Neutral Citation Number: [2023] EWHC 669 (Ch)

Case No. CR-2012-007914

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 March 2023

Before:

His Honour Judge Keyser KC
sitting as a Judge of the High Court

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Between:

GEOFFREY CARTON-KELLY (as Liquidator of CGL Realisations Limited)	**Applicant**
- and -	
DARTY HOLDINGS SAS	**Respondent**

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- -

Nehali Shah (instructed by **Jones Day**) for the **Applicant**

Jonathan Nash KC and Peter Ratcliffe (instructed by **Sidley Austin LLP**) for the **Respondent**

Hearing dates: **21 March 2023**

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JUDGMENT

HHJ KEYSER KC

Introduction

1. By an application notice dated 10 March 2023, Mr Geoffrey Carton-Kelly as liquidator of CGL Realisations Limited applies for two orders: first, an order that a portion of the judgment sum paid into court pursuant to the order dated 19 December 2022 be paid out; second, an order restricting the use of a document provided as a confidential exhibit in connection with the application.

2. The application is supported by the eleventh witness statement of the applicant dated 10 March 2023. In response there is a fifth witness statement of Mr Matthew Shankland, a partner in Sidley Austin LLP, the solicitors who act for the respondent.

3. The applicant's claim against the respondent sought relief under section 239 of the Insolvency Act 1986 in respect of what was said to be an unlawful preference in connection with the sale of the business of Comet Group Plc. In order to pursue the proceedings, the applicant had to rely on funding from LCM Funding UK Limited and also had to enter into after-the-event ("ATE") costs insurance. Both of those funding arrangements involved increased liabilities for the applicant, and correspondingly increased benefit for the counterparties, linked to the stage of the proceedings reached.

4. The claim was tried in October 2022 by Mrs Justice Falk, who handed down judgment on 17 November 2022. The hearing to consider consequential matters, including the terms of the order, was on 12 December 2022, by which time the judge had become Lady Justice Falk. Her order ("the Order") is dated 19 December 2022, though so far as I can make out that was the date of approval of the minute and sealing of the Order and the correct date of the Order was 12 December 2022.

5. The Order declared that the payment of approximately £115 million of intra-group debt made by Comet Group Plc, which is now CGL Realisations Limited, to Kesa International Limited as part of the sale of Comet by a listed group headed by Kesa Electricals Plc to vehicles established by OpCapita LLP on 3 February 2012, constituted a preference by Comet of Kesa International Limited within the meaning of section 239 of the 1986 Act. Lady Justice Falk ordered that the respondent, as successor to Kesa International Limited, pay to the applicant a total judgment sum of nearly £111 million, but that the judgment sum be paid into court pending determination of a proposed appeal by the respondent (for which permission was given by the judge on limited grounds) or agreement of the parties or further order of the court in the meantime.

6. With that introduction, I turn to consider the liquidator's application for payment out of part of the judgment sum.

The Application for Payment Out

The terms and circumstances of the Order

7. That the entirety of the judgment sum ought to be paid into court was, in the event, the common position of the parties before Lady Justice Falk on 12 December 2022. In view of the way in which the argument has proceeded before me, I need to explain in some detail how matters stood in the period after the hand-down of the judgment and the hearing on that date.

8. As I have said, the judgment was handed down on 17 November 2022. The "consequentials" hearing was listed for Monday 12 December 2022.

9. On 30 November 2022, Jones Day, the solicitors acting for the applicant, wrote to Sidley Austin in terms that included the following:

> "3. You have raised the question of a stay of execution of the award. The starting position is obviously that a stay is the exception to the ordinary rule, for which solid grounds must be put forward of irremediable harm if the

judgment is paid over. Also relevant is the perceived strength of the appeal (in respect of which we are plainly unable to make any proper assessment at this juncture – see further below).

4. In the meantime and entirely without prejudice to what is set out above, having now (as foreshadowed) discussed with relevant stakeholders what comfort could be offered in respect of preservation of the sums to be paid by your client under the judgment pending determination of any appeal, our client would be prepared in theory for the majority of judgment funds to be paid into court, with judgment interest continuing to run. Our client would require, however, that this arrangement not extend to the following elements (c. £22m in total), which would instead fall to be payable directly in the ordinary way: …

5. This arrangement would, importantly, enable our client to avoid very substantial additional costs of funding (i.e. on the basis that he would have access to sufficient funds to satisfy the sum due under the funding agreement before the further increase to the multiplier on 1 February 2023). It would also enable him to: (i) meet outstanding legal fees (including counsel fees); (ii) fund his own costs of defending any appeal; (iii) pay the premium due under his ATE insurance policy (c. £1.3m – see in this regard paragraph 22 of our previous letter); and (iv) explore obtaining further ATE insurance in respect of any appeal.

6. Further, in order to eliminate any residual risk in respect of an order to repay these sums in due course (i.e. should the appeal be successful), our client would seek to obtain an insurance policy to cover that eventuality. The intention would be to use the remainder of the sums referenced above on any such judgment protection insurance premium. We understand, however, that any insurer would require due diligence in respect of the merits of the appeal, and that it would realistically take around four weeks of diligence from the application to the Court of Appeal before any policy could be secured. We are plainly unable to progress this matter absent visibility over the grounds of appeal, and therefore request that you now provide (in draft, as necessary) your client's application for permission under CPR 52.3(3)(a) (i.e. on the assumption that Falk J will refuse permission) without delay, and in any event by close of business on 14 December 2022. That is the document that any insurer will require. Given that your client will have been in receipt of the judgment for well over a month by that point, we cannot see that this request poses any difficulty.

7. In circumstances where: (i) there would be such material detriment to our client in not having access to the £22m (which represents, we note, less than 25% of the principal judgment debt) now; (ii) the risk of the judgment debt being entirely extinguished on appeal may well be low (as set out above, no assessment in that regard is currently possible); and (iii) our client would in any case seek to insure against the risk of repaying these sums, we trust that your client will see that this is a reasonable proposal."

10. There was intervening correspondence, which I can pass over, and on Tuesday 6 December 2022 Jones Day wrote again:

> "6. We do not intend to engage in debate with you as to whether or not your client would be able to recover from LCM or the ATE insurer. The ATE insurance policy clearly identifies that a successful appeal would lead to a reversal of the premium position. In any event, we have made a fair proposal whereby our client would seek to obtain judgment preservation insurance and would further undertake not to distribute funds to either the ATE insurer or LCM until such insurance was in place. That could be by way of undertaking to the court and our client has already engaged with insurance brokers who are positive in their view that insurance can be obtained.
>
> 7. Your proposal is to pay £3.25 million rather than the entire judgment sum. We proposed an alternative which was to pay a sufficient amount so as to enable our client to purchase judgment preservation insurance. On your client's case, your proposal would only serve to expose our client as well as yours to the very risks of recoverability which you set out without being able to address those risks by means of the policy solution identified. That is unhelpful. Of course, if your client were to pay the entire amount now owing, our client is confident from discussions with insurance brokers that he would have no difficulty in obtaining insurance to cover any risk. That is the way forward which our client will seek on Monday."

11. On the following day, Wednesday 7 December 2022, Sidley Austin wrote, enclosing draft grounds of appeal. The letter said in part:

> "11. You now state in your 6 December letter that your client will give an undertaking to the Court not to distribute funds to either the ATE insurer or LCM until judgment protection insurance is in place. However, in light of the strength of Darty's Draft Grounds of Appeal, there is no guarantee that your client will be able to obtain such insurance and/or as to what premium may be required. Further, the undertaking provides no protection against the monies being used for other purposes.
>
> 12. In an effort to reach a pragmatic agreement, Darty would in principle be willing to pay your client: (i) £3.25 million in full and final settlement of his all legal costs (inclusive of all interest and the sum of £75,000 payable under CPR 36.17) within 14 days of the consequentials hearing; and (ii) £19.5 million (being the £22 million Mr Carton-Kelly requested less the £2.5 million on account of costs, given that sum would be comprised within the £3.25 million). Darty would pay your client the £19.5 million directly, provided that your client can satisfy Darty's justifiable concerns regarding dissipation.

13. Accordingly, Darty's offer to pay your client £19.5 million (as described in paragraph 12 above) directly is subject to the following conditions: (a) the balance of the judgment debt (including any interest) is paid into the Court Funds Office (the 'CFO') with interest accruing at the CFO rate (not the statutory judgment debt rate of 8%); and (b) your client first obtains judgment protection insurance in the sum of £19.5 million and provides Darty with a copy of the same (the 'Offer').

14. The only acceptable alternative solution to this is that the entire judgment sum is paid into Court and interest runs on it at the CFO rate. In such circumstances, our client would pay Mr Carton-Kelly £3.25 million in full and final settlement of his legal costs (to include all interest and the sum of £75,000 payable under the Part 36 Offer) within 14 days of the consequentials order."

12. Jones Day replied on Thursday 8 December 2022:

"3. We are also pleased to see that your client is content in principle for the judgment sums to be released to our client provided that he obtains appropriate judgment protection insurance. However, the offer set out at paragraph 13 your letter does not seem to address the risks which you are keen to highlight in the event that your client succeeds on an appeal and turns to our client to recover sums already paid away to the funder and insurer:

3.1 As you are aware, our client's costs of funding (conditional on successful recoveries) fall to increase substantially if he is unable to discharge the funding line from LCM by 1 February 2023. Our client is concerned that there would not be sufficient time for both (i) an insurance policy to be obtained and (ii) (as your client's offer envisages) the parties to reach agreement in respect of that policy before that date.

3.2 With that in mind, our client requires instead that £22.65m (i.e. the total of the items set out at paragraphs 7(a) and (c) of your letter and the agreed £3.25m in respect of costs) be paid to this Firm's client account within seven days of the consequentials order, on terms that the funds only be released to him once he is in receipt of an insurance policy that in his reasonable opinion as officeholder adequately covers the recoverability risk in respect of those funds (a risk to him personally as much as to your client). To the extent that an insurance policy is not obtained to his satisfaction within three months of the consequentials order, the £22.65m would be paid into Court within seven days of that three-month period elapsing.

3.3 Our client is prepared for the balance of the judgment sums to be paid into Court. Any question of a further insurance policy covering the recoverability risk in respect of those funds, and in turn their removal from Court, would be subject to further agreement or an application.

> 3.4 If your client agrees to this mechanism, our client would be content for interest to accrue on any funds held in Court at the relevant Court Funds Office rate, rather than the 8% judgment rate."

13. Sidley Austin replied on the same day, Thursday 8 December 2022:

> "9. During the call between our firms this afternoon, you clarified that if Mr Carton-Kelly obtains judgment protection insurance within three months on terms which are satisfactory to him, your firm would pay to him the £22.65 million without further reference to Darty. That aspect of your client's proposal is unacceptable. £22.65 million is a very significant sum of money and Darty should be entitled to review and approve the terms of the policy before the money is paid to Mr Carton-Kelly (there is no reason why we cannot be provided with a copy of the policy terms – even if subject to further negotiation - well in advance of cover being taken out).
>
> 10. Further, we do not agree that post-judgment interest should run on the judgment sum at 8% until such time as our client pays the relevant sums …
>
> 11. Accordingly, Darty would in principle be willing to accept Mr Carton-Kelly's proposal regarding preservation of the judgment sums as set out in your letter of 8 December provided that:
>
> (a) Mr Carton-Kelly gives an undertaking that he will provide a copy of the
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> judgment protection policy to Darty as soon as reasonably practicable;
>
> (b) your firm gives an undertaking that it will not distribute the £22.65 million to Mr Carton-Kelly or any third parties until such time as Darty agrees that the terms of the policy are adequate (such agreement not to be unreasonably withheld or delayed); and
>
> (c) post-judgment interest accrues from the date of the judgment (i.e. 17 November 2022) until payment of the funds into your firm's client account and the Court respectively at the CFO rate, not the judgment rate of 8% - to be clear, Darty will not agree to pay 8% interest on any judgment sums for any period."

14. On Friday, 9 December the parties filed their skeleton arguments for the consequentials hearing.

The respondent's skeleton argument sought a stay of execution and said:

> "20. There is a very real risk of injustice to Darty if no stay is granted, due to the probability of it being unable to recover sums paid in the event that its appeal is successful. In seeking to find a consensual resolution to this issue the parties have proceeded on the basis that this is a real and legitimate concern which needs to be satisfactorily addressed.

> 21. Darty's proposal for a stay conditional on the judgment debt being paid into Court (with interest running at the Court Funds Office Rate) but subject to the Liquidator being entitled to receive £22.65m from the monies paid into Court upon obtaining judgment protection insurance in respect of that amount and satisfactory evidence of the same provides a fair balance between the competing interests of the parties.
>
> 22. Accordingly, in the event that a consensual arrangement cannot be reached, Darty will ask the Court to stay execution pending appeal on those terms."

Thus, if agreement could not be reached, the respondent was seeking, by way of a form of stay, an order for the judgment sum to be paid into court (though carrying interest at only the rate on funds in court, not the judgment rate), but on the basis that the liquidator could receive a partial payment out if he obtained a JPI policy and provided satisfactory evidence that it provided adequate protection.

15. The skeleton argument for the applicant, the liquidator, set out the proposal made in correspondence and continued:

> "25. Time is of the essence if this mechanism is to work effectively. The Liquidator must act quickly in providing any potential insurer with the necessary materials in respect of Darty's appeal and receive an executed policy before the increased multiplier becomes effective on 1 February 2023. Darty's apparent insistence that the mechanism is conditional upon it approving the insurance policy will almost inevitably lead to a delay that will make it impossible to achieve the desired outcome.
>
> 26. In any event, such a right of approval is unnecessary and unreasonable in the circumstances. The Liquidator is an officer of the court and is acutely aware of his professional responsibilities. He is more than capable of forming a reasonable judgment on the adequacy of any insurance policy and, given the personal risk to him in the case of inadequate cover, the mechanism naturally incentivises him to obtain sufficient cover, in the absence of which the sums will by default be paid into court directly from the client account of Jones Day."

16. That was the position as Lady Justice Falk saw it when she read the papers, but by the time of the hearing on 12 December 2022 it had been overtaken by events. On the afternoon of Friday 9 December, Jones Day wrote to Sidley Austin:

> "1. We refer to your letter of 8 December 2022.
>
> 2. In paragraph 9 of the letter you make clear that our client's proposal which was designed to offer a practical accommodation is unacceptable. In circumstances in which your client maintains its insistence on scrutinizing and approving any insurance policy designed to protect the position of our client, it is clear that no accord can be reached. …
>
> 3. We have made clear the process required for our client to obtain an insurance policy, as well as the likely timeframe in that regard. Given your client's obstructive position, as set out above, our client considers that there is now no realistic prospect of the £22.65m being released to him in time to avoid the substantial increase to his funding costs on 1 February 2023.
>
> 4. Reluctantly, therefore, our client will agree to all of the monies being paid into court on the relevant payment date. …"

The letter went on to insist that the appropriate rate of interest was the rate applicable to judgment debts. That indeed was the main issue for consideration by Lady Justice Falk on 12 December 2022.

17. Sidley Austin replied to that on the same day, expressing pleasure at the acceptance that the funds should be paid into court, but rejecting Jones Day's suggestion that the approach taken by the respondent was unreasonable and obstructive.

18. I have been referred at some length to passages in the transcript of the hearing before Lady Justice Falk on 12 December 2022. I refer in particular to the passages at pages 2 -3, 5 - 6 and 49 – 51 of the transcript. I do not think that they are sufficiently important or illuminating to require that I read them aloud. It will suffice to read the following parts of Lady Justice Falk's ruling on consequential matters:

"23. I now move on to the question of post judgment interest. The parties have agreed that the entire amount ordered to be paid, including the costs which the parties have agreed, should be paid into court. The issue between the parties is whether, as Mr Carton-Kelly says, interest should nonetheless run at the judgment rate of 8% from the date of judgment, or as Darty says, should run at the rate that the Court Funds Office would pay.

24. The background to this is Darty's concern that funds paid over to Mr Carton-Kelly may not be recoverable in the event of a successful appeal. As regards the bulk of the amount in question, which might otherwise go to the unsecured creditors, Mr Carton-Kelly had offered an undertaking that sums would not be distributed pending any appeal. Darty's concerns appear to relate primarily to an amount totalling around £22 million, the most significant component of which is an amount of about £15.4 million due to LCM, Mr Carton-Kelly's litigation funder. The remainder comprises £1.3 million due by way of ATE insurance premium, together with other sums primarily in respect of legal fees.

25. Mr Carton-Kelly's position is that any amount paid to LCM would be recoverable from it in the event of a successful appeal, and the ATE sum would also be recoverable, but Darty has not been prepared to accept this and believes there to be a material risk.

26. This has led to an agreement between the parties that the entire amount should be paid into court. That is a development from what was presented in the skeleton arguments, from which I had understood that the sum in excess of c.£22 million would be paid into court, and the proposal being discussed was that the balance would be paid over to Jones Day, Mr Carton-Kelly's solicitors, and held in their client account pending the obtaining of insurance to cover the risk of non-recovery. The parties explained to me that it has proved to be impossible to reach agreement on the details of that proposal.

…

[After a discussion about the appropriate interest rate]

35. In my view, there is no sufficiently good reason to depart from the 8% rate in this case. In reaching that conclusion I must and do take into account the fact that even if a stay was sought and ordered, the 8% interest would typically run. Payment into court has been agreed by the parties, taking account of Darty's concerns about the risk of repayment not occurring, despite Mr Carton-Kelly offering to undertake not to distribute the vast majority and stating that the other sums ought to be recoverable. I note that this is a statement from a person who acts in a professional capacity and as an officer of the court, and clearly takes his responsibilities seriously.

36. I therefore award interest at 8%. I do note that I have been presented with orders that only give me the choice of 8% or Darty's preferred rate. Both assume that the full amount is paid into court. I have observed to the

> parties that there may be scope to reach some different agreement, and I think there should be liberty to the parties to do so, but I do not see a good reason to depart from the 8% rate."

19. I turn to the Order itself. Paragraph 1 was the provision for the judgment sum. Paragraph 2 ordered the respondent to apply to have the judgment sum paid into court. Paragraph 3 provided for interest to run on the judgment sum. Paragraph 5 gave the respondent permission to appeal on limited grounds. The following further paragraphs are relevant:

> "4. No dealing in respect of the funds held in court pursuant to paragraphs 2 and 3 above shall be permissible absent (i) agreement between the parties or (ii) further order of the court."
>
> "8. There shall be liberty to apply."

The application for release of funds

20. By his application the applicant seeks the release to himself of £36,288,000 from the judgment sum held in court. In his eleventh witness statement he explains that he has obtained a judgment protection insurance policy ("the JPI Policy"), which he entered into on 3 March 2023. The sum sought to be realised is the sum of (i) the amount insured by the JPI Policy, that is £35 million, and (ii) £1.288 million insured under the ATE policy. In respect of the latter amount, the applicant relies on an undertaking from the ATE insurer to make repayment to him, and on his own undertaking to pay any sum so repaid to the respondent: paragraph 13 of the witness statement. The applicant's pressing need for the release of the funds is set out in paragraph 14 of his witness statement. It is not said that alternative avenues of funding are impossible, but it is said on his behalf that any such alternative avenues would come at a cost and that he already has significant liabilities for fees and disbursements that he is currently unable to discharge.

21. For the respondent, Mr Nash KC submits that the application falls at the first hurdle, because the applicant is required to show that there has been a material change of circumstances since the hearing before Lady Justice Falk and is unable to do so.

22. Mr Nash referred in that regard to the following notes in the current edition of the White Book concerning the variation of interim orders:

> "3.1.17.1 … In the leading case of *Tibbles v SIG Plc* [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, the Court of Appeal reviewed the authorities (which are not rehearsed here) and stated that although the discretion under r.3.1(7) was apparently broad and unfettered, considerations of finality, and the need to avoid undermining the concept of appeal, pushed towards 'a principled curtailment' of an otherwise apparently open discretion. Rix LJ, giving the leading judgment, said (at [39]) that the cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence had laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated. There was room for debate in any particular case as to whether and to what extent misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. This was said to be a matter of discretion for the judge in each case. Questions might arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknowable. These too were factors going to discretion but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate. Rix LJ concluded that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.
>
> Rix LJ also stated that there is room within CPR r.3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time. On that basis, the power within the rule would not be

> invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court. Rix LJ emphasised the word "prompt". The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made."
>
> "3.1.17.3 In the context of interim orders, judges often include 'liberty to apply' in the order. As was recognised in *Tibbles* (above), this is an express recognition of the possible need to revisit an order in an ongoing situation. In such cases the court making the order does not lose seisin of the matter: the inclusion of a liberty to apply indicates that it is foreseen that further applications are likely in the course of implementing the decision. However, the liberty does not constitute a "broad licence to avoid appeals". In order to secure the variation or revocation of an order the requirements of Tibbles must still be satisfied. It is difficult to see how 'a liberty to apply' provision in an order would justify a subsequent variation in the absence of a change of circumstances or the misstatement of facts. The absence of 'liberty to apply' certainly does not preclude an application."

23. As a general point, I do not think that the "material change of circumstances" requirement is properly referred to as a jurisdictional requirement; that would involve a loose use of the concept of jurisdiction and is inconsistent both with the terms of r. 3.1 and with the recognition, in *Tibbles* and other cases, that it is inappropriate to attempt to formulate an exhaustive definition of the circumstances in which the power to vary an order may properly be exercised. Rather, the point made in *Tibbles* is that, in the usual case, it will usually be an improper exercise of discretion to vary an interim order unless circumstances have materially changed since the order was made. This point is necessary and salutary, because parties cannot be permitted to keep presenting the same arguments at different hearings until they get the answer they like—they cannot be given a "second bite of the cherry". So, clearly, if the liquidator's present application for payment out fails, he will not be able to come back to court and make the same application on the same grounds in the hope of a different outcome: unless something material has changed, he would get short shrift if he tried to do so.

24. Turning to the present application, in my judgment there are two answers to Mr Nash's submission regarding material change of circumstances.

25. The first answer is that the *Tibbles* curtailment of the proper exercise of discretion to vary an interim order does not apply in the present case, because the liquidator's application is not for variation of the Order of Lady Justice Falk. In the particular circumstances of this case, this first answer may not be of much practical importance, because the order for payment of the judgment sum into court was made because the liquidator accepted that he could not then show that there would be no material risk of irreversible prejudice to the respondent if he had free access to the judgment sum, whereas he makes the present application precisely because he says that he has subsequently taken steps to eliminate that risk. However, I think that it is helpful not to begin by mischaracterising the liquidator's application. Lady Justice Falk's Order was that money be paid into court and be not dealt with other than by agreement or further order. The current application does not seek to vary that Order at all, far less set it aside. It simply seeks an order for payment out of part of the moneys in court, pursuant to r. 37.3 and in accordance with paragraph 4 of the Order. As the application does not seek to vary an order, the principled curtailment of the proper exercise of the discretion under r. 3.1(7) is not the correct starting point for the analysis. That said, of course, there remains the question why, when the common position before Lady Justice Falk was that the entire judgment sum should be paid into court, any of it should now be paid out. Unless a good answer to that question can be given, the application will fail.

26. The second answer, however, is that, if it is considered necessary or helpful to begin consideration of the present application by reference to a need for a material change of circumstances since the "consequentials" hearing, it is plain that there is such a change of circumstances, namely the obtaining of the JPI Policy.

27. Mr Nash submits that this is not a material change of circumstances. He says that, as is shown both by the correspondence and by the passages in the transcript to which I have referred but which I have not read out, the liquidator knew that the avenue of obtaining a judgment protection policy was available in principle and expected that he would indeed be able to obtain such a policy, but in the event he did not pursue the matter, did not reserve his position before Lady Justice Falk and did not say that he might apply for payment out after obtaining such a policy; to paraphrase Mr Nash's submission, the liquidator effectively shrugged his shoulders and said, "Well, we've given it a go, but the attempt to reach agreement did not work, so there we are and that is that—the money can just go into court."

28. I regard the contention that there has been no material change of circumstances since 12 December 2022 as obviously wrong. Although at that date the liquidator knew that the risk of irreversible prejudice to the respondent might be capable of being overcome by a JPI Policy, he did not have such a policy at the time and, obviously, its adequacy could not be considered. Further, as appears from the correspondence to which I have referred, there was even disagreement as to whose satisfaction ought to be sufficient—the liquidator's, as an officer of the court and a professional man, or the respondent's, as the party that was liable to be subjected to a risk of non-recovery. Now, however, the liquidator does have a JPI Policy and the court is in a position to consider whether the terms of that particular policy provide adequate protection.

29. The impossibility of the respondent's current position is starkly illustrated by a consideration of the position it has previously adopted. The Order provides for the possibility of payment out of court in the event of either agreement between the parties or further order of the court. Mr Nash submits that reference to an order of the court is merely a reflection of the court's own jurisdiction over moneys in court and that obtaining a JPI Policy could not amount to a relevant change of circumstances because it had been envisaged by the time of the hearing on 12 December 2022.

But the respondent's agreement to payment out of moneys before the determination of the appeal would only be forthcoming if it agreed that the terms of a JPI Policy afforded sufficient protection —the very thing it could not agree in the absence of a particular policy to consider. This is precisely the point made in Sidley Austin's letter of 8 December 2022. It is also the point made in paragraph 21 of the respondent's skeleton argument for the "consequentials" hearing (above), which envisaged precisely the present situation. In my view there is nothing at all to be said for Mr Nash's contention that moneys can now be paid out of court only if the respondent is satisfied that the JPI Policy provides adequate protection and agrees to payment out, but not if, in the absence of such agreement, the court is satisfied that the JPI Policy provides adequate protection.

30. I now turn to my analysis of the liquidator's application.

31. The first point, which the order for payment into court ought not to obscure, is that the liquidator has a valid judgment for the judgment sum. The position is therefore different from the cases on security for costs (to which I refer later), where the court generally approaches the matter from, as it were, a position of neutrality and does not analyse the merits. The respect shown to an unimpeached judgment underlies the principle that an appeal does not of itself give rise to a stay of execution. Of course, however, the jurisdiction to grant a stay (or, as in this case, to order payment of money into court so that it is preserved) is an important power of the court in order to prevent the risk of irremediable injustice. Being kept out of one's judgment money is itself an injustice.

32. I find assistance in the test for granting a stay of execution, as explained Clarke LJ in *Hammond Suddards Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065, at [22]:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the

> appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

33. Further, as Ms Shah for the applicant submits, the exercise of any discretionary power is always to be by reference to the overriding objective.

34. In considering the particular question of prejudice to the respondent, I am assisted by some decisions in the context of security for costs where the adequacy of insurance has been discussed. I bear in mind, of course, that the context of the discussion in those cases is different from the present context, because the courts were concerned with a jurisdictional requirement for an order for security, namely that there is reason to believe that the claimant company will be unable to pay the defendant's costs if ordered to do so (r. 25.13(2)).

35. Mr Nash referred me to relevant notes in the White Book:

> "25.12.9 The fact that a claimant has obtained a legal expenses insurance (usually an after the event, 'ATE' policy) can, in principle, be taken into account on the question whether the court should make an order for security for costs (*Premier Motorauctions Ltd v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872; [2018] BPIR 158; [2018] Lloyd's Rep. I.R. 123). If the application for security for costs is brought against a claimant company relying upon r.25.13(2)(c) (insolvent or impecunious companies) the existence of the policy may, depending upon its terms, be enough to persuade the court that there is no reason to believe that the claimant will be unable to pay the defendant's costs, if ordered to do so. …
>
> Even at the jurisdictional stage of considering security for costs, defendants are entitled to some assurance that the insurances are not liable to be avoided for misrepresentation or non-disclosure; see *Premier Motorauctions* (above) in particular at [27] and [29]. Akenhead J in *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC) held, when summarising the relationship between security and ATE, that:
>
> > '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.'"
>
> "25.12.9.1 An anti-avoidance clause in this context is a policy term which removes any right the insurer would otherwise have to avoid or deny cover under the policy in respect of any non-disclosure or misrepresentation made by the policyholder or by anyone acting on behalf of the policyholder.
>
> It is now established that, if a policy does not contain any anti-avoidance clause, a claimant company will not be able to rely upon it in order to prevent a finding that the court has jurisdiction to order security under r.25.13(2)(c) (insolvent or impecunious companies): see *Premier Motorauctions* (above) especially at [29] and [31]. In that case the claimants' liquidators had obtained an ATE policy which provided cover up to £5 million but which contained no anti-avoidance clause. The Court of Appeal reversed the lower court's decision that no ground for security had been established and, on proceeding to rule upon what if any order for security to make, ordered the claimants to provide security in the sum of £4 million. In arriving at that sum, the court did not make any reduction in respect of the ATE policy."

36. I have to say that I do not consider that the sentence in note 25.12.9.1 beginning "It is now established …" is quite accurate or that it reflects the basis of the decision in *Premier Motorauctions Limited v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872. The note is in terms too sweeping to be an accurate statement of the law.

37. In *Premier Motorauctions*, the defendants (PwC and a bank) applied for security for costs on the grounds that there was reason to believe that the claimant companies would be unable to pay their costs if ordered to do so. The claimants obtained ATE insurance. Snowden J refused the application for security, essentially on the grounds that the ATE policies provided sufficient security. His decision was overturned by the Court of Appeal. The main judgment was given by Longmore LJ. At [24] he rejected a submission that ATE policies were irrelevant and said, "It is therefore necessary to consider whether the particular ATE insurance in this case does give the defendants sufficient protection." His consideration of that question was set out in the following paragraphs:

"25. It is immediately apparent that the policies in this case contain no anti-avoidance provisions of the sort envisaged by Mance LJ in *Nasser*. The judge did not consider this a problem since he considered the prospect of avoidance for non-disclosure or misrepresentation purely theoretical. It is true that the Companies' conspiracy case involves more than a mere evidential dispute between Mr Elliott and Mr Warnett on 11 August 2008 but Mr Elliott's evidence will be central to the resolution of the key question in this case namely whether PwC and the Bank conspired together unlawfully to depress the Companies' assets and then acquire them at an undervalue. One only has to look to the amended particulars of claim to see that they are redolent with references to what Mr Elliott was told, particularly that he was told that Mr Warnett was to be a non-executive director and a "critical friend", that a £2 million cash injection was required, that Mr Elliott was discouraged from raising capital from other sources, that he was told that monies payable to DVLA had to be segregated, that it was unnecessary to sell non-core assets and that it was necessary to produce 'worst case' figures to present to the Bank … These are all essential parts of the case against the defendants and depend on the evidence that Mr Elliott will give at trial. I cannot, with respect, agree with the judge when he says he has 'real doubts that the disputed evidence of Mr Elliott will be as central to the case as the defendants suggest'. Of course the Companies may have other hurdles to surmount before they achieve a judgment in their favour but, unless Mr Elliott is believed, they will not get to first base.

26. If Mr Elliott is not believed, the Companies will lose and be liable for the costs of PwC and the Bank. The judge said that 'it was something of a Leap' to conclude that disbelief of Mr Elliott on the part of a judge would provide grounds for insurers to avoid the policies.

27. Again I cannot with respect agree. Of course it does not follow that insurers would avoid but the difficulty is that neither the defendants nor the court has any information with which to judge the likelihood of such avoidance. One knows that ATE insurers do seek to avoid their policies if they consider it right to do so … The landscape after trial may be very different from the landscape as it appears to be at present and it is unsatisfactory to have to speculate.

28. The judge felt he could rely on the fact that the proposals to 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 providing a high level of objective professional scrutiny. All this is, of course, true but the best professional advice cannot cater for cases of non-disclosure of matters which the professionals do not know.

29. Neither the defendants nor the court have been provided with the placing information put before the insurers but, even if that had been provided, it is unlikely that the court could be satisfied that the prospect of avoidance is illusory. Even at the jurisdictional stage of considering security for costs,

> the defendants must, as Mance LJ said in *Nasser*, 'be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure'. I cannot see that on the facts of this case these defendants have that assurance. It follows therefore that there is reason to believe that the Companies will be unable to pay the defendants' costs if ordered to do so and that the jurisdictional requirement of CPR 25.13 is satisfied."

I need not cite from the following paragraphs of Longmore LJ's judgment, at [30] – [36]. It is right that he referred at [30] to "important questions of principle", but the actual concern related to the possible tendency of judges at first instance to accept that an ATE policy could stand as security for costs without analysing rigorously the risk of avoidance. The actual decision was that, on the facts of the case, there was jurisdiction to order security: see [35]. (The court went on to order security rather than remit the case to the judge.)

38. The Insurance Act 2015 narrows or to some extent restricts the circumstances in which insurance policies can be avoided. Mr Nash points out, however, that the approach taken in the *Premier Motorauctions* case has continued to be applied. In *Hotel Portfolio II UK Limited (In Liquidation) v Ruhan* [2020] Costs LR 205, [2020] EWHC 233 (Comm), Butcher J made an order for security for costs against a company in liquidation, despite the existence of an ATE policy. He said:

> "12. The policy has no anti-avoidance clause, such as a provision limiting the circumstances in which there can be avoidance for fraud. Furthermore, the claimants have not provided to the defendants disclosure of the proposal for the ATE insurance and it was not before the court.
>
> 13. There has been previous consideration in the courts of the circumstances in which an ATE policy may be regarded as providing sufficient protection to the defendant so that there is no reason to believe that a claimant company will be unable to pay the defendant's costs if ordered to do so. Of particular significance is the Court of Appeal authority of *Premier Motorauctions Ltd (in Liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872. That case indicates that in principle a court can take into account the existence of an ATE policy when deciding whether the condition under CPR rule 25.13.2(c) is met. The case further indicates that where an ATE policy contains anti-avoidance provisions, that may give a

defendant some assurance. Where an ATE policy contains no anti-avoidance provisions, the court does not generally speculate on whether or not the insurer would avoid liability. What was said in *Premier Motorauctions* at para 27 by Longmore LJ was as follows … [Butcher J then quoted from paragraph 27 of that judgment and continued]

14. Where there are no anti-avoidance provisions there are difficulties in relying on the fact that the proposal to insurers was made by liquidators 'who are independent professional insolvency office-holders, and who investigated the claims with the assistance of experienced solicitors and counsel' since, as Longmore LJ said in para 28: 'The best professional advice cannot cater for cases of non-disclosure of matters which the professionals do not know.' [Butcher J then quoted from paragraph 29 of that judgment and continued]

15. In my judgment and without at this stage considering the financial position of the insurer, Elite, the ATE policy does not provide adequate protection such that there is no reason to believe that the company will be unable to pay the defendants' costs if ordered to do so. I say this for the following principal reasons.

(1) Firstly, there may be bases on which the insurers could avoid. There is no anti-avoidance provision. The way in which the matter was presented to insurers is not known as the proposal has not been provided. Only strictly limited comfort can be taken from the fact that Ms Aird-Brown says she put matters properly before the insurers. She could not disclose what she did not know and, as the claimants accepted, the documentation in this case is voluminous. She cannot be expected to know everything that is in it. In those circumstances, it is not a fanciful risk that there might be avoidance.

(2) Secondly, quite apart from possible avoidance, the exclusions and the cancellation provisions provide for a significant range of circumstances in which there may not be cover. There is what I would consider to be a more than theoretical or fanciful risk that circumstances will eventuate in which there is no cover. That is a realistic risk in the present circumstances and with the terms of the present policy.

(3) Thirdly, there is a limit of £3 million for the 'Commercial Court claim', but there is some lack of clarity as to what the 'Commercial Court claim' is or extends to. The appendix to the schedule lists far more parties than are currently party to this action as opponents to the 'Commercial Court claim'. As the 'Commercial Court claim' is defined as the 'Commercial Court claim described in the insurance proposal' and as neither the defendants nor the court have seen the proposal, there is residual uncertainty as to what litigation may be subject to that £3 million limit.

For those reasons alone I do not consider that the existence of the ATE policy provides adequate assurance to the defendants or the court so that

> there is no reason to believe that the first claimant will be unable to pay the defendants' costs if ordered to do so."

39. I make the following short points on the judgments in those two cases. First, in both cases the question was whether the ATE policies were sufficient to negate the jurisdictional starting-point, namely that (apart from the policies) there was reason to believe that the insolvent corporate claimants would be unable to pay a costs award. Where jurisdiction is established on that ground, security for costs will typically follow, unless there is a sufficient countervailing reason, commonly that an order for security would stifle the claim. As I have already observed, the present application raises a different question, which is essentially whether the justice of the case and the balance of prejudice require that the liquidator continue to be kept out of judgment moneys. Although the matters relevant to the determination might be similar, the questions are not the same. Second, in answering the question before them, the judges in the *Premier Motorauctions* and *Hotel Portfolio* cases addressed the particular facts of the case before them, as they were bound to do. In particular, the absence of anti-avoidance clauses was not a simple knock-down answer: in each case it had practical significance.

40. Turning to the present case, the starting point, in my view, is that the applicant has a money judgment and is not able to have access to the judgment sum. The reason he is not able to have access to the judgment sum is the risk of irreversible injustice to the respondent. So we come to the question which has some similarity to that in the security for costs cases but is not identical: not the question whether the existence of the JPI Policy means that there is no reason to believe that the liquidator will be unable to meet a costs award, but the question whether the JPI policy provides sufficient protection to the respondent to make it just to give the liquidator access to part of the judgment sum.

41. No question arises as to the financial position of the insurer. (Contrast the *Hotel Portfolio* case.)

42. The main point relied on by the respondent is that the JPI Policy contains no anti-avoidance provision. The evidence shows that the JPI Policy is a bespoke agreement, the product of careful negotiation. Mr Nash asks rhetorically: if avoidance is not a realistic possibility, then why not have an anti-avoidance policy? And why ought the risk of avoidance, which could have been expressly negated if it does not exist, lie with the respondent?

43. There is some force in that submission and I have considered it carefully. I cannot say, however, that I find it compelling.

44. The JPI Policy has been examined in some detail in the course of the hearing. It contains extensive provisions that have some bearing on the matter, but for convenience I focus on paragraph 10, which is headed "Insurance Act". Clause 10(a) provides that the Insurance Act 2015 shall apply to the policy "save as expressly agreed in this Policy." Clause 10(b) provides that sections 4 and 6 of the Act, so far as they relate to an insured, shall not apply to the Policy "and, for the purposes of the Policyholder's duty to make a fair presentation of the risk and to provide the Representations Letter, the knowledge of the Policyholder shall be limited to the Actual Knowledge of the Knowledgeable Persons." The definitions section in clause 1.1 defines "Knowledgeable Person" to mean each of three named persons, the liquidator and two others in the same practice. "Actual Knowledge" is defined to mean the actual personal knowledge of the relevant person; constructive or imputed knowledge of such a person is expressly excluded; also excluded is any knowledge, whether actual, constructive or imputed, of any agents or advisers of the Policyholder.

45. In the light of this narrow application of the duty to make fair presentation of risk, a consideration of the circumstances of the case makes it entirely unsurprising that absolutely no practical, as opposed to merely theoretical, risk of avoidance has been identified.

46. When the risk of avoidance has arisen in the context of applications for security for costs, the circumstances have generally concerned the protection afforded by policies of ATE insurance in claims that going through the stages of the litigation process where evidence and findings have not been tested and made. A major, albeit not the only, risk of avoidance comes from the possibility that the insurer has given cover on the basis of what it is told of the facts and that this depends on evidence that might be rejected at trial. That was the particular risk adverted to by Longmore LJ in the *Premier Motorauctions* case.

47. However, the present matter concerns an appeal from the judgment of Mrs Justice Falk, as she then was. She granted permission to appeal on two specific grounds. Lewison LJ has subsequently refused to give permission on further grounds. At my request, I was shown the grounds of appeal. The first ground of appeal is that Mrs Justice Falk erred in law and fact in holding that Comet was balance sheet insolvent within the meaning of section 123(2) of the Insolvency Act 1986 immediately before the relevant disposal. The second ground of appeal is that Mrs Justice Falk was wrong to find that the decision to give the preference was influenced by a desire to place Kesa International Limited (to which the respondent is the successor) in a better position than it would otherwise have been in in the event of an insolvent liquidation. In that regard, it is said that the judge relied on facts that did not support the inferences that she drew from them.

48. These grounds have nothing at all to do with evidential questions, other than as regards the conclusions and inferences to be drawn from evidence before the trial judge and findings that she made. No question of reliability of the applicant's evidence arises. The issues on appeal ultimately boil down to a legal question, namely whether Mrs Justice Falk was entitled to draw the conclusions that she did from unchallenged facts or findings of primary fact, or whether she drew conclusions and inferences that went beyond what was justified by the primary facts. At that

point, it becomes very difficult to see what scope there is for there to be a failure of the duty to make a fair presentation of risk, and it is unsurprising that the respondent has not identified how or in what respects any such failure could have arisen. A schedule has been disclosed of the documentation that was produced to the insurer; the respondent has not identified any further documentation that might be material, and I find it difficult to see what documentation could be material for the purposes of the appeal, other than the evidence adduced at trial.

49. The applicant is both a professional person and an officer of the court. In the *Premier Motorauctions* and *Hotel Portfolio* cases, that fact did not count very much, for the obvious reason that the professionalism and good faith of the officeholders did not take them very far when the risk of avoidance related to the evidence and knowledge of third parties. Such problems do not apply in the present case. Further, the evidence is that Jones Day themselves acted in conjunction with the liquidator in collating the documentation that went before the underwriters, so as to ensure that no relevant documentation was omitted. And, as I have said, I cannot see what practical possibility there could be for the omission of relevant documentation. Mr Nash suggested that the requirement to make disclosure of opinions prepared by counsel creates a potential problem, in that there might have been disclosure of written opinions but not of oral opinions. That seems to me not to rise above the level of speculation and, indeed, barely to get that far. As Ms Shah pointed out, if counsel gives an opinion by telephone or in a conference, rather than in writing, then there will be an attendance note of it. Of course, it is theoretically possible that no one prepared an attendance note. But the possibility is no more than theoretical, as is the risk that any such attendance note was not disclosed. Further, in this case the underwriters, having received the disclosed opinions of counsel on behalf of the liquidator, took their own legal opinion. Still further, as I have said, the situation is that the concern is not with the prospects of a claim viewed as a whole, but rather with the prospects of success of two

specific and limited grounds of appeal. The scope for a failure to make fair presentation of the risks in respect of those grounds is, I think, no more than conjectural or speculative and unreal.

50. The further matters that are relied on really go to questions about what is said to be uncertainty in the policy. In particular, a query has been raised concerning the question of whether there is a right of avoidance that has not been effectively excluded in respect of unintentional non-disclosure or failure of the duty of fair presentation. This arises in particular because of what is said to be an ambiguity in clause 10(f), which I shall not read out. In that regard, I have great difficulty in seeing practical scope for the possibility of any material unintentional breach of the duty of fair presentation in this particular case. Indeed, the argument that there is an ambiguity that could be exploited regarding the construction of clause 10(f) seems to me to verge on the unrealistic. Anyway, the underwriters have provided written confirmation that the JPI Policy is to be understood as providing only for avoidance in the event of deliberate or reckless breach. Mr Nash observes that such confirmation does not fall within the terms required by the JPI Policy itself for a formal variation, because it is not by way of an endorsement on the Policy. In the circumstances already described, and where the confirmation has been given by commercially reputable underwriters for the purpose of being put before the court on this application, the objection has now moved a long way from one based on material risk. (I observe, also, that a confirmation, intended to be acted upon, regarding the construction of the Policy, would anyway be likely to be effective as establishing the parties' shared position as to the meaning of ambiguous terms. Questions of variation need have nothing to do with it.)

51. The conclusion is the same regarding the question of the rights of direct enforcement by the respondent. The question itself does not seem to me to raise any practical concern, and Mr Nash accepted that the position has been addressed pragmatically. I think it has been sufficiently addressed, if (as I doubt) it needed to be addressed at all.

52. In conclusion, so far as the moneys covered by the JPI Policy are concerned, the liquidator's *prima facie* entitlement to the funds and practical need for the funds clearly outweigh what I regard on the basis of the information before me as no more than a theoretical prejudice to the respondent. The balance of justice persuades me that the funds ought to be released.

53. So far as the position of the remainder of the moneys in the application is concerned, the point is taken that the ATE insurers have not given an undertaking to the court; they have given an undertaking to the liquidator, who in turn has given an undertaking to the court; this does not create any direct means of enforcement by the respondent against the ATE insurer.

54. This, again, is a theoretical rather than a practical point. The liquidator faces personal liability in these proceedings. He is also a professional person whose good faith and competence are not in question. The idea that he would not seek to take advantage of his rights against the ATE insurer seems to me to be capable of being disregarded. Mr Nash says that the liquidator might not have the wherewithal to enforce those rights. But, if that were the case, the respondent could give him the wherewithal. Mr Nash responds by saying that this is to move from the current position, where the respondent has the security of moneys in court, to the unsatisfactory position of the respondent being potentially in the frame for funding the liquidator to proceed against the ATE insurer. That response goes nowhere. First, this entire chain of possibilities rests on speculation upon speculation; it has no touch with reality. Second, the respondent's original complaint that it had not been given a direct right of recourse against the ATE insurer supposed that it would have used such a right, which would have had no practical difference from the position now being complained about (namely, the possibility of funding the liquidator to use his own right). I am afraid that this level of objection does lend credence to the liquidator's complaint that the respondent is being obstructive. Third, for reasons that I have tried to explain, it is wrong to

approach the issues on this application as though one were considering an entitlement to entirely unqualified security or a jurisdictional threshold for security for costs.

55. Accordingly, I shall accede to that part of the application which relates to the costs covered by the ATE insurance.

The Application for Confidentiality

56. As regards the second part of the application, the JPI Policy has been exhibited as GCK 12 to the eleventh witness statement of the applicant. He seeks an order that that exhibit be marked as confidential and restricted and be not available for public inspection. The respondent does not oppose the application but remains neutral as to it and makes the point that it is for the applicant to satisfy the court.

57. The position under CPR r. 5.4(c) and r. 5.4(d) is that non-parties would have no automatic right to obtain a copy of the JPI Policy but could make an application for such a copy. The application need not be on notice, but the court would have power to direct that notice be given to the parties. Rule 31.22(2) provides that the court may make an order restricting or prohibiting the use of the document which has been disclosed, even where the document has been read to or by the court or referred to at a hearing which has been held in public, as this hearing has been.

58. The application is brought because of clause 9.10(b) of the JPI Policy. Clause 9 requires the Policyholder and the Legal Advisers to keep the existence and terms of the policy confidential to the fullest extent permitted by law, subject to specific exceptions that I need not read out. Clause 9(b) provides:

> "To the extent disclosure to the Court of this Policy with the Agreed Redactions is required in order to facilitate the Court Funds Release, the Policyholder by his Legal Advisors shall take all available steps to procure that such disclosure shall be by way of confidential schedule not to be available for inspection of the Court record."

The reason why confidentiality is sought is that the JPI Policy is of a kind that is not yet widespread in this jurisdiction and has been the product of long and detailed negotiation and is therefore regarded as commercially sensitive.

59. The order in the terms sought would achieve the ends sought. However, it would preclude applications for inspection by persons who have not been heard on the question whether they ought to be precluded from making such applications. The principle of open justice seems to me to make preferable Ms Shah's alternative proposal, which is that there be an order that no non-party be provided with a copy of or entitled to inspect the JPI Policy on the court file without order of the court, such order only to be made on application with notice to the parties. That would mean that the court would retain control of the matter, the applicant would retain its right to argue for non-disclosure, but the court would not be pre-judging the position of third parties. I shall make an order in that alternative form.

[After further argument]

Ruling on permission to appeal

60. I shall refuse permission to appeal.

61. The application for permission is put only on the grounds that my decision on "material change of circumstances" was wrong; no application is made on the grounds that I was wrong to hold that the JPI Policy provides adequate protection.

62. Regarding material change of circumstances, it is said that there is a real prospect of the Court of Appeal holding that I was wrong to decide (a) that a material change of circumstances was not a

condition of the application and (b) that, if it was a condition, there was a material change of circumstances.

63. The short answer, in my view, is that, for the reasons I gave in my judgment, there plainly has been a material change of circumstances. So, however the legal test might be formulated, I do not see any realistic prospect of the Court of Appeal allowing an appeal on that ground.

[After further argument]

Ruling on the application for a stay

64. I shall refuse to order a stay.

65. First, for reasons that I have given, I do not see any reason why the Court of Appeal could arguably allow an appeal on the suggested grounds. It seems to me, with great respect, that the respondent's argument on this point is obviously without merit.

66. Second, even if the proposed grounds of appeal against my judgment had arguable merit, the application for a stay would still have none. The money to be released from the Court Funds Office is money to which the liquidator is entitled under a judgment. Moreover, by my judgment I have held that the liquidator should no longer be kept out of the use of that money. The only argument for a stay, in those circumstances, would be implementation of my judgment would create a risk of irremediable prejudice. But such an argument would have no merit, because the applicant does not seek permission to appeal against my judgment that the JPI Policy provides adequate protection. That Policy relates to the overall recovery in the proceedings. If money is released pursuant to my judgment but Darty thereafter succeeds on the main appeal, it will be protected by the Policy. If Darty fails on the main appeal, of course, no issue will arise.