



BUSINESS & COMMERCIAL GROUP BULLETIN



Welcome to the latest Bulletin. We live in a world where the costs pressure on litigants is relentless. The possibility of an insurer being involved in commercial litigation at some stage is never far away. But insurers, too, have to be careful with their shareholders' money. It is inevitable that if an insurer can avoid making a large payment it will do so. In this Bulletin, Andrew Butler and Amanda Gourlay explore two developments highly relevant to insurers – the new Third Parties (Rights against Insurers) Act 2010 and a recent decision confirming the right to avoid an ATE policy for misrepresentation/non-disclosure. And Cecily Crampin looks at an interesting decision on the quantum of damages which would suggest that in some cases there will be no loss to insure!

Charles Joseph

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THE PERILS OF SUCCESS: ATE INSURANCE AND SECURITY FOR COSTS

A costs order against an unsuccessful party whose liability for costs is underwritten by an after the event insurance policy can be pyrrhic where success at trial is so convincing that it causes the ATE insurer to avoid the unsuccessful party's insurance policy and therefore the successful litigant's path to recovery of its costs.

The case of *Persimmon Homes Ltd. & anor v Great Lakes Reinsurance (UK) plc* [2010] EWHC 1705 is a good and recent example.

A claim was brought by a limited company ("CPH") against Persimmon Homes. The dispute centred on when and whether a binding agreement was reached between the parties. The case turned to a large degree on the credibility of each side's witnesses. CPH took out ATE insurance.

Persimmon considered – and did not pursue – an application for security for costs. CPH appeared to be asset poor. There is no doubt that Persimmon's advisers were aware of the fragility of CPH's ATE insurance. In a letter to CPH's solicitors they went so far as to state that "one of our fundamental concerns arises out of the fact that such policies normally contain provisions which entitle the insurer to avoid the policy as a result of any material non-disclosure. Our client would have no assurance that grounds do not exist (or will not arise) entitling insurers to avoid the policy".

Time passed. The pleadings were amended, increasing the value of the claim fivefold. Costs rose. The insurer began to get cold feet. It predicted either "a glorious win or a very big loss".

A very big loss followed. In his judgment the judge held that he had had "to make some wide-ranging findings, frankly of dishonesty in the way in which evidence has been given and of documents which have been created after the event for creating a false impression". The court found for Persimmon and ordered that CPH pay costs on the indemnity basis.

**THE PERILS OF SUCCESS:
ATE INSURANCE AND
SECURITY FOR COSTS**

**THE NEW THIRD PARTY
(RIGHTS AGAINST INSURERS)
ACT 2010**

**UNPROFITABLE CONTRACTS
- DAMAGES FOR BREACH**

CONTINUED OVERLEAF



AMANDA GOURLAY

Amanda has been a member of Tanfield Chambers since completing pupillage in 2005. Her practice encompasses commercial and property disputes. Recent work includes defending and settling a claim for damages for breach of a commercial hire agreement and a claim

for repayment of a loan made by a credit union where the existence and scope of the authority of a director to bind the company was an issue. Her interest in and experience of the principles affecting security for costs applications stems from the litigation arising from the collapse of Imagine Homes Limited in 2008. She is a fluent French speaker, plays squash and recently retired from competitive running, her swan song being the 2010 Great North Run.



ANDREW BUTLER

Andrew Butler reluctantly took over the reins of the Chambers Business and Commercial Group after Mark Hoyle's departure to Dubai in 2009. Also a member of Chambers' Property Group, Andrew's practice encompasses a range

of property and commercial disputes including insurance and professional negligence cases, in particular against architects, solicitors and surveyors. Andrew is a regular contributor to publications such as the Solicitors Journal and New Law Journal. Away from chambers, Andrew is a keen sportsman, professing in particular to a love of cricket and (more secretly) Crystal Palace FC.

Persimmon's enjoyment of their success was not long-lived. Six weeks after judgment, the insurance company avoided the ATE policy on the grounds of material non-disclosure. In effect, Persimmon had been too successful.

Using its rights therefore under the Third Parties (Rights against Insurers) Act 1930, Persimmon brought a claim against the insurer. Ironically, whereas at trial it had sought to demonstrate the hopelessness of CPH's case, it now needed to show that the very hopelessness which had brought about its success should not entitle the insurer to avoid the policy.

Experts on both sides supported the insurer's defence that the representations made to it were material, and that their non-disclosure was in breach of the duty of utmost good faith. Persimmon was left with three further angles to its claim: a) that the (mis)representations and non-disclosure had not induced the policy, b) that the insurer had waived any breach and c) negligent underwriting. It failed on all three.

The case spells out the fragility of an ATE policy where the honesty of witnesses is at stake and demonstrates that there is no substitute for security for costs.

Would CPH have been in a position to resist an application for security for costs by relying on its ATE policy? It would appear unlikely. The case is further evidence of court's movement away from the position stated by Mance LJ in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, in which it was held that a claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.

The Court of Appeal cited *Nasser* in *Al Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123, but dismissed an appeal against an order for security for costs notwithstanding the existence of ATE insurance. The claim was for defamation, the outcome of the case depended entirely on who was telling the truth, and the terms of the policy permitted the insurers to avoid any liability for costs which was consequent upon their not having been told the truth.

Longmore LJ went further in *Belco Trading Ltd v Kordo* [2008] EWCA Civ 205, holding that it "is most unlikely that any standard form of ATE insurance could provide a suitable alternative to the standard forms of order for security for costs".

Persimmon's case was foreshadowed by three months by *Michael Phillips Architects Ltd v Rilkin & anor* [2010] EWHC 834 (TCC), in which Akenhead J considered *Nasser*, *Al Koronky* and *Belco* and held that an ATE policy which conferred no direct benefits on the defendants, under which the defendants were not among the insured parties, and which allowed cancellation of the policy for no reason, provided no appreciable benefit nor raised any presumption or inference that the claimant would be able to pay the defendants' costs if ordered to do so.

The reasons why Persimmon did not apply for security for costs are not given: in his judgment David Steel J simply observes that "following it would appear gloomy advice from counsel, Persimmon decided not to pursue an application for security [for costs]".

Whatever the facts in Persimmon's case, all the indications are that in an application for security for costs, an ATE policy is unlikely to be an effective shield.

AMANDA GOURLAY

A MATTER OF POLICY

On 25th March this year, royal assent was given to the *Third Parties (Rights against Insurers) Act 2017* where a victim has a claim against a wrongdoer, and that wrongdoer has been dissolved, the claim can proceed directly against the insurance company in the event of a claim against the wrongdoer.

Of itself, this is nothing new. The 1934 Act of the same name conferred a similar right. It was introduced because of the perceived injustice of leaving a victim of an insolvent company's wrongdoing to a claim in insolvency, when the assets for distribution were swollen for the benefit of all the creditors by an insurance pay-out which should fairly have been earmarked for him.

"More seriously still, in a situation in which the wrongdoer had been dissolved, it could prevent a victim from recovering at all because there was no way of establishing the primary liability."

But the 1934 Act had certain shortcomings. In particular, it was held in *Post Office -v- Norwich Union Fire Ins Ltd*. [1967] 2 QB 363 that it was necessary to establish liability against the wrongdoer before taking proceedings against the insurer, leading to the requirement of multiple proceedings in order to secure compensation. More seriously still, in a situation in which the wrongdoer had been dissolved, it could prevent a victim from recovering at all because there was no way of establishing the primary liability. This situation arose in *Bradley -v- Eagle Star Insurance Ltd*. [1989] 1 AC 957 and led directly to the enactment of the *Companies Act* 1989, under whose provisions dissolved companies could be restored to the register for the purpose of a claim being made against them.

A further shortcoming of the 1934 Act was in the rights of information it conferred; arguably at least, until the victim had established liability against the wrongdoer, he or she could not know whether there was insurance or if so what the terms of the policy were. Accordingly, since the rights of the victim were no greater than the rights of the insured, an insurer might have had a full defence to a claim based on some act of non-disclosure or misrepresentation of the risk, or some other breach of condition, about which the victim could not possibly have known before he embarked on litigation.



CECILY CRAMPIN

Cecily Crampin has just completed her first year of tenancy at Tanfield. She is instructed regularly in commercial matters, and has found that an ability to argue about the correct basis of a claim for damages can bring considerable success.

Outside work she enjoys travelling, in particular to the Middle East. She recently travelled to Syria where the beauty of the ancient ruins impressed her, but still slightly less than the pleasure of buying a rug in Aleppo's souk.

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ties (Rights Against Insurers) Act 2010. As a result of this Act, wrongdoer has insurance against the liability in question, the victim of the insolvency, or indeed dissolution, of the wrongdoer.

It was to address these and other failings of the 1934 legislation that the 2010 Act was passed. Its main impact is to give the victim the choice of proceeding either against the insured first (as under the old Act) or directly against the insurer, resolving all questions, including the liability of the insurer, in a single claim (s.1). An insured may not always wish to proceed directly against an insurer – in construction disputes, for example, it may still be desirable to establish the underlying liability by e.g. adjudication before commencing proceedings against the insurer – but often doing so will offer a very substantial reduction in time and cost.

The Act introduces further flexibility in that it allows a victim to seek declarations as to the insured wrongdoer's liability or the insurer's potential liability, backed up in either case with the appropriate judgment against the insurer – s.2. That section also enables the victim to join (and therefore bind) the wrongdoer if he so wishes, and it provides that the rights conferred by the Act may be exercised in arbitral proceedings if the insurance policy requires. While the Act generally preserves the spirit of the 1934 Act by leaving open to the insurer any defences which it would have had in a claim by the insured, this does not extend to conditions requiring the insured to provide information or assistance to the insurer, or to settle its liability as a condition of indemnity – conditions which, precisely because the insured no longer exists, will almost certainly have been breached (s.9).

“The Act introduces further flexibility in that it allows a victim to seek declarations as to the insured wrongdoer's liability or the insurer's potential liability, backed up in either case with the appropriate judgment against the insurer.”

Furthermore the 2010 Act significantly improves the victim's access to information. These enhanced rights are enshrined in Schedule 1 to the Act, which is enacted by virtue of s.11. Under them, a victim has the right to obtain information not only from the wrongdoer, but also from anyone else who is able to provide it



– which might include an underwriter, a former director, or an insurance broker. The information which can be sought is set out in para.1(3) of Schedule 1 and, as well as including details of the policy itself, extends to details of any proceedings between insurer and insured in respect of the supposed liability. A notice requesting such information must be answered within 28 days, and if it is not, can be enforced by order of the Court.

Schedule 1 goes further still. Where the wrongdoer is a company which has been dissolved, there is a very real risk that a victim will be prejudiced, notwithstanding his rights against insurers, by an inability to obtain disclosure to support his claim. The Act is alive to that risk, providing in para.3 of Schedule 1 that notice requiring disclosure can be given to a former employee of the company, or to a liquidator, or the official receiver. If such a notice is given, the disclosure obligations of that person are co-extensive with those that would arise under an order for standard disclosure pursuant to the CPR. Again, the obligations must be complied with within 28 days.

The 2010 Act appears to give robust and pragmatic answers to the many shortcomings in the 1934 Act which had been revealed by decisions under it. Whether it has ironed out all of the many injustices which may face the victim of an insured but insolvent wrongdoer will be seen when the Act comes into force.

ANDREW BUTLER

GREAT EXPECTATIONS

It is established law that in a claim for damages for breach of contract, the claimant can recover expenditure wasted as a result of the breach. A recent case in the High Court has thrown some light on the relationship between recovery of this type of reliance loss, and the more common recovery of loss on the basis of expectation.

In *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm), an appeal from an arbitration award, the owner of a ship who had accepted a repudiatory breach of a charter party, claimed only for the costs they had incurred; installation of a crane was a requirement of the contract. Unusually, the charterer had repudiated despite having agreed a contract price that was \$7,500 a day cheaper than the market rate. They had failed to get approval for an intended sub charter. It was accepted by the owner that it had not lost any profit as it was able to hire out the vessel at the higher rate. It had also made sufficient money to cover its wasted expenditure. The owner's argument, which succeeded before the arbitration tribunal, was that it was nevertheless entitled to recover that expenditure on the reliance loss basis.

The charterer appealed. The relevant principles are relatively straightforward to state. The claimant must choose between expectation and reliance loss, and cannot recover the latter if he has made a bad bargain. What is less clear is whether reliance loss has a separate legal basis to expectation loss in the sense that it puts the claimant into the position he would have been in had the contract not been made.

Mr Justice Teare in his judgment started from the principle set out in *Robinson v Harman* (1848) 1 Exch 850 that the claimant should be put into the position he would have been if the contract had been performed. His conclusion, having surveyed the case law including authorities from Australia, the US and Canada, was that reliance loss was just a form of this expectation loss. Were there to be a separate basis, with reliance loss recoverable "without regard to what the position would have been had the contract been performed, the defendant would in effect underwrite the claimant's decision to enter the contract" (para 45). The owner's receipts from hire after the repudiation of the contract were sufficient to cover the expected profits and the expenditure, and hence no damages would be awarded.

This analysis explains the bar to recovery where there has been a bad bargain, which had seemed to be a freestanding limitation to reliance loss. Recovery by the claimant is only possible to the extent that the benefit he expected from the contract was greater than the costs he incurred. He is thus limited by the position he would have been in if the contract had been performed. The burden in showing that the contract was unprofitable falls on the defendant, however. Thus Mr Justice Teare stated that where a contract is for pleasure or charitable purposes, and hence profit is not intended, claims for wasted expenditure will usually succeed because the defendant will be unable to show that the expenses exceeded the benefit. The role of choice between claiming reliance or expenditure loss is reduced. It is a practical choice based on the likely ability to prove that the claimant would have made a profit.

One dispute that this judgment does not directly address given its facts is the extent to which reliance loss and expectation loss can both form part of the same claim. In *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292, the Court of Appeal decided that the claimant cannot recover both. However, if reliance loss is just a form of expectation loss, then the legitimacy of recovering both depends on analysing whether the claimant would have recovered his expenditure and made a profit under the contract. This is the point made in *Chitty* (26-077). Considered in this way, there is no double recovery of the expenditure, and in fact to deny the claimant his expenditure is to put him in a worse position than had the contract been performed.

CECILY CRAMPIN

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