Neutral Citation Number: [2021] EWHC 2316 (Ch)

Case No: BL-2020-001323

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

Remotely at:
The Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 20 August 2021

Before :

DEPUTY MASTER RAEBURN

- -

Between :

R5 CAPITAL LIMITED	**Claimant**
- and -	
MITHERIDGE CAPITAL MANAGEMENT LLP	**Defendant**

- -
- -

Neil Berragan (instructed by Aticus Law Solicitors) for the Claimant
Graham Chapman QC and Mark Cullen (instructed by Greenberg Traurig LLP) for the Defendant

Hearing date: 16 June 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 20 August 2021 at 10 am.

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Deputy Master Raeburn:

Introduction

1. This is the Defendant's application for security for costs and for an order to strike out aspects of the Claimant's statements of case. The applications were made by way of application notice dated 26 April 2021.

2. The Claimant is a company incorporated in England and Wales which provides management and consultancy services. It operates as a personal service company for its sole shareholder, director and employee Mr. Peter Rosenbauer. The Defendant is a specialist private equity real estate firm which amongst other things, advises on various real estate development and investment projects requiring financing and investment.

3. By way of context, the underlying claim is made for breach of an Introducers Agreement entered into between the parties on 26 April 2016 which provides that a success fee would be paid to the Claimant if an introduction “sourced primarily” by the Claimant resulted in a subscription to a fund or portfolio company advised by the Defendant and notified to the Defendant in Schedule 1 of the Introducers Agreement, or subsequently in writing.

4. The claim relates to subscriptions made in two funds, one made by Endowment Estates Limited ("**EEL**") and another by TOF Corporate Trustee Limited ("**TOF**"), both of which are entities administered by Oxford University Endowments Management ("**OUEM**"). The Claimant claims that it introduced OUEM to the Defendant, that OUEM were specifically identified as a potential referral and that by reason of OUEM's connection with EEL and

TOF, the Claimant is entitled to a success fee pursuant to the Introducers Agreement.

5. The Defendant's position is that neither of EEL or TOF's subscriptions to the relevant funds resulted from an introduction sourced primarily by the Claimant pursuant to the terms of the Introducers Agreement. It says that EEL and TOF invested in the funds for reasons unconnected with any alleged introduction made by the Claimant.

6. In terms of procedural history, the claim was issued on 20 August 2020 and the parties subsequently engaged in correspondence culminating in a without prejudice mediation on 15 March 2021, at which the parties agreed to take further steps which extended until 29 March 2021. The Defendant issued the current application for security on 26 April 2021, in advance of the first CCMC which was heard on 6 May 2021 at which the Court ordered that the present hearing be listed to hear the application.

Security for Costs

The Legal Principles

7. The application for security for costs is brought under CPR 25.12(1) which provides that: "*A defendant to any claim may apply under this Section…for security for his costs of the proceedings*" and under CPR 25.13 which further provides:

> *"(1) The court may make an order for security for costs… if:*

"(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

"(b)(i) one or more of the conditions in paragraph (2) applies…"

8. CPR 25.13(2)(c) sets out one of those conditions, which is that:

"the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so".

9. The principles governing such an application are well-known and in effect, set out a two-stage process. As a threshold matter, the Court must first consider whether the relevant condition has been satisfied and if it is, consider as a matter of discretion whether it is just in all the circumstances to make an order.

10. The relevant condition in CPR rule 25.13(2)(c) requires the Court to have "reason to believe" that the Claimant will be unable to pay the Defendant's costs if ordered to do so, which is different to requiring the Defendant to prove on the balance of probabilities that the Claimant will be unable to pay. As explained by Arden LJ in Jirehouse Capital v Beller [2008] EWCA Civ 908 at [26]:

"...there is a critical difference between a conclusion that there is "reason to believe" that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to

reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balance of probabilities."

11. Although the question of whether there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so is to be judged as matters stand before the Court, the Court's assessment must take into account and give appropriate weight to evidence as to what is expected to happen in the period of time prior to the eventual costs order being made.

12. The net asset balance of a company is not determinative; the nature and liquidity of the relevant assets must be evaluated: Thistle Hotels Ltd v Gamma Four Ltd [2004] EWHC 322 at [11], citing In Re Unisoft Group Ltd (No 2) [1992] 10 WLUK 175 (Sir Donald Nicholls V-C) at p 533.

13. If a relevant condition for the award of security for costs applies then the Court has a broad discretion as to whether it is just to make an order, and if so how much should be paid or secured by way of security. Previous reported cases have articulated a number of discretionary factors which may be taken into account by the Court, but the overall the question is whether the Court is satisfied having regard to all the circumstances of the case, that it is just to make such an order: CPR 25.13(1)(a)).

14. The foundation of an application for security for costs is to prevent injustice; in considering all the circumstances the Court will have regard to the Claimant's prospects of success, but should not go into the merits in detail unless it can be clearly demonstrated that there is "*a high degree of probability of success or failure*": Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All E.R. 534 at 540D-E. In this regard, it follows that a claimant who

demonstrates at the time of the interim application that it is "*highly likely to succeed at trial*" will not be required to lodge security for the defendant's costs: Al-Koronsky v. Time Life [2006] EWCA Civ 1123 at [24].

15. The Court must evaluate the question based upon the totality of the evidence before it, which includes the absence of relevant evidence from the only party who is able to provide it; Sales J in Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120 at [19].

The Relevant Evidence

16. In support of its application for security, the Defendant relies upon the first and second witness statements of Ms. Susan Wilson of the Defendant's solicitors, dated 23 April 2021 and 3 June 2021, respectively.

17. In response to the Defendant's application for security, the Claimant relies on the first witness statement of Mr. Simon Fagan of the Claimant's solicitors, dated 20 May 2021. At the hearing before me, Counsel for the Claimant applied to adduce the second witness statement of Mr. Fagan, dated 11 June 2021 containing further evidence of the Claimant's financial position. This application was not resisted by the Defendant and permission was granted to admit the evidence for the purposes of this application.

18. In his first witness statement, Mr. Fagan seeks to make a number of points in support of the Claimant's position. In summary, he: (i) states that the Claimant is and has been a trading business since its incorporation on 9 November 2015; (ii) submits that the Defendant's application is little more than an attempt to stifle the progression of the claim; (iii) submits that the security

application is late in the proceedings, being made some 8 months after the commencement of the claim; (iv) states the Claimant's averment that the application is made due to ongoing concerns as to the process of disclosure and the claimed reluctance on the Defendant's part to provide relevant material.

19. He also makes the broad statement that the "*value of the Claimant has continued to improve annually*" and that the Claimant "*continues to provide a wide range of services to fee paying clients, as evidenced by the continued increase in value,*[and] *the payment of what is now in excess of £200,000 in court fees*".

20. Mr. Fagan refers to the Claimant's bank account balance, which as of 19 May 2021 was in credit to the value of £460,109.92. Mr. Fagan also exhibits a credit report for the Claimant which he says confirms that it does not have any adverse judgments.

21. In his second witness statement dated 11 June 2021, Mr. Fagan states that as of 31 May 2021, the Claimant had assets of £563,475.85, liabilities falling due within one year of £76,948 and a net asset value of £486,527.85. He states that despite an increase in liabilities, the value of the business has increased since the Company's last filed accounts and that income as generated by the Claimant is solely derived from commissions arising from the Claimant introducing finance to parties for the purposes of investment, development or other such fund raising. Mr. Fagan also states that:

> *"The Claimant has confirmed that it expects, as between the date of this Second Witness Statement and the date of trial, that through existing*

contractual arrangements with other parties, significant commissions, will be paid into the Company".

22. In support of the Defendant's application, the relevant sections of Ms. Wilson's first and second witness statements state in short, that: (i) the Claimant has not filed or produced any evidence of its turnover or a profit and loss account; (ii) the Claimant said (through its solicitors in a letter dated 13 April 2021) that it was preparing management accounts specifically for the purposes of responding to the security application, but has failed to produce any; (iii) since the Claimant's incorporation, only in one instance (its December 2020 accounts filed at Companies House), have assets other than cash been recorded and then only of debtors, of £4,786; (iv) the source of the Claimant's cash is not explained in the Claimant's evidence; (v) the credit report produced as an exhibit to Mr. Fagan's first witness statement demonstrates that the Claimant has limited notional credit available to it, some £14,051; (vi) the net asset value of the Claimant since incorporation ranged from £144,121 as at 31 December 2016, £322,368 in 31 December 2017, £327,600 in 31 December 2018 and £398,033 in 31 December 2019. For these reasons, Ms. Wilson says there is reason to believe that the Claimant will not be able to pay the Defendant's costs if ordered to do so at the end of the trial.

23. Regrettably, much of the witness evidence before the Court and which I summarise above is in fact comment and submission rather than factual evidence. As Andrew Baker J observed in Skatteforvaltningen v Solo Capital Partners LLP [2020] EWHC 1624 (Comm) at paragraph [86], taking a Court through the documents, making submissions as to what they show or what

inferences are to be or might be drawn from them, is a matter for argument, not for witness evidence.

24. For the purposes of this application, I shall ignore the argument present in the witness statements adduced by the parties and proceed to consider whether there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so.

Is there reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so?

25. Counsel for the Defendant submits that there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so on the following basis: (i) the Claimant's assets are made up almost entirely of cash it has in the bank at any given time and the Claimant's most recent bank statement dated 31 May 2021 states a balance of only £465,255.90; (ii) the Claimants' highest ever reported net asset value of £477,064 is lower than both the total of the Defendant's incurred and approved budgeted costs as at the CCMC of £551,789 and lower than the total of the Claimant's incurred and approved budgeted costs as at the CCMC of £484,635.40. Those figures combined comprise some £1,036,424.40, which is submitted to be more than double the Claimant's highest reported net asset value.

26. Counsel for the Defendant also submits that the Claimant has not provided satisfactory evidence, by way of a profit and loss statements and/or management accounts or otherwise which demonstrates: (i) the source of its cash and whether it is trading; (ii) any other source of funds; or (iii) its ability

to meet an adverse costs order, referring to the fact that the Claimant's bank statements for a 3 month period do not evidence any payments in.

27. Further, Counsel for the Defendant refers to statements made in Counsel for the Claimant's skeleton argument, which state that "…*any shortfall between those assets and the Claimant's ultimate costs liability would be over-topped by the fees which the Defendant has withheld*.". Counsel for the Claimant says this represents an acknowledgment that the Claimant will indeed have a shortfall, which supports the need for the Defendant's application for security.

28. In short, Counsel for the Claimant submits that the threshold condition in CPR 25.13(2)(c) is not met. It is submitted that: (i) there is no reason to suppose that Mr. Rosenbauer will not continue to provide consultancy services on behalf of the Claimant and that the Claimant will therefore continue to increase its assets; (ii) the Claimant has few expenses (given it only has a single employee); (iii) the Claimant's most recent filed accounts to 31 December 2020 show that there are no outstanding trade creditors and only liabilities for corporation tax, other creditors and accruals and deferred income which total some £51,948; and (iv) that looking at the Claimant's filed accounts for the previous years, its net asset position demonstrates an increase in the year ended 31 December 2019 of £70,033, which, (it is submitted) equates to the increase on the profit and loss account in the same period.

29. In addition, Counsel for the Claimant erroneously sought to provide his own projection of the financial position of the Claimant through to the date of trial which is due to take place between April and July 2022, suggesting that "*In the light of past performance, and noting the healthy results of the past two*

years, the Claimant may reasonably expect an increase in its total current and net asset position of potentially £173,000 to a figure in the region of £650,000 by 31 December 2021, with a further proportionate increase by the conclusion of the trial".

30. In my judgment, it is clear for the reasons provided by Counsel for the Defendant that there is reason to believe that the Claimant would be unable to pay the Defendant's costs if ordered to do so.

31. As indicated at paragraph 12 above, whilst net asset value is not determinative, on any view the Defendant's net asset value of £486,527.85 is insufficient to meet the potential overall costs liability it could face at the conclusion of the trial.

32. The Claimant is not a large company and is owned and controlled entirely by Mr. Rosenbauer, who could be reasonably expected to have an accurate grasp of the financial health, prospects, assets and liabilities of the Claimant. There is no evidence from Mr. Rosenbauer as to the Claimant's profit and loss, cash flow or any evidence at all which otherwise supports or corroborates the broad statements made in the Claimant's solicitor's witness statement that the Claimant expects significant commissions to be paid to it through existing contractual arrangements (see paragraph 21 above). The absence of Mr. Rosenbauer's evidence who is uniquely positioned to provide particular insight into the finances and prospects of the Claimant can and should be taken into account by this Court as part of its overall assessment.

33. Mr. Fagan's evidence that the Claimant expects significant commissions to be paid to it is not supported by any particular documents or other information as to the nature and extent of such prospective income.

34. There is no evidence which even in broad terms, describes the nature of those contractual arrangements, the likely quantum of any sums the Claimant is likely to receive or any reliable assessment as to the likely short or medium term prospects of the Claimant in terms of revenue generation. Even if the Claimant had concerns to keep its financial position and contractual arrangements confidential (which has not been submitted), the Court could make arrangements such as sitting in private or avoiding reference in public to the relevant financial amounts, if appropriate, to the extent that there were legitimate business reasons for keeping that information confidential.

35. The Court therefore has very limited evidence before it to support the Claimant's averment that it has the requite ability to pay the Defendant's costs in what could be 8 to 10 months' time.

36. The Claimant's assets are comprised principally of cash which, although liquid, is not sufficient in amount to meet the potential costs liability the Claimant may have to meet. This, combined with the lack of reliable, cogent evidence as to the Claimant's likely future income in the relevant period between this application and trial means that there is reason to believe that the Claimant will be unable to pay the Defendants' costs if ordered to do so.

37. I therefore consider that the first stage of the test under CPR 25.13(2)(c) is made out.

Discretion

38. Counsel for the Claimant submits that a number of factors militate against this Court making any order for security as a matter of discretion. His principal submission is that there is a high probability that the Claimant will succeed on its claim to a greater or lesser extent. Counsel for the Claimant says that on the face of the Particulars of Claim this is (or should be) a relatively straight-forward claim.

39. In support of this contention, he says that it is reasonably apparent from the Defence that the Defendant is seeking to "renege" on the Introducers Agreement by seeking to rewrite the requirement for the subscription to "*result from an introduction sourced primarily by* [Mr. Rosenbauer]" and that it is difficult to see that it is in dispute that Mr. Rosenbauer was the primary source of the relevant introduction.

40. I reject the Claimant's submissions. The Claimant has not clearly demonstrated that it has a high degree of probability of success and it would be inappropriate for this Court to entertain a detailed examination of the merits of the case at this interim stage.

41. The Claimant's case against the Defendant has been met with a pleaded Defence which denies that the relevant investments resulted from an introduction sourced primarily by the Senior Advisor and notified to the Defendant as contemplated by the Introducers Agreement. The Defendant has pleaded what it says are the alternative reasons for the relevant investments arising.

42. The draft Agreed List of Issues for determination at trial demonstrates that there are issues of interpretation which arise between the parties as to the effect of clause 1.2.1 of the Introducers Agreement and the meaning of its terms, particularly as to whether the Defendant (or a Mitheridge Capital entity or portfolio company) is obliged to pay a success fee and the meaning of "completion of a subscription". Whether or not the Claimant will succeed on its case is unclear at this interim stage. I certainly cannot conclude on the evidence before the Court that the Claimant has a high degree of probability of success and I find it unnecessary to go into the merits of the case in any further detail.

43. For the avoidance of doubt, I make no conclusions as to the merits of the parties' respective cases other than to say that in the context of this application, I find that the Claimant has not demonstrated that it has such a high degree of probability of success that this Court should exercise its discretion against making an order for security for costs.

44. It is unclear whether the Claimant maintains its contention that the Defendant's application for security was "late" as submitted in Mr. Fagan's witness statement dated 19 May 2021. This was not raised in oral argument by Counsel for the Claimant, but to the extent that this submission was to be raised by Counsel, I would reject it. The Defendant's application was issued prior to the first CCMC and following extensive correspondence between the parties' solicitors discussing the issue. Allegations of delay are not therefore relevant to this application.

45. Mr. Fagan's witness statement dated 19 May 2021 also contends on behalf of the Claimant that the Defendant's application was an attempt to stifle the claim. It would seem that this contention is no longer maintained. Counsel for the Claimant stated in oral argument that he did not seek to suggest that the grant of security would stifle the claim; this being on the basis that Mr. Rosenbauer was independently wealthy and of sufficient means to maintain the action (and could therefore provide the Claimant with appropriate funds) should he be required to do so.

46. In any event, to the extent any such allegation were to be pursued by the Claimant, it has not discharged the burden of proving on the balance of probabilities that an order for security is likely to stifle the claim and no evidence has been adduced by the Claimant supporting this contention; Goldtrail Travel v Onur Air [2017] 1 WLR 2013, per Lord Wilson JSC at [15].

47. Counsel for the Claimant further submits that any shortfall between the Claimant's assets and the Claimant's ultimate costs liability would be "over-topped" by the fees which the Defendant has withheld and states that the Claimant is prepared to undertake that no dividend will be paid until after the conclusion of the proceedings, or further order in the meantime.

48. Neither of these submissions persuade me as a matter of discretion against making an order for security for costs. I remind myself that where a claimant's want of means has been brought about by the conduct of the Defendant then this is a factor that can be taken into account by the Court when exercising its overall discretion; Deleclass Shipping Company Limited & Anor v

Ingosstrakh Insurance Company Limited [2018] EWHC 1149 (Comm) per Mr. Andrew Henshaw QC at [37].

49. Whilst I accept that if proved, the Claimant would have greater means if it were in receipt of the sums it claims against the Defendant under the Introducers Agreement and that it therefore could be said that the Defendant has worsened the Claimant's financial position, on balance, considering all of the factors of this case, it would not be fair for the Defendant to potentially bear the cost of an unsuccessful claim in the future.

50. The Court must balance the potential injustice to the Claimant in preventing the proper pursuit of a claim by an order for security, as against the injustice to the Defendant who runs the risk of the claim failing and finding itself unable to recover its costs. In this case, it would appear that the Claimant continues to litigate with substantially less risk than that faced by the Defendant. As intimated by its Counsel, the Claimant has the benefit of further funds being provided to it as and when necessary at the election of its sole director and shareholder, Mr. Rosenbauer. The Defendant on the other hand could potentially face a scenario in which it seeks to enforce a costs order against the Claimant (whose primary asset is cash which may fluctuate significantly at any given time), without the benefit of further "top up" from Mr. Rosebauer, which could leave it exposed to a shortfall.

51. I conclude, therefore, that having regard to all the circumstances of the case, it is just to make an order for security for costs against the Claimant.

The Amount and Manner of Security

52. The amount of security awarded is in the discretion of the Court, which will fix such sums as are just, having regard to all the circumstances of the case, (CPR 25.13(1)(a)).

53. Counsel for the Defendant seeks security for its costs to trial by way of payment into Court. The Defendant's approved costs budget should be used as the relevant reference point for considering the amount to be ordered as security for costs; Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120 at para [52].

54. In short, the Defendant seeks 65% of its incurred costs up to and including the CCMC, namely £143,659.10 on the basis that it is reasonable to assume that the Defendant will recover at least this amount on assessment. In addition, the Defendant seeks sums representing the costs of steps going forward (namely, disclosure, witness statements, trial preparation and trial phases) which amount to some £263,000 in total.

55. The Defendant's approved budgeted costs are the correct starting point and the Defendant's distinction between incurred costs and budgeted costs is appropriate as the Court should take a different approach to these categories of costs.

56. CPR 3.18 provides that where a costs management order has been made, when assessing costs on the standard basis, "*the court will…not depart from such approved or agreed budgeted costs unless satisfied that there is good reason*

to do so". A costs judge is therefore likely to conclude the assessment of budgeted costs at the same or similar figure.

57. Exercising my discretion, a reasonable sum to order as security for the Defendant's incurred costs (which have not been approved by the Court) is 60%, amounting to £132,608 which represents an estimate of the likely level of recovery, together with an appropriate margin for error.

58. Turning to the Defendant's approved budgeted costs, I make a reduction of the maximum appropriate amount of 10% in order to reflect the possibility that there may be deductions from the costs budget for "good reason"; MacInnes v Gross [2017] EWHC 127 (QB) per Coulson J at [28]. That produces a figure of £236,700.

59. For the reasons given, I will therefore make an order for security for costs. It will be in the sum of **£369,000** (which I have arrived at by rounding down £132,608 + £236,700).

60. As to the form of security, in oral argument, Counsel for the Claimant submitted that the appropriate form of security should be by way of personal guarantee from Mr. Rosenbauer, as an alternative to payment into Court in the usual way.

61. In support of this position, Counsel for the Claimant relies upon Premier Motorauctions Ltd v PricewaterhouseCoopers LLP [2017] EWCA Civ 1872 and submits that the position in this case is similar, in that a controlling party in a position to offer a personal guarantee should serve as an appropriate form of security.

62. I reject the Claimant's submissions. This was the first time that the Claimant had made an offer of a personal guarantee from Mr. Rosebauer as a form of security and there is no evidence before the Court as to the nature and extent of Mr. Rosenbauer's assets, the form of the personal guarantee or its identified terms. There would be far too many genuine doubts as to the value of such a guarantee meaning it would not be just to make an order for security in this manner.

63. Whilst I accept that the existence of this personal guarantee, could in theory be an answer to an application for security, and should be taken into account as an asset when assessing whether there is reason to believe that the Claimant will be unable to pay the costs of the Defendant, in my view the distinct lack of particularity and evidence supporting the offer of a personal guarantee lead to the clear conclusion that it is not an acceptable form of security and cannot be regarded as a reliable source of funding.

64. I do not therefore consider the personal guarantee from Mr. Rosebauer to represent sufficient security and do not regard its existence to disturb my conclusion above that there is reason to believe that the Claimant will be unable to pay the costs of the Defendant if ordered to do so.

65. I will hear submissions on the form of order, including in terms of timing and stages of payment.

The Pleadings Application

66. The Defendant seeks an order compelling the Claimant to produce draft amended Particulars of Claim setting out any case based on its “subsequent

subscription" argument, failing which paragraph 20(b) of the Reply is struck out, together with consequential orders.

67. Paragraph 20 of the Reply states as follows (my emphasis):

> *"In relation to paragraph 31:*
>
> *a. Paragraph 19 above is repeated;*
>
> *b. The investment by TFO in Fund II* ***was a subsequent subscription*** *that resulted from the Claimant's introduction of the Defendant to OUEM (thereby falling within the definition of Mitheridge Capital Investment Amount under the Agreement);*
>
> *c. The Claimant is therefore entitled to a Success Fee in respect of Fund II."*

68. The basis of the Defendant's application is in essence, that the Claimant's Reply is inconsistent with its Particulars of Claim, in breach of paragraph 9.2 of Practice Direction 16.

69. It is said that the Claimant's Reply introduces a new case that "*the investment in TFO was a subsequent subscription*" which is contrary to the Claimant's Particulars of Claim and the Claimant's Response to the Defendant's RFI, which states that "*The Claimant does not rely upon the Fund II Investment as being a "subsequent subscription*".

70. Counsel for the Claimant submits that there is no need for any amendment to the Particulars of Claim, nor to the Reply. He says that the Claimant has stated expressly in its response to the Defendant's request for further information that

it does not allege that the Fund II Investment was a "subsequent subscription" as those words are used in clause 1.2.1(f) of the Agreement and that no order should be made by this Court as the Defendant would be bound by its Particulars of Claim and Reply in any event.

71. In oral argument, Counsel for the Claimant submitted that the confusion has arisen as a result of a mere drafting infelicity and that paragraph 20(b) of the Reply simply refers to the Fund II Investment as a subsequent investment, because it was made after the Fund I Investment and that this was intended to refer to a further, later, second or subsequent investment resulting from the same introduction as the first investment.

72. The applicable principles are as follows; paragraph 9.2 of Practice Direction 16 provides that:

> *"A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example, a reply to a defence must not bring in a new claim.*"

73. Counsel for the Defendant referred me to the judgment of Mr Justice Pepperall in Martlet Homes Ltd v Mullaley & Co Ltd [2021] EWHC 296 (TCC), at paragraph [21], which states:

> *"Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at a proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of*

the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply…"

74. CPR 3.4(2)(c) also provides that the Court has a discretion to strike out part of a statement of case if it appears to the Court that there has been a failure to comply with a rule, practice direction or court order.

75. In my judgment, there is clearly an inconsistency in the Claimant's statements of case which has arisen due to its use of the term "subsequent subscription" which could be taken as having a particular meaning under the Introducers Agreement. That ambiguity goes to the ambit of the Claimant's pleaded case. Pursuant to Practice Direction 16, a new and inconsistent case cannot be left to stand in the Reply and although Counsel for the Claimant has conceded that it does not seek to assert a positive case on the basis that investment by TFO in Fund II was a "subsequent subscription", its statements of case require greater clarity because as drafted, they are contradictory.

76. I therefore find that it is necessary and in furtherance of the overriding objective to make the order sought by the Defendant as it appears that there has been a failure to comply with a practice direction in the manner described above. I will hear Counsel on the form of order.