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corporatedisputes@financierworldwide.com

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PERSPECTIVES

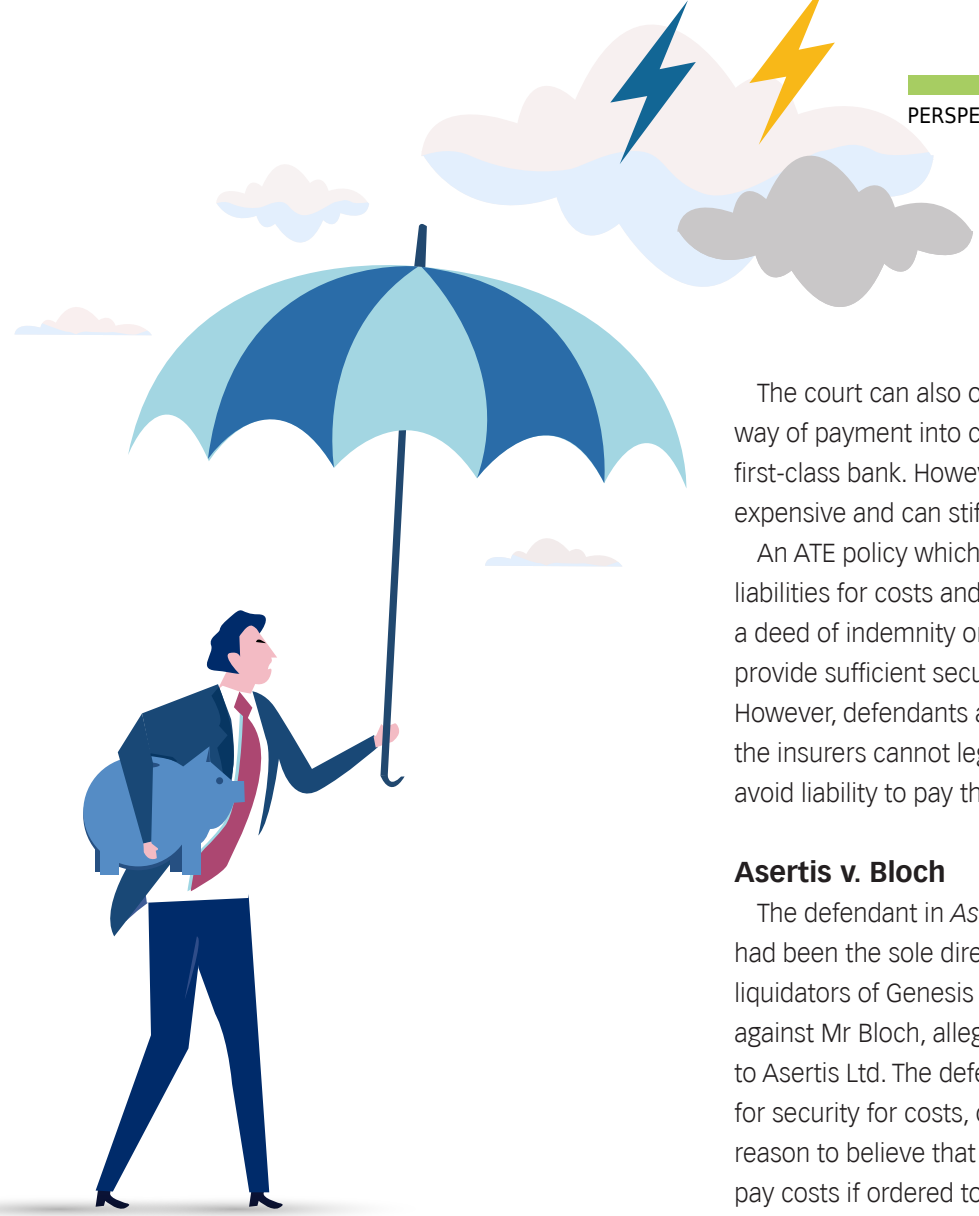
DEVELOPMENTS IN SECURITY FOR COSTS CASE LAW

BY **CHAYA HANOOMANJEE AND RACHEL BRIGHT / JAMIE MOLLOY**
> AUSTEN HAYS / IGNITE SPECIALTY RISK

In September 2024, the High Court handed down judgment in *Asertis v Bloch* and *Musst v Astra.* Both judgments deal with an application for security for costs where the claimant had taken out after the event insurance (ATE), but with very different outcomes.

In *Asertis*, the court ordered the claimant, a litigation funder bringing the claim under assignment, to make a payment into court by way of security for the defendant's costs. The order was made despite the claimant having taken out ATE with anti-avoidance endorsement (AAE) provisions. AAE provisions prevent an insurer from exercising their usual termination and cancellation rights (unless otherwise agreed with the defendant) thereby providing the defendant with assurance that the insurer will, in all circumstances, meet their costs should the policy be called upon.

While the judgment has garnered a lot of attention in the legal press, practitioners should not be alarmed. This judgment has simply highlighted a principle well established by case law – every case will turn on a careful consideration of the actual terms of the ATE policy relied on.



Jurisdiction to make an order for security for costs

Under CPR 25.13, the court has discretion to make an order for security for costs against a claimant company if there is reason to believe that they will be unable to pay the defendant's costs if ordered to do so. In exercising its discretion, the court will consider all the circumstances of a particular case.

The court can also order that security be given by way of payment into court, or a guarantee from a first-class bank. However, this is often prohibitively expensive and can stifle valid claims.

An ATE policy which covers the claimant's liabilities for costs and is accompanied by either a deed of indemnity or an AAE provision can provide sufficient security for the defendant's costs. However, defendants are entitled to assurance that the insurers cannot legitimately and contractually avoid liability to pay the defendant's costs.

Asertis v. Bloch

The defendant in *Asertis* was Lewis Bloch, who had been the sole director of Genesis Capital. The liquidators of Genesis Capital assigned claims against Mr Bloch, alleging breach of director's duties, to Asertis Ltd. The defendant made an application for security for costs, on the basis that there was reason to believe that Asertis would be unable to pay costs if ordered to do so and pointed to Asertis' accounts which showed it trading at a loss. Asertis rejected this argument, and relied on an ATE policy supplemented by an AAE.

Ultimately, Judge Mullen found that there was a real risk that the ATE policy would not meet an adverse costs order in full and directed a payment into court.

Below, we consider the deficiencies in the ATE policy and AAE as highlighted in the judgment, and

what practitioners should be looking out for when selecting an ATE policy, to avoid these potential pitfalls.

First, the claimant's policy had a cover limit of £250,000, however the AAE only covered the first £160,000. The defendant's original budget was £340,000, which was higher than both amounts. The policy limit was therefore likely to be less than the amount of an adverse costs order made against the claimant.

The policy coverage obtained should be adequate to meet the defendant's estimated costs.

Second, the structure of the AAE used was such that it removed certain conditions contained in the policy, but it did not cover every eventuality. At paragraph 23 of the judgment Judge Mullen cited the example of a failure to disclose a material circumstance during the life of the policy and that this would give rise to termination rights. This restricted the security the policy would provide.

The policy should use wording previously accepted by the court in a security for costs application.

Third, the policy could be terminated without notice being given to the defendant, and it was unclear from the wording of the AAE whether costs incurred up to the termination would be covered.

The policy should include a termination provision, giving the defendant 30- or 60-days' notice of any termination, with it being expressly clear the defendants costs up until that point will be met.

Fourth, the policy wording offered no protection in respect of the costs incurred by the defendant in the nine months before the policy was taken out.

The policy should contain an AAE which covers all defendant's costs irrespective of date or add a simple endorsement backdating cover to the date the defendants started incurring costs.

Fifth, the defendant had no means of enforcing the policy directly for his benefit.

The AAE should provide for a 'loss payee' clause or similar mechanism, which confers a direct benefit on the defendant, to claim on the policy.

It is an unfortunate finding which could have been avoided if the above was implemented.

Musst v. Astra

In *Musst*, the defendants, Astra Asset Management, made an application for security for costs. Musst, the claimant, sought to rely on an ATE policy supplemented by an AAE, and an existing £180,000 payment into court, which had been made in relation to previous proceedings between the parties.

The AAE as drafted in this claim used similar wording to an AAE approved by the Competition Appeal Tribunal (CAT) in the *UK Trucks* case. In *UK Trucks*, the CAT found that the wording in the AAE demonstrated that the claimants were able to pay the defendant's costs.

Careful consideration was given to the actual terms of the ATE policy and AAE. In examining the

AAE wording, the court noted a number of key points, as outlined below.

First, the AAE provided that any claim would be honoured in full up to the policy cover limit "regardless of any exclusions or any provisions of the Policy or of the general law, which would have otherwise rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind or discharge the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability for Opponent's Costs under the terms of the Policy".

Second, the AAE provided that the defendant in the proceedings was the intended beneficiary of the policy, and the policyholder provided an irrevocable instruction to the insurer to pay any policy claim to the defendant.

Third, the AAE continued irrespective of the insolvency of the policyholder or insurer.

Fourth, just because the AAE does not explicitly state that it will cover fraud, does not mean it cannot act as adequate security. Reference was made in the judgment to the decision in *Saxon Woods*, in which it was held that notwithstanding the fraud exclusions contained within the main body of the policy wording, the wording of the AAE made clear that the policy intended to cover such a finding.

Fifth, while the defendant may seek a 'deed of indemnity', this is rarely used in the ATE market, and it is the decision of the court, not the defendant.

"It is therefore important that practitioners scrutinise ATE/AAE arrangements to ensure they do not provide an easy route for defendants to quash claims."

Finally, the AAE provided that the policy had a termination notice period, the defendant was to be given notice of termination and that the insurer would be obliged to meet the defendant's costs up to the date the notice of termination is given, but not after.

Comment

The judgments in these cases demonstrate how important it is for an AAE to include an overarching clause which makes it clear that an insurer will meet claim liabilities, irrespective of the circumstances giving rise to the claim. The court may not view an AAE which seeks to pick through and remove sections of the ATE policy wording as providing adequate security.

It is also clear from the judgment in *Musst* that a defendant cannot expect the ATE policy to provide that the insurer will directly indemnify them for adverse costs for the entirety of the proceedings, even if the insurer legitimately terminates the policy at some earlier stage.

The judgments also demonstrate the safety net of utilising a court endorsed AAE wording, such as the wording in *UK Trucks*.

A security for costs application is one of the most common tools used by defendants to discourage claimants from pursuing a claim without having to deal with the substantive elements of the claim. However, if the wording of the ATE policy meets the conditions set out below, there is no reason why the ATE and AAE should not be found to provide adequate security.

ATE/AAE checklist

Practitioners should ensure that any ATE insurance product they utilise: (i) comes from an A-rated, reputable, experienced insurer; (ii) has an AAE or a deed of indemnity; (iii) preferably contains court-endorsed wording for the purposes of security for costs; (iv) utilises wording that is clear, concise and demonstrates that notwithstanding the policy terms and conditions the policy will meet the defendant's costs irrespective of the claimant or insurer's insolvency; (v) addresses issues such as policy termination; (vi) provides defendants with a direct method of making a policy claim; and (vii) has an adequate cover limit and coverage attachment point.

Insurers undertake extensive due diligence on a case before ATE/AAE is offered. This provides a valuable armour for claimants as it allows them to progress meritorious cases and often is a prerequisite for obtaining funding. It is therefore important that practitioners scrutinise ATE/AAE arrangements to ensure they do not provide an easy route for defendants to quash claims. CD

Chaya Hanoomanjee
Partner & Managing Director
Austen Hays
T: +44 (0)20 7653 1668
E: chaya.hanoomanjee@austenhays.com

Rachel Bright
Solicitor
Austen Hays
E: rachel.bright@austenhays.com

Jamie Molloy
Head of ATE
Ignite Specialty Risk