

When Will ATE Insurance Defeat an Application for Security for Costs?

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Introduction

All applications for security for costs begin with a simple proposition. A defendant has been brought involuntarily into litigation, may spend a substantial sum defeating the claim, and should not be left with a costs order which is worthless because the claimant cannot pay it. That proposition is easy to state. Its application is less straightforward. The jurisdiction is protective, not punitive. It is not intended to enable a defendant to stifle an arguable claim by requiring the claimant to put its litigation budget beyond use. Nor does it entitle a defendant to insist upon the most expensive or inconvenient form of security merely because it would prefer it.

After-the-event insurance (ATE) therefore creates an obvious difficulty. If a substantial insurer has undertaken to meet an adverse costs order, the risk against which security is intended to protect may already have been transferred. But insurance is not cash. Cash in court does not cease to exist because the claimant misrepresented a fact, breached a policy condition, rejected advice, committed a fraud or allowed cover to lapse. Insurance cover may cease to respond, unless the contractual arrangements say otherwise. The real question is not simply whether the claimant has ATE insurance. It is whether the policy, endorsement and associated machinery leave a real risk that the defendant's costs will not ultimately be paid.

AT A GLANCE

1. Security for Costs Bid Rejected
2. Court Clarifies Evidential Requirements
3. Practical Guidance for Commercial Litigants

The jurisdiction

The present jurisdiction is contained in CPR 25.26 and 25.27, following the renumbering of Part 25 which took effect on 6 April 2025.^[1] The court may make an order if, having regard to all the circumstances, it is just to do so and one of the jurisdiction conditions is satisfied. In commercial litigation the familiar condition is that the claimant is a company or other body and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.

The discretion remains broad. In *Keary Developments Ltd v Tarmac Construction Ltd* the Court of Appeal emphasised the need to balance the injustice to a claimant if an order prevents it from pursuing a genuine claim against the injustice to a defendant which successfully defends the proceedings but cannot recover its costs.^[2] *Keary* is often remembered principally as an authority on stifling. Its wider importance is that the jurisdiction exists to provide protection, not collateral advantage.

That distinction matters in funded litigation. A claimant may have little free capital of its own while possessing substantial insurance against an adverse costs order. To ask whether the claimant itself has cash is therefore only part of the enquiry. The more difficult question is whether the arrangements actually in place mean that the defendant faces a material risk of being left unpaid.

^[1] Civil Procedure Rules 1998, rr 25.26-25.27; Civil Procedure (Amendment) Rules 2025, SI 2025/106.

^[2] *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (CA), 539-542.

Insurance is not necessarily security

The modern starting point is *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP*.^[3] The Court of Appeal accepted that an appropriately framed ATE policy could be relevant to whether there was reason to believe that an insolvent corporate claimant would be unable to meet an adverse costs order. If there is a reliable contractual entitlement to have the defendant's costs paid, that may bear directly upon whether the claimant should be regarded as unable to pay them.

But *Premier Motorauctions* also rejected the opposite extreme, namely that production of an insurance policy ends the enquiry. The policies were capable of avoidance for misrepresentation or non-disclosure, and the defendants had no direct right to enforce them. There remained a material question whether, when the music stopped and an adverse costs order had actually been made, the insurance proceeds would be there.

Longmore LJ remarked upon the unattractive prospect of security applications depending upon detailed investigation of insurance contracts into which the defendant had no input and which it could not itself enforce. That concern remains. Security applications should not become miniature insurance trials. Equally, a court cannot sensibly treat an ATE schedule showing a large indemnity limit as equivalent to money in court without asking what lies beneath it.

“The enquiry is functional rather than formal.”

The real risk

The approach was developed by Akenhead J in *Michael Phillips Architects Ltd v Riklin*.^[4] An ATE policy can provide real protection; it will rarely be as good as cash or a bank guarantee; the court must be satisfied that the policy actually provides protection; and the amount of conventional security may be reduced to reflect the protection which the insurance reliably affords. The enquiry is functional rather than formal.

Asertis Ltd v Bloch illustrates the problem neatly.^[5] The claimant possessed an ATE policy supplemented by an anti-avoidance endorsement. On a superficial view, that might have appeared to answer much of the defendant's concern. It did not. The policy did not cover part of the period during which costs had already been incurred; its indemnity limit might prove insufficient; the defendant could not directly enforce it; and payment depended upon conditions whose observance the defendant could neither control nor readily police.

The expression "real risk" is useful. The defendant does not defeat an ATE proposal by discovering an ingenious theoretical possibility under which an insurer might avoid liability. Almost any contractual promise can be made to look precarious if subjected to sufficient imagination. Conversely, the claimant cannot answer the application by pointing to the reputation of the insurer or the headline value of the policy. A solvent insurer is of little assistance if it has no obligation to pay.

The relevant questions are therefore rather more mundane. Does the policy cover costs already incurred? Is the indemnity limit sufficient? Can it be exhausted by another liability? May the insurer cancel if the merits deteriorate? What happens if the claimant changes solicitor, rejects advice, breaches a condition or becomes insolvent? Can the insurer rely upon fraud, dishonesty, misrepresentation or non-disclosure? Who receives the proceeds? Can the defendant enforce the obligation itself? These are questions about contractual machinery rather than insurance theory, but they are likely to determine whether the policy has any real value as security.

There is a further point which is easily obscured by arguments about form. The court is not deciding whether the insurance market has produced a product which is philosophically equivalent to cash. It is deciding whether the defendant has been given adequate protection against the practical risk which justified security in the first place. The comparison with payment into court is important because cash exposes the defendant to virtually no credit or coverage risk. But the search for equivalence should not become a demand for metaphysical perfection. The question is whether any remaining difference is material in the circumstances of the case, including the amount at stake, the insurer, the wording, the claimant's financial position and the consequences of requiring conventional security.

[3] *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872, [2018] 1 WLR 2955 [25]-[30].

[4] *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC) [18].

[5] *Asertis Ltd v Bloch* [2024] EWHC 2393 (Ch) [17]-[20], [32].

Security, rather than insurance

The development of ATE as security has involved a slightly curious process. The better the product becomes as security, the less it resembles ordinary insurance.

Recovery Partners GB Ltd v Rukhadze provides a useful illustration.^[6] The insurer executed a deed under which it undertook unconditionally and irrevocably to pay relevant costs directly to the defendants. The obligation extended to costs determined by summary assessment, detailed assessment and orders for payment on account. The insurer acted as principal debtor rather than merely as surety.

The case is also important for a wider principle. Where two forms of security provide equal protection, all else being equal, the court should prefer the form which is least onerous to the claimant. That does not oblige a defendant to accept inferior security merely because it is cheaper. It does mean that the jurisdiction should not be used to extract cash from a claimant once another arrangement provides substantially the same protection.

That distinction has practical bite. Money paid into court cannot simultaneously be spent on solicitors, experts, disclosure or trial preparation. There is nothing objectionable in seeking cash security where the defendant genuinely needs it. There is rather more difficulty in insisting upon cash where another instrument already removes the material risk. At that point the application begins to change character. Protection against an unpaid costs order is one thing. Depleting the opposing party's litigation resources is another.

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-Andrew Hogan

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The Lloyds Developments solution

The two 2025 judgments in *Lloyds Developments Ltd v Accor HotelServices UK Ltd* show how far the process has travelled.^[7] In the first judgment Constable J examined the proposed ATE arrangements in detail, including questions of termination, notice, avoidance and fraud. An important procedural point also emerged. A defendant which says that the proposed security is defective should identify the defects in time for them, where possible, to be addressed. It is not satisfactory simply to say that cash is better and keep detailed objections in reserve until the hearing.

That approach is commercially sensible. If the purpose of the application is protection, then a defect capable of being cured should ordinarily be identified and cured. The object is not to set an insurance drafting examination which the claimant must fail.

The second *Lloyds Developments* judgment records the resulting product.^[8] The approved wording made the relevant cover effectively non-avoidable and non-cancellable for the secured liability. The insurer could not escape payment by reliance on policy exclusions or general-law remedies of avoidance in the circumstances covered by the endorsement. Payment was directed to the secured party, protection survived insolvency, adverse amendment was restricted, and the defendant obtained direct rights of enforcement.

By this stage it becomes legitimate to ask what remains of the ordinary concept of insurance. The defendant is no longer dependent upon the claimant maintaining cover, complying with every policy condition or passing insurance proceeds across after receipt. The insurer has assumed a direct and tightly defined obligation to meet the costs liability. The instrument may have begun life as an ATE policy, but functionally it has moved a considerable distance towards a financial guarantee.

That matters because arguments about ATE as a category are increasingly beside the point. There is no general answer to the proposition that "ATE is adequate security", just as there is no general answer to the proposition that it is not. The answer lies in the terms.

^[6] *Recovery Partners GB Ltd v Rukhadze* [2018] EWHC 95 (Comm), [2018] 1 WLR 1640 [13]-[18], [22], [30]-[32], [40]-[46]; *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 1 WLR 1334 (CA), 1337.

^[7] *Lloyds Developments Ltd v Accor HotelServices UK Ltd* [2025] EWHC 1238 (TCC) [5]-[17], [52]-[53].

^[8] *Lloyds Developments Ltd v Accor HotelServices UK Ltd* [2025] EWHC 2011 (TCC) [1]-[10] and appendix A.

Residual risk

Contis Group Ltd v Swipewallet Holdings Ltd demonstrates the other side of the line.^[9] The policy gave substantial protection, but the court considered that a real risk remained, in particular because provisions permitting termination following a deterioration in merits could undermine the very protection on which the claimant relied. The event which made defeat at trial more likely could also affect the continued existence of the cover intended to meet the resulting costs order.

The importance of *Contis* lies in the court's willingness to deal with the remaining risk proportionately. A security application need not produce a binary answer under which either the insurance is accepted without qualification or the whole of the defendant's estimated costs must be paid into court. The court can identify what protection is reliable, identify what remains exposed, and require conventional security for the latter. In *Contis* the court required additional security of £300,000, directed to preserving the defendants' position if the policy later ceased to provide the expected protection.

Bargain Busting Ltd v Shenzhen SKE Technology Co Ltd reinforces the practical importance of getting the arrangements right before forcing the defendant to litigate about them.^[10] The defendants were justified in seeking security and in continuing with their applications until ATE cover was put into a form which sufficiently protected their interests. The eventual improvement of the insurance arrangements did not mean that the applications had been unnecessary when made.

ATE Policy Checklist

- Adequate limit of indemnity
- Anti-avoidance endorsement
- Non-cancellable cover
- Direct rights for the defendant against the insurer
- Financially secure insurer
- Minimal conditions that could invalidate cover
- Covers adverse costs orders in full or substantially in full

What should practitioners do?

- For claimant solicitors the first lesson is to address security at the beginning of the funding exercise rather than after an application has been issued. An ATE policy intended merely to insure the claimant may be quite different from an ATE product intended to satisfy a defendant seeking security. If an application is foreseeable, the policy and any deed or endorsement should be examined against the obvious points of vulnerability before they become the subject of hostile correspondence.
- The claimant should be able to explain what costs are covered, from what date, to what amount and for how long. It should know whether cover can be cancelled or avoided and in what circumstances. It should identify what happens on fraud, insolvency, breach of condition, deterioration in merits and change of solicitors. It should establish whether payment goes directly to the defendant and whether the defendant possesses enforceable rights of its own. If one of those questions produces an uncomfortable answer, it may be cheaper to repair the instrument than to defend an application.
- The defendant's solicitors should conduct the same exercise from the opposite direction. A bare assertion that ATE is not as good as cash is unlikely to take matters very far. The defendant should identify the actual risk: a gap in cover, avoidability, termination, insufficient limits, lack of direct enforceability, insolvency risk or another contractual weakness. And it should identify the point early enough for the claimant to respond. A defendant which refuses to engage with a curable defect may later have difficulty explaining why cash was the only acceptable answer.
- There is also a costs trap for both sides. A claimant which produces inadequate insurance arrangements and improves them only after an application has been issued may find that the eventual adequacy of the policy does not save it from the costs of the application. A defendant which continues to insist upon cash after the material defects have been removed may face the opposite problem. Once the legitimate protective purpose of the jurisdiction has been satisfied, further resistance requires justification.

^[9] *Contis Group Ltd v Swipewallet Holdings Ltd* [2025] EWHC 3065 (Comm) [45]-[51], [64]-[71], [87], [100].

^[10] *Bargain Busting Ltd v Shenzhen SKE Technology Co Ltd* [2026] EWHC 1476 (Ch) [18]-[19], [29]-[31].

Conclusion

ATE insurance lies on a spectrum. At one end is an ordinary policy whose continued value depends upon compliance with contractual conditions and decisions which remain in the hands of the insurer. It may provide perfectly good insurance to the claimant while providing imperfect security to the defendant. At the other end is an irrevocable, non-avoidable and directly enforceable obligation by a creditworthy insurer to discharge identified costs liabilities. It may still be described as ATE insurance, but the label is doing less and less work.

The cases therefore do not establish that ATE insurance is, or is not, good security. They establish something less dramatic and considerably more useful. The court asks whether there is a real risk that the defendant will remain unpaid and, if there is, what is required to remove it. Sometimes the answer will be cash. Sometimes it will be an amended policy, endorsement or deed. Sometimes it will be a combination of insurance and conventional security.

Cash remains wonderfully uncomplicated. That does not mean that a defendant is always entitled to it. The jurisdiction has done its job when the defendant has real protection against the costs risk. The modern argument is increasingly about what "real" means.

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