Case No: HT-2014-000038

Neutral Citation Number: [2015] EWHC 1122 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29th April 2015

Before:

THE HONOURABLE MR. JUSTICE COULSON

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Between:

(1)	**Harlequin Property (SVG) Limited**	**Clai**
(2)	**Harlequin Hotels and Resorts Limited**	**Respo**
	- and -	
	Wilkins Kennedy (a Firm)	**Defe** **App**

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Mr Nicholas Davidson QC and **Mr Hefin Rees QC**

(instructed by **ELS Legal LLP**) for the **Claimants/Respondents**

Mr Justin Fenwick QC and **Mr George Spalton**

(instructed by **Kennedys Law LLP**) for the **Defendant/Applicant**

Hearing date: 27 March 2015

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Judgment

The Hon. Mr Justice Coulson:

1. Introduction

1.

On 4 December 2014, the defendant issued an application for security for costs. This application followed many months of correspondence in which detailed but unsuccessful attempts had been made to agree the nature and form of voluntary security to be provided by the claimants. Since the application was issued, further progress has been made by the parties on these issues. It is not now disputed that the claimants should provide security; and it is not disputed that, at present, the relevant amount of the security should be £2.75 million.

2.

The remaining dispute between the parties arises out of the ATE insurance policy into which the claimants have entered and which, they say, provides sufficient security for the defendant's costs. Unusually, perhaps, the claimants are supported in that view by the insurers themselves, DAS Law Assist ("DAS"). The defendant says that, on analysis, the ATE policy does not provide proper security in the circumstances of this case. The argument between the parties focuses on whether the objections now made by the defendant to the terms of the policy are realistic or fanciful.

3.
I propose to deal with the issues in this way. In **Section 2** below, I summarise the particular circumstances of this case which, for reasons which I will explain later, I consider to be a critical element in the exercise of my discretion as to the form of security to be provided. At **Section 3** below, I deal with the law, and in particular the authorities concerned with the use of ATE insurance as a vehicle for security for costs. In **Section 4** below, I set out the relevant terms of the policy and the endorsements, some of which have been added to provide comfort to the defendant in this case. I then address the two particular concerns raised by the defendant at the hearing: the risk of commutation (**Section 5** below), and the risk that the policy may not provide any protection to the defendant if the claimants go into liquidation (**Section 6** below). I should express my thanks to both counsel for the clarity and succinctness of both their written and oral submissions.

2. Factual Background

4.
The first claimant is incorporated in St Vincent and the Grenadines ("SVG"). The second claimant is incorporated in Grand Cayman. Mr David Ames is a director and main shareholder of each company. He has been involved in property development in various parts of the world.

5.
These proceedings are concerned with a property development in SVG known as Buccament Bay. Money was raised for the development from private investors, mainly resident in the United Kingdom. The money was raised through another company owned by Mr Ames, Harlequin Management Services (Southeast) Ltd, which is now in liquidation. The investors paid deposits of up to 30% of the purchase price of a room or apartment in the Buccament Bay resort.

6.
The construction works were significantly delayed and are still ongoing. There is an investigation into the scheme by the Serious Fraud Office, and there have been a number of different sets of proceedings, some started by disgruntled investors, and some involving attempts to put the claimant companies into liquidation.

7.
The defendant provided accountancy and auditing services in respect of the Buccament Bay resort. The principal person involved on their behalf was a Mr MacDonald. These proceedings centre on what is said to be the various breaches of contract and other duties on the part of the defendant, and Mr MacDonald in particular. Many of these allegations centre on Mr MacDonald's relationship with the ICE Group, owned by Mr O'Halloran, who were the main contractors employed to carry out the construction of the resort at Buccament Bay (and who are also at the centre of fraud allegations). It is said that the defendant, and Mr MacDonald in particular, had a clear conflict of interest by giving financial advice to both the employer (the claimants) and the contractor.

8.

The claimants' allegations against the defendant amount to a case that the defendant was responsible for the delays and the cost overruns on the resort project. It is also said that the defendant was responsible for the claimants' losses suffered as a result of what is alleged to be the fraudulent conduct on the part of ICE Group and Mr O'Halloran. The defendant denies the claims in their entirety.

9.
It will be seen, therefore, that some of the issues in this case are rather different from those that arise in an 'ordinary' TCC case, involving as they do allegations of fraud involving both the employer and the contractor, and an allegedly fundamental conflict of interest on the part of the defendant. Furthermore, even by TCC standards, the claims are significant: the claim is pleaded at a sum in excess of US $60 million.

3. The Law

10.
Pursuant to CPR 25.12 and 25.13, the court has a wide discretion as to whether or not to grant security and, if so, the method by which such security should be provided. As I have said, in the present case, there is no dispute that security should be given. The only issue is the form of that security.

11.
The first case in which ATE Insurance was considered as a form of security for costs was **Al-Koronky and another v Time-Life Entertainment Group Ltd and another** [2006] EWCA Civ. 1123. In that case, Sedley LJ said:

"35…What may matter, however, is what insurance the claimant has obtained against the eventuality of having to pay the defendant's costs. A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.

36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective.

37. It follows that the claimants' CFA, while it does not count against them either in law or in the exercise of the judge's discretion, does not help them to ward off an order for security for costs. Eady J made no error in this regard. While he refers to the probable 100% uplift in the event of success, he does not suggest — and neither does Ms Page — that this enhances the defendants' case for security."

12.
The next case in time was **Belco Trading Co v Kondo and another** [2008] EWCA Civ. 205, a decision of the Court of Appeal. In that case the judge at first instance had accepted that, in theory, an ATE insurance policy could be used as an alternative to a payment into court, or an acceptable bank guarantee, as a means of providing security for costs. The order provided that the insurance policy should give the defendants an "equal or better security" than that afforded by a payment into court or a bank guarantee. It is clear from the judgment of Longmore LJ in the Court of Appeal that these

words were added because the judge did not know anything about the terms of the policy. The Lord Justice went on to say:

“5. It would, in my judgment now, be most unjust to the defendants to prevent them from pointing out that the policy in fact gives them much less security than the traditional form of security for costs. If the judge had been informed of, or had foreseen, the problems that have arisen out of the terms of the ATE policy now that it has been acquired, he would almost certainly, in my view, not have given the claimants' the option of providing security by reference to the ATE insurance in the first place.

6. In fact, it is in any event doubtful if the judge did accept in principle the suitability of an ATE policy. He says in paragraph 10 of his judgment:

“Whilst in principle I find that there should be an order for security of costs, the alternative to that is the claimant providing evidence that it has acquired the relevant insurance cover which would satisfy the defendants that that would be equal to, or even better than, payment of monies into court in respect of security.”

7. That, to my mind, is saying that the defendants are entitled to be satisfied that any ATE policy proposed is not in fact equal to, or better than, payment into court, and to reject it if not reasonably so satisfied.”

13.
The trio of more recent cases which, to my mind, sets out clearly the general relationship between ATE insurance and the provision of security of costs starts with the decision of Akenhead J in **Michael Phillips Architects Ltd v Cornel Clark Riklin and another** [2010] EWHC 834 (TCC). Having looked at the relevant cases, Akenhead J summarised the principles as follows:

“18. These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party’s costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the defendant in circumstances where security for costs should be provided by the claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:

(a) There is no reason in principle why an ATE insurance policy which covers the claimant’s liability to pay the defendant’s costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.

(b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.

(c) It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.

(d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the defendant."

14.
Akenhead J then turned to the ATE insurance in that case. Having analysed the terms of the policy and the points made about it, he concluded that the ATE insurance provided no real comfort for the defendants' costs, let alone any real security for them.

15.
In **Verslot Dredging v HDI Gerling Industrie Vesicherungag AG** [2013] EWHC 658 (Comm), Christopher Clarke J (as he then was) noted that the claimants were saying that the ATE insurance "could stand in the place of security and would be something against which, in the event, the claimants failed, the defendants would be able to secure a recovery of costs". However the claimants did not ultimately rely on the ATE insurance policy; instead they were offering as security a deed of indemnity in favour of the defendants and which the insurers, QBE, had executed. As the judge pointed out:

"4. It seems to me that the question as to whether or not that deed is acceptable is a matter which arises in relation to the ATE insurance which the claimants have obtained. The claimants can, with some force, submit that that which they propose to offer, namely the deed, is something better than the insurance itself which they previously contemplated offering, since any insurance might be subject to avoidance, misrepresentation or nondisclosure or be such that, in the end, there could be no recovery in respect of it and would not in any event constitute a direct contract with the defendants; whereas the deed that is offered is not subject to those defects. Whether those points are good or bad, it seems to me that the contention that the security should now be permitted to take the form of a deed of indemnity is, as I say, something that arises in relation to ATE insurance which the claimants have obtained."

The judge went on to conclude that in the circumstances, the security that was on offer was acceptable. At paragraph 10 he set out the test which, on his analysis, the deed met:

"10. In my view, it is necessary to take a pragmatic view or, as the Master of the Rolls expressed in **Shlaimoun & Anor v Mining Technologies International Inc** [2012] EWCA Civ 772, a realistic view. There is no magic in the provision of security from a first-class London bank. The essential question for the court in deciding on what form of security is acceptable is whether what is proposed does indeed provide real security. This it may do if it amounts to a promise which would in all likelihood be honoured, given by an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given by a truly creditworthy entity."

16.
In the most recent case on the point, **Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc** [2013] EWHC 147 (TCC), Stuart-Smith J concluded that, on the facts of that case, the ATE insurance policy was adequate security. That makes **Geophysical** the only case in which a judge has analysed the objections being made, and the terms of the policy, and concluded that the policy was, in all the circumstances, adequate security.

17.
In my view, a number of points need to be made about that case. It involved a claimant incorporated under the laws of Jordan and a defendant incorporated under the laws of Panama. The dispute centred

on an alleged partnering arrangement between the two companies in respect of a proposed contract to drill for oil. It was, therefore, a straightforward TCC claim with no suggestions of fraud, insolvency and the like that are present here.

18.
Stuart-Smith J concluded at paragraph 15 that “the court’s starting position should be that a properly drafted ATE policy provided by a substantial and reputable insurer is a reliable source of litigation funding.” He said at paragraph 19 that the court had to form a view about the meaning of the policy and how readily it might be legitimately and contractually avoided and as to the likelihood of circumstances arising which would enable the policy to be readily, legitimately and contractually avoided. He went on at paragraph 20 to say:

“20. Ultimately, on an application such as this, the question is not whether the assurance provided by an ATE policy is better security than cash or its equivalent, but whether there is reason to believe that the claimant will be unable to pay the defendant's costs despite the existence of the ATE policy.”

19.
Thereafter, in his analysis of the policy, the judge focused on the risk of avoidance, because that was the principal point taken by the defendant. He said that there was no material that raised anything more than a theoretical chance that insurers, who he had found to be reputable and well-known, might seek to avoid the policy on that basis. In relation to the other points raised, he again accepted that, whilst cancellation was a theoretical possibility, it was no more than that. He also identified the longstanding relationship between the solicitors and the insurers, which made it commercially much less likely that the insurers would seek to avoid spurious or tenuous grounds, thereby jeopardising the relationship which had been built up over the years.

20.
At paragraph 43 of his judgment, Stuart-Smith J also dealt with an issue that had been raised, although it was not central to the defendant’s case, that the defendant was not a party to the contract of insurance and would not be in a position to enforce the contract directly. The judge said that that was factually correct but, although full argument had not been addressed to him on the point, he thought that in the event of the claimant’s insolvency, the defendant may obtain a direct right of action pursuant to the provisions of the **Third Parties (Rights Against Insurers) Act 1930**. The question of third party rights is a much more important issue in the present case, and I deal with it separately below.

21.
As a matter of principle, therefore, I conclude from this brief tour of the authorities that:

(a)
Adequate security for costs can be provided to a defendant by means other than a payment into court or a bank guarantee;

(b)
Depending on the terms of the insurance and the circumstances of the case, an ATE insurance policy may be capable of providing adequate security;

(c)

There may be provisions within the ATE insurance policy which a defendant can point to and say that, on the happening of certain events, those provisions may reduce or obliterate the security otherwise provided;

(d)
In that event, the court should approach such objections with care: in order to amount to a valid objection that an ATE policy does not provide appropriate security, the defendant's concern must be realistic, not theoretical or fanciful.

4. The Policy

22.
The ATE policy in this case was provided by DAS to the claimants. Under the heading 'What Is Covered' the policy said:

"1. The most **we** will pay under **your** policy is shown on the schedule plus the amount, if any, **you** are liable to pay for **your** insurance premium.

2. **We** will:

•
pay **your** solicitor's **disbursements** and barrister's fees (except if the barrister is acting under a conditional fee arrangement); and

•
pay **your** opponent's legal costs and disbursements **you** are liable for:

(a)
if **you lose**; or

(b)
if **your claim** is withdrawn by agreement between **us** and **your** solicitor; or

(c)
if, after a **Part 36 offer, you win** but a court awards **you damages** that are less than the offer to settle.

3. **We** will **indemnify you** against **your** liability to pay **your** insurance premium for **your** policy:

(a)
if **you lose**; or

(b)
if **your claim** is withdrawn by agreement between **us** and **your** solicitor.

4. **We** will pay **your** opponent's legal costs and disbursements arising from an **interim order** made against **you** by the court following a **pre-action disclosure** or **interim application**."

The policy went on also to deal with 'What Is Not Covered':

"1. **Any claim** brought outside England and Wales.

2. Any fees or costs incurred before the start date of **your** policy.

3. Fines, penalties, compensation or damages that a court orders **you** to pay.

4. Any **counterclaim** against **you** or any appeal **you** make against the final judgment or order without our agreement.

5. Any fees or costs arising from any **pre-action disclosure** or **interim applications** brought by **your** solicitor without **our** agreement.

6. Any fees or costs arising from enforcement proceedings brought by **your** solicitor without our agreement.

7. Any fees or costs arising from negotiations about costs and any detailed assessment proceedings relating solely to **your** solicitor's fees without **our** agreement.

8. Any fees or costs arising from a fraudulent, exaggerated or dishonest **claim**.

9. Any fees or costs arising from not following the court's process.

10. Any increased fees or costs arising as a result of a failure by **you** or **your** solicitor to take reasonable steps to mitigate **your** liability.

11. Any fees or costs arising if **your claim** is abandoned as a result of **you**, either not having the funds to continue, or not being willing to commit funds to continue, with **your claim**.

12. Any **claim** where **you** may be one of a number of people involved in a legal action resulting from one or more events arising at the same time or from the same cause, which could result in the court making a Group Litigation Order.

13. Any **claim** where **you** take legal action that **we** or **your** solicitor have not agreed to or where **you** do anything that hinders **us** or **your** solicitor.

14. Any increased fees or costs arising from any delay or other default by **you** which, in **our** opinion, affects the way the **claim** is handled.

15. **We** will not pay any **claim** covered any other policy, or any **claim** that would have been covered by any other policy if **your** policy did not exist.

16. An application for judicial review."

23.
The policy also set out a number of conditions. I refer expressly to conditions 6 and 9 as follows:

"6. The cover **we** provide will end at once if:

(a)
your solicitor refuses to continue acting for **you** with good reason; or

(b)
you dismiss **your** solicitor without good reason; or

(c)
you stop a **claim** without **our** agreement; or

(d)
you do not give suitable instructions to **your** solicitor without good reason.

We will then be entitled to reclaim from **you** any payments made under **your** policy.

…

9. A person who is not a party to this contract of insurance has no right under the Contracts (Rights of Third Parties) Act 1999 (or any amending or subsequent legislation) to enforce any term of this contract but this does not affect any right or remedy of a third party which exists or is available other than by virtue of this Act."

24.
The policy is subject to a number of endorsements, many of which have arisen as part of the welcome attempts by the claimants and DAS to meet the concerns raised by the defendant. The endorsements are in the following terms:

"The insurers confirm that this policy of insurance is now non-avoidable and any claim made against it will be honoured irrespective of any provisions of the policy or of the general law, which would have otherwise have entitled the Insurers to void or deny cover under this policy and without limiting the generality of the forgoing, clauses 8-15 of "WHAT IS NOT COVERED" and "Conditions" 1-4, 6, 7 and 8.

In the event that the Insurers have to indemnify the opponent's costs and own disbursements, where there has been a breach of a warranty, the insurers reserve the right to claim such costs directly from the Insured.

If either or both of the Claimants enter in to an insolvency event then the policy will be assigned to a liquidator or administrator should they decide to continue the claim.

If the case is lost, discontinued, or there is a failure to beat a Part 36 offer, Insurers will deal directly and make any payment directly to the opponent's solicitors in respect to adverse costs.

It is noted that BC Investments Limited have been assigned as interest in this policy limited to the sum of £250,000, as per Deed of Partial Assignment dated 16th February 2015."

25.
I now turn to deal with the two objections raised by the defendant in respect of this current version of the ATE policy. One concerns the risk of commutation; the other concerns their rights as third parties in the event of the liquidation of the claimants.

5. Commutation

26.
Mr Fenwick QC said that there was no prohibition in the policy on an agreement being reached between DAS and the claimants to commute the policy, which might leave the defendant without security. Mr Davidson QC maintained that this was an entirely theoretical possibility and that there was no evidence that this would or could happen. He submitted that DAS were a reputable insurer and that, in circumstances where this point had been expressly raised by the defendant in open court, and had been addressed by DAS, it was fanciful to think that DAS would even contemplate acting in this way.

27.
I accept Mr Davidson QC's submission on this point. I find that there is no realistic risk that DAS will enter into some arrangement with the claimants in order to deprive the defendant of the security otherwise provided by the ATE policy. I can see no basis for saying that it is even a possibility that DAS would risk their reputation in the insurance market by acting in a way that they have expressly

disavowed. Accordingly, I do not consider that this is a valid objection; it cannot be said that, in this respect, the ATE policy does not provide proper security.

6. The Defendant's Status as a Third Party

28.
Mr Fenwick QC's second, and much more substantial objection, relates to the defendant's status as a third party under the ATE policy, and the risk that they might not recover anything under the policy if the claimants are wound up or put into liquidation. This was similar to the peripheral point which arose in **Geophysical** (paragraph 20 above), but it is at the centre of the submissions here. Mr Davidson QC's response is the same: that DAS are reputable insurers and have agreed to make direct payments to the defendant's solicitors. This objection too should therefore be characterised as fanciful rather than realistic.

29.
I do not accept Mr Davidson QC's submissions on this second issue. In my view, different considerations apply to this objection. For the reasons set out below, I do not consider that the objection is fanciful; on the contrary, it is a legitimate and realistic concern. What is more, the particular circumstances in which the ATE policy would not provide proper cover in the event of insolvency would not depend on DAS deliberately deciding not to pay out to the defendant; the lack of security would arise because DAS might be legally required to pay out to somebody else.

30.
The starting point for this analysis concerns the financial position of the claimants. For the purposes of this application only, it is not disputed that I should deal with the application for security for costs on the basis that the claimants would be unable to pay the defendant's costs if ordered to do so. In insolvency proceedings in the Chancery Division last year, Mr N Strauss QC, sitting as a Deputy Judge of the High Court, concluded that the United Kingdom court did not have the necessary jurisdiction, and that any insolvency proceedings would have to be commenced in SVG. In those circumstances, Mr Fenwick QC argued that it was highly likely that some or all of those who sought to put the claimants into liquidation in the United Kingdom (who were, as I understand it, some of the disgruntled investors), will seek to do the same in SVG.

31.
If there are such insolvency proceedings in SVG, the defendant's position might be significantly compromised. That is because:

(a)
In the United Kingdom, prior to the **Third Parties (Rights Against Insurers) Act 1930**, the proceeds of any insurance policy covering a liability which the insured had incurred to a third party, were payable to the insurer's insolvency practitioner. Once paid over, they formed part of the insured's assets and were distributed as such to his general creditors. The third party whose loss had triggered the claim against the insurer was likely only to recover a small dividend as one of those creditors.

(b)
The 1930 Act, which conferred rights against insurers by third parties in the event of the insured becoming insolvent, was designed to deal with this problem. However, the 1930 Act does not apply in SVG. Thus the pre-1930 Act position, where the money is paid to the insured's insolvency practitioner, continues to apply there.

(c)
On that basis, the defendant might find that any sums due under the ATE policy, which would otherwise have constituted its security, have been paid out to the claimant's insolvency practitioner, and the defendant would have no greater claim on the money than any of the other (numerous) creditors of the claimant companies.

(d)
The defendant might be protected if the **Contracts (Rights of Third Parties) Act 1999** applied but, as noted in paragraph 23 above, it has been expressly excluded by the words of this ATE policy. What is more, DAS have so far refused to allow the deletion of that exclusion, saying that it would "fundamentally alter" the contract of insurance.

(e)
The **Third Parties (Rights Against Insurers) Act 2010** is not yet in force and would in any event only apply where the insured has been declared bankrupt or wound up in the United Kingdom which, as a result of the decision of Mr N Strauss QC noted above, is not this case.

32.
Thus, there is a real risk that, if the claimants are the subject of insolvency proceedings in SVG, any sums under the ATE policy may have to be paid out by DAS, not to the defendant, but to the claimants' insolvency practitioner in SVG. That would be significantly detrimental to the defendant's rights. It could even make the ATE cover worthless for them.

33.
In my view, this concern is a realistic one, given the claimants' financial position. Furthermore, it does not seem to me to be a concern that can be met by the reputation argument. Whilst I accept that DAS' reputation is such that they would not get together with the claimants and commute the policy behind the defendant's back, it is quite another thing if DAS had a legal liability to pay an insolvency practitioner in SVG rather than the defendant. Unless DAS are contemplating paying the same sum twice over – and there is nothing in the ATE policy, or in the evidence, to suggest that they are – the defendant would have no protection, and it could hardly be said that this would adversely affect DAS's reputation: they would simply have complied with their legal obligation to pay the insolvency practitioner.

34.
Of course, this concern links back to the principal difficulty for all defendants faced with the offer of an ATE insurance policy, namely that they are not parties to that policy, and are therefore being offered protection which is, in one sense at least, at arms' length. That doubtless explains why the direct deed was offered in **Verslot**, and why Akenhead J rejected the policy as being adequate insurance in **Phillips**. The particular difficulty here is the combination of the absence of any direct deed or guarantee from DAS to the defendant, and the exclusion of the 1999 Act. There is therefore a real risk that the defendant could become nothing more than an unsecured creditor in insolvency proceedings in a foreign jurisdiction.

35.
For all those reasons, I consider that the defendant's second ground of objection to the ATE policy, as it currently stands, is made out.

7. Where to Next?

36.

I made clear to the parties in argument that, if I was minded to accept one or both of Mr Fenwick QC's submissions, I would not want that to be seen as some sort of nuclear option, whereby only the payment of a sum into court or the provision of a bank guarantee would be sufficient. It seems to me that the parties have come so far in endeavouring to reach agreement on the basis of the ATE policy that it would be a great shame if they could not go the extra step and deal with the single point that I consider to be outstanding.

37.

It seems to me that this could be dealt with either by the provision of a direct indemnity, or an endorsement which provided that any costs ordered to be paid to the defendant would be paid directly, without set-off. It may well be that, as Mr Fenwick QC says, this could be linked to the deletion of the exclusion of the 1999 Act but, in the first instance, I will leave that detail to the parties.