Neutral Citation Number: [2020] EWHC 235 (Ch)

INGENIOUS LITIGATION

Claim Nos: HC-2015-002715, HC-2015-004581
HC-2017-000490, BL-2018-000279
BL-2018-001466, BL-2018-002554

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

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 10 February 2020

Before :

MR JUSTICE NUGEE

- -

Between :

MR NIGEL ROWE & Others	**Claimants**
- and -	
INGENIOUS MEDIA HOLDINGS PLC & Others	**Defendants**

Claim Nos: HC-2015-004561, HC-2016-001674
HC-2017-001049, BL-2018-000507

And Between :

MR ANTHONY BARNESS & Others	**Claimants**
- and -	
INGENIOUS MEDIA LTD & Others	**Defendants**

Claim No: FS-2017-000005

And Between :

MR THOMAS AHEARNE & Others	**Claimants**
- and -	
PATRICK ANTHONY McKENNA & Others	**Defendants**

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- -

Nicholas Bacon QC (instructed by **Stewarts Law LLP** and **Peters & Peters Solicitors LLP**) for the **Stewarts Claimants** and the **Peters & Peters Claimants**

P J Kirby QC (instructed by **Stewarts Law LLP**, **Peters & Peters Solicitors LLP and Therium**) for the **Stewarts Claimants**, the **Peters & Peters Claimants** and **Therium**

Tom Mountford (instructed by **Mishcon de Reya LLP**) for the **Mishcon de Reya Claimants**

Simon Birt QC, **Craig Morrison** and **Geoffrey Kuehne** (instructed by **RPC**) for the **Ingenious Defendants**

Ben Quiney QC and **Carlo Taczalski** (instructed by **Kennedys Law LLP**) for **SRLV (a firm)**

James Duffy and **Nick Daly** (instructed by **Herbert Smith Freehills LLP**) for **UBS AG**

Andrew Green QC, **Simon Pritchard** and **Harry Adamson** (instructed by **Eversheds Sutherland (International) LLP**) for **HSBC Private Bank (UK) Ltd**

David Yates QC (instructed by **TLT LLP**) for **Coutts & Co**, **The Royal Bank of Scotland plc** and **National Westminster Bank plc**

Hearing dates: 19, 20 and 21 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. On 19 to 21 November 2019 I heard a number of applications in relation to the funding of this litigation. These consisted of an application by the Claimants for a costs-sharing order; and a number of applications by Defendants for security for costs.

2. The costs-sharing order put forward by the Claimants sought to deal with a number of aspects of costs-sharing, but the focus of the argument was whether the Claimants' liability for any adverse costs should be several and not joint, and this aspect of it was referred to in argument as a *"several liability order"*. The terminology is not of course overly important but I will use this term where appropriate as it makes clear that what is sought is an order that seeks to limit the Claimants' potential liability to the Defendants, rather than simply regulating the position of the Claimants as between themselves. As was pointed out at the hearing, the latter does not necessarily need an order at all, as the Claimants can always agree amongst themselves how the costs incurred by them should be borne. In what follows I will try and distinguish between (i) what each Claimant is liable to contribute to an adverse costs order made in favour of one or more Defendants (ie the question whether a several liability order should be made); (ii) what each Claimant is able to recover from a Defendant under a costs order made in favour of (some or all of) the Claimants; and (iii) what each Claimant is liable to contribute to their own solicitors' costs. There was in some of the submissions a tendency to run these together under the rubric of costs-sharing, but it is helpful to keep them distinct.

3. I asked counsel to agree a numbered list of the questions that required decisions from me, and such a list was very helpfully provided. At the conclusion of the argument on 21 November 2019, I was able to give the parties answers to a number of those questions in the form of a brief oral judgment (the neutral citation number of which is [2019] EWHC 3234 (Ch)), but there were various questions which I was not able to give a decision on there and then, either because I wished to consider them further or (on one point) because I invited further submissions in writing. In addition I asked the parties to indicate whether they wished me to set out my reasoning in more detail, and Mr Nicholas Bacon QC, who appeared for the Stewarts and Peters & Peters Claimants, subsequently sent my clerk an e-mail indicating that those instructing him needed a further short judgment on two points which I had decided, described by him as *"the several / quid pro quo point"* and *"the pro-rata point"*; Mr P J Kirby QC, who appeared for a litigation funder called Therium Litigation Finance AF IC (**"Therium"**), also asked for expanded reasoning on certain points. This judgment therefore contains my reasons for my decisions on those points in more detail, as well as my decisions on the points I reserved.

4. By way of background I can conveniently repeat what I said in my judgment in *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch) at [2]-[4]:

> "2. This is part of the Ingenious litigation. It is not necessary for the purposes of this judgment to give the background to this litigation, of which I am now the Managing Judge, in any detail, but I should give a brief account. From 2002 to 2007 a number of schemes (8 in all) were promoted under the name "Ingenious". The schemes were promoted as tax-efficient vehicles through

which individual taxpayers could contribute funds to a limited liability partnership (or **"LLP"**) for investing in films (or in one case video games), and set off their share of the LLP's losses against other taxable income. For the schemes to work as intended it was necessary that the LLPs should be trading with a view to profit, and that the losses should be of an income nature so that what is called 'sideways loss relief' would be available to the individual investors as members of the relevant LLP.

5. But HMRC did not accept that the schemes worked as intended, and disallowed the losses claimed by the LLPs, with the effect that the members could not maintain their claims to sideways loss relief. The LLPs appealed to the First-tier Tribunal, which heard the appeals of three of the LLPs as lead cases, and held that most of the claims to allowable losses failed (largely because the claimed losses were for the most part of a capital nature); on a further appeal to the Upper Tribunal by both the LLPs and HMRC, the Upper Tribunal held that the LLPs were not trading at all. Subject to any further appeal, that means that no loss relief is available to the investors. The outcome for the individual participants in the schemes is that they have not only lost the sums which they invested, but have not obtained the anticipated tax relief either, and have been, or may be, exposed to claims by HMRC for arrears of tax with interest and penalties; there may be other losses as well.

6. A very large number of them (over 500) have issued claims to seek to recover their losses. There are three firms of solicitors acting for them, Stewarts Law LLP, Peters & Peters Solicitors LLP and Mishcon de Reya LLP, and between them they have issued a number of claim forms. These variously seek to recover the investors' losses from a range of defendants, including not only a number of Ingenious entities (and associated individuals) but also intermediaries such as financial advisers. Under an Order made by Morgan J in March 2018 these actions are being managed together, and only a selection of the claimants and defendants have in the first instance been directed to plead their cases. In the event 28 such 'Pleading Claimants' have been identified and have served a single pleading (subsequently amended). The main body of these Amended Particulars of Claim consists of generic allegations relied on by one or more of the Pleading Claimants, with individual schedules annexed for each Pleading Claimant in which allegations particular to him (or in one case her) are made."

That I think serves as an adequate introduction, with the addition of the fact that many of the Stewarts Claimants, and all the Peters & Peters Claimants, have the benefit of funding from Therium, against whom various Defendants seek security for costs. Some of the Stewarts Claimants however are self-funded and are paying their own costs.

The several / quid pro quo point

7. What I understand Mr Bacon to be referring to as *"the several / quid pro quo point"* is a point that was not actually on counsel's list of questions but was argued and that I thought I ought to answer. What I said in my oral judgment was as follows:

> "1. …Taking the very helpful list of issues however, there is before we get to issue 1, in fact a prior question, which is: are the two applications necessarily linked in the quid pro quo sense?

2. My answer to that is: no, I think they are separate applications and that there is nothing wrong with the claimants bringing their application for several liability and the question of security does not need to be resolved at the same time and they do not form parts of the same coin.

3. On the other hand, as I think both Mr Bacon and Mr Kirby accepted, if I accede to the claimants' application it will have a knock-on impact on the question of security."

8. The point arose because the Defendants said that the two applications were linked in that it was impossible to address the Claimants' application for a several liability order fairly without at the same time dealing with the application for security. Mr Simon Birt QC, who appeared for the Ingenious Defendants, said for example that they saw the two applications as *"very clearly linked"*, and that *"there needs to be a quid pro quo and the only basis on which the defendants ought to bear that risk* [the risk of having to pursue individual Claimants] *is that there is adequate security for costs on appropriate terms to safeguard the position."* The Claimants' submission on the other hand was that the two applications were in principle separate, and that the Court should consider whether a several liability order should be made without consideration of the security for costs application.

9. As appears above, I preferred the Claimants' submissions on this point. The application for a several liability order is not I think logically dependent on there being adequate security for the Defendants' costs, and can be addressed on its own merits. That is not to say that the question of whether the Defendants have adequate security may not be relevant to the question whether a several liability order ought to be made; equally, if a several liability order is made, that may be relevant to the question whether security should be ordered. But as appears from the authorities to which I was referred, the Courts started making orders of this type long before there was any question of defendants obtaining security for costs from claimants who were individuals, and it still remains the case that in general security cannot be obtained by defendants from such claimants. It is now possible – and this forms the basis of the Defendants' application for security – for defendants sued by individual claimants to obtain security in appropriate circumstances against third party funders, but the question of whether claimants should have the benefit of a several liability order does not appear from the authorities to have been linked to the provision of security, nor in my view is it logically dependent on it.

10. Some of the Defendants' submissions were advanced on the premise that the default position or starting point was that the Claimants would all be jointly and severally liable for the Defendants' costs, and hence that if the Claimants wished to limit their exposure they ought to pay a price in terms of providing security. Despite the fact that Mr Bacon was inclined to accept this at least to some extent, I do not myself accept that the starting point or default position is as starkly straightforward as that. Costs are always in the discretion of the Court, and cases vary infinitely.

11. Of course in a simple case where A and B have a true joint claim (for example where they claim as the joint owners of property, or joint parties to a contract), one would expect them to be jointly liable for the defendants' costs. And I also have no difficulty with the proposition that the same applies as a general rule to many cases where the claimants technically have several claims, but, as very commonly happens

– probably in the majority of claims in this Division – a number of claimants join forces to bring what is in effect a single claim, or to be more precise a single group of claims. Very often in such cases the claimants will be connected parties (for example companies in the same group; members of the same family; individuals, their trustees and their corporate vehicles; and the like), and there will in effect be only one case being made, even if, due to the complexity of the facts, technically different claimants have different causes of action and claim different relief. Mr Ben Quiney QC, who appeared for SRLV, referred me by way of example to the decision of Warby J in *Ontulmus v Collett* [2014] EWHC 4117 (QB) at [64] where he said (citing appropriate authority which I need not repeat):

> "As I understand the law, the general rule where several parties combine to advance an unsuccessful case is that each is liable for the common costs incurred by the successful party in resisting that case."

In that case there were three claimants suing on the same alleged libel, and a number of specific matters were relied on in support of the submission that the claimants had made common cause, some of which Warby J found to represent strong arguments in favour of joint liability (see at [62]-[63]).

12. But it does not follow that the same applies to litigation with hundreds of individual claimants, none of whom is connected with each other and each of whom has their own genuinely independent claim, varying enormously in value. Such claims could in theory have been brought in separate claim forms, and when brought in a single claim form, are joined together not so much because the claimants are making common cause by combining to advance a single case, but because there are issues which arise which are common to many of the claimants' claims and it is convenient for all parties (the claimants, the defendants and the Court itself) that such issues be tried once rather than hundreds of times. In fact, as here, there are often a number of claim forms but the actions are all managed together for the same reason – it is in the interests of all parties. It is far from obvious, at any rate to me, that if such actions are unsuccessful at trial the default position, or starting point, is, or should be, that every single claimant, however small their personal stake in the outcome of the proceedings, should be jointly liable for what are bound to be very heavy costs running into many millions of pounds. Even without a several liability order having been made in advance of the trial, there are to my mind significant arguments for regarding it as fairer that unsuccessful claimants in such a case should be severally, not jointly, liable for the defendants' costs. Counsel were agreed that I was not being asked at this hearing to decide what the default position would be, and I will therefore not do so, but for the reasons I have given I am certainly not persuaded at this stage that the default position is one of joint and several liability.

13. So I think it is wrong to approach the present application for a several liability order on the basis that it is a departure from what would otherwise be the position, thereby depriving the Defendants of a *prima facie* right to hold the Claimants all jointly liable, and hence to be characterised as an indulgence to the Claimants which needs to be balanced by a *quid pro quo*. Rather as I see it the appropriate approach is that the Court should simply consider, as an exercise of its wide discretion over the costs of the proceedings, whether it is an appropriate case for a several liability order to be made or not. That does not mean starting from any particular starting point, or requiring the claimants to justify departing from any particular default position. It

simply turns on what is just in all the circumstances. This indeed appears to have been the approach that has been adopted in the authorities, which I refer to below.

Should a several liability order be made?

14. It is possible, although not perhaps as clear as it might be, that Mr Bacon intended by referring to *"the several / quid pro quo"* point also to encompass my answer to Question 1, which was as follows:

> "Should the Stewarts and Peters & Peters Claimants' liability for adverse costs be several?"

The answer I gave in my oral judgment was Yes. In case that was one of the points on which he wanted expanded reasons, I will deal with it as well.

15. What I said in my oral judgment was as follows:

> "4. The answer to question 1 is: Yes. The *Ward v Guinness Mahon* case, as Mr Birt points out, actually encapsulates the issue which is: where does the risk of collection from the claimants lie? Does it lie with the other claimants or does it lie with the defendants? *Ward v Guinness Mahon*, which is a Court of Appeal decision, clearly establishes that it was then thought by the Court of Appeal to be demonstrably fairer that the risk should lie with the defendants, and I have not been persuaded that the change in the legal landscape and the introduction of ATE policies, the rise of the commercial funding market, the introduction of formal GLO processes in the rules and the like, changes the fundamental equation as to where the risk ought principally to lie.
>
> 5. It is noticeable that not a single case has been put before me, whether under a formal GLO or where cases have been managed without a formal GLO, in which any order has been made for joint and several liability among the claimants for potential adverse costs to defendants. Every single case that I have been shown, and the orders which Mr Bacon showed me, have been on the basis of several liability. That is also, of course, now the regime which is the default regime for the purposes of CPR 46.6. I accept that this is not a GLO. I accept that an application that there should be a GLO was not pressed, but I do not see that that changes the fundamental question. This case, although not yet and maybe never the subject of a formal GLO, shares very many characteristics with the sort of cases which are suitable for a GLO, and in particular, the characteristic that a very large number of claimants are bringing claims. In those circumstances, I do not see why the principles applicable under CPR 46.6 do not apply equally in this case."

16. I should note the authorities that I was referred to on this point. The earliest in time was *Davies v Eli Lilly & Co* [1987] 1 WLR 1136. This concerned the Opren litigation. 1500 plaintiffs had brought proceedings. It would seem from the report that these were all separate actions: see the reference at 1142E to *"1,500 sets of proceedings"*, and also the remarks of Sir John Donaldson MR at 1139D from which it is clear that the procedures available in some jurisdictions, notably the United States, for related claims to be disposed of in a single action, were (or at any rate were assumed to be) not then available in England. Hirst J, the nominated judge, nevertheless made a series of orders for managing the actions, including directing master pleadings and the selection of lead actions, and giving a direction that issues

decided in the lead actions should be treated as preliminary issues in all the actions (see at 1139F per Sir John Donaldson MR, and at 1143H per Lloyd LJ who described the arrangement as *"eminently sensible"*).

17. Hirst J also made an order in relation to costs. This was that where particular plaintiffs incurred costs in pursuing lead actions, or became liable to pay costs to the defendants, every other plaintiff should contribute rateably on a per capita basis: see at 1141D per Sir John Donaldson MR. He there described the order as *"wholly novel"*, and explained at 1141H to 1142E that such an order would have been impossible before the House of Lords decision in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 (***"Aiden Shipping"***) to the effect that s. 51 of the Supreme Court Act 1981 (now the Senior Courts Act 1981 (**"SCA 1981"**)) was wide enough to enable the Court to order a person to pay the costs of proceedings even if they were not a party to them. This order was appealed by Mr Davies, one of the plaintiffs – it is not clear to me from the report why he wanted to appeal – but the only point argued on the appeal was that the Court had no jurisdiction to make an order dealing in advance with the apportionment of costs, an argument based on the wording of the then rules (Ord 62 of the RSC) which referred to costs *"following the event"*. This argument was rejected by the Court of Appeal, being described by Sir John Donaldson MR at 1143A as *"if I may say so, as ingenious as it is wholly unsound"*.

18. The actual *ratio* of the case is therefore of no relevance to the question I am asked. The case is nevertheless of interest as being the earliest example that has been identified of an order providing for costs to be shared between large numbers of plaintiffs with similar claims. And although the Court of Appeal did not in the event hear a challenge to the way Hirst J had exercised his discretion (this had been one of the grounds of appeal but was not pursued at the hearing: see at 1143H-1144B) the members of the Court all supported the order, Sir John Donaldson MR saying at 1143C that Hirst J was to be congratulated in producing *"a very fair and workable order"*, Lloyd LJ at 1144B that it was *"the fairest that could be devised: fair not only to the defendants, who support the order, but fair also to the plaintiffs"*, and Balcombe LJ at 1146F that he agreed that it *"cannot be faulted"*.

19. As appears however from *Ward v Guinness Mahon plc* [1996] 1 WLR 894 (***"Ward"***), there was later a dispute as to precisely what the effect of the order in *Davies v Eli Lilly* was. In *Ward* there had been a great deal of argument before Alliott J whether the order in *Davies v Eli Lilly* was merely directed at the position of the plaintiffs as between themselves, or was also directed at the position of the plaintiffs vis-à-vis the defendants, or in other words a several liability order: see at 897F. Sir Thomas Bingham MR, who gave the only reasoned judgment, said that the issue was no longer fundamental, but that his opinion, having read not only the Court of Appeal's decision but a draft of Hirst J's judgment, was that the order in *Davies v Eli Lilly* was only directed at the position as between the plaintiffs themselves. To that extent therefore it is not of direct assistance on whether an order should be made that does limit the Claimants' potential exposure to the Defendants.

20. The decision in *Ward* however squarely addresses this question. In that case a number of investors had been persuaded to invest in a company which later failed. 99 of them brought actions against Guinness Mahon which had sponsored the prospectus and provided loan finance, and was also said to have been the promoter of the scheme, and to have advised at least some of the plaintiffs. Again it appears that these

were all separate actions. 6 of them were to be tried as lead actions. The plaintiffs sought an order that each plaintiff should be severally liable for Guinness Mahon's costs, each being liable for no more than 1/99th of the total. Alliott J dismissed the application, largely it would seem on the basis that he thought there was no jurisdiction to make such an order. On appeal, it was accepted that there was jurisdiction to make the order, and the Court of Appeal considered the exercise of discretion for itself. Sir Thomas Bingham MR, with whom Rose and Roch LJJ agreed, made the order as requested.

21. One of the matters which he took into account was that since Alliott J's judgment a Law Society working party had published a report which had considered the incidence of inter partes costs in group actions, and had recorded that there was general agreement that the liability of plaintiffs for common issues should be several and not joint, as any other arrangement:

> "would make the risk inherent in group actions so great as to limit access to justice solely to those plaintiffs with nothing at all to lose" (at 900C-D).

Sir Thomas Bingham, having referred to this, said (at 900F):

> "It is, I think, plain that whichever decision one makes imposes a risk of non-recovery of costs on someone. If we make the order that Mr Guthrie asks for [ie a several liability order], then there is a risk that Guinness Mahon (if successful) may fail to enforce all its orders against individual plaintiffs. If, on the other hand, we make the order that Mr Leaver seeks for Guinness Mahon [ie that the lead plaintiffs be jointly and severally liable for Guinness Mahon's costs], then there is a risk that certain of the lead plaintiffs may fail to be reimbursed by some of the other plaintiffs.
>
> The broad question, as it seems to me, is: what, in this situation, does fairness demand?"

He then rejected the suggestion that to make any order was premature, on the basis of following Sir John Donaldson's commendation, in *Davies v Eli Lilly*, of the practice of giving an indication which would enable plaintiffs to know where they stood before they started (subject always to the discretion of the trial judge to modify that order at the end of the trial); and continued (at 900H):

> "Speaking for myself, I am persuaded by Mr Guthrie that it is, in all the circumstances, appropriate to make an order that the liability of the individual plaintiffs be limited to the proportionate share of the overall costs, whether incurred by the plaintiffs or payable by the plaintiffs to the defendant, and that such liability should be several not joint. It appears to me that the defendant is no worse off under such an order than if it had been sued to judgment by 99 plaintiffs; although it is fair to add, given the sums involved (many of which are quite small) that such an event would appear extremely unlikely. I am, however, persuaded by Mr Guthrie's argument that the role of lead plaintiff would be one which, on the defendant's order, no well-advised plaintiff would be wise to accept; and furthermore, that the purpose of selecting lead cases would be vitiated if regard had to be paid not to the issues in particular actions but to the means or willingness of the particular plaintiffs to accept a high degree of risk. It is, in my judgment, significant that the Law Society working party has come out strongly in favour of what Mr Guthrie urges as the appropriate rule in this case."

22. I have cited extensively from this judgment because it seems to me that the question dealt with by the Court of Appeal (on whom should the risk of non-recovery fall?) is essentially the same as the question facing me, as Mr Birt pointed out. Given the very clear indication given by Sir Thomas Bingham as to what in his view fairness demanded, I think that I should approach that question on the basis that unless subsequent cases have suggested a different answer, or there has been some material change in the legal landscape, or there is some other material difference in the facts, I should be guided by what he said and do the same. Costs as I have said are always discretionary, but on a question like this there is much to be said for uniformity of practice where possible, not only because like cases should as a matter of principle be treated alike but also because it helps the parties if costs are relatively predictable.

23. None of the other cases cited to me indicates that the guidance given by Sir Thomas Bingham has been subsequently modified, or has become overtaken by developments. Indeed Mr Birt himself said that none of those cases was actually grappling with the issue that I have to grapple with. Nor was I shown any case in which in litigation of this type (which, without seeking to define it exhaustively, I take to be litigation where a large number of claims are brought that raise common issues, and which are managed by the Court, very often by selecting some claims to come to trial before others) an order has been made for the claimants (where there are multiple claimants) or defendants (where there are multiple defendants) to be jointly and severally liable for the other side's costs rather than severally liable. I can refer to them relatively briefly.

24. In *Nationwide Building Society v Various solicitors* [1999] All ER (D) 850 the Society had brought some 500 claims against various solicitors of which 25 proceeded to judgment, largely in the Society's favour. Blackburne J made an order that what he called the Society's *"generic costs"* (as opposed to *"case specific costs"*) should be borne by all the defendants, whether parties to the 25 cases tried or not, who had either been found liable or settled claims on terms they would pay the Society's costs, the defendants' liability being several rather than joint and several. At p 10 of the report he said:

> "Although the Nationwide managed litigation is not a group action of the kind considered in *Ward v Guinness Mahon & Co* it is not relevantly different. The task is to define the defendants who can fairly be said to have benefited from the litigation among whom the burden of any order apportioning the generic costs should be shared."

The case is therefore an illustration of the fact that orders of this type can be made in managed litigation whether or not the litigation is a group action, something that Mr Birt did not dispute.

25. In *Sayers v Merck SmithKline Beecham plc* [2001] EWCA Civ 2017 the Court of Appeal considered the details of costs orders in three multi-claimant actions (relating respectively to MMR, oral contraceptives and exposure of employees to asbestos). Each was the subject of a group litigation order or GLO, provision for which had by then been made in the CPR as a result of the Woolf Report, and was therefore subject to what was then CPR r 48.6A (now replaced by CPR r 46.6) which made provision for costs where a GLO had been made. The costs orders provided for the liability of each party for costs to be several and not joint, and also for definitions as to what

were individual costs and what common costs, and made other detailed provisions, for example as to the position of claimants discontinuing and settling. There was no challenge in the Court of Appeal to the provision for several liability, and no discussion of it, no doubt because it was the default position under the rules. In those circumstances I do not think the decision, interesting though it is, is of much if any direct assistance to the main question, which is whether a several liability order should be made. Mr Bacon relied on it primarily for the propositions that claimants and defendants needed to know the basis on which costs should be spread if an order for costs were made; and that the purpose of making the order now was not to pre-empt the trial judge's discretion over the costs of trial – it was not about what order should be made, but how any order that was made should be borne. Neither proposition seemed to me to be significantly in dispute.

26. *Brown v Russell Young* [2006] EWHC 90055 (Costs) is a decision of Master Hurst in the Senior Courts Costs Office concerning the detailed assessment of costs where large numbers of claimants had asserted claims against the defendant solicitors for advising them to settle vibration white finger claims at too low a value. The claims had been settled before proceedings were brought and Master Hurst held that even in the absence of a GLO or costs-sharing order a claimant was entitled to recover common or generic costs. Mr Bacon relied on that as an example of a case where common costs could be shared even without a GLO. It is to be noted however that it did not concern the several liability of unsuccessful claimants, but the ability of successful claimants to recover common costs. As already referred to there was a tendency in some of the submissions to run the two together under the rubric of costs-sharing orders but they are in principle distinct.

27. Mr Bacon however did show me a number of orders that had been made in managed litigation which was not the subject of formal GLOs and which provided for several liability. They were (i) an Order made by Sales J on 17 March 2014 in relation to what were called "Right to Buy" claims; (ii) an Order made by Vos J on 20 April 2012 in relation to voicemail intercept litigation; and (iii) an Order made by Aikens J on 14 October 2005 in relation to litigation known as the Winterthur Swiss litigation. Each provided for the parties' costs liabilities to be several and not joint, the first two in similar terms as follows:

> "The liability of each Party for, and each Party's entitlement to recover Costs shall be several and not joint"

In the third the provisions were more elaborate but to the same effect.

28. The other case which Mr Bacon showed me was *Greenwood v Goodwin* [2014] EWHC 227 (Ch) (***"RBS* [2014]"**) a decision of Hildyard J in the RBS rights issue litigation. A number of actions had been started and were the subject of a GLO. At [20(5)] Hildyard J referred to one of the consequences of a GLO being that it opened the way to costs sharing:

> "without which many smaller investors would in all probability be prevented from pursuing a claim (since the exposure would so enormously outweigh any potential recovery)."

At [24] he referred to the default position under CPR r 46.6(3) which provides as

follows:

> "Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs."

At [29] he referred to the fact that none of the parties represented before him actively contended for the default rule, but all accepted that there should be several liability, the dispute being as to the basis of apportionment, an issue I refer to below.

29. Those were the authorities which I was shown. As can be seen, several liability was ordered in each of them, although it is fair to say that there appears to have been little if any argument on the point. But they certainly bear out the points I made earlier that I have not been shown anything (at any level) which suggests that the guidance given by *Ward* has been overtaken by developments; nor have I been shown any example of joint liability being imposed on parties in litigation of this type.

30. Mr Birt said that the litigation context had changed immeasurably since *Ward* was decided in 1996, which was before the CPR, before GLOs, before commercial funding, and before the developed market in ATE insurance. That is of course true, but I do not see in any of these developments any particular reason why the way in which the balance was struck in *Ward* has become outdated. Certainly the introduction of the CPR and GLOs does not seem to me to suggest this, as the CPR contained, and contain, provisions under which the default position in a GLO is several liability. Nor do I think that the rise of ATE insurance should make a difference: ATE insurance is about insuring oneself against the risk of an adverse costs order, and as a matter of principle it seems to me that if a group of claimants lose an action, the question what costs order should be made against the claimants in favour of the defendant(s) should be decided first as between the parties to the litigation, without regard to the question whether the claimants are insured in relation to that liability.

31. So far as commercial funding is concerned, it is true that this can provide a solution to some extent to the question of access to justice. But it comes at a heavy price, and as the present case illustrates, not every claimant wishes to take advantage of it. And in any event the availability of commercial funding is about being able to afford one's own costs; it is not about the adverse costs risk. I see no reason to think that the risk of joint liability has ceased to have a deterrent effect. Those of relatively modest means whose claims are small are likely to consider any substantial costs risk as outweighing the potential recovery; and those who are wealthier and have larger claims are likely to fear that a defendant with the benefit of a costs order enforceable against all claimants jointly will seek to recover first from those with the most assets, or at any rate those which are most easy to enforce against, including their homes.

32. In those circumstances, as I said in my short oral judgment, I have not been persuaded that the change in the legal landscape changes the fundamental equation as to where the risk ought principally to lie; nor does the fact that in this case no GLO has (yet) been made, and may never be (the Claimants are reserving their position on the point), since the case shares very many characteristics with the sort of cases which are suitable for a GLO, and in particular, the characteristic that a very large number of claimants are bringing claims together.

33. That was the basis on which I decided that in principle an order for several liability rather than joint liability should be made.

The pro rata point

34. The other issue that Mr Bacon asked me to expand upon was the pro rata point. This was Question 2(a) on the agreed list of issues, which was as follows:

> "What is the basis on which the Claimants' liability for adverse costs is to be apportioned, ie should it be pro rata to the size of their cash investments or per capita?"

35. The answer that I gave in my oral judgment was that it should be pro rata rather than per capita. What I said was as follows:

> "6. Question 2(a): I have not the slightest doubt that it should be apportioned pro rata to the size of their cash investments, rather than per capita. I am sorry, Mr Duffy, but you were not only facing opposition from all the other counsel, but I am afraid you were facing an instinctive opposition from the bench. It does seem to me, as a matter of fundamental equitable principles, that if a number of people band together in a venture, whether that be litigation or anything else, and they stand to get out of it very disproportionate rewards, then if they are going to share the risks, the starting point as to what is fair is that they should share the risks proportionate to the possible rewards. That was what was done in RBS.
>
> 7. The notion that in a case like this, where some people have invested £35,000 or £50,000 and other people have invested millions, that they should be equally liable on a per capita share for the downsides of the litigation when the upsides of the litigation are so disproportionately spread is one that I do not find attractive in the least. I will provide for liability to be apportioned pro rata to the size of their cash investments."

36. Although Mr Bacon asked for expanded reasons, there is not much to add to this reasoning which speaks for itself, but I will do what I can. As there appears, the only counsel who positively argued for a per capita sharing of the liability was Mr James Duffy, who appeared for UBS, all other parties being content with a pro rata apportionment based on the Claimants' cash investments.

37. As also there appears, the amount of each Claimant's investment varied quite significantly. There was in evidence a schedule of the Stewarts Claimants who are bringing claims against the Ingenious Defendants showing the total cash contribution of each. At the top end the single largest contributor invested £10.5m, the second largest £5m, and four others £3m or more. Between them those six investors contributed nearly £29m, which amounts to over 20% of the total contributions (of the Stewarts Claimants) of some £143.5m. At the other end of the spectrum, there are 12 Claimants who contributed £36,000 each (and hence between them about 0.3% of the total contributions).

38. Although the default position under CPR r 46.6 is that liability for common costs will be shared by litigants equally (that is per capita), the Court plainly has a jurisdiction to order that the liability be shared in some other way, and this was done in *RBS* [2014]. There indeed it was not suggested that there should be a per capita order, and the

argument was what sort of pro rata order should be made, namely one which divided the costs between all claimants in proportion to acquisition cost, or one which divided the costs equally between the different claimant groups, and then split between the members of that group: see per Hildyard J at [29]. He decided on the former: see at [33].

39. At [28] he said this:

> "Where there is, as there is in this case, a very considerable disparity between the values of the claims of different parties, if they are all unsuccessful the default rule is unlikely to meet the requirement of fairness. It is not fair or equitable that an institutional investor with millions, in some cases hundreds of millions, at stake should pay an equal contribution as an individual claimant with claims in the hundreds, or even hundreds of thousands. Adoption of the default rule would tend to negate a primary purpose of GLOs."

40. At [33] he gave further reasons for his order, saying, among other things:

> "(3) whilst for the reasons I have already adumbrated, the starting point of equality of risk for every litigant must, where there is such a disparity in the value of claims, yield to some fairer relationship between risk and reward, the objective should be a fair alignment of risk and reward by reference to the position of each claimant, the group they have chosen to join being of little, if any, legal or logical relevance; …
>
> (5) I have taken account, and indeed when the matter of costs sharing was first ventilated in July 2013 was much swayed by, the dangers of any allocation which in effect enables persons to litigate at minimal risk individually (which is the mathematical result in the case of persons with small claims, however measured): I have concluded that the advantages outweigh the risk, and it is after all to enable claims where the reward hugely outweighs the risk that the rules have provided for several liability in the context of GLOs. Further, and as Mr Lazarus on behalf of the LK Group stressed, the effect of cost sharing is that even those with large claims face a comparatively small costs exposure: the risk is very much diluted for all."

41. My own view is very much aligned with these. Given that I have already decided that the liability of the Claimants for the Defendants' costs should be several rather than joint, it seems to me fairer that the risks to a Claimant of participating in the litigation should be proportionate to the reward that he or she might obtain from the litigation. The notion that someone who invested £36,000 (and who, if successful, might recover compensation, whether for loss of investment, penalties or interest, commensurate with that) should contribute to the common venture exactly the same as someone who invested £10.5m (and whose compensation if successful would be very much larger accordingly) seems to me plainly unfair on the most basic principles of equity.

42. It is noticeable that in *Davies v Eli Lilly* Sir John Donaldson MR said of Hirst J's order at 1141D:

> "Those who practise in the Commercial Court, of which Hirst J is one of the judges, will recognise the age old respectability of such an order, based as it clearly is upon the Rhodian Law, the Rolls of Oleron and the maritime law of general average."

Those who do not practise in the Commercial Court might like to be reminded of the maritime law of general average, set out in *Halsbury's Laws* (vol 7 (2015), Carriage and Carriers) at §606 as follows:

> "**606. Principle of general average.**
>
> General average is part of the law of the sea founded on equity. It formed part of the Rhodian law, was based in earlier custom and existed many centuries before the existence of marine insurance. Rhodian law provided that, when cargo was thrown overboard to lighten a vessel, that which had been given for all had to be replaced by the contribution of all. The most often cited legal definition of 'general average' is 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo losses within general average, and must be borne proportionately by all who are interested'."

The relevant word here is "proportionately". Those interested in the preservation of the vessel (generally ship, freight and cargo interests) have to make a general average contribution calculated according to the value of their interest (see *op cit* §608 referring to a *"rateable contribution"*), and there are rules as to how such interests fall to be valued for this purpose.

43. That principle of maritime law (incidentally said to be founded on equity) seems to me to be very similar to the principle I tried to express in my oral judgment that those who embark on a venture together should bear the risks involved in the venture proportionately to their interests in its success. Although the order made by Hirst J in *Davies v Eli Lilly* was in fact on a per capita basis, it suggests to me that Sir John Donaldson would have been sympathetic to an order providing for a pro rata contribution to the costs had the plaintiffs' claims differed widely in value. In fact the plaintiffs, who were mostly elderly, did not have very large claims (see at 1138E-H). It is perhaps unlikely therefore that their claims showed the same disparity between the values of claims as in the present case.

44. Mr Duffy made a number of points. He said that there was no logical link between the amount invested by a particular Claimant and the costs that would be required to fight that claim. As a general principle I accept that is likely to be so: it would probably cost much the same to litigate an individual claim whether the amount invested were £100,000 or £1m. But I do not see where this logically leads. The claims are not going to be separately litigated as 500 separate claims. They are (one hopes) going to be managed so that the issues can be resolved by the trial of a selection of claims. That means that a Defendant such as UBS will not face the costs of defending every claim brought against it, large or small, but only such of the claims brought against it (whether large or small) as end up being tried. It is not disputed that if it is wholly successful it can expect to have an order for costs made in its favour, and that will be an order against all the relevant Claimants, albeit on a several basis. In that way it should in principle recover the costs of defending the claims that are actually tried, regardless of whether those are the larger claims or the smaller ones or a mix of the two. The present issue is not about how much costs it can recover but how that liability is to be split between the Claimants. I do not see that the fact that a small claim might, had it been tried separately, have cost as much to defend as a large claim has any relevance to that question.

45. Second he said that the usual or standard order was for the liability to be apportioned

per capita. That is so, but in many cases, such as the right to buy litigation, one might expect the claims to show nothing like the degree of variation in the present case. In any event in none of the other cases I was shown does the point appear to have been argued until *RBS* [2014].

46. Then he said that *RBS* [2014] was a very extreme case with some small investors investing mere hundreds, and some large institutional investors hundreds of millions of pounds. That may be so, but the principles do not seem to me to apply only in extreme cases. In the present case, even though not as extreme as *RBS* [2014], it can still be said that there is a *"very considerable disparity between the values of the claims of different parties"*; in the case of the Stewarts Claimants, the largest investment of £10.5m is nearly 300 times that of the smallest investment of £36,000.

47. Mr Duffy then referred to information that had been provided about the current net wealth of some of the Claimants, from which it appeared that although the largest investors were generally, as one would expect, said to be the wealthiest (the amount of their original investment being likely to be proportionate to their then income), that was not always the case and UBS could find itself chasing large investors where they either now had few assets, or no information was available. That may be so, but a division of the costs per capita would mean that UBS would have to pursue a large number of investors for equal amounts despite the fact that they are likely to have very unequal assets. It is not at all clear to me in those circumstances that UBS would be better off with a per capita order.

48. Finally Mr Duffy said that the position was exacerbated by the fact that some of the larger investors were self-funded. He said it was unfair that there should be a push away from those Claimants who had the benefit of being funded and where the Defendants had the benefit of being able to go after the funder, on to self-funders who could end up bearing a disproportionate amount of the costs liability. I understand why UBS would prefer it if a larger share of the overall costs liability fell on the funded rather than self-funded Claimants, which may explain why Mr Duffy made the submissions he did, the self-funders tending to be (although by no means always) among the larger investors. But the risk of being sued by an individual who is funding himself and hence where there is neither a funder for a defendant to look to, nor usually any prospect of obtaining security, seems to me to be one of the risks that a defendant simply has to bear. I do not see that the apportionment as between the Claimants should be distorted from what seems to me obviously fair so as to mitigate that risk.

49. In those circumstances I remain of the view that the appropriate order is one under which the Claimants' liability for costs is apportioned pro rata rather than per capita. No party suggested that if this was to be done it should be done other than by reference to the amount of cash contribution invested by each Claimant, as proposed by Mr Bacon. There might in strict theory be an argument for proposing that it be apportioned by reference to the amount of compensation claimed by each Claimant instead, but in practice this would cause significant practical difficulties as it would require an assessment to be made of each Claimant's claim, and the likelihood in any event is that the amount of cash contributions (readily ascertainable, and indeed already ascertained) is a good proxy for the respective values of the Claimants' claims.

50. That concludes the issues on the Claimants' application on which I was asked to expand my oral judgment.

Question 2(b)

51. The next question (and the only other question which I need to address on the Claimants' application) is Question 2(b) on the list of issues, which was as follows:

> "Should the order which the Court makes now be one which, in general terms, resembles that proposed by (a) the Stewarts and Peters & Peters Claimants of 28 October 2019, or (b) the Application Defendants as attached to the Ingenious Skeleton Argument."

I will refer to those as **"the Claimants' order"** and **"the Defendants' order"** respectively.

52. In my oral judgment I did not reach a conclusion on this question. What I said was as follows:

> 8. I am going to park, I am afraid, 2(b). I do not find that a question which is capable of short or easy answer. In general, I agree that it is sensible to put in place now a structure which is capable of being adapted later. The general principles do not seem to me to be difficult in concept. There will be certain costs of this litigation which it is appropriate should be shared, as I have just explained, on a pro rata basis. There will be certain costs which it is appropriate should be borne by claimants individually.
>
> 9. Given the very complex nature of the way in which the claims have been brought, it is entirely possible, indeed very likely, that there will be costs that should be shared by some groups of claimants and not other groups of claimants. For example, the liability of the claimants to UBS in the event that UBS is successful and has a costs order in its favour is one which, prima facie, one would expect to be shared, save insofar as any of those costs related to individual claims, by the claimants (all the claimants and only the claimants) who brought claims against UBS.
>
> 10. But I do not think that it is necessary at this stage to try and draw up lists of issues and try and allocate particular issues to particular sharing regimes. All that it needs -- and, in my judgment, all that can really be done at this stage -- is to enunciate the principle that where costs ought to be shared because they are common, either among all the claimants, which will apply to the administrative costs and may apply to other costs but it is far too early for me to form a view on that, or among particular groups of claimants, then they should be shared pro rata in the way indicated.
>
> 11. Quite what that means in terms of what the form of order looks like, I would like to give further consideration to."

And then later on:

> "20. That deals with the issues I was asked to deal with in relation to several liability, the claimants' application, apart from one other point which I can make on 2(b), which is whether the order should at this stage provide for the claimants' recoverability of costs, whether the claimants should be able to

recover both their individual costs and their share of common costs and the architecture in Mr Bacon's draft for that.

21. I see entirely why he says that logically follows and is a sensible provision to put in place, and I think at this stage, it is almost inevitable that some such architecture will need to be put in place, because just as the claimants' liability to meet the defendants' costs will be driven by which issues are common and which are individual, the claimants' ability to recover costs will necessarily also be driven by which of their costs they have incurred are individual and which are common.

22. But in the light of Mr Birt's complaint that this was not really dealt with in the evidence, and in the light of the very scanty argument that I have heard on that aspect, I am content not to make any order in relation to that aspect at this stage, but I would anticipate that such an order or an order along those lines will in due course be necessary, and one would hope that the parties would be able to agree some suitable structure for that purpose. That is all I want to say at this stage on the claimants' application."

53. As I say there, the general principles do not seem to me conceptually difficult, but the detailed working out of the principles in a case such as this where there are three groups of Claimants suing a variety of different Defendants requires considerable care. I was not really addressed on the detail and certainly not taken through the drafting of the rival orders in minute detail. Mr Bacon made a general submission that as soon as you tried to work out what needed to be done you would inevitably end up with an architecture such as that put forward in the Claimants' order, and had some specific criticisms of the Defendants' order, but otherwise did not address me on the detailed mechanics. Counsel for the various Defendants similarly addressed me to some extent on what they submitted were shortcomings in the Claimants' order.

54. In those circumstances I propose to start by setting out what I understand the general principles to be. In the simple case such as *Ward*, there are a number of claimants (there 99) bringing actions against a single defendant (there Guinness Mahon) which raise some common issues, and where certain claims are to be tried first. The idea behind the costs sharing order is that all the claimants should contribute to the costs that benefit them all, that is the common costs. That has two facets. One is the claimants' potential liability for the costs of the defendant. The second facet which the costs order may (but so far as I can see need not) deal with is the claimants' liability to contribute to their own solicitors' costs, both if they lose and if they win (as they will be unlikely to recover all their costs from the defendant even if entirely successful), and the recoverability of such costs from the defendant.

55. I propose at the moment to focus only on the first facet, that is the claimants' liability for costs orders in favour of the defendant. If the defendant succeeds at trial it will expect to obtain a costs order in its favour; and it may also obtain any number of costs orders at interlocutory hearings. The general principle does not seem to me to be difficult to state, which is that all the claimants who were potentially interested in the part of the case on which the costs were incurred should bear an apportioned part of the liability for the defendant's costs insofar as they were common costs.

56. That gives rise potentially to three supplementary questions: (i) which claimants were interested in that part of the case? (ii) which costs incurred by the defendant were

common costs? and (iii) how should they be apportioned?

57. The present case is factually much more complex, but I do not see that this affects the principles. A table included in Mr Bacon's written submissions shows that while all the Claimants bring claims against one or more Ingenious Defendants (but not necessarily the same ones), the numbers claiming against other Defendants varies widely. Thus there are 113 Mishcon de Reya Claimants, none of whom brings claims against non-Ingenious Defendants; and of the 125 Peters & Peters Claimants, only a comparatively small number do (1 against UBS, 15 against Coutts, 25 against Natwest, and 9 against others – this is subject to the impact of the judgment I gave disposing of certain claims against Coutts and Natwest); whereas of the 278 Stewarts Claimants, 249 bring claims against HSBC, 50 against UBS (which would suggest that at least some of these 50 also have claims against HSBC), 11 against SRLV, 19 against Coutts and 25 against others.

58. But as I say I do not think that affects the principles. Of the 3 supplementary questions I have identified above, the answers I have already given effectively deal with (iii), the answer being that the apportionment should be on the basis of several liability apportioned pro rata to the relevant Claimants' cash contributions; but I cannot deal in the abstract with the other two. That depends on the circumstances in which each costs order in favour of a Defendant is made. Suppose for example there is an interlocutory hearing at which an application is unsuccessfully made against UBS, and UBS is awarded its costs. Which of the Claimants should contribute to this? The answer is all those interested in the matter that was argued. That is very unlikely (although it is not completely inconceivable) to include any Claimant who does not bring a claim against UBS. But it does not necessarily include all those who do (the 50 Stewarts Claimants and the 1 Peters & Peters Claimant). It might include only the Stewarts Claimants, arising out of a point that they took but that the Peters & Peters Claimant did not. It might not include all of the Stewarts Claimants – it might have concerned only a subset of them, or conceivably only one. None of this can be prescribed for in advance.

59. Nor do I think that it is easy to prescribe in advance what costs are common costs. Instinctively one might think that costs incurred on an individual claim would be individual costs, and costs incurred on common issues would be common costs, but it is not as simple as that. The whole point of selecting certain claims to be tried first as lead claims is that the outcome of those claims should benefit everyone. Thus one finds in CPR r 46.6(2) a definition of "common costs" for the purposes of a GLO as follows:

> "(i) costs incurred in relation to the GLO issues
>
> (ii) individual costs incurred in a claim while it is proceeding as a test claim
>
> (iii) costs incurred by the lead legal representative in administering the group litigation."

That illustrates that if a claim is tried as a test claim, the costs incurred on that claim, although costs incurred in relation to a particular claim, should be treated as common costs not individual costs. That seems right: the whole problem that *Davies v Eli Lilly* was trying to solve was that if the costs of the lead actions were treated as incurred for

the sole benefit of the individual plaintiffs in those actions, no-one well advised would put their name forward for that role, and hence that all the plaintiffs should contribute to those costs, whether they were lead plaintiffs or not; the same should follow where, as in *Ward*, an order is made the effect of which is to make all the plaintiffs liable for the defendant's costs. But I think it is very difficult to prescribe in advance which costs are to be treated as common costs and which not, and in any event because of the complexity of the claims in the present case, it would not fully answer the question, as it would still beg the question "common to whom?". No decision has yet been made even as to the impact that the trial of the claims of the Pleading Claimants will have on those of the non-pleading Claimants, this being something that as I understand it is due to be argued at CMC 2.

60. Nor do the difficulties stop there. One of the features of the present case is that there were 8 different Ingenious schemes, with different Ingenious entities involved in each scheme. Some Claimants may have participated in a single scheme, but others undoubtedly participated in more than one year and hence in more than one scheme. Some issues as between the Claimants and the Ingenious Defendants may be common to all 8 schemes; some may be common to the film schemes but not the one games scheme; some (for example claims based on representations made in a particular year in relation to a particular scheme) may only relate to individual schemes. It is not therefore simply a case of identifying whether costs are common or not; they may be common to all the claims against Ingenious Defendants, or they may be common to only some of them.

61. I am therefore wary at this stage of seeking to do any more than articulate the general principle that I have already set out, that where a costs order is made in favour of any of the Defendants, the relevant Claimants should be severally liable on a pro rata basis for such part of those costs as are common costs. In any particular instance that needs filling out by identifying both who the relevant Claimants are (namely those who are interested in the particular question which gave rise to the costs), and which costs are to be treated as common costs, or to put it more simply: which costs are common? and common to whom?

62. I am conscious that that does not really answer Question 2(b) in the terms in which it is asked. I do not intend to set out the full detail of each of the rival orders, but only to identify the main points, and those specifically argued. Taking first the Claimants' order, it has the following main features:

(1) It seeks to deal with both the calculation of costs recoverable by a Claimant, and the calculation of costs recoverable by a Defendant from a Claimant.

(2) It contains provisions for a Claimant Register, identifying the membership of each Claimant Group. A Claimant Group does not appear to be defined as such, but by reference to the definition of Claimant Group Costs, it appears to consist of those Claimants represented by the same solicitors who are pursuing claims against the same Defendant, for example the Stewarts Claimants who are pursuing claims against UBS. There is a drafting point on this (below) but the general intent is clear enough.

(3) It contains provisions for additional Claimants to come onto the Register, and for Claimants to come off the Register if their claims are discontinued or

settled.

(4) It provides for accounting periods, on a quarterly basis going forward.

(5) It identifies three levels or baskets of costs on each side. First there are Claimant Common Costs. These comprise (a) Administrative Solicitors' costs (already defined by an Order of Morgan J dated 20 March 2018 by reference to certain administrative tasks to be performed by Stewarts on behalf of all 3 Claimant groups) and (b) any other costs that the parties agree (or the Court orders) to be Claimant Common Costs. The intention is to identify those costs incurred by the Claimants which benefit all Claimants, whichever group they are in, and whichever Defendants they bring claims against. I was not I think given much in the way of specific examples of that.

(6) Then there are the Claimant Group Costs. I have already explained what a Claimant Group appears to be, and these are costs common to Claimants in the same Claimant Group, for example the Stewarts Claimants pursuing claims against UBS, or the Peters & Peters Claimants pursuing claims against Coutts.

(7) Then there are Claimant Individual Costs which are costs incurred by a Claimant which are not either Claimant Common Costs or Claimant Group Costs; it is said that they will normally concern matters which are personal and specific to an individual Claimant.

(8) Largely mirroring these are Defendant Group Common Costs, Defendant Group Costs and Defendant Individual Costs. These are not drafted by reference to whether the costs are incurred on issues common to the Defendants, but by reference to whether the costs are (i) incurred on issues common to more than one Claimant Group; (ii) on issues common to a Claimant Group; and (iii) on a specific Claimant's claim.

(9) These definitions are then used to provide for the calculation of costs recoverable by Claimants and Defendants respectively. The general principle is that a Claimant is entitled to recover, under an order for costs in their favour, a pro rata share of Claimant Common Costs and of Claimant Group Costs (and I assume the intention is their Claimant Individual Costs although it does not actually say so); and is liable to pay, under an order for costs in favour of a Defendant, their pro-rata share of that Defendant's Defendant Common Group Costs and of Defendant Group Costs (and again I assume the Defendant Individual Costs attributable to their claim).

63. I said that there was one drafting point on what a Claimant Group is (by reference to the definition of Claimant Group Costs). This refers to claims against "the same Defendant". It is not clear how this is intended to work in the case of the Ingenious Defendants. Are all the Ingenious Defendants to be treated together so, for example those Stewarts Claimants who bring claims against Ingenious Defendants (that is, all 278 of them) are to be regarded as a single group? Or are there separate groups depending on which scheme(s) individual Claimants participated in, and hence which Ingenious entities a Claimant claims against? At one point in his submissions, when considering the Defendants' liability for the Claimants' costs, Mr Bacon said that they would dispute any attempt to divide up costs within the Ingenious cohort as it would

be enormously difficult (and Mr Tom Mountford, who appeared for the Mishcon de Reya Claimants, said something similar, describing it as an absolutely monstrous task); but at another point in his submissions, when considering the potential liability of the Claimants to the Defendants, Mr Bacon said that one could not have a situation in which a Claimant who invested in only one scheme (such as Mr Rushton-Turner, who invested in a scheme called ITP) should be liable for the costs of any of the other Claimants who invested in other schemes. I am not sure these positions are mutually consistent, but I do not propose to consider this any further, as I was not asked to resolve the point and did not hear extended argument on it; indeed Mr Birt said that that was a debate for another day. It is however to my mind an illustration of the danger of trying to draft a structure in the abstract, as it were, without thinking about how it will actually work in practice with real specific examples.

64. The Defendants' order has the following features:

(1) It only provides for the Claimants' liability for adverse costs. It does not seek to deal with the calculation of costs recoverable by the Claimants.

(2) As drafted it contained provision for the Stewarts and Peters & Peters Claimants' liability to be several up to the level of security or indemnity provided by Therium, but joint and several for amounts in excess of that.

(3) It provides for a process under which the parties are to seek to agree a "Costs List of Issues", with the Court resolving any disputes on this, and deciding the basis on which liability for adverse costs should be allocated between the Claimants, at CMC 3.

(4) It sets out various principles which the Court shall have regard to, including in particular the identification of separate categories of costs, including (i) costs incurred by a Defendant in responding to all of the Claims; (ii) costs incurred by a Defendant in responding to a subset of the Claimants (the definition of such subsets to be the subject of further consideration by the Court); and (iii) costs incurred by a Defendant in relation to claims pursued by an individual Claimant.

65. I propose first to consider the Claimants' criticisms of the Defendants' order and then vice-versa. Mr Bacon put forward three points:

(1) The first was that the Defendants' order provided for several liability for that part of the costs covered by security or an indemnity from Therium and joint and several liability for the excess. In the light of the decisions I have already come to, that provision obviously cannot stand.

(2) The second was that it provided:

> "the Stewarts and Peters & Peters Claimants to pay the recoverable costs of the Original Defendants"

which Mr Bacon read as providing for *all* the Stewarts and Peters & Peters Claimants to pay the recoverable costs of *all* the Defendants. That is a simple misreading of the Defendants' order. What it actually provides is:

> "the liability of … the Stewarts and Peters & Peters Claimants to pay the recoverable costs of the Original Defendants (i) shall be several up to the amount of [etc]"

As Mr Birt explained (and I agree this is the natural interpretation of these words), this does not purport to make all the Stewarts and Peters & Peters Claimants liable for all the Defendants' costs. It is only dealing with the question whether, if a costs order is made in favour of a Defendant, the liability of the Claimants who are liable to pay is a joint and several liability or a several liability. It is not purporting to decide which Claimants are so liable. There is nothing in this point.

(3) Third, Mr Bacon complained that the effect (and he would suggest intent) of the Defendants' order is to put off the question as long as possible, what he referred to as *"kicking the can down the road"*. That I do not think is right. The essential question which needs to be decided on this application is whether the Claimants' liability should be several or not. That was what Mr Bacon described as the nut that needed to be cracked. I have already answered that question. Having done so, I am not sure that I see the Defendants' order as putting things off any more than the Claimants' order. Neither seeks at this stage to identify which costs are common, and common to whom. What the Claimants' order seeks to do is set up an architecture or structure, which can later be populated. The Defendants' order seeks to set up a mechanism for deciding which costs are common or not, and for the Court to resolve how such common costs are to be allocated. But the identification of what are common costs has to be done under either order. So the only real difference is whether you build the architecture first and then identify the common costs; or first identify the common costs and then decide on the structure. I do not see one process as inherently designed to put things off more than the other. Nor did I detect any real dispute by the Defendants that in principle liability for common costs should be shared by those interested in the issue which gave rise to those costs. The argument was primarily about whether such liability should be several or not.

In those circumstances I do not think Mr Bacon's specific criticisms of the Defendants' order are well-founded.

66. Mr Mountford had another point which is that the proposed Costs List of Issues might prove to be an impractical and disproportionate exercise if it involved seeking to characterise every pleaded issue as falling within a particular costs category. There is I think some truth in that, in that in my experience long lists of issues in complex litigation can take a very long time to agree, even as between two parties, let alone where there are multiple parties, as each party tends to divide up the issues in a different way, sometimes for tactical reasons and sometimes simply because they see the case from a different perspective. But ultimately either the parties are going to have to agree, or the Court is going to have to decide, whatever the form of order that is adopted, which costs are common and to whom they are common.

67. I can consider next the Defendants' specific criticisms of the Claimants' order. Mr Birt referred to the following;

(1) It deals not only with the Claimants' liability for the Defendants' costs but also what the Claimants can recover, but no explanation had been given for this. I think Mr Birt was protesting a bit too much here: it does not seem very difficult to understand that just as a Claimant if unsuccessful should be liable for the costs incurred by the Defendants on their individual claim and an apportioned share of the common costs incurred by the Defendants, so they would expect if successful to recover the costs they had incurred on their individual claim and an apportioned share of common costs. As Mr Bacon said they naturally go hand in hand. Nevertheless it is the case that I heard very little argument on this aspect of the Claimants' order and Mr Bacon accepted that his clients were most concerned about what their liabilities would be.

(2) The main point however that Mr Birt made was that the architecture of the Claimants' order was very complicated but it might not end up being appropriate. The way he put it was that it was far from clear that dividing up the costs by group in the way that had been done was ultimately going to be the best way to do it.

68. I tend to agree with the latter point. I see entirely what Mr Bacon is trying to do, and I accept that at the end of the day many of the costs which will fall to be dealt with will fall into one of the baskets that he has identified. But I feel very far from confident that this will be true of all the costs. I have already suggested that it is not obvious how his group structure is intended to deal with the fact that some Claimants claim against one Ingenious Defendant and some against others. Let me give another example. How does the order apply to costs incurred on the present application? Mr Bacon's fees are not Claimant Common Costs as defined, as they are not costs incurred by Stewarts in their capacity as Administrative Solicitors, nor have they been agreed as Common Costs, nor, since they only affect the Stewarts and Peters & Peters Claimants and not the Mishcon de Reya Claimants, would it be appropriate for them to be borne by all the Claimants. It is self-evident that they should be borne by the Stewarts and Peters & Peters Claimants alone. But they would not appear to be Claimant Group Costs either as they are not costs common to Claimants represented by the same solicitor pursuing claims against the same Defendant: they are common to Claimants represented by two different solicitors who are pursuing claims against numerous different Defendants. But they are also plainly not intended to be Claimant Individual Costs.

69. Mr Bacon I think suggested that in cases like this the costs could be apportioned between the various Claimant Groups. But I do not think that necessarily works either. Suppose two Stewarts Claimants who have invested the same amount (say £100,000), one of whom (A) only brings a claim against Ingenious Defendants, and the other of whom (B) also brings a claim against an intermediary, say UBS. Should B bear (and be able to recover) the same proportion of the costs incurred in briefing Mr Bacon as A? Since they invested the same amount, and both stand to benefit equally from Mr Bacon's advocacy, one might expect this to be the case. But if the costs are apportioned between the various Claimant Groups, B will end up paying more than A, as he will bear the same share of the costs apportioned to the Claimant Group consisting of "Stewarts Claimants claiming against Ingenious Defendants", but in addition bear a share of the costs apportioned to the Claimant Group consisting of

"Stewarts Claimants claiming against UBS". (It is no answer to say that all the Stewarts Claimants are suing one or more intermediaries, partly because I have no idea if this is the case, but also because Mr Bacon is also appearing for Peters & Peters Claimants many of whom are not suing anyone except Ingenious Defendants). This sort of question (should a Claimant suing two separate Defendants be liable for, and able to recover, the same costs, or more costs, than a Claimant suing one Defendant?) should be raised and answered on its own merits, not answered as a by-product of the way in which the architecture is drafted without this point in mind.

70. I am therefore inclined to agree with Mr Birt's submission that the Claimants' order contains all sorts of tripwires that might cause problems in the future.

71. There were a few other specific points. Mr Andrew Green QC, who appeared for HSBC, had concerns that the Claimants' order could make HSBC liable for costs, such as Administrative Solicitors' Costs, incurred before the claims against HSBC were ever brought; or for Claimant Common Costs incurred by Claimants who had not brought claims against HSBC. I am not sure that the latter point is really well-founded but I can see the former might be on the way the Order is drafted.

72. I also received written submissions from Mr Christopher Greenwood on behalf of Pannells Financial Planning Ltd (**"Pannells"**), an IFA that is alleged to have given negligent advice to a single Claimant (Mr Beswick, represented by Peters & Peters) who is not one of the Pleading Claimants. That was to the effect that the Claimants' order could work very unfairly against such a Defendant as it could find itself liable for an apportioned part of (very large) common costs that had very little connection with the issues in the claim against Pannells.

73. This particular submission illustrates how one cannot understand how the costs-sharing order will work in practice until one has a better idea of what costs are common, and common to whom. On the face of the Claimant's order, the relevant Claimant Group Costs are those costs common to Claimants represented by Peters & Peters who are pursuing claims against Pannells. But there is no such Claimant Group as the only such person is Mr Beswick himself, and so there are no common costs. That would appear to mean that the only costs for which Pannells would be liable would be Mr Beswick's apportioned share of Claimant Common Costs (Administrative Solicitors' Costs and others agreed to be common to all Claimants) which are likely to be relatively small, and Mr Beswick's Individual Costs. On that basis, I think Pannells' fears, as articulated by Mr Greenwood, are probably overstated. But it does illustrate that attempting to draft the architecture now, before applying it to particular cases, may produce unexpected results. Whether Pannells should have any wider potential liability for costs incurred on the lead actions should not depend on the accidents of drafting, but on whether anything decided in the lead cases is of any relevance to the claim against it. Mr Greenwood says that the claim against it is unique: it depends on the terms of the retainer given by Mr Beswick, the advice given to him, his level of sophistication, and, for limitation purposes, what he knew or should have known when; and that none of that will be affected by other cases by other Claimants against other advisers. That may be right, but I am in no position at this stage to assess that, or to decide if the lead cases will have any material consequences for the claim against Pannells.

74. Having surveyed the various points made on all sides, I can give my conclusions:

(1) The most important thing is to decide the question I have already decided, that the Claimants' liability should be several rather than joint.

(2) I have also decided that the Claimants' liability should be apportioned on a pro rata rather than a per capita basis.

(3) I have also stated what I believe to be the general principle that where a Defendant incurs costs that are common to more than one claim, the Claimants who should be potentially liable for those costs are the Claimants who are potentially interested in the part of the case on which those costs were incurred.

(4) The working out of that principle requires in any particular case identification of which costs are common, and common to whom.

(5) It is too early to do that, and until some clarity is obtained as to which claims are going to be tried and what effect they will have on the other claims it will probably not be possible to do it.

(6) So far as the Claimants' order is concerned, no objection was made to the parts concerning the keeping of the register and quarterly accounting periods, and it probably makes sense to put those in place now. But I am not convinced that what is required is to put into place the detailed structure found in the order now, and there are dangers in trying to do so, as it may be found too prescriptive and have unexpected and unwelcome side-effects. To that extent I accept Mr Birt's criticism of it. On the other hand I suspect that something along those lines will ultimately be required. I also do not think that it is necessary now to deal with the recoverability of the Claimants' costs and given that it was objected to, and I heard very little argument on it, I think that should not be provided for now; but I doubt it will in the end prove to be very controversial.

(7) On the other hand so far as the Defendants' order is concerned, I am not attracted by the idea of a formal process of drawing up lists of costs issues, which is likely to prove contentious and drawn out. Matters may be rather clearer after a decision has been made as to which claims are to be tried and what effect they will have on other claims.

75. It can be seen that I am not entirely supportive of either draft order. To my mind the most important thing, once the questions of several liability and the basis of apportionment have been decided, is the principle that liability for common costs should be shared between those interested. That principle having been established, how one puts flesh on the bones is to my mind much less important. The parties should give further thought to how to take that forward, although as I say it may be easier after CMC 2.

Other questions on the Claimants' application

76. I do not need to say anything about the other questions raised on the Claimants' application (Questions 2(c) to (f)) as I dealt with those in my oral judgment and no party has asked for expanded reasons.

Security for costs

77. Question 3 on the list of issues was:

> "If the Stewarts and Peters & Peters Claimants' liability for adverse costs should be several, should Therium give security for the costs of the Application Defendants?"

78. That reflects the facts (i) that a number of the Defendants (the Ingenious Defendants, HSBC, UBS and SRLV, but not Coutts, RBS and Natwest) have applied for security for costs; (ii) that Mr Birt, who took the lead on this, made it clear that he would only press the application for security if the several liability order were made; and (iii) that the application is only against Therium, which is providing funding to the Stewarts Claimants (and as already explained not all of those, as some of them are funding themselves) and the Peters & Peters Claimants. The Mishcon de Reya Claimants have their own funder, but arrangements satisfactory to the Defendants have been entered into with them and I am not concerned with their position.

79. There is no dispute that the Court has power to order security for costs against a funder such as Therium. CPR r 25.14 provides as follows:

> "**25.14 Security for costs other than from the claimant**
>
> (1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if—
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions in paragraph (2) applies.
>
> (2) The conditions are that the person—
>
> (a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
>
> (b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and
>
> is a person against whom a costs order may be made."

It is common ground that in the case of Therium the condition in CPR r 25.14(2)(b) is satisfied, as Therium is a funder that has contributed to the Claimants' costs in return for a share of any recovery. Mr Birt pointed out that Therium is in the business of commercial funding of litigation, and is acting in its own commercial interest (as it is of course entitled to), not out of a pure desire to see justice done.

Can security be ordered against Therium in respect of self-funded Claimants?

80. Subject to one point it is also common ground that if the claims fail, the Court can make an order for costs against Therium under s. 51 SCA 1981. Mr Kirby however said that the Court could only do so in respect of the funded Claimants, and not in respect of the self-funded Claimants. Strictly speaking the decision in *Aiden Shipping*

is that there is no limit on the Court's jurisdiction under s. 51 SCA 1981, but it is well established that the jurisdiction must be exercised in a principled way: see for example the recent decision in *Travelers Insurance Co Ltd v XYZ* [2019] UKSC 48. Mr Kirby therefore accepted that his submission was in effect that there were no grounds on which the Court could properly exercise its s. 51 jurisdiction to make Therium pay for costs which are the responsibility of the self-funded Claimants.

81. I agree, and indeed said so in my oral judgment where I said this:

> "13. …It seems to me that claimants who are self-funding cannot be properly made the subject of an order for security against Therium under CPR 25.14 because the principle for awarding security under 25.14 is that Therium as a funder will be liable potentially under section 51. But it will only be liable potentially under section 51, it seems to me, once an order for several costs has been made, for those claimants whose litigation it has funded and not for self-funders. I do not think there is any answer to that point."

I should make it clear that this is subject to any exceptional circumstances, as it is in theory possible that Therium might behave in such a way as to render itself potentially open to an order for costs even in relation to the self-funded Claimants, but the circumstances would have to be fairly unusual. In all normal circumstances I do not think that an order under s. 51 would in principle be made against Therium in respect of the costs attributable to the self-funded Claimants.

82. Mr Kirby gave me some figures showing the proportion of costs attributable to the self-funded Claimants (who, it will be recalled, are all Stewarts Claimants). In the case of the claims against HSBC and SRLV all the claims are brought by Stewarts Claimants; and these figures assume the same is true of the claims against UBS (even though in fact, as I understand it, there is one claim brought by a Peters & Peters Claimant against UBS, who I am not sure has been taken account of). The figures are as follows (all the percentages being calculated by value, based on the amount of investment):

Defendant	% self-funded	% funded
HSBC	35%	65%
UBS	22%	78%
SRLV	27%	73%

The position with the claims against the Ingenious Defendants is slightly more complex. In this case claims are brought by both Stewarts and Peters & Peters Claimants, and of those 81.35% are brought by Stewarts Claimants and 80% of those are funded, 20% being self-funded. That means that the self-funded claims are (81.35% x 20%) or 16.27% of the total, and the funded claims (18.65% + (81.35% x 80%)) or 83.73% of the total, ie

Ingenious	16.27%	83.73%

83. Mr Kirby asked for full reasons in respect of this part of my decision, but I do not see that there is anything much to add. In the case of a commercial funder such as

Therium, the reason why an order under s. 51 SCA 1981 will ordinarily be made is that given by Lord Brown in *Dymocks Franchise System (NSW) Pty Ltd v Todd* [2004] UKPC 39 at [25]:

> "Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as gaining access to justice for his own purposes."

This was cited and applied to a commercial funder funding group litigation by Hildyard J in the RBS litigation: see *In re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch) (***"RBS* [2017] (1)"**) at [25]; and *In re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch) (***"RBS* [2017] (2)"**) at [19]-[24]. (In the latter case he also referred to the so-called *Arkin* cap, which is an issue of some current debate, but I was told that I was not concerned with it in the present case and I have not given any consideration to this point). But it can be seen that the basis for the order is that the funder *"substantially … controls or at any rate is to benefit from"* the proceedings. In the case of the funded Claimants, it is not disputed that Therium stands to benefit from a share of their recoveries. But in the case of the self-funded Claimants, there is no reason to think that Therium either controls their proceedings, or will share in their recoveries. So there is no principled basis, or at least none that has yet been identified, on which the Defendants can expect to recover the costs attributable to the self-funded Claimants against Therium.

General principles

84. Mr Birt drew my attention to a number of other points made by Hildyard J in the *RBS* cases as follows. First in *RBS* [2017] (1):

(1) The liability of third parties under s. 51 (such as funders) is not secondary to, or dependent on, the position of the claimants [40].

(2) Although orders under s. 51 against non-parties are always exceptional, this means no more than outside the ordinary run of cases [42]. While each case turns on its own facts a commercial funder acting in its own commercial interest for gain has no legitimate expectation that it will be treated any differently from any other real party (beyond that inherent in the requirement that the jurisdiction is discretionary and must be exercised justly) [43].

(3) At [44] Hildyard J said:

> "Indeed, in the context of a group litigation order, where the proceedings are often likely only to be made possible by funders, and where commercial funders stand to gain very considerable financial returns if the case succeeds, often far greater than any individual claimant, there is good reason to assume that enforcement may be directed first against the funders; and a fortiori where (as here, and as is usual) the GLO has resulted in several liability for costs, making enforcement against individual claimants awkward, at best. To that extent, they stand in the front line."

(4) And at [49] he referred to one of the defects in the claimants' approach in that

case being:

> "to ignore the fact that ease of recourse is a material consideration especially where the difficulties of enforcement against multiple claimants have been compounded by the usual order for several liability under a group litigation order."

85. Then as to *RBS* [2017] (2):

(1) He made a similar point to the last one at [17]:

> "Thus it is a truism, but an important one, that every case must be considered on its facts; but in my view, a case with multiple claimants seeking to vindicate their rights under a GLO and who have been accorded by Court order the considerable benefit of several and not joint liability for costs will be likely to be considered 'exceptional'. In such a case, the defendant(s) will almost inevitably be put to exceptional difficulty in enforcing any costs order in their favour if they obtain one at the end of the day."

(2) The fact that litigation funders are potentially exposed to an order under s. 51 does not of itself mean that an order for security should be granted [19]. Hildyard J there set out some of the factors of particular relevance to that question, of which Mr Birt said that the most relevant in the present case was whether there was a real risk of non-payment.

(3) Hildyard J expanded on that at [29]-[35]. At [29] he said that the security for costs regime exists to protect defendants against the risk that a costs award in their favour would go unsatisfied and that an order for security is ordinarily therefore only appropriate where such a real, and not fanciful, risk exists.

(4) On that question, the Court can take account of *"deliberate reticence"* as to its financial position on the part of a funder: see [31], citing *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120 at [19] per Sales LJ.

(5) It is not a pre-condition to the making of an order against a funder that the defendant first show that there is a risk of non-payment by the claimant [32]-[34].

(6) But that does not mean the ability of the claimants to meet an adverse costs order is *"entirely irrelevant"* [35]. Hildyard J rejected a submission to that effect and continued:

> "That submission assumes a compartmentalised approach; whereas, in my view, the Court must ultimately consider the matter in the round, even if it must initially divide the issues for the purpose of analysis. The question in the round in this context, as it seems to me, is whether there is a real risk that an order for costs in the Defendants' favour will not be paid: and that is a relevant consideration in assessing both whether a Section 51 order is sufficiently likely and whether security should be ordered in respect of that contingent liability. It is part of the overall assessment of the justice of the case."

(7) At [68] he said that both the possible alternative recourse (that is against the individual claimants) and the difficulties in enforcing it were to be taken into account. And at [69] he said:

> "Whilst the order for proportionate several liability for costs was to my mind appropriate and necessary in the context of the GLO it undoubtedly alters the balance between the parties and (as it seems to me) it would be unrealistic and unjust to accentuate the imbalance by underestimating the difficulties of recovering such comparatively small sums from so many."

86. I did not understand Mr Kirby to dissent from the principles set out by Hildyard J in the two *RBS* cases. I will proceed on the basis that while the whole matter must be looked at in the round, the most significant question is whether there is a real and not fanciful risk that the relevant Defendants will not be paid if they succeed in obtaining costs orders in their favour.

Quantum of security sought

87. In order to assess whether there is a real risk of non-payment, I think it is convenient to start, as Mr Kirby did, with seeking to assess the level of costs that the Defendants might reasonably expect to recover.

88. The current applications only concern costs down to the end of CMC 3. The amounts (i) that the relevant Defendants estimate as their actual costs to that date and (ii) that they each seek by way of security are as follows:

Defendant	Actual Costs	% claimed	Amount claimed
Ingenious	7,981,580.00	75%	5,986,185.00
HSBC	2,805,760.36	70%	1,964,032.25
UBS	2,506,666.67	75%	1,880,000.00
SRLV	1,573,333.33	75%	1,180.000.00

(I have taken these figures from Mr Kirby's summary of the evidence; it was not suggested that it was wrong).

89. Mr Kirby made the point that these include the costs referable to the self-funded Stewarts Claimants and should be adjusted to exclude those. I have already accepted that this is a valid point (above). He produced a helpful table showing the relevant figures depending on the percentage recovery that should be assumed for each Defendant.

90. One question that is obviously relevant to the identification of an appropriate percentage is whether there is a real prospect of a Defendant, if successful, recovering costs on the indemnity as opposed to standard basis. The position of the various Defendants was as follows:

(1) For the Ingenious Defendants, Mr Birt submitted that there was a real possibility of indemnity costs being awarded in their favour if successful. He

relied primarily on the fact that the claims against them include *"serious and wide-ranging allegations of dishonesty over an extended period of time"*.

(2) For HSBC, Mr Green did not in terms rely on there being a prospect of indemnity costs, and as shown on the table above, HSBC's application only sought 70% of their costs, this being put forward as within the range for standard costs. But in reply Mr Green said that if 75% was appropriate for others, it was certainly appropriate for HSBC which was also facing allegations of dishonesty.

(3) For SRLV, Mr Quiney accepted that the claims against it were not claims of dishonesty but only of negligence. He did not entirely disclaim the possibility of indemnity costs, but his primary position as I understood it was that given the comparatively modest costs that SRLV were claiming, 75% was not unreasonable, but he accepted that 65% to 70% might also be just.

(4) For UBS (which is also facing claims of negligence rather than dishonesty), Mr Duffy did not place any reliance on the possibility of indemnity costs, but said that 75% was still reasonable given how reassuringly inexpensive his client's costs were compared to others.

91. Mr Kirby accepted that there were claims of dishonesty pleaded against the Ingenious Defendants and HSBC, but said that there was no real likelihood of indemnity costs being awarded. As I understood it, he relied on the fact that although some of the claims are based on oral representations, many of them are based on written representations (where I assume there will be little or no dispute as to what was said), and therefore the issue will be not so much whether the Claimants are telling the truth but whether what the Defendants said was untrue, and whether the relevant Defendants knew that.

92. I find it quite difficult at this stage of the proceedings to assess to what extent the individual Claimants' cases will turn on their credibility. I will assume however that the main issue at trial will not be whether the Claimants are putting forward a deliberately false story supported by perjured evidence. But that is not necessary to justify an award of costs on the indemnity basis. As is well known, the jurisprudence in this area establishes that while there must be something to take the case out of the norm (*Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 at [19], [39]), the categories of case in which indemnity costs are justified are not closed and vary enormously. However in *Three Rivers DC v Bank of England* [2006] EWHC 816 Tomlinson J gave detailed consideration to the whole question and at [25] set out the principles which he derived from the authorities, including at principle (8)(a) the following:

> "(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;
>
> (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time…"

(This is obviously the source, directly or indirectly, of the way in which Mr Birt

characterised the present case). I have been shown nothing to suggest that what Tomlinson J there said has been disapproved of, and it accords with my own experience: to accuse people of fraud or dishonesty is a high-risk strategy, and if such allegations are made but not established, that can certainly in my judgment be a factor justifying indemnity costs, whether the claimants have lied or not. Of course it is not an automatic consequence as all the relevant circumstances as they appear after trial have to be taken into account, but it is certainly a highly material consideration.

93. I was not taken through the Particulars of Claim in the present case in any great detail, but even a cursory glance at them shows that although the claims against the Ingenious Defendants are based on a number of causes of action, those put at the forefront are fraudulent misrepresentation and deceit, and the bulk of the factual allegations consist of particulars of representations made in relation to each Ingenious scheme, particulars of why those representations are said to have been false, and particulars of fraud in which it is alleged that certain specific individuals knew that the representations were false (or were reckless as to their truth). And there is a further claim in unlawful means conspiracy which is brought against certain of the Ingenious Defendants and HSBC, the conspiracy consisting of a combination to injure prospective investors by the use of the fraudulent misrepresentations.

94. This in my judgment certainly makes the possibility of indemnity costs a real one. It does not matter that Therium is not itself responsible for the way the case is pleaded, nor indeed did Mr Kirby suggest that it did: on this point see *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 at [24] per Tomlinson LJ:

> "The funder chooses which claims to back, whereas, as the judge rightly observed at [125], a defendant does not choose by whom to be sued, or in what manner… I can see no principled basis upon which the funder can dissociate himself from the conduct of those whom he has enabled to conduct the litigation and upon whom he relies to make a return on his investment."

95. The way in which I put it in my conclusion on this point in my oral judgment was as follows:

> "23. So far as the security for costs application is concerned, much of this I would like to think further about in the light of submissions that I have received today. I can say at this stage that so far as quantum is concerned, I will proceed on the basis that the Ingenious defendants and HSBC defendants, who are respectively facing allegations of deceit and conspiracy to use unlawful means, the unlawful means being fraudulent misrepresentations, are defendants who I regard as having a reasonable prospect, if they are successful, in recovering costs on an indemnity basis.
>
> 24. That, of course, is not intended to give any indication of what I would do if I were the trial judge and found those claims to fail. The question of standard or indemnity costs is always dependent on a very large number of factors, and what I have just said should not be taken as any prediction of what would happen, but I certainly regard claims of deceit and of unlawful means conspiracy, based on fraudulent misrepresentations being the unlawful means, as serious allegations which at least open the door to the possibility of indemnity costs in the event that the claims are found at trial to be unfounded.
>
> 25. I do not think that the other intermediary defendants, UBS and SRLV, are in

> the same camp. As I understand it, they only are facing claims of various types of negligence, and on the face of it, although one can never rule out that cases might be run in such a way as to merit an award of indemnity costs, there is nothing at this stage to suggest that failure in those claims would attract such an award."

I see no reason to change or qualify what I there said.

96. What does that translate into in terms of percentages? In *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) Teare J said at [17]:

> "Where there is no possibility of costs being assessed on an indemnity basis or where such possibility is no more than speculative the courts generally make orders for security for costs by reference to 60-70% of the incurred and expected costs. Cases noted by Mr. Crow suggest a range of 60-75% but my experience suggests that 60-70% is more usual. It appears to me that where there is a reasonable possibility of indemnity costs the order should be made (at any rate in this case where very substantial costs are involved) by reference to about 75% of the incurred and expected costs. Criticisms were made of the quantum of costs claimed both by the First and Second Defendants and by the Third Defendants; see, for example, paragraph 29 of Ms. Boulton's seventh witness statement dated 5 September 2018. A reduction of 25% takes proper account of those criticisms."

97. Mr Kirby showed me by way of brief reference to a large number of cases that in fact there is a wide variety of percentages adopted in the reported cases, his overall submission being that 50% to 60% was the sort of range typically seen in cases of costs on the standard basis, although that could clearly be higher in the case of indemnity costs. I accept that that is what they show, and it is not necessary for me to set them all out.

98. He also submitted that this was a case where the costs, at any rate of the Ingenious Defendants, could be seen to be likely to be excessive, inviting me to consider briefly the schedules of costs for the present applications as well as a sample of the very detailed schedules that were in evidence. Mr Birt in reply gave various reasons why that level of costs was justified, not least because of the way in which he said the litigation had been conducted by the Claimants.

99. The costs are undoubtedly heavy but this is complex and large-scale litigation involving serious allegations reaching back many years, and the Claimants' own costs are also very significant. I do not think I can conclude, on the basis of the quite cursory examination of the costs schedules that was undertaken, either that the Defendants' costs are out of line with what one would expect in litigation of this type, or, if so, who bears responsibility for that. Of course it is the case that on a standard basis a receiving party can only recover costs that are reasonable and proportionate, and even on an indemnity basis cannot recover costs unreasonably incurred, but these matters are taken account of by the range suggested by Teare J. I have already said that it is helpful to litigants if practice in relation to matters such as this is reasonably uniform and I have decided that I am not satisfied that there is any good reason to depart from the practice referred to by Teare J.

100. In my judgment therefore the appropriate percentage in a case where there is a realistic prospect of indemnity costs is 75%. That is the figure adopted by Teare J,

and is also what I would myself have thought about right judging from what experienced litigation solicitors have told me in other cases that they would expect to recover on a detailed assessment on the indemnity basis. I will adopt that for the Ingenious Defendants. I would have also adopted it for HSBC had HSBC asked for it but since HSBC have only asked for 70%, I do not think I should on this occasion go any higher. But that does not preclude them from revisiting the question at a later stage.

101. Costs on the standard basis are more variable, but Teare J's range of 60% to 70% again seems to me not out of line with my own experience in other cases of what litigation solicitors say they expect to recover. I think 70% is rather at the top end, and 65% or ⅔ is more typical, but in the present case I accept the point that the estimated costs of the relevant Defendants (SRLV and UBS) are comparatively modest compared with those both of the Claimants and of the Ingenious Defendants, and I think that 70% is appropriate.

102. That by my calculation (and taking into account Mr Kirby's very useful tables) produces the following figures:

Ingenious Defendants

P&P Cls		1,488,565	x 75% =	1,116,423.50
Stew Cls		6,493,015		
	Funded	x 80% = 5,194,412	x 75% =	3,895,809.20
			total	5,012,232.70
HSBC		2,805,760.36		
	Funded	x 65% = 1,823,744	x 70% =	1,276,620.96
UBS		2,506,666,67		
	Funded	x 78% = 1,955,200	x 70% =	1,368.640.00
SRLV		1,573,333.33		
	Funded	x 73% = 1,148,533	x 70% =	803,973.33

103. Such figures of course have a spurious precision about them, and it is usual to take a broad brush approach and deal with round figures. In round figures that is as follows:

Ingenious:	P&P £1.1m, Stew £3.9m =	£5.0m
HSBC		£1.25m
UBS		£1.35m
SRLV		£0.8m
	Total	£8.4m

Position of Therium

104. Those are therefore the sums (down to the end of CMC 3) which the Defendants in my judgment are reasonably entitled to expect that the relevant Claimants (that is, the funded Stewarts Claimants, and the Peters & Peters Claimants) should be able to meet if costs orders are made against them. The next question is whether there is a real risk that costs orders of that magnitude will not be met.

105. Three sources are put forward to meet any such liability. They are (i) the Claimants themselves; (ii) a number of ATE policies taken out by the Claimants; and (iii) Therium's own resources.

106. I will start with Therium's own resources. In my oral judgment I said this:

> "30. So far as Therium itself is concerned, I am not persuaded that I can proceed on the basis that Therium will meet any order for costs under section 51. It is striking that no actual financial information about Therium has been adduced in evidence. The evidence is that if Therium had to put up cash, it would need to make a call on its investors. It is not clear from the evidence whether it has any right to call on its investors, or whether the investors' response to that would be voluntary. I am not persuaded that the decision of Mr Justice Roth and the rest of the tribunal in the CAT, in the Trucks case, is sufficient basis for me to be confident that Therium would meet any order for costs made under section 51.
>
> 31. Nor am I confident that its membership of the ALF, and the obvious pressure which that puts on it to comply with the ALF rules, is sufficient to give one enough confidence that if it were facing a large liability for costs at the end of the day, that the money would be forthcoming.
>
> 32. Nor does the evidence that in 50 cases which have terminated there has been no default, explain with sufficient detail whether any of those cases resulted in orders under section 51 against Therium, the quantum of them or whether, as Therium itself says, it looks to cap the liability for potential adverse costs orders by requiring those it funds to take out sufficient ATE policies."

107. Mr Kirby said that he did not require any further reasons in relation to this point, and since none of the other counsel asked for it either, I do not need to expand on it. I will just therefore explain, in case it is of any interest to anyone reading this judgment, that the reference to *"the Trucks case"* is to the decision of the Competition Appeal Tribunal in *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV* [2019] CAT 26, and the reference to *"the ALF"* is to the Association of Litigation Funders of England and Wales, of which a UK based company called Therium Capital Management Ltd is a founder member, the actual funder (Therium Litigation Finance AF IC) being a Jersey entity that is associated with it.

The individual Claimants

108. Stewarts have provided some information about the net wealth of 33 of the largest investors who are Claimants. This is in the nature of a ballpark figure (£1-3m, £3-5m, £5-10m, £10-20m, £20m+). It is confined to the top 52 (by contribution) but does not include all of those – for example it does not include Claimant 4 whose investment was some £3.4m and who would be responsible for 2.37% of the Ingenious

Defendants' costs (assuming that such costs are shared between all Stewarts Claimants), or Claimant 20 whose investment at £1.625m was the largest single contribution of the 11 claiming against SRLV and would be responsible for over 23% of SRLV's costs (again, assuming that liability for such costs was shared between those 11).

109. By itself this clearly does not give any comfort that a costs order in favour of a Defendant would be fully discharged. For a start the ballpark figures do not indicate what sort of assets are held by each Claimant, whether permanent or transient, where they are located, or how easy it would be to execute against them, or even if they are held in the name of the individual (many wealthy individuals have a tendency to count as part of their net wealth assets in fact held in joint names with their spouses, or in corporate vehicles or family trusts or the like, which may not be amenable to execution); and although the great majority of the Claimants have given residential addresses in the UK, a number have given addresses abroad. And a snapshot of a person's wealth does not give any guarantee that their position will be the same in a number of years' time when the proceedings have run their course: many of the Claimants are facing demands from HMRC, and an indication that a Claimant who contributed £2.5m now has wealth of £1-3m (even though this is said to be *"net"* wealth) may not be much assurance. Some Claimants have indeed become bankrupt.

110. But even leaving aside these points, the effect of the several liability order is of course that each Claimant can only be made liable for his or her apportioned share. So even if every one of the 33 Claimants for whom an indication of net wealth has been given in fact met their liability without difficulty, there would still be a significant shortfall. No attempt was I think made before me to quantify what level of recovery a Defendant would make even if the 33 all paid in full, but it looks to me rather under 50%. To effect a full recovery a Defendant would have to chase literally hundreds of Claimants, in some cases for relatively minor sums. So one cannot simply say that there are enough wealthy Claimants to pay the costs – each has to be looked at individually.

111. Mr Kirby said very little about this aspect of the case. He accepted that the information that had been given was fairly limited, but did say that there were some well-known names amongst the Claimants of presumably reasonable wealth and they were a source of payment for the Defendants, albeit as he accepted on a several basis. None of that really answers the point made by Hildyard J in both *RBS* [2017] cases that the effect of several liability is to make enforcement against individual claimants *"awkward, at best"*; that ease of recourse is in those circumstances a material consideration; that in a case with multiple claimants who have been accorded the considerable benefit of several liability, defendants will almost inevitably be put to *"exceptional difficulty"* in enforcing any costs order in their favour; and that the effect of a several liability order is to lead to difficulties in recovering comparatively small sums from many people (see paragraphs 84-5 above).

112. In those circumstances the fact that there are a number of wealthy individuals amongst the Claimants (as I accept there are, scanty though the information is), does not mean that the risk of the Defendants not being paid is not a real one.

113. Since I am according no real weight to Therium's own financial resources, not having any information about them, the question is whether the combination of the wealthy

Claimants and the ATE policies is sufficient to mean that the defendants are not facing a real risk of not being paid if they succeed in obtaining costs orders in their favour. But one cannot simply add them together, and say that the wealthy Claimants are worth £X and the ATE policies worth £Y, and so long as £(X + Y) exceeds the amount sought, the Defendants do not need security. This is for two reasons.

114. First, no attempt was in fact made to do this. In order to do it, one would have to place some value on the wealthy Claimants' ability to meet an order for costs. But no such exercise was undertaken. In those circumstances, I do not think I ought to attempt one myself, unaided by any submissions.

115. Second, the wealthy Claimants are just as much entitled to the benefit of the ATE policies as the less wealthy ones. This means that one cannot simply use the ATE policies to meet the liabilities of the less wealthy Claimants. To explain this point, I will give a simplified example. Suppose the Ingenious Defendants became entitled to an order for costs in the exact sum of £5m; that of the 33 wealthy Claimants, the majority of them paid their share; that together that amounted to 40% of the total or £2m; and that the Claimants also had the benefit of an ATE policy for £3m. In those circumstances I think it rather doubtful if the Ingenious Defendants could simply look to the ATE policy for the outstanding £3m. Each of the Claimants would be a joint policyholder, including the wealthy Claimants, and that would *prima facie* enable them to claim 40% of the value of the policy, or £1.2m, leaving only £1.8m available to meet the other Claimants' liability for costs. In fact the ATE policy would have to be £5m in order to provide £3m of cover for the non-wealthy Claimants. As can be seen that means that the ATE policy would have to be sufficient to meet 100% of the amount owing under the costs order before it could be said that the Defendants were adequately protected.

116. In those circumstances I do not think that the fact that there is some, rather limited, evidence that some of the Claimants are wealthy is either an answer by itself to the application for security, or that one can simply add a figure for what might be recoverable from them to the figure for the ATE policies to see if there is enough to protect the Defendants.

The ATE policies – cover available

117. That brings me to the ATE policies. There are four relevant policies, as follows:

(1) Peters & Peters policy

I will start with the Peters & Peters Claimants where the position is simpler. Only the Ingenious Defendants seek security for claims brought by Peters & Peters Claimants, and there is one ATE policy. This does provide cover for adverse costs liability in respect of claims against the Ingenious Defendants but also in respect of claims against a number of other Defendants. Apart from Pannells who made written submissions (above), none of those other Defendants took any part in this application and I know very little about them, although I assume that they are financial advisers. The limit of indemnity is £1m.

(2) Stewarts policy (1)

There are three Stewarts policies. The first, and largest with an indemnity limit of £4.125m, covers claims against the Ingenious Defendants, HSBC, UBS, SRLV and Coutts, as well as a number of other Defendants, again not represented before me but who I assume to be financial advisers; it was referred to in argument as *"the hybrid policy"* for this reason.

(3) Stewarts policies (2) and (3)

The other two policies can be taken together. They each provide cover for claims against the Ingenious Defendants and HSBC, the limits of indemnity being respectively £2.125m and £1m.

118. In addition the evidence is that Therium have given a contractual indemnity to the Peters & Peters Claimants. It was in the initial sum of £1.5m, but as well as the claims in this litigation it covers proceedings known as the Scion Premier proceedings, about which I know almost nothing, and formerly covered proceedings called the Agents Claims, about which I know equally little except that they have now been settled. At the time of the hearing before me the amount of remaining indemnity was £1,430,330.00. Since then however I have given judgment striking out, or granting reverse summary judgment on, certain so-called *"lending claims"* brought by four Peters & Peters Pleading Claimants against Coutts and Natwest (*Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch)), and by an Order made by me earlier this year, I ordered those Claimants to pay (i) Coutts and Natwest's costs of the application, summarily assessed at £170,000; and (ii) Coutts and Natwest's costs of defending those claims, to be the subject of detailed assessment but with an interim payment of £350,000. On the assumption, which is what I understand to be the case, that these sums are payable under the indemnity, that reduces the amount available by £520,000 to £910,330.

119. It can be seen that the total ATE cover available to the Stewarts Claimants is £7.25m. Since I have concluded that the amount for which the Defendants can reasonably expect to be secured is £7.3m, it can be seen without going any further that the ATE policies are not quite sufficient to come up to this figure.

120. But that assumes that the entirety of the ATE policies would be available to meet the claims of the Defendants seeking security. This is not so, for two reasons. The first, and most obvious, point (which Mr Kirby readily accepted when I put it to him at the hearing, although it does not seem to have been anticipated) is that since I have accepted that security should be limited to the costs attributable to the funded Stewarts Claimants, it is only their share of the ATE policies that can be taken into account. It appears that all the Stewarts Claimants, whether funded or self-funded, benefit from one or other of the Stewarts ATE policies, which means that the self-funded Claimants are just as much entitled to the benefit of them as the funded ones, and they have a very lively interest in seeing that an appropriate share of the ATE policy moneys is used to discharge any liability that they have.

121. Once the point had been raised, Mr Kirby and his team did some calculations and told me that (i) 16.68% by value of the Claimants covered by policy (1) (the hybrid policy for £4.125m) and (ii) 30.5% of the Claimants covered by policy (2) (the £2.125m

policy) were self-funded, but all the Claimants covered by policy (3) (the £1m policy) were funded. That can be summarised as follows:

Policy	Limit	% funded	Funded share
(1) Hybrid	£4.125m	83.32%	£3,436,950
(2)	£2.125m	69.5%	£1,476,875
(3)	£1m	100%	£1,000,000
			£5,913,825

There has no doubt been some rounding as Mr Kirby gave me a figure of £5.92m. These calculations were sprung on the Defendants who had not had a chance to consider them or understand the basis of them, but even on the assumption they are right (and I have no reason to doubt them), they significantly reduce the available value of the ATE policies.

122. Second, it can be seen that although policies (2) and (3) are limited to claims against the Ingenious Defendants and HSBC, the hybrid policy is not, but extends to claims against a number of other Defendants. I was not shown any provision of the policy or any other mechanism for resolving priority between the various Defendants. Indeed, subject to a possible assignment I mention below, the Defendants as such have no interest in the policy – the policyholders are the Claimants. It can be assumed that the Claimants are likely to draw on the policy to meet adverse costs orders in whatever order they happen to have to meet them. Suppose a claim against a particular Defendant is discontinued, or struck out, in circumstances in which it became entitled to its costs, something which I do not think can be dismissed as fanciful. I do not see that either the insurers, or the other Defendants, would have any right to prevent the policy being used to discharge the liability for that Defendant's costs. But that would erode the remaining value of the policy. This was not a point that was argued at any length, although it was briefly mentioned in the evidence of Mr Hibbert for the Ingenious Defendants, and Mr Birt (and some of the other counsel) did refer to it. I do not think it was specifically addressed by Mr Kirby, but it seems to me a point of some potential significance.

123. I have so far assumed that the ATE policies will respond. Even on that assumption it can be seen that, at any rate so far as the Stewarts Claimants are concerned, there is a noticeable shortfall between the available value of £5.92m and the relevant sum of £7.3m.

Will the ATE policies respond?

124. In fact Mr Birt made a concerted attack on the ATE policies, and suggested that no reliance could be placed on them as there was a real risk that they would not respond.

125. For the law, I was referred to *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872 (***"Premier Motorauctions"***). Longmore LJ made the following points in his judgment. An appropriately framed ATE insurance policy can in theory be an answer to an application for security [20]

(citing *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556 per Mance LJ). But in order to provide sufficient protection to the defendants, the defendants must be entitled to some assurance that the policy is not liable to be avoided for misrepresentation or non-disclosure [29]. In that case there was no anti-avoidance clause, and the Court did not have any information with which to judge the likelihood of avoidance [27]. ATE insurers do sometimes seek to avoid their policies [27] (referring to *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc* [2010] EWHC 1705 (Comm)). It might be different if insurers could only avoid the policy for fraud, as it may not be a particularly difficult exercise for a judge to assess the likelihood of avoidance if confined to fraud [31].

126. That was not a case of security being sought against a funder under CPR r 25.14, but a case of security being sought against a company under CPR r 25.13 on the grounds that there was reason to believe that it would be unable to pay the defendant's costs if ordered to do so, but I do not think this makes any difference to the question of principle.

127. Mr Birt took me through one of the policies which has been disclosed, albeit in a redacted form (in fact the hybrid policy for the Stewarts Claimants). I was told the others were in largely similar form. The particular provisions he relied on were as follows:

(1) Discontinuance etc without consent

Under a provision amended by an endorsement, there is excluded from cover legal proceedings which are abandoned, discontinued or settled on terms whereby costs are payable to the opponent without the written consent of the insurers. There is provision as to the circumstances in which the insurers are to provide written consent.

(2) Rejecting an offer without consent

Similarly there is excluded from cover an offer which is rejected without insurers' written consent.

(3) Fraud

Cover is excluded in the event of fraudulent non-disclosure or misrepresentation in obtaining the policy. There is a significant proviso to the effect that the application for insurance is treated as a separate application by each insured, so that the fraud of one Claimant does not affect the availability of indemnity to the other Claimants.

(4) Increases in Opponent's Costs

Amended provisions provide that the insurers will not cover increases in the Opponent's Costs where arising from the Steering Committee knowingly or recklessly not following the Court's processes without the insurers' written consent, or from any act or omission which unreasonably hinders or delays the legal proceedings, or the Insured's solicitor's unreasonable conduct of the proceedings.

(5) Fair presentation

By condition 1 it is a condition of the policy that if an individual insured deliberately or recklessly misrepresents information, the insurers are entitled to avoid the policy and retain all premiums. Again the effect is limited to the avoidance of the policy in relation to that individual. Mr Birt pointed out that half the clause had been redacted on the grounds of privilege, and he had no idea what might be contained in that clause; he also said that they had not seen what presentation had been made to insurers.

(6) Non-cancellation

By condition 3, the insurers waive all rights to rescind, cancel or avoid the policy, but this is subject to various other provisions including condition 1 (fair presentation), breach of any condition that materially increases the likelihood of, or the amount of, payment under the policy and non-payment of premiums. But no terms in relation to the premiums have been provided, and so the Defendants do not know what premiums are due, when they are due, whether they have been paid or the like.

(7) Keeping amounts reasonable

Condition 4 requires the Steering Committee to use reasonable endeavours to keep any amount the insurers have to pay to those reasonable and proportionate to the issues. Breach of this condition is presumably breach of a condition that materially increases the amount of any payment under the policy and entitles the insurers to cancel the policy. It would appear to mean that if the Defendants are put to unreasonable expense by the way the Claimants conduct the action (just the circumstances in which the Defendants might expect a costs order in their favour) that very fact will increase the risk that insurers will seek to avoid the policy on the grounds of a failure by the Steering Committee to use reasonable endeavours to keep the amount paid out reasonable.

(8) Termination of cover

Conditions 6 and 7 give the insurers various rights to terminate cover, for example if the insured dismisses the insured's solicitor; or if the prospects of success deteriorate.

(9) Redactions

Condition 13 has been redacted. The Defendants have no idea what it might say, or what effect it might have. There are also significant redactions in the schedule.

(10) Disbursements

In this policy, it is clear from the schedule that disbursements are not covered. But in one of the other Stewarts policies (policy (3)) this is not clear from the schedule, although Stewarts have said that disbursements are not covered; nor

is it in the Peters & Peters policy, where no confirmation has been forthcoming.

128. Mr Birt's overall submission therefore was that there were a number of potential gaps in the policies, over which the Defendants had no control. That exposed the Defendants to risks, and there was no good reason why they should have to bear those risks. Moreover, the endorsements showed that one of the original insurers had had to be replaced after it went into liquidation, which illustrates that ATE insurers do sometimes fail, something I am aware of from another case. He also made the point that the Defendants have no right to the policy moneys as such. Subject to the rights given by the Third Parties (Rights against Insurers) Act 2010 (to which I was not referred, but which as I understand it only applies if the insured becomes subject to an insolvency procedure), the policy moneys belong to the Claimants, and may be available to meet the Claimants' other creditors.

129. So far as the Peters & Peters indemnity is concerned, no copy of it has been provided, even in redacted form, and Mr Birt said that it was therefore impossible to have regard to it at all.

130. Mr Quiney had another point on the policies which is that they do not tell you if there is any excess or deductible.

131. In response to the various points made Mr Kirby said that it was only in the case of fraud that the insurers could avoid the policy ab initio. That was something that the Court could take a view on, as contemplated by *Premier Motorauctions*, and in any event only affected individual Claimants. In relation to other rights to terminate, his understanding was that insurers would still remain liable for costs up to the date of termination. On instructions he said that if insurers did terminate cover, the Claimants' solicitors would notify the Defendants, and in a post-hearing Note confirmed that the insurance has not presently ceased and that all premiums have been paid to date. In the same Note he repeated an offer by the Stewarts Claimants to assign the proceeds of the ATE policies to the Opponents (the term used in the policies). This was designed to allay the fears that the proceeds could be used to pay other creditors.

Clause 14.8

132. That Note also dealt with a point raised in Mr Birt's reply. This was that by a letter dated 12 November 2019 from Stewarts (and so written shortly before the hearing), the Defendants were provided with a partially redacted copy of an agreement between Therium and the funded Claimants amending the litigation funding agreement between them in various ways. One of the amendments was a replacement clause 14, dealing with security for costs, clause 14.8 of which now reads as follows:

> "The Claimants agree to hold the Legal Expenses insurance policy and all proceeds payable under it on trust for Therium throughout the Trust Period on terms that Therium shall be entitled to such part or all of any proceeds of the Legal Expenses Insurance which become payable as a consequence of an Adverse Costs Order as shall be equal to the amount of any security posted by Therium pursuant to clause 14.5 used to discharge the Claimants' liability (either entirely or in part) in respect of any Adverse Costs Order, save where the security posted by Therium is otherwise reimbursed to Therium."

133. On the face of it this appeared to be a significant point. If say the security that I thought the Defendants should have was £7m, and the ATE policies were worth £5m, it would not be any good simply requiring Therium to put up the balance of £2m. For that would trigger the obligation on the Claimants to hold £2m of the proceeds of the ATE policies for Therium at which point only £3m would be available to meet the Defendants' costs. That would require another £2m to be put up as security and so by an iterative process the point would be reached where Therium would have to put up the whole £7m, although it would take the whole of the proceeds of the policies.

134. In his post-hearing Note Mr Kirby addressed this point by making the following offer:

> "My Clients' offer to assign the proceeds of the ATE policies is repeated and for the avoidance of any doubt, if the proceeds were assigned, Therium would waive any entitlement to rely on clause 14.8 provided credit (whether in the full amount or any proportion of the full amount) is given for the level of cover provided by the ATE policies."

135. In a response Mr Birt said that the proposals were too vague and should have been drafted out if any reliance were to be placed on them. In particular it was unclear to whom the policies were to be assigned, and whether the terms would be such as to enable the Defendants to claim directly against ATE insurers, or would merely have rights as personal creditors of the Claimants or Therium.

136. I have not found it easy to resolve this myriad of issues. The fundamental difficulty is that an ATE policy, as recognised on both sides, is not designed as security for costs. It is designed as cover for the Claimants, and like all insurance, insurers are astute to protect themselves from behaviour of the insured which changes the risk they have agreed to undertake. That explains why insurers reserve the rights they do both to avoid and to terminate the policy. Adapting such a policy to make it suitable to stand as security for the costs of a defendant requires quite a lot of work, because it is not written with the interests of the defendant in mind, and once the claim has failed and the defendant has become entitled to its costs, the interests of the defendant are naturally antithetical to those of the insurer.

137. In the present case, the difficulties seem to me to be as follows:

(1) <u>Fraud / deliberate non-disclosure</u>

I accept both that the right to avoid for fraud is limited to the individual Claimant concerned, and that in *Premier Motorauctions* Longmore LJ said that it might not be particularly difficult for the Court to form a view on the likelihood of avoidance for fraud. But I have to say that I do not find that an easy task in the present case. I have not been asked to study the Particulars of Claim in any detail, although I have looked through the generic allegations. But in addition to those, each Pleading Claimant relies on their own allegations, and I was told that many of them do rely on oral representations as well as the written ones in the main body of the pleading. That is not surprising as an oral representation is likely to have been made to an individual, unlike a written representation that might be made to a class of investors. What I find however very difficult to assess at this stage of the case is the likelihood that rejection of a particular Claimant's case will entail the

trial judge having to form a view of the Claimant's credibility. It is entirely possible that this will not be necessary and that as I said above when considering indemnity costs, the case will turn not so much on the Claimant's evidence but on what the Defendants can be shown to have known. But I do not think that the possibility of the trial judge taking, and expressing, an adverse view of a Claimant's truthfulness can be ruled out. Nor of course do the Defendants know what presentation of the case was made to insurers. I am left overall very uncertain as to what the likelihood is that insurers might seek to avoid cover for any particular Claimant on this ground.

(2) Termination provisions

There are a number of other circumstances in which insurers can exclude or terminate cover. Mr Kirby's offer that the Claimants' solicitors would notify the Defendants if such steps were taken, coupled with his understanding that this would not prevent insurers from being liable for costs up to that date goes some way to mitigating the effect of these provisions, but he does not of course speak for insurers, and I have seen nothing from them confirming that their understanding is the same. In some cases, I have some doubts whether by the time notification was received it would be too late for the Defendants to do anything about it. Take a case where a Claimant discontinued without insurers' written consent. That would enable insurers to decline cover. Even if the Defendants are notified of this, what can they do? They cannot sensibly ask for security for costs of a claim which has been discontinued, and even if they are alert to the problem and oppose discontinuance, it is doubtful if the Court would refuse to allow a Claimant to discontinue who wished to do so.

(3) Redactions

The redactions (is condition 13 of any relevance? is there an excess? are disbursements covered?) seem to me to be likely to be points that could be cleared up fairly easily. If redactions cannot be lifted, a letter from insurers confirming that there is no excess, or that disbursements are not covered, or the like should eliminate the risk of unknowns. But it has not in fact been done.

(4) Other Defendants

On the other hand the fact that the hybrid policy covers not only the Defendants applying for security but a series of other Defendants does seem to me a more serious problem. No mechanism has been suggested for apportioning the proceeds of the policy between the various Defendants and I think there is a real risk that by the time the Defendants now applying for security wish to enforce, the value of the policy may have been eroded. It is noticeable that the Therium indemnity in favour of the Peters & Peters claimants has been significantly eaten into by the costs payable to Coutts and Natwest following their successful strike-out.

(5) Assignment

A similar point applies to the proposal to assign the proceeds of the ATE

policies. Who is it proposed to assign them to? Mr Kirby's post-hearing Note suggests that the proposal is to assign them to the Opponents as defined in the policies. That would be all the Defendants covered by the particular policy. That leaves entirely unclear how much of the policy proceeds will be available to each particular Defendant.

138. I have come to the conclusion, with some reluctance, that there is a real, and not a fanciful risk, that the ATE policies will not respond in full. I say *"with some reluctance"* as I am conscious that ATE insurance is not cheap, and since it is intended to provide protection to claimants against the risk of adverse costs orders, it would be advantageous to all concerned if it could also provide sufficient protection to defendants against the risk that costs orders in their favour would go unpaid. But as the cogent submissions in the present case have to my mind demonstrated, there is real difficulty in adapting a policy that is written for one purpose into the quite different purpose of meeting an application for security. I suspect the problems that have been identified could be solved, and there may be something to be said for litigation funders and ATE insurers to seek to develop a form of policy that could both act as insurance for claimants and sufficient protection for defendants. But for the reasons I have sought to give, I am not persuaded that that has been done in the present case. Mr Birt referred me to the recent decision in *Kompaktwerk GmbH v Liveperson Netherland* [2019] EWHC 1762 (Comm) as another example of a case where an ATE policy was found not to be an adequate answer to an application for security, the risks involved being not illusory or fanciful: see at [43].

139. Mr Kirby suggested that if I was not persuaded that full value should be given to the policies, I could and should nevertheless attribute substantial value to them: see *Bailey v GlaxoSmithKline UK Ltd* [2017] EWHC 3195 (QB) where Foskett J deducted £500,000 (being ⅔ of the value of an ATE policy providing £750,000 of cover) from the security he would otherwise have ordered. Mr Birt countered with *Danilina v Chernukhin* [2018] EWCA Civ 1802 where Hamblen LJ said that once a real risk had been found, it was inappropriate to attempt to discount the security figure and the starting point was that the defendant was entitled to security for the entirety of their costs: see at [59] and [64].

140. This is another point that is not entirely straightforward, but on this particular point I prefer the submissions of Mr Kirby. The risks I have found in the ATE policies are not that they will not respond at all. They are that the policies might be avoided for fraud (but if so that will only affect the particular Claimants responsible); that they might be terminated in circumstances where it is too late to do anything about it (but this seems unlikely to apply to all the claims); that the Defendants might have to share the proceeds with other Defendants; and that there may be provisions which affect the level of cover. None of these are likely to mean that there is no cover at all. That is rather different from *Danilina v Chernukhin* where once the risk had been identified, security in the full amount was appropriate.

141. That then leaves the question how much value should be attributed to the policies. On this I had no real help at all, and I have to do the best I can. First I think that the difficulties identified should be cleared up as much as possible. What follows is therefore subject to the Claimants procuring the following:

(1) confirmation from insurers that they accept that save for avoidance in the case

of fraud or deliberate non-disclosure, exercise by insurers of the various rights to terminate or exclude cover would not prevent insurers being liable for costs incurred up to that point;

(2) confirmation from Stewarts and Peters & Peters that their respective policies (i) do not provide cover for disbursements; (ii) do not provide for an excess or deductible; (iii) do not in condition 13 contain anything material to the scope of cover or right to terminate or otherwise affecting the interests of the Defendants;

(3) confirmation from Stewarts and Peters & Peters that they will notify the Defendants' solicitors of any decision by insurers to exclude from cover or terminate liability under their respective policies;

(4) an assignment in suitable form of the proceeds of the policy to the Opponents as defined in such a policy in terms that confers priority on the assignee over other creditors of the Claimants; and

(5) a waiver in suitable terms by Therium of its rights under cl 14.8 of the funding agreement as amended.

142. Subject to those steps, for the Stewarts policies (2) and (3) where the only relevant Defendants are the Ingenious Defendants and HSBC, I propose to allow ⅔ of the value of the policies attributable to the funded Claimants as a deduction against the security that would otherwise be ordered. For the Stewarts hybrid policy (1), and the Peters & Peters policy, where there are competing Defendants, I propose to allow ½ of the value.

143. So far as the indemnity from Therium to the Peters & Peters Claimants is concerned, I have not understood why the terms of the indemnity have not been provided even in redacted form. If reliance is to be placed on it I think the Defendants are entitled to see the terms setting out what costs it covers and in what circumstances it can be revoked or terminated. That does not require disclosure of all its terms, but it does require disclosure of more than has taken place. Subject to such disclosure, and on the assumption that it provides the cover it is said to, and subject to confirmation from Peters & Peters that they will notify the Ingenious Defendants as and when any further amounts become payable under it, I propose to allow it in full.

Quantum of security

144. I think the result of the above is as follows:

(1) Peters & Peters

The amount of costs that the Defendants can expect sufficient protection for is £1.1m. Subject to compliance with the points above, I will assume the value of the Therium indemnity to be £910,330; and the value of the ATE policy to be ½ of £1m = £500,000. On those figures no further security is currently required.

(2) Stewarts policies (2) and (3) – Ingenious Defendants and HSBC

The quantum for which the Ingenious Defendants can expect sufficient protection is £3.9m, and HSBC £1.25m, a total of £5.15m. The value of the funded share of the Stewarts ATE policies (2) and (3) is £1,476,875 + £1,000,000 = £2,476,875 (paragraph 121 above). The value I place on those policies is ⅔ x £2,476,875 = £1,651,250. That leaves £3,498,750, or say £3.5m. Splitting that proportionately gives a split as follows:

Ingenious:	3.9/5.15 x £3.5m	=	£2.65m
HSBC:	1.25/5.15 x £3.5m	=	£0.85m

(3) Stewarts policy (1) – Ingenious Defendants, HSBC, UBS and SRLV

To the balance of £3.5m above has to be added £1.35m for UBS and £0.8m for SRLV, making a total of £5.65m. The value of the funded share of policy (1) is £3,436,950. The value I place on that is ½ x £3,436,950 = £1,718,475. That leaves £3,931,525 to be provided by way of security. That is to be split as follows:

Ingenious:	2.65/5.65 x £3,931,525	=	£1,843,989
HSBC:	0.85/5.65 x £3,931,525	=	£ 591,468
UBS:	1.35/5.65 x £3,931,525	=	£ 939,390
SRLV:	0.8/5.65 x £3,931,525	=	£ 556,676

145. As before, these figures should be rounded. I will therefore order Therium to provide security in the following amounts:

Ingenious Defendants	£1.85m
HSBC	£0.6m
UBS:	£0.95m
SRLV:	£0.55m

146. That will be on the basis that the various steps set out in paragraph 141 above are taken. If not, I would prima facie be inclined to order Therium to provide security without regard to the value of the ATE policies. The parties are to be at liberty to apply for that purpose, and to correct my calculations, and indeed generally.

Form of security

147. Question 4(b) on the list of issues was as follows:

> "In what form ought that security to be provided, absent agreement? (*It is agreed that any order the Court should make should permit the parties to seek to agree a suitable form*)."

148. The answer I gave in my oral judgment was as follows:

> "34. So far as question 4(b) is concerned, I have not really been addressed on alternative forms of security. The usual provision in my understanding is the court provides that security be provided, leaving it to the parties to agree a suitable mechanism, or to be determined if they cannot agree."

I see no reason to change or expand on the views I there expressed.

Cross-undertaking

149. Question 4(c) on the list of issues was as follows:

> "Should any of the Application Defendants be required to give the funded Stewarts and Peters & Peters Claimants [and/or Therium] a cross-undertaking in damages?"

150. The answer I gave in my oral judgment was as follows:

> "35. So far as a cross-undertaking in damages is concerned, on the footing that I order security, which, as I say, I think I am likely to do, I do not think that a cross-undertaking in damages should be required in relation to the losses which have been identified in Therium's evidence. Those losses are the losses that will be sustained by the claimants in having to pay Therium a larger return out of the litigation than would otherwise be the case.
>
> 36. That seems to me to be a matter between Therium and the claimants. It does not amount to an external cost on Therium and the claimants together. It amounts to a reallocation of the recoveries between Therium and the claimants. Therium and the claimants together have financial interests in the success of this litigation. It is a matter for them and their commercial arrangements as to how they share those recoveries between themselves. I do not think that the proper function of a cross-undertaking in damages is to require the defendants to underwrite those arrangements.
>
> 37. On the other hand, if there are external costs of providing securities, if, for example, Therium proposed to provide security by obtaining a bank guarantee, then the case for a cross-undertaking against that extra cost, which is an extra cost imposed on the claimant pool as a whole, is a much stronger one.
>
> 38. I am not going to make any order at this stage, because I think that questions as to that would be better addressed once it has been identified after I have made any order for security, how that security is proposed to be provided, and that should be revisited at that stage."

151. Again I think there is little need to add anything. As there appears, the basis for seeking a cross-undertaking in damages was that Therium had stipulated in its agreement with the funded Claimants that if it had to put up security, it would seek an enhanced return out of any recoveries by the Claimants. That obviously means that Therium will not suffer relevant damage by putting up security: the cross-undertaking would only fall to be enforced if the claims succeed, but if the claims succeed, Therium will be better off, not worse off.

152. So far as the Claimants are concerned, it is true that if Therium puts up security, a greater share of the recoveries will go to Therium, and to that extent there will be a

cost to the Claimants. But that is not a cost imposed on the Claimants' side as a whole, treating the Claimants and Therium together as being the parties interested in the claim. It is a reallocation of the recoveries as between the funded Claimants and their funder. The total cost of pursuing the claim is the same; it is just borne differently. As I said in my oral judgment I do not think this is something that should be underwritten by the Defendants, and no authority was shown to me to suggest that it should.

153. That I think concludes the questions that I was asked. There will no doubt have to be considerable working out of the practicalities.