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5 **IN THE COMPETITION**

Case No. : 1382/7/7/21

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 Friday 1st April 2022

14
15 Before:
16 The Honourable Mrs Justice Bacon
17 Professor Robin Mason
18 Justin Turner QC
19 (Sitting as a Tribunal in England and Wales)
20

21
22 **BETWEEN:**

23
24 Consumers' Association

Applicant

25
26 v

27
28 Qualcomm Incorporated

Respondent

29
30
31
32 **A P P E A R A N C E S**

33
34 Jon Turner QC, Ciar McAndrew, P J Kirby QC and George McDonald (On behalf of
35 Consumers' Association)
36 Mark Howard QC, Tony Singla QC, Nicholas Bacon QC, David Bailey and Alexandra
37 Littlewood
38 (On behalf of Qualcomm Incorporated)
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(10.30 am)

MRS JUSTICE BACON: Just before we start, I'll repeat the usual live stream warning for those who are viewing these proceedings remotely.

So good morning everyone. These proceedings are being live streamed, so I'll start with the usual warning that these are proceedings in open court and for those who are watching remotely as much as if you were here in the Tribunal physically, an official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording whether audio or visual of the proceedings, and breach of that provision is punishable as a contempt of court.

Mr Kirby?

Submissions by MR KIRBY

MR KIRBY: I appear on behalf of the Consumers' Association, along with my learned friend Mr McDonald, and my learned friend Mr Nicholas Bacon QC appears on behalf of Qualcomm.

As my Lady will be aware, this is a short hearing this morning just dealing with the outstanding matters with regard to funding, but more particularly in fact the question of whether there's a need for an anti-avoidance endorsement on the ATE policies, and also dealing with three possible amendments or requirements with regard to notification, et cetera.

Can I just highlight what therefore those four points are. First of all, whether there is the need for an anti-avoidance endorsement. Then there are three separate points, which is whether there should be a requirement for notification of an actual or threatened termination; secondly whether there should be notification of and consent for material changes to the ATE; and thirdly the question of third party rights to enforce the policy.

My Lady, can I start with two general points, then I'll come on to the actual points in issue. My Lady was taken on one of the days when I was dipping in and out of the recording to the Trucks decision -- there's no need to go to it now, but at paragraph 66 in the

1 authorities when the point was made that it's always in the interests of the respondents
2 to these applications to make the pursuit of claims as burdensome as possible.

3 And secondly, again in Trucks, at paragraph 105, in that particular case, my learned
4 friend -- as it happens Mr Bacon QC -- in that case had submitted that the Tribunal had
5 to be satisfied in relation to every factor within 78(2) and that submission was rejected.
6 They are obviously factors that have to be taken into account, but it's not as if they are
7 jurisdictional gateways.

8 Can I therefore then come on to the actual substantive points. I'm sure you've had an
9 opportunity of seeing the mercifully short supplemental skeleton arguments Which?'s
10 is -- sorry, the Consumers' Association is at 549 of the core bundle, Qualcomm's is at
11 553 of the core bundle, and the issues set out in the skeleton arguments were agreed
12 between the parties in correspondence and therefore we say should not be widened
13 during the course of this hearing were that step to be taken by my learned friend.

14 The Consumers' Association has £15 million worth of ATE. It has not taken out
15 an anti-avoidance endorsement at this stage. It says there is no need for it to do so
16 and that there should not be a general requirement for an anti-avoidance
17 endorsement.

18 The anti-avoidance endorsement goes to the question of avoidance of a policy and I would
19 suggest that occasionally in both the authorities, and indeed more likely in the
20 correspondence between the parties, sometimes words are used which perhaps don't
21 necessarily always mean the same thing. So sometimes the word "termination" is
22 used, sometimes the word "avoidance" is used, sometimes the word is "cancellation"
23 is concerned.

24 A concern of a defendant or a respondent to a claim with regard an ATE policy is whether that
25 ATE policy will respond when called upon to do so. So far as the ATE policies in this
26 case are concerned, those policies can only be avoided ab initio in the event of a
27 fraudulent presentation or a deliberately reckless presentation with regard to the taking
28 out of the policy. Those are the only circumstances in which the policy can be avoided,

1 and perhaps we could go to -- there are three ATE policies in the supplemental bundle,
2 if I could take you to supplemental bundle, page 980.

3 Actually, I should start on 979, but 980 is the start of the policy, the start of the definitions.

4 This is one of the post-CPO proposed policies. There is also a pre-CPO policy and
5 there is a supplemental post-CPO policy. But the wording is the same, it's more or
6 less identical, and we don't need to look at them unless my friend suggests otherwise.

7 MRS JUSTICE BACON: No, but can you just give us the references to the other two.

8 MR KIRBY: Yes, of course.

9 MRS JUSTICE BACON: Just for our note.

10 MR KIRBY: The pre-CPO ATE is at 950, the first post-CPO is at 963, and the third one is at
11 979.

12 MRS JUSTICE BACON: So you're taking us to the second post-CPO policy.

13 MR KIRBY: Yes. I wonder, in fact, if you'll forgive me, if I could go to the first one -- yes, that's
14 probably more sensible, which is the first post one which starts at 963 but that's just
15 the cover sheet.

16 MRS JUSTICE BACON: Hang on. The pre-CPO policy is at 950, the first post-CPO is 963,
17 the third post-CPO is 979.

18 MR KIRBY: Yes.

19 MRS JUSTICE BACON: And the second?

20 MR KIRBY: No, sorry, the second is at 979.

21 MRS JUSTICE BACON: Okay. The second post-CPO is 979 and the one you were going to
22 take us to was the third post --

23 MR KIRBY: No, it was the second one. But as my learned friend has suggested, it probably
24 makes more sense to go to the first one.

25 MRS JUSTICE BACON: And how many post-CPOs are there?

26 MR KIRBY: Two. Sorry, it's my mistake, I probably said there were three policies which
27 included the pre-one.

28 MRS JUSTICE BACON: I'm there.

1 MR KIRBY: If we can go to the one which starts 963, it's the cover sheet, but then if we can
2 go then to 973 -- I'll just wait for it to come up. At 973, you'll see at paragraph 9 there's
3 a duty of fair presentation, and then obviously there's a duty to make fair presentation.

4 Then at 9.2:

5 "Without prejudice to the exclusions set out in clause 2.1 above [and I'll take you to those in a
6 moment], the insurer waives its right to rescind, cancel or avoid the policy for any
7 reason other than:

8 The fraudulent or deliberate breach of the duty of fair presentation of the risk to the insurer set
9 out in clause 9.1 above. If and only if the insured or the representative deliberately or
10 fraudulently breaches the duty of fair presentations set out in clause 9.1, then the
11 insurer may treat the policy as having been terminated.

12 From its inception if the breach took place in proposing for this policy

13 From the time that the variation was concluded if the breach took place in proposing to vary
14 this policy.

15 In accordance with clause 4.1 above, in which case the policy will not be rescinded or avoided
16 ab initio and the consequences of clause 4.2 shall apply; and

17 In accordance with clause 10.1 below, in which case the policy will not rescinded or avoided
18 ab initio and the consequences of clause 10.1.3 shall apply."

19 So a breach of the duty of fair presentation as referred to there would result in a policy being
20 avoided ab initio, and that is obviously something that would be of concern. But one
21 has to then consider: is that realistic in a case such as this, where the Consumers'
22 Association are the proposers of the policy. This is not a case, unlike some of the
23 authorities referred to in relation to security for costs, where the case will turn upon
24 who is believed as to who said what, when, with regard to misrepresentations,
25 et cetera, or claims in fraud. So it's simply not that sort of case.

26 If one goes back then to page 966, 966 at clause 2 has a number of exclusions and the one
27 that has been raised with us prior to this hearing and which we sought to deal with in
28 correspondence is in particular 2.1.1. Now, the important thing to note generally with

1 regard to the exclusions is that this is not to do with excluding entire cover, it's
2 excluding cover with regard to the extent to which costs may have been incurred as a
3 result of, for instance, a failure to co-operate.

4 So those costs in themselves are likely to be limited and this is not to do with the termination
5 of the policy.

6 We proposed, and bearing in mind the time available this morning, I might give you page
7 references rather than always taking you to matters.

8 MRS JUSTICE BACON: Yes, of course.

9 MR KIRBY: This has been, if I can put it, played out in the correspondence and I wonder if
10 I could give you eight letter references without going to them all.

11 The point was first raised by Quinn Emanuel, and that's in a letter of 10 November 2021,
12 page 170 in the correspondence. The substantive response to that is correspondence
13 205, so that's from Hausfeld, and that is the only one I'm going to take you to now. If
14 we can quickly go to correspondence 205.

15 You will see at paragraph 4 of that letter, we proposed certain amendments, so adding
16 non-trivial failure to co-operate and failure to follow the reasonable advice of the
17 representatives and new notification provisions. We make the point in that letter
18 obviously about the standing of the claimant being a very reputable organisation
19 obviously of longstanding -- 60 goodness knows how many years, just older than
20 me -- and that therefore they're unlikely to have actually been involved in an unfair
21 presentation.

22 The next letters which you needn't go to, I'll just give you the references, are: Quinn Emanuel's
23 letter of 27 January at correspondence 209; Hausfeld's at 211; Quinn Emanuel's at
24 221, that's quite a long letter; Hausfeld's short letter at 226; Hausfeld's slightly longer
25 letter at 236; and then Quinn Emanuel's letter at 238, which was dated 17 March. So
26 those eight letters, when you are considering your decision in this aspect, as it
27 happens, those eight letters actually summarise or set out most of the arguments which
28 in fact I am seeking to summarise. So they are useful references.

1 But going back to the policy itself, which was supplemental 966 --

2 MRS JUSTICE BACON: Can you summarise where you've got to on the proposal because
3 your skeleton argument sets out essentially a summary of your letter at 205? Has that
4 been accepted and is that proposal even accepted by your insurers?

5 MR KIRBY: We have reached agreement with our insurers with regard to the wording mainly,
6 but that is very recent, as in I think within the last 24 hours. So that wording itself has
7 not yet been agreed, for instance, with Quinn Emanuel.

8 MRS JUSTICE BACON: So is it the wording in the letter at page 205 which has been agreed
9 with your insurers, or is there some modification to that?

10 MR KIRBY: It's not the wording at 205 because 205 is a proposed amendment to the policy
11 rather than a new anti-avoidance endorsement. So the anti-avoidance endorsements
12 go wider than 205. The anti-avoidance endorsement I'm sure would be more attractive
13 to the respondent because the anti-avoidance endorsement deals with both the
14 possibility of avoidance with regard to presentation.

15 MRS JUSTICE BACON: Yes.

16 MR KIRBY: And also has some additional coverage with regard to the exclusions.

17 MRS JUSTICE BACON: I'm slightly lost because I thought there were two points you were
18 making: there was an anti-avoidance endorsement and then a proposal to modify
19 clause 2.1.1. Have they now been elided?

20 MR KIRBY: The anti-avoidance endorsement, if it's required, would cover, we would say,
21 although as I said wording hasn't been agreed with the respondents, but the
22 anti-avoidance endorsement we say would cover all of the concerns of the respondent.

23 MRS JUSTICE BACON: So you've agreed a wording on that but it's not before the court.

24 MR KIRBY: We've agreed the wording with the insurers but the wording I don't think is before
25 the court.

26 MRS JUSTICE BACON: But you still say you don't want to take that out.

27 MR KIRBY: We don't want to take it out, we don't think it's necessary to pay out just short of
28 £1.7 million for the anti-avoidance endorsement.

1 MRS JUSTICE BACON: I had understood that clause 2.1.1 is separate. Are you telling me
2 that stands or falls with the anti-avoidance endorsement?

3 MR KIRBY: If the anti-avoidance endorsement is required --

4 MRS JUSTICE BACON: Then you don't need 2.1.1.

5 MR KIRBY: -- then we would suggest that it would cover 2.1.1.

6 MRS JUSTICE BACON: If it's not required, what's happening to 2.1.1?

7 MR KIRBY: If it's not required, so far as 2.1.1. is concerned, we have not agreed it with the
8 insurers but we say that something along those lines should satisfy the respondent.

9 MRS JUSTICE BACON: You say that should satisfy them, but has the insurer agreed to
10 include that modification?

11 MR KIRBY: As I stand at the moment, no.

12 MRS JUSTICE BACON: Have you asked them?

13 MR KIRBY: No, we haven't, because when we put it forward to the respondent, the
14 respondent was not agreeable to it and didn't think it was acceptable. So we didn't
15 want to have to go through trying to persuade the insurers with regard to that knowing
16 that in any event, the respondent said that that wording was not acceptable.

17 MRS JUSTICE BACON: The problem is your skeleton argument says with those proposed
18 modifications, the exclusion in that clause would be extremely narrow. But I'm not in
19 a position to know whether you can make those modifications or not if you haven't put
20 them to your insurer.

21 MR KIRBY: Forgive me a moment.

22 I'm grateful to my learned friend. One of the insurers agreed it at the time but we didn't then
23 continue with the process in the absence of any indication from, indeed not only
24 absence of any indication that it would be acceptable, but in fact in the light of the
25 indication given by the respondent that it would not be acceptable.

26 Our position is that none of this should be required. That is our position because we say that
27 Which? is obviously a longstanding reputable organisation that has its own in-house
28 legal department, has highly reputable solicitors acting for it, and it is fanciful to suggest

1 that it will not follow the advice or recommendations of those who are advising it,
2 particularly where the consequences of doing so -- bearing in mind it's also a
3 charity -- the consequences of doing so would, on the face of it, be orders for costs
4 against that party. So it is fanciful to suggest that an organisation such as Which?
5 would risk having to face an adverse order for costs not met by ATE and go off on a
6 frolic of its own and simply not follow the recommendations, not notify the insurers,
7 et cetera.

8 MRS JUSTICE BACON: All right. I mean, there are two issues. One is the substantive point
9 you've made but the other is, I think, what the Tribunal is supposed to do with this
10 proposed modification or any of the correspondence on it. Because you are relying on
11 that as dealing with any problem with 2.1.1 but what you're telling me is that it's entirely
12 unknown whether the insurers will both accept this or not.

13 MR KIRBY: My Lady, I accept the current position is that I cannot say to the Tribunal that
14 those particular amendments are agreed. The insurers, I think and I hope, are
15 watching this now and clearly if it is necessary at any point for particular wording to be
16 agreed, then we would hope to be in a position to do that and obviously submit it to the
17 Tribunal. But those particular modifications at the moment are not agreed.

18 If those modifications were required, and as I say our primary position is that the notifications
19 themselves should not be required, but if they were required, then obviously we would
20 take instructions immediately and notify the Tribunal that the insurers had agreed to
21 the same.

22 MRS JUSTICE BACON: All right. Can you then just elaborate a bit on your proposed
23 modifications to 2.1.1? What do you have in mind with non-trivial -- the insured's
24 non-trivial failure to co-operate with the representative? What co-operation are you
25 talking about there?

26 MR KIRBY: Well, the concern as we understood it of the respondent is that it would cover any
27 failure to cooperate with the representative. So we would submit that that

1 non-co-operation has to be material, ie non-trivial, failure. So a trivial failure to
2 co-operate --

3 MRS JUSTICE BACON: Whose failure to co-operate with who are we talking about here?

4 MR KIRBY: We're talking about co-operation between the PCR and the representative, who
5 are Hausfeld.

6 MRS JUSTICE BACON: I see. So it's the legal advisers, is it?

7 MR KIRBY: Yes, so it's -- one can more easily consider trivial failures to co-operate, such as,
8 you know, we want to have a conference this Thursday and the insured saying, "Sorry,
9 can't do Thursday, we're not going to do Thursday, but we'll do next week". Now, that
10 would obviously be trivial in the extreme --

11 MRS JUSTICE BACON: Yes.

12 MR KIRBY: -- but would really have no bearing upon the insurance cover. So that is why
13 we've suggested -- in that proposal in the correspondence, that is why we've
14 suggested that particular wording.

15 MRS JUSTICE BACON: All right.

16 JUSTIN TURNER QC: Can I ask: the amendment to 2.1.1, if it were agreed, is there a cost
17 associated with that in isolation?

18 MR KIRBY: I think the most I would say to that is we hope not. Insurers, as one can see from
19 the anti-avoidance endorsement, obviously expect to be paid additional premiums. But
20 we would certainly hope with regard to that that there shouldn't be any additional cost
21 because actually the difference is really minimal.

22 MRS JUSTICE BACON: You're trying to just clarify and tighten up the wording, as far as
23 I understand.

24 MR KIRBY: Sorry, forgive me.

25 MRS JUSTICE BACON: You're trying to clarify and tighten up the wording of the clause.

26 MR KIRBY: Yes.

27 I mean, when we proposed it to the main insurer, there was no suggestion of any increase of
28 costs at that time. I wouldn't want to say categorically there could never be.

1 MRS JUSTICE BACON: All right.

2 MR KIRBY: The amount with regard to the anti-avoidance endorsement, which by the time
3 we add on the tax, is just short of £1.7 million. That amount appears to come about
4 because there appears to be a standard 10 per cent of cover with regard to
5 anti-avoidance endorsements, and that I think has been reflected in other cases also.
6 So that's the £15 million plus IPT.

7 MRS JUSTICE BACON: Yes.

8 MR KIRBY: It is said that £1.7 million is not a significant sum in the context of this case. We
9 say it is a significant sum. It will obviously impact upon the return that will have to be
10 paid to the funder because it would then become part of additional funding. And if the
11 funder was claiming by reference to a multiple, then obviously that would increase the
12 amount payable to the funder. In any event, it obviously reduces the amount either
13 available to members of the class or alternatively to the Access to Justice Foundation.
14 So it is not simply a sum that one can say it's nothing.

15 I'm somewhat conscious of the time, my Lady, bearing in mind the directions given by the
16 Tribunal.

17 MRS JUSTICE BACON: Yes.

18 MR KIRBY: Can I just ensure that I make the following quick points and then perhaps anything
19 else I will deal with by way of response.

20 My Lady, so far as termination is concerned, termination of the policy -- this is where I go back
21 to the use of language -- so far as termination of the policy is concerned, termination
22 only results in the policy being terminated from that point. So it doesn't affect cover up
23 to that point. We accept that where there is termination, there's an obligation on those
24 instructing me to notify the Tribunal, as well as the respondents. We say that we should
25 not be required to give notice of threatened termination because that could be
26 prejudicial to our client, particularly where there's a dispute resolution provision. But
27 say, for instance, the Consumers' Association suddenly came across a particular
28 document which hadn't been disclosed which should have been disclosed, they

1 disclose it to the other side, and a few days later we're obliged to give notice of
2 threatened termination.

3 Well, anyone can read between the lines. We would say that's obviously because they think
4 this document suddenly really damages their case, whereas under the procedure, it
5 may be that there has been an opportunity to persuade the insurer that it didn't in fact
6 damage the case. So notice of threatened termination we say is unfair to the
7 Consumers' Association.

8 So far as not being able to enforce directly is concerned, we say that is again a fanciful
9 objection. The suggestion that Which? on behalf of its 1.6 million members would not
10 in fact seek to enforce its own insurance policy we say is completely fanciful. And
11 of course even if any order for costs at the end of the case was limited to the amount
12 of the ATE cover, the order for costs itself would still be against Which? in order for the
13 ATE to bite and to respond.

14 We do say that so far as the status of the Consumers' Association is concerned, it is in
15 a -- I was going to say similar, but in fact significantly superior, we would say, position to
16 that of the RHA in the Trucks case, where a distinction was drawn between the SPV,
17 which was a UK truck company, and the RHA, which was a long established trade
18 body. Here you have the Consumers' Association, which is the largest independent
19 consumer organisation in the country. It's a charity, it has more than 1.5 million
20 members. It is fanciful to suggest that these various eventualities which are relied
21 upon by the respondent would in fact eventuate.

22 I think I will leave further points to reply in the light of the fact I've now been 32 minutes.

23 MRS JUSTICE BACON: You did say you had four points in opening, the third of which was
24 notification or consent for material changes to the ATE. Were you going to deal with
25 that?

26 MR KIRBY: I'm sorry, you're quite right, my Lady. So far as the notification of material
27 changes are concerned, I put that in the same category as notification of terminations,
28 which is that there would be an obligation on us in any event to notify the Tribunal, and

1 those instructing me would also notify the respondent's solicitors with regard to any
2 material change.

3 MRS JUSTICE BACON: All right.

4 MR KIRBY: Because of course this Tribunal can and does revisit any order if the
5 circumstances have changed and it needs to revisit the factors in rule 78.

6 MRS JUSTICE BACON: Thank you very much. Yes, Mr Bacon.

7 **Submissions by Mr Bacon QC**

8 MR BACON: Yes, very good morning to you. Can I begin -- I have 20 minutes, as
9 I understand it. Could I begin with the policy, please, 973, supplemental bundle.

10 Just for heads up, my Lady, I'm going to take you to the policy terms, the concerns raised, and
11 then address you on some law and some recent developments, including overnight
12 from yesterday's case, and I'll summarise matters at the end.

13 Mr Kirby took you to clause 9.2 and 9.2.1 in particular. 9.2 falls under the heading "Duty of
14 fair presentations". It's slightly odd because in fact the clause deals with something
15 more than just the duty of fair presentation. If one looks at the clause as a whole
16 carefully, firstly 9.1 requires the insured to make a fair presentation of the risk, which
17 is clearly understandable and demanded in most policies. Then 9.2 says:

18 "Without prejudice to the exclusions set out in 2.1 ..."

19 That's all of the exclusions, not just 2.1.1, all of the exclusions in 2.1 are said to be without
20 prejudice to the rights of the agreement of the insurer to waive its rights to cancellation.

21 What it's really saying is, "We will waive our right to rescind, cancel or avoid the policy
22 for any reason other than fraud and deliberate breach due to the duty of fair
23 presentation". But the exclusions clauses in clause 2 continue to apply, and a clause
24 which wasn't drawn to your attention -- no criticism because we don't have much
25 time -- but 9.2.2 maintains the insurer's right in accordance with clause 4.1, despite the
26 insurer's waiver of its right to terminate for non-fraudulent or deliberate breaches of fair
27 presentation, to rescind or avoid -- or to terminate, rather -- under clause 4.1. It
28 says -- 9.2 ends with the words:

1 " ... for any reason other than fraud, deliberate breach and then in accordance with clause 4.1
2 in which case the policy will not be rescinded or avoided ab initio and 4.2 will apply."

3 So it's maintaining the insurer's right to terminate under clause 4.

4 If one then goes to clause 2, I know you've been taken to it, and it's right to say that in
5 correspondence, this started with concerns over clause 2.1.1. But my skeleton makes
6 it clear that we have concerns and the Tribunal ought to have concerns about clause 2.
7 These are clauses which are familiar in all ATE policies and it's why we say the law is
8 very much shifting towards the requirements in this jurisdiction, as well as in the
9 security for costs jurisdiction for anti-avoidance policies or endorsements to be
10 demanded.

11 If one just casts one's eye down to clause 2, there is a huge amount of control ceded effectively
12 to the insurer. And here the insurers -- there are four different separate lines of risk
13 that have been scratched effectively by these insurers which does over-complicate
14 matters. But 2.1 is the insured's failure to co-operate. The suggestion is that can now
15 read or should now read "insured's non-trivial failure" -- "anything other than a trivial
16 failure to co-operate". We've already indicated in our written argument that we submit
17 that that amendment just goes to show the uncertainty around the meaning of
18 clause 2.1.1.

19 They are not liable to pay for any deliberate or reckless failure by the insured or the
20 representative to comply with an order of the court or any equivalent procedural rule.
21 They're not required to pay any interim applications costs resisted without insurer's
22 approval -- not the solicitor's approval, the insurer's approval under 2.1.4. If any costs
23 in relation to the insured's decision to discontinue the dispute without the insurer's
24 approval -- I don't need to read them out, you can do so in your own time. But there
25 are a number of terms in there which cede to the insurers a whole host of the approvals
26 and requirements which in our submission are completely avoided and are avoided by
27 an anti-avoidance policy endorsement. Because the terms of an anti-avoidance
28 endorsement would cover not only the duty of fair presentation, but also the entitlement

1 on the part of the insurer to terminate for any other breaches and that's -- you have the
2 wording of the proposed AAE in the correspondence which reflects the AAE endorsed
3 by the court in the Trucks.

4 Then clause 4, just so you have it, "Termination":

5 "The insurer may cancel the policy with immediate effect [page 971] if the insured fails without
6 good reason to meet any one or more of the insured's obligations under clause 3."

7 So you have to go back to clause 3 to see what those obligations are. These, as I say, remain
8 alive, despite clause 9 and clause 3. I don't have the time to read it all through, but
9 you'll see there are obligations in terms of the conduct of litigation and direct obligations
10 on the insured to instruct the representative in a certain particular way, all sorts of
11 standardised trip wires you see in ATE policies which with great respect ought to cause
12 the Tribunal deep concern in terms of the ability to meet the requirements of rule 78.2.

13 The point I make in my skeleton is that the High Court certainly has recognised in the context
14 of security applications the problem with these ATE policies is they developed initially
15 following the Access to Justice Act, the introduction of recoverable ATE premiums in
16 a personal injury world and they're now being used effectively to support applications
17 for security. Mr Justice Nugee in the Rowe case hit the nail on the head when he said
18 really these policies aren't designed to deal with the defendant's concerns about being
19 paid in a case at the end of the case when you're looking at security or by analogy, in
20 my submission, rule 78.

21 I've taken you in my skeleton to the relevant passages, and he's absolutely right about that:
22 these policies are designed as between an insurer and an insured, and naturally the
23 insurer, between the insurer and the insured, wishes to protect itself in terms of its
24 obligations under the policy. When drafting the terms, it has no need to or desire to
25 concern the interests of the defendant at all.

26 And that's the problem with these clauses and that is why we see in this jurisdiction, I submit,
27 with respect, and ought to see more of the jurisdiction recognising actually the inability

1 or the risks associated with these sorts of policies in responding to cost claims and
2 whether they do in fact satisfy the requirements of rule 78.

3 Yesterday's case, the FX case, is a good example of the point I'm making. Both solicitors'
4 teams in those case, Hausfeld for whom Mr Kirby represents, and Scott and Scott on
5 the competing carriage side, both had anti-avoidance endorsement policies put in
6 place.

7 MR KIRBY: My Lady, my instructions are that's not actually correct.

8 MR BACON: That's what the judgment said. I was instructed in the case, I didn't appear
9 because I couldn't, but my junior appeared in the case. I have a copy of the judgment
10 here.

11 MRS JUSTICE BACON: Well, do you want to send that to the court?

12 MR BACON: I only looked at it overnight. But for your reference, page 337 is a good starting
13 point to read from and at paragraph 340 -- I have hard copies if you would like to see
14 it.

15 MRS JUSTICE BACON: Well, hand them up if you want to make a submission, but have you
16 provided those to Mr Kirby?

17 MR KIRBY: Yes.

18 MR BACON: It's a lengthy judgment, as my Lady will know, but the judge records -- as I said
19 the starting point at 337 "Recovery of costs of successful defendant", if I can just ask
20 you to read that. Then over the page at 338, it explains why we have this rule to protect
21 the defendant at 338.

22 MRS JUSTICE BACON: Yes. So both PCRs have taken out ATE insurance, and what is the
23 point on the AAE --

24 MR BACON: At 339, he doesn't descend into the detail of the ATE policies because at 340,
25 there are two points of differentiation between the ATE insurance purchased by
26 Higgins and the ATE purchased by Evans, and you'll see at subparagraph 1
27 "Anti-avoidance endorsements":

1 "As is well known, commercial insurance can be set aside and/or avoided for non-disclosure
2 or misrepresentations. That of course affects the security of the insurance from the
3 respondent's point of view. Both PCRs recognising this have sought to procure
4 anti-avoidance endorsements."

5 Then the Tribunal goes on to express -- well, appears to us to be real concern about the
6 level -- you might want to note this. It's not a point we've developed in skeletons,
7 although I did flag it. It's a concern we flagged in correspondence about the level of
8 cover. The Tribunal was concerned that even ATE insurance to the tune of
9 £33.5 million on one side and £23 million on the other would not be sufficient to cover
10 the adverse costs.

11 JUSTIN TURNER QC: But there was no argument in the AAE in this case, is that right?

12 MR BACON: That's correct. Both claimants volunteered the AAE insurance themselves.

13 JUSTIN TURNER QC: How does that assist us?

14 MR BACON: The point I was seeking to make is that certainly in this jurisdiction, it's becoming
15 much more common, we would submit, for either direct deeds of indemnity to be
16 provided by the funders directly to the defendant, or anti-avoidance endorsements to
17 be made to ATE policies to placate the concerns that the Tribunal or the defendant
18 may have about the likelihood of response.

19 JUSTIN TURNER QC: Excuse my ignorance asking this question, but is there no duty of fair
20 presentation when you get an AAE?

21 MR BACON: Subject to fraud, the fraud exception remains. So if you look at the endorsement
22 we've proposed -- for your reference it's at 899 in the Trucks case, or in the
23 correspondence which you might already have open, in our letter of -- just bear with
24 me -- we set out our proposed -- yes, at page 1957 of the supplemental bundle, you
25 have our proposed AAE non-avoidance endorsement, the wording at 1957.

26 The insurer there confirmed that:

27 "The policy is non-avoidable and non-cancellable and any claim will be honoured in full,
28 irrespective of any exclusions or any provisions of the policy of the general law which

1 would have otherwise rendered the policy or the claim unenforceable or entitle the
2 insurer to avoid, rescind, discharge, cancel [so that's a termination point] or vitiate the
3 policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the
4 terms of the policy."

5 So it covers all of these points about clause 4, clause 3, clause 2 and clause 9 and that's,
6 I say, the beauty of them. I accept that they come at a cost, but the point of them is
7 that they provide the security which the defendant, and we would submit the Tribunal,
8 ought to be cautious about ensuring. If we're going back to the case of Gutmann,
9 similarly -- because my learned friend relies upon Trucks, but Trucks was a
10 1919 -- you know, things have moved on and the way the matters have developed, in
11 my submission, supports the proposition that we're making: in order to avoid those
12 arguments about whether or not the policy will respond and descending into the
13 particulars of whether or not a particular PCR is going to be more compliant than
14 another, which is just speculation which one can't really endorse, we would submit,
15 this Tribunal ought to really adopt the reasoning of Mr Justice Nugee in the Rowe case
16 and insist upon an AAE, subject to just questions about costs, and so on. We say
17 that's a proportionate legal spend, bearing in the risks that are insured by it.

18 In Gutmann -- for your reference, it's 1091 of the authorities -- a direct indemnity was given by
19 the -- as you often see in these cases, the funder can either take out insurance, pay
20 for the costs of a policy to respond, and then have an endorsement added to it; or the
21 funder could provide a direct bond indemnity to the defendant direct, so it's not this
22 indirect arrangement. That's what happened in Gutmann, a more recent case, 1091.

23 MRS JUSTICE BACON: But Mr Bacon, what is your response to Which?'s argument that a
24 distinction needs to be made according to the type of claimant, or type of proposed
25 claimant? It says Which? is a charity, it has millions of members, it's been established
26 for 60 years, that's a very different proposition to, say, a private individual or an SPV.

27 MR BACON: Well, the answer with respect to that, my Lady, is it's relatively straightforward.
28 First of all, disputes between insureds and insurers arise, however responsible the

1 insured is. The courts do not make distinctions and the cases do not make distinctions
2 between particular types of insured. You can have the most co-operative dignified
3 insured who will still face a coverage challenge by an insurer. Sir Marcus Smith in his
4 paragraph 341 makes this point in the third sentence:

5 "Even innocent non-disclosure misrepresentation ..."

6 So he's recognising the fact that however innocent one may be in terms of conduct, there is a
7 desire, we would submit, one gets from that the parties recognise an AAE shuts it
8 down. It deals with it.

9 MRS JUSTICE BACON: Sorry, which paragraph?

10 MR BACON: Paragraph 340, subparagraph 1:

11 "As is well-known, commercial insurance can be set aside and/or avoided for non-disclosure
12 or misrepresentation."

13 I would add in there can be terminated through non-compliance with the policy terms, the
14 obligations on the insured, by the proposed insured, even innocent. So this is
15 not -- insurer's decisions to terminate policies is not dependent on the nature of the
16 insured; it depends upon the nature of the conduct of the insured and the decision
17 taken by the insured and whether or not the insurer accepts it.

18 When you look at clause 3 and the obligations on the insured here, I would hope you would
19 able to see quite rapidly that even Which?, as it's been described, will and could easily
20 be subject to challenge by the insurer in terms of whether or not insurance should
21 continue, given a certain refusal to comply with a solicitor's request, or the insurer's
22 request, more importantly, where the insurer has the control and a dispute then arises
23 which can bring about a termination.

24 None of that is desirable in a case where you're seeking to set in place a CPO from beginning
25 to end. If truncated or the risk of truncated termination can be avoided through an AAE,
26 we would submit that that ought to be encouraged.

27 MRS JUSTICE BACON: What would in practice happen if there was termination?

1 MR BACON: If there was termination by the insurer, then the matter would obviously have to
2 come back before the Tribunal. The class itself would presumably wish to pursue its
3 claim and obviously, acting for the defendant as I am, that will simply be applications
4 and the whole thing to be brought to a halt. But the Tribunal will be concerned with the
5 class and the claim may well continue --

6 MRS JUSTICE BACON: Well, not without ATE insurance.

7 MR BACON: Sorry, my Lady?

8 MRS JUSTICE BACON: Not without ATE insurance.

9 MR BACON: No. So further additional ATE insurance would have to be expended at great
10 cost. The AAE insurance here will avoid all that.

11 MRS JUSTICE BACON: I'm trying to work out what practically will happen. Two things could
12 happen. One is that alternative ATE insurance could be found and the claim could
13 continue; the other is that it couldn't and it couldn't.

14 MR BACON: Correct, I understand that, perfectly legitimate speculation. But the point I'm
15 making --

16 MRS JUSTICE BACON: It's not speculation. Those are the two outcomes, as I see. Is there
17 any third thing that could happen which could cause further damage to Qualcomm? If
18 a claim continues, it would be with ATE insurance, but if it doesn't continue, that's the
19 end of it and presumably any costs up until then would be covered by the insurance
20 policy.

21 MR BACON: The funders themselves might agree to provide an indemnity. That's possibly
22 a third option.

23 MRS JUSTICE BACON: But the question is: what is the damage to Qualcomm of the
24 insurance being terminated in the middle?

25 MR BACON: Well, the damage to -- Qualcomm on the face of it, depending on the nature of
26 the termination, should be paid its costs, its reasonable costs, up to the point of
27 termination.

28 MRS JUSTICE BACON: Yes.

1 MR BACON: But that was a point which Mr Kirby developed before Mr Justice Nugee. But in
2 the Rowe judgment, Mr Justice Nugee said, "Well, I understand that point", but it wasn't
3 enough to satisfy the court that was adequate security.

4 MRS JUSTICE BACON: We're not talking about that case, we're talking about this case.

5 MR BACON: I understand that, but the point remains that there is an uncertainty about the
6 ability of the defendant to be paid out in such circumstances.

7 MRS JUSTICE BACON: What's the uncertainty? We have two possibilities: one, the claim
8 continues with ATE insurance and we would have to be satisfied that the new
9 insurance would cover the defendant. The second is that the claim terminates and the
10 defendant recovers its costs. Is there a third option under which you would lose out?

11 MR BACON: If the claimant -- I think it's very difficult to -- I call it speculation, but in my
12 submission there's a danger in trying to resolve this question now and foreshadowing
13 what might or might not happen in the future. My submission is a much simpler one,
14 which is the benefit to everybody of an AAE. So setting aside costs --

15 MRS JUSTICE BACON: We can all see there's a benefit, but the question is it comes at a
16 cost. So the question before the Tribunal is whether it should mandate that as a
17 condition of certification.

18 MR BACON: Yes.

19 MRS JUSTICE BACON: And said against you is that it's not necessary. So irrespective of
20 whether there's a benefit or not, the question is the necessity of that. So I'm just trying
21 to tease out what the damage is in event of termination mid-proceedings. At the
22 moment, I haven't seen an explanation of what the damage would be if the insurance
23 came to a halt because of something that happened in the middle.

24 MR BACON: Well, one can imagine the sort of "fallout" that would arise: there's going to be a
25 dispute between the insurer and the insured which will probably have to be resolved
26 in court or arbitration proceedings, there'll be real uncertainty about whether or not -- it
27 might be that Which? will be challenging the decision to terminate. There'll be all sorts

1 of difficulties created by that which will disrupt the class' claim in these proceedings
2 and the court's management of these proceedings which is not desirable.

3 I could say on behalf of the defendant of course we would be delighted if the case would come
4 to an end, but it's not the point I'm seeking to make. I'm seeking to make in one sense
5 that the court should have in mind the overall benefit of an AAE for the class as a
6 whole. Removing the ability of the insurer to effectively control and stop these
7 proceedings if the insurer takes the point that under the policy it has the right to do so.
8 That is avoided with an AAE and it provides a continuity which we would submit is a
9 valuable continuity that should be endorsed.

10 So far as cost is concerned, the cost of this will be recoverable, as the other additional costs
11 of funding are if the claim is successful at the end of the case from the undistributed
12 damages if the CPO is granted on an opt-out basis.

13 We're in the remarkable position in one sense that the insurers have agreed in this case, as
14 we understand it, to provide the AAE in the terms we've sought. We're not in a case
15 where they're refusing to provide the AAE. The argument against me is that the class
16 representative doesn't want to spend the money. That really boils down to the funder
17 not wishing to fund the policy terms. That's what in reality that means. And given the
18 returns the funder is making in this case, which are substantial, it's a matter for the
19 Tribunal to determine. But we would submit it's not an unfair demand to insist on
20 an AAE for the reasons I've developed.

21 MRS JUSTICE BACON: Do you want to say anything about the other points in Mr Kirby's list
22 of four?

23 MR BACON: Well, we submit that if you're against us, then at the very least, certainly so far
24 as 2.1.1 is concerned, we're concerned that it's woolly and it amplifies the concerns
25 we have about the whole of clause 2.

26 MRS JUSTICE BACON: But if the Tribunal were to be against you on the principle of an AAE,
27 are you agreeable to the wording that's proposed in relation to 2.1.1?

1 MR BACON: No. We've indicated in correspondence we don't consider that that protects the
2 respondent.

3 MRS JUSTICE BACON: Have you put forward alternative wording?

4 MR BACON: No, because we rely on the AAE.

5 MRS JUSTICE BACON: The question is: if the Tribunal were against you on the AAE, what
6 about 2.1.1?

7 MR BACON: You're either against us or you're with us. We submit that that clause, 2.1.1, is
8 far too woolly to provide --

9 MRS JUSTICE BACON: Are you saying it's binary: either we require the AAE or not and if the
10 Tribunal were to be against you on the AAE, you're not asking for any modification of
11 2.1.1?

12 MR BACON: We would ask for it to be removed from the policy. That's effectively the same
13 thing as the AAE. All these clauses which --

14 MRS JUSTICE BACON: I'm trying to tease out what happens in the event that you're not
15 successful on the AAE. Do you want the modification of 2.1.1. proposed or not?

16 MR BACON: No. We would go further and say there shouldn't be an ability on the part of the
17 insurer to terminate the policy for reasons other than non-trivial breaches. So the
18 clause should not remain in the policy. It's the equivalent of an AAE, but I don't have
19 any -- there's no alternative wording that's been explored between the parties.

20 MRS JUSTICE BACON: All right, and what about Mr Kirby's other three points?

21 MR BACON: Well, we submit that the notification requirements provide some comfort to us
22 and we're surprised that we shouldn't be entitled to that. It's been refused.

23 We would submit that in circumstances where the entire case effectively, given the
24 consequences of clauses 2, 3 and 4 are that the continuation of the claim is ceded
25 effectively to the insurers, any one of the four insurers. Because if that's the reality,
26 there should be a provision within the terms of the CPO which requires the insurers to
27 give everybody notice, not just the Tribunal, but also us, in advance of any proposed
28 termination of the policy on whatever grounds are relied upon.

1 Mr Justice Nugee also had this point and said it would just be too late, costs would be incurred
2 by the defendant that will not be recoverable from the policy if notification -- Mr Kirby
3 submitted, his case there was we could provide notification to placate the concerns
4 and he's now saying he shouldn't, but he was saying on behalf of the funder that they
5 could. Mr Judges Nugee said that wasn't sufficient. I don't have the time, but the Rowe
6 case is an important analogy. I know it's not the same. I know it's not the same, it's
7 an analogy.

8 MRS JUSTICE BACON: Well, you do know I'm a docketed judge in that case.

9 MR BACON: I didn't know that, but there is an analogy with it, and certainly Mr Justice Roth
10 in Trucks accepted the broad submission I made that the cases on security are helpful
11 in terms of the ATE position, the cases on the ATE. By that he meant cases where
12 the courts have considered whether or not an ATE is a sufficient security.

13 What's happened in that case, as you know, is that the judge took the ATE policy and said,
14 "It's not worth 100 per cent of what says it's worth, I'm going to place a broad valuation
15 of two-thirds of that policy as being representative of what really it's worth in terms of
16 adverse costs cover".

17 So he treated the policy as being worth two-thirds of what it provided for. Let's say it provided
18 for £30 million worth of cover, he said the effect of the submissions that have been
19 made in terms of coverage is it's really worth £20 million, deducted one-third off. If that
20 was the approach applied here, the £15 million would be reduced to £10 million, and
21 there clearly wouldn't be sufficient cover.

22 So I've agreed to a timetable of 20 minutes, I was asked to do so yesterday and I stick with
23 that, but I would ask you -- I'm sure that you will -- in your own time to consider those
24 submissions in the light of Rowe.

25 So, my Lady, in short answer to your points about the other three, we're not agreed on those
26 and we would submit that the proportionate, reasonable appropriate step to take in this
27 case is to call upon the class representative to insist on the AAE despite the cost. It's
28 there, the insurers have agreed to provide it in those terms, as I understand it, which

1 usually you're faced with the argument that they're not prepared to do it, but they are
2 in principle.

3 MRS JUSTICE BACON: Yes. Well, perhaps we could have sent to us the wording that's been
4 agreed overnight at some point.

5 Thank you very much, Mr Bacon.

6 **Submissions in reply by MR KIRBY**

7 MR KIRBY: Yes, my Lady, I need to make one point absolutely clear: that is that the wording
8 of the AAE that the insurers have agreed does not extend to non-cancellation and in
9 our submission, whilst I accept that in Trucks that word is in the AAE, it's the most
10 extraordinary suggestion that an insurer should not be allowed to terminate a policy.

11 Take the example, because it could arise in any case, where the insurer considers that the
12 prospects of success are no longer sufficient to justify the continuation of the ATE. Is
13 it really going to be suggested that there should be an AAE endorsement which means
14 that the insurer is stuck with the case. The AAE should cover avoidance *ab initio* and
15 should cover costs that result from the provisions of 2.1 and that's what -- our proposed
16 AAE and we will provide that.

17 My Lady, I just have a very few points. So far as the FX decision is concerned, the decision
18 at paragraph 340(1) refers to the PCRs having sought to procure anti-avoidance
19 endorsements. That in a sense is what we've also done but we say that it should not
20 be required.

21 So far as notification is concerned, we have made clear that we will notify but not of threatened
22 termination and there are the general points which is that this increases the costs of
23 bringing this sort of action before this Tribunal. If on every occasion, regardless of the
24 status et cetera of the PCR, there is always going to be a requirement for AAE then
25 that simply increases the costs and indeed therefore is an additional hurdle, albeit
26 a financial one, with regard to bringing these claims.

27 So far as the Rowe v Ingenious decision is concerned, that is a very different situation where
28 there are claims with regard to what was said with regard to film investments and

1 indeed there are allegations against some of the defendants of fraud and therefore that
2 is exactly the sort of case where it's highly likely that, if the claimants are not believed
3 at trial, the insurer would then seek to avoid cover because it's said, well, you've told
4 us you said this but a judge has just decided that you didn't and in fact that you'd lied.

5 So that is exactly the sort of case where an anti-avoidance endorsement would be expected.

6 My Lady, we would also say that the Trucks case is 2019. At one point my learned friend said
7 it was 1919 and I didn't think I was that old, but it was 2019, which is not exactly old
8 law and we do say that that is of assistance to you.

9 Effectively, were you to require an anti-avoidance endorsement that actually covered any
10 cancellation or termination of the policy, my instructions are that is simply not available.

11 To say to an insurer that there are no circumstances, regardless of the conduct of this
12 case going forwards, in which you can terminate is, we would say, fanciful. Of course
13 we accept, and it's already provided for, that, if there is termination, then the
14 respondent should be notified of that by us and of course we accept that the
15 respondent should be entitled to its costs up to termination. As my Lady's made the
16 point, if we've got to notify you and notify them of termination of a policy, we're going
17 to be back here and, unless we've got either another ATE policy or some other bond
18 or something of that nature, the case isn't going anywhere. So the additional expense
19 and the additional requirements simply are not necessary and certainly not on the facts
20 of this case and all of these cases ultimately are fact specific and we submit that an
21 important fact in this matter is the nature and standing of the PCR. I don't know if
22 I can -- forgive me one moment.

23 My Lady, just one further point. The Tribunal is not today, we say, concerned with the level of
24 the ATE and I just want to make that clear.

25 MRS JUSTICE BACON: It's been flagged but I don't think that's said to be a reason why the
26 Tribunal shouldn't certify.

27 MR KIRBY: No, and also it was agreed between the solicitors in correspondence correspond
28 what issues would be dealt with before the Tribunal and I can give you just the

1 correspondence reference on that. It may even be in the ones I've already given. It's
2 in correspondence 238 where the solicitors for the respondent said:

3 "The supplemental skeleton argument should be limited to issues concerning Which?'s ATE
4 policies, namely whether Which? should be ordered to incept an AAE and the
5 proposed amendments as set out in Quinn Emanuel's letter of 4 March 2022..."

6 So that doesn't deal with quantum and in any event, so far as quantum is concerned, this
7 Tribunal has got no evidence before it at all as to what the respondent's costs are
8 anyway, unless I've missed something in the bundles. I don't think there's been any
9 evidence put in with regard to that or any particular estimates.

10 MRS JUSTICE BACON: All right. Thank you very much everyone.

11 MR BACON: My Lady, can I just give you a reference if I may. It's not a response, but it's the
12 more recent Merricks decision when it came back from the Supreme Court. Page 1024
13 of the authorities bundle. That's the third party rights clause. Paragraph 28. Thank
14 you.

15 MRS JUSTICE BACON: I've noted that. Thank you very much.

16 Now, is there anything else that we need to deal with or does that conclude this hearing?

17 MR KIRBY: I think that's concludes it certainly as far as I'm concerned.

18 MR BACON: Yes on our side.

19 MRS JUSTICE BACON: All right. Well, you won't be surprised to know that we will reserve
20 judgment and you'll be notified in due course.

21 **(11.41 am)**

22 **(The Tribunal concluded)**

1 |

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?