UNRELIABLE ATE POLICIES - A WARNING FOR DEFENDANTS

The recent decision in Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) plc [2017] EWHC 391 (Comm) highlights the fact that defendants should not be confident that, if a claim fails, the unsuccessful claimants' ATE policies will pay out.

A company (Mploy) had brought a claim, with the benefit of an ATE policy, against Denso. Mploy rejected and then failed to beat Denso's CPR Part 36 offer so was ordered to pay Denso's costs of over £300,000. Mploy went into insolvent liquidation without paying Denso. Relying on the Third Parties (Rights against Insurers) Act 1930, Denso claimed for its costs against Mploy's ATE insurer. The court held that the insurer was entitled to deny liability on the grounds that Mploy had breached a number of conditions precedent to liability under the ATE policy, relating to obligations to co-operate in any claim, to provide information and to pay premiums.

The court observed that "the ATE policy cannot work without the input of the insured because the insurer is not a party to the litigation, and is entirely reliant on the insured cooperating with it and giving it information". Accordingly it was unsurprising that the ATE policy included provisions such as that:

"The Insured must give all information and assistance required by the Solicitor. This must include a complete and truthful account of the facts of the case and all relevant documentary or other evidence in the Insured's possession" and that

"All bills or other communications relating to fees or costs which may be payable under this Policy should be forwarded to Us without delay."

In breach of the policy terms, Mploy had delayed for over two months in providing the insurer with details of Denso's part 36 offer. The court construed that the obligation to pass on "communications relating to fees or cost" as including any Part 36 offers and considered what "without delay" meant in this context:

"This is a form of wording which would denote passing on within days or at most well under a month (14 days used to be considered an acceptable turnaround time for business correspondence, but even this may be regarded as unacceptably slow in the modern world). Quite where one draws the line is not of any moment as regards this item, as I consider that it would certainly be drawn earlier than two months."

The court found a further breach of the ATE policy by Mploy from a 20 day delay in the provision to the insurer of a copy of letter notifying the commencement of detailed assessment of costs.

The decision in **Denso** highlights that defendants' exposure to costs risks exists notwithstanding any claimant's ATE policies. Such risks are often given little weight by the courts. For example,

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on an application for security for costs against a party supported by an After the Event insurance policy, the court's starting position is that a properly drafted ATE policy, provided by a substantial and reputable insurer, is a reliable source of litigation funding. See Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc [2013] EWHC 147 (TCC). This approach is followed not least because the courts consider that there is a public interest in permitting ATE insurance on appropriate terms to provide access to justice for insolvent companies under the control of responsible insolvency office-holders. See Premier Motorauctions Ltd (In Liquidation) v PricewaterhouseCoopers LLP [2016] EWHC 2610 (Ch). However, **Denso** shows that even reputable insurers will do all they can to establish that ATE policy terms have been breached by an insured claimant so as to avoid paying a successful defendant.

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