PREMIER V PWC & LLOYDS [2016] EWHC 2610 (CH)

In a decision handed down on 24 October 2016, the High Court confirmed that ATE insurance can be sufficient to successfully resist an application for security for costs, even in circumstances where a claimant company is insolvent.

The underlying claim, brought by the companies in liquidation, involves allegations of wrongdoing on the part of the defendants, who it is alleged artificially distressed the companies using unlawful means with a view to gain by doing so. The allegations form part of a pattern of profitable, but vulnerable, businesses being moved into business support units used as profit centres by the banks, a practice which was reported on by Lawrence Tomlinson, whilst he was Entrepreneur in Residence at the Department for Business, Innovation and Skills. The defendants deny the allegations.

Soon after the pleadings stage of proceedings closed, the claimants were faced with security for costs applications by both defendants, which relied upon the impecunious company condition prescribed by CPRr25.13(2)(c) ('t*he 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*'). Although the claimants had taken out ATE insurance to cover the defendants' anticipated reasonable costs, the defendants contended that the policies were not sufficient security principally because they could be avoided by the insurers in certain circumstances, and therefore contended that a deed of indemnity was required instead.

Snowden J rejected the defendants' contentions, and approved and applied a line of authority concerning the effectiveness of ATE policies as security, which can be traced back to the decision of Stuart-Smith J in *Geophysical v Dowell* [2013] EWHC 147, the effect of which was to consider whether the risk of avoidance was anything more than theoretical. Where the risk was no more than theoretical, the jurisdictional threshold for security could not be satisfied, because (applying the test as illuminated by the decision of the Court of Appeal in *Sarpd Oil*) there was no reason to believe that a claimant will be unable to pay costs if ordered to do so. The fact that a claimant company is in liquidation is not, in itself, sufficient to satisfy the jurisdictional threshold in circumstances where the company has valid ATE cover where the risk of avoidance is no more than theoretical. The question is not whether ATE insurance provides as good a security as traditional forms of '*copper-bottomed*' security, but '*whether, having regard to the terms of the ATE policy in question, the nature of the allegations in the case and all the other circumstances, there is reason to believe that the ATE policy will not respond so as to enable the defendant's costs to be paid*'.

In the circumstances of the case, the court was not persuaded that the risk of avoidance was such that the jurisdictional threshold had been crossed, and therefore dismissed the applications.

Hugh Sims QC and Jay Jagasia were instructed on behalf of the claimants by Hausfeld & Co LLP (with Ross Fentem also acting as a leading junior in the litigation).