Neutral Citation Number: [2023] EWHC 2467 (KB)

Case No: QB-2020-001291

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2023

Before :

MASTER STEVENS

- -

Between :

1. Adam Robert Giaquinto	**Claimants**
2. Capital International (Nominees) Limited	
3. Gilbo Management Limited	
4. HCT Management Limited	
5. James Robert Edwards	
6. Jonathan Charles Hammond	
7. Montagu Square Limited	
8. Philip Harvey Barnett	
9. Stuart James Anderson	
- and –	
ITI Capital Ltd (formerly "Walbrook Capital Markets Ltd" and "FXCM Securities Limited")	**Defendant**

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Mark James (instructed by **iLaw**) for the **Claimants**
Bobby Friedman (instructed by **Rosenblatt**) for the **Defendant**

Hearing dates: 7 March 2023 and 28 June 2023

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Approved Judgment

This judgment was handed down remotely at 2pm on 13th October2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER STEVENS

Master Stevens:

INTRODUCTION AND BACKGROUND TO THE APPLICATIONS

1. The claimants in this action are a mixture of corporate bodies and individuals that invested in an option trading strategy with the defendant's predecessor in title in 2014. The investments were unsuccessful, and the claimants lost everything. They allege that the defendant is liable for the losses due to breaches of contract and statutory duties, negligence and misrepresentation. There are also suggestions of dishonesty on the part of the defendant although the adequacy of that pleading is contested. The claim is pleaded in excess of £4M and is fully defended with the defendant maintaining the position that each of the claimants was a highly experienced and sophisticated investor.

2. On October 28th, 2021, the defendant issued an application for security for costs against the corporate claimants only. There were difficulties obtaining a suitable listing so eventually it was passed to me, although not the Assigned Master, for a hearing. In fact, 3 hearings ensued, and I handed down a detailed judgment in favour of the defendant with neutral citation number [2022] EWHC 973 (QB). This judgment needs to be read alongside the previous one ("my first judgment"), where I reviewed the relevant authorities as to the nature of security that might be appropriate before setting out my decision. All references to "the claimants" in this judgment in the context of security-related correspondence and applications relate to the corporate claimants only.

3. It is important for me to directly reference paragraph 83 of my first judgment where I explained that the ATE policy that the claimants had offered at that time could be used by way of security for costs, if it was backed with suitable anti-avoidance provisions and there were provisions addressing problems of solvency and a direct payment mechanism to the defendant. Most ATE policies contain numerous exemption clauses, many of which relate to defaults in the conduct of the insured, and over which the defendant has no control. This is just one of the reasons why the inclusion of anti-avoidance provisions within the policy is regularly ordered by the court, if an ATE policy is to be accepted as suitable security, or partial security for costs. Such provisions provide comfort to a defendant who can then rely on the policy to pay out irrespective of the acts of the insured. It is usually necessary to also have a direct payment mechanism between the insurer and the defendant so that they can readily recover monies owed to them, rather than having to rely on the insured submitting a claim under the policy and paying monies over to the defendant after the policyholder has received them. Courts will also usually consider the issue of possible insolvency of the claimants and how to ensure that monies due to be paid out under an insurance policy are ringfenced for the purposes for which the policy was incepted i.e., they do not fall to be distributed amongst other creditors, such that a defendant may not receive the full amount due under the security ordered by the court. All of these issues were argued in front of me before I handed down my first judgment, hence my decision in the terms recited above.

4. Whilst the claimants in this application continue to submit that the solvency issue is of relatively limited concern in this case, the defendant disagrees. Any time for appeal of

my first judgment has long since passed. The defendant has submitted to me in previous hearings that "*there is a strong likelihood that the corporate claimants are all insolvent. They have no business and no assets*". It is not contested that the second claimant is an investment club and nominee company, registered in the Isle of Man. Material contained within the first hearing bundle [at 15/240-241] demonstrated that the company is a vehicle to hold client monies only, and its funds are not proprietary funds belonging to the company itself. The other three corporate claimants all have dormant accounts, are nominee companies and none of them has more than £100 on their balance sheets. It was for these reasons that I previously required the claimants to address the "*problems of insolvency*" when putting up adequate security.

5. The relevant insurance policy at the time of my first judgment was from BCR Legal Assist Ltd ("BCR") although the provider was not actually named in that judgment. That policy had been the subject of extensive correspondence between the parties pre-hearing (see for example [30] and [31] of my first judgment), as the defendant had sought to negotiate detailed amendments to it, with some success by the time of the hearing. Indeed, I had noted at [35] of my first judgment that many points taken, even in the skeleton arguments, had significantly narrowed by the time of oral submissions. This factual context will become relevant in later sections of this judgment. Importantly, my first judgment did not specify that the requirements of solvency and direct payment mechanisms would need to be satisfied by means of a Deed of Indemnity. The authorities that had been placed before me demonstrated that a Deed could be a suitable mechanism, but my judgment did not mandate it, as I was aware that a Deed was not the only method by which the concerns I had identified, could be satisfied.

6. Following the handing down of my first judgment on 10th May 2022, I requested that the parties draft an order dealing with consequential directions. The defendant supplied a draft order to the claimants on 11th May 2022 which was subsequently filed at court. That draft provided that:

"(1) Unless alternative security in the form described in paragraph 2 below is put in place at or before 4:00 PM [14 days from the date of the order], the Second Claimant, Third Claimant, Fourth Claimant and Seventh Claimant shall each give security for the Defendant's costs until the experts stage by each paying the sum of £64,800 each into the Court Funds Office, by 4:00 PM on [14 days from the date of the order].

(2) the alternative security referred to in paragraph 1 above shall consist of an after the event insurance policy ("the ATE Policy"), issued to the Claimants in the form described at paragraph 83 of the Judgment to include:

2.1 adverse costs cover of at least £100,000 for each Claimant to the Proceedings;

2.2 a suitable anti-avoidance endorsement in accordance with the Judgment; and

2.3 a suitable deed of indemnity directly from the insurer to the Defendant.

3. Unless the security or alternative security (as referred to in paragraphs 1 and 2 is given as ordered by the Claimant in question, in the time specified above, then in respect of that Claimant:

a. That Claimant's claim is struck out without further order, and

b. On production by the Defendant of evidence of default, there be judgment for the Defendant on that Claimant's claim without further order, with the Claimant to pay the Defendant's costs of its claim, to be the subject of detailed assessment if not agreed."

7. Written submissions on post-judgment issues were submitted by both counsel on 12th May. Despite 4 pages of written submissions from the claimants, they did not raise an objection to the terms of the draft order which the defendant had submitted, save for the issue of the costs of the application itself and the amount of time to be allowed in which to provide the security.

8. Upon reviewing the draft order, the submissions and correspondence from the parties, I noted the insertion, within the draft order, of a requirement to supply a Deed of Indemnity, as well as a debarring order, should the requisite security not be provided within the time scale indicated. The debarring order provision had been advanced in the defendant's original N244 application but was not something that I expressly dealt with in my first judgment. I had indicated at [84] that only a brief amount of further time should be allowed for the claimants to arrange acceptable alternative security to a payment into court, but I had not actually specified a debarring order. I was naturally mindful of the listing and other delays that had been encountered since the defendant's application was first issued, and the need for the claim to be progressed and resolved as expeditiously as possible in accordance with the overriding objective, but the issue of a debarring order was a matter left for consequential directions.

9. Whilst the draft order supplied to me was therefore rather more prescriptive as to the security to be provided than my first judgment had mandated, the only relevant issue I was asked to determine following written submissions from both parties, as relevant to these applications, was the time to be allowed for the security to be put in place. I decided that 14 days was adequate and wrote to the parties on 30th May advising of this *"in view of the lapse of time since judgment was handed down"* and stating, "*As I understand it there is no other contention between the parties as to the remaining terms of the draft order*". Thereafter no further pertinent matters were raised by either party with me, so the order was duly sealed ("the Security Order") and served by the defendant on 1st June.

Claimants' application

10. On 7th June 2022, almost 4 weeks after the written submissions on post-judgment issues, and over 7 months after the issue of the defendant's application, the claimants' lawyers wrote to the defendant attaching 2 quotations for an alternative ATE policy to the previous BCR one considered by the court, this time from a new provider, Accelerant Insurance Europe SA ("AIE"), whose offerings had not been reviewed in either the original security application or my first judgment. The new proposals, with substantially different wording, had been prepared by newly instructed insurance brokers, Mission Underwriting UK Limited, trading as Ignite. The product will be referred to as "the Ignite policy" in this judgment. BCR is based in London. AIE is registered in Belgium and authorised by the National Bank of Belgium. AIE was only operating under a temporary permissions regime in the UK at the time the policy quotations were obtained.

11. The claimants maintained in their letter of 7th June, that a Deed of Indemnity was not in fact required if there was an appropriate anti-avoidance endorsement on the ATE policy. No reason was given at that time for the apparent U-turn in approach to providing security and change of provider from the terms of the Security Order, save that the new provider was not licensed to provide Deeds of Indemnity, which the claimants now maintained would not be necessary anyway to implement the requirements of my first judgment.

12. On 9th June the defendant's solicitors replied to the claimants' correspondence insisting that the Security Order be complied with, on its terms, which included the provision of a Deed of Indemnity so it would be directly enforceable without reference to the ATE policy, failing which the relevant claims should be struck out automatically. They also set out why they considered the new policy terms in the Ignite policy were less favourable and the anti-avoidance provisions inadequate.

13. Notwithstanding the defendant's warning of 9th June, and the strict terms of the Security Order, it was only on 13th June 2022, the last day for compliance with the Security Order, that the claimants replied to the defendant with revised anti-avoidance wording, maintaining that they considered the same was unnecessary, but provided simply in the interests of "*goodwill*" and to save court time in listing a hearing on their application issued the same day for an extension of time to put security into place. The updated wording of the policy endorsement was said to comply with that approved in *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others* [2019] CAT 26 ("*UK Trucks claim*"). The accompanying application also sought a variation of the Security Order to remove the reference to a Deed of Indemnity and a declaration that the Ignite policy and endorsements now offered should be sufficient alternative security.

14. Within the application, and for the first time, the claimants' solicitor indicated a new reason for the apparent volte face[1] in approach towards the Security Order, indicating a mistake made due to pressure of time in drafting of the post-judgment order. No details were provided as to who was said to have made the mistake, nor how the significant time gap between the circulation of the draft embargoed judgment and sealing of the Security Order caused "*pressure*". There was no request for the matter to be remitted back to a judge urgently.

The defendant's application

15. On 11th July the defendant's solicitors wrote to the court advising that they wished to issue a cross-application for hearing alongside the claimants' application, to strike out the claims of the corporate claimants for failure to provide security in the form ordered. This resulted in a 4-hour time estimate overall for both applications. There were then difficulties finding suitable dates when both parties would be available, and the applications ended up being listed in March 2023 with a time estimate of just 2 hours which was inadequate for all matters to be disposed of. In advance of the hearing, I asked counsel for a list of issues to be submitted, so that the limited time available could be managed well. At the hearing, I suggested that I listen only to submissions on the preliminary point of whether the Security Order could/should be amended under the slip rule or varied pursuant to CPR 3.1(7) due to a mistake and the hearing proceeded on that basis. This left a detailed examination of any relevant change in circumstances

[1] 4th witness statement of Ms Lau dated 13.6.2022, at paragraphs 8 and 9

resulting in the new policy proposals, and the application for an extension of time to be determined later.

16. A return date for the balance of the applications was listed for the end of June. At the start of the second hearing, I gave a brief oral judgment on submissions made in March on the permissibility of a variation or amendment due to a "mistake". I considered that the correct legal tests were not satisfied. I mentioned that the test for variation, in addition, required consideration of all the circumstances of the case, not just whether there had been a mistake, such that it was possible new circumstances would be brought to my attention which would cause me to reflect further. That aspect of my reasoning was somewhat obscured in some of the submissions which followed, which appeared to assume that my view had been expressed on a final basis regarding the variation; that has not however hampered my work in reaching final conclusions in this judgment regarding both applications. Submissions at the second hearing were chiefly directed towards the adequacy/inadequacy of the new security proposed by the claimants, if it was indeed appropriate to alter the previous order setting out the requirement, inter alia, for a Deed of Indemnity.

17. Due to the importance of the decision for both parties, I will now set out my reasoning more fully on the preliminary points and then proceed to deal with the new security being offered. The overall structure, for ease of navigation, will be as follows:

Request to amend under the Slip Rule

(i) CPR 40.12(1) and principal authorities

18. This rule provides that *"The court may at any time correct an accidental slip or omission in a judgment or order"*. The commentary in the White Book at 40.12.1 explains that "*the rule "cannot enable a court to have second or additional thoughts*" as once the order is drawn up any mistakes must be corrected by an appellate court". The emphasis in the wording of the rule is therefore on an accident or mistake.

19. The White Book commentary starts with reference to *Bristol-Myers Squibb v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414 ("*Bristol-Myers*") which reviewed previous authorities and the CPR. That authority makes it plain that the rule cannot be deployed to enable the court to have "*second or additional thoughts*" but any mistakes in an order can be corrected to give effect to the intention of the court [25]. The later case of *Leo Pharma A/S v Sandoz Ltd* [2010] EWHC 1911 (Pat) *("Leo Pharma")* develops the point further and is summarised in the White Book as follows, "w*here a court encourages parties to agree matters of detail to be included in an order, a subsequent agreement as to the form of the order would plainly be within the intention of the court*". The commentary goes on to summarise more of the decision by stating, "*matters deliberately included by parties in an order drawn up and sealed do not constitute accidental slips and omissions within the rule"*.

20. The parties placed 11 authorities on the rule within the hearing bundle and took me to most of them during the course of submissions. Where the analysis of those decisions

was most strongly contested it is more convenient to summarise the arguments by reference to the party making them in the sections below.

(ii) Claimants' submissions

21. The claimants submitted that they should be entitled to rely upon the slip rule provision to vary the Security Order as *"an error was made in the drafting of the order in that it does not reflect the Master's ruling (paragraph 83) that the indemnity was to be an alternative to the anti-avoidance provisions"*. As mentioned at paragraph 13 above, the claimants' solicitor had alluded to time pressures in drafting the order resulting in a mistake being made. They sought to emphasise the fact that my judgment had not specifically required a Deed of Indemnity to be executed. They referenced a number of cases where the courts had accepted an ATE policy without any Deed of Indemnity. They submitted that my judgment concentrated on *"substance and not form"* for the security. The fourth witness statement of the claimants' solicitor at [8], went further to suggest that my ruling specified that "*the indemnity was to be an alternative to the anti-avoidance provisions*". In written submissions, the claimants sought to rely upon decisions in three cases where amendments were made to orders under the slip rule.

22. The first case relied upon was "*Bristol-Myers"* where it had been held at [25] that *"it is possible under the slip rule to amend an order to give effect to the intention of the Court"*.

23. The second case relied upon was *Dickinson v Tesco plc* [2013] EWCA Civ 226 which was a judgment on an appeal where there had been a discrepancy between various sections of a judgment and the resultant order, and a subsequent amendment was ordered pursuant to CPR 40.12(1) when the error was brought to the court's attention.

24. The third case relied upon was *Libyan Investment Authority v King* [2020] EWCA Civ 1690 ("*Libyan Investment Authority"),* where the Court of Appeal permitted the variation of an order under the slip rule in circumstances set out at [106] where the order "*did not accurately reflect the judge's reasoning in the 2018 Judgment, was internally inconsistent and procedurally incoherent"*, relying upon a plain manifest mistake by the judge in the formulation of his order at [121]. They relied particularly upon the reasoning of Arnold LJ at [119] as "*most illuminating*", where it was held that "The *slip rule cannot be used to enable the court to have second or additional thoughts, but it does enable the court to correct an order so as to ensure that it reflects the court's intention and to prevent the order from having an unintended consequence"*.

25. In oral submissions the claimants also relied upon the decision in *Riva Bella S.A. v Tamsen Yachts GmbH* [2011] EWHC 2338 (Comm) where a draft order was approved by leading counsel for the claimant and then there was both an application to correct the order subsequently pursuant to CPR 40.12 and an appeal. The error which had crept into the order was said to be caused by a lack of recollection during trial by the claimants as to monies already paid when agreeing the balance of a debt to be inserted into the final order. The defendant denied that there had been any relevant previous payment and therefore that there was any basis to change the order. At [25] the judge held that consistent with the court's intention at the time of giving judgment, the total figure which he would have awarded, and the correct figure to his mind, was only to award the defendant sums which it was owed, and therefore the figure in the final order should be corrected under the slip rule as should the calculation of interest.

26. The claimants also had included *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Ors* [2015] EWHC 5267 (Comm)("*Fiona Trust")* within the authorities bundle where the judge concluded it was appropriate to use his inherent jurisdiction to clarify what he had intended within his order about consequential monetary relief claims. He had explained at [33] his intention in inviting the parties to agree an order was for the purposes of giving effect to the judgment, stipulating, *"I did not give the parties licence to agree that the court should make an order that did not do so"*. The judge also mentioned at [33] that *"the slip rule is used to deal with errors and omissions that result from "accidents" on the court's own part as well as those of the parties"*.

27. The claimants sought to distinguish the decision in *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236 ("*Vasiliou*") at [16] on its own particular facts, that there had been no mistake made, arguing that the decision did not seek "*to lay down a rule of law*". Furthermore, relying upon *Smithkline Beecham plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch) ("*Smithkline*"), they argued that there was no obligation upon them to identify who had made the mistake, in the manner which they said was contended for by the defendant, as the test is objective, and plainly a mistake had been made. In that case, there was considerable discussion asked whether the mistake had emanated from the judge or counsel seeking to embody the terms of the judgment into a draft order.

(iii) Defendant's submissions

28. The defendant relied upon a decision of the Supreme Court in *In re L and another* [2013] 1 W.L.R. 634 [19] where it was held that *"there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under CPR r 40.2 (2) (b), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal"*.

29. The defendant also relied on the *Bristol-Myers* case at [22] to support a contention that mistakes following the sealing of an order can only be corrected by an appellate court.

30. The defendant's argument was further crystallised into 5 submissions, namely:

    i) That I made no mistake when approving the draft order because I had first checked with the parties that the terms they had agreed represented "*the only suitable mechanism*" which they had identified for meeting the concerns that I had outlined within my judgment regarding solvency and direct access to monies by the defendant.

    ii) The terms of the order had been specifically considered and agreed by counsel for the claimants.

    iii) No evidence had been put forward that claimants' counsel had made a mistake and their instructing solicitor had expressly disavowed such a suggestion at paragraph 6 of her 5th witness statement.

    iv) The claimants' instructing solicitor had subsequently clarified that the only mistake was an assertion that the judgment and the Security Order differ as to the requirement for a Deed which does not satisfy the definition of a mistake within rule 40.12.

v) Finally, the nature of the judgment was such that it required distilling into the form of an order; it did not have the nature of a statute which needed to be construed, but rather it was a case of the parties drafting the order and the court considering and approving it.

31. The defendant placed heavy reliance upon the decision in "*Leo Pharma"* at [17], "*it is common for the court to encourage parties to agree matters of detail in the drawing up of its order with the proviso that the parties may mention the matter again to the court in the event of disagreement. Whilst in such circumstances it could be said that the court had no specific intention at the time it spoke its order, a subsequent agreement as to the form of order would plainly be within the intention of the court, and such an agreement could not, as it appears to me, be corrected under the slip rule. There is neither a failure to reflect the intention of the court, nor any accident or slip*".

32. Further reliance was placed upon the rulings at [18] and [25] in *Leo Pharma*, namely, "*18….matters deliberately included by the parties in an order drawn up and sealed by the court do not constitute accidental slips or omissions within the rule. It is different where, as in Bristol-Myers [2011] R.P.C. 45, the order had an unexpected and unintended effect inconsistent with the court's intention….*

25. The court should be very cautious before going behind an apparent agreement between counsel, and for obvious reasons...It was throughout open to Sandoz to pursue its objection to this provision, either by persuading Leo to accept a different form of order, or by restoring the matter for argument in court or on paper. Sandoz did not take any of these options. It expressly elected for the form of order in Leo's draft".

33. Additionally, the defendant relied upon the Court of Appeal's judgment in both the *Vasiliou* case at [16] referenced above, and the *Smithkline* case at [63] where the fact that the terms of orders were agreed by counsel was held to be conclusive that there had been no accidental slip or error.

(iv) Analysis & conclusions

34. Despite the intensity of conflicting submissions as to how I should interpret the application of CPR 40.12, and the various authorities, once I had an opportunity after the hearing to read the relevant cases thoroughly, there was no doubt in my mind that the wording complained about in the Security Order is not amenable to correction under the slip rule. I believe the fundamental missing foundation block for the claimants' argument is the lack of a true "*mistake*". I have already explained that there was no mistake made by me in approving the draft Security Order; I was well aware that it was more prescriptive than what I had set out in my judgment, hence my email to the parties on 30th May (see [9] above) but the Security Order was not inconsistent with my judgment, unlike the situation in *Libyan Investment Authority*; the parties had come up with one of several ways of giving effect to my intentions and it was not an incorrect solution.

35. The claimants have not been very clear about the nature of any mistake made in allowing the draft Security Order to be placed before me unchallenged in their submissions on the terms of that Order; both the reasons and the alleged nature of the mistake have been elaborated upon over time but are still somewhat hazy and I did not find the submissions compelling in respect of the test they are required to meet. This is

especially true given what I have already said about my intentions in writing my first judgment, and in approving the draft Security Order. In the 4th witness statement of the claimant's solicitor at [8], it was stated that the mistake was a misinterpretation of my judgment because an indemnity was supposed to be an alternative to anti-avoidance provisions, but I fail to understand that as it is quite plain from my judgment that anti-avoidance, direct payment mechanisms and insolvency were all to be addressed and that these issues each required consideration, as the authorities that had been argued before me made clear. The parties deliberately chose a form of words for the consequential directions order, it was approved by the claimants' counsel and not inconsistent with my first judgment. The claimants' other *"pressure of time"* argument is not understood and was not explained. It is incomprehensible to me how a period of 4 weeks and 6 days from handing down judgment to the final date for compliance under the Security Order, could be said to give rise to the sort of pressure where this type of mistake could be made; those with conduct are experienced in litigation where far more punishing timescales are commonplace. My doubts are further reinforced by the fact that at [15] in the claimants' solicitor's 5th witness statement it is stated that, "*The court will recall that the Corporate Claimants sought four weeks to put security in place. This was opposed by the Defendant. The court permitted the Corporate Claimants just 14 days to do this*". By my calculations, the claimants actually had longer than the 4 weeks requested to find alternative security and it is plainly wrong to suggest that time only started running against them from the date of the Security Order which they agreed with the defendant; my requirements had been set out in the earlier judgment, which in fact had been circulated for 6 days on an embargoed basis before even the public hand down.

36. It is important that I am clear that the situation covered by this application is not the same as in the "*Fiona Trust"* case where there was consideration of a situation where parties perhaps intentionally make adjustments in an order that fall outside the intention of the court, and therefore are potentially amenable to correction under the slip rule by the judge. I chose to order the provisions which the claimants now seek to overturn as they were consistent with what I had ordered.

37. The claimants also took time in their skeleton argument to refer to cases where an ATE policy had been allowed by the courts as adequate security without a Deed of Indemnity, as though by implication my approval of an order mandating the provision of such a Deed was wrong. There are several difficulties with that approach. First, my judgment had not mandated the provision of a Deed; that was only introduced by the form of words they chose to insert and agree in the draft order, and that choice of wording was also not inconsistent with my first judgment, such that I took a conscious decision on receiving the draft order before approving it. My approval followed a query to the parties to alert me if terms were still in part contentious between them other than timings, which elicited nothing but consent on the material sections. Secondly, if the claimants considered there was something wrong with my first judgment, they should have appealed it. Thirdly, if they had wished to bring another authority before me to reflect upon prior to handing down my first judgment, such as the UK Trucks claim, which was placed within this hearing bundle, and raised in their submissions for the first time on this application, they had ample opportunity to do so in the hearings in 2021/22; by then the *UK Trucks claim* decision was already 2 years old. It is inappropriate to introduce new argument on an application under CPR 40.12. In any event, the fact that a Tribunal has ruled that an ATE policy alone may be adequate

security will be fact-specific to the case and is not necessarily inconsistent with my judgment.

38. As to a "mistake" by counsel, which the decision in the "*Fiona Trust"* case makes clear may also be covered by the rule, there is a lack of evidence to support any such assertion. Indeed, as the defendant pointed out, the witness evidence in support of the application goes so far as to refute the suggestion that any identification is relevant and therefore makes no attempt to identify who made the mistake (at paragraph 6 of the claimants' solicitor's 5th witness statement).

39. Whilst the claimants sought to persuade me that it was unimportant who made the mistake, when objectively they believe an error has been made, that argument does not get off the ground when I cannot identify a mistake, nor can the defendant, and the claimants fail to particularise it in any meaningful way. This is in circumstances where I actively noted the choice of wording in the draft Security Order, and the different use of language to my first judgment, and checked the parties had no further contentions not previously notified to me and decided that the drafting was not inconsistent with my first judgment, and duly proceeded to authorise the sealing of the order on that basis.

Request for a Variation

(i) CPR 3.1(7) and principal authorities

40. The claimants' alternative position, if I did not find favour with their submissions under the slip rule was to contend for a variation to the terms of the Security Order, pursuant to CPR 3.1(7), on the basis that there has been a manifest mistake in the formulation of the order or a change of circumstances, namely the inability of the ATE insurer to provide an indemnity by reason of the terms of its licence. Given my findings at paragraphs 34-39 above, the application cannot succeed on the basis of a "*mistake*", but I will address whether there is any basis to make an order under rule 3.1(7) due to a change in circumstances.

41. CPR 3.1(7) provides that, *"A power of the court under these Rules to make an order includes a power to vary or revoke the order".* The leading authority, cited by both parties, is *Tibbles v SIG plc* [2012] EWCA Civ 518 ("*Tibbles*"). The headnote to the case summarises the decision as follows: "*that the jurisdiction of the court to vary or revoke its own order under CPR r 3.1(7) was apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion*". The headnote went on to recite that "*in the light of the very long delay in the making of the application to vary the reallocation order, which had caused inevitable prejudice to the defendant, the application did not fall within the spirit of the primary circumstances in which rule 3.1(7) might be invoked"*. There was also a reference to the overriding objective requiring cases to be dealt with justly which requires proper consideration to all the materials before the court. In *Tibbles*, the application to vary was made 10 months after the order which was sought to be varied.

42. Earlier authority from Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch) was cited from [28] to the effect that a party should not rely on submissions and evidence available to them at the time of the earlier hearing but

which, for whatever reason, they had chosen not to deploy. The court has a broad discretionary power and judges have been at pains not to provide exhaustive definitions of the situations where the rule may be deployed successfully. The exercise of powers under the rule should not come anywhere near close to allowing a party to ask a judge to review their own decision, on the basis of some subsequent event, if a variation of a final order is being sought. For interim case management decisions, subsequent events may be brought to the attention of the judge upon a variation application. At [39(v)] Rix LJ held that "*where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate*".

43. Also within the authorities' bundle is the case of "*Libyan Investment Authority",* but the circumstances of that case resulted from a contradiction in a judge's order between his expressed intention and the intention manifested by his previous judgment which is not the scenario before me.

44. The final authority within the bundle was *Pipia v BGEO Group Limited* [2022] EWHC 846 (Comm). This was a case involving a material change in circumstances where an application to vary was approved by Henshaw J. A costs order had been made and a lengthy detailed assessment had been ordered to follow, but following a failure to make a payment on account, it was held that the cost and expense involved in proceeding with the detailed assessment was no longer appropriate, and a summary assessment would be more cost-effective; the material change in circumstances caused by the failure to pay any more monies by way of payment on account, in the context where there was a sizeable amount already held in court as security for costs, justified a variation to the order as there would be little practical benefit in spending more money on the assessment process when there was already an enforcement issue under the costs order that had been made. The most relevant changes of circumstance taken into consideration by the judge were:

i) The failure to comply with an existing order and re-instruction of lawyers by the defaulting party.

ii) Subsequently the debtor once again becoming a litigant in person, showing no inclination to comply with the costs order despite a presumption that legal advice had been given during the period that he was legally represented.

iii) There had been no material delay in the application being made.

45. The notes in the White Book at CPR 3.1.17.1, add a further consideration not mentioned within the authorities in my hearing bundle, that it may, in principle, be an abuse of process for a party to seek to re-open an interim order on the basis of a material change of circumstances relying upon a development that was wholly within that party's control. *"In deciding whether it is an abuse the court should take a broad, merits-based approach; it must take into account the public and private interests involved and all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court".* It was a point of contention between the parties as to whether or not the variation sought was in respect of an interim order (the claimants' position) or a final order (the defendant's position). These notes put the position a little more strongly than the reasoning of Rix

LJ in the *Lloyds Investment* case referenced above at [42] where the state of knowledge at the time of the previous hearing was held to be "*material*", but "*abuse of process*" was not the terminology adopted.

(ii) Factual context for the variation - documents within the hearing bundle

46. There is no chronology within the hearing bundle setting out the material change in circumstances contended for by the claimants concerning their arrangements to provide for adverse costs liabilities, whether by the provision of ATE and/or a Deed of Indemnity. However, the documents and evidence I have received on the point can be summarised in the table that follows.

47. Chronology of events

Date	**Event**	**Source**
3.4.2020	Proceedings issued	Court file
27.7.2020	ATE cover arranged in principle with BCR	Claimants' solicitor's witness statement 4 at [11]
29.7.2020	Proceedings served	Court file
13.11.2020	Defence	Court file
12.10.2021	Failed mediation	Submissions
21.10.2021	Costs budgets exchanged	Court file
28.10.2021	Defendant's application for security issued	Court file
2.11.2021	First reference by claimants to the defendant of an ATE policy having been secured although it was not identified	Exhibit to the defendant's first witness statement at [126] of the hearing bundle

November/December 2021	2 hearings relating to security	
December 2021	Claimants in discussion with BCR to increase levels of cover under the ATE policy on offer, at the time of the first hearing of the application	Claimants' solicitor's witness statement 4 at [11]
31.1.2021	Final agreement re. budgets up to experts' phase	Court file
10.5.2022	Judgment handed down NB the draft had been circulated on 4.5.2022 requiring better costs protection than that offered by the BCR policy considered at the hearings of the application	
12.5.2022	Claimants' written submissions to the court regarding consequential orders requesting 4 weeks in which to put the security in place	Document at [138-141] of the hearing bundle
27.5.2022 (Friday)	Defendant solicitor emails claimants' solicitor to request confirmation that the claimants are in discussion with their insurers as to the revised terms of the ATE policy and requesting sight of the same	Document at [179] of the hearing bundle

30.5.2022 (Monday) at 08:08	Claimants' solicitor responds to the email above stating discussions are ongoing and that *"Our clients are reviewing an updated proposal from ATE insurers and we expect to be in a position to update you shortly"*.	Document at [179] of the hearing bundle
30.5.2022	Parties confirm the draft Security Order reflects their agreement save for the amount of time to be allowed to put security in place	
30.5.2022	Master Stevens' email to the parties approving the draft noting that 14 days would be allowed to put in place the security not 4 weeks *"in view of the lapse of time since judgment was handed down"*	Document at [142] of the hearing bundle
	Claimants assert they only had 2 weeks to find alternative security before the unless order came into effect	Claimants' solicitor's witness statement 6 at [4]
After 10.5.22 and before 1.6.2022	BCR advise the claimants they cannot offer the proposed increase in cover in the timescales required by the court. At an unspecified time, a new ATE product is sourced from Ignite. NB this is unknown by the defendant until 7.6.2023	Claimants' solicitor's witness statement 4 at [12]

Period 30.5.2022-13.6.2022	The claimants state they did not investigate the market or submit applications to other insurers for ATE because time was too short. Their broker moved in this period from BCR to Ignite hence the new ATE proposal from AIE -this was not known by the defendant until 7.6.2023	Claimants' solicitor's witness statement 5 dated 24th February 2023 at [15]
1.6.2022	Security Order sealed and served by the defendant and acknowledged by the claimants	Defendant's solicitor's witness statement 17.2.2023 at [14]
1.6.2022	AIE confirms to the claimants that Ignite has authority to enter contracts of insurance on its behalf but only for class 17 products	Document at [383] of the hearing bundle
2.6.2022	Date of Ignite quotation	Document at [91] of the hearing bundle
7.6.2022	Claimants' solicitor advised the defendant of the proposal for alternative security to replace BCR and enclosed copy insurance contract documents wording (version of main policy terms dated 04/22)	Claimants' solicitor's witness statement 4 at [13] and letter to the defendant in the bundle at [86]
9.6.2022	Defendant advises the alternative security is not acceptable	Document in the bundle

13.6.2022	Claimants make an application to court to vary the Security Order and supply updated endorsements	Court file
6.3.2023	Claimants' solicitor confirms the broker only has delegated authority to issue Class 17 products but not Class 16 on behalf of AIE -no reply to the defendant as to why they did not approach AIE directly	Claimants' solicitor's witness statement 6 at [3-4] and letter to defendant in the bundle exhibited and marked LJK3 to the defendant's solicitor's witness statement 3

(iii) Claimants' submissions

48. The claimants' principal submission was that the first judgment did not expressly require a Deed of Indemnity, and as they considered the Security Order was an interim order not a final order, I should allow them to provide security by way of the new anti-avoidance provisions which they had secured from AIE, which they said were equally good security. They stated the adequacy was demonstrated by the fact that the policy endorsement mirrored the provisions reviewed by the Competition Appeal Tribunal in the *UK Trucks claim* and described it as "*impossible*" for the defendant to argue the security was inadequate, maintaining the defendant's opposition was one of form, not substance. The change in circumstance relied upon was the inability of the insurance broker for AIE to provide an indemnity because it is a class 16 product[2] but the broker was only licensed to provide class 17 products. Upon questioning by the defendant immediately prior to the hearing about why AIE had not been approached directly for a Deed (as the defendant had discovered they were suitably licensed even if their broker was not), the claimants maintained that there was not enough time in the 2 weeks permitted under the Security Order to make a direct approach to AIE.

49. The claimants asserted that there would be no prejudice caused by the variation to the defendant but that "*considerable prejudice will be caused to the corporate claimants by not permitting the variation since they will lose their claims which have, at the very least, real prospects of success*". They relied on the "*broad and unfettered*" discretion of the court to vary orders as set out in the *Tibbles* case and the need to comply with the overriding objective to ensure the matter was dealt with justly.

50. The remainder of the submissions focused on the difference between the BCR and AIE policies in an endeavour to persuade me that the defendant would not be materially worse off if I allowed a variation to the Security Order to permit the AIE policy with

[2] Pursuant to Part 1 of Schedule 1 to the Regulated Activities Order 2001(as amended) made under the Financial Services and Markets Act 2000, implementing into English law Annex A to 73/239/EEC, the First Insurance Directive.

relevant anti-avoidance endorsements, in place of the security originally ordered. It was submitted that the defendant was really seeking a windfall on their strike-out application which would be unjust. There was criticism of the defendant's lateness in issuing their cross-application and their lack of engagement after the claimants' new proposals were supplied in June 2022. In dealing with the defendant's contention that the request for a variation had caused yet further delay to the timetable and the listing of an application for strike-out of the claims against all claimants (not just the corporate claimants against whom security had been ordered), they asserted that there would have been delay anyway due to listing difficulties at the court.

51. Submissions and the evidence relied upon in witness statements from the claimants' solicitor also touched upon certain aspects of the factual context said to necessitate the variation as set out in the table above i.e. that on an unspecified date between handing down my first judgment on 10th May 2022, and 1st June 2022 when the Security Order was served, BCR indicated that they were unable to provide the increased cover required by my first judgment in the timescales set out in the Security Order. The individual broker for BCR relied upon by the claimants, also appears to have moved employment to work for Ignite during this time frame but precisely how that had impacted matters was not set out. There was an exhibit within the hearing bundle showing that on 1st June the new provider, AIE, wrote to the claimants' solicitors to confirm that Ignite had authority to enter contracts of insurance on its behalf, hence why alternative security could now be offered.

(iv) Defendant's submissions

52. The defendant submitted that the reason for the variation request was a deliberate decision by the claimants to flout the terms of the Security Order for their own convenience, pointing out that 9 months after the Security Order was made, the claimants had still failed to provide security of any sort, let alone security compliant with the Security Order. They reminded me that no insurance proposal has been accepted, nor any monies paid into court. This they said has led to delay in terms of progression of the rest of the claim, a hearing date (for their strike-out application which had been issued on 24th November 2021) and a trial date (originally listed for 6th March 2023) have been lost and that delay is prejudicial to the defendant's business activities, all the time there is a live claim against them which includes allegations of dishonesty. It was submitted that in addition to prejudice to reputation whilst litigation remains afoot, there is financial prejudice as provision has to be made in the company accounts for the claim. The defendant noted that there has never been any evidence filed that the claimants could not make a payment into court if required to do so, for which they then could have sought payment out, if and when a suitable ATE policy was put in place.

53. The defendant further maintained that the only basis for the variation that would have been permissible, would have been by an appeal of my decision as to the required form of security, but that has not been pursued. They relied on submissions that the claimants had agreed to the terms of the Security Order which contained an unequivocal requirement for a Deed of Indemnity. They referred to the claimants' lack of alacrity in dealing with the question of security throughout, and which has been a live issue since the defendant first issued its application for security on 28th October 2021. They submitted that the claimants have "*sat on their hands*" since the application was issued, choosing to rely on a broker rather than approach BCR or AIE directly for a Deed of Indemnity, it being apparent that AIE (as opposed to its broker) is licensed to provide

such a Deed, and there being no indication that BCR could not also have done so, given adequate time. They noted that the claimants' solicitor in her 6th witness statement indicated the claimants had not gone to market to obtain the security needed but relied simply on one broker, without explaining their reasons for doing so (aside from the alleged shortness of time after the Security Order was made which was disputed by the defendant due to the much greater length of time their application has been afoot). They noted the gap in evidence as to how long BCR would have taken to provide the cover under the Security Order which is now said to be a reason that they could not comply with that Order. They maintained that as there had already been previous extensive correspondence between the parties regarding amendments to the BCR ATE policy to make it suitable security, it was unacceptable to require them to go through the process all over again with a new provider, when plainly the new policy was less appropriate than the former one - a theme I shall return to below.

54. By way of overall summary, the defendants submitted that a "mistake" not having been made, there was no other cogent basis put forward by the claimants for requesting a variation, i.e., due to a material change of circumstances beyond their control, or the facts on which the original decision was made being innocently or otherwise mis-stated as set out in the *Tibbles* judgment at [39(ii)].

(v) Analysis & conclusions on the broader principles

55. Leaving aside, for now, the differences between the BCR and AIE policies, I will summarise my conclusions on the broader points around the necessary "*material change of circumstances*". I remind myself of the correct test set out above under CPR 3.1(7). My discretion is broad and unfettered but plainly my decision should be consistent with the overriding objective, such that the case is dealt with justly and at proportionate cost. This includes ensuring that matters are dealt with expeditiously, allotting an appropriate share of court resource and enforcing compliance with orders.

Delay

56. I consider it would be wrong of me not to take into account the lengthy history of the defendant's application for security and just to focus on the time taken to issue the claimant's application to vary. To my mind, the corporate claimants have been reactive rather than proactive throughout this litigation in making appropriate provisions to meet any adverse costs orders that may be made against them. By way of recap, the corporate claimants' precarious financial status plainly satisfied the CPR gateway criteria for a security order to be made, but that was denied and resisted until the day before the first hearing of the defendant's application, some 18 months after proceedings had been issued, causing delay in resolving matters.

57. Similarly, further delay has been caused by the claimants' refusal to engage appropriately regarding material aspects of the initial BCR ATE policy which they had secured in principle before my first judgment. Their position pre-hearing was that "*there is no real risk of avoidance and/or cancellation. The claimants have instructed experienced solicitors and counsel who have consulted with the ATE insurer* ***at all times*** *(my emphasis) and will continue to do so*" (summarised at [30] in my first judgment). The claimants maintained right up to the first hearing that the risk of anti-avoidance was "*theoretical*" "*and not an important risk*" as referenced at [34] of my first judgment. Plainly that approach was wrong both on the facts of this case, and more

generally as the risks are well-recognised by the courts, and addressed in numerous authorities, so there should have been better attempts to address the concerns early on rather than maintain a spirit of denial which has materially held things up.

58. Following my first judgment all the parties were clear that there should be no further delay in providing security. The natural expectation would indeed have been, in their own words, that the claimants' legal representatives "*consulted with the ATE insurer at all times*" as they had represented the position previously. They knew following the judgment what alterations were required to their ATE cover, and the timescale within which to put it in place. They should have checked that the insurer was able to implement everything they knew was included in the draft Security Order, before allowing it to be submitted to the court for approval, unchallenged in the material respects they have now sought to raise. Their evidence is silent about many crucial aspects of what happened in the period from hand down to submission of the order for consequential directions. They should have ensured that the ATE provider supplied them with a proper audit trail as to what they would do and when they would do it, such that they could evidence it before the court if there were any subsequent difficulties caused by the provider which were wholly outside the control of the claimants' legal team. Instead, the court has been asked to find that there has been a "*mistake*" in what was ordered, but without any real clarity around that, as the Security Order was certainly not inconsistent with my first judgment, and without any compelling evidence as to why an alleged shortness of time led to that mistake; this is in circumstances where the overall time between handing down of the judgment and the final date for implementation of the terms of the Security Order, was slightly longer than the time period requested by claimants' counsel (as set out at [35] above).

59. The application to vary was only issued on the final date for compliance, even though the defendant had promptly indicated that it would not accept the claimants' alternative proposals some days earlier, and there was no request to seek an urgent listing; the paperwork was simply filed on the court's CE system to wait in a queue for processing. The box on the application notice regarding other hearing dates was completed but that is not enough. The claimants' submission that there would be delays anyway with listing is no answer to what they should have tried to do to expedite matters. It ignores the seriousness of having lost both another hearing date and a trial date as referenced earlier.

60. All of the factors mentioned above have led to significant costs and delay in reaching a final resolution; indeed, the resistance to providing security means that the case is still at a relatively early procedural stage, whereas by now the trial should have taken place.

Attitude towards compliance

61. It is my considered opinion that the claimants have been less than forthcoming in terms of what they have been prepared to communicate with both this court and the defendant about how they could meet an adverse costs liability, only producing documentation at the 11th hour, as seen from remarks in my first judgment, for example at [28], and from my chronological table at [47] in this judgment. They seem to have worked from a starting point that their assurances should be accepted at face value that appropriate cost protection is in place. This might have been slightly more understandable if the insurance cover they initially arranged had not been so deficient when compared to the sort of cover generally approved in the case authorities, as my first judgment made

clear. This unfortunate approach appears to have continued since my first judgment and resulted in the predicament that the corporate claimants now find themselves in; they did not indicate to the defendant that there was any issue in arranging amended cover from BCR to comply with the Security Order until shortly before their variation application was issued. Instead, they sought to introduce wholly new policy terms in correspondence without any proper explanation regarding the change in provider, until after the defendant indicated its unwillingness to accept the new policy. Their witness statement accompanying the variation application only articulated reasons for the change of provider in a superficial way, blaming the shortness of time permitted by the court, but without meaningful evidence of how they had tried to implement directions.

62. As to the principal change in circumstance relied upon by the claimants for offering a different form of security to that ordered (irrespective of provider), relating to different licencing regimes for different types of insurance product, there is a wholly inadequate chronology and evidence base for me to find that knowledge of this difficulty was beyond the control of the claimants, or something that they had made any reasonable endeavour to overcome so that they could comply with the Security Order. The witness evidence before me is non-specific as to the communications between the legal representatives and either BCR or Ignite in the material period between the claimants' date of knowledge of the security provisions required by my first judgment and the making of the Security Order by consent, and the final date for compliance with it. If the tenor of prior correspondence placed before me in earlier hearings regarding security had shown a greater level of proactivity or transparency over the issue, I might have been more inclined to accept that all suitable diligence had been exercised to try and comply with the Security Order. Sadly, the history is not supportive and therefore does not assist. The evidence produced for this latest application is lacking in substance. The defendant has raised a good question as to why there was no direct approach to either insurer for a Deed of Indemnity, rather than reliance simply on the broker; there has been no good response.

63. Whilst I do not share the defendant's view that there has been a "*deliberate attempt to flout the terms of the Security Order*", the state of affairs appearing from the evidence before me to be rather more haphazard than that, the overall attitude towards compliance is nonetheless severely lacking.

The need for finality

64. I prefer the argument of the defendant as to the correct mechanism to try and change the form of security my first judgment required to be put in place, namely that it should have been by way of appeal, if at all. It is also inappropriate to seek to argue new authority before me now, when that authority had been widely circulated for a considerable period of time before my judgment. Efforts to try and characterise a debarring order for security as an order that can readily be varied are also misplaced; such arguments, to my mind, at least in the factual context of this action, fly in the face of the requirements of the overriding objective to proceed expeditiously and to allot an appropriate share of the court's resources. There has already been extensive time and energy expended on the security issue, and the court should be extremely cautious about re-working the position reached in the Security Order.

Prejudice

65. I have full regard to the assertions of prejudice submitted by both parties. I recognise that striking out the claims of the corporate claimants is a severe step, but I have already referenced the notes in the White Book at CPR 3.1.17.1, that the court should take account of matters that are within a party's control. The claimants chose to issue this action, when given their financial status it should have been plain that a court would need to be satisfied that they could meet any adverse costs liability. They have had more than a couple of years to sort matters out and have failed to provide any decent evidence they have taken all reasonable steps to put adequate security in place.

66. On the other hand, the defendant has asserted the reputational and financial prejudice to its business by having live litigation pending, but delayed, against them. I cannot measure the extent of that prejudice, but I recognise that there is force in the argument, especially due to the allegations of dishonesty and the loss of both a hearing date on their application to strike out the claims and most seriously, loss of a trial date. In view of some of the claimants' submissions concerning a potential "*windfall*" to the defendant I wish to make it clear that I cannot criticise the defendant for seeking to ensure that their financial outlay caused by this litigation is protected appropriately; that protection is hardwired into the CPR.

67. From the foregoing it should be plain that I do not consider the reasons given for requesting a variation represent the type of change of circumstances which would merit a variation to the Security Order. I have weighed against the claimants the issues of delay, their attempt to re-open matters that should have been appealed if they disagreed with earlier findings and authorities that should have been argued before the court previously if they wished to rely upon them, as well as the need to comply with court orders, especially a debarring order made by consent. I recognise the prejudice to the claimants of being struck out, but it is not enough to outweigh the other factors currently considered against them. Before reaching a final view however, in view of the severity of the sanction, I will now consider the security offering which the claimants say is available by way of suitable alternative. Clearly, if the claimants' proposal now meets the security concerns identified in my first judgment, that is a material consideration, even if the "packaging" of the relevant provision is labelled rather different differently to what was set out in the Security Order.

(vi) Comparison of Policy terms between BCR and Ignite policies

68. In terms of the new Ignite policy proposals, the defendant submitted that to have any prospect of successfully arguing for a variation the claimants would have needed to show that the policy terms offered were at least as good as those from BCR, as that was the policy considered by the court on the original security application. The defendant identified 12 aspects of the Ignite policy which they said were inferior to the BCR policy previously considered by the court, impacting the anti-avoidance, solvency and direct access to insurers requirements which I had set out in my first judgment. They contended that it was unnecessary to satisfy me on all those 12 aspects because there was a single "*knockout point*" in terms of the level of cover being inadequate and contrary to what I had ordered. I will now consider that, alongside several other points, together with the claimants' responses, before returning to the substantive issue of whether a variation should be ordered due to a change of circumstances.

(a) Whether there is £75,000 anti-avoidance cover, not £170,000 as ordered

(aa) Defendant's submissions

69. The defendant took me back to paragraph 83 of my first judgment where I had required the corporate claimants to arrange "*adverse costs cover so it would be £100,000 per claimant i.e., £400,000 for the corporate claimants with £170,000 of this backed with anti-avoidance provisions*". The defendant went on to state that the judgment was clear that the anti-avoidance sum was required specifically for the corporate claimants, as otherwise it would have been potentially worthless to the defendant if not ring-fenced in that way because the other five non-corporate claimants, who are not subject to the Security Order, could have used up all the anti-avoidance monies first. The defendant also referred me to line 3 of paragraph 34 of my first judgment where the corporate claimants had previously submitted to me that the new proposed anti-avoidance wording which they had at that time provisionally arranged with BCR for £170,000 adverse costs cover was "*for the corporate claimants*". On that occasion, they had sought to argue this provision left the defendant with nothing further to argue about on the security application, save for the costs of the application itself. To be absolutely clear that there had been no mistake on the point, the defendant then took me to a copy of the BCR policy schedule contained within a previous hearing bundle, which clearly set out the ring-fencing of £170,000 for the corporate claimants' anti-avoidance provision alone. On a purely arithmetical basis, the defendant submitted that the current policy wording from Ignite equated to just £75,000 anti-avoidance cover for all the corporate claimants together.

70. Due to the staggered nature of the hearings in this matter, and the production of skeleton arguments in time for the first hearing in March 2023, where this point had been set out clearly by the defendant, the defendant argued it was even more egregious that the claimant had done nothing within the intervening period of 3 months to secure endorsements compliant with the Security Order; the defendant pointed out that this was notwithstanding the claimants' submission that the defendant had failed to engage and was simply seeking a windfall judgment on a strike-out application.

(ab) Claimants' submissions

71. The claimants submitted that the defendant's argument about the level of anti-avoidance cover was misconceived, as it was, "*plainly just for the corporate claimants as they were the only ones who had the order made against them*". I consider it best to quote directly from their skeleton argument where it was stated at [26.1] that "*the Master decided that £170,000 of the total of £400,000 ATE cover should be backed by anti-avoidance provisions: judgment at [83]. This ruling is reflected in the order at [2.2]. This is what the ATE quotation provides for. There is no breach of the order in this regard*".

72. Furthermore, they said that there had been no anti-avoidance endorsement before the court when hearing submissions for the first judgment, and at [35.2] the skeleton argument continued, "*which had been approved by the then ATE insurer (although proposed wording had been addressed in correspondence). The precise wording was left for agreement between the parties: Master's judgment at [45a] and [45b]. The Master gave some helpful guidance: Master's judgment at [45c]. This has been followed. Accordingly, the corporate claimants say they have done exactly what the court contemplated should be done (i.e., obtained a suitable anti-avoidance endorsement from a reputable insurer)*".

(ac) Conclusions on whether the ATE anti-avoidance cover level of indemnity proposed accords with my first judgment.

73. I have studied the most recent Ignite quotation form for security for costs dated 23rd February 2023 (which offers more comprehensive terms generally than the quotation supplied to the defendants dated 7th June 2022, in partial response to some of their earlier criticisms) and it is incontrovertible that the policy cover headed "*security for costs*" has a stated anti-avoidance limit of indemnity of £170,000 and has been issued in favour of a named claimant "*Adam Giaquinto & Ors- see attached for full list*" at [206] of the hearing bundle. The attached list provides details of all 9 claimants, not just the 4 corporate claimants against whom security has been ordered so it is impossible to construe the cover as anything other than much diluted from the terms of the Security Order, contrary to the claimants' submissions at [71] above. To my mind, it is this sort of lack of attention to detail by the corporate claimants that has plagued their efforts to put in place suitable security/protection for adverse costs since proceedings were first afoot. Even in this "last chance saloon" this is a striking omission to fail to clearly define the 4 corporate claimants as the subject of the anti-avoidance cover, which goes to the heart of the security issue. The defendant's skeleton argument drawing attention to this point was dated 6th March 2023. There were no obvious efforts by the claimants to seek a revised list of claimants from the insurer which they could have attached to the quotation before the second hearing in June; they simply relied upon submissions that the point was "*misconceived*" which I find remarkable given that the only list in the bundle plainly refers to all 9 claimants. Mathematically speaking the defendant is therefore correct that the anti-avoidance cover for the corporate claimants is £75,555 at best if it were to be allocated on a pro-rata basis (i.e., 170 divided by 9 x 4). This is way below the sum required by my first judgment.

(b) Meeting the costs of interim applications

(ba) Defendant's submissions

74. Another deficiency in the policy wording from Ignite, according to the defendant as noted by their solicitors' letter of 9th June 2022, is that the policy will not respond to interim orders for costs in favour of the defendant i.e., costs would not be paid as they fell due, which was not the position under the BCR policy. They sought to rely on this and other terms they perceived to be less beneficial from Ignite than offered by BCR, to suggest that I would have ordered a higher sum to be provided by way of anti-avoidance protection, if the Ignite policy had been presented to me at the time of my first judgment.

(bb) Claimants' submissions

75. The claimants did not contest the interpretation of the "*final orders*" provision but instead sought to rely on my first judgment where I had not awarded security in respect of two interim applications that were foreseen at the time. The claimants summarised aspects of my first judgment where I had indicated that the defendant's omission of such costs from their budgets, upon which I had assessed the quantum of security, presented uncertainty that could be addressed at a further top-up security application if necessary (security was only assessed up to and including the expert witness phase in the claim). In oral submissions the claimants went further, suggesting that security for costs is usually about the cost of the final trial and typically costs of interim applications are

not covered. They maintained that the different terms of the Ignite policy, compared to that from BCR, did not breach the Security Order and that it was a "*barren exercise*" to compare terms on a like-for-like basis as some were a little better and others a bit worse so, overall, there was no material difference.

(bc) Conclusions on the Ignite policy cover for adverse costs of interim orders

76. I do not accept that the provision of security should be limited to the costs of the trial itself, and it is plain on the policy wording now proposed that the provision is less favourable than that under the earlier BCR policy. Notwithstanding these observations, the difference between terms is not so material that I would allow it any significant weight against exercising my discretion to permit a variation, if I found it overall appropriate to do so.

(c) Policy inception date

(ca) Defendant's submissions

77. The defendant referred to the definition of "*period of insurance*" within the Ignite policy and the exclusion of cover for any costs incurred before the inception date as another material disadvantage of the policy compared to the BCR one. They maintained that it was precisely this type of disadvantage that would have justified me ordering a higher level of security or anti-avoidance cover in my first judgment, when considering that an ATE policy would be acceptable security. They referred me to the fact that the policy defined the commencement date for insurance as the date shown in the schedule of cover, but also pointed out that no such schedule had been supplied; they therefore understood the commencement date to be in 2023, as the quotation has not yet been accepted. They argued that they should not be required to accept something so doubtful and reminded me that the claimants have been aware of this concern for some time and not produced anything from the insurer to quell their concerns. The BCR policy previously considered at the time of my first judgment had an inception date of 27th July 2020.

(cb) Claimant's submissions

78. The claimants maintained that the position regarding incurred costs is covered by the anti-avoidance endorsements to the policy which make it plain that any exclusions of the policy including the "*What is not covered*" section meet the objections of the defendant. They also sought to suggest that "*the reference to costs incurred before the Inception Date relates to the Claimants' own costs and not those of the defendant*" at [34.3] of the claimants' solicitor's 4th witness statement.

(cc) Conclusions on the question of liability for incurred costs under the Ignite policy

79. I find I am unable to agree with the claimants' interpretation of the policy documentation to the effect that incurred costs will be covered. The precise wording of the "*What is not covered*" section of the policy states that it applies to "*Any Costs or Disbursements incurred before the Inception Date of this Policy except where these are specifically mentioned in the Schedule of Cover*". Contrary to the claimants' assertions, there is no express reference within any schedule or the endorsements supplied to

incurred costs, unlike many of the other references in the endorsements which seek to address express exclusions within the main policy wording. Furthermore, *"Costs*" is defined as "*Any legal fees and expenses incurred in respect of the Legal Action*", so I cannot find support for the claimants' solicitors interpretation of that definition being restricted only to claimants' costs. I agree with the defendant that this leaves them with an unjustifiable element of doubt about the extent of the cover and given the amount of time that the claimants have been on notice of the defendant's specific concern in this regard, their failure to address it makes the doubt all the more concerning. This is precisely the sort of issue which would have been taken into account when I assessed the amount of security required in my first judgment, had I known of the problem then.

(d) Implications of AIE being based overseas

(da) Defendant's submissions

80. The defendant highlighted 3 difficulties with AIE being based overseas. First, it was plain from the policy wording, and acknowledged by all parties, that the insurer was operating under a temporary permissions regime which allows EEA-based firms to operate in the UK for a limited period while seeking full authorisation. The defendant was concerned that this permission could be rescinded prior to a trial which could now be 2 or 3 years away, and therefore the parties could encounter a lack of regulatory protection in dealing with an unlicensed insurer.

81. Secondly, the defendant identified potential European Union regulatory barriers to the defendant securing payment out under the policy, due to the sanctions regime currently in force against certain Russian entities as a result of the Ukraine war. This was a new point, not apparently canvassed in correspondence before the second hearing, when counsel for the defendant explained that the defendant has strong links with Russia through its operations in Guernsey and London. A news article was shown to me at the hearing indicating that the defendant's operation in Guernsey had been temporarily shut down by the regulator on the basis of their links to a sanctioned bank. Thus, it was said that the objection to an overseas insurer was not based on a hypothetical situation, but a very substantial potential difficulty. The defendant submitted that whilst it might not be illegal to pay them monies from the insurance policy, the practical reality was that it could be extremely difficult to secure payment from any provider in a European Union country, subject to a different sanctions regime to that of the UK whenever adverse costs orders might fall to be enforced against the claimants. It was the increased risk in dealing with an insurer overseas, compared to being subject solely to the UK sanctions regime where the action is brought, which was the chief concern.

82. Thirdly the defendant drew my attention to the requirement under the AIE policy to proceed to arbitration in the event of a dispute, when there was no such clause in the BCR policy, such that the parties could have approached the court directly to resolve a conflict. The terms of the policy do not specify the seat of arbitration and therefore it is possible, it was submitted, that any such arbitration would be subject to Belgian procedural law, due to the registered office address of AIE in Brussels. This the defendant said could lead to additional cost of enforcement overseas as well as added uncertainty.

(db) Claimants' submissions

83. The claimants sought to rely on the ratings agency, A M Best, which gives AIE a financial strength rating of "A" excellent and a long-term insurer credit rating of "A" which is also classed as excellent. They noted that the Security Order had not specified the ATE insurer must be based in England and Wales and referenced a previous case from 2017 where the insurance product under consideration was German, and the courts had accepted the insurance policy. They considered that it would have been anti-competitive to make any ruling restricting the provider to a UK-based one, in any event. In addition, the claimants submitted that there was no suggestion that AIE was prohibited from issuing a policy and once it had been incepted, even if their licence was revoked, they submitted that the policy would not be.

84. On the question of arbitration, counsel for the claimants was uncertain where the seat of arbitration would be, but thought that under the Arbitration Act 1996, English procedure would be adopted. Counsel noted that this particular argument appeared not to have been raised in prior correspondence or detailed in the defendant's written skeleton argument.

(dc) Conclusions on prejudice to security being caused by AIE being based overseas

85. I am cautious about making findings that AIE is unsuitable as a provider of security due to its foreign base or temporary permission status. Usually, the court would be assisted by better evidence on the point, whether from a foreign law and/ or regulatory expert. The best point for the defendant seems to be the greater risk of losing access to monies due to it, by virtue of multiple sanctions regimes, but even that issue is one that I would prefer not to weigh it in the balance when exercising my discretion to permit a variation or not, on the basis of the limited material before me.

(e) Costs payable on the insolvency of either party

(ea) Defendant's submissions

86. The defendant was keen to press a point that there would be no costs payable on the insolvency of either party. They drew my attention to clause 19 of the exclusions section within the Ignite policy wording which reads that costs and disbursements are not covered "*if the legal action is abandoned, withdrawn, discontinued or stayed by virtue of the bankruptcy, receivership, administration, liquidation, entering into a voluntary arrangement, or other threatened act of insolvency of you or the opponent*" (N.B. the terms "*legal action*", "*you*" and "*opponent*" are all defined elsewhere in the policy). The defendant observed that the provisions of clause 2.2 in the BCR policy were not as draconian; there was a right to withdraw cover only if the insured, i.e., the claimants, were "*adjudged bankrupt, deemed insolvent or subject to any formal insolvency process*". The defendant submitted that the Ignite policy wording caused them additional prejudice because if they entered a brief period of administration, for example, if a sanction had been imposed against them, that would automatically stay the claim and the AIE policy would not pay out.

87. The defendant also referenced the fact that one of the corporate claimants (the second claimant) is based overseas on the Isle of Man and therefore not covered by the Third Parties (Rights against Insurers) Act 2010, which protects those due to receive a payout from an insurance policy, when the insured has become insolvent, from becoming

general creditors only of the insured. They submitted that a Deed of Indemnity protects the defendant from this risk and protects them in respect of the other corporate claimants when the ATE policy seeks to exclude their rights under the Act. The defendant harboured lingering worries that the ATE policy could be rescinded, notwithstanding the new anti-avoidance endorsements offered dealing with insolvency, such that they would lose any benefit under it. They further argued that although the anti-avoidance endorsements proposed by the claimants were similar to those considered acceptable in the *UK Trucks claim*, the proportion of the security backed by anti-avoidance cover was more limited and therefore the cover was not as good overall as in either UK Trucks claim or under the BCR policy wording.

(eb)Claimants' submissions

88. The claimants accepted that the points made by the defendant were a fair contractual interpretation of the wording of the policy document but submitted that the defendant had overlooked the extent of the endorsements offered which expressly provide that the anti-avoidance provisions would ensure the policy would pay out and be honoured, irrespective of any exclusions. The endorsements reflected wording adopted in the *UK Trucks claim*, such that the payment would be made without any set-off. In respect of the second claimant, they argued that the Isle of Man has a similar statute to the UK one, namely the Third Parties (Rights against Insurers) Act 1932 ("*the Isle of Man Act*"), although counsel had to concede that the process for enforcement under that Act was less straightforward than in the UK, as the defendant would have to establish both liability and quantum before being able to make a claim, however they submitted it would be "*hardly onerous*".

(ec) Conclusions as to costs payable under an insolvency pursuant to the Ignite policy

89. The anti-avoidance policy endorsement offered by the claimants on the Ignite quotation form dated 7th June 2022 quite plainly did not address insolvency issues. The updated endorsements on the quotation of 10th of June 2022 stated at 3. "*The arrangements contained in this endorsement shall continue to apply notwithstanding the liquidation or insolvency of the insured or the insurer*". Whilst I recognise the ongoing fears expressed by the defendant that something could go wrong with their redress under the ATE policy, and that they could have avoided that risk with a direct Deed of Indemnity, I do not consider the risk to be material in respect of the insolvency point, save for the second claimant where there is a significant difference and greater risk due to their base in the Isle of Man. The defendant's argument concerning the watering-down of protection overall in the ATE policy, for each new element of risk introduced since my first judgment was handed down, has been mentioned already above, and I will return to this below.

(f) Amount of anti-avoidance cover as a proportion of the overall amount of security

(fa)Defendant's submissions

90. The defendant had 2 main overarching points to demonstrate their concern at what they believe to be an inferior level of protection now being offered by the claimants compared to the original BCR policy put forward as security, at the time of my first

judgment; they reminded me that protection was to have been bolstered by additional anti-avoidance endorsements and a Deed of Indemnity pursuant to the Security Order. First, they raised issue with 12 Ignite policy clauses said to afford weaker protection than the BCR policy, some of which I have discussed already. Whilst they recognised there were new Ignite anti-avoidance measures being proposed, they considered the overall level of risk of the ATE policy not performing as intended to protect them was now heightened, such that a greater amount of the security overall was required and /or there should be a higher level of anti-avoidance cover than I had originally mandated.

91. Secondly, the defendant argued that the whole point of having a Deed of Indemnity was so that they did not need to worry about things going wrong under the ATE policy as they would have had a separate contract to enforce against directly. They submitted that this additional layer of protection is completely absent under the corporate claimants' variation request.

(fb) Claimants' submissions

92. The claimants simply maintained that the endorsements now being offered had been scrutinised carefully in the *UK Trucks claim* and held to be acceptable, without a separate Deed of Indemnity, and the revised ATE policy should therefore also be "*acceptable by analogy*". They sought to remind the court that the insurers were irrevocably authorised to pay the defendant notwithstanding any insolvency, pursuant to the endorsements. They also reminded the court that the defendant has a direct right to enforce the terms of the policy pursuant to the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"), at least in respect of the claimants registered in England and Wales and of their rights in respect of the second claimant under *the Isle of Man Act* which performs a similar role to the 1999 Act, albeit through a process requiring a little more effort.

(fc) Conclusions about the amount of anti-avoidance cover as a proportion of the overall amount of security

93. Having set out some detail about a handful of the 12 clauses which worry the defendant, and having noted that some are significantly weaker than what was being considered prior to my first judgment, whilst others are less concerning, I have stood back to look at the overall effect of the new wording offered. To my mind it is not a complete answer to say that because the Competition Appeals Tribunal accepted the endorsements I should also. I have previously stated at [37] that cases will be fact specific, and I also find it unhelpful, at the very least, to be presented now with a whole new argument based on an authority that was readily available to the claimants prior to my first judgment but which they chose not to rely upon.

94. In any event, and without focussing purely upon the severity of the omissions as I have found them in at least two of the new clauses, (the lack of ring-fencing of the anti-avoidance security for the corporate claimants and the difficulty with the policy inception date), I consider it incontrovertible that the cumulation of many inferiorities in policy wording does affect the overall value of the ATE policy as partial security. The impact of this is that I would have been entitled to consider a higher level of both cover generally and /or anti-avoidance provision in respect of the corporate claimants, if I had been presented with the proposed Ignite policy at the time of my first judgment. The greater the number of risks of the policy not paying out, the higher the scrutiny that

may be required in respect of the anti-avoidance measures and the value of costs to be insured generally. The absence of a Deed of Indemnity being offered alongside the new policy terms only serves to compound the situation. It is unhelpful, and I would also say inappropriate on a variation application, to start arguing the 1999 Act and *the Isle of Man Act* before me now, when both were in force prior to my first judgment and those statutes were not a focus for argument or included in the hearing bundle previously. I accept that the 1999 Act was briefly referenced in prior case authority but it was not the thrust of the parties' submissions, nor referenced in their skeleton arguments. I remind myself that the claimants did not contest a draft Security Order where they were expressly obligated to provide a Deed of Indemnity.

(g) Overall conclusions and determination in respect of the request for a variation pursuant to CPR 3.1(7)

95. I have already recorded that the general circumstances that might merit a variation to the Security Order are not made out at [67] pursuant to the overriding objective and the lack of a material change of circumstances beyond what the claimants should have been able to control. I indicated that a final composite view could be reached after I had reviewed the terms of the alternative security that the claimants have offered. During the course of submissions, I was taken to a number of clauses within the Ignite policy which were said by the defendant to be less favourable than those of the BCR policy. I decided that I did not need to recite all those arguments as my determination can be made on the more important policy differences which I have already outlined above.

96. The claimants' response to those submissions, was that the latest policy anti-avoidance endorsements removed the risk to the defendant. They were keen to impress upon me that their new solution to the issue of security was wholly consistent with the substantive requirements of my first judgment.

97. I conclude that the initial alternative proposals offered by the claimants and dated 7th June 2022 were grossly deficient in respect of the security I envisaged when handing down my first judgment. There is no need to lengthen this judgment by creating an exhaustive list of the initial deficiencies but, for example, the anti-avoidance wording did not extend to fraud, dishonesty or misrepresentation, which were some of the principal concerns the anti-avoidance provisions should have been designed to provide for.

98. The proposals were significantly amended on 10th June 2022 following receipt of the defendant's comments. Notwithstanding those amended endorsements and a further smaller amendment in an updated quote issued on 23rd February 2023, there are still fundamental inadequacies with the alternative security offered, which I believe do not warrant a variation order being made for the security that should be provided. Of particular concern is the lack of ring-fencing of anti-avoidance cover for enforcement of the corporate claimants' adverse costs liabilities such that the provision is much diluted from the ordered sum, but also the uncertainty over provision for all costs incurred to date. These lacunae upset the calculations which I performed in my first judgment as to the correct amount of general indemnity and/or anti-avoidance cover to order. The claimants have had ample time to clear up these 2 deficiencies, since they were notified of them, but there is no new evidence put before me to satisfy the concerns. I will not dwell now on the other clauses in the Ignite policy said to be less favourable than those from BCR, which also impact the calculations in my first

judgment, probably in very small ways taken in isolation, but cumulatively the picture becomes more clouded. It is enough for the purposes of deciding how to exercise my discretion to focus on the two most serious deficiencies which I have described.

99. Although the endorsements offered provide a direct right of access to the insurer and proceeds under the policy, without set-off, by the defendant this is less effective in respect of the second claimant based in the Isle of Man, and certainly not as good as a Deed of Indemnity for that particular party.

100. Overall, I conclude that there are no principled grounds for me to grant a variation to the Security Order, taking account of the general background factors to the application recited at [55] to [67] and the specifics of the new security offered.

Request for an extension of time

CPR 3.1(2)(a) and principal authorities

101. The final request of the claimants was for an extension of time of 7 days to give them an opportunity to accept the quotation from AIE. Whilst my previous conclusions regarding the adequacy of the quotation, and the general circumstances of the variation request, on one level render any deliberation over an extension of time otiose, I will nonetheless briefly consider the merits of an extension on a standalone basis, should I have been wrong about the variation. The defendant contended that the claimants are "*in essence in Denton territory*" for relief from sanction (CPR 3.9) in seeking such a variation. The claimants do not accept that proposition because the application for an extension was made prior to the expiry of the period specified in the Security Order; as such they describe my discretion as one which should simply have regard to the overriding objective. They referenced various cases in their skeleton argument but only 3 authorities were in the hearing bundle, 2 of which concerned extension of time applications dealt with under the so-called *Denton* principles, as promulgated by the decision in *Denton v TH White Ltd* [2014] 1WLR 3026.

The authorities

***(i) Andrew James Barclay-Watt & Ors v Alpha Panareti Public Ltd (1) and Andreas Ioannou (2)* [2021] EWHC 3298 (Comm)** ("*Barclay-Watt*")

102. The claimants in this case wanted to develop a new claim for loss of alternative investment opportunity but the case managing judge was keen to avoid any prejudice to the trial date. The claimants had been ordered to provide notice by a specified date, if they were going to pursue the additional claim and failed to do so; thereafter they were given a time limit for applying for an extension of time. The parties disagreed as to whether the request should be considered under the *Denton* principles, the main reason being that compliance had been expected within time because of the consequences on the rest of the timetable of non-compliance. Sir Michael Burton GBE decided that the application should indeed be considered on *Denton* principles. This was because it was made slightly out of time and with an expectation of compliance due to further evidence needing to be prepared and served without imperilling the final hearing date. In fact, the trial was not going to take place when originally planned for other reasons, but the judge held that the claimants had not exercised diligence in commissioning further expert evidence within prescribed time limits, proceeding under

a "*wholly optimistic expectation*" that their expert could turn instructions around quickly, even though the expert had not yet been instructed. He referred to further "*unforgivable delay*" in providing notice of the intention to serve expert evidence. The appropriate sanction which the judge chose by virtue of the default was an unless order debarring the claimants from bringing the claim for alternative damages unless they complied with the new timetable. He held that it would be disproportionate to not provide the claimants that opportunity in circumstances when there would be no prejudice to the defendant as they would still have plenty of time to prepare for the trial.

(ii) *Harrison Jalla (1), Abel Chujor (2) v Shell International Trading And Shipping Co. Ltd (1) and Shell Nigeria Exploration and Production Co. Ltd. (2)* [2021] EWCA Civ 1559 ("*Jalla*")

103. The *Jalla* case concerned an appeal from a decision not to extend time to allow various claimants to serve additional pleadings, against a background of many previous delays and extensions of time in the proceedings. Coulson LJ noted at [29] that "*The court will grant a reasonable extension if it does not impact on hearing dates or otherwise disrupt proceedings*". He continued, "*the fact that a refusal to extend time would in practice mean the end of the claim is a factor to be weighed in the balance, but it cannot of itself warrant the grant of relief…The need to comply with court orders was there said to be of paramount importance". That approach ties in with the long-standing principle that a claimant's entitlement to sue a defendant is not an absolute right and does not permit that claimant to fail to comply with court orders, or delay and disrupt the administration of justice*". And at [91] Underhill LJ set out, "*Although the Court is rightly slow to make "disciplinary" orders on case management grounds which will prevent parties from having their substantive disputes determined, there are circumstances where such orders are justified*". The lower court had considered whether the principles applicable to relief from sanctions under rule 3.9 were relevant but had concluded that the application for an extension of time made just in time did not warrant it. Importantly, Coulson LJ concluded that the regime under rule 3.9 was not directly applicable because the extension request was not made against the backdrop of unless order. Nonetheless, he considered at [33] that the approach under relief from sanctions provisions were of some relevance because " *just as if they were facing an unless order with which they had not complied, the claimants needed the court to get them out of a major difficulty; where they were throwing themselves on the mercy of the court in order to prevent the vast majority of their claims from coming to a shuddering halt*". Therefore, it was held at [33] that the *Denton* principles relating to relief from sanctions applications were "*applicable, at least by analogy, when considering the application of the overriding objective*".

(iii) *Everwarm Ltd v BN Rendering Ltd* [2019] EWHC 2078(TCC)("*Everwarm*")

104. The factual scenario in *Everwarm* was markedly similar to the current one. It concerned a defendant applying for an extension of time within which to comply with security for costs which had been the subject of a debarring order. The application was made in time and the Deputy High Court Judge held therefore that CPR 3.1(2) applied, rather than CPR 3.9. He considered that the court should take account of the fact that the additional time being requested related to an unless order for which there was always a powerful public interest in ensuring compliance. The overriding objective was held to govern the decision and in granting the application it was held that the lack of prejudice and the fact that security had been put in place albeit late, warranted the granting of an extension

of time. The Judge was satisfied that "*bona fide attempts*" were made to comply with the order for security in time and that there had been no prejudice to the other party as a result of the delay in compliance. There was no delay to the trial. At [12] the judge took note of the fact that if the application for more time was wholly successful, then the unless order would have been complied with, as the appropriate security had already been put in place by the time of the hearing.

(ii) Defendant's submissions

105. The defendant maintained that the test I should apply, in accordance with the decision in *Everwarm*, is not as stringent as CPR 3.9 would require, but is higher than the test in a normal case. They said I should consider the matter in the light of the overriding objective, being mindful of the fact that the court should be particularly cautious to grant an extension when an unless order has been made, and in circumstances where the application is only made just before the deadline for compliance, the need to conduct matters expeditiously, and to provide financial protection in relation to the proceedings so that parties are on an equal footing.

106. The defendant was keen to impress upon me that whilst only a short extension was sought in the application, I should view that within the context of significant delay between the date that the Security Order was made and the hearing of this application, which has had the effect of producing a very much longer extension request, especially as the security has still not been provided. It submitted that there should have been greater efforts to secure an earlier listing. It was submitted that the failure to deal with security in a timely manner has had a catastrophic impact on the proceedings, wasting court resource and "*has ripped up the timetable to trial*". The defendant considers that the failure to provide security is a deliberate and conscious choice by the claimants, without justification, as they could always have provided security by payment into the Court Funds Office, as an alternative, there never having been any evidence placed before me that they were unable to do so.

107. The defendant also considered that seeking an extension of time was a collateral attack on my previous considered decision as to the amount of time that should be allowed for arranging security. The defendant attacked the reasons for the extension as being poor, given that they considered the alternative security offered was inadequate and that if the claimant believed it was nonetheless appropriate, they should have had the courage of their convictions and incepted the insurance policy that they had been quoted for. Finally, it was submitted that the *Jalla* case is good authority for finding that no consideration of Article 6 rights of a claimant should interfere with the court's determination on an extension application and that breaches of unless orders should not generally be countenanced by the court.

Claimants' submissions

108. The claimants relied upon the fact they had made an in-time application for an extension and contended that the only appropriate way for me to approach the extension of time application was pursuant to my discretion under CPR 3.1.2(a), and therefore pursuant to the overriding objective. They cited 3 main reasons why the extension should be granted. First, it was said that the defendant's suggestions of delay were misplaced as they were due to difficulties in listing the hearing which were not the fault of the claimants; the claimants were only seeking a 7-day extension pursuant to their

application. Secondly a hearing was inevitable, given the defendant's objection to any form of security not providing a Deed of Indemnity. Thirdly, they maintained that there was no prejudice to the defendant if an extension was granted, but there would be enormous prejudice to the claimants because they would lose their Article 6 right to the trial of a claim that has real prospects of success. They also mentioned paradoxically that if the claims are struck out, the defendant will lose the benefit of security for costs altogether as regards those claims. They indicated that the only reason they had not paid the premium and incepted the Ignite policy was because if the court found the security offered was inadequate, they did not want to have incurred the expenditure for no good reason.

(iii) Conclusions on the extension of time application

109. As this was an in-time application, albeit requiring an extension of time to comply with a direction which had been the subject of a debarring order, it seems to me that I should approach my decision using the discretion conferred under CPR 3.1.2 (a) in accordance with the overriding objective.

110. As the request for an extension is made against the backdrop of an unless order that was not contested in written submissions to the court prior to its approval, and therefore by implication perceived to have been one final chance to put in place adequate security, I need to be extremely cautious in exercising my discretion so as not to undermine the concept that orders should be complied with. Unlike the *Everwarm* case, I am not satisfied that there have been "*bona fide attempts*" to comply with the Security Order throughout the time allotted for compliance; the original Ignite policy provided after the Security Order was sealed was wholly inadequate, and reasonable concerns raised by the defendant have not been fully acted upon. There has only been an extremely late flurry of more meaningful activity to try and get suitable anti-avoidance endorsements in place but those still don't fully address proper concerns or provide cover in accordance with my first judgment. Furthermore, in marked contrast to both the *Barclay-Watt* case and the *Everwarm* case, there has been significant prejudice caused to the defendant by the delays in arranging security, with both a hearing date and a trial date having been lost.

111. I am mindful that a refusal to grant an extension, leaving aside the inadequacy of what has been proposed, will result in the termination of the corporate claimants' actions which is a situation the court is slow to bring about, due to the obvious prejudice to them. But I rely upon the *Jalla* case as a useful reminder that the right to sue on an action does not give licence to claimants to fail to comply with court orders or disrupt the efficient conduct of proceedings, or to consume an inappropriate share of court resource. There have now been 4 hearings directly concerned with the question of security, a delay of 2 years in resolution of the claim and I recognise prejudice has inevitably been caused to the defendant, because of the specific nature of the allegations. The claimants have at times criticised the defendant and implicated their conduct in the delay, for example, bemoaning what was said to be a lack of active engagement with the terms of the Ignite policy after the 9th June 2022, and the delay in issuing the cross application for a strike-out. I do not find these criticisms attractive, having studied the many detailed points which the defendants have made in the past couple of years in correspondence to try and secure acceptable provision for their costs. I may not have accepted all those points, but many I have, and it is the task of the claimants to make acceptable provision. For whatever reason, much time over the

whole 2-year period has been expended by the claimants simply rejecting the overarching concerns of the defendant that there should have been better provision than what was allowed for in the initial BCR policy.

112. Whilst I have already set out my final view pursuant to CPR 3.1)(2)(a) above, I will remark in passing that even if I had considered an extension was appropriate, there is a further problem for the claimants in seeking just 7 more days in which to put in place adequate security. There have never been any submissions, in the alternative, that they had a back-up plan if I considered their ATE solution to be inadequate, for example to secure a Deed of Indemnity from AIE or BCR directly, within 7 days. Similarly, the two most striking features of the anti-avoidance endorsements which I have considered to be deficient, were alerted to them by the defendant several months before the final hearing, and simply not addressed in any form of draft amended wording from the insurer. There were no submissions to the effect that these issues could be addressed within 7 days; the existence of the problems was simply refuted. As noted in the preceding paragraph this approach reflects a theme running through much of the correspondence in the 2 years since the question of security was first raised. I do accept that a lot more work has been done by the claimants' legal team in respect of the very latest amendments to the initial quotation from Ignite, but that has still somewhat missed the mark, in terms of what was required under my first judgment.

113. Finally, although my conclusions have been reached pursuant to CPR 3.1 (2)(a) as I do not consider this to be a case that should be determined under *Denton* principles, I will briefly set out the conclusions I would have reached if I thought rule 3.9 applied. First, breach of an unless order, and where a hearing date and a trial date have already been lost would I consider be appropriately described as both serious and significant. The authorities no longer require me to assess whether there was a good or bad reason for non-compliance, but whether I have received an explanation for it. The explanations that have been given were not immediately apparent when the claimants first indicated they would be providing alternative security, but by the time of the first hearing of this application I had been furnished with some sort of explanation. Turning to the third stage of the *Denton test*, namely all the circumstances of the case, these have already been considered above pursuant to the overriding objective, and my analysis is unaltered, namely that it would not be just or proportionate to grant the extension or relief from sanction if that had been the relevant test.

Overall summary of decisions

114. For all the reasons set out above I have concluded that:

(i) It would be an inappropriate use of the slip rule to amend the terms of the Security Order;

(ii) I should not exercise my discretion to permit a variation of the Security Order, there having been no mistake made, and separately not being satisfied that there has been a material change of circumstances of the type recognised by the courts when exercising its discretion;

(iii) Even if I had decided it was appropriate to direct a variation to the Security Order, the alternative security which the claimants have now proposed is unacceptable, as it is inconsistent with the requirements of my first judgment;

(iv) In any event, without prejudice to the foregoing conclusions, it would be contrary to the overriding objective to permit an extension of time for compliance with the Security Order. Separately, even if relevant, application of the *Denton* principles would not result in a different conclusion;

(v) In all the circumstances, pursuant to the debarring provisions in the Security Order, the corporate claimants' actions should now be struck out.

115. Counsel for both parties are invited to prepare a draft order dealing with the consequential directions that are now required.