These were therefore squarely in everybody's minds. To an extent Mr Rivett's position on this is simpler than in *Moronello* where the Court had to consider fraud allegation which may not have been known.

49. Mr Rivett also relied upon the case of *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and others [2019] CAT 26*. The appendix to that judgment sets out the endorsement to the policies in relation to collective proceedings order in relation to competition claims by the Consumer Rights Act 2015. Those words are identical to the ones continued in the current AA endorsement and in that case, the CAT expressly considered that the ATE provided sufficient protection. The words are identical for the most part save that the rights reserved in relation to any claims by the insurer against the insured. The appendix contained the agreed amendment to the UKTC ATE policies :-

    The Insurer confirms that this Policy is non-voidable and non-cancellable and any claim made against it will be honoured in full irrespective of any exclusions or any provisions of the Policy or of the general law, which would have otherwise rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind, discharge, cancel or vitiate the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the terms of the Policy. However, if any payment is, or has been made, under this Policy due to fraud by the Insured, the Insurer reserves the right to reclaim such costs
    directly from the Insured.

50. It is important to place this case into its context. The Tribunal in this case can authorise a person to act as the class representative only if it considers it just and reasonable for that person so to act in those proceedings. One of the factors which the Tribunal is to consider is whether that person will be able to pay the defendant's recoverable costs if ordered to do so. The Tribunal therefore considered the ATE polices in that context and expressly referred to *Premier Motorauctions*. None of the other cases, such as *Holyoake v Candey* were considered or appeared to have been referred to the CAT. The Tribunal was concerned with 'follow-on' claims based on the earlier decision which found a serious infringement. The remaining issues related to causation and quantum. The Tribunal stated, '*The RHA is a responsible well established body and we regard as minimal risk that it would be reckless let alone fraudulent in providing information to the insurers. There are no serious allegations of fraud.'* Therefore it appears that the Tribunal considered that

the wording set out above would still allow for the possibility of a fraudulent non disclosure but that there was no real risk due to the nature of the case and the status of the defendants.

51. In my judgment, the *Trucks* case provides an example of the application of the principles set out in *Premier Motorauctions* but it does not refer to the concerns and the analysis raised in *Holyoake v Candey* in relation to the issues of public policy. However, I do accept that in *Trucks*, the Tribunal were satisfied that the wording would cover fraudulent non disclosure. However the Tribunal clearly held that there was no real risk relating to fraudulent non disclosure on the facts in that case.

52. With the legal principles above in mind, I turn to the words of the policy and the AA endorsement and the factual background in so far as not dealt with above.

The policy and AA endorsement – terms and construction

53. As Mr Rivett explained, the terms of the endorsement are such that it is essentially part of the policy and needs to be read as forming part of the policy. Mr Hill did not detract from this particular submission. I agree with Mr Rivett. Under the original policy, the policy could be avoided in the event of reckless or fraudulent breach of the duty or fair presentation. A negligent breach had been excluded for avoidance purposes, by the terms of the original policy. Mr Rivett submits that the endorsement does exclude avoidance for recklessness and fraud and this would cover fraudulent or reckless non-disclosure. He says that is clear from the words used and the factual matrix. He also says the risk which Mr Hill relies upon is fanciful and illusory. I turn to the terms of the policy and the AA endorsement before delving in more detail in relation to the opposing arguments.

54. The relevant terms of the policy are as follows:

'3.5 Failure to act reasonably

Opponent Costs and/or an amount sought in a Policy Claim increased or incurred as a result of or in connection with :

*3.5.1 a deliberate or reckless failure to mitigate such a liability of the **Insured**;*

*3.5.2 any unreasonable failure to comply with the rules of the **Court** and/or any order of the **Court**, save where the **Insured** has acted in accordance with the advice of the **Appointed Representative**;*

*3.5.2 any negligent act or omission by the **Appointed Representative**;*
*3.5.3 an unreasonable failure by the **Insured** to follow the advice of and/or cooperate with the **Appointed Representative**; or*

*3.5.4 any failure and/or delay on the part of the **Insured** and/or **Appointed Representative** to notify the **Insurer** of material developments the **Insured** and/or **Appointed** Representative are, or ought reasonably to be aware of.*

4.2 Fair presentation
*4.2.1 The **Insured's** obligation to provide the **Insurer** with a fair presentation of the risk pursuant to the Insurance Act 2015 shall be limited to matters which the **Insured Executive(s)** have actual knowledge or would have actual knowledge of following diligent investigation and reasonable searches. The **Insured's** obligation to provide a fair presentation of the risk shall apply on inception of this **Policy** and in respect of any variations or amendments agreed hereto after this date.*

*4.2.3 If an Insured fails to provide a fair presentation, but such failure was neither nor deliberate nor reckless, then notwithstanding any provision of the Insurance Act 2015, the **Insurer** shall indemnify the **Insured** in full, subject to the other conditions of the Policy.*'

55. So, as Mr Rivett submitted, the policy itself would not allow for the policy to be avoided on the basis of negligence but required there to be some conduct which is

described as deliberate or reckless. That would, in my judgment, encompass dishonest or fraudulent statements made. Clause 4.13 provided that the insurance did not confer or create any rights enforceable under the Contracts (Rights of Third Parties) Act 1999 by any person not named as an insured or the insurer. Mr Hill did not seek to place a different construction on the terms of the policy. Mr Hill's construction points really related to the terms of the AA endorsement and what, if anything, they changed from the terms of the original policy. In short his submission is that the words of the AA endorsement in this regard really did not alter what were the terms of the policy itself and still left the First Respondent exposed to the risk of fraudulent and reckless non disclosure as a ground for avoidance by the Insurer.

56. The AA endorsement sets out the following :

*[recital]'In consideration of the premium paid and received, effective from the receipt the **Insured's** written instruction to effect the changes in the **Policy**, **Insurers** automatically agree to effect the changes detailed in this **Endorsement** from the time and date that the **Insured's** written instructions are by Arthur J Gallagher and that Arthur J Gallaagher will notify Insurers as soon as practicable'*

The Policy is hereby amended follows:
Limit of indemnity: GBP 2,925,000 in the aggregate Opponent's only

Definitions
1. The following defined terms shall be added to the Policy:
a. "Loss Payee" means a party nominated by the Opponent and notified to the Insurer.
b. "Security Claim" means a claim under the terms of this endorsement made by the Loss Payee, on behalf of the Opponent, or any of them, which, if made by the Insured, would have been a Policy Claim and which satisfies the criteria set out in clause 11 of this endorsement 1. However, a Security Claim does not include any claim made under this endorsement 1 or the Policy arising out of Opponent's relating to orders for costs security, including variations to such orders for costs security.
Security
2. Provided that the Loss Payee makes a Security Claim, the Insurer will pay to the Loss Payee the Opponent's subject to the Limit of Indemnity.

3. Subject to clause 4 of this endorsement 1, in respect of any Security Claim, the Insurer confirms:
a. that this Policy is non-voidable and non-cancellable; and

b. any claim made against this Policy will be honoured in full irrespective of:

i. any exclusions or any provisions of the Policy, or

ii. any provisions of general law,

which would have otherwise rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind, discharge, cancel or vitiate the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the terms of the Policy.

This clause shall in no way prejudice the Insurer's rights against any other party including the Insured. In the event that the Insurer is subject to a claim which the Insurer would have been entitled to avoid, rescind, discharge, cancel, vitiate, avoid, reduce, exclude, deny cover for or otherwise repudiate liability for but for the terms of this endorsement 1, the Insured will indemnify the Insurer. The Insurer retains full subrogation rights.'

57. The endorsement increases the level of cover to £2,925,000 and provides the First Respondent with an entitlement to rely upon it directly. The AA endorsement states clearly that it is non-voidable and non-cancellable. It also states that any claim made will be honoured in full irrespective of any exclusions or any provisions of the Policy or any provisions of general law which would otherwise have rendered the policy or the claim unenforceable or entitled the Insurer to avoid, rescind, discharge, vitiate or cancel or vitiate the policy*, 'or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the terms of the Policy'.*

58. Mr Rivett submits that it is important to place this in its factual matrix. The AA endorsement was sought and obtained by the Petitioner after the First Respondent had made its new allegations relating to the conduct of Mr Loy (see below). According to the evidence of Ms Quierin, the Insurer was asked to consider providing the AA endorsement so that the Petitioner could rely upon the AA endorsement and the policy as constituting sufficient protection, effectively replacing the cash sum which had been ordered by me on 9 December 2022. The Insurer was provided with the draft amendments to the First Respondent's Points of Defence as well as the lengthy letter plus exhibits which had been sent by the First Respondent's solicitors to the Petitioner's solicitors. So, Mr Rivett submits, the aim

of the AA endorsement was to provide sufficient protection. Mr Rivett also submits that it is clear from that evidence, that the Insured had been provided with all the documentation and draft pleadings before it made its decision to provide the AA endorsement. The Insurer would also have been provided with what the Petitioner asserts is the case in relation to the draft amended pleading and the documentation provided. Mr Rivett's submits that the allegations made by the First Respondent as against Mr Loy were squarely in everybody's minds, including the Insurer's.

59. As to the construction of the AA endorsement, Mr Rivett submits that this is straightforward. There is, he submits no need for the word fraud or dishonesty to appear. It is a question of determining what is encapsulated by the AA endorsement which forms part of the policy. He submits that the clause is clearly and expressly wide enough to cover and does cover, any exclusions in the policy itself relating to dishonesty but also it covers any other fraud which would entitle the Insurer to avoid the policy under any provision of law. This, Mr Rivett asserts, would cover the ability of the Insurer to avoid the policy for fraudulent/reckless non disclosure.

60. Mr Rivett submits that when the wording of the AA endorsement is considered alongside its factual matrix, there are no real grounds allowing it to be avoided legitimately or contractually. As to the likelihood/risk of this occurring, Mr Rivett relied on the pleaded case alongside the amendments to support his submission that effectively the likelihood of circumstances arising are, he submitted, fanciful or illusory.

61. Mr Rivett took me to the amended petition and the amended points of defence. He submitted that the Petitioner's pleaded case relied upon the terms of a written agreement between the parties as its foundation. The First Respondent was not seeking to set aside the agreement as a sham or some type of fraud. The defence is that there was compliance with the terms of the agreement. Paragraph 18 of the petition asserts that the First Respondent was the controlling shareholder to the extent that directly or indirectly he has control over the appointment of the majority of the board of the company. This is denied by the First Respondent. Paragraph 28

and onwards of the amended petition sets out the pleaded case in relation to unfair prejudice. A summary set out in paragraph 28 states as follows :-

> *'(i) The Company has acted in breach of clause 6.2 of the Shareholders' Agreement, both in respect of the First Phase and the Second Phase.*
>
> *(ii)Further or alternatively, Mr. Costa's conduct in relation to the purported Exit process involved breaches of the duties which he owes to the Company as a director.*
>
> *(iii)Thus the affairs of the Company have been conducted in a manner which is unfairly prejudicial to the interests of Saxon Woods as a member of the Company within the meaning of section 994(1) of the Act.*
>
> *(iv)Mr. Costa was responsible for, and/or was at least sufficiently connected to, that unfairly prejudicial conduct such that it would be just to grant the relief sought against him in relation to that conduct'*

62. So, as submitted by Mr Rivett, the petitioner's claim relies upon the terms of a written agreement and the conduct of the First Respondent. The amended points of defence set out particulars of what it is alleged are breaches of duties owed to the company by Mr Loy. At paragraph 45.1.8, it states:-

'45.1.8. In so acting, Mr Loy breached his duties to the Company in the manner specified below.

PARTICULARS

(1) Mr Loy failed to exercise his powers for the purposes for which they were conferred. Instead he exercised them in a way which pursued his own sectional interests and / or those Saxon Woods and/or those IDEX and/or those Mr Flammini to those the Company and its shareholders generally, by seeking to pre-empt, subvert or otherwise undermine the Company's Exit process with a view to benefitting from rolling over their investments and/or regaining management control the Company and/or obtaining different and better terms than those available to other shareholders and/or constructing a

transaction from which Mr Loy and/or Saxon Wods and/or Mr Flammimi and/or IDEX (and therefore Mr Loy himself) could benefit

(2) Further or alternatively, Mr Loy failed to act in the way he considered, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole, and / or had no regard or no adequate regard to the need to act fairly as between members of the Company, but instead acted in pursuit of his own sectional interests and / or those of Saxon Woods and / or those of IDEX and/or Mr Flammini to those of the Company and its shareholders generally, by seeking to pre-empt, subvert or otherwise undermine the Company's Exit process with a view to benefitting from rolling over their investments and/or regaining management control of the Company and/or obtaining different and better terms than those available to other shareholders and/or constructing a transaction from which Mr Loy and/or Saxon Woods and/or Mr Flammini and/or IDEX (and therefore Mr Loy himself) could benefit.

(3) Further or alternatively, Mr Loy failed to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted, or might conflict, with the interests of the Company, and in pursuing his own sectional interests caused the Company to incur substantial and unnecessary cost as referred to at paragraph 45.1.7 above,

(4) Further or alternatively, Mr Loy failed to declare the extent of his interest in the proposed transaction or arrangement with Metric (as to which see further paragraphs 88.9 to 88.10 below), and sought dishonestly to conceal the nature and extent of his interest in the proposed transaction or arrangement with Metric and the Hut Group when asked (as particularised at paragraphs 88.9 to 88.10 below).

Paragraph 88.9 – 88.10 states as follows:-

88.9 In 6 April 2020, Mr Loy emailed the directors and shareholders of the Company and belatedly disclosed certain dealings that he had had with Metric. In particular, he said that:

(a)It was "*common practice for existing shareholders in a target to be asked either to 'roll' their shares over or to re-invest post-acquisition*".

(b)Metric had "*asked [him] whether [he] together with other shareholders might wish to reinvest in the Company post-acquisition*".

(c)In response he had said that he was "*willing to consider some form of reinvestment if that is necessary in order to achieve the highest possible value for shareholders*."

(d) This issue was one "*which can (and should properly) be the subject of discussion between Metric and Jefferies LLC, once Jefferies has been properly engaged to cause an Exit in accordance with clause 6.2 of the Shareholders' Agreement*."

(e)With the exception of Metric, he had "*no interest in a sale to any of the third parties who have communicated an interest in purchasing the Company to either the Company or Jefferies. Of course, it is quite possible that they will in due course raise with Jefferies the possibility of certain shareholders reinvesting post-sale and no doubt Jefferies will keep a record of all personal interests as part of the Exit process*."

88.10 This email was materially misleading and failed to disclose or fairly represent (and, indeed, actively concealed) the true extent of Mr Loy's interests in a potential transaction or the discussions that he had had with Metric or other parties (including the Hut Group) with which he had engaged, and it was sent by Mr Loy knowing that the contents of his email concealed from his fellow directors and the shareholders (and was intended to mislead them as to) the true extent of his interests in a potential transaction and the discussions that he had had with Metric, without honest belief that the email represented the true position and / or reckless as to whether it represented the true position. In sending that email, Mr Loy was acting dishonestly, in that knowingly and actively concealing the true position from his fellow directors and the shareholders, intentionally misleading

ranted to copy or use in court

them as to the same, and providing that information while having no honest belief as to the true position or being reckless as to the same, is all by its nature dishonest. Paragraph 45.1 above is repeated. Without prejudice to the generality of what is pleaded therein:

88.10.1. Mr Loy's email wrongly sought to portray that the suggestion for a rollover had come from Metric when in fact, as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.1 to 45.1.4 above, he had approached Metric on the basis that he and Mr Flammini would rollover their interest; further, Mr Loy did not disclose that he and Mr borating to achieve a transaction of this kind and pre-empt the Exit process (as to which paragraph 45.1 is repeated)

88.10.2 His email wrongly suggested that the basis for his willingness to rollover was to achieve the highest possible value for shareholders, when in fact, as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.1 to 45.1.4 above, (1) it was to prefer his and / or Saxon Woods' and / or Mr Flammini's sectional interests (and indeed his conduct as regards Metric and other potential investors and / or purchasers was likely to depress the value that could be achieved for other shareholders), (2) Mr Loy's approach to investors was on the basis that the EBITDA was depressed and there was an opportunity to seek to pre-empt the exit process.

88.10.3. His email wrongly suggested that he had no interest in a sale to any the third parties (other than Metric) who had communicated an interest in purchasing the Company when in fact as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.4(13) and 81.6 above, he had sought to make arrangements with the Hut Group as pleaded above;

88.10.4 Despite Sidley Austin having requested by their letter dated 30 March 2020(to which Mr Loy was responding) that directors "confirm that they have disclosed all relevant personal (financial or otherwise) interest in a sale to any of the potential bidders for the Company (including, but not limited to, those potential bidders identified by Jefferies", Mr Loy wrongly failed to disclose the fact that, as he knew from his involvement in the matters pleaded

at paragraphs 45.1.1 to 45.1.4 above, he had approached potential bidders for the Company in a manner that preferred his and/or Saxon Woods' sectional interests (including by the proposed involvement of IDEX) and in respect of a sale to which he would therefore have a relevant personal interest'

63. Mr Rivett submitted that the amendments were allegations of dishonesty being made as against Mr Loy and not Saxon Woods. There was, he submitted no public policy that related to exclusions on the grounds of fraud by the agent. Mr Hill submitted that the pleadings assert that Mr Loy is the controlling mind of the Petitioner and that he actively misled the Board by a dishonest disclosure of his dealings on behalf of the Petitioner. Before considering this point, I need to determine the meaning of the clauses and as part of that exercise, to consider whether the words alert the commercial party to the extraordinary bargain he is invited to make.

64. Mr Hill submits that properly construed, the clause does not encompass fraudulent non-disclosure. Mr Hill submits that the endorsement does not specifically refer to reckless or fraudulent non-disclosure and does not contain 'clear and specific wording' to exclude fraud. He submits effectively that the endorsement, in reality, goes no further than the original terms in the policy. This would mean that the effect of the clause changes nothing on this issue from the terms of the original policy whereby only deliberate and reckless non-disclosure were excluded from the cover. The ATE policy in its original form clearly did not cover deliberate and reckless non-disclosure. Mr Hill also submitted, as set out in the passages from *Holyoake v Candey*, that there was doubt that a clause could, as a matter of public policy, exclude avoidance on the grounds of fraud of the party. In this context, I note that Lady Justice Gloster left the point undecided and in the later passages seemed to assert that it would be possible but of course would depend upon the construction of the relevant agreement. As set out in *Maranello Rosso*, in affirming the first instance judge, the Court of Appeal did not consider that actions based on fraud were incapable of being incorporated into a release clause in a settlement agreement. Moreover, it is clear from *Maranello* that there is no requirement to use

express words like 'fraud' or 'reckless'. The Petitioner and its advisors were well aware that the AA endorsement needed to go further than what was already excluded under the policy in its original form. Mr Hill submitted that the risk of reckless or fraudulent non-disclosure occurring in the current case was not fanciful or illusory. He submitted that the allegations are that Mr Loy, alleged to be the controlling mind of the Petitioner actively mislead the Company's Board of Directors by a dishonest non-disclosure of his dealings on behalf of the Petitioner in relation to a prospective sale of the Company.

65. In my judgment, the clause in the AA endorsement did go further than what was originally excluded for insurance cover under the policy. The clause covers, in my judgment, reckless and fraudulent non disclosure entitling the insurer to avoid the policy. The Insurer agreed that the policy was non-voidable and non-cancellable. This in itself would alert the Insurer to the type of agreement it was being asked as a commercial party to enter into, namely one which did not allow the Insurer to seek to cancel or declare the policy void. The Insurer also agreed to meet any claim made against the policy irrespective of any exclusions or any provisions of the Policy or any provisions of general law, *'which would otherwise have rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind, discharge , cancel or vitiate the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the terms of the Policy'*. In my judgment, the words used are clear, unambiguous and unequivocal. Not only was the Insurer agreeing to meet any claims regardless of any exclusions in the policy or in relation to any provisions in the policy but additionally any provisions of general law. This would include claims arising under the Insurance Act 2015 and any other claims arising under law. In my judgment, these words clearly provide to a commercial party, being the Insurer, the knowledge of what has been called the 'extraordinary bargain'. This was not a clause which stated in general terms, 'on any grounds whatsoever' but clearly focussed the parties on what the Insurer agreed to, namely that notwithstanding the Insurer's entitlement to avoid the policy or rely on any of the other remedies normally available to it, the Insurer agreed that it would not do so under this clause.

66. The remedy for a fraudulent non-disclosure is clearly set out in that part of the clause. There is in the clause a focus on the Insurer being unable to exclude either along the lines set out in the policy, or under any provisions of general law and also being able to rely on any of the listed remedies which would normally be available to the Insurer. The policy in its original form prevented the insurer relying on any negligent breach of disclosure or fair presentation by the insured. It stipulated that neither deliberate or reckless conduct would be covered by the terms of the policy. So that expressly preserved the Insurer's entitlement to avoid on other grounds, being fraudulent or reckless or deliberate non-disclosure. The AA endorsement clause expressly set out to exclude the Insurer's ability to avoid or have any remedy along the lines set out in the policy, the words being '*any exclusions or any provisions of the Policy'*. This was in my judgment a clear reference to 'deliberate or reckless' non-disclosure or conduct set out in the terms of the original policy. That encompasses fraud.

67. The last part of clause 3 makes it clear to the Insurer the types of remedies normally which would be available to the Insurer are effectively excluded by the clause. All the above would alert the Insurer, if more 'alerting' was required at this stage, that the clause encompassed excluding the ability of the Insurer to avoid or rely on any of the other remedies on the grounds of fraudulent or reckless non-disclosure. The final provision in that clause confirms that the insurer retains the ability to pursue the Insured for claims which would have entitled the Insurer to avoid, rescind, discharge, cancel or vitiate, avoid, reduce, exclude or deny cover or otherwise repudiate liability but for the terms of the endorsement. To my mind, this also goes towards confirming the clarity of the clause in excluding avoidance for fraudulent and reckless non-disclosure.

68. The construction is also one which fits in with the factual matrix. The original policy did not cover deliberate or reckless inaccurate fair presentation. In my judgment, the Petitioner was seeking cover from the insurer which would cover fraudulent or reckless non-disclosure. This was the reason that the AA endorsement was sought and for which the Petitioner would have to pay, I suspect, a not insignificant premium. It is also relevant that the insurer took its time to consider

the new serious allegations being made against Mr Loy. As the evidence shows, this was why no anti-avoidance endorsement was available before me at the hearing in December 2022. The Insurer was able to consider the new allegations before it agreed to provide the anti-endorsement policy. In reaching the above determination, I did consider carefully Mr Hill's submission that the AA endorsement did not go further than what was already in the policy because it did not cover the Insurer being entitled to avoid the policy in the event of reckless or fraudulent non-disclosure. I consider that this construction goes against the clear wording of the clause. The clause does not restrict itself to certain types of fraud or carve out claims for fraudulent or reckless non-disclosure. The construction of Mr Hill would distort and strain the clear language being used. Additionally, Mr Hill's submission on this basis would mean that effectively these terms in the AA endorsement had no meaning. Mr Hill did not point to the AA endorsement covering anything which was not, in his submission, already covered or excluded by the terms of the policy. So effectively his submission leads one to the conclusion that despite the wording and the terms of the AA endorsement, it covered nothing new from that set out in the policy itself. The parties therefore contracted in relation to this term to produce a meaningless exclusion for avoidance of the policy. This is therefore another reason as to why I reject Mr Hill's construction. I should add that as is set out above, there is clear authority that there is no need to use express words such as fraudulent non-disclosure. I reject this submission of Mr Hill to the contrary as well. As I have set out above, the language used is clear, in my judgment.

69. Mr Hill's second submission in this respect related to the issue of public policy. He submitted, as I have set out above, that it was doubtful whether as a matter of public policy for an insured party to contract out of its own fraud. Paragraph 107 of the judgment of Lady Justice Gloster expressly envisages the possibility of the insurance policy being adequate fortification in a case where allegations of fraud are being made against the claimant. In the current case, the First Respondent is clearly the person in the position of the innocent third party who has been given extensive rights under the terms of the AA endorsement. He is not the person seeking to benefit from his own fraud. Having determined that the clause is clear

unambiguous and wide enough to cover reckless and fraudulent non-disclosure by the Petitioner, then it seems to me there is no real risk that as a matter of public policy, the clause could not be enforced. Despite Mr Hill's assertion that Mr Loy was the controlling mind of the Petitioner, there is a difference between the Petitioner and its agent. Moreover, as Mr Rivett makes clear, the acts which form the basis of the amendments to the pleaded case relate to Mr Loy's actions and his alleged breaches of duty as a director of the Company. In those circumstances, the case is different from *Holyoake v Candy.* Lady Justice Gloster made the clear distinction from the position of excluding liability for the fraud of the agent (see paragraph 99 of *Holyoake v Candy* and also paragraphs 16 and 76 of *HIH Casualty*) and that of the principal.

70. Furthermore, having considered the amendments to the pleaded case set out above, it is clear what is being alleged relates to Mr Loy's actions. It refers to conduct which it asserts is a breach of the duties owed by Mr Loy to the Company. I can see that in so far as these allegations are determined in favour of the First Respondent, this may well have a bearing on the remedy being sought by the Petitioner. Equitable maxims may well apply. However, this will also depend upon the determination by the Court of the case being advanced against the First Respondent. It may well be that breaches are determined by the Court at trial to exist on both the part of the First Respondent and on the part of Mr Loy. This is not a straightforward case of for example fraudulent misrepresentation (see Lewis Thermal) where if the Claimant does not succeed it is clearly because the Court did not believe the evidence of the director. Here, the Court may well accept that the breaches alleged are established on both sides in relation to the duties owed by Mr Loy and the First Respondent as directors. A finding against Mr Loy on the serious allegations (or some of them) made may therefore not lead necessarily to the Petitioner's case failing. The Petitioner's case is based on its unfair prejudice allegations which encompass allegations made against the First Respondent. A finding that Mr Loy's conduct was such that he mislead the Board of Directors does not absolve the First Respondent from the allegations he faces. Much will depend upon what the Court makes of the breaches alleged against the First Respondent as

well as its direct and indirect interests and whether it was effectively causing the company to breach the terms of the shareholders agreement. The case before me is therefore not one where there is such a diametrically opposed bilateral choice for the judge at trial as in *Lewis Thermal*. The facts in *Holyoake v Candy*, which I have set out above, are also very different from those in the pleaded case before me. The assessment of risk is therefore very different from those types of cases. I do not agree with Mr Hill that the risk is such that the endorsement and the policy do not offer sufficient protection. As I have analysed above, the case against the First Respondent is not in some way defeated by the allegations against Mr Loy. Breaches of duty by Mr Loy do not absolve the First Respondent. Furthermore, in many respects the way in which the AA endorsement was sought and the fact that the Insurer clearly needed time to consider the allegation being made against Mr Loy, is relevant. It is hard for the Insurer to have a realistic chance of avoiding the policy based on the matters which were front and centre of its consideration just before it agreed to provide the AA enforcement in its clear terms. This last point is not decisive but is part of the factual matrix as well as my consideration of the risk based on the pleaded case.

71. In those circumstances, I consider that the policy provides sufficient protection to the First Respondent. The terms of the policy are clear and unambiguous for the reasons I have stated above. As the Insurer was aware of the proposed amended pleadings, the serious allegations made and the evidence produced by the First Respondent, I do not consider that the AA endorsement as construed by me can be avoided legitimately or contractually. The Insurer would effectively be seeking to argue the construction being placed upon it by Mr Hill which I have rejected for the reasons set out above. As to the issue of public policy, I accept Mr Rivett's points and do not accept that it would be in the public interest to deprive someone in the position of the First Respondent being able to enforce the policy by reason of the conduct of Mr Loy as agent for the Petitioner. I have considered the pleaded case as amended. The pleaded case against the First Respondent is not necessarily defeated by the case now being made against Mr Loy. The allegations being made, if established, may well have some bearing on remedy, but this itself will also

depend upon whether the case has, in any event, been made out against the First Respondent. There is a difference, in my judgment, between alleged breaches against Mr Loy which do not appear to have caused loss to the Company and breaches alleged against the First Respondent which, as pleaded, caused a breach of the Company's obligations under the shareholders agreement and prevented the exit process taking place when it should have done thereby creating a loss in value of the shares in the company. In those circumstances, I do not consider that the risk of the Insurer successfully avoiding the policy is such that the AA endorsement does not offer sufficient protection. I have therefore sought to answer the three questions raised in paragraph 32 above which I have derived from the authorities I was referred to in this case.

72. In the exercise of what is a wide discretion, I have also considered the following matters. Firstly, the application was made extremely quickly after the hearing on 9 December 2022. There was some delay which related to attempts to obtain the agreement of the First Respondent prior to the issue of the application itself. That is understandable. The original order for security was based on both the ATE policy as well as the cash sum which was due to be paid in. Secondly, the First Respondent was well aware that the Petitioner wished to rely upon an anti-avoidance endorsement. The First Respondent was also, in my judgment, aware that the proposed amendment to the pleading would have a bearing on the anti-avoidance endorsement which was being sought. As such the production, for whatever reason, of the proposed amended case and application so close to the hearing would have an impact on the ability of the Petitioner to obtain an anti-avoidance endorsement. Thirdly, there is obviously a difference between cash as security and an ATE policy, even one with the anti-avoidance endorsement as here. However, the test is clearly whether what is being proposed offers sufficient protection. For the reasons set out above, in my judgment, this policy with its anti-avoidance endorsement does offer sufficient protection. In reaching this conclusion, I have taken into account the pleaded case, the public policy issues as well as construing the policy and the anti-avoidance endorsement. Fourthly, for the reasons I have set out above, I consider that there is a strong explanation as to why the anti-avoidance endorsement was not

before the court on the last occasion. The amended pleading with its serious allegation altered the ability of the Petitioner to produce that endorsement in the time available before the hearing. Fifthly, on the evidence contained in Ms Quierin's statement, I am satisfied that a refusal to accept the anti-avoidance endorsement will lead to prejudice to the Petitioner and make it unable to pursue its claim as being unable to obtain the cash necessary to pay into Court. Finally, I also consider that the First Respondent is also able to rely on the fact that if he defeats the claim and obtains an order for costs against the Petitioner, he can seek to protect his position by obtaining a charge over the shares of the Petitioner in the Company. I rejected the value of these shares for the purposes of an order for security on the grounds of illiquidity, but in my judgment, their existence is a factor I can take into account in the exercise of my discretion. They provide some further protection to the First Respondent.

73. Having considered the factors I have set out above, I will accede to the application and will vary the order I made on the 9 December 2022 to allow for the ATE policy and its anti-avoidance endorsement to stand as security. I will hear the parties on any issues arising when this judgment is handed down.