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Case No.: 1282/7/7/18, 1289/7/7/18

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 June 2019

Before:

The Honourable Mr Justice Roth, Dr William Bishop, Professor Stephen Wilks

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK Trucks Claim Limited

v

Fiat Chrysler Automobiles N.V. and Others

and

Road Haulage Association Limited

v

Man SE and Others

*Transcribed by **Opus 2 International Ltd.**
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Hearing– Day 2

Wednesday, 5 June 2019

(10.30 am)

THE PRESIDENT: We have received, Mr. Thompson, this morning a letter from your instructing solicitors about the amendments to the opt in LFA and the position on the draft amended opt out LFA.

MR THOMPSON: I am grateful. I was not wanting to take up Mr. Bacon's time. It was just to confirm that we had an email exchange overnight and then this tries to set the matter out more fully, and obviously I'll have to deal with that when it is my turn.

THE PRESIDENT: Yes, and as I understand it, the position is that if a CPO is granted, whether it is either opt in or opt out to your client, then to UKTC you would undertake to execute the one agreement or to make the amendments and execute the other one.

MR THOMPSON: Yes, as we discussed at the original hearing, there are obviously some differences between the two agreements, but subject to that --

THE PRESIDENT: But the one set out in the letter.

MR THOMPSON: -- broadly speaking they are in a common form.

THE PRESIDENT: Yes, thank you very much.

Submissions by MR. BACON

MR BACON: A very good morning, Mr. Chairman, sir. As you know, I appear on behalf of a group of respondents and

1 interested parties and to make that clear, obviously you
2 have in our written submissions. I appear with, to my
3 right, my learned junior, who has, if I may say so,
4 provided some invaluable assistance during the course of
5 the preparation, Mr. Carpenter. To his right, Mr.
6 Peter Kirby and Mr. David Went. To my left, you know
7 Mr. Rhodri Thompson to go with Judith Ayling. Those are
8 the parties, persons who are speaking, as I understand
9 it, during the course of this hearing.

10 My Lord, I appear on behalf of the respondents and
11 proposed objectors to the UKTC application and to those
12 respondents to the RHA claim, the first objectors of
13 that claim and all other respondents. Volvo supports
14 the joint funding response, just so that was clear. And
15 there are, in our submission, some key points that need
16 to be drilled into, sir, in respect of this application,
17 both applications, and I intend to deal with the
18 submissions in the following way, subject to any
19 observations you have, sir.

20 First of all, to outline the key concerns we have as
21 regards the funding arrangements; to turn to the
22 statutory provisions that govern the Tribunal's approach
23 to this matter; and then to turn to the detail of the
24 funding arrangements themselves, the LFAs, the ATE
25 policies, and explain why in the light of the statutory

1 material we say that there are real issues with the
2 proposals.

3 The key points are these: there are material
4 concerns over the structure of the funding and ATE
5 arrangements. There are real concerns about the
6 adequacy of the funding available to the applicants in
7 order to bring the claims to a final conclusion.

8 There are material concerns, sir, over the use, and
9 it is related to point one, of the offshore entities,
10 the SPVs, which are said to be providing necessary
11 funding. There is a complete lack of visibility in
12 respect of their financial standing.

13 There are real concerns related to point two, about
14 the adequacy of the adverse costs cover that is provided
15 by the two ATE policies. There is a real concern about
16 the commitment, particularly in relation to the Therium
17 arrangements, to fund the proceedings from beginning to
18 end.

19 We submit, sir, that each of the points that we will
20 develop through that rubric of those six points, taken
21 individually or collectively, provide a proper basis for
22 the Tribunal to hold that the applicants have not
23 satisfied the minimum standard requirements, which we
24 will turn to shortly, so that neither can be certified.

25 Of course the Tribunal is more familiar than I with

1 the statutory framework surrounding this certification
2 procedure, but it is still nevertheless fairly
3 embryonic. Could I ask you, please, to turn to the
4 authorities bundle. It is the second volume where the
5 rules at tab 41 of the bundle are extracted, paginated
6 at the bottom of the page. I would like to turn to
7 page 45 of tab 41, rule 78. Rule 78, page 45:

8 "The Tribunal may authorise an applicant to act as
9 the class representative whether or not the applicant is
10 a class member, but only if the Tribunal considers it is
11 just and reasonable for the applicant to act as a class
12 representative in the collective proceedings."

13 78(2):

14 "In determining whether it is just and reasonable
15 for the applicant to act as the class representative,
16 the Tribunal shall consider whether that person"

17 And, sir, I am primarily concerned with (d):

18 "... will be able to pay the defendant's recoverable
19 costs if ordered to do so"

20 And (a):

21 "Would fairly and adequately act in the interests of
22 the class members"

23 78(3):

24 "In determining whether the proposed class
25 representative would act fairly and adequately in the

1 interests of the class members the Tribunal shall take
2 into account all of the circumstances, including ..."

3 So it is illustrative, rule 78(3,), rather than
4 exclusive.

5 That includes at (c):

6 "Whether the proposed class representative has
7 prepared a plan for the collective proceedings which
8 satisfactorily includes a method of bringing the
9 proceedings, [...] procedure for governance, [...] any
10 estimate of and details of arrangements as to costs,
11 fees or disbursements which the Tribunal orders that the
12 proposed class representative shall provide."

13 We will come to the detail of the budgets and the
14 arrangements as to costs in due course.

15 Whilst we are in the bundle, again, not unfamiliar
16 territory I am sure, behind tab 44, sir, is the
17 Tribunal's Guidance. At page 72, bottom of the page of
18 44, so over the page, "Authorisation of class
19 representative". Tab 44, page 72, the fourth line down
20 of 6.29, 78(1)(b):

21 "The central purpose of this assessment is to ensure
22 that class members are adequately and appropriately
23 represented. This is particularly important in respect
24 of opt out proceedings. Must act in the interest of the
25 class as a whole. Hence, being a class representative

1 involves significant and serious obligations, and is not
2 a responsibility to be taken on lightly."

3 The factors the Tribunal will take into account,
4 reading from 6.30:

5 "When considering whether it would be just and
6 reasonable for the proposed class representative to act
7 in that capacity are set out in rule 78(2). The first
8 of these factors is whether the proposed representative
9 would fairly and adequately act in the interests of the
10 class members."

11 Then I am not going to read it all out, you will be
12 familiar with it, there are a list of circumstances
13 which the Tribunal will take into account.

14 Over the page the second heading, the first heading
15 "Any plan for", second paragraph, page 73:

16 "Any plan for the collective proceedings" (rule
17 78(3)(c)):

18 "The Tribunal will expect the proposed class
19 representative to have prepared a plan for the
20 collective proceedings which addresses the matters set
21 out in the relevant sub-rule. Such a plan should be
22 sufficiently detailed and comprehensive to correspond to
23 the nature of the particular case. It should explain
24 how the proposed class representative and its lawyers
25 intend to ensure that the collective proceedings will be

1 effectively and efficiently pursued in the interests of
2 the class, referring to the issues likely to arise in
3 the particular case."

4 Matters that may be set out include a series of
5 bullet points, including whether experts should be
6 needed, what kind, and how appropriate experts will be
7 identified and retained, and proposed timetables and
8 so on.

9 We will see in due course how we submit that there
10 are parts of the plans that have been submitted here
11 which fall short of these requirements.

12 There should be appended to the litigation plan,
13 just reading from the bottom of that section:

14 "... a costs budget to the end of the trial."

15 That is important because we are presented with two
16 applications which assume that the trial will contain
17 and consider only certain common issues which are
18 presented to the Tribunal. There are, and we will see
19 in due course, a whole series of other, what might be
20 called individual, issues, which have not been the
21 subject of budgets, which have not been the subject of
22 proper forensic consideration in terms of preparing the
23 plan, which we would say is inconsistent with the
24 requirements of the Guide, certainly, therefore, the
25 rules.

1 And the Guide assumes that the certification is
2 a certification requiring appropriate funding on both
3 sides -- when I mean own sides' costs and adverse
4 costs -- for the entire proceedings to trial. That is
5 obviously necessary because it will assist the Tribunal
6 in understanding what and how it should proceed within
7 the CPO so it has all the information available to it to
8 make the necessary case management decisions that duly
9 will be required in due course.

10 The Guide, we recognise, as we have in our skeleton
11 and in our joint bundle in response, says in that same
12 paragraph that the Tribunal is not constrained at
13 a point, at this juncture. It can, at appropriate
14 procedures and appropriate moments, revise or review
15 plans. We accept that. But that is not to say that as
16 of today the Tribunal must not be satisfied that
17 sufficient funding and provision has been made to
18 funding on our own side and adverse costs, together with
19 appropriate plans, as of now based upon a realistic
20 assessment of what these CPOs would require if granted.

21 Over the page, sir, at paragraph 6.33 of the Guide
22 is another important paragraph, "The fourth factor the
23 Tribunal is required to consider relates to the proposed
24 class representative's financial resources: would the
25 proposed class representative be able to pay the

1 defendant's recoverable costs if ordered to do so?"

2 I am going to repeat that because it is not "might
3 it". It is:

4 "Would the proposed class representative be able to
5 pay the defendant's recoverable costs if ordered to do
6 so? (rule 78(2)(d))"

7 That question needs to be answered as of today, now,
8 based upon the material that is presented to the
9 Tribunal by the two applicants.

10 "By extension, the proposed class representative's
11 ability to fund its own costs of bringing the collective
12 proceedings is also relevant. In considering this
13 aspect, the Tribunal will have regard to the proposed
14 class representative's financial resources, including
15 any relevant fee arrangements with its lawyers, third
16 party funders or insurers. The cost budget appended to
17 the collective proceedings plan referred to above is
18 likely to assist the Tribunal's assessment in this
19 regard."

20 So that's the Guide and the rules. The effect of
21 the Guide and the rules, we submit, is that the
22 applicants, each of them, must be able to demonstrate
23 the following. There are three points:

24 Firstly, that they have a realistic cost budget for
25 the entirety of the litigation, not a budget for part of

1 it. Secondly, that they confirm the entirety of their
2 budget together with non-legal expenditure which they
3 will need to incur in order to bring the proceedings to
4 a conclusion; and thirdly, that they will be able to pay
5 any adverse costs if ordered to do so.

6 The burden of proof here, sir, we submit, is
7 squarely on the applicants and it is not an area where
8 we would say the applicants need to show a real prospect
9 of satisfying these matters. They are matters which
10 must be established at the time that the CPO is sought.
11 An applicant who cannot establish those matters will not
12 be suitable as an applicant for a CPO.

13 There is not a huge amount of jurisprudence, sir, on
14 any of this. You will be more familiar than I, but
15 I have done my homework and it seems to us that there is
16 a requirement for the Tribunal to consider what all this
17 really means, what is the test that you should apply in
18 arriving at your conclusions as to whether the
19 requirements and conditions of the rules and the
20 guidance have been met.

21 The test should be whether there is a realistic, as
22 opposed to fanciful or theoretical, possibility that
23 funding is insufficient. That is the test which we say
24 we can glean from your decision in *Merricks*. It
25 might be worth having a look at that. It is in the

1 authorities bundle, tab 13, from memory.

2 THE PRESIDENT: That is in the first authorities.

3 MR BACON: The first one. I will just check that. Yes,
4 tab 13.

5 You will recall, sir, that I appeared before you on
6 the other side of the fence in that case for
7 Mr. Merricks, and you will recall, I am sure, that the
8 funding arrangements were considered in some real
9 detail, and if I may say so, respectfully, you pointed
10 out there were issues regarding the indemnity principle
11 that caused the Tribunal concerns. I had to scurry
12 around and come up with some re-drafting and we worked
13 our way through it. But in the course of your judgment
14 at paragraph 121 of tab 13, the most I can do, certainly
15 from your approach in that case, is to refer to that
16 paragraph:

17 "Thus, in its present form, we considered that the
18 Funding Agreement would not entitle or enable the
19 Tribunal to order the payment of the "Total Investment
20 Return" in the manner envisaged. It follows that the
21 funder could terminate under section 2.4 of the FA, and
22 given that it faces the prospect of failing to recover
23 the consideration for which substantial funds would be
24 advanced, that must be, at the very least, a realistic
25 possibility. As things stand, therefore, we would not

1 authorise the Applicant to act as the class
2 representative."

3 That is why I adopt this 'realistic possibility'
4 approach which seems to us to be consistent with the
5 wider jurisprudence on things like security for costs
6 and other areas, which I will turn to in a moment.

7 Before I do that, could I ask you to turn up UKTC's
8 funding submissions. They are in the bundle --

9 THE PRESIDENT: Just before you do that, you referred to,
10 I think a couple of times, to the fact that the funding
11 has to be adequate until the end of trial.

12 MR BACON: Yes.

13 THE PRESIDENT: And that the applicants have suggested that
14 there may be certain issues which have to be individual
15 issues. We are concerned here with the application for
16 a collective proceedings order, collective proceedings
17 for the funding of collective proceedings --

18 MR BACON: Yes.

19 THE PRESIDENT: -- to the conclusion of the collective
20 proceedings.

21 MR BACON: Yes.

22 THE PRESIDENT: Not any subsequent individual proceedings
23 that may follow. If there are a number of individual
24 issues that are pursued against only one OEM, for
25 example, in a subsequent trial, that is not part of the

1 collective proceedings.

2 MR BACON: I think there are grades of answers to that
3 question, sir. There are going to be issues which
4 doubtless will be very specific to a particular
5 claimant, but the distinction I seek to make between
6 common issues and individual issues is that, on the one
7 hand, UKTC includes within common issues pass-on,
8 interest and so on. We will say that they are issues
9 which should be the subject of the Tribunal's decision
10 in due course, further down the line, and subject to,
11 therefore, budgeting and funding commitments of the kind
12 that we have anticipated in our budgets, but they have
13 not.

14 We will go to the detail in due course, but there
15 are issues which the claimants have sought to excise
16 from their budget and funding proposals on the pretext
17 that they will not be the subject of common
18 determination in that sense within these four walls,
19 when we submit that they very much will be.

20 THE PRESIDENT: If you are right on that, then I understand.

21 MR BACON: Yes, that --

22 THE PRESIDENT: Equally, to the extent there will be
23 individual issues subject to judgment in the collective
24 proceedings, we would not expect that to be in the
25 budget.

1 MR BACON: No, I see that. I think it is a division as to
2 what is meant by individual issues, but we will come to
3 that in due course. We ought to be on the same hymn
4 sheet that obviously at some point further upstream or
5 downstream, depending on which heading, sir, you are
6 intending to proceed, there is going to be a hearing at
7 which you determine what the issues in these cases will
8 be. There is a dispute about that at the moment.
9 I just want to lay the marker that the funding
10 arrangements that are being put forward by the
11 applicants do not accommodate key issues which we say
12 will be the subject of the ultimate CPO in due course.

13 THE PRESIDENT: Yes.

14 MR BACON: Sir, the funding submissions, the UKTC funding
15 submissions, volume 3, tab 47. This is part of the
16 submission on what is the correct approach.

17 THE PRESIDENT: I am sorry, did you say 47?

18 MR BACON: Volume 3, tab 47, page 1434. This is UKTC's
19 reply.

20 In the context of what is the general approach under
21 rule 78(2)(d) the UKTC, not, I should say, the RHA, so
22 it is not a submission they make, but UKTC makes the
23 submission at paragraph 31 that inherent in the approach
24 you should take to 78(2)(d), you must ask yourself what
25 likelihood there is of UKTC paying the defendant's costs

1 following the making of a CPO.

2 "Had the defendants not taken the attritional
3 approach they have chosen to take, this would have been
4 akin to a liability admitted case. Indeed, any adverse
5 costs order in such circumstances is unlikely at the end
6 of a contested damages claim ..."

7 We would submit that that is wrong as a matter for
8 you to take into account.

9 THE PRESIDENT: Just pause a moment. Sorry. (Pause) I am
10 trying to understand it. I did not quite understand it
11 when I first read it.

12 MR BACON: My submission, sir, is it really amounts to
13 saying that applicants for a CPO in follow-on claims
14 should not have to establish their ability to pay
15 adverse costs, or they should have some lesser
16 obligation to do so, because such claims are bound to
17 succeed. That is not what the rules provide. We would
18 say as a matter of fact that it is a particularly
19 ill-made submission in circumstances where the
20 Commission's decision was that this was a case of
21 information exchange and not a price fixing cartel per
22 se.

23 As all of the joint OEMs have pleaded it will be for
24 the applicants to prove an effect on price and
25 overcharge. Even if the applications are certified the

1 outcome does not necessarily result in success. There
2 is a significant degree of uncertainty which the
3 claimants have in establishing their claims.

4 THE PRESIDENT: Just one moment. (Pause)

5 MR BACON: Sir, there will be questions of causation, pass
6 on, downstream issues which could ultimately mean, and
7 we say will mean, that these claimants are potentially
8 significant subsets of claimants and will recover very
9 little even if there has in fact been a notional
10 overcharge.

11 So we would very much countenance against this
12 approach that this type of CPO application should result
13 in some more lenient --

14 THE PRESIDENT: There could be a claimant's offer.

15 MR BACON: Sorry?

16 THE PRESIDENT: There could be a claimant's offer --

17 MR BACON: Yes.

18 THE PRESIDENT: -- which is not accepted, so that even if
19 something is recovered at the end it may be less than
20 the offer. It is the equivalent of a Part 36 offer.

21 MR BACON: Quite. And there are set-off provisions within
22 the funding agreement which do not assist the claimant
23 in that regard. They end up paying.

24 We would submit that that fundamental submission,
25 that submission, which appears to underlie what is being

1 said by UKTC, is just wrong.

2 So far as the ability to pay the adverse costs,
3 I will come to the detail in a moment, we are still
4 looking at the test and the correct approach you should
5 take, we submit that the Tribunal should take the same
6 approach to the adequacy of ATE insurance in
7 demonstrating satisfaction of rule 78(2)(d), as is taken
8 by analogy on applications for security for costs.

9 The Tribunal of course can make orders for security
10 for costs, rule 59, and it follows rule 25 in the Civil
11 Procedure Rules, but it permits an order to be made
12 where the claimant is a company or other body and there
13 is reason to believe that it will be unable to pay the
14 defendant's costs if ordered to do so. Rule 59(5)(d).

15 THE PRESIDENT: Yes.

16 MR BACON: I think it might be in the authorities bundle.

17 THE PRESIDENT: We have it, yes.

18 MR BACON: It is the obverse to the requirement under rule
19 78(2)(d), if you have that out. I think I said it was
20 tab 13 of the first volume of the authorities bundle.
21 Tab 41 of the second. Volume 2, tab 41. Under
22 78(2)(d):

23 "The Tribunal shall consider whether that person
24 will be able to pay the defendant's recoverable costs if
25 ordered to do so."

1 Rule 59(5) (b) :

2 "... there is reason to believe that it will be
3 unable to pay the defendant's costs if ordered to do
4 so."

5 So they are the obverse of each other, and we submit
6 you can draw by analogy, quite appropriately, the
7 approach taken to security for costs. Obviously the
8 obverse nature of these two provisions reflects the
9 different burden of proof. Under security it will be on
10 us, and the rule 78(2) (d) it is on the claimants, but
11 the test should be the same.

12 Drawing on that analogy, if in principle it is right
13 to do so and we submit it makes logical and appropriate
14 sense to do so, we know that where a claimant is
15 otherwise without assets it is common for an ATE policy
16 to be put forward by the claimant as demonstrating that
17 the claimant will in fact be able to pay the defendant's
18 costs. As you know, there have been a series of
19 authorities, inconsistent in the early days, as to
20 whether an ATE policy is an appropriate form of security
21 to substantively respond to a security for costs
22 application. *Premier Motorauctions*, which I would
23 like to turn to in a moment, is the leading end of the
24 road decision on this point. It is an important case,
25 we say, for the application of rule 78, by analogy, and

1 I entirely accept it is a different regime.

2 It is in tab 18, file 1. It is a useful case
3 because it does traverse some of the history of the
4 cases on -- the Court of Appeal judgment which I will
5 turn to is tab 19 and the first instance is tab 18. It
6 is tab 19 that we need to concern ourselves with.

7 Tab 19. The claimant companies, sir, were in
8 compulsory liquidation with no substantial assets but
9 their liquidators obtained after the event insurance and
10 disclosed copies to the claimants, to the defendants, in
11 order to effectively provide adequate security.

12 THE PRESIDENT: Yes.

13 MR BACON: Just sticking with the headnote for the moment:

14 "Allowing the appeal, that in principle the court
15 could take an ATE insurance policy into account when
16 deciding whether it had jurisdiction to make an order
17 for security for costs against the claimant company ...
18 if such a policy gave the defendants sufficient
19 protection [they are quite important words which I will
20 come back to in a minute] then the court would not have
21 reason to believe that the claimant would be unable to
22 pay the defendant's costs if ordered to do so ... with
23 the consequence that there would be no jurisdiction to
24 make an order for security of costs; that, on the facts,
25 the defendants could not be assured that the insurers

1 would not avoid the ATE insurance for non-disclosure or
2 misrepresentation if the claimant's claim were
3 dismissed; that, therefore, there was reason to believe
4 that the claimants would be unable to pay the
5 defendant's costs if ordered to do so, and the
6 jurisdictional requirement of CPR 25.13 was satisfied:
7 that, where the court was satisfied that there was
8 jurisdiction to order security for costs and that
9 ordering security would not stifle the claim, it was
10 normally appropriate to order security ..."

11 No issue of stifling arises in these cases. The
12 issue --

13 THE PRESIDENT: When you say "These cases --"

14 MR BACON: In these claims, in these two applications. This
15 is a statutory -- we are looking at a statutory
16 requirement imposed upon them to satisfy the terms of
17 the rules, to pursue -- bring a claim.

18 THE PRESIDENT: It is the consideration that we are bound to
19 take into account. That's the requirement. We must
20 take into account that consideration.

21 MR BACON: I accept insofar as the Tribunal is satisfied
22 that it has not been possible for an applicant to a CPO
23 to secure sufficient funding to pay those costs, then
24 a CPO cannot be granted. That might well mean that the
25 claim will not proceed. It is not a stifling point. It

1 is just that they have not satisfied the statutory
2 requirements of the rules.

3 THE PRESIDENT: The requirement of the rules is that we must
4 consider this matter. It is one of the things we have
5 to consider. That is what the rules say.

6 MR BACON: Yes.

7 THE PRESIDENT: It does not say a CPO must not be granted.

8 MR BACON: No, it is a factor within the decision making.

9 THE PRESIDENT: Yes, it goes into the discretion.

10 MR BACON: It goes into discretion, I accept that.

11 Paragraph 6 of the judgment sets out the rule that
12 you will be familiar with, I am sure, sir, rule 25.

13 I have already referred to it.

14 THE PRESIDENT: It may be that not all members of the
15 Tribunal --

16 MR BACON: No, quite, I am conscious of that. Paragraph 6:

17 "CPR 25.13 ... provides ..." and it is
18 sub-paragraph 2:

19 "The conditions are that the claimant is a company
20 [...] and there is reason to believe that it will be
21 unable to pay the defendant's costs if ordered to do
22 so".

23 That is the statutory governing provision behind the
24 making of orders of security: reason to believe it will
25 be unable to pay. It is against that background that

1 the rest of the judgment really turns.

2 You will see that at paragraph 9, just before I go
3 on to that, paragraph 7, there is a reference to the
4 *Jirehouse Capital* case, the Court of Appeal, and an
5 observation that was endorsed by
6 Lord Justice Moore-Bick, reading from paragraph E in

7 SARPD:

8 "It follows that it is not sufficient for the court
9 or the defendant to be left in doubt about a claimant's
10 ability to pay the defendant's costs if a claimant
11 loses. Nor is it sufficient, as the first instance
12 judge in *Jirehouse* had done, to paraphrase the wording
13 of the rule by saying that there was a significant
14 danger that the claimants would not be able to pay such
15 costs. The court must simply have reason to believe
16 that the claimant will not be able to pay them."

17 What happened, sir, was that the ATE policy, you
18 will see at paragraph 9, contained a whole series of
19 exclusions which are not unfamiliar to those provisions
20 you will see in the ATE policies you see before you
21 today. You will see at the bottom of the page,
22 exclusions. I am not going to read them all. They are
23 there for reading in due course, but they are a series
24 of what might be referred to as fairly standard
25 provisions within ATE policies, and prior to this case,

1 the case of *Premier Motorauctions*, one of the
2 points taken was that because of the standardisation of
3 these sorts of policies it would be unreasonable to
4 expect the court to refuse security on the basis that
5 one of these clauses might be engaged in due course.

6 That was rejected by the Court of Appeal.

7 Paragraph 10 of the judgment:

8 "Clauses 3.2 and 4.9 confirm that the ordinary
9 common law principle by which the insurer is entitled to
10 avoid liability if the insured makes any material
11 non-disclosure is applicable to the contract of
12 insurance. One sometimes sees anti-avoidance clauses in
13 ATE insurance policies pursuant to which insurers
14 promise not to avoid or promise only to rely on any
15 non-disclosure on representation made fraudulently."

16 But there is no such provision here.

17 That is something we will return to, sir, because we
18 say that what happened in *Premier Motorauctions* was
19 that such an anti-avoidance clause was not in existence
20 and there was not a proposal for a bond, and security
21 was ordered.

22 In these two applications the way that the Tribunal
23 could resolve the differences between us is to require
24 such a clause. We do not see any reason why that would
25 be unreasonable.

1 Paragraph 19 of the judgment:

2 "It is, in a sense, unfortunate ..."

3 And this might sound in, sir, your own mind.

4 "It is ... unfortunate that the court's jurisdiction
5 to order security for costs [make an order for approval
6 of a CPO] should depend on a detailed analysis of the
7 claimant's ATE insurance policies."

8 I might say 'at least partly depend', in the light
9 of your observations earlier, but certainly it is
10 a requirement to have a:

11 "... detailed analysis of the claimant's ATE
12 insurance policies into which the defendants have had no
13 input and which they have no direct right to enforce.

14 But I fear that such analysis is inevitable."

15 Paragraph 20.

16 We would submit that there ought to be a similar
17 approach that you will take.

18 THE PRESIDENT: Yes.

19 MR BACON: "There is little appellant authority on the
20 topic, but such as there is does support the proposition
21 that appropriately framed ATE insurance policy can in
22 theory be an answer to an application for security."

23 Can in theory be an appropriate form of providing
24 the necessary funding under the rules.

25 THE PRESIDENT: Yes.

1 MR BACON: Then paragraph 60 of the *Nasser* case, at
2 paragraph G on this page, indented at paragraph H is
3 referred to:

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

16 That ultimately was the approach that the Court of
17 Appeal took in the end in *Premier Motorauctions*.

18 Paragraph 22:

19 "These authorities do not in terms touch on the
20 question of jurisdiction but do give credence to Mr.
21 Sims' submissions that ATE insurance can, in principle,
22 be taken into account, at any rate if it gives the
23 defendant sufficient protection, to use
24 Lord Justice Sedley's words. If it does give that
25 sufficient protection, then there will not be reason to

1 believe that the company will be unable to pay the
2 defendant's costs if ordered to do so and there will
3 therefore be no jurisdiction to make an order.

4 "Since it will be inevitable that the question of
5 whether ATE insurance gives sufficient protection to the
6 defendant has to be decided at the discretionary stage
7 ... it will not perhaps be too troubling to have to
8 determine the question at the jurisdictional stage."

9 And that is really where we are engaged at this
10 point.

11 "Sufficient protection", heading, last paragraph,
12 paragraph 25 of that page:

13 "It is immediately apparent that the policies in
14 this case contain no anti-avoidance provisions of the
15 sort envisaged by Lord Justice Mance in the *Nasser*
16 case. The judge did not consider this a problem since
17 he considered the prospect of avoidance ... was purely
18 theoretical."

19 Now this sounds very much, just pausing there -- one
20 has read the skeletons and the submissions which have
21 been made by my learned friend, but there is rhetoric to
22 the extent that none of is this, this is theoretical,
23 this will not happen, of course they will pay. It is
24 exactly the sort of tone that was presented to the Court
25 of Appeal in *Premier Auctions* which was not

1 accepted as being attractive or appropriate in the end.

2 Paragraph 27:

3 "Again I cannot, with respect, agree. Of course it
4 does not follow that insurers would avoid but the
5 difficulty is that neither the defendants nor the court
6 has any information with which to judge the likelihood
7 of such avoidance. One knows that ATE insurers do seek
8 to avoid their policies if they consider it right to do
9 so: see *Persimmon Homes* in which a successful
10 defendant was unable to recover its costs from ATE
11 insurers. The landscape after trial may be very
12 different from the landscape as it appears to be at
13 present, and it is unsatisfactory to have to speculate."

14 THE PRESIDENT: What happened in *Persimmon Homes*?

15 MR BACON: There was a claim by the successful defendant for
16 a claim of the policy which was effectively subject to
17 an avoidance, so that there was -- these policies.

18 THE PRESIDENT: What was the avoidance? What was the
19 non-disclosure?

20 MR BACON: I am not sure, I will come back to you on that,
21 sir, but in the end they could not recover the costs and
22 that is one example. There are others.

23 "The judge felt that he could rely on the fact that
24 the proposals to insurers were made by joint liquidators
25 who are independent professional insolvency office

1 holders, and who had investigated the claims with the
2 assistance of experienced solicitors and counsel
3 providing a high-level objective professional scrutiny."

4 We have all of that balance in these cases too.

5 "All of this is of course true, but the best
6 professional advice cannot cater for cases of
7 non-disclosure matters which the professionals do not
8 know.

9 "Neither the defendants nor the court have been
10 provided with the placing information put before the
11 insurers ..."

12 Similarly here.

13 "... but, even if that had been provided it, is
14 unlikely that the court could be satisfied that the
15 prospect of avoidance is illusory."

16 That is an important gradient test that is being
17 applied by the Court of Appeal there. We would submit
18 that it is appropriate to adopt some similar approach.

19 "Even at the jurisdictional stage of considering
20 security for costs, the defendants must, as
21 Lord Justice Mance said in the *Nasser* case, 'be
22 entitled to some assurance that the insurance was not
23 liable to be avoided for misrepresentation or
24 non-disclosure'. I cannot see that on the facts of this
25 case these defendants have that assurance. It follows

1 therefore that there is reason to believe that the
2 companies will be unable to pay the defendants' costs if
3 ordered to do so ..."

4 Then the court at paragraph 30 refers to the fact
5 that the questions of evaluation here have raised
6 important questions of principle which have not been
7 previously considered.

8 At paragraph 31 of the judgment, about four or five
9 lines down:

10 "It is set out in paragraph 23 in the following
11 terms ..."

12 And there was an avoidance, the clause:

13 "'8. The insurer shall not be entitled to avoid
14 this policy for non-disclosure or misrepresentation
15 ...'"

16 This was a form of non-avoidance clause.

17 "I would, however, take issue with the suggestion
18 [at paragraph 32] that access to justice has quite the
19 relevance which Mr Justice Stuart Smith thought it had
20 since, as Mr. Fenwick and Mr. Zelic submitted, that
21 consideration is more normally relevant to the
22 possibility that an order for security might stifle
23 a claim. As I have already said, that is not a point
24 that arises in this case.

25 "Like the judge, I am not particularly impressed by

1 the fact that the companies have declined to procure
2 a deed of indemnity. If it is not a straightforward
3 guarantee I am not sure what a deed of indemnity is
4 since no draft of any such deed was put before us, but,
5 on any view, it would mean that insurers are giving up
6 their right to avoid and their rights under the
7 endorsement. It is enough to say that the existence of
8 those rights give sufficient reason to believe that the
9 companies will not pay the defendant's costs if ordered
10 to do so."

11 Over the page, paragraph B:

12 "That at least shows that insurers do sometimes
13 issue such a document but ironically the phrase 'deed of
14 indemnity' does not appear anywhere on the policy
15 itself."

16 In the end at paragraph 34 and 35, 34:

17 "Since drafting this judgment, the case of the
18 *Holyoake* case had come out, the court was not
19 considering whether ATE insurance could constitute
20 security of costs, but, for reasons similar to those
21 I have already expressed, the court did consider that
22 even an ATE insurance policy which provided for
23 avoidance only in cases of fraud was not suitable to
24 stand as fortification ..."

25 And the application therefore was that there was on

1 the facts, jurisdiction to make an order for security
2 costs and it was successful.

3 What we get from that is, as I say, sir, there are
4 real similarities in the ATE policies that are being
5 relied on, being put forward by these applicants which
6 generate precisely the same concerns that face the case
7 on an application for security. They are capable of
8 being resolved by the provision of a deed of indemnity,
9 a waiver clause, properly drafted anti-avoidance
10 provision clause, being incorporated into the provisions
11 of the ATE policies. That is something we submit should
12 happen. In order to avoid these arguments we need good
13 reason or sound reason why if those that stand behind
14 the policies are confident that they will be -- they
15 will stand up in due course, there is no reason why they
16 should not come clean now, so to speak.

17 You know, sir, from our submissions that the
18 ATE policies also do not afford us, the opponents, with
19 any rights under the Contracts Right of Third Parties
20 Act of 1999. We submit that unacceptably leaves us
21 reliant upon the insured claimant making a claim under
22 the policy. I would, if I may, just ask you to turn to
23 the case of *Lewis* which is within the authorities
24 bundle. It is file 1, tab 9. This is an application
25 for security for costs against the claimant. It is the

1 decision of last year in the High Court TCC. If one
2 turns to paragraph 17 we get to know something about the
3 facts. The claimant is a dormant company, no activity
4 or assets. Its only purpose is to pursue the
5 application, paragraph 17. There is obviously
6 a similarity that chimes here with the claimants in
7 these cases.

8 THE PRESIDENT: In one?

9 MR BACON: In one.

10 THE PRESIDENT: Not the RHA.

11 MR BACON: I agree.

12 "It has no independent means of satisfying any costs
13 order that might be made in favour of the defendant."

14 So if that is true here:

15 "The claimant relies on an ATE after the event
16 policy which it claims satisfies the threshold test.
17 The defendant's position is that the ATE insurance would
18 not provide sufficient security in regards to the
19 defendant's costs."

20 And therefore the court had to look at whether the
21 ATE did provide that security. Obviously the case, the
22 judgment looked to, turned to

23 *Premier Motorauctions*, paragraph 20:

24 "Particular examples of ATE policies that have not
25 provided adequate security are, first of all, where

1 there is a risk of insolvency if the claimant's said
2 that the funds, effectively, go to his creditors and are
3 not available for the defendant's costs."

4 Paragraph 21:

5 "In that regard he said that the particular
6 difficulty that arose [this is Mr Justice Coulson as he
7 then was] was the absence of any direct deed or
8 guarantee from the insurer to the defendant. And the
9 exclusion of the Contracts (Rights of Third Parties) Act
10 1999 which gave rise to a real risk that the defendant
11 could become an unsecured creditor in respect of its
12 outstanding costs."

13 Absolutely germane, we would say, sir, to the
14 present cases.

15 Over the page, paragraph 29:

16 "The issues that are raised by the defendant are the
17 concerns that the ATE insurance is inadequate. Firstly,
18 the policy creates no direct enforceable rights for the
19 defendant against the ATE insurer."

20 These sentiments will come back in my submissions as
21 we move upstream, sir, because we look at how this is
22 all structured, particularly with UKTC with Yarcombe
23 being the insured and all of that. So I ask you just to
24 have that in mind as a gloss behind this.

25 THE PRESIDENT: Yes.

1 MR BACON: "The policy creates no direct enforceable rights
2 for the defendant against the ATE insurer and excludes
3 the Contracts (Rights of Third Parties) Act 1999."

4 Then over the page at paragraph 35:

5 "In my judgment, the ATE insurance policy does not
6 provide adequate security for the defendant's costs."

7 THE PRESIDENT: Sorry --

8 MR BACON: Paragraph 35.

9 THE PRESIDENT: Yes.

10 MR BACON: "That is essentially for reasons which have been
11 considered in the cases to which I have already
12 referred.

13 "First of all, clause 8 contains general exclusions:
14 "... abandoned, discontinued, stayed or dismissed as
15 a result of the claimant either not having the funds to
16 continue or not being willing to commit funds ...
17 Exclusion of liability because although the claimant has
18 the benefit of no win no fee arrangements with its
19 solicitors, it does still have to fund disbursements
20 which are relatively significant."

21 Clause 8.7 at paragraph 36:

22 "... non-disclosure provision could give rise to an
23 avoidance of liability on the part of the insurer ...
24 Failed to disclose material facts ... it is ... not
25 fruitful for the court to speculate on what might amount

1 to material facts, but no doubt matters found within
2 disclosure or matters that subsequently emerge through
3 the witness evidence could easily be relied upon by the
4 insurer as material facts ..."

5 "Thirdly ... there is the potential for the insurer
6 to avoid the policy where there has been any fraudulent,
7 false or misleading misrepresentation."

8 "Fourthly" --

9 THE PRESIDENT: That is based on the nature of that case, I
10 think.

11 MR BACON: I think it is important that I read it. I accept
12 that is against that factual context where you have
13 allegations against witnesses that they are telling
14 untruths, it is non-material. I perfectly accept that,
15 but certainly 1 and 2. And then fourthly:

16 "... provides in terms that the insurance does not
17 confer or create any right enforceable under the
18 Contracts (Rights of Third Parties) Act 1999. As
19 a result of this, the defendant does not have a direct
20 right of claim against the insurer in respect of its
21 costs. As such, it is dependent on the claimant putting
22 forward an appropriate claim to the insurer in respect
23 of the defendant's costs.

24 "In the absence of such a claim which, as
25 Mr. Hickey has reminded the court, would be by a dormant

1 company, with no activity or assets, whose only purpose
2 is to pursue the litigation ..."

3 We have that in spades, sir, with Yarcombe.

4 Then there is finally a termination provision over
5 the page at paragraph 39, 13.21:

6 "Provides that the insurer may terminate the policy
7 if the insured fails to observe any material term of the
8 policy, or if the insured becomes bankrupt or
9 insolvent."

10 There has been some movement on insolvency by both
11 sides, tinkering, if I may say so, helpfully though with
12 the terms but they have not gone far enough on this.
13 But their recognition that parts of the policy terms
14 could be removed suggests that we are looking, heading
15 in the right direction in terms of why that should be,
16 and it is because of the uncertainty that is created by
17 the terms.

18 The judge in that case held at paragraph 40:

19 "For those reasons I considered that the threshold
20 test is passed and that the claimants would be unable to
21 satisfy, whether directly by itself or through its ATE
22 insurance, a costs award made."

23 THE PRESIDENT: Yes.

24 MR BACON: We say, as I said before, the fact that these
25 terms within the policies are what might be called

1 industry standard, which is the approach taken by my
2 learned friends, is irrelevant because they can be
3 overcome, as we have seen from the commercial court
4 cases by anti-avoidance clauses, indemnities,
5 guarantees, bonds, promises to pay which are directly
6 enforceable. This is not -- when I come back to the
7 stifling point. We are not seeking to put obstacles in
8 the way or in the path of the applicants. It is the
9 applicants who are seeking the Tribunal's indulgence to
10 award and make a CPO order and it is they who rely upon
11 these provisions, these ATE insurance provisions, to
12 substantiate their case that they will be able to pay if
13 an order is made. We say, in the light of the
14 authorities I have taken you to, that is just simply not
15 possible on the current drafting of those ATE policies.

16 That, I think, covers my general jurisdiction-type
17 submissions as a matter of the application of the rules
18 and how you should approach matters, and it is now
19 probably appropriate to turn to the funding arrangements
20 themselves.

21 THE PRESIDENT: We need at some point to take a short break
22 for our transcribers. Normally we do it at quarter to,
23 if you think it would be an appropriate moment now.

24 MR BACON: It probably would, sir.

25 THE PRESIDENT: We will come back at quarter to as we break

1 early.

2 (11.35 am)

3 (A short break)

4 (11.50 am)

5 THE PRESIDENT: Yes, Mr. Bacon.

6 MR BACON: Yes, I was going to move on to the LFAs but
7 having had the opportunity to speak with those
8 instructing me and my learned junior about what has
9 already passed, can I just go back on the rule where the
10 short period of dialogue between us, where under rule
11 78(2), it is in tab 41, this is going to be key to your
12 judgment ultimately, tab 41 of the authorities bundle.

13 THE PRESIDENT: Yes.

14 MR BACON: 78(2) says that:

15 "In determining whether it is just and reasonable
16 for the applicant to act as the class representative the
17 Tribunal shall consider ..."

18 So it is absolutely clear there is an obligation on
19 the Tribunal to consider the factors (a) to (e) which
20 includes (d), which is that person will be able to pay
21 if ordered to do so, that is a factor I accept within
22 rule 78(1) tells us that you may authorise -- of course
23 ultimately there is a discretion here, but once one is
24 engaged in that process, I would submit, I am not sure
25 we are going that far, but it is -- clearly it is

1 a factor, the ability to pay costs under (d). It is not
2 a factor amongst lots that go into a pot, it is a factor
3 which must be considered.

4 THE PRESIDENT: Yes.

5 MR BACON: We would submit that unless you are satisfied
6 that any one of (a) to (e) are satisfied, you are not
7 likely to satisfy 78.

8 THE PRESIDENT: That is the point. I am saying it does not
9 say: you shall not authorise unless (a). It just says
10 (a), (b), (c), but clearly they are matters we must take
11 into account and you may fairly say it would be, we
12 should be reluctant to --

13 MR BACON: Yes. One would go further than that.

14 THE PRESIDENT: -- find that it is just and reasonable if
15 these are not fulfilled.

16 MR BACON: We would certainly go further than that, sir, we
17 would say that it cannot be just or reasonable ever to,
18 particularly in a case of this size, where the expense
19 and efforts involved on both sides and the Tribunal's
20 time not least is occupied, for the Tribunal ever to
21 certify a case where it is not satisfied that the
22 applicants could not pay their costs. That would be
23 quite a remarkable --

24 THE PRESIDENT: It might be, for example, the reason they
25 could not pay the costs is they were being so

1 overcharged for so long by members of the cartel that
2 they now have no resources left, so the inability is
3 caused by the conduct, as in security for costs
4 applications, if it is the matter that is being claimed
5 that is the reason for the inability to pay, that is
6 a matter you can consider, but that is not this case.

7 MR BACON: That is not this case.

8 THE PRESIDENT: Just when you say "never" I am always just
9 a bit cautious about "never".

10 MR BACON: Probably right to row back slightly from never,
11 but almost --

12 THE PRESIDENT: You say it is a very important factor and
13 clearly, and you say it would be wrong to certify if
14 that is not satisfied.

15 MR BACON: Absolutely we do. Absolutely we make that clear.

16 THE PRESIDENT: I think we have the point. I think we ought
17 to move on because we have spent quite a lot of time on
18 that and there is a lot more to get through.

19 MR BACON: I will say in the course of the funding
20 agreements what they cover, because it remains an
21 important outstanding point as to the court's approach
22 to the certification of the issues, and what issues are
23 and are not considered, we had that dialogue and I will
24 just park that for the moment.

25 THE PRESIDENT: Yes.

1 MR BACON: So turning to the LFA. Starting with UKTC first
2 of all. File 1 and 3, it may be worth having available.

3 THE PRESIDENT: We can put away authorities.

4 MR BACON: You can put away authorities. I am just going to
5 start with the opt out agreement because we have had
6 some correspondence overnight saying they prefer the opt
7 out terms and they are going to incorporate some of the
8 opt in. So I will use the opt out agreement which is at
9 tab 51 of volume 3 as my sort of anchor base to
10 scrutinise these agreements.

11 THE PRESIDENT: Yes.

12 MR BACON: Just before I go to the detail I want to draw
13 your attention to some key parts of the agreement.

14 First of all, the funder, at the top of the page,
15 opt out litigation funding agreement made between the
16 funder whose particulars are given in schedule 1.

17 Schedule 1 you will find at page 1573.

18 THE PRESIDENT: That is Yarcombe.

19 MR BACON: Yarcombe, a Guernsey registered SPV, effectively.

20 I will come back to it in a moment. The definition of
21 adverse costs have been amended, which means:

22 "Any sum up to but not greater than the limit of
23 indemnity of the insurance policy obtained by the
24 funder."

25 So this is -- this illustrates the fact that the

1 unusual nature of these arrangements is that it is the
2 funder, the Jersey SPV that has no assets that is taking
3 out the ATE insurance:

4 "An indemnity of the insurance policy obtained by
5 the funder becoming payable in respect of the
6 defendant's legal costs."

7 Within the terms of the definitions clauses over the
8 page at 1553, there is a definition of defendants which
9 seems to us to completely dismiss or dispel any notion
10 that was advanced, I think it was advanced, that it was
11 inappropriate to prepare budgets or obtain ATE insurance
12 to cover the costs of those others for whom I act that
13 are not parties to the UKTC claim, so to speak. One
14 turns to the definition of defendants at page 1553 which
15 says:

16 "Any person against whom proceedings have been
17 commenced or may from time to time be brought in
18 connection with the subject matter of the claims and who
19 has been named as defendant, co-defendant or Part 20
20 defendant."

21 So the funding agreement, I am reading from
22 page 1553, the funding agreement, its purpose is to fund
23 claims against all defendants and all Part 20 defendants
24 and co-defendants.

25 THE PRESIDENT: A Part 20 defendant one must read, that is

1 obviously a reference to the CPR, the equivalent in our
2 rules.

3 MR BACON: Absolutely so. You see that manifesting itself
4 on page 1573 which is the schedule where the defendants
5 are one or more of MAN, Volvo, Renault, Daimler, Iveco,
6 Scania or DAF.

7 THE PRESIDENT: Yes.

8 MR BACON: We will come back to it because it is said, as
9 you know, sir, that the funding which is provided here
10 is not sufficient to cover all of the OEMs' legal costs.
11 The answer we have had is, well, we are not providing
12 funding for all of you lot. We are providing funding,
13 we are going to bring a claim against two. As we see
14 it, that is not consistent with the terms of the funding
15 they have secured.

16 So far as the funding is concerned, the amount of
17 the funding. Just before I turn to that, clause 2 of
18 the agreement tells us what the obligations of the
19 parties to payment of the claimant's legal costs are.

20 Paragraph 2.2:

21 "In consideration and subject to terms of this
22 agreement the funder agrees to pay, insofar as not
23 already paid, the claimant's legal costs including the
24 claimant's disclosed legal costs up to a maximum sum in
25 respect of legal costs specified in schedule 1 provided

1 always that the claimant's legal costs are reasonably
2 consistent with the costs estimate."

3 Then 2:

4 "In consideration of and subject to the terms of
5 this agreement the funder agrees [so this is Yarcombe
6 agreeing to pay] the adverse costs incurred in respect
7 of the proceedings up to the limit of indemnity on the
8 insurance policy in respect of adverse costs specified
9 in schedule 1."

10 That, going back to the definition of adverse costs,
11 is why we say that the obligation on Yarcombe is to pay
12 more than just some defendant's costs, it is to pay all
13 of the defendant's costs, Part 20 defendant's costs, to
14 use my analogy, co-defendant's costs, that is what it is
15 agreeing to do, subject to the maximum sums.

16 Success in the proceedings --

17 THE PRESIDENT: Sorry, what is specified in schedule 1?

18 MR BACON: Schedule 1, it specifies the maximum sums at
19 clause 5. So page 1573.

20 THE PRESIDENT: Yes. I think that reference might have
21 related to maximum sum.

22 MR BACON: Yes. Which reference are you referring to, sir?

23 THE PRESIDENT: In 2.2.

24 MR BACON: Yes. So there are two points --

25 THE PRESIDENT: It is the reference "specified in

1 schedule 1", I think that related to when maximum sum
2 was in the clause because maximum sum is specified in
3 schedule 1.

4 MR BACON: Yes, correct.

5 THE PRESIDENT: But I am not sure what else is relevant in
6 schedule 1.

7 MR BACON: What clause 2.3 does is tells us that Yarcombe is
8 paying the adverse costs as defined, up to the limit of
9 indemnity of the insurance policy in respect of adverse
10 costs. The words "costs specified in schedule 1" I
11 think should be deleted.

12 THE PRESIDENT: I think they went with maximum sum.

13 MR BACON: Agreed. Then one turns to the maximum sum,
14 clause 5 in the schedule, and you will see that in
15 bullet point 2:

16 "In respect of premiums on the insurance policy
17 £4 million which it is anticipated would permit a limit
18 of indemnity of £20 million."

19 THE PRESIDENT: I see, yes.

20 MR BACON: We will turn to the ATE insurance in a moment.

21 At the moment the signed agreed schedule in respect of
22 ATE is just £12 million for all defendants' costs as
23 defined.

24 THE PRESIDENT: Do we know the premium for the £12 million?

25 MR BACON: Yes, behind --

1 THE PRESIDENT: Is it £4 million?

2 MR BACON: The current schedule is at page 1583. I am going
3 to turn to the ATE policy shortly, but there are two
4 deposit premiums payable so they are non-refundable
5 premiums of £2.4 million.

6 THE PRESIDENT: There is a 6.

7 MR BACON: And then there is a balance to be paid of 6 on
8 success, so it is £8.4 million.

9 THE PRESIDENT: On success --

10 MR BACON: On success.

11 THE PRESIDENT: -- in the litigation.

12 MR BACON: In the litigation which is -- we are going to
13 come to success.

14 THE PRESIDENT: I am just wondering where the £4 million
15 comes from, the premium of £4 million. It envisages
16 a different level of cover but a different premium.

17 MR BACON: As we said, sir, we obviously had a flurry of
18 activity yesterday in terms of correspondence. But from
19 our perspective it is perfectly reasonable for us to
20 work on the basis, and indeed the Tribunal to work on
21 the basis of the documentation presented to the Tribunal
22 supporting the application.

23 THE PRESIDENT: We have to.

24 MR THOMPSON: I do not want to interrupt, but the
25 explanation in the evidence is at paragraph 9 of

1 Mr. Perrin's third statement.

2 MR BACON: I am going to come to Mr. Perrin's statement in
3 due course, but at the moment the wording, the
4 contractual proposed wording of the LFA provides for the
5 anticipated level of indemnity of £20 million. It is as
6 vague as that. The ATE policy presented to us as part
7 of the CPO is a policy for £12 million.

8 THE PRESIDENT: Yes.

9 MR BACON: Now, coming back to success, that is defined at
10 page 1556 and this is important, I submit, sir, in the
11 context of the discussion we had earlier about where the
12 case may go upstream in terms of the issues where you
13 indicated that you may well in the end make an order
14 which limits the common issues to certain issues, and it
15 may be that the quantification of claims will not be the
16 subject of a common trial.

17 THE PRESIDENT: Yes.

18 MR BACON: There is a real danger, with respect, in
19 divorcing that decision-making from the funding
20 agreements. They need to be looked at together because
21 the funders here will only get paid out, as indeed will
22 the individual claimants, on success, and success
23 anticipates an order for damages being made, so that so
24 far as the funding is concerned, these are provisions,
25 financial provisions to bring the case to a conclusion.

1 It is right that I say, as I said at the outset,
2 that in analysing whether these funding agreements
3 provide sufficient funding for the purposes of the
4 rules, one has to contemplate everything that is
5 required, reasonably required or anticipated, to get the
6 thing to the end, to the conclusion, to the success as
7 defined by the agreements with which we are concerned,
8 not some sort of midway point.

9 So that if it is the case that in order to achieve
10 success there are a whole load of costs that have not
11 been budgeted for, you need to know that and you need to
12 be concerned by that, we would submit with respect.

13 We know that to be the case. We know that the costs
14 are passed on and interest and so on have not been
15 specifically budgeted for.

16 THE PRESIDENT: Yes.

17 MR BACON: We read this agreement and contractually it needs
18 to be read on the basis that what is provided for by way
19 of funding takes the claimants to the endgame, and
20 proceeds ties that in on page 1556. It is defined as
21 the total of the damages paid by the defendants. Unless
22 there are proceeds, the insurers and ATE insurers and
23 funders receive nothing. So put another way, I dare say
24 the funders are here, if the CPO is in fact limited to
25 a series of common issues which do not actually result

1 in the end to a damages award, merely the finding of
2 a potential overcharge and whatever it may be without
3 more --

4 THE PRESIDENT: It is more of an issue for opt in.

5 MR BACON: It is more of an issue for opt in.

6 THE PRESIDENT: The definition is the same, is it, in the
7 opt in?

8 MR BACON: They are the same and we are told that they are
9 adopting the definition in the opt in, the terms of this
10 are going to be effectively the same as the opt in. But
11 it is also relevant for opt out because, as you know,
12 the funders cannot get paid until there are
13 undistributed damages in an opt out, so one has to, one
14 would have to look at the funding terms and the
15 quantification and sums involved of the funds available
16 by reference to that ultimate end date, not some earlier
17 date.

18 These funders are seeking certification on the basis
19 that what they are funding takes them to a final
20 conclusion, lest there be any doubt about that, that is
21 what they are doing. We say that hidden from view is
22 a whole series of very substantial costs that I dare say
23 have not found themselves into the budget, either
24 because the funders are not prepared to put up such
25 levels of funding, or for some other reason, but that is

1 most likely to be the position, and we have two very
2 stark differences in approach. The RHA have more money
3 in the pot, so to speak, considerably more in terms of
4 the overall figures, but I will come to --

5 THE PRESIDENT: We will come to them.

6 MR BACON: I will come to them shortly. So that is UKTC.

7 Key points then are: the funder is Yarcombe, we will
8 come to Yarcombe; there is a maximum sum, there is
9 a limit of indemnity in terms of the own side's costs,
10 the claimant's legal costs, the funding is limited to
11 just £12 million to pursue claims against all
12 defendants. There is a contingency of £8 million, in
13 the third bullet point:

14 "For further expenses required to be paid in respect
15 of claimant's legal costs insurance policy premiums and
16 funder's outlay ..."

17 Which just leads us into uncertainty as to -- in
18 circumstances where there is no ATE policy currently
19 signed off for a premium of £4 million allowing for
20 £20 million. It is not clear really where schedule 1
21 takes us.

22 Then turning to the ATE policy which we looked at
23 momentarily ago, 1583, and just reminding oneself that
24 on the OEM side's position of £12 million that is an
25 all-encompassing figure not split into phases. So

1 before we come to the ATE, the OEM's side £12 million,
2 according to schedule 1, the UKTC opt out provisions, it
3 is an all encompassing figure, unlike, we will come to
4 Therium's proposals where there are a series of stages.

5 THE PRESIDENT: When you say it is all encompassing --

6 MR BACON: It is £12 million in respect of the claimant's
7 legal costs.

8 THE PRESIDENT: And £4 million for premium.

9 MR BACON: £4 million for premium.

10 THE PRESIDENT: And £8 million for contingency, further
11 expenses.

12 MR BACON: Including insurance policy premiums and funder's
13 outlay.

14 THE PRESIDENT: Yes, additional premiums, yes. So
15 £12 million is not, you said "all in".

16 MR BACON: No, sorry, the context of my point is important.
17 It is -- when you look at the different funding
18 agreements the RHA funders fund in tranches.

19 THE PRESIDENT: Yes, we have seen that.

20 MR BACON: And we will come to that in due course. Here
21 there is not tranching, to put it simply, for the
22 claimant's own costs. It is £12 million plus the other
23 bits. That is all the points I want to make because
24 I am going to come back to tranching shortly.

25 THE PRESIDENT: Yes.

1 MR BACON: Turning then to the ATE policy, we are still on
2 opt out, the insured is Yarcombe, so the insured is not
3 the class representative or the claimants.

4 THE PRESIDENT: Yes.

5 MR BACON: The policy, despite what is said in the funding
6 agreement, the policy appears to have been deliberately
7 drafted to limit the definition of other side to Daimler
8 and Iveco, clause 7 of the schedule, which is not --

9 THE PRESIDENT: Sorry, this is clause 7.

10 MR BACON: Page 1583. That would have to be amended because
11 it is inconsistent with the promise of the funder to
12 fund the other defendants' defences. And this is what
13 belies the problem, the ATE insurers have valued the
14 adverse cost cover of £12 million on the basis of just
15 two respondents, when contractually the funder has
16 agreed to fund the adverse costs of all defendants.

17 THE PRESIDENT: Yes.

18 MR BACON: So it has to follow, as night would follow day,
19 that the £12 million for two falls well short of what
20 would be required for five, put in simple terms. That
21 needs to be reconsidered.

22 THE PRESIDENT: Yes, what we have been told is that they
23 expect to get a further £8 million cover at a cost of
24 £1.6 million.

25 MR BACON: Yes, but -- Perrin 3 we will come to in a moment.

1 THE PRESIDENT: That is how they get to the £20 million.

2 MR BACON: It is. But with the greatest respect, sir, you
3 put in place, if I may say so, very sensibly upon
4 agreement with us all, a structured case management
5 process to enable us to narrow the issues between us, so
6 that when we arrived here today there would be presented
7 to you a suite of documents that we could look at.

8 THE PRESIDENT: And you say that is just an expectation.

9 MR BACON: Absolutely.

10 THE PRESIDENT: No, we have the point.

11 MR BACON: And these are -- that is a significant point so
12 going into the body of the ATE policy, it is a very
13 curious -- it is either slapdash or it is deliberate.
14 If it is slapdash you should be concerned, if it is
15 deliberate we should be concerned because the -- for
16 example, under the heading of "Conduct of the
17 litigation" at clause 3.6 -- what has happened here is
18 that those who put together the ATE policy have appeared
19 to ignore the fact that the insured is Yarcombe and not
20 the claimant. It is most unsatisfactory, if I may say
21 so, sir, that the policy makes no sense in parts. You
22 are being asked to certify a claim where the policy
23 requires Yarcombe to report, have direct access to the
24 lawyers. Having a real control over, on the face of it,
25 through clause 3.6 the proceedings which would be

1 completely inappropriate for reasons I need not, I dare
2 say, explain.

3 This document is, as I say, either poorly prepared
4 or deliberate. I suspect it is the former but
5 insufficient care has been taken, sir, over its terms.
6 This is because of the definition of insured as it
7 appears throughout the terms of the policy. Clause 3.6
8 should really be referring to the claimant, for example.
9 There are other examples. These are matters that have
10 been identified and raised and we are still here today
11 with a policy which does not make a lot of sense in the
12 context of the proceedings.

13 THE PRESIDENT: In 3.6 --

14 MR BACON: The insured, Yarcombe, is under a contractual
15 obligation throughout the dispute, that throughout the
16 dispute the insurers shall be allowed direct access to
17 the representative and the insured will instruct the
18 representative to report all material developments in
19 dispute to the insurer, report as soon as reasonably
20 practical all second offers, comply with all requests by
21 the insurer of information, afford the insurer the
22 opportunity where permissible to attend all meetings."

23 So this is Yarcombe requiring the insurer to have
24 this access.

25 THE PRESIDENT: Yarcombe agrees that it will instruct

1 Weightmans to do these various things.

2 MR BACON: Yes. But Yarcombe should have no business in
3 that. It should be the claimants who instruct
4 Weightmans, the representatives. For example, it talks
5 of 4.3 of the liability. You picked us up on an
6 important point of the indemnity principle in
7 *Merricks*, but I mean 4.3 --

8 THE PRESIDENT: Yes, it will not be the insured's solicitors
9 fees.

10 MR BACON: No.

11 There are other important points. You have
12 exclusions at clause 2 which are the sorts of exclusions
13 that we saw and have seen in the other cases concerning
14 security. So again, unreasonable delay or default at
15 clause 2.1.25, Yarcombe.

16 It is your watch, so to speak, sir, but I would
17 submit that it would be quite inappropriate for you to
18 be requested in fact to prepare a judgment which says to
19 the world at large that you are content with the terms
20 of this policy. It is a mess, quite apart from the fact
21 that it does not provide sufficient cover for what the
22 funders have agreed to fund.

23 THE PRESIDENT: Where is the definition of own solicitor's
24 fees?

25 MR BACON: Clause 14, 593. 14.22, just above the first hole

1 punch:

2 "All professional fees payable by the insured ..."

3 THE PRESIDENT: "Which are incurred ..."

4 MR BACON: "Which are incurred ..."

5 THE PRESIDENT: "Or amount in the conduct of the

6 dispute ..."

7 MR BACON: The fees should be incurred and be payable by the

8 clerk's representative, the claimants. That is obvious.

9 They are being funded by Yarcombe. We have not been

10 provided with a copy of the conditional fee agreement

11 that has been entered into, as we understand it, in this

12 case. We provided the CFA in the *Merricks* case to

13 you. No explanation has been provided as to why we have

14 not --

15 THE PRESIDENT: I was looking at 4.2, just trying to

16 understand 4.2.1.

17 MR BACON: 4.2?

18 THE PRESIDENT: 4.2.1, the insured, Yarcombe does not

19 recover own disbursements and/or own solicitor's fees

20 from the other side.

21 MR BACON: No.

22 THE PRESIDENT: But Yarcombe will not.

23 MR BACON: No, one other illustration of the --

24 THE PRESIDENT: It is UKTC which would recover.

25 MR BACON: Absolutely.

1 THE PRESIDENT: So --

2 MR BACON: Yes.

3 THE PRESIDENT: Yes.

4 MR BACON: They have tried to get around some of the

5 problems created by Yarcombe being the insured under the

6 policy. It is quite important I take you through this.

7 The clause 14 at page 1592 defines the insurers,

8 Navigators, IGI, Markel, and Liberty, so four

9 underwriters, four insurers. The definition of other

10 side's costs at 4.20 means:

11 "Costs ..."

12 So this is what is insured under the policy, costs

13 which the claimant is ordered to pay. That assumes that

14 the claimant has the liability to pay policy:

15 "... with the insurer's approval, the claimant

16 agrees or becomes liable to making or accepting the

17 offer to pay to the other side unless stated otherwise

18 in the schedule."

19 That has to be read with 14.13, which is the insured

20 liability, means:

21 "The insured's legal obligations ..."

22 So this is Yarcombe's legal obligation, as it is

23 put:

24 "... to pay any other side's costs, own

25 disbursements and own solicitor's fees which the insurer

1 has agreed to indemnify up to the limit of the cover."

2 So it is very curious. This is a policy under which
3 the insured, Yarcombe, is assuming a legal liability to
4 pay the respondent's costs, the definition of insured
5 liability.

6 THE PRESIDENT: I am not sure it is, is it? It is assuming
7 a legal liability.

8 MR BACON: Pay our costs.

9 THE PRESIDENT: No, to pay the costs which the claimant has
10 been ordered to pay.

11 MR BACON: Correct.

12 THE PRESIDENT: And that liability could come under the
13 litigation funding agreement.

14 MR BACON: The costs it is liable to pay is obviously our
15 costs. I agree with you on the interpretation of the
16 clause --

17 THE PRESIDENT: The claimant is ordered to pay your costs.
18 That is other side's costs, and then Yarcombe has an
19 obligation to pay the claimant or UKTC --

20 MR BACON: Yes.

21 THE PRESIDENT: -- in that respect, and assume there is
22 a liability, I am not sure you showed it to us, under
23 the litigation funding agreement that Yarcombe has got
24 that.

25 MR BACON: Yes, I did take you to that.

1 THE PRESIDENT: So that does seem to work.

2 MR BACON: It does seem to work. We have said that in our
3 skeleton, that it seems to work but it does not resolve
4 the problem which is the elephant in the room, that it
5 is Yarcombe who we would have to seek an order against
6 for payment of the costs. Yarcombe.

7 THE PRESIDENT: Why?

8 MR BACON: Yarcombe is the insured.

9 THE PRESIDENT: Yes.

10 MR BACON: So a costs order is made in our favour at the end
11 of the CPO. The costs order says: costs payable by
12 claimant, UKTC.

13 THE PRESIDENT: Yes, that then becomes the definition of
14 other side's costs.

15 MR BACON: Yes, UKTC is not the insured under the policy.

16 THE PRESIDENT: Correct.

17 MR BACON: Yarcombe is, so UKTC would respond to our claim
18 for costs made against it by calling upon Yarcombe to
19 pay under the terms of the LFA. Yarcombe then has to
20 call upon the four insurers under the policy, the ATE
21 policy, to pay it, the sums that eventually we would ask
22 to come back.

23 That is, we would submit, an unfair and unreasonable
24 approach to take to the --

25 THE PRESIDENT: Why?

1 MR BACON: Because it places -- real uncertainty. It is one
2 thing for Yarcombe, for UKTC to have to go through these
3 loops and for us to do that. It is quite another when
4 you accept that Yarcombe is a body worthless of nothing
5 more than probably its brass plate in Jersey with no
6 direct obligations to us, given the exclusions of the
7 various provisions within the ATE policy.

8 THE PRESIDENT: You are assuming Yarcombe, although it has
9 an insurance policy covering this liability, would
10 rather breach its obligations to UKTC.

11 MR BACON: It might. Well this is --

12 THE PRESIDENT: What conceivable reason would it have for
13 doing that when it has insurance cover for covering
14 exactly that liability? Why on earth in the real world
15 would it do that?

16 MR BACON: It is important that we deal with this. There
17 are a whole series of reasons why the insurer itself may
18 not respond to Yarcombe.

19 THE PRESIDENT: That is a different point.

20 MR BACON: It is not actually a different point. It is
21 mixed with that. It is a reason why Yarcombe may not
22 itself seek to pass on the benefit, effectively, of that
23 insurance policy. Where you have --

24 THE PRESIDENT: Could the insured not get -- could not UKTC
25 seek specific performance of the LFA as against

1 Yarcombe?

2 MR BACON: Yes, but I mean -- I dare say it could embark on
3 substantial litigation, potentially.

4 THE PRESIDENT: Substantial -- if they have an absolute
5 obligation to pay and if they have insurance cover,
6 leave aside all the avoidance points, it is a separate
7 point, but if they have adequate insurance cover to
8 cover the liability they will not make a claim on their
9 insurance and rather say: no, we'll breach our agreement
10 even though we could get the money to pay you, we'll
11 breach it.

12 MR BACON: Yarcombe has that. Yarcombe has the ability to
13 claim on the insurance, it being the insured.

14 THE PRESIDENT: Yes.

15 MR BACON: But UKTC, from whom we would be seeking costs,
16 does not.

17 THE PRESIDENT: Yes.

18 MR BACON: And that is the problem. This is an exceptional
19 set of provisions. When I say exceptional I mean it is
20 very unusual in litigation of this -- any litigation,
21 let alone of this size, for the litigant not to be the
22 insured.

23 THE PRESIDENT: Are you suggesting it has been set out this
24 way because there is some devious plan that they are not
25 going to make a claim on the policy?

1 MR BACON: It is important we pause there, because there has
2 to be a reason why it is being set up this way. It
3 seems to us there is no other conclusion to reach other
4 than the funders, Yarcombe, supported by Calunius,
5 alongside Calunius, wish to isolate themselves from
6 direct risk under the policies by creating an SPV that
7 is the insured and the funder. There is no other
8 reason -- look, the obvious thing to have done here
9 would be for UKTC, just like Mr. Merricks, to be the
10 insured --

11 THE PRESIDENT: Like the RHA, I think.

12 MR BACON: Yes, correct. We do not have the same -- they
13 use an SPV but it is the insured is the RHA.

14 THE PRESIDENT: That is your point.

15 MR BACON: That is right. That is my point.

16 I understand, sir, what you say: well surely this is
17 all sort of pie in the sky thinking, it may be that you
18 say all this.

19 With the greatest respect, it is not for us to be
20 put in a position under the rules where you shall be
21 satisfied that we will be paid, for us to speculate on
22 the uncertainty of what might be a specific performance
23 application between UKTC and Yarcombe, and Yarcombe and
24 four insurers, with respect.

25 In a case where UKTC has lost, so it has been

1 ordered to pay our costs, what would be the commercial
2 incentive for UKTC to pursue the specific performance
3 proceedings that you anticipate might be brought? The
4 incentive needs to be on the insured. It needs to be --
5 the policy needs to be in the name of the insured so
6 that this does not arise. Moreover, the policy needs to
7 be in the name of the funder who has the capital
8 immediately available to it, not some offshore SPV
9 through which the funding is being placed.

10 THE PRESIDENT: Sorry, I thought you said the policy has to
11 be in the name of the claimant.

12 MR BACON: The policy --

13 THE PRESIDENT: That is your whole point is it not, the
14 policy has to be in the name of the claimant?

15 MR BACON: -- has to be in the name of the claimant.

16 THE PRESIDENT: Not the funder.

17 MR BACON: The policy needs to be in the need of the
18 claimant. The insurer, the ATE insurer needs to be
19 something other than an SPV, so a recognised insurer
20 regulated and so on with the capital funds available to
21 it, not some --

22 THE PRESIDENT: The ATE insurer.

23 MR BACON: The insurer here is the four insurers, right, no
24 difficulty with that.

25 THE PRESIDENT: Yes.

1 MR BACON: What we have in the middle is Yarcombe to whom
2 the insurers have the contractual liability to pay.
3 That should be removed from the equation. The insured
4 should be UKTC. The insurer should be the four
5 insurers, so that when a call is made on the policy by
6 the respondents we are not chasing UKTC to chase
7 Yarcombe for Yarcombe to chase the insurers. That is
8 our position.

9 THE PRESIDENT: Yes. It is a short point, but you say it is
10 an odd arrangement, it is unusual. That is borne out by
11 the fact that the wording of the policy does not quite
12 fit and seems to envisage in certain clauses that the
13 insured is actually the claimant because otherwise they
14 do not make sense, and one should not speculate on what
15 the reason might be for going this round about way.

16 MR BACON: Yes.

17 THE PRESIDENT: You ought to have the insurance that is the
18 more usual way where the party against whom the costs
19 order might be made has the insurance cover.

20 MR BACON: Correct.

21 THE PRESIDENT: And that is what it boils down to.

22 MR BACON: Clause 9.1 of the ATE policy contains the
23 Contracts (Rights of Third Parties) Act exclusion which
24 is an obvious concern, particularly in -- when you
25 consider it to be a concern for the courts in a security

1 for costs application as we saw, that was not even
2 a case where we had this additional major problem that
3 the insured is not the litigant. You can just imagine
4 what the Court of Appeal would have said in those cases.

5 THE PRESIDENT: Yes, I think we have the point.

6 MR BACON: So you have that.

7 THE PRESIDENT: Is there anything else on the policy?

8 MR BACON: That is the policy --

9 THE PRESIDENT: Are there any avoidance --

10 MR BACON: Yes, so you have --

11 THE PRESIDENT: -- which you took us to in the security for
12 costs case, that you want to refer to?

13 MR BACON: There are obviously a series of various
14 obligations throughout the course of the policy imposed
15 on the insured. Then at page 1596, behind the section
16 on how to make a complaint, there are various:

17 "If prior to entering this contract the insured
18 shall breach the duty ..."

19 THE PRESIDENT: What is this document?

20 MR BACON: As I understand it, it is the last two pages of
21 the terms of the policy.

22 THE PRESIDENT: Is it? It is headed "Insurance Act".

23 MR BACON: It is dated 16 March.

24 THE PRESIDENT: It is headed "Insurance Act 2015".

25 MR BACON: It is. "Remedies for breach of duty of fair

1 presentation." It is a series of provisions which
2 enable the insurers to avoid the contract.

3 THE PRESIDENT: Yes. (Pause) Mr. Thompson, can you just --
4 Mr. Thompson, is this pages 59 -- it is part of the
5 policy, is it?

6 MR BACON: It is part -- if you turn to page 1585.

7 THE PRESIDENT: I see, "Any breach ..."

8 MR BACON: "Pre-contractual considerations".

9 "A breach of duty of fair presentation by the
10 insured" at 3.4.

11 THE PRESIDENT: Yes, I see. LMA9129 attached. Is this
12 a quote from the Act, then? Is that what these remedies
13 are?

14 MR BACON: The very last sentence on page 15 -- says:

15 "Nothing in these clauses is intended to vary the
16 position under the Insurance Act 2015."

17 THE PRESIDENT: I just wonder, are these two pages? Have
18 you looked at the Insurance Act?

19 MR THOMPSON: Yes, I am sorry, I think Mr. Bacon is slightly
20 ahead of me but I will make enquiries.

21 THE PRESIDENT: Yes.

22 MR BACON: We believe the wording is largely replicated by
23 the Act.

24 THE PRESIDENT: So this is deliberate or reckless
25 misrepresentation, and if not deliberate or reckless

1 then it is what would the insurer have done.

2 Yes. Yes, I see.

3 MR THOMPSON: Mr. Perrin is whispering that the LMA is the
4 Lloyd's Markets Association. I think they are standard
5 clauses, a model clause I should say.

6 THE PRESIDENT: Yes.

7 MR BACON: Sir, on page 1596, on those remedies for breach
8 of duty and fair presentation under the Act, we will
9 turn to the RHA policy in due course. They have
10 excluded or ruled out 1(b), as I understand it, so they
11 have taken a view in respect of the application of these
12 clauses, whereas UKTC's insurers have not.

13 THE PRESIDENT: Yes.

14 MR BACON: As you know, we say that all of -- the concerns
15 about the ability of the insurers to pull cover, either
16 on reckless or deliberate grounds, whatever it may be,
17 is entirely avoidable with some form of direct bond or
18 guarantee or anti-avoidance provision, as we saw in the
19 cases, and until and unless that is provided, there
20 remains real uncertainty about the binding nature of
21 this policy at the end of the conclusion of the case.

22 THE PRESIDENT: Yes.

23 MR BACON: That I think answers, sir, your questions about
24 anti-avoidance and so on.

25 THE PRESIDENT: Yes.

1 MR BACON: So turning then to the opt in terms. For that we
2 need to go to file 1, tab 7.

3 THE PRESIDENT: Yes.

4 MR BACON: If you bear with me one moment, sir.

5 THE PRESIDENT: Yes. (Pause)

6 MR BACON: My learned junior pointed out, before we depart,
7 you may have put it away, 1596, the Insurance Act,
8 renders a breach of duty of fair presentation, the
9 clauses that they seek to rely upon include 1(b)(iii)
10 which is the --

11 THE PRESIDENT: Sorry, I have put it away.

12 MR BACON: Sorry, I do apologise. So:

13 "If the insured's breach of duty of fair
14 presentation is not deliberate or reckless..."

15 It is including breaches of duty not as serious as
16 deliberate or reckless. In other words, it is much
17 wider than the insurer's remedy would depend on what the
18 insured would have done and it includes, I have been
19 asked to point out rightly, that (iii):

20 "In addition, if the insurer would have entered
21 into the contract but would have charged a higher
22 premium, the insurer may reduce proportionately the
23 amount to be paid on a claim."

24 So it is a pretty wide exclusion that continues to
25 pertain, as we say, should be subject to an

1 anti-avoidance clause.

2 Coming back to the litigation funding agreement
3 first of all in tab 7. I will do the same as I did with
4 the opt out: look at the funding agreement first and
5 then the ATE.

6 THE PRESIDENT: That funding agreement now is subject to the
7 amendments that will be made.

8 MR BACON: Yes. First of all, just turning to the
9 definitions, you will see that the funder -- there is
10 a schedule 1 attached to the funding agreement which is
11 at page 165. We have a similar problem with the funder
12 being Yarcombe. This agreement has been subsequently
13 amended but I find it helpful in my submission to go
14 back to it, for example, in clause 2, Penframe has been
15 the subject of amendment UKTC is now --

16 THE PRESIDENT: Yes.

17 MR BACON: You will see that the funding agreement
18 approaches the definition of defendants in the same way
19 at page 144.

20 THE PRESIDENT: I think it would be enough, Mr. Bacon, if
21 you point out any separate features. So far as it is
22 the same, you do not have to go through them all again.

23 MR BACON: Yes, the main features arise as a consequence of
24 the changes that were made by the addendum which you
25 will find at tab 9 which introduces the wholly vague,

1 from our perspective, concept of economic viability and
2 that, as I understand it, is not the subject of any
3 change at the moment. Is that right?

4 MR THOMPSON: It is not right so far as the maximum sum is
5 concerned, which I thought was the concern in terms of
6 adverse costs liability. I am not sure whether that is
7 the point that Mr. Bacon is referring to, because that
8 is one of the things being amended.

9 MR BACON: What I am referring to is the fact that what this
10 addendum does, sir, is to create phases through which
11 the maximum sum of £12 million is payable. So the
12 bottom of page 183, paragraph 5 of schedule 1 is to be
13 read as creating -- and these are in our skeleton. We
14 have a box in our skeleton with phase 1, £825,862
15 together with some adverse costs of £1 million.
16 Phase 2, over the page at 184, on all steps in the
17 period between the hearing of the application to the
18 grant to the claimant of a CPO --

19 THE PRESIDENT: Pause because we need to know whether we are
20 still live because I thought that part of schedule 1 --
21 just looking at the letter we had this morning.

22 MR BACON: Yes, I think that -- I say "I think", my learned
23 friend can confirm it, as I understand it, the phasing
24 has gone; is that right? The phasing has gone, but I do
25 not know whether the economic viability threshold plays

1 any further role in the provision of funding. The
2 answer to that question is either yes or no.

3 THE PRESIDENT: Perhaps that is something Mr. Thompson can
4 clarify with you over the short adjournment and come
5 back to it rather than taking up time with that now.

6 MR BACON: Yes.

7 THE PRESIDENT: Because obviously you need to know to save
8 everybody bobbing up and down.

9 MR BACON: What we would say, just in anticipation of the
10 answer is -- given that the opt out funding agreement
11 does not impose the threshold, viability threshold
12 requirements, we see no reason why it should have to
13 apply to the opt in.

14 THE PRESIDENT: The opt in, yes.

15 MR BACON: I think that probably then deals with the opt in
16 LFA. The problem with the economic viability is
17 illustrated, if I may just highlight it so that my
18 learned friend knows, in the addendum, page 183,
19 clause 6.2 is said to have been amended:

20 "Where economic viability is not achieved the
21 claimant shall apply to the Competition Appeal Tribunal
22 for further directions and the funder shall meet its
23 obligations under clause 2 in respect of the claimant's
24 legal costs ..."

25 I open brackets there and insert underlined in red,

1 "but not the adverse costs".

2 "... up to and including the date of sealing of the
3 Tribunal's order whereupon this agreement will
4 terminate."

5 So there are two quite significant issues arising
6 from this economic viability clause. One, it leaves us
7 without any adverse costs protection in the event of
8 this exercise and two, without more, the entire
9 agreement just ceases without, as I say, an obligation
10 on the face of it to pay adverse costs. As I say,
11 I hope that will be clarified.

12 Certainly as of now, that is the provision that we
13 are having to answer, sir.

14 THE PRESIDENT: Yes.

15 MR BACON: The ATE policy is behind tab 10. Again, it
16 contains -- I do not need to spend long on it because
17 you have seen already its replicated form as amended for
18 the opt out policy. Suffice to say, it has the same
19 problems of the insured being Yarcombe. It has the same
20 provisions as to breach of duty and fair presentation,
21 pages 202 to 203. Clause 14.9, absent amendment, which
22 I think must be accepted is required, page 199, the
23 point you picked up, I think, sir, which is the other
24 side's costs means costs which the insured is ordered to
25 pay. Again, there is a mismatch between who the insured

1 is and who it should be, namely UKTC.

2 The cover is the same, £12 million.

3 THE PRESIDENT: In what way is it different from the other
4 policy that we have spent some time looking at?

5 MR BACON: Apart from the fact that this sits alongside an
6 LFA which is subject to staging, subject to the points
7 I made and subject to the economic threshold, they are
8 the same --

9 THE PRESIDENT: Yes.

10 MR BACON: -- as I understand it.

11 THE PRESIDENT: So the points you make apply to this as
12 well, simple as that.

13 MR BACON: Yes. That is right. They do. They apply with
14 equal force.

15 Given the commonality of Yarcombe to both of the
16 policies, it is perhaps worth spending just the
17 ten minutes before lunch to turn to Mr. Perrin's
18 evidence on the structure of these agreements. The
19 first witness is at Perrin 1 which is in the same file
20 you are currently in behind tab 6.

21 Mr. Perrin is the chairman of Calunius Capital LLP
22 (Calunius). At paragraph 5 of his witness statement he
23 says:

24 "Calunius acts as the sole investment adviser to the
25 three Calunius litigation risk funds and also to funding

1 vehicles associated with the Calunius funds. The
2 Calunius funds and associated funding of vehicles,
3 advised by Calunius, have combined capital commitments
4 of more than £230 million."

5 In paragraph 7 he says:

6 "Calunius was a founding funder member of ALF" and
7 that Calunius complies with ALF code of conduct.

8 "As a founder member of ALF Calunius has had its
9 standing funding agreement reviewed by an independent
10 barrister to ensure the agreement complies with the
11 code."

12 We do not know what the standard funding agreement
13 looks like but we doubt it includes the provisions that
14 we have seen in this case. I am not sure how far that
15 takes us.

16 "The corporate director of the Calunius funds is
17 Calunius GP3. GP3 has agreed to the funding of these
18 proceedings and has chosen to do so through a special
19 purpose vehicle based in Guernsey." No explanation is
20 provided as to why that is necessary.

21 "Yarcombe is wholly controlled by GP3. I hereby
22 undertake that Calunius will use its best endeavours to
23 ensure that Yarcombe will comply with the code for the
24 duration of these proceedings".

25 That is a most unsatisfactory position for us all to

1 be left in. The issues which arise from the decision
2 taken by Calunius to structure the arrangement in the
3 way they have ultimately rest on a best endeavours
4 promise by an individual to ensure that Yarcombe will
5 meet obligations under the code. In other words,
6 Yarcombe will act as though it were a funder regulated,
7 self-regulated by Yarcombe. None of this is required or
8 necessary. The funder, Calunius litigation risk,
9 Calunius, should be the funder, Calunius Capital LLP or
10 one of its subsidiaries but not some special purpose SPV
11 which obviously raises deep concern on our side about
12 potential enforcement in the future.

13 You would be certifying -- there is not a case, as
14 I understand it in this Tribunal, where the court has
15 been asked to certify a case where the funder is not
16 a recognised -- where the funder contractually, as
17 opposed to the funder in the back room, is a member of
18 ALF, is fully recognised and so on and this, we would
19 suggest, embark the Tribunal down a route which is an
20 unhappy one where intermediaries with no formal
21 recognition or status as insurers are able effectively
22 to treat themselves as funders because they have
23 individuals promising to ensure that they do meet their
24 requirements as though they were a funder. That is
25 a most unsatisfactory playing field for the court to

1 contemplate and approve.

2 THE PRESIDENT: So that is Mr. Perrin's first --

3 MR BACON: That is his first witness statement.

4 His second -- I do not think I need to turn to the
5 second because that is dealing primarily with the DBA.

6 THE PRESIDENT: That is the original opt out which is
7 being --

8 MR BACON: Then we turn to Perrin 3 which is in file 3,
9 tab 50 I think from memory.

10 THE PRESIDENT: Yes.

11 MR BACON: What this statement does is introduces the new
12 amended ATE policies for the opt in and the opt out.
13 The opt out ATE, which we looked at earlier, and
14 provides that an amended ATE policy provides, will
15 continue to apply unless and until an opt out CPO is
16 made, and a draft opt out LFA which I took you to
17 earlier, but it also, at paragraph 10, responding to our
18 concerns, deep concerns about the use of Yarcombe as the
19 funder and all that brings, in a very short
20 paragraph 10, it is said:

21 "I refer to my first witness statement in which
22 I described the funder and its excellent reputation and
23 standing in some detail together with its adherence to
24 the ALF code of conduct."

25 It does not really answer the concerns that we have.

1 In fact, none of the points we raised about the reasons
2 behind the legitimacy or otherwise of using this SPV
3 have been answered at all.

4 In paragraph 9, we will look at it after lunch, the
5 quantum, the size of the adverse cost cover available.

6 At paragraph 9 towards the end that paragraph he
7 says:

8 "UKTC now has the benefit of an amended and
9 confirmed ATE policy that has been issued to Yarcombe
10 providing £12 million of cover at a premium of
11 £2.4 million."

12 That is the policy I took you to before on page
13 1583.

14 "Willis Towers Watson who advised that they would
15 expect to source at least a further £8 million of
16 adverse cost cover at a maximum cost of £1.6 million in
17 the event that the application is successful."

18 Where is the policy? Why is it not before the
19 Tribunal? It is not good enough to simply say: we have
20 been advised that they expect to be able to obtain it.
21 We are here today as part of the certification process
22 and an expectation of something is not good enough for
23 the purposes of certification.

24 That is really I think all I need to say about that
25 witness statement. It does not answer --

1 THE PRESIDENT: Is there anything in his fourth witness
2 statement, Mr. Perrin's fourth witness statement?
3 MR BACON: That deals with the DBA.
4 THE PRESIDENT: It deals with -- yes.
5 MR BACON: It is at tab 55.
6 THE PRESIDENT: That is all about Calunius and the DBA, yes.
7 MR BACON: That is right.
8 THE PRESIDENT: Yes, I see.
9 MR THOMPSON: Sir, just seeing the time and also while we
10 are on Perrin 3, can I just confirm that the ATE policy
11 we were looking at first was the amended and current opt
12 in policy and I do not think we did look at the draft
13 opt out policy. I think the old one is a bit of a red
14 herring, because at least some of the drafting problems
15 with the old one have been addressed in the version that
16 we were looking at, in particular.
17 THE PRESIDENT: So the version that we looked at was the one
18 at tab 52 of this bundle.
19 MR THOMPSON: Yes, and there is in fact a draft one behind
20 it at tab 53.
21 THE PRESIDENT: The draft at tab 53 is for the opt out, is
22 it?
23 MR THOMPSON: Yes.
24 THE PRESIDENT: Just to be clear, the one at 52 replaces the
25 one at tab 10 of bundle 1; is that not right?

1 MR THOMPSON: Yes, it is all spelt out at paragraph 5 of
2 Mr. Perrin's statement under subparagraphs (a), (b) and
3 (c). Given the short adjournment coming up, just in
4 case Mr. Bacon wants to see that.

5 MR BACON: Yes, that is correct. The ATE policy you looked
6 at 52 is the ATE policy for the opt in proposals that
7 will continue to apply unless opt out is ordered. 53 is
8 the opt out proposal, unexecuted at the moment, I think
9 but to be executed. The principal difference being
10 clause 6.2 where you see reference to the claim being
11 opt out. At 6.2:

12 "The insured agrees to pay the insurer deposit
13 premium 2 when the claimant is appointed."

14 Class representative is an opt out claim as opposed
15 to clause 6.2 on page 1590, which contains the economic
16 viability test which I was troubling with earlier. If
17 you have your finger in 1590 and 1607 you will have --

18 THE PRESIDENT: 1597. That is the first one you took us to.

19 MR BACON: That is right. That is the opt in, ATE policy
20 that is currently being presented to the Tribunal and
21 will continue to apply in the event that the opt out
22 policy or the opt out application fails.

23 THE PRESIDENT: Yes.

24 MR BACON: You will see that clause 6.2 referred to the
25 economic viability test within the addendum, which

1 I queried. Whereas 6.2 in the opt out policy at 1607
2 does not have that threshold and obviously now expressly
3 refers to opt out as opposed to opt in. Do you see
4 that?

5 THE PRESIDENT: Yes.

6 MR BACON: Other than that that is the difference between
7 the two. One is --

8 THE PRESIDENT: Yes.

9 MR BACON: -- just reflecting the fact that -- the
10 substantive points we make remain on both. As I say,
11 the economic viability issue remains in clause 6.2 for
12 the opt in which I am hoping is going to be clarified
13 over lunch. If there is an economic viability clause
14 within 6.2 but not within the LFA, then there is a real
15 problem. Likewise if there is economic viability in LFA
16 but not the ATE there is a problem.

17 That probably is an appropriate moment, sir.

18 THE PRESIDENT: Yes. You will be finishing by 3 o'clock?

19 MR BACON: Yes, indeed. After this we only have quantum and
20 budgeting sort of issues.

21 THE PRESIDENT: 2 o'clock.

22 (1.04 pm)

23 (Luncheon Adjournment)

24 (2.00 pm)

25 MR BACON: RHA. When I say RHA what I plan to do is deal

1 with the RHA litigation planning agreement and ATE
2 policy relatively shortly, and then return to UKTC and
3 the RHA in the context of what is on offer in terms of
4 adverse costs and (inaudible) costs and go to budgeting
5 issues.

6 So file 2, for the LFA in RHA, tab 32.

7 THE PRESIDENT: We have a slightly better copy at 32A.

8 MR BACON: We have. It is only slightly better. I have
9 been using 32.

10 THE PRESIDENT: I think it is the same. It is just it is
11 more legible.

12 MR BACON: I have been using 32.

13 THE PRESIDENT: Of course if you give us pages within the
14 document --

15 MR BACON: It is a lot easier that way.

16 THE PRESIDENT: -- rather than ...

17 MR BACON: So tab 32, page 845, litigation funding agreement
18 between Therium Litigation Funding IC, Therium RHA IC,
19 and then the RHA and the claimants.

20 A very different structure to the structure that we
21 were looking at with UKTC, and, may I say, less
22 controversial. The agreement, the main issue we have
23 with the agreement, if I can just turn to some of the
24 definitions, the definition of defendant is consistent
25 with the arguments I developed earlier on UKTC. What

1 you have to have when looking at the funding agreement
2 is a finger in the schedule there is a schedule 1 at
3 page 869 and 906.

4 THE PRESIDENT: It is the only schedule, I think.

5 MR BACON: It is the only schedule but it is mixed up.

6 There is a priorities agreement which I do not intend to
7 address.

8 THE PRESIDENT: Yes.

9 MR BACON: You will see that the definition of defendant at
10 page 5, internal page 5 of the LFA means:

11 "The defendant specified in the schedule."

12 Then the schedule at internal page 25 defines the
13 defendant as:

14 "One or more of the entities named and fined in the
15 European Commission cartel decision..."

16 "and any other defendant

17 ... agreed between Therium and RHA (including, for
18 example, other entities within the corporate groups of
19 the entities named and fined in the European Commission
20 cartel decision)."

21 THE PRESIDENT: So it is not just defendants to a claim, in
22 other words.

23 MR BACON: Yes, quite. The agreement to fund is in clause 2
24 at page 7, internal page 7 of the LFA. Subject to
25 clause 2.2 below, so this is reading from clause 2.1:

1 "In return for the Claimant's agreement to pay,
2 where there is a Recovery ..."

3 Again, I make the same point about the funding
4 provided for here anticipates a process under which one
5 starts before the CPO, the granting of the CPO, and then
6 right through to the point where there is a recovery and
7 therefore it must, we would submit, be appropriate for
8 the Tribunal to consider all potential streams of work
9 that are likely to arise before there is a recovery when
10 testing whether the funding agreement does or does not
11 provide adequate cover.

12 They agreed to pay the reasonable costs incurred,
13 and then you will see the reference to tranche 1 in 2.1,
14 there is a reference to:

15 "Therium agrees to pay the Reasonable Costs incurred
16 in respect of Tranche 1 and any subsequent tranches or
17 sub-tranches of funding incepted up to the amount of the
18 Committed Funds for those tranches or sub-tranches in
19 accordance with the terms of this Agreement and any
20 amounts distributed pursuant to the Priorities
21 Agreement ..."

22 Skip 2.2, that is about recoveries. 2.3:

23 "At the option ..."

24 And this is what we would submit is the
25 objectionable part of the scheme:

1 "At the option of Therium, exercisable on the
2 exhaustion of the Committed Funds for Tranche 1 and at
3 Therium's sole discretion, Therium shall have the
4 exclusive right but not the obligation to fund Tranche 2
5 on the terms set out in this Agreement. Therium may
6 elect to incept Tranche 2 either as a single tranche of
7 Funding or as a series of sub-tranches."

8 Then 2.4:

9 "At the option of Therium exercisable on the
10 exhaustion of the Committed Funds for Tranche 2 ..."

11 THE PRESIDENT: It is just the same.

12 MR BACON: And on and on.

13 THE PRESIDENT: Yes.

14 MR BACON: At the early stages I think there were four
15 tranches which you see from page 25 and 26. That has
16 been amended and there are now -- at tab 36, page 1008
17 of the same file there is a letter of 14 August where
18 there are five tranches, but tranche 1 has been
19 subdivided now into three different tranches, so there
20 are a total of seven tranches, and this is an amendment
21 that has been made to the LFA.

22 It is our understanding that that same provision in
23 clause 2.1, 2.3, 2.4 and 2.5, namely that Therium
24 retains at its sole discretion on completion of or
25 exhaustion of the funds for each particular tranche to

1 effectively opt out of the funding, which is a major
2 problem for reasons which ought to be obvious. It
3 creates real uncertainty.

4 Under the rules, as we looked at this morning, there
5 is a requirement for the Tribunal to be satisfied that
6 the proceedings, that is all of the proceedings, are the
7 subject of adequate funding, both as to the claimant's
8 own costs of funding, obviously with the best interests
9 of the claimants, but also so as to protect those on the
10 other side, and where you have an arrangement under
11 which a funder can effectively sit alongside the
12 proceedings and has a discretion of its own to pull
13 cover at any stage for any reason at its sole
14 discretion, you do not, and cannot be satisfied, as it
15 seems to us, that the rule would be met because how can
16 you be? This is not something which UKTC has sought to
17 develop in terms of its funding because we know that
18 they have gone still further overnight to say that there
19 is a £12 million provision which is unfettered by
20 tranching or staging.

21 DR. BISHOP: May I ask a question. Is there any prejudice
22 to your clients caused by this clause?

23 MR BACON: Yes.

24 DR. BISHOP: Or is it a prejudice to the Truck --

25 MR BACON: It is prejudice to both sides. So, first of all,

1 the claimants themselves on the face of it only have
2 funding so long as Therium does not exercise its right
3 to -- not to terminate termination clauses, that is
4 a separate right there -- but simply not to provide the
5 cover, the funding which it says it will advance under
6 the LFA. So there is a real uncertainty from the
7 claimant's perspective we would say.

8 THE PRESIDENT: Yes, Dr. Bishop was asking about your
9 clients.

10 MR BACON: To answer your question, both of us. From our
11 side the purpose of the rules, as we understand them, is
12 that you certify, taking into account, obviously, as you
13 are required to, the ability of the applicant to pay for
14 the adverse costs that are being incurred by the
15 defendants, by the other side.

16 THE PRESIDENT: Yes.

17 MR BACON: The funding -- insofar as the funding agreement
18 is terminated at any stage, obviously that will mean
19 that any further adverse costs funding will also fall
20 away.

21 THE PRESIDENT: Once they have terminated --

22 MR BACON: Yes, but how --

23 THE PRESIDENT: -- you will not have --

24 MR BACON: This presupposes, there is a problem here. It
25 presupposes that you will be preparing a defence of

1 a claim in anticipation potentially that all the work
2 you are doing may be the subject of a reversal of
3 decision making by Therium, or it may not even be
4 a reversal but an exercise of discretion by Therium not
5 to continue funding the case, leaving the respondents
6 with a major difficulty. They would have incurred --
7 THE PRESIDENT: That is the question. You will get a costs
8 order obviously if the claim stops. Are you covered for
9 an adverse costs order by the insurance?

10 MR BACON: We will come to that --

11 THE PRESIDENT: That is the point of Dr. Bishop's question.
12 A claimant can always discontinue proceedings. They
13 might need permission of the court and the court will
14 require the claimant to pay the defendant's costs. They
15 will not say no, you do not want to continue this case.
16 You have to go on, because we, the court would like to
17 know what might happen.

18 MR BACON: I understand that but there is another point to
19 this. Clearly Therium has a right to terminate under
20 the basic provisions of the LFA anyway. That I accept.
21 This is a separate termination point.

22 THE PRESIDENT: Yes, because they do not want to spend more
23 money.

24 MR BACON: If one goes to -- in the same file you will see
25 the code of conduct, the ALF code.

1 THE PRESIDENT: But in answer to Dr. Bishop's question,
2 which is does that prejudice -- we fully understand your
3 point that this goes to the certification criteria and
4 we have to be concerned about the represented class and
5 so on, but the question was more specific: does it
6 prejudice your protection against the costs incurred to
7 that point?

8 MR BACON: It does, because the whole purpose of this
9 certification process, in my submission, is to put in
10 place a procedural framework under which both sides will
11 be operating to address the claim that is being met. We
12 will be incurring costs in responding to a claim from
13 beginning to end, and there will be resources deployed,
14 funding deployed, money deployed with a view to ensuring
15 that is achieved.

16 If it is the case that through a quite exceptional
17 clause in an LFA that the funder, who is not running the
18 claim, it is not their claim, can effectively pull the
19 funding with the consequence that claimants and
20 defendants both end up in a situation where they cannot
21 continue to pursue the claim from beginning to end, it
22 is highly undesirable for the Tribunal to be certifying
23 on that basis.

24 THE PRESIDENT: We understand that, but that does not answer
25 the -- Mr. Bacon, that does not answer the question.

1 DR. BISHOP: Is there some claim that the costs of the
2 defendants here are in some sense front end loaded,
3 front-end heavy, that you have to incur a lot of the
4 costs for the entire -- a disproportionate amount of the
5 costs for the entire claim will have to come up-front?
6 And that, therefore, limits of this sort might leave you
7 out of pocket.

8 MR BACON: Yes, there is that.

9 DR. BISHOP: Is that -- I do not think we have had any
10 evidence of that, have we?

11 MR BACON: The way these cases are prepared, to answer your
12 question, sir, is that on this side I am sure that we
13 will not be preparing this case by reference to the same
14 tranche periods that are -- so once you understand that,
15 you realise that there is a disconnect between the
16 requirements of the funder who want to stage their
17 funding in this way and the ability of litigants and
18 respondents' litigants to prepare their cases.

19 THE PRESIDENT: That is often the case between claimants and
20 defendants, the way they spend their money. At the
21 moment I have not seen anything which suggests that if
22 the claimant discontinues and you have a costs order in
23 your client's favour, by reason of this clause your
24 clients will not be able to enforce the costs order --

25 MR BACON: My main point, sir, is --

1 THE PRESIDENT: -- which will cover you for the costs
2 incurred.

3 MR BACON: It is one thing to say it is all right because
4 you can make a claim on the policy, but in one respect
5 this misses the point, because clearly that is
6 a position under any litigating funding case or any
7 other case where a funder can terminate because there is
8 a breach, whatever it may be, of the agreement, but
9 there are good reasons for the termination to take
10 place, and the courts and the Tribunal accept that there
11 are going to be occasions when cases have to come to an
12 end because the claimants themselves have taken that
13 decision or because they have misbehaved in some way.

14 This is a different ball game. This is where
15 a third party who has no control over the proceedings on
16 our side or their side can effectively exercise their
17 own discretion to leave both sides without pursuit of
18 the claim.

19 THE PRESIDENT: In theory, if at any point for whatever
20 reason, the RHA would say, "well, we've changed our
21 mind. We do not think this is a good idea. We want to
22 stop." The only concern of your clients is, "well, we
23 want all the costs that we have incurred". They will
24 not say "we are terribly disappointed that you are not
25 suing us any more".

1 MR BACON: I accept that --

2 THE PRESIDENT: Can you now just ask the question which,
3 I think, is the third time I have asked it. Does the
4 termination of this provision deprive you of your right
5 to get a costs order, and does it interfere with the
6 insurance cover of the RHA to meet that costs order?

7 Either it does or it does not. It is a very simple
8 question.

9 MR BACON: Yes. I accept the scenario you gave arises in
10 cases where --

11 THE PRESIDENT: I just want to know the answer to the
12 question.

13 MR BACON: It does cause -- there are going to be
14 irrecoverable costs on one view. There is going to
15 be --

16 THE PRESIDENT: They are always irrecoverable. Any claimant
17 can terminate litigation. You do not have to recover
18 the costs.

19 MR BACON: Disruption caused by the decision of a claimant
20 to withdraw a claim is one thing. I accept that if they
21 withdraw and say they do not want to continue we get
22 a costs order. That is one thing. But the sanction of
23 the Tribunal, which is what this would be, to permit
24 a third party to bring an end to the proceedings because
25 of the unusual discretionary rights they have to

1 terminate the retro-funding arrangement is quite
2 another, and we would submit that is not something that
3 the Tribunal should permit.

4 THE PRESIDENT: You still have not answered my question.

5 MR BACON: We may well have the right to recourse to the
6 policy, but in any view we are not going to get all the
7 costs back and it is hugely disruptive. To think that
8 there is going to be the potential of Therium not
9 providing or pulling cover under this particular clause,
10 hanging over the course of the litigation for
11 potentially many years is unacceptable.

12 THE PRESIDENT: So what your concern is, is that it is
13 hugely disruptive to the truck manufacturers to know
14 that the claimant might not be able to continue for lack
15 of funds. That is the concern.

16 MR BACON: Yes, because --

17 THE PRESIDENT: From your clients.

18 MR BACON: It is one thing to be able to plan the defence of
19 a claim taking into account the risks of the claimants
20 making a decision not to continue to pursue the claim,
21 or breaches that they may cause in terms of their
22 relationship with the funder, but quite another to be
23 subject to the effective whim of the insurer, the funder
24 under a clause of this kind. There is a difference.

25 THE PRESIDENT: Yes, okay. Right. What is the next point?

1 MR BACON: I am reminded that in the *Merricks* -- just
2 for your note, sir, in the *Merricks* judgment,
3 paragraph 57 you said in your judgment:

4 "Collective proceedings on an opt out basis can
5 bring great benefits if successful for the class members
6 which those individuals or small businesses otherwise
7 could never achieve. But like almost all substantial
8 competition damages claims they can be very burdensome
9 and expensive for defendants. The eligibility
10 conditions set out in section 47(b)(6) and adumbrated in
11 the CAT rules require the Tribunal to scrutinise the
12 application for a CPO with particular care to ensure
13 that only appropriate cases go forward."

14 An appropriate case would not be one we would say
15 which is subject to the extra, or the external, here,
16 quite unusual discretions to be exercised by a funder,
17 as opposed to the usual more common expectations that
18 yes, there might well be a decision taken by claimants
19 to discontinue, or an insurer may decide to repudiate
20 based on a breach of the clauses. That is a very
21 different scenario.

22 I was going to refer you to the code because it is
23 important that one has in mind the legitimacy of this
24 clause. The code is at tab 28, file number 2. It is in
25 tab 28 of file 2.

1 THE PRESIDENT: Yes, we have it in various places, yes.

2 MR BACON: There are certain requirements imposed on funders
3 who are parties to this code limiting their abilities to
4 terminate, sir, and they are set out at clauses 11 and
5 12 of the code.

6 THE PRESIDENT: Yes.

7 MR BACON: 11, first of all:

8 "The LFA shall state whether (and if so how) the
9 funder or funder's subsidiary or associate entity may
10 provide input to [...] terminate the LFA in the event
11 that the funder or funder's subsidiary [...] ceased to
12 be satisfied about the merits ... no longer commercially
13 viable ..."

14 And so on.

15 12:

16 "The LFA shall not establish a discretionary right
17 for a funder or a funder's subsidiary [...] to
18 terminate... in the absence of the circumstances in
19 clause 11.2."

20 THE PRESIDENT: Yes.

21 MR BACON: That amplifies the points I am making. There is
22 a reason for that, because if that was permitted in
23 litigation up and down the land you would end up in
24 a quite unreal position where, beyond legitimate
25 commercial desires to terminate an LFA justified, there

1 is a separate ability to terminate unconstrained by any
2 boundaries of merit or justification, you end up with
3 cases being funded which are not really funded at all
4 until and unless the funder does not exercise the
5 option.

6 We would submit that in these important cases the
7 Tribunal should consider with real care whether it
8 should permit the funder, Therium, who is bound by this
9 code. The evidence in the case -- they rely heavily on
10 the fact that we are a member of ALF and the code and
11 so on, and yet their own agreement purports to breach
12 one important aspect of the code.

13 THE PRESIDENT: Yes.

14 MR BACON: We do say that those -- it is fine to have
15 tranches. They can fund the case as they wish in terms
16 of tranches, but to have an option to terminate at the
17 completion of each of these tranches is not
18 acceptable --

19 THE PRESIDENT: Yes.

20 MR BACON: -- or reasonable.

21 DR. BISHOP: Mr. Bacon, suppose the clauses were amended to
22 read:

23 "At the end of each tranche the funder will consider
24 whether there is any longer economic viability and
25 commercial viability in the dispute or whether the claim

1 still has merits."

2 And on that basis decide whether to go forward to
3 the next phase, the next tranche, would that satisfy you
4 on this point?

5 MR BACON: Yes, because that is a commercially acceptable
6 proposition. That the funder should have the right, the
7 ability to cease to fund the case which is no longer
8 economically viable. Nobody wants cases being pursued
9 as a matter of public policy which are not worth the can
10 they purport to be. So it is a good thing that that is
11 permissible. What is not a good thing is giving
12 a funder the ability to fund, even if the case is a good
13 one on the face of it, just to have the ability to
14 withdraw funding without any boundaries or parameters as
15 to the exercise of that discretion, simply because on
16 this reading the funds have been exhausted for that
17 particular trial. That is an unacceptable proposition
18 for the Tribunal to accept. There is an important
19 difference between the two.

20 DR. BISHOP: Even though I could well see that the member of
21 the class who thinks he is going to get some money out
22 of this important if overpayment of his truck might be
23 very unhappy about that, but it appears only to benefit
24 your clients does it not, that they are stopping the
25 litigation and going away?

1 MR BACON: I am not convinced that is the way to answer the
2 question with respect. The certainty is important to
3 both sides in all of this.

4 DR. BISHOP: I take it that this Tribunal has responsibility
5 to the claimant as well, absolutely.

6 MR BACON: One of the problems with these cases,
7 particularly we see it with UKTC, is that the funding
8 agreements are negotiated by, in the case of UKTC, an
9 entity that is simply existing for the purposes of the
10 proceedings. If one were to think about the commercial
11 cases that we see where you have an entity that wants
12 funding from a third party, the idea that the entity
13 would sign up to an agreement which gave the funder the
14 exclusive right to simply pull cover whenever it wanted
15 to would be unthinkable.

16 What is going on with this regime, as I understand
17 it, as I see it, the burden is really being placed on
18 the respondents to take the points that would otherwise
19 be taken by responsible claimant litigants if they had
20 a real interest in the funding agreements because they
21 have a personal liability in the end to the funders.

22 That is really the problem. I am seeking to
23 articulate --

24 THE PRESIDENT: I think these cases are indeed unusual but
25 I think there is a burden on the Tribunal, even if the

1 respondents do not appear.

2 MR BACON: I agree with you. Share responsibility. The
3 gatekeeper here is clearly the Tribunal but there is
4 a responsibility on our part to bring to the Tribunal's
5 attention matters which might otherwise have been
6 brought by a commercial entity with the wherewithal and
7 interest in pursuing it.

8 THE PRESIDENT: No, we understand the point.

9 MR BACON: The same applies, if I may say so, sir, with the
10 UKTC SPV Yarcombe. No commercial entity, let us say for
11 example Daimler who I act for, one of the clients,
12 wanted to have a case funded, the idea that it would go
13 to a funder and say can we have £15 million, please, the
14 idea they would sign up to a funding agreement under
15 which the funder is an offshore SPV with no assets is
16 unthinkable.

17 Because the bargaining negotiators who negotiated
18 this is such as it is that that has happened.

19 THE PRESIDENT: There may be all sorts of reasons. Okay,
20 let us move on.

21 MR BACON: That is the problem with the staging and the ALF
22 code.

23 The ATE policy, not a great deal to be said on that.
24 We can put file 2 -- it is tab 31.

25 THE PRESIDENT: It is in this file.

1 MR BACON: You are quite right, it is tab 1 and it is at
2 page 803 where you will immediately see, sir, that the
3 insured is, as one expects, the parties set out at
4 appendix A which is at page 806, the Road Haulage
5 Association. The opponent at page 803 is defined as
6 including:

7 "... other defendants as advised to insurers
8 including those defendants who have joined in the legal
9 action as per rule 39 [...] "specifically contemplating
10 the defence of the action by joiners".

11 The limit of indemnity here is more than that
12 provided for currently by UKTC. You recall that UKTC's
13 current written policy is for £12 million. The limit of
14 indemnity here is £20 million.

15 We have raised issues in our skeleton and in the
16 joint funding response about the several liability of
17 the insurers to the policy schedule and the concerns
18 that that raises. CBL was one of the examples of the
19 insurers that became insolvent, and there is a several
20 liability on the part of the insurers. I am not going
21 to say any more about that in my submissions but it is
22 a concern.

23 THE PRESIDENT: We are told that that is absolutely standard
24 for insurance.

25 MR BACON: Of course, I understand that.

1 THE PRESIDENT: There might be a stifling point on that
2 basis.

3 MR BACON: No, I hope that, the way in which I am addressing
4 that point is understood. It is of much greater concern
5 is the earlier concern about this funder's ability to
6 control effectively the proceedings through its
7 discretion.

8 THE PRESIDENT: Yes.

9 MR BACON: Now I turn to the questions of adequacy of cover
10 in respect of both of these arrangements. UKTC's cover
11 for adverse costs, starting with adverse costs, is
12 £12 million.

13 THE PRESIDENT: Just before you go on, is there anything
14 about right of termination?

15 MR BACON: Yes, we have the same --

16 THE PRESIDENT: Or avoidance, as it were.

17 MR BACON: Yes. Just bear with me one moment, sir, if you
18 would not mind. (Pause)

19 THE PRESIDENT: Because there is, I think, a waiver, is
20 there not, in this point?

21 MR BACON: Yes, there is a partial waiver which I referred
22 to earlier.

23 THE PRESIDENT: Yes.

24 MR BACON: But there is not a complete waiver. I was just
25 looking at the LFA. I was just speaking to my

1 learned junior about the LFA termination.

2 THE PRESIDENT: I thought your point was about the ATE

3 cover, the cases you took us to, and that is what we are

4 on.

5 MR BACON: We are.

6 THE PRESIDENT: Whether the waiver, namely that they cannot

7 avoid except for fraudulent, deliberate or reckless

8 breach --

9 MR BACON: Correct.

10 THE PRESIDENT: -- meets the point.

11 MR BACON: It is obviously far better than the UKTC.

12 THE PRESIDENT: Because that is the sort of waiver that is

13 referred to I think in the Court of Appeal case, is it

14 not?

15 MR BACON: It is. We do submit that there is more to it

16 than just that waiver and in fact the --

17 THE PRESIDENT: What is the concern about the right of the

18 insurer to terminate?

19 MR BACON: I am just trying to find in our skeleton -- maybe

20 we should go to our skeleton. (Pause)

21 MR THOMPSON: I am sorry, I am less familiar with the LFA

22 documents. I am not sure which passage we are talking

23 about.

24 THE PRESIDENT: In his general submissions Mr. Bacon made

25 a point about ATE policies as providing assurance that

1 the adverse costs of the respondents can be met. One
2 has to look at the ATE policy because if it can be
3 avoided easily by the insurer it does not give
4 sufficient assurance, and you will recall he took the
5 Tribunal to those cases on security for costs,
6 *Premier Motors* in particular, and he drew attention
7 to an avoidance clause in the UKTC policy. Now that we
8 are on the RHA policy, I do not think it concerns your
9 clients at this point, I am asking is there any clause
10 here which gives rise to concern given that there is
11 a waiver of the right to avoid, save for fraud or
12 deliberate -- in clause 4.2 policy. Does that meet the
13 point? That is what I was asking.

14 MR BACON: Yes, there is still clause 4.1.2 which is the
15 Contracts (Rights of Third Parties) Act point which
16 remains. So that is not dealt with.

17 THE PRESIDENT: No. That is the point that remains, you
18 see.

19 MR BACON: It is the point that remains. The way that RHA
20 have sought to address this is in Mr.Meyerhoff's second
21 statement. Perhaps I can ask you to turn to that. It
22 is in file 3, tab 59, this is, we would say, with
23 respect, the right way to go about resolving these
24 uncertainties. I say that not in the context only of
25 right of termination but the fact that we have concerns

1 about, there is obviously an SPV behind this funding
2 agreement as well. It is not the same, I accept it is
3 not in the same class as the UKTC point but you will see
4 at paragraph 23 of tab 59:

5 "ATE in favour of RHA. In essence the respondents
6 complaint here is that in the event that some or all of
7 them are awarded adverse costs which are paid out under
8 the policy, the RHA might capriciously decide not to pay
9 those funds out to the recipient respondents. I note
10 that Mr. Burnett has addressed this ..."

11 And so on.

12 25 is important:

13 "If the respondents remain concerned about this
14 issue [which we do] following any certification [we say
15 it does not need to follow a certification, it remains
16 our concern] the RHA is willing to explore providing a
17 bond or deed of indemnity referred to in the joint
18 funding response."

19 Which was the approach that the Court of Appeal and
20 other courts in those security for costs cases have
21 adopted as an alternative.

22 We would suggest that that is the appropriate way in
23 which to deal with both applications, requiring
24 appropriate bonds or deeds of indemnity to be incepted
25 giving the respondents the satisfaction, some confidence

1 in being ultimately entitled to be paid or being paid in
2 fact at the end of the case if they succeed.

3 THE PRESIDENT: Yes.

4 MR BACON: The only reservation to Mr. Meyerhoff's statement
5 is that if we remain concerned following certification,
6 but we do not see why it should wait for certification
7 for that proposal to be explored further. That would
8 resolve a lot of these issues.

9 THE PRESIDENT: Yes.

10 MR BACON: Coming on to the cover, the adequacy of the cover
11 then, sir, subject to your own further directions.

12 THE PRESIDENT: Yes.

13 MR BACON: Adverse cover first of all, the cover offered by
14 UKTC's ATE insurance is £12 million, and the cover by
15 RHA is £20 million. Obviously I am somewhat piggy in
16 the middle here, but the obvious point to make against
17 UKTC is that obviously the market has responded to
18 a claim substantially in excess of £12 million ATE, at
19 not much substantially higher cost. So one is looking
20 at questions in the future about whether there is going
21 to be one CPO certified or two, and whether it is opt in
22 or opt out. £12 million if it is one in UKTC to cover
23 the entire adverse costs of all the respondents from
24 beginning to end including trial and quantum
25 calculations which necessarily flow from the terms of

1 the funding agreement for the reasons I discussed
2 earlier, but it is not until then that even the
3 funder -- the funder will only be paid in the event that
4 there is a recovery, so the expectation is that funding
5 will be available for that purpose. But £12 million is
6 obviously, falls well short of what would be reasonably
7 and proportionately required expenditure on the part of
8 respondents who might well succeed in the end.

9 As is £20 million.

10 We have sought to develop our arguments in relation
11 to the quantum by identifying what our costs, what the
12 respondents' costs are likely to be, and there are three
13 witness statements. File 2 contains the witness
14 statements. I do not know whether you have had an
15 opportunity to look at them but they are very
16 instructive in terms of what the likely costs scheme
17 will be going forward.

18 First of all, tab 39 is a witness statement from Mr.
19 Huw Jenkin of Travers Smith, solicitors for the eighth
20 to tenth respondents, DAF. These witness statements are
21 all from, as you know, very experienced practitioners in
22 this area.

23 THE PRESIDENT: Yes.

24 MR BACON: Obviously there can be no precision in any of
25 this point, sir, because -- but just on a broad-brush

1 approach what Mr. Jenkin says in his witness statement,
2 in my submission, sounds more than plausible to say the
3 very least. He has put together a table over at
4 paragraph 15 of an estimate of the costs that DAF is
5 likely to incur as a defendant, setting out solicitors,
6 counsel and experts, RHA £20 million, excluding VAT,
7 UKTC, £18.8 million. This is by no means all of their
8 costs. What we wanted to do was to put forward a figure
9 which is an absolute minimum, justifiable minimum by
10 reference to one's understanding and experience of the
11 case and of other cases.

12 So immediately one can see even if it was just DAF,
13 the adverse costs cover provided for by UKTC and RHA is
14 insufficient. He says at paragraph 18 that:

15 "Although I set out below the steps that I have
16 taken in reaching my estimate there are additional costs
17 which I expect that DAF will incur which are reasonable
18 and necessary in the litigation."

19 Those are the costs of De Brauw Blackstone --

20 THE PRESIDENT: Why would they be recoverable in litigation
21 because DAF is using Dutch counsel to coordinate across
22 Europe? We are concerned with the costs of these
23 proceedings.

24 MR BACON: There would certainly be arguments about the
25 recoverability of those --

1 THE PRESIDENT: On what possible basis could they be
2 recovered? This is an English action. The fact that
3 there are actions in Holland and therefore they want
4 their Dutch lawyers to be involved because they are
5 concerned about parallel --

6 MR BACON: What is being said at paragraph 18 is that these
7 are costs that are being incurred or likely to be
8 incurred --

9 THE PRESIDENT: They may --

10 MR BACON: -- which are not included in the estimate.

11 THE PRESIDENT: No, because they are not recoverable.

12 MR BACON: The point is --

13 THE PRESIDENT: So why are they relevant?

14 MR BACON: I think we are at cross purposes. The point I am
15 making is that the table that we have put together for
16 the costs makes it clear that it does not include costs
17 which are being incurred which will not be recoverable.
18 Paragraphs A --

19 THE PRESIDENT: Costs of people within DAF who have to do
20 some work on this.

21 MR BACON: They have all been excluded. Lest it would be
22 said that we have included costs of that kind, they are
23 not included.

24 THE PRESIDENT: Yes.

25 MR BACON: At paragraph 19 his estimate is around eight

1 phases of litigation, adopting the precedent H type
2 approach to the litigation. He has set out the likely
3 hours and number of months that are likely to be taken,
4 and on disclosure at paragraph 38:

5 "It does not include disclosure relating to
6 individual issues following completion of a common
7 issues trial."

8 Which obviously would be incurred in relation to the
9 ability to recover some damages if damages are ever
10 going to be awarded.

11 He has provided what I would submit, and what
12 I submit you ought to accept is a perfectly fair
13 assessment based on his current knowledge of what is
14 likely to be spent.

15 Similarly, Mr. Farrell, behind tab 41, James Farrell
16 of Herbert Smith on behalf of Fiat, Iveco and CNH, he,
17 too has prepared an estimate but not of the kind that
18 Mr. Jenkin was providing. He has been even more
19 reserved and took the line which seems to us to be
20 a sensible one that, "What can I say confidently as
21 a minimum legal spend given the difficulties of
22 preparing a comprehensive budget at this particular
23 stage?"

24 What he provides is an estimate at page 1236 of the
25 trial costs including the counsels' brief fees and

1 refreshers and the expert fees for trial alone, plus --
2 no, it is trial plus -- it is experts' disbursements for
3 the preparation and attendance at trial, an updated
4 economists' report and preliminary reports of other
5 experts. So the experts' disbursements are limited to
6 those three categories but the other costs are trial
7 costs of the solicitors and barristers. And you get
8 a figure of £5.9 million.

9 THE PRESIDENT: Yes, this does not cover disclosure, is that
10 right?

11 MR BACON: No, exactly. This is a very, very
12 conservative -- it is not an estimate of the costs of
13 the proceedings. I make that absolutely clear. This is
14 just to highlight why it is that £20 million by RHA if
15 divided by five is going to be insufficient, and
16 certainly 12 divided by the five is going to be
17 insufficient, simply because you get to six just by
18 looking at the trial figures and the expert costs. That
19 is the purpose of the budget.

20 THE PRESIDENT: Yes, I see.

21 MR BACON: Obviously the costs will be considerably more
22 than that.

23 At paragraph 10 he really summarises his position:

24 "In this statement I set out the reasons why

25 I consider that even the higher amount of adverse costs

1 cover provided by RHA of £4 million per defendant will
2 be insufficient to cover ... costs ..."

3 And just simply concentrates on what one might call
4 the known variables so to speak, as opposed to the
5 unknown.

6 Then in addition to that, there is a statement from
7 Quinn Emanuel, Mr. Bronfentrinker, Boris, who says at
8 tab 43 that based on his experience in this kind of
9 litigation adverse costs cover up to £12 million,
10 paragraph 8, or even 20, is clearly inadequate.

11 What he has prepared is a more detailed budget based
12 upon his experience in the *Merricks* case, adopting
13 a similar approach that was appointed in the preparation
14 of his budget which this Tribunal in the end was content
15 with in terms of its approach, where you will see at
16 page 1307 a budget of nearly £23 million.

17 At paragraph 10 of his witness statement, page 1 --

18 THE PRESIDENT: 1307.

19 MR BACON: 12 --

20 THE PRESIDENT: You say the total of those figures is

21 £23 million, yes.

22 MR BACON: Yes. First --

23 THE PRESIDENT: And the CPO hearing should not be included

24 in this, in what we are looking at.

25 MR BACON: The CPO hearing would be included. It is part of

1 the costs of the claim.

2 THE PRESIDENT: Yes, but, Mr. Bacon, if your clients are

3 successful at the CPO hearing there will not be a trial.

4 MR BACON: No, absolutely.

5 THE PRESIDENT: The total cost, they will seek recovery in

6 this case, it looks like £1.86 million, is it?

7 MR BACON: Yes.

8 THE PRESIDENT: And that will be it, and so the question is:

9 is the insurance cover adequate for £1.86 million, if

10 you are successful at the CPO hearing?

11 MR BACON: But the purpose of the rule is to ensure that the

12 costs of the entire proceedings are adequately provided

13 for.

14 THE PRESIDENT: And the entire proceedings only follow if

15 you are unsuccessful at the CPO hearing.

16 MR BACON: Yes.

17 THE PRESIDENT: Nothing is certain in this world but if

18 *Merricks* is a precedent, your clients will not

19 recover the costs of opposing the CPO because you failed

20 on that and therefore those costs will not be

21 recoverable.

22 MR BACON: I think there are a couple of --

23 THE PRESIDENT: Is that not right?

24 MR BACON: One big major point first of all. When one is

25 certifying, I would submit when one is first certifying

1 the proceedings, the applications themselves, one is
2 certifying against the background that they will go to
3 trial. That is what the rules talk about.

4 THE PRESIDENT: Yes, that is right.

5 MR BACON: So the budgets that have to be accommodated, the
6 likely adverse costs awards that need to be considered
7 are what is the likely claim for costs at the conclusion
8 of the proceedings if the defendants succeed?

9 THE PRESIDENT: Yes. Normally after a CPO hearing there is
10 a judgment either granting or refusing.

11 MR BACON: Yes.

12 THE PRESIDENT: Following the judgment there is an
13 application for costs at that stage.

14 MR BACON: Yes, but --

15 THE PRESIDENT: If you failed on that stage then it is
16 a little difficult to see that even if once the hearing
17 proceeds then, once the case proceeds, because the CPO
18 hearing is to decide whether the case can continue, that
19 you should nonetheless, even if you are successful at
20 the end of the day, get your costs of having mounted
21 a strenuous opposition to a CPO being granted.

22 MR BACON: We would absolutely want to say that the costs of
23 the CPO would be in the case at the very least, so if
24 the defendants were successful overall they would
25 absolutely want to say to the Tribunal, we want the

1 costs of the claim and the CPO hearing that brought the
2 claim.

3 THE PRESIDENT: You might want to say that.

4 MR BACON: Naturally. I am sure we would, but --

5 THE PRESIDENT: Normally, and indeed as I recall,
6 Mr. Merricks did not have to pay costs of the funding
7 argument because he succeeded on it, and indeed the
8 position of the Tribunal of costs was that Mr. Merricks
9 should get his costs. The funding argument was netted
10 off as against the costs of Mastercard. One does not
11 have to have an issue-based costs order on everything.
12 You have had a whole separate stage of proceedings, and
13 we have had a five day hearing, and your clients have
14 failed on that, and need not have opposed the CPO. The
15 idea that nonetheless you should get your costs of doing
16 that some people would think a bit surprising.

17 MR BACON: With the greatest respect, what happened in
18 *Merricks* is -- what we are contemplating here with
19 these budgets is the case proceeding beyond the hearing
20 of the CPO application, so there has been a successful
21 outcome.

22 THE PRESIDENT: Of course you are.

23 MR BACON: In which case we would not be seeking our costs
24 because we would have lost on the CPO. We would have
25 incurred the costs of the CPO.

1 THE PRESIDENT: Yes, but somebody else might be seeking
2 their costs of the CPO.

3 MR BACON: We are talking about the adverse costs liability.

4 THE PRESIDENT: I have made the point. Let us just move on.
5 You say ultimately whether it is £22.9 million or
6 £21 million may not greatly matter.

7 MR BACON: Yes. We say that certainly there is sufficient
8 material, sir, put before you with these budgets. There
9 may be the odd wrinkle here or there but it does not
10 take a lot to realise that bringing a claim of this size
11 against five respondents is going to be -- has every
12 likelihood that the costs on the respondents' side
13 greatly exceed £12 million, greatly exceed £20 million.
14 The likelihood is the very minimum, I would have
15 thought, this is not a figure that I am going to be held
16 up to in years to come, I dare say, but even if one
17 takes a figure of £60 million for five respondents, that
18 is only allowing just over 12 or whatever it is for each
19 of the other parties, that is obviously not going to be
20 accommodated by either of these two ATE policies, and
21 evidence needs to be given, in my submission, before
22 certifying these proceedings, that the funders out
23 there, these funders or other funders do not have the
24 capacity, because I am sure they do, to provide for that
25 more sensible serious level of funding that this case

1 would require.

2 THE PRESIDENT: That is what you say is the appropriate
3 figure as a ballpark.

4 MR BACON: As a ballpark figure, yes.

5 On the -- given the time, on the own side's -- so
6 that is adverse cost cover.

7 THE PRESIDENT: Yes.

8 MR BACON: On the adverse costs cover the case against me
9 seems to be *Merricks's* £10 million was mentioned as
10 a figure but that was obviously a unitary claim in the
11 sense that there was one defendant. That is the point
12 taken against me that £10 million was the figure that
13 the Tribunal adopted as being a reasonable and
14 proportionate figure. Even if that £10 million was
15 adopted by five it is not difficult to articulate the
16 point that --

17 THE PRESIDENT: It means more wide ranging the cartel, the
18 more successful it is in involving the entirety of the
19 industry, the harder it is to bring a case against them
20 because you need more money, because even if you only
21 sue two members of the cartel they will bring in all the
22 others to rack up the cost.

23 MR BACON: Well --

24 THE PRESIDENT: That is the consequence, is it not?

25 MR BACON: It may well be but these funders are not in this

1 for nothing. We are talking about three to four times
2 return on the stipulated proposed level of damages. We
3 are talking about hundreds of millions of pounds being
4 paid to funders for funding significantly less than that
5 figure. £47 million funding RHA, £20 million,
6 £24 million on UKTC, with returns of over £100 million
7 potentially. So, yes, they should provide funding for
8 a minimum of £65 million. The economics justify it.

9 THE PRESIDENT: 60 or 65? I thought you said 60, but five
10 times 12, but ...

11 MR BACON: 60 or 65.

12 THE PRESIDENT: Yes.

13 MR BACON: There are some sort of chuntering along counsels'
14 bench here, but this is a serious point. On
15 certification the Tribunal needs to be satisfied that
16 there is adequate funding for both adverse costs and on
17 own side's costs, and on any view the ATE policy
18 coverage at the moment falls well short of what would be
19 reasonably, proportionately required as costs.

20 On the own side's position, if we can just turn to
21 the budgets, there is a budget, UKTC's budget, I will be
22 quite quick, file 1, tab 5 is UKTC's budget, cost
23 budget.

24 THE PRESIDENT: That is 42.6, I think.

25 MR BACON: Be careful about this. First of all, they are

1 substantial numbers. That does include additional
2 liabilities within the figure of that. What you really
3 need to -- the right-hand total column, the four
4 additional liabilities, so ending in the £293,000, the
5 last, those other totals above it, total about
6 £22 million to which there are added additional
7 liabilities and so on.

8 THE PRESIDENT: I see, yes.

9 PROFESSOR WILKS: Sorry, could you go over that again. This
10 is page 124 is it?

11 MR BACON: Yes, it is page 124.

12 PROFESSOR WILKS: Which figures are you seeking to --

13 MR BACON: You see the total figure at the right-hand side
14 of the page. The total of the budget is £42.5 million.
15 That figure is derived from adding the 20568 to the
16 other totals above it, and those other totals are about
17 £22 million, so it becomes £42 million. The 20566 is
18 the product of the additional liabilities added
19 together. You go across the page, as I understand it
20 you go from 600, 677, 7.9, 11.3 to arrive at a total of
21 20.5 for additional liabilities which we can ignore for
22 the purpose of comparing the costs. That is the purpose
23 of my submission. Do you have that?

24 THE PRESIDENT: Yes, it is £22 million.

25 MR BACON: It is about £22 million, which rather speaks to

1 our point, just on a wider perspective, that £12 million
2 adverse costs cover does not compare particularly
3 favourably to the £22 million which UKTC intends to
4 spend.

5 THE PRESIDENT: Yes.

6 MR BACON: There is insufficient funding, we would submit,
7 in any event in this budget. You will see, for example,
8 that the total disclosure costs, the total budget for
9 disclosure is £4.1 million, call it 4.2, if one rounds
10 it up, of which disbursements represent about
11 £2.2 million, and we say that that is very, very low
12 compared to what we would expect to be incurred in terms
13 of disclosure going forward. For your note, RHA's
14 comparable is £6.8 million on disclosure.

15 THE PRESIDENT: Yes.

16 MR BACON: And curiously for disclosure there is no -- if
17 one looks at the budget in a bit more detail by turning
18 through the various pages of it, and the disclosure is
19 at 126, you get to the figure of 4.16, page 126. There
20 is no allowance there at all for any experts in the
21 disclosure process which seems to us to be a curious
22 omission. If you look at disclosure on page 126 there
23 is a heading "For experts' costs" which is nil, and we
24 would submit that disclosure is an area where it is
25 crucial for experts to be engaged. There is nothing in

1 there for third party disclosure applications either.

2 THE PRESIDENT: Yes, so you say it is on a budget. We had
3 better move on quickly to the other one because you are
4 running out of time.

5 MR BACON: Yes, so far as RHA's budget is concerned, that
6 you will find in the same bundle at tab 24. It is an
7 annex to the litigation plan at page 695. You will see
8 at page 696, first bullet point:

9 "Overall funding required, £27 million."

10 Do you have that first bullet point? Because I can
11 take this quite quickly.

12 THE PRESIDENT: Yes, page 696.

13 MR BACON: Correct. There is a budget of £22.77 million for
14 legal costs and disbursements. So their own estimate
15 for legal costs and disbursements is £22.77 million
16 which is why we say, as you will understand, ATE for
17 £12 million for just two defendants as opposed to all of
18 them is woefully inadequate even on their own
19 expectations as to what they will incur in terms of
20 legal costs.

21 It gets slightly worse than that because the legal
22 costs and disbursements are broken down into
23 £6.2 million for experts and £2.7 million for team of
24 RHA employees so there is a need to accommodate that.

25 £13.68 million for lawyers' fees alone is a proxy

1 for you to consider against the claim by potentially
2 five respondents lawyers' fees. There is no reason why
3 the Tribunal should not treat both sides as having equal
4 or broadly equal expenditure here.

5 THE PRESIDENT: I am not sure that Backhouse Jones' hourly
6 rates are the same as Herbert Smith's hourly rate, or
7 using more economical funding.

8 MR BACON: We have not been given that detail as
9 I understand it.

10 THE PRESIDENT: Well --

11 MR BACON: It is a point that cannot be made in
12 circumstances where the budget is this document.

13 MR KIRBY: The rates are on page 700.

14 MR BACON: 700 is it.

15 THE PRESIDENT: I expect we have in your budgets, do we not,
16 the hourly rates of your instructing solicitors?

17 MR BACON: Yes, going back to the --

18 THE PRESIDENT: Which might of course go to reasonableness
19 on a standard basis of assessment.

20 MR BACON: Indeed. The rate of £600-odd an hour, sir,
21 I would not have thought would be something that would
22 be outwith the sort of hourly rates that you would be
23 allowing for a case of this kind.

24 THE PRESIDENT: I see.

25 MR BACON: Tab 3 of the authorities bundle, volume 1, is

1 a case called *Breasley Pillows* which you might
2 recall was an assessment of costs. This was an
3 application that was heard in less than half a day.
4 I do not know whether that brings back any memories, it
5 probably does not. I do not know, but it says:

6 "I recognise the defendants are represented by City
7 of London solicitors. Unless I regard the hourly rates
8 charged as beyond what is reasonable on this
9 application, I do not think that the lower rates charged
10 for the solicitor's claimants a fair guide. I consider
11 the rates of 600 for a partner and 300 for an associate
12 of appropriate seniority should be regarded as
13 reasonable."

14 We would not approve of that.

15 THE PRESIDENT: Yes. Anything else, because we are going to
16 have to allow Mr. Kirby and Mr. Thompson.

17 MR BACON: Just finally on RHA's funding, there is something
18 like 640,000 provided for third party disclosure which
19 we would submit is very low given the fact that
20 claimants will need third party disclosure against the
21 dealers and finance companies etc.

22 Pass on and tax, these have not been sought to be
23 certified by RHA as common issues and we would submit
24 that there needs to be recognition that these costs, or
25 costs of those issues, will have to be built into the

1 funding arrangements between RHA and the funders to
2 accommodate those costs.

3 So overall, you have the picture, sir, that the
4 overall figure for funding own side's costs and adverse
5 costs is not adequate and should be the subject of
6 further review by both UKTC and RHA before the Tribunal
7 certifies the proceedings, and we are particularly
8 concerned about the level of adverse cost cover.
9 Clearly we are concerned about the ability of the claims
10 to be funded properly by the claimants themselves but
11 our principal interest concerns the inadequacy of the
12 ATE cover.

13 THE PRESIDENT: Yes.

14 MR BACON: Thank you, sir.

15 THE PRESIDENT: Thank you. I think it might be sensible,
16 Mr. Kirby, to take our break now.

17 MR KIRBY: I was wondering whether this would be an
18 appropriate time.

19 THE PRESIDENT: And come back at 3.20.

20 MR KIRBY: Thank you.

21 (3.10 pm)

22 (A short break)

23 (3.20 pm)

24 Submissions by MR. KIRBY

25 MR KIRBY: Sir, can I start with a few general points before

1 coming on to the particular matters, but they are
2 important general points and the first one probably the
3 most important.

4 That is what the proper approach of the Tribunal
5 should be when considering the application for
6 authorisation of the class representative.

7 Sir, to some extent it is a point that was referred
8 to by you in discussion with Mr. Bacon.

9 If one turns to rule 78 which is at divider 41 of
10 the second authorities bundle, one sees at 78(2) that
11 there are a number of matters which the Tribunal shall
12 consider when it is considering whether it is just and
13 equitable for the applicant to act as the class
14 representative. They are matters for the Tribunal to
15 consider. They are not matters that the Tribunal has to
16 be satisfied on. An interesting distinction can be
17 drawn in support of that from rule 79, over the page,
18 dealing with certification, where under rule 79 the
19 Tribunal has to be satisfied on a number of matters
20 rather than just be required to consider such matters.

21 Insofar as my learned friend, Mr. Bacon, has
22 referred to a need to be satisfied, we say that that is
23 not the correct approach.

24 Can I just digress for one moment because I have
25 just used the word "we", and my learned junior is Mr.

1 David Went and not Mr. David West for the purposes of
2 the transcript, and I also apologise for not having
3 given him any credit yesterday.

4 Let me go back to the main narrative. As I say, we
5 say that it is a matter that you have to consider. It
6 is obviously an important matter. We do not shy away
7 from that in the least. But it is not a matter that you
8 have to be satisfied on.

9 We also say that the test is not the reverse of the
10 security for costs test. Of course, security for costs
11 can be awarded in this Tribunal and that is pursuant to
12 rule 59 which is again in that divider 41, tab 41, and
13 is in the very similar terms to those in the CPR. The
14 relevant provisions so far as this matter is concerned
15 would be at 5(f) which is on page 36 where the claimant
16 has been authorised to act as the class representative
17 in collective proceedings under rule 78, and there is
18 reason to believe that the claimant will be unable to
19 pay the defendant's costs if ordered to do so.

20 I wish to make two points in relation to that. The
21 first is that it is clearly open to any of the
22 defendants going forward to make an application, once
23 someone has been appointed as a class representative,
24 for security for costs if at that particular time they
25 have considered there is reason to believe that the

1 claimant will be unable to pay those costs, but that can
2 only be done once the class representative has been
3 authorised.

4 The second point is that I accept that the test
5 about there being a reason to believe that the claimant
6 will be unable to pay the defendant's costs is
7 a relatively low one in that there has to be a real
8 reason rather than some sort of fanciful reason to
9 believe that, and that is confirmed in the authority
10 that you were taken to, the *Premier* case, but what
11 we do not accept is that that is the test so far as 78
12 is concerned. That merely being able to show, for
13 example, is there a possibility that something might
14 occur is sufficient so far as the respondents, the
15 defendants are concerned.

16 It may be useful if, having referred to security for
17 costs, if I addressed you very briefly on the
18 authorities that my learned friend sought to rely on, in
19 particular the *Premier Motorauctions* case. That is
20 at divider 19 in bundle 1. That is the Court of Appeal
21 decision. What is important when looking at any of
22 these cases with regard to security for costs when they
23 are considering the adequacy of ATE is the facts of the
24 case. The case before you follows on from a decision of
25 the European Commission where certain facts have been

1 accepted. Premier Motorauctions -- and although we do
2 not have a copy of it we looked up on our phones
3 *Persimmon Homes*, are all cases where the
4 allegations in the matter involve allegations of fraud
5 and dishonesty, and effectively where, having made those
6 very serious allegations of fraud and dishonesty, the
7 claimants have been unsuccessful and therefore, surprise
8 surprise, it turns out that the claimants themselves
9 have been dishonest in pursuing the claims.

10 Taking the *Premier Motorauctions* case, it is
11 quite clear from paragraph 29 of the judgment of the
12 Court of Appeal that the decision was made on the facts
13 of this case. You see that at the line below letter G,
14 and you will see further up the page, that within
15 paragraph 25 sets out some of the facts of the case
16 itself.

17 If I can invite you to go to the second line up from
18 the bottom of page 2964:

19 "One only has to look at the amended particulars of
20 claim to see they are redolent with references to what
21 Mr. Elliott was told, particularly he was told that
22 Mr. Warnett was to be a non-exec director and a critical
23 friend, that a £2 million cash injection was
24 required ..."

25 Etc etc.

1 "These are all essential parts of the case against
2 the defendants and depend on the evidence that Mr.
3 Elliott will give at trial. I cannot, with respect,
4 agree with the judge when he says he has real doubts
5 that the disputed evidence of Mr. Elliott will be as
6 central to the case as the defendants suggest. Of
7 course the companies may have other hurdles to surmount
8 before they achieve a judgment in their favour but
9 unless Mr. Elliott is believed they will not get to
10 first base. If Mr. Elliott is not believed the
11 companies will lose and be liable for the costs of PwC
12 and the bank."

13 Sorry, I should correct myself on something I said
14 just a few moments ago. Of course this case is the
15 security for costs hearing, so there has not yet been
16 a decision of a claim that is not going to succeed. It
17 is in the *Persimmon* case. As we shall say, we do
18 not have a copy. If a copy is needed it can be brought
19 tomorrow. In the *Persimmon* case the headnote
20 suggests it was a thoroughly dishonest case because that
21 was after judgment.

22 *Premier Motorauctions* which is primarily
23 dealing with the question of ATE, and in fact my learned
24 friend Mr. Bacon did not really press very hard the
25 point about the threat of avoidance, certainly not so

1 far as RHA is concerned, but we would say putting it in
2 its context in any event, these decisions are very fact
3 specific, and in particular, on the facts of these
4 cases, these cases are not dependent on allegations
5 being made dependent on oral evidence of persons
6 alleging joint ventures or whatever it is which are then
7 going to either be believed or disbelieved.

8 These cases depend upon the settlement and European
9 Commission decision and what flows from that.

10 Can I then make a further general point and that is
11 that one cannot overlook the fact that obviously the
12 OEMs' desired outcome in relation to this hearing is
13 that a CPO should not be made. It is in their interests
14 to see these claims stopped at an early a stage as
15 possible. They face multi-billion claims arising out of
16 infringement of competition law and one way of stopping
17 the claims proceeding is obviously to satisfy the
18 Tribunal that RHA does not have sufficient funds. That
19 is the purpose of my learned friend's submissions.

20 We say, as I have said in my first general point,
21 that the ability to fund the matter and the ability to
22 meet any adverse costs orders are important matters for
23 your consideration but are not jurisdictional gateways.

24 Secondly, we say that the Tribunal should treat with
25 caution both the OEMs' own estimates of costs and their

1 criticisms of the RHA's funding. I will come to those
2 points in detail later in my submissions. This is not
3 a cost budgeting exercise where opposing parties may
4 seek to show that the other side's costs are too high.
5 This is the somewhat reverse of that where the parties
6 seek to say, "Oh you should go and spend another few
7 million, you haven't spent enough. If only you could
8 spend another ten million on pursuing this claim you
9 would then be able to get this right."

10 These are all very substantial cost figures,
11 whichever figure is going to be used.

12 We also say that this Tribunal should adopt
13 a flexible approach to authorisation. The OEMs say that
14 if the Tribunal is not satisfied on any point in
15 relation to funding or ability to make an order for
16 adverse costs, in their written submissions they suggest
17 that this Tribunal should dismiss the whole application.
18 It does not in fact appear to have been my learned
19 friend's oral submission because he seems to leave open
20 the fact that if there are particular points of concern
21 to the Tribunal that it may be appropriate that the
22 parties are given the opportunity to address those, such
23 as testing the market with regard to additional ATE
24 cover if that was something of concern to the Tribunal.

25 The point that we make is that this should be

1 a flexible and dynamic approach. That is obviously
2 a phrase that I have taken from the *Canadian*
3 *Godfrey* case and which appears to be the approach that
4 is favoured by the Court of Appeal in *Merricks*,
5 albeit that those, neither of those decisions were in
6 relation to the funding aspects of the claims.

7 THE PRESIDENT: I think we may have said something, speaking
8 from memory, in *Merricks* on the funding aspect
9 about that.

10 MR KIRBY: Yes, forgive me. You did, sir. What I was
11 saying was that the Court of Appeal having approved the
12 approach in the Canadian case *Godfrey*, that
13 *Godfrey* was not to do with costs and funding. In
14 fact, to be honest I have no idea whether there is cost
15 shifting in Canada or not.

16 THE PRESIDENT: There is.

17 MR KIRBY: Thank you. I could not work it out from the
18 judgment and certainly the *Godfrey* decision itself
19 was not to do with costs or funding.

20 Certainly there should be that flexible and dynamic
21 approach to the further conduct, as I am sure there will
22 be, of these proceedings.

23 That may involve, bearing in mind the sort of
24 figures that are being thrown about or bandied about in
25 this matter, that could involve in due course not only

1 vigorous and rigorous case management but also cost
2 management and the possibility of there being cost
3 budgeting or indeed cost capping. We have said in our
4 evidence that that is something that we would seek in
5 due course.

6 Finally by way of a preliminary general point, can
7 I just highlight the fact obviously the stage at which
8 we are at. We are at a pre-pleading stage. There has
9 been talk about the extent to which we have or have not
10 allowed for pass on. We have not actually seen what the
11 pleaded case is in relation to that. It has not been
12 pleaded obviously at this stage at all. We are at also,
13 obviously a pre-disclosure stage. This is not a case
14 that one can necessarily predict with any level of
15 precision sufficient to say that whatever you determine
16 today with regard to appropriate budgets is likely to be
17 the budget that actually applies a year down the line.

18 Again, we come back to the point that with continual
19 case management and, if necessary, cost management that
20 some of these matters may and perhaps should be
21 revisited in due course.

22 THE PRESIDENT: We are in a slightly unusual position in
23 this case or these cases in that, as you know, there are
24 other trucks claims that the Tribunal is hearing, rather
25 more advanced inevitably than these, against the same

1 respondents. So that may cut both ways and come into
2 play at other points, but on the point you just
3 mentioned, pass on, I think we do have a fairly clear
4 idea from what the Tribunal has seen in the pleadings in
5 those cases that pass on is almost certain to be raised
6 as a defence.

7 MR KIRBY: I have no doubt it will be raised as a defence.

8 It would be very odd if it was not. But nevertheless,
9 at this particular stage it has not been pleaded. It is
10 not a pleaded issue and whilst it is something that
11 might be anticipated, it is something that we are still
12 entitled to see how it is pleaded.

13 Can I --

14 THE PRESIDENT: That is obviously -- you are in due course,
15 but when looking at what is the likely shape of eventual
16 trial I think it is the -- the respondents may say it is
17 reasonable that we should have regard to the fact that
18 pass on is likely to be there.

19 MR KIRBY: Yes. We reserved our position with regard to the
20 extent to which pass on can be dealt with as a common
21 issue and clearly there will in due course be directions
22 with regard to that.

23 THE PRESIDENT: Yes.

24 MR KIRBY: Again, it is those sort of directions that will
25 have a bearing upon costs and indeed consideration of

1 adverse costs. So we do not for one moment shy away
2 from that. Indeed, we reserved our position with regard
3 to common issues on pass on, interest and tax, and even
4 if it turned out, or this Tribunal directed that some or
5 all of those could not be dealt with as common issues,
6 we have also put forward in a report of Mr. Davis
7 possible ways forward with regard to how those issues
8 might be dealt with by way of either sampling or by way
9 of particular groups of claimants.

10 THE PRESIDENT: Yes.

11 MR KIRBY: Sir, I wonder if I can pick up on a point you
12 made just a moment ago just before that last point with
13 regard to the other matters that are going on.

14 We do say that you should take into account the fact
15 that there are a significant number of other matters
16 going on, not only in this jurisdiction but, as we
17 understand it, in Germany and the Netherlands and in
18 Spain, and again, that bearing in mind it is the same
19 parties, that they are using similar legal teams, there
20 will be a number of, if not exactly the same issues, the
21 same sort of issues arising and the same sort of matters
22 that have to be considered in the evidence and in the
23 expert evidence and these are, therefore, legal teams
24 that are certainly not starting from scratch with regard
25 to the consideration of these claims, they are legal

1 teams that are well into the conduct of these matters.

2 You will also --

3 THE PRESIDENT: That is quite a significant point,
4 Mr. Kirby. Disclosure may well be almost identical to
5 the disclosure that is being made in favour of the other
6 claimants --

7 MR KIRBY: We submit -- yes.

8 THE PRESIDENT: -- in the other actions for which the work
9 will have been done by the time your clients, if you are
10 proved and certified, get to disclosure.

11 MR KIRBY: It is difficult to see -- well, it is impossible
12 to see in fact how there would not be significant
13 overlap when it came to disclosure. There may of course
14 be additional disclosure and some of the disclosure that
15 has been given in the individual matters may not be
16 relevant in these matters, but there must be significant
17 overlap.

18 We submit that those are matters that you are
19 properly entitled to take into consideration when
20 considering the level of possible adverse costs, in that
21 there is highly likely to be a level of duplication
22 between the costs in this case and some of the work that
23 has been done and will be done in the other matters.

24 Contrast that, we say, with our position. We may
25 have put together a team of experts in relation to

1 competition law, but we are not involved obviously in
2 any of the other matters that are going on in the
3 Tribunal at the moment with regard to trucks.

4 We also say as a general point, that one only has to
5 look in this room to see vast teams of City lawyers at
6 City rates on behalf of huge international corporations
7 for whom the, what might be thought eye-watering levels
8 of costs are but a drop in the ocean so far as in
9 relation to the size of the claims that are being
10 brought against them. But the vast banks of City
11 lawyers sitting in this room should not be the yardstick
12 by which the recoverable proportionate costs of this
13 matter should be determined.

14 Having made those general points can I come on to
15 some specific points. I am very conscious of the fact,
16 and no criticism of my learned friend at all because
17 obviously we are all working under time constraints,
18 that there may have been matters that my learned friend
19 did not address orally but which he still would urge
20 upon you through his skeleton argument. I think I do
21 have to deal with a number of matters that perhaps he
22 did not focus on necessarily orally, although I hope to
23 do it swiftly.

24 Can I first of all deal with the ATE policy. That
25 is in bundle 2 at divider 31. My learned friend's

1 criticisms of our ATE policy were relatively mild but
2 nevertheless some are made. You were taken obviously to
3 the level of cover, the insured etc. The points I want
4 to highlight are some points that in fact you, sir, did
5 mention in passing but I just wish to emphasise, and
6 that is that we do have provisions here with regard that
7 the policy can only be terminated in the event of
8 fraudulent, reckless or deliberate misrepresentations.
9 That, we say, is a very important limitation on the
10 right to terminate.

11 Sir, you have obviously already seen those
12 provisions, having drawn attention to them, but they are
13 at 3.10 and 3.12.

14 Sir, one point that I do wish to draw attention to
15 is on page 801 which is at 4.20.

16 THE PRESIDENT: I have not read it as closely as I am sure
17 you have, Mr. Kirby. I have not quite worked out how
18 3.10 and 3.12 link in with 4.2 which is the termination
19 provision. Is that subject to 3.10 or is it --

20 MR KIRBY: 4.2 is subject to 3.10 as one can see. It says
21 that within it.

22 THE PRESIDENT: Yes, it says it.

23 MR KIRBY: 4.2 is the termination by insurers clause,
24 subject to a number of, clauses and they:

25 "... waive their right to rescind cancel or avoid

1 the policy for any reason other than any fraudulent,
2 deliberate or reckless breach of the insured of its duty
3 to make a fair presentation of the risk to the insurers.
4 Any material increase in opponents' costs under this
5 policy due to the breach of the any policy condition by
6 the insured caused by deliberate or reckless action(s)
7 of the insured."

8 THE PRESIDENT: As I understand it, 3.10 and 3.12 and 3.14
9 is an exclusion of costs for which they'll provide
10 cover. It is not a termination.

11 MR KIRBY: No.

12 THE PRESIDENT: 4.2 is the termination; is this right?

13 MR KIRBY: Sir, you are entirely correct and I misdescribed
14 that. It is 4.2 and then you get to the similar
15 provisions following on within 4 with similar wording.
16 What I would like to draw attention to is at 4.20.

17 THE PRESIDENT: Yes.

18 MR KIRBY: Sir, this is:

19 "... conditions applying in collective proceedings
20 and/or outside collective proceedings and only applying
21 to claimants including when dealing with determination
22 of common issues and individual issues [...] without
23 prejudice to clauses 3.12 and 3.14 [the ones we have
24 just mentioned] deliberate or reckless breach of the
25 duty of fair presentation, and clause 4.2, termination

1 by insurers above, the obligation of claimants to
2 provide the insurers with a fair presentation of the
3 risk shall be limited to matters of which the executive
4 of the claimants have actual knowledge. If the
5 claimants fail to provide a fair presentation but where
6 such failure was neither deliberate nor reckless the
7 insurers shall indemnify the insured in full ..."

8 THE PRESIDENT: Are you in 4.20?

9 MR KIRBY: I do apologise. I have made the mistake of using
10 a very small copy in order to have transported it. It
11 is 4.28. I do apologise. So 4.28 on page 801.

12 THE PRESIDENT: Fair presentation, yes, I see.

13 MR KIRBY: My apologies. What I wanted to draw attention to
14 was that the obligation to provide the insurers with
15 a fair presentation, the risk is limited to the matters
16 of which the executives of the claimants, i.e. RHA, have
17 actual knowledge.

18 Does not even -- this does not even cover deemed
19 implied, imputed or any other form of knowledge. They
20 would have to have had actual knowledge and then to have
21 provided that information fraudulently, recklessly or
22 deliberately.

23 THE PRESIDENT: Yes.

24 MR KIRBY: The ability of the insurer to terminate is
25 extremely limited. Again, I go back to the references

1 to the ATE cases where insurers may of course -- there
2 may be situations where an insurer does seek to withdraw
3 cover but is likely to terminate because of what has
4 happened during the course of the trial because the case
5 has concerned, as we have seen from the facts of
6 *Premier Motorauctions*, the facts involve serious
7 allegations of fraud being made between often former
8 business people who had had former business dealings and
9 where those allegations may be found to be --
10 subsequently found to have been untrue. That is not the
11 situation here, and the ability to terminate is
12 extremely limited.

13 A point has also been made in relation to the ATE
14 that one of the insurers did in fact become insolvent.
15 So far that point is concerned, of course that layer of
16 insurance was indeed replaced very quickly.

17 THE PRESIDENT: Yes.

18 MR KIRBY: We say that despite that extremely unusual
19 occurrence it shows that we were able to deal with it
20 quickly and appropriately. We do say that it is
21 standard industry practice, I know my learned friend
22 says that is not an answer, but we do say it is standard
23 industry practice that layers of insurance, that that
24 liability under that is several rather than joint.

25 THE PRESIDENT: Yes.

1 MR KIRBY: It would be extraordinary in fact if it was not.

2 THE PRESIDENT: Yes, I do not think you need spend time on
3 that.

4 MR KIRBY: You would think: what is the point of having it?

5 So, so far as the ATE is concerned, we submit that
6 this is an accepted form of security. We say that the
7 only issue that should arise with regard to the ATE is
8 the level of the cover which is a matter which I will
9 deal with later when I come on to the particular figures
10 that were being suggested. We say there is nothing in
11 the policy of insurance that should give any cause for
12 concern to this tribunal.

13 If I can put ATE to one side until I come to the
14 figures which will probably be tomorrow or shortly
15 before 4.30.

16 THE PRESIDENT: Yes.

17 MR KIRBY: Can I deal then with the funding under the LFA
18 and the tranches of funding.

19 Sir, my learned friend Mr. Bacon was pressed on
20 a number of occasions with regard to the provisions
21 under the LFA for funding, but I should say, sorry, the
22 LFA is at tab 32 which I think is volume 2.

23 THE PRESIDENT: It is the same volume.

24 MR KIRBY: Yes, same volume, 32 or 32A. One thing that my
25 learned friend did not draw the Tribunal's attention to

1 is what the position would be if in fact Therium decided
2 not to advance a further tranche. It was obviously then
3 in discussion as to, well, then the claim would not
4 progress etc, but before you even get to that point, if
5 you turn to 2.7, clause 2.7 on page 852 or internal page
6 number 8, we see that it is not by any means a complete
7 discretion in reality when it comes to the exercise of
8 the options at clause 2.3. It says:

9 "While the RHA acknowledges that the exercise of the
10 options at clause 2.3 above is in Therium's sole
11 discretion, Therium agrees that it shall exercise or
12 decline to exercise those options in a rational and
13 reasonable manner having regard to the benefit for which
14 the parties entered into this agreement. Any decision
15 by Therium not to fund tranche 2 or later sub-tranches
16 shall be subject to the provisions of termination,
17 dispute resolution and law and jurisdiction."

18 In fact, when one goes over to the provisions with
19 regard to termination, which are at internal numbering
20 page 19, in effect the decision not to advance a further
21 tranche adds nothing to the existing right to terminate
22 on the grounds of economic viability or merits.

23 THE PRESIDENT: Is that right, because if so what is it
24 there for?

25 MR KIRBY: I think that is a very good question because it

1 is subject to -- it says in terms that it is subject to
2 clause 16. And clause 16 simply deals with the grounds
3 upon which it can be terminated.

4 THE PRESIDENT: I puzzled over that, Mr. Kirby, when I read
5 it because the opening words of 2.7 are, which you have
6 read:

7 "Whilst the RHA acknowledges the exercise of the
8 options above is in Therium's sole discretion ..."

9 Then there is this slightly weak obligation that it
10 has to be rational and reasonable, and if it is subject
11 to clause 16 it says nothing because clause 16.3 has
12 a termination, as you have just pointed out, where the
13 claim is no longer commercially viable, which, it seemed
14 to me 16.3 in itself certainly fitted with the ALF code
15 of conduct, and indeed, Mr. Bacon did not make any
16 criticism of 16.3. Because we do also note 2.8, and if
17 really these tranches go no further than the right to
18 terminate and therefore cease funding under 16.3, one
19 simple solution is the RHA should get together with
20 Therium, the funders, and say: you, Therium have got
21 16.3, there are concerns about what these tranches mean
22 if some go way further and they should be deleted.

23 MR KIRBY: Sir, this may short-circuit things or may at
24 least alleviate any concerns that the Tribunal have.
25 I have obviously taken instructions from the funder in

1 relation to this, or from those instructing me and the
2 funder, and the purpose behind the tranches, and this
3 was dealt with in the evidence, is because until the
4 funds are committed they do not have to be taken into
5 account in the event of a settlement and a multiple of
6 the committed funds. It is in the interests of the
7 claimants that the funds are paid out in tranches rather
8 than £27 million being paid up-front from the word go.
9 Because it is the moment it is committed that
10 £27 million --

11 THE PRESIDENT: We understand that, but there is no
12 objection, I think, to you having funding from Therium
13 in tranches. It is the option not to go ahead to the
14 next tranche in the sole discretion of Therium that
15 is ...

16 MR KIRBY: When I took my instructions it was before I heard
17 Mr. Bacon make that concession or accept there was no
18 objection to it.

19 THE PRESIDENT: I am not sure he made a concession.

20 MR KIRBY: Sorry, not a concession, an acceptance that there
21 was no concern with funding in tranches because that was
22 my understanding of what he said.

23 THE PRESIDENT: Yes.

24 MR KIRBY: When I took my instructions, my instructions were
25 that if necessary the £27 million could be committed

1 straight off now. But that is a matter that would be of
2 concern to a funder going forward, if that was regarded
3 as that all the funds in relation to the funding of
4 a matter had to be committed from day one because of the
5 detriment that that can work on the funded party, and
6 because those funds are then effectively ring-fenced
7 for, in a case such as this, two years, two and a half
8 years.

9 THE PRESIDENT: It would not be difficult to redraft this,
10 really cross-referring to clause 16 in a way that would
11 preserve the tranches but not give what is here, as it
12 were, a sole discretion, subject, it seems, only to
13 rationality which is not a high burden in a way that
14 overcame this problem as it seems from clause 2.8 the
15 parties almost anticipated.

16 MR KIRBY: Yes. If all that is required at the time or if
17 what is required at the time of considering a further
18 tranche is whether the agreement should be terminated
19 pursuant to 16, then clearly it should not be difficult
20 at all to redraft in that regard. I had understood but
21 clearly it is not a point that has found favour, I had
22 understood that that was the effect of the
23 cross-reference to clause 16, that in effect it did not
24 add anything, but clearly the agreement could be
25 modified to make that crystal clear.

1 THE PRESIDENT: If you can either today or tomorrow morning
2 give an undertaking, having -- I do not know if Therium
3 have representatives in the Tribunal, but no doubt your
4 clients can speak to them overnight, an undertaking to
5 modify clause 16 in that way, I think that would
6 certainly address the concern that -- we have discussed
7 this among ourselves -- that we do think about it.

8 MR KIRBY: I will certainly take instructions and I am sure
9 obtain an undertaking to that effect so that there
10 continue to be tranches, but it is not a simple sole
11 discretion as to whether or not they are advanced.

12 THE PRESIDENT: Yes.

13 MR KIRBY: So far as any other points with regard to the
14 funding agreement are concerned, there obviously has
15 been concern expressed by my learned friend with regard
16 to the level of funding that is provided under the
17 agreement, and, as my learned friend was submitting,
18 whether it takes it through right to the very end.

19 Can I at this point say that despite a roomful of
20 commercial lawyers there is a lack of commercial reality
21 with regard to some of these submissions. Therium is
22 going to advance up to £27 million. Therium, under the
23 agreement, will not get a penny unless the claims are
24 successful and result in payments to the claimants and
25 the class members. To suggest that the OEMs are very

1 concerned that Therium might pull out because they are
2 front end loading all their work, and how dreadfully
3 disruptive it is all going to be, just has a layer of
4 commercial unreality to it when it is clearly in
5 Therium's interests to ensure that the matters progress
6 to a point where there is a settlement or a decision
7 that results in payments to the class members, because
8 until that point Therium has no hope of either
9 recovering its investment or making what it hopes to be
10 a very substantial profit on the matter.

11 When Mr. Purslow, whose evidence is in the bundle,
12 talks about 'of course they would give consideration to
13 further funding', yes, he has not committed to any
14 particular amounts, but it is the commercially realistic
15 evidence that you can expect and can accept.

16 Of course Therium will not, I assume, continue to
17 fund the matter if, for whatever reason, and most
18 aspects of competition law are completely above my head,
19 if there are aspects of the case in due course which
20 means that it is unlikely to succeed. Neither would you
21 expect Therium to continue to fund the matter in such
22 situation, because it is not appropriate to continue to
23 fund a claim that does not have reasonable prospects of
24 success.

25 That was the main thrust of the Court of Appeal's

1 decision in *Excalibur* where the Court of Appeal
2 encouraged funders to vigorously review, ideally through
3 independent lawyers, the conduct of matters to ensure
4 that the claim is still a good one, and that if they did
5 that they would be improving access to justice, they
6 would not be interfering with it, and therefore they
7 would not be overstepping the line into champerty and
8 maintenance.

9 I think the point is made in the written submissions
10 but not orally today, and still dealing with the LFA,
11 about the use of effectively an SPV for the purposes of
12 this particular claim, but you will note that both
13 Therium Litigation Funding IC and Therium RHA IC are
14 parties to the agreement.

15 If I can take you to Mr. Purslow's witness
16 statement, which is in tab 62 of bundle 3. He deals
17 with the criticism of the provisional structure of the
18 LFA, this is at page 2086, and at the top of 2087, under
19 the heading of "Funding entity is an SPV", he deals with
20 that but he makes clear that the parent company is
21 responsible for the subsidiary's compliance with the ALF
22 code under the ALF code, and that also the parent
23 companies, this is at paragraph 16 on page 2087, that
24 TCML is willing to undertake to use best endeavours to
25 procure that CAL, FIC and TRIC should comply with the

1 ALF code should the Tribunal think it appropriate.

2 The ALF code, as you have been addressed previously,
3 originally came in in November 2011, being welcomed by
4 Lord Justice Jackson at that time. It is now into an
5 edition published in 2018 and it is a self-regulating
6 body. But it is an important self-regulating body and
7 Therium is one of the founder funding members of that
8 body. We submit that that is something that you can and
9 should take into account when Mr. Purslow gives evidence
10 along the lines that he does in this witness statement.

11 I should just in passing, whilst it is open, refer
12 to his evidence on tranche funding, but we have now
13 dealt with that and I do not think I need take up any
14 more time with regard to that.

15 He also deals with what is again said in the written
16 submissions about material risk of termination. This
17 was not repeated by my learned friend in oral
18 submissions, and it is not clear to us whether it is
19 a point that actually is going to be in any sense urged
20 upon you, because the right to terminate is qualified by
21 an ALF-approved procedure for the obtaining of an
22 opinion from an independent QC, the right to terminate
23 is when the merits are below 51% or when it is no longer
24 economically viable.

25 If it is terminated, then I take up the point that

1 Professor Bishop was saying, if it is terminated then
2 the case is not going to proceed, that is not going to
3 affect any existing ATE cover, and why would the
4 respondents be complaining about it being terminated
5 because the prospects were no longer more than 50% or
6 because it was no longer economically viable?

7 THE PRESIDENT: I think the point was made about the
8 different ground, which is the 16.4 ground, not the
9 non-viability of the action, but breach by claimants
10 including one of the claimants, and the claimants here
11 include those who opt in, so the individual purchaser or
12 lessor of a truck, and if the Tribunal were to certify
13 both CPOs, and I think both parties say we should not or
14 cannot, but if we were to and if a claimant then wanted
15 to opt in to the UKTC CPO, then it would be breaching
16 the RHA CPO and that could lead Therium to discontinue
17 its funding. It is a slightly convoluted argument but
18 I think you understand.

19 MR KIRBY: I certainly do understand it. It is also,
20 I would again submit, one that is not grounded in any
21 commercial reality at all, so one truck -- so a one
22 truck operation in Wigan decides to step out, leaving
23 11,000 or 10,999 truck owners where Therium is investing
24 substantial sums in relation to the matter and it wants
25 a return and it wants to make a profit.

1 THE PRESIDENT: I can see that clearly with one truck or one
2 claimant, but if a significant number were to say: we
3 want to go with UKTC, for whatever reason, then this
4 might become a less attractive proposition for Therium,
5 not because the claim would not succeed but because the
6 total amount, if there are less claimants in the class,
7 Therium which RHA is representing is rather less and
8 therefore the total recovery would be rather less for
9 the RHA's class.

10 MR KIRBY: Yes. Those who have opted in are contractually
11 obliged, having opted in, to remain in or to remain --
12 sorry, to remain part of the opt in. Therefore, they
13 would themselves be in breach by then seeking to get out
14 of the opt in and join some other possible CPO. So this
15 is all, we would submit, a somewhat hypothetical and
16 indeed non-commercial reality scenario, and is one that
17 you are entitled, as we say, when you are considering
18 the funding and when you are considering whether it is
19 reasonable to appoint RHA as the class representative it
20 is a matter that you can take into consideration but
21 then you would not say because there is that theoretical
22 risk which is perhaps the sort of approach that one
23 finds in security for costs, because there is that
24 theoretical risk they are not suitable.

25 In our submission the more appropriate approach is

1 for you to say, on the balance of probabilities so far
2 as this consideration is concerned, is it more likely
3 than not that Therium would continue to fund the matter
4 until such time as it was not economically viable in
5 which case it would have the right to terminate under
6 16?

7 Our submission would be that that finding on the
8 balance of probabilities is one that is not only open to
9 you but is an obvious one.

10 Therium is unlikely, I will take instructions but
11 I would have thought it is unlikely to say, well,
12 however many people leave we will continue to fund,
13 because there must come a point where the number of
14 people who leave and who themselves are in breach of
15 contract but the number who leave calls into question
16 the economic viability.

17 You may say to me, sir, in which case you can rely
18 on 16.3, but we say that it is not grounds for not
19 making the authorisation because it is not something
20 that is grounded in commercial reality and is something
21 that on the balance of probabilities simply would not
22 arise.

23 THE PRESIDENT: Yes.

24 MR KIRBY: Sir, I think I have already mentioned it, but the
25 same point so far as the LFA is concerned applies so far

1 as any need for future funding if it turned out that for
2 whatever reason during the course of these proceedings
3 the £27 million or effectively so far as the legal costs
4 are concerned, £20 million, that the £20 million has
5 turned out to be insufficient. It is commercially
6 unrealistic to say because funding could run out,
7 because this may end up being more expensive than we
8 thought so far, that Therium at that point will step
9 aside.

10 Again -- I have made the point too often -- they are
11 not going to set aside, step aside unless it is not
12 commercially viable or unless the prospects have been
13 reduced because they want a return on their investment
14 and they want to make a profit.

15 Sir, you have already, I think, drawn attention to
16 a particular term in the LFA which I just want to
17 mention before leaving the LFA which was 2.8. Sorry,
18 sir, I am back into bundle 2, divider 32. We say so far
19 as this clause is concerned, bundle 2, divider 32, which
20 is one, sir, that you mentioned in passing, but we did
21 not actually read out, provides that:

22 "If for whatever reason the CAT is minded to grant
23 the CPO but is not minded to approve the terms and
24 conditions on which Therium is providing funding,
25 Therium and the RHA shall negotiate with each other in

1 good faith to revise the funding terms offered such that
2 the CAT is willing to issue the CPO and having regard to
3 the benefit for which each party entered into this
4 agreement."

5 We say that you can take a number of things from
6 that clause. One is it shows the commitment of Therium
7 to this particular matter and to advancing the matter
8 for the benefit for which each party entered into the
9 agreement. It also reflects what clearly Therium
10 understands, and no doubt those instructing me
11 understand, to be the flexible nature of the procedure
12 that can occur in this Tribunal, that this should not be
13 an occasion, as urged upon you by my learned friend in
14 written submissions, that if you were dissatisfied on
15 any particular point in the litigation funding agreement
16 that you should say: tough, that is it, on your bike.
17 Sorry, that is not a very legal expression. That is it,
18 that is enough and that the CPO application has been
19 dismissed. There should be the opportunity for the RHA
20 to address any of those concerns and indeed, sir, we
21 have had an example of that during the course of my
22 submissions which I will now take instructions on as it
23 is now 4.28.

24 THE PRESIDENT: May I leave you with another.

25 MR KIRBY: Yes.

1 THE PRESIDENT: Which was raised in Mr. Bacon's written
2 submissions but not in his oral submissions which is
3 clause 19 on page 901.

4 MR KIRBY: The assignment point?

5 THE PRESIDENT: The assignment point. Mr. Purslow says --
6 we need not turn it up. He says:
7 "The purpose is to permit the LFA to be assigned by
8 Therium within its group and affiliates."
9 That is of course not what it says and if it were --
10 if that is the intention.

11 MR KIRBY: Whether I can give an undertaking to an amendment
12 to that effect.

13 THE PRESIDENT: I am sure what he says is right because he
14 says it, then if the clause said so, as opposed to at
15 the moment it is an unfettered right to assign to any
16 third party, whether they are a member of ALF or not.

17 MR KIRBY: We will certainly take instructions on that
18 overnight as well.

19 THE PRESIDENT: And that could then be addressed.

20 MR KIRBY: I am very grateful.

21 THE PRESIDENT: So 10.30 tomorrow morning.
22 (4.30 pm)
23 (The hearing adjourned until Thursday, 6 June 2019 at
24 10.30 am)
25

INDEX

1
2 Submissions by MR. BACON1
3 Submissions by MR. KIRBY122
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25