Neutral Citation Number: [2024] EWHC 1702 (Ch)

Case No: CR-2024-002901

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

IN THE MATTER OF CONSORT HEALTHCARE (TAMESIDE) PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 3 July 2024

Before :

MR JUSTICE RICHARDS

- -

Between :

CONSORT HEALTHCARE (TAMESIDE) PLC	**Claimant**
- and –	
TAMESIDE AND GLOSSOP INTEGRATED CARE NHS FOUNDATION TRUST	**Defendant**

- -
- -

Tom Smith KC and Henry Phillips (instructed by **Herbert Smith Freehills LLP)** for the **Claimant**
Daniel Bayfield KC and Ryan Perkins (instructed by **Addleshaw Goddard LLP)** for the **Defendant**

Hearing date: 20 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 3 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Mr Justice Richards:

1. This is my judgment on an application (the "Application") by Tameside and Glossop Integrated Care NHS Foundation Trust (the "Trust") for security for costs to be given by Consort Healthcare (Tameside) PLC (the "Company").

2. The Application arises in the context of a restructuring plan (the "Plan") that the Company is putting forward under Part 26A of the Companies Act 2006 ("Part 26A"). The background to the Plan is set out in my judgment reported at [2024] EWHC 1438 (Ch) (the "Convening Judgment") in which I explained my reasons for convening meetings of three classes of creditors of the Company to consider, and if thought fit approve, the Plan. I will explore the Plan in more detail later in this judgment and use defined terms set out in the Convening Judgment unless the context requires otherwise.

PRINCIPLES

3. The parties were agreed on the following principles that emerge from CPR 25.12 and CPR 25.13:

   i) An application for security for costs may be made by a "defendant to any claim" (CPR 25.12(1)). It is common ground that this condition is satisfied. The proceedings before me are brought by way of a Part 8 Claim Form. In my order of 20 May 2024 (the "Convening Order"), I joined the Trust as party to the claim as a defendant.

   ii) The court may make an order for security for costs only if one of the "gateways" set out in CPR 25.13 is present. The Trust relies on the gateway set out in CPR 25.13(2)(c) namely that there is "reason to believe that [the Company] will be unable to pay [the Trust's] costs if ordered to do so".

   iii) Even if a gateway is present, the Court must still be satisfied that it is just to make an order for security for costs having regard to all the circumstances of the case. That requires the application of a judicial discretion.

4. The parties are also agreed that the "reason to believe" condition set out in CPR 25.13(2)(c) must be tested at the time a hypothetical costs order in favour of the Trust would fall due for payment. The hearing at which the court is invited to sanction the Plan is listed to start on or around 15 July 2024 and to last for two or three days. It is common ground that, allowing some time for the court to reach a judgment, if a costs order were made against the Company then a payment would become due during the month of August 2024. The Company accepts that it may be unable to pay a costs liability that falls due for payment in August 2024. It is therefore common ground that the gateway set out in CPR 25.13(2)(c) is present. The Company nevertheless argues, for reasons that will be considered in more detail in this judgment, that its likely inability to pay costs in August 2024 is of relatively little significance since ultimately the Trust will owe a much bigger liability to the Company and any costs liability owed by the Company will simply have the effect of reducing the amount that Trust is liable to pay the Company (the "Set-Off Argument").

5. Accordingly, the dispute in this case is whether the court should exercise its discretion to order for security for costs, rather than whether any necessary "gateway" is present. The Company advances three arguments why the court should not exercise discretion to order security for costs:

i) The nature of proceedings under Part 26A is fundamentally different from ordinary adversarial litigation.

ii) If the Application were allowed, there would be a risk that the proceedings under Part 26A would be "stifled" with that risk being particularly unpalatable having regard to the nature of the Part 26A regime; and

iii) The Set-Off Argument means that the Trust is not subject to any real risk of being unable to recover costs against the Company.

6. In the sections that follow, I will consider each of the Company's arguments set out in paragraph 5.. I will then circle back and consider the appropriate exercise of my discretion in the light of the conclusions that I have reached.

The difference between Part 26A proceedings and "ordinary" adversarial litigation

7. I agree with the Company that there are differences between proceedings that invite sanction of a plan under Part 26A and ordinary adversarial litigation. Some of those differences are explored in *Re Virgin Active* [2021] EWHC 911 (Ch) ("*Virgin Active (Costs)*") and *Re Smile Telecom Holdings Ltd* [2022] Bus LR 591 ("*Smile (Sanction)*"). For example:

i) In ordinary litigation, a claimant seeks a remedy to protect its own enforceable rights. The court's role in such a case is to decide between the competing interests of a claimant and a defendant. By contrast, Part 26A permits a company to invoke a statutory procedure which, if sanctioned, will involve a change in the legal rights of members or creditors of the company involved. One aspect of the court's role in such a case is to consider the position of all creditors or members affected by the Part 26A plan (see [20] of *Virgin Active (Costs*)).

ii) A defendant to ordinary civil litigation has no real choice but to put in an appearance to resist a claim. Shareholders and creditors who consider that there are features of a Part 26A plan of which the court should be aware are, by contrast, not obliged to put in an appearance. Yet the observations of a shareholder and creditor in opposition to a Part 26A plan may well be helpful to the court when considering whether to sanction the plan (see [54] of *Smile (Sanction)*).

8. Those differences between a Part 26A plan and adversarial litigation are reflected in the court's different approach to costs in the two cases. Whereas it will be usual for a losing litigant in adversarial civil litigation to be ordered to pay the costs of the winner, the position in Part 26A plans is different. As Snowden LJ said at [55] of *Smile (Sanction)*:

> *54. It is also worth repeating, in case there be any doubt about it, that creditors or members who follow such a course [i.e. by making a considered and focused case supported by evidence in opposition to a Part 26A plan] and advance reasonable arguments on genuine issues which assist the court in its scrutiny of the proposals are unlikely to be ordered to pay the company's costs of the exercise. Depending on the facts, they may also be able to recover their costs from the company, even if their opposition is unsuccessful.*

9. The Company is also correct to point out that any company proposing a Part 26A plan to its creditors or members is necessarily in a degree of financial distress since otherwise it would not be able to satisfy the requirement of "Condition A" set out in s901A(2) of the Companies Act 2006 which is a necessary pre-condition to the convening of plan meetings.

10. I therefore broadly agree with the Company's characterisation of Part 26A proceedings as "a court-supervised coordination of the interests of a number of stakeholders who share the common misfortune of being economically exposed to a company in financial distress".

11. The Company also argued that Part 26A proceedings are "underpinned by a policy of facilitating company rescues". If by this the Company means that Part 26A was enacted to permit companies in financial distress to propose restructuring plans I agree, and I respectfully agree with the comments of Miles J to similar effect in *Re CB&I UK* [2023] 2987 (Ch) at [24]. However, I do not accept that it follows that any particular plan enjoys a presumption that it will be sanctioned simply because at a high level of generality it might be said to "facilitate a company rescue". Rather, whether a particular plan is sanctioned will involve the exercise of judicial discretion in the particular circumstances applicable to that plan. I therefore do not accept the Company's submission that the court should necessarily be reluctant to make an order for security for costs because that would place a "hurdle" in the way of the Company's exercise of the facility afforded by Part 26A.

12. Nor do I accept the Company's submission that the court should be particularly reluctant to impose such a "hurdle" now that it has made the Convening Order. The Trust attended the convening hearing before me and, in its skeleton argument, said it would make the Application. The Trust and the Company agreed between themselves, quite rightly in my judgment, that there was insufficient time and notice to deal with the Application at the convening hearing. Accordingly, I was invited to make directions for the Application to be dealt with a week or so following the convening hearing. I consider that it would be wrong to penalise the Trust for assisting with the sensible case management of the Application by concluding that the Application is now "too late".

13. The Company does not argue that the court is precluded from making any order for security for costs in Part 8 proceedings requesting sanction of a Part 26A plan. I consider the Company was correct not to advance an argument such as this. By way of analogy, in *Re Dalnyaya Step LLC* ([2017] EWHC 756 (Ch), Rose J as she then was, made an order for security for costs otherwise than in ordinary adversarial litigation namely recognition proceedings pursuant to the Cross-Border Insolvency Regulations 2006.

14. Nevertheless, given the differences between proceedings involving Part 26A plans and ordinary civil litigation, the Company argues that the court must necessarily apply a different approach to the Application from the approach it would apply in the case of an impecunious claimant in ordinary civil litigation. In particular, the Company argues that its own impecuniosity counts for much less than it would if it were a claimant in ordinary civil litigation since that impecuniosity is inevitable given the very fact that it is proposing the Plan. Accordingly, it argues that some additional factor would be necessary before the court should make an award of security for costs, for example a suggestion of dissipation of the Company's assets or a suggestion that the Plan was somehow hopeless or improper.

15. I do not accept that submission. Pursuant to CPR 25.12, I must consider all the circumstances of the case when exercising my discretion. I quite accept that the differences between the Plan and ordinary adversarial litigation are relevant "circumstances" which should be taken into account. However, I do not accept that this compels the approach for which the Company argues.

16. I also consider that the Company's argument set out in paragraph 14 proceeds at too high a degree of generality by asserting that simply because the Company is proposing a Part 26A plan, it necessarily follows that the court must take a particular approach to

the Application. Rather, in my judgment, it is appropriate to bear in mind the points that the Company makes having due regard to the particular nature of the Plan that is proposed and surrounding circumstances.

17. As explained in the Convening Judgment, the Plan is proposed as a compromise with just three creditors:

i) Ambac, the guarantor and "representative creditor" of the Senior Debt. Even before my Convening Order, Ambac was prepared to indicate that it supported the Plan by reference to the details of it that it had then received and the Practice Statement Letter;

ii) "IntermediateCo", which is a company in the same group as the Company, holds Subordinated Debt issued by the Company and has also indicated that it supports the Plan; and

iii) the Trust which opposes the Plan.

18. It is also clear that the Plan has been proposed in the aftermath of an adjudication (the "Adjudication") on a dispute between the Company and the Trust as to the precise nature of its obligations under the Project Agreement as described in paragraphs [4] to [7] of the Convening Judgment. The Trust was successful in the Adjudication, obtaining an award in its favour of some £9 million. In addition, the Adjudication has implications for the future as it suggests that the Company's obligations going forward are more onerous than the Company previously considered them to be. The Trust also considers that the Company is liable for a further £20 million in respect of construction defects at the Hospital.

19. At a high level of generality, if sanctioned the Plan seeks to reverse some of the benefits that the Trust obtained following the Adjudication. It seeks to do that by giving the Trust a choice between (i) accepting a new Project Agreement that imposes lower service level obligations on the Company than did the previous Project Agreement (as interpreted following the Adjudication) and a reduced right to make deductions from the "Unitary Charge" payable under the Project Agreement; or (ii) rejecting the new Project Agreement but exercising the "Initial Termination Right" within 30 days.

20. In my judgment, the Plan can be understood as a continuation of the commercial dispute between the Company and the Trust relating to performance obligations under the Project Agreement. Having lost the Adjudication, the Company argues that the resulting interpretation of the Project Agreement makes its business unviable with the result that some compromise with the Trust should be imposed. The Part 26A procedure gives the Company a tool which it hopes to use to impose a compromise which negotiation has thus far not achieved.

21. It is also instructive to consider how the costs of the Company and its creditors are being met. Two funds (Infra Red Infrastructure Yield LP and Instructure Investments LP (the "Funds")) own indirectly through investment vehicles (i) the equity in the Company and (ii) the equity in IntermediateCo. It follows that the Funds own (indirectly) the entire interest in both the equity in the Company and its Subordinated Debt.

22. The Funds are funding their own costs, the costs of Ambac and the costs of the Company in connection with the Plan. The Funds have provided "RP Funding" to the Company of £4.9 million to enable it to pay professional and other fees in connection with the Plan. That RP Funding has been provided on an interest-free basis and on terms that it will be converted into shares, rather than repaid in cash, if the Plan is

sanctioned. That suggests that the Funds consider that they will derive a substantial commercial benefit if the Plan is sanctioned which is worth more than the principal amount of the RP Funding. The fact that Ambac supports the Plan tends to suggest that the commercial advantage to both Ambac and the Funds from the Plan being sanctioned will come at the expense of the Trust.

23. These features, in my judgment, make the present dispute relating to the Plan not that dissimilar to adversarial litigation. The Trust considers that it has rights that it needs to protect, consisting of its entitlements under the Project Agreement, and that the Plan represents an attempt to deprive it of those rights by giving it an unpalatable choice either to accept a "watered-down" new Project Agreement or immediately exercise its right to terminate the existing Project Agreement. Since Part 26A contains provisions under which the Plan can be imposed on the Trust by means of a "cross-class cramdown", the only way in which the Trust can seek to protect rights it considers to be valuable is by inviting the court not to sanction the Plan.

24. The Company says that ultimately all contested restructuring plans under Part 26A involve a dispute between various categories of creditor or shareholder as to how the value of the company concerned should be shared between them with one creditor's benefit being financed by a corresponding disbenefit to other creditors or shareholders. However, I consider that to be a point of relatively little force. The question is how the court should exercise discretion in this case. This case is not dissimilar to adversarial litigation involving, on one side, Ambac and IntermediateCo, both of whom are funded by the Funds and the Trust on the other. Any gains accruing to Ambac and IntermediateCo will necessarily come at the expense of the Trust. Moreover, the Plan can realistically be considered to be a by-product of adversarial litigation between the Company and the Trust.

25. The funding arrangements also diminish the force of the argument based on impecuniosity set out in paragraph 14. above. Certainly the Company is sufficiently impecunious to satisfy Condition A in s901A(2) of Part 26A. However, it has the benefit that not all impecunious companies have, of its professional costs being paid by another.

26. Nor do I consider there to be any great force to the Company's "floodgates" argument that, if the Application is allowed, dissenting creditors will routinely seek security for costs as a means of frustrating the kind of restructurings that Part 26A is intended to facilitate. Each application is, by CPR 25.12, to be considered by reference to the circumstances of the case. In this case, I consider the court proceedings relating to the Plan to be not dissimilar to ordinary adversarial litigation. In other Part 26A plans, there may be no such similarity or the similarity may be weak. I do not consider that a concern as to how creditors affected by other restructuring plans might behave in the future provides much of a guide as to how I should exercise my discretion in the particular circumstances of this Plan.

STIFLING

27. In its skeleton argument and evidence, the Company advanced a case that its ability to put forward the Plan would be "stifled" if the Application is allowed. Accordingly, it was argued that the court should simply decline altogether to make an order for security for costs on the basis, for example, of paragraph [16] *of Goldtrail Travel Ltd v Aydin* [2017] 1 WLR 3014.

28. The Company no longer puts its "stifling" argument in that undiluted form. Instead, it argues that there is a risk that the Plan would be stifled with that risk operating, not as an absolute bar, but as an element in the court's discretion. Given the way the argument

is now put, I do not need to consider all of the authorities and principles on the circumstances in which the court must refuse an application for security for costs on the basis that it might "stifle" a claim. However, some of those principles will put into context the way in which I approach the risk of stifling as a discretionary factor.

29. First, it is appropriate to examine not just the financial resources that the Company itself has immediately at its disposal. Rather, it is appropriate to examine resources that others, such as the Funds, might be prepared to make available. In *Responsible Development for Abaco Ltd v Christie* [2023] 4 WLR 47 at [67] the Privy Council emphasised the relevance of such resources saying:

> *… the burden is on an impecunious corporate claimant to show that there are no third parties who could reasonably be expected to put up security for the defendant's costs*

30. Inevitably, certain third parties are likely to express reluctance or even unwillingness to provide security for costs reasoning that if they did otherwise, the court would be likely to make a security for costs order. The court looks critically at what could be regarded as self-serving assertions that a company's backers are unwilling to provide security. As Lord Wilson said in *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] 1 WLR 3014:

> *24…In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.*

31. It is quite clear to me that the Funds could reasonably be expected to put up security for the Company's costs. According to their accounts, one investment vehicle through which the Funds invested had net assets of over £133 million as at 31 December 2022 and the other investment vehicle had £400 million of net assets as at 31 March 2023. I am not satisfied that the Funds lack either assets or liquidity.

32. Moreover, the Funds have already provided £4.9 million to the Company to enable it to pay costs associated with the Plan. The Funds are also contributing to Ambac's costs. The terms of the RP Funding suggest that the Plan is in the Funds' commercial interests and so their return comes, not from an ordinary funding return on money advanced, but rather in another commercial benefit that the Funds hope to secure (presumably a higher return on their indirect holding of the Company's debt and equity).

33. Both of the Funds sent letters to the Company explaining their reluctance to provide security for costs. However, I concluded that those letters were self-serving and unconvincing. They were also carefully worded. They did not say that the Funds would not, or lacked the resources to, provide security for costs. Rather, they explained that they saw no "sound commercial basis for agreeing to produce or contribute further resources for security for the Trust's legal costs". They referred to the risk of making a nil return on their economic interest in the Company's subordinated debt as a "very strong disincentive to provide or contribute to the provision of security". However, the letters failed to explain why, having provided £4.9 million of RP Funding thus far, the Funds have reached their limit. In particular, the letters did not explain why, if the court

made an order requiring the provision of security on pain of the Part 8 claim being struck out, the Funds would prefer to walk away and run the risk of losing the money already advanced.

34. I recognise that the Funds have a "risk versus reward" calculation to perform. I was shown some estimates that suggest that it is at least possible that returns on the Subordinated Debt might be higher if the Company goes into administration than under the Plan. I therefore accept that, in principle, there must be some "tipping point" beyond which the Funds would prefer to lose the amount already contributed to the Company's costs rather than provide more funding. However, the Company's evidence gave little clue as to where precisely that tipping point might lie. There was some suggestion that the tipping point might not be particularly close given that as at 24 April 2024, the Funds' total provision of funding was estimated to be "in excess of £3.5 million" in the Practice Statement Letter. In the Explanatory Statement itself dated 21 May 2024, the estimate had risen to "in excess of £4.5 million". The most recent figure was "up to £4.9 million" as set out in correspondence on 30 May 2024. The Funds appear to have increased their provision of funding in reasonably short order by significant amounts.

35. I therefore proceed on the basis that I should, when exercising at my discretion, be conscious of the risk of exceeding a tipping point. I should not assume that, despite their significant resources, the Funds would be prepared to provide the full amount of the security requested. However, relatively little information has been given as to where the tipping point lies, and there are indications that it would not be exceeded by a requirement that the Company provide reasonable and proportionate security for costs.

THE SET-OFF RIGHT

The provisions dealing with early termination of the Project Agreement

36. The Project Agreement was executed in 2007 and at that time was expected to last for 34 years. The Project Agreement was entered into under the then government's "Private Finance Initiative" ("PFI").

37. At a very high level, the Project Agreement required the Company to spend in excess of £100 million to develop the Hospital. The Company financed that expenditure by issuing the Senior Debt and the Subordinated Debt. Having developed the Hospital, the Company would provide ongoing services in return for the Unitary Charge. The essence of the Project Agreement, therefore, was that the private sector in the form of the Company would fund the development of the Hospital rather than that cost being paid out of public funds. Having developed the Hospital, the Company would then provide other services including maintenance and would recover its investment and make a profit from the Unitary Charge over the next 34 years.

38. In those circumstances, even if the Project Agreement terminated because of serious breaches of contract by the Company, it would still be appropriate for the Company to receive a payment on termination. Otherwise, the Company would risk obtaining insufficient credit for the large amounts it paid to develop the Hospital in the first place. For those reasons, the Project Agreement makes provision for the Company to receive a "compensation on termination" payment (which the parties described as the "COT Payment") if the Project Agreement terminates early. In principle the COT Payment takes as its starting point the "Fair Value" of the Company's remaining rights and obligations under the Project Agreement which is broadly the net present value of (i) the stream of future Unitary Charges that the Company will receive less (ii) the costs that the Company would incur in performing its obligations under the Project

Agreement. From that Fair Value, the Trust is entitled to make certain permissible deductions to arrive at the COT Payment due to the Company.

39. The Project Agreement contains two methodologies for ascertaining Fair Value depending on whether a "Liquid Market" exists. In essence, there will be a Liquid Market if there are sufficient bidders for the opportunity to become the successor to the Company under the Project Agreement for their bids to be a reliable indicator of Fair Value.

    i) If there is a Liquid Market then it is assumed that the relevant bidders will be basing their bids on the net present value of rights and obligations under the Project Agreement and the highest bid is, accordingly, taken to be the Fair Value. In that case, the Trust is obliged to pay over that highest bid less permissible deductions. An obvious benefit of there being a Liquid Market is that the Trust can retender the right to be the supplier pursuant to the Project Agreement and so does not need to finance the COT Payment out of its own resources.

    ii) If there is no Liquid Market, then an "Estimated Fair Value" is prepared by means of the application of various assumptions in an essentially arithmetic process. The Trust is obliged to pay that Estimated Fair Value less permissible deductions to the Company by way of COT Payment and would have to fund that payment out of its own resources.

40. The Company and the Trust agree that the "retendering" approach and the "Estimated Fair Value" approach are seeking to value the same thing, namely the fair value of remaining rights and obligations under the Project Agreement. They disagree on whether there is a Liquid Market. However, they agree in principle that, if there is a Liquid Market, it is likely to result in a lower COT Payment to the Company on termination. That is because bidders in a retendering process are likely to experience some nervousness at the possibility of hidden costs associated with their future participation in the Project Agreement. More generally, bidders are likely to note the historic disputes between the Company and the Trust and conclude that there is a risk of further such disputes in the future. Both of these factors may lead to a reduction in bids made in a Liquid Market. By contrast, the essentially arithmetic calculation that applies if there is no Liquid Market leaves less room for such nervousness to be reflected in the COT Payment.

41. That introduces a significant factual dispute between the Trust and the Company as to what will happen if the Plan is, or is not, sanctioned. The Trust's position is as follows:

    i) If the Plan is not sanctioned, the Company will go into administration (that being common ground). The Trust would then exercise "step-in rights" under the existing Project Agreement for a period of 30 months under which it would require the Company's own sub-contractors to perform the necessary services under the Project Agreement. It would use those 30 months to set up an orderly re-tendering process pursuant to the Project Agreement which would ensure the presence of a Liquid Market. That re-tendering process would complete in a further 18 months.

    ii) If the Plan is sanctioned, the Trust will not accept the proposed new Project Agreement. Instead, it will exercise its "Initial Termination Right" under the existing Project Agreement within 30 days. Where the Trust exercises the "Initial Termination Right", it is not able to exercise "step in rights". Accordingly, while there would still be a Liquid Market, the Project Agreement would require the re-tendering process to be completed in two years.

42. The Company does not accept the Trust's formulation of how it would act in the two scenarios set out in paragraph 41. largely because the Company does not accept that there is a Liquid Market or that it would be practicable for the Trust to exercise step-in rights. However, the Company realistically accepts that I am in no position to determine whether there is a Liquid Market or not. Accordingly, the Company resists the Application by arguing that, even if the Trust's formulation set out in paragraph 41. is the correct one, the COT Payment due from the Trust to the Company will still be much greater than the amount of any costs that the Company could realistically be ordered to pay to the Trust. Therefore, the Company argues that the Trust is not actually running any risk of its costs going unpaid since it can exercise its contractual right of set-off in Clauses 48.1, 48.2 and 35.6 of the Project Agreement by applying any costs due to it against the much larger sum that it will owe to the Company.

43. It will be seen that on the Trust's formulation, any COT Payment will be due to the Company in either four years' time (if the Plan is not sanctioned) or in two years' time (if the Plan is sanctioned). Therefore, it will take time for the Trust to be able to exercise any right of set-off to which it is entitled. The Company argues that this imposes no additional risk or cost on the Trust since any costs award made to the Trust will earn interest at 8% pursuant to the Judgments Act 1838 with the result that the Trust will have an effective remedy for being kept out of its money until it can exercise it set-off right.

The likely incidence of costs

44. The Trust seeks security in the amount of £926,560.25. That figure represents a 70% of the costs that the Trust estimates that it is likely to incur in connection with its opposition to the Plan. The Company has not suggested that the Trust's estimate of its total costs is excessive.

45. The Trust clearly has a realistic prospect of obtaining a costs order in its favour should it succeed in its opposition to the Plan.

46. I also accept that the Trust can realistically expect some costs award to be made in its favour even if the court ultimately decides to sanction the Plan. That follows from the judgment of Snowden LJ in *Smile Telecom (Sanction)* from which I have quoted a passage in paragraph 8. above. Clearly the amount of costs remains a matter that is in the discretion of the court following the sanction hearing. The Trust is perhaps unlikely to recover all its costs should its opposition to the Plan fail. However, the Company did not dispute the Trust's submission to the effect that its opposition to the Plan has already resulted in some aspects of the Plan being altered which is likely to be a relevant factor.

Costs risk if Plan not sanctioned

47. As noted, the Trust's position (which is disputed) is that if the Plan is not sanctioned, there will be a retendering in a Liquid Market which completes in 48 months' time. Even if the Trust's position is correct, I do not consider that it would be running a significant risk of being unable to set off the costs owed to it against a much larger COT Payment owed by it.

48. The Trust has engaged EY to model various financial outcomes in different scenarios. EY's opinion is that, if the Plan is not sanctioned and the COT Payment is determined following a re-tendering in a Liquid Market, the Trust will have to make a retender settlement net of costs of somewhere between £41.3m and £81.3m. That figure is obviously much higher than the £926,000 costs award that the Trust considers would be made in its favour.

49. The Trust argues that, notwithstanding EY's estimates, it still suffers a significant risk of not being able to set off a costs award against its liability to make a COT Payment because of the likelihood of construction defects being discovered as part of a "Centre of Best Practice Survey" (the "COBP Survey") that it is currently conducting. The COBP Survey seeks to uncover previously unknown construction defects in the Hospital. The survey itself is expected to be completed in August 2024 with a process of identifying what needs to be done in order to correct the defects, and the likely cost of correction, likely to take a further 14 months.

50. The Trust has put forward evidence from Mr Manley (of the Trust's consultants ("P2G")) who designed the COBP survey to the effect that COBP surveys on other similar projects have tended to show a wide range of non-compliance and a corresponding need for rectification works. Mr Manley's opinion is that on all of the surveys in which P2G have been involved there has never been a situation where there have been no further defects. He expresses the opinion that he would expect the deductions flowing from the COBP Survey at the Hospital to "wipe out the entire Service Payment". He says that he is expecting some 5,000 to 10,000 non-compliant events to emerge from the survey.

51. In a similar vein, Mr Beal of EY expresses the opinion that on other PFI contracts, significant defects have been discovered after termination. He gives the example of the Royal Liverpool University Hospital PFI Scheme where, after the construction company (Carillion) went into liquidation, rectification costs increased by more than five times the original estimate after a full survey was carried out.

52. The difficulty with this evidence is that with the COBP Survey due to complete by August 2024, it would have been open to the Trust to provide some evidence of actual defects that it has discovered so far. That it has not done so, and has instead relied on high level impressions that Mr Manley and Mr Beal have based on previous experiences on different projects does not incline me to conclude that there is a significant risk that those defects will reduce the COT Payment by such a large amount as to cause the Trust's set-off right to fail.

53. The Trust makes a separate point to the effect that it will have to wait up to 4 years to exercise its right of set-off. That is true. However, to the extent it obtains an award of costs in its favour, interest at the 8% Judgments Act rate will accrue on unpaid costs. Provided the Trust can exercise its right of set-off that interest will operate to reduce the amount of COT Payment that the Trust owes.

54. The Trust argues that there is a separate problem with setting off interest. It submits that in an administration, an administrator could make an early declaration of an intention to make a distribution thereby ousting contractual set-off and triggering set-off pursuant to the Insolvency Rules. Under the Insolvency Rules, it was argued that future accruals of Judgments Act interest could not be set off against the COT Payment.

55. At the hearing before me, this was presented as something that an administrator could do. No evidence was given suggesting that it was something an administrator would do although Mr Bayfield KC shared some experiences from the Lehman administration. It was not said, for example, that potential administrators had been approached with those administrators saying they proposed to make an early declaration of intention to distribute. An early declaration of an intention to distribute strikes me as not straightforward since any receipts from bidders in a retendering process would be uncertain in amount and possibly due to be received in 48 months' time.

56. Based on the evidence that was before me at the hearing, I regarded the risk that the Trust articulated as being a lawyer's concern about a way an administrator might act

which did not disclose a significant risk that an administrator of the Company would actually act in that way. Following the hearing at which I made my order, the Trust sent me further material on this point. However, since I had by then made my order, and since my order had to be based on evidence available at the hearing, I have not read that further material.

57. Nor do I accept the Trust's point that the risk is more acute still if the Company goes into insolvent liquidation, since it was common ground between the parties that the "relevant alternative" is an administration.

58. I conclude that the risk of the Trust being unable to set off Judgments Act interest against the COT Payment is no higher than the associated risk in relation to the costs themselves.

Costs Risk if the Plan is sanctioned

59. The Trust says that, if the Plan is sanctioned, then it is "currently minded" to exercise its Initial Termination Right. The Trust's position is that following the exercise of that right, there would still be a Liquid Market. However, in that case, the retendering process would need to be completed in a total of 24 months. The Trust would not have the total of 48 months (consisting of up to 30 months in which step-in rights are being exercised plus 18 months of re-tendering) that would be available if the Plan is not sanctioned.

60. In his oral submissions on behalf of the Company, Mr Smith KC did not invite me to make factual findings to the effect that the Trust would not, or could not, exercise its Initial Termination Right if the Plan is sanctioned. Indeed, as noted in paragraph 42. above, the Company recognised the impossibility of me making findings on disputed questions of fact such as whether there was a "Liquid Market" or not. The focus of Mr Smith KC's oral submissions was that, even if the retendering process took place over 24 months rather than 48 months, that could not make that much difference given the substantial headroom available even on the Trust's own analysis of likely COT Payments following a re-tendering process culminating in 48 months' time.

61. As a matter of pure logic, there was some common sense to the Company's submissions. The Hospital has indeed been functioning for several years and one might well debate the likelihood that any construction defects identified will be so significant as to counteract the substantial COT Payments being modelled. In addition, given that there appears to be plenty of headroom in the COT Payment if there is a re-tendering that is completed in 48 months' time, one might well intuitively query why there would not be similar headroom if the re-tendering is completed in 24 months' time. Finally, there is some force in the point that the Trust's risk involves a lower amount of costs given that it might well be unlikely to obtain all of its costs if the Plan is sanctioned.

62. However, the question should be approached by reference to all the evidence that is actually in front of me. One straightforward proposition emerges from that evidence, which is not seriously in dispute. If the Company is ordered to make a payment of material costs to the Trust following the sanction hearing, the Company is unlikely to be able to comply with that order when it falls due for payment. The Company seeks to establish that the actual risk of non-payment of costs is minimal because of the level of COT Payment that the Trust can expect to receive in due course. However, none of the evidence as to likely COT Payments focuses on a re-tendering that has to be completed in 24 months' time.

63. The Company seeks to portray that lack of evidence as a failure by the Trust to evidence its case sufficiently. However, I do not agree. There is a clear risk that the

Company will not be able to pay any costs falling due for payment in August 2024. In those circumstances, if the Company seeks to persuade me that the risk is negligible, even if a re-tendering takes place in a 24 month timescale, in my judgment it needs to do better than simply advancing submissions that reason by analogy with the evidence of likely COT Payments in 48 months' time.

64. A re-tendering in 24 months' time will, by definition, have had only half the time of a 48-monthly tendering process to attract bids and bidders. Moreover, while bidders could expect to have the results of the COBP Survey in August 2024, the evidence before me suggests that it will take a further 14 months for bidders to know what fixing those defects is likely to cost. By way of counterpoint to the Company's submissions set out in paragraph 61., I see a clear logic to the proposition that bidders participating in a shorter process, in which full information on the likely cost of construction defects becomes available over halfway through, might well be inclined to bid less. I also see a clear logic to the proposition that a shortened process like this might attract fewer bidders which in itself might reduce the price payable.

65. The evidence before me does not seek to model how EY's estimate of likely re-tendering payments made following a 48-month process would be affected if the process instead had to be completed in 24 months. Both sides advanced sensible arguments as to what the effect might be, but I had no evidence from a person acquainted with the area. I attach little significance to the fact that Ms Wilson, in her evidence on behalf of the Trust, described the risk of a failure of set-off as a "non-trivial possibility which cannot be ruled out as being fanciful". Ms Wilson is the Trust's solicitor and has had no more evidence from someone knowledgeable in the field than I have. The fact that she declined to use any kind of overstatement is to her credit and is not a secure guide to the level of the risk.

66. EY's calculation is that in order for any set-off against a COT Payment to be possible, the re-tendering proceeds would have to be in the order of £13.9 million. I am not prepared to conclude at this stage based on the evidence I have been shown, which has not been tested in cross-examination, that retendering proceeds would necessarily be higher than this amount in a 24-month process. It follows that I conclude that there is at least a realistic and material risk that, if the Plan is sanctioned, the Trust will not be able to set off the full amount of any costs made to it against the COT Payment.

CONCLUSION ON EXERCISE OF DISCRETION

67. It is common ground that the threshold conditions set out in CPR 25.13(2)(c) are satisfied. I have also concluded that there is a real risk of the Trust not being able to set off its entitlement to receive costs from the Company against any COT Payment due to the Company. That real risk, in my judgment, is most acute in the scenario where the Plan is sanctioned as, based on my assessment of the evidence, I conclude that the risk of set-off failing if the Plan is not sanctioned is not significant.

68. Those conclusions, in my judgment, indicate that it is appropriate to exercise discretion to require the Company to provide some security for costs. I am not persuaded that the differences between the Plan and "ordinary adversarial litigation" are sufficient to dissuade me from that course.

69. The Company refers to paragraph [57] of the judgment of the Court of Appeal in *Chernukhin v Danilina* [2019] 1 WLR 758 to the effect that:

> *In principle, security should be tailored so as to provide protection against the relevant risk.*

70. The Company formulates the "relevant risk" as being the risk of the Trust ultimately being unable to obtain the economic value of any costs award by setting it off against the COT Payment. It argues that, since that relevant risk is low, particularly in the scenario where the Plan is not sanctioned, the court should either decline to make an order for security for costs, or should set the security at a low level.

71. I quite accept that, if a statistician were asked to evaluate that formulation of the "relevant risk" he or she might proceed by evaluating (i) the respective probabilities of the Plan being sanctioned or not; (ii) the likely award of costs in either scenario and (iii) the probability of these costs not being covered by the Trust's set-off right. That process might culminate in an estimate of an "expected loss" to the Trust.

72. However, I do not consider that is the approach I should follow in this case. The purpose of security for costs is not to compensate the Trust for "loss of a chance". Its purpose is to secure the Trust against the "relevant risk" identified by CPR 25.13(2)(c) namely the risk that the Company will be unable to pay the Trust's costs if ordered to do so. In *Chernukhin v Danilina*, the relevant risk was that of non-enforcement of a costs order against a foreign litigant. The Court of Appeal rejected the proposition that that risk should be measured on a "sliding scale" with Hamblen LJ saying at [64] and [65]:

> *64. In my judgment, once it has been established that there are "substantial obstacles" sufficient to create a real risk of non-enforcement, the starting point is that the defendant should have security for the entirety of the costs and there is no room for discounting the security figure by grading the risk using a sliding scale approach.*
>
> *65. That is the starting point but it by no means follows that security for all or indeed any of those costs will be ordered. The quantum of security is a matter of discretion and discretionary factors such as, for example, delay or stifling, may affect the amount of security to be ordered, if any.*

73. In my judgment, the Company's submission summarised in paragraph 70. mischaracterises the "relevant risk" to which the Court of Appeal was referring. The relevant risk is the risk that the Company will be unable to pay costs if ordered to do so. The Trust is subject to that risk which is not addressed fully by the existence of the Trust's right of set-off. The starting point, therefore, should be that the Trust should obtain security for the entirety of its costs.

74. However, in my judgment, that is not the end point in the particular circumstances of this case. This is not a classic situation, of the kind that would arise in ordinary adversarial litigation where (i) a defendant is likely to be awarded costs only if it wins so that (ii) if a claimant does not pay a costs order on the due date for payment that suggests that a good proportion of the defendant's recoverable costs might go unpaid. A costs award in the Trust's favour might be less than £926,000 (if the Plan succeeds) and, even if the Trust is not paid costs on the due date, there is a good prospect of the set-off right mitigating the effects of that failure. Even though those matters are not susceptible to a "sliding scale" approach of the kind rejected in *Chermukhin v Danilana*, it is right that these points of difference with the classic situation should be recognised when I exercise my discretion.

75. Moreover, any security for costs will in my judgment have to come from the Funds since it is the Funds who have been providing the RP Funding to date. I accept that the Funds have a complicated "risk versus reward" calculation to perform and I should therefore have regard to the risk of an order for security stifling the Plan.

76. In the circumstances of this case, I consider that the competing constraints are appropriately balanced by requiring the Company to provide security for costs for half the amount that the Trust has requested.

77. The Company argues that I should impose a further condition namely that, if the Plan is not sanctioned, the security given should be refunded so that the Trust has to rely on its set-off right for the entirety of its costs rather than having recourse to the security provided. It argues that this approach is justified by my conclusion that there is not a significant risk of set-off failing if the Plan is not sanctioned.

78. I reject that argument for reasons similar to those set out in paragraph 72.. The purpose of security for costs is to protect the Trust against the risk of the Company being unable to pay costs that it is ordered to pay. The order for security must be made now and looking at matters now, that risk is present.

79. I also consider that the "balance of prejudice" points against the Company's suggested approach. Litigants are entitled to expect that costs orders made in their favour will be paid when due, but on the Company's approach, despite security being made available, the Trust will be declined recourse to that security if the Plan is not sanctioned and will have to wait up to four years to exercise its set-off right. Moreover, once the Company has provided security, it suffers no incremental prejudice if that security is used to pay costs that the Company owes since the Company should have been paying those costs anyway. Any risk of "stifling" will have passed by the time any costs order becomes payable. By contrast, there is a risk of prejudice to the Trust if any security has to be returned if the Plan is not sanctioned. While I might well evaluate the risk of the set-off failing as low today, circumstances might change such that ultimately the Trust cannot exercise its set-off right. In that case there would be real prejudice to the Trust as it would not obtain effective payment of costs ordered by the court.

COSTS OF THE APPLICATION

80. I award the Trust its costs of the application. I consider the Trust to be the overall successful party. It has obtained an order for security for costs in circumstances where the Company argued that no such order should be made.

81. The Company argues that costs should be reserved until it is seen whether the Plan is sanctioned. I do not agree as I consider that argument subject to the same flaws as the similar argument summarised in paragraph 77. which I have rejected.

82. Nor do I agree that, because the Trust has obtained only 50% of the security that it sought, the Company should have to pay only 50% of its costs. The Company has been unsuccessful on almost all the arguments that it put forward as a principled objection to the provision of security for costs. It is true that I have accepted the Company's assessment of the magnitude of the risk of set-off failing if the Plan is not sanctioned in preference to the assessment put forward by the Trust. However, that was simply an element of failure on the way to the Trust's overall success in the Application.

83. The Company was also critical of what it submitted to be the Trust's late deployment of arguments based on costs risk even if the Plan is sanctioned. I do not accept that criticism and indeed any such criticism did not form a substantial component of oral submissions at the hearing before me. The Company did not, for example, say at the hearing that it had had insufficient time to meet this argument which was fully set out in the Trust's skeleton argument.