ATE Insurance & Security for Costs

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Premier Motorauctions *v PWC* decision

1. An 'After The Event' insurance policy can be taken into account when considering, in an application for security for costs, whether there is "*reason to believe*" that a claimant company will be unable to pay the defendant's costs if ordered to do so. At that jurisdictional stage the policy terms may need to be scrutinised to assess the degree of protection that it provides: Premier Motorauctions Ltd & Others v Pricewaterhousecoopers LLP & Lloyds Bank Plc [2017] EWCA Civ (23 November 2017).

3PB's Analysis

2. **The Facts.** The Claimants were two companies in liquidation who, through their liquidators, sought to pursue claims in conspiracy against their bank and an advisor appointed by it to review the companies' business. The liquidators had secured an ATE insurance policy for £5,000,000 in order to pursue the action.

3. **The application at first instance.** The Defendants applied for security for their costs, relying on CPR 25.13(2)(c), which sets a jurisdictional threshold that "*the claimant is a company… and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*". The High Court Judge had concluded that the ATE insurance policy could be taken into account and, in light of it, there was no reason to believe the policy would not cover the Defendants' costs. He declined to order security.

4. The Defendants appealed the decision arguing that the ATE Insurance policy was only a contingent asset which must be excluded from consideration.

5. **The arguments.** Primary submissions on both sides centred on two issues: First, whether at the jurisdictional stage the Court could consider the ATE Insurance Policy. Second, if the policy could be considered whether the policy in question provided sufficient protection so as to negate the need for a security order.

6. **The Court of Appeal.** On the first issue the Court agreed with the Claimants that an ATE policy could in principle be considered an asset of the Claimants, and might provide an answer to an application for security. However, the *adequacy* of protection afforded to the defendant by the terms of the policy also had to be considered *at the jurisdictional stage*. It was necessary to consider, in light of the terms of coverage and the likelihood that the insurer might avoid the policy, whether the defendant had "*sufficient protection*" (*i.e.* that a costs order could be met).[1]

7. The Court considered an earlier dictum that:

   "*defendants would, at the least, be entitled to some assurance as to the scope of the cover, that [the insurance policy] was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere*".[2]

   Those factors were relevant at the jurisdictional stage, and the absence of an anti-avoidance clause might make it much more difficult for the Court to be satisfied that the defendant is sufficiently protected (see at [29], [31]).

8. On the facts, the ATE insurance policy did not provide sufficient protection. The strength of the Claimants' underlying claim depended too heavily on the evidence of the Claimants' Director. That had the potential to give rise to a relevant misrepresentation or non-disclosure in the event that the claim failed, upon which insurers might rely to avoid liability under the policy. Because of that, and because the

[1] See at [12],[19]-[24].
[2] Nasser v. United Bank of Kuwait [2002] 1 WLR 1868, per Mance LJ.

Claimants had not revealed the placing information given to the insurer before the policy was incepted, the court could not be satisfied that the likelihood of the policy being avoided was illusory. The absence of an anti-avoidance clause in the policy (by which the insurer promised not to cancel the policy) was therefore critical. Consequently, the jurisdiction threshold for an order for security had been met and, in the exercise of discretion, it was necessary to order security in order to ensure the parties were placed on a level playing field.

Impact of the Decision

9. The Court of Appeal have issued clear guidance that ATE Insurance Polices are capable of providing sufficient protection when considering whether it is necessary to make an order for security for costs. But the existence of a policy it not itself sufficient without considering the specific drafting of each policy under consideration.

10. The absence of a Non-Avoidance Clause may not prove fatal[3] to the strength of a policy but its inclusion could be vital in circumstances where misrepresentation and non-disclosure present a risk that is more than illusory.

11. A point of more general interest is the Claimants' reliance on the need for access to justice, and the role that ATE insurance plays in that. That factor had featured in earlier decisions,[4] but held little weight on the facts. The Court commended that such a submission would usually be relevant only where an order for security might stifle a claim (see at [32]).

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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[3] The risk of the policy being avoided has since been relied on at the *discretionary* stage to justify setting the amount of security at a higher level: Bailey v. GlaxoSmithkline UK Ltd [2017] EWHC 3195 (QB), at [68]-[70],[79].

[4] In Geophysical v Dowell [2013] EWHC 147 Stuart-Smith J considered that the funding of litigation by ATE policies had long since acted as central feature of the ability of parties to gain access to justice. Therefore, in the absence of evidence to the contrary, 'the court's starting point should be that a properly drafted ATE policy provided by a reputable insurer is a reliable source of litigation funding'.