Review of the Year:
Top 5 Insurance Cases of 2010

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A. Introduction

This is our personal selection of the top 5 insurance cases of 2010. We have selected cases which we think are of interest to specialist insurance law practitioners, because they illustrate an approach to an important area of insurance law or practice, because they break new ground, or because they reassert and remind us of important principles.

B. Overview of the cases

These are the cases we have selected:

- Barnes v Seabrook [2010] EWHC 1849 (Admin) – consideration of the principles applicable to the grant of permission to commence proceedings to commit to prison for contempt of court a person who has made a false statement (witness statement or schedule verified by statement of truth or disclosure statement) in county court proceedings

- Employers' Liability Insurance 'Trigger' Litigation [2010] EWCA Civ 1096 – construction of employers' liability policy wordings in the context of mesothelioma – already on its way to the Supreme Court

- Ghadami v Lyon Cole Insurance Group Ltd [2010] EWCA Civ 767 – consideration of the principles governing the liability of an insured for solicitors' fees where the solicitors were appointed by an insurer, pursuant to a policy of liability insurance, to act for the insured in defending a claim by a third party, including a review of the authorities including Lewis v Averay (No 2) and Davies v Taylor (No 2)

- Omega Proteins Ltd v Aspen Insurance UK Ltd [2010] EWHC 2280 (Comm) – insurer and insured were not bound, for the purposes of determining the insured's liability under a policy of liability insurance, by a judgment or award in respect of the insured's liability to a third party

- Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc [2010] EWHC 1705 (Comm) – circumstances in which an after the event policy of legal expenses insurance may be avoided for non-disclosure or misrepresentation based on the facts as found at trial and thereby in practice deny the successful defendant its costs against an impecunious claimant

C. The cases in detail

(1) Barnes v Seabrook [2010] EWHC 1849 (Admin)

Barnes v Seabrook is not, strictly speaking, a case about the law of insurance. It is, nonetheless, a case of significant interest to insurers and their legal representatives. In Barnes v Seabrook, the Divisional Court considered applications for permission to commence proceedings for the committal to prison of unsuccessful claimants in three unrelated cases for contempt of court for having made, during the course of county court proceedings, false statements in documents verified with a statement of truth and (in one of the three cases) in a false disclosure statement.

The background to the applications was set out in a statement made by the solicitor to one of the applicants, which was referred to in detail by Hooper LJ in his judgment, and which included the following:

'*Insurance fraud is endemic. The reason for that is that many perpetrators perceive it to be a victimless crime for which the penalties of being caught are negligible. The advent of accident management companies and no win no fee lawyers mean that all the fraudsters need to invest in their fraud is a day of their time at trial (if the case goes that far). Hitherto, if their fraud is exposed, they merely walk away from the litigation unscathed, any adverse costs being met by their ATE [after the event] LEI [legal expenses insurance]. The fact that this fraud was perpetrated by an educated London cabbie indicates the contempt for which the civil justice system is currently held by fraudsters. The perceived unwillingness of the civil courts to punish litigants who abuse their process deceitfully is itself a factor that perpetuates the rise of fraudulent claims.*'

The Divisional Court considered and gave detailed guidance on the procedure to be followed by parties to county court proceedings for bringing applications for committal for contempt of court in respect of false statements in documents verified by a statement of truth in those proceedings.

Hooper LJ, with whom Kenneth Parker J agreed, drew a series of propositions (at paragraph 41) from the judgment of the Court of Appeal in KJM Superbikes v Hinton [2008] EWCA Civ 1280, which concerned a witness who had made a false statement in support of a strike-out application. The propositions, which effectively summarise the

principles to be applied by a court when deciding whether to grant permission to commence committal proceedings in these circumstances, are as follows:

'*i)* *A person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it.*

ii) *It must be in the public interest for proceedings to be brought. In deciding whether it is the public interest, the following factors are relevant:*

a) *The case against the alleged contemnor must be a strong case (there is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance);*

b) *The false statements must have been significant in the proceedings;*

c) *The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings;*

d) *"[T]he pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality."*

iii) *The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings;*

iv) *Only limited weight should be attached to the likely penalty;*

v) *A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account.*'

Hooper LJ added (at paragraph 47) that the fact that a claimant has delayed in bringing the contempt proceedings is a significant factor which the court should take into account, and said that:

'*It would not be appropriate for me to lay down any general principles, other than to say that a court may well be reluctant to grant permission if the fact that false statements have been made is discovered before the conclusion of the main proceedings and there is a significant period of delay between the conclusion of the main proceedings and the application for permission. In some cases it may be appropriate to start the contempt proceedings before the conclusion of the main proceedings but the passage already quoted from* <u>KJM Superbikes Ltd</u> *should be borne in mind:*

> *"However, it is important not to impose any improper pressure on a witness who may later be called to give oral evidence. In particular, if the alleged contemnor is to be called as a witness, an application under rule 32.24 should not be made, and if made should not be entertained by the court, until he has finished giving his evidence."'*

Permission was given in relation to two of the applications before the Divisional Court. The approach taken by the Divisional Court is likely to indicate the approach which might be taken in future cases. This was as follows.

In the first case, the defendant (the claimant in the underlying proceedings) was a self-employed taxi driver who claimed to have given up work completely as from a stated date as a consequence of a road traffic accident, and made statements to this effect in a schedule of loss and witness statement, both verified by the claimant. The claimant (the defendant to the underlying proceedings) contended that the defendant had continued to work as a taxi driver after the stated date, and provided evidence in support including video surveillance evidence. A compromise of the underlying proceedings reflected the fact that the defendant might well have suffered modest soft tissue injury in the accident and incurred some legitimate costs in pursuing a compensation claim in respect of that injury.

Hooper LJ summarised the evidence in support of the application and said that permission should be granted because (at paragraph 66):

'*In my view this material, not disputed by [counsel for the defendant], reveals a strong case against the defendant that he knowingly made false statements verified by truth which were very material as to a central issue in the proceedings, namely the amount of damages that would be awarded. I have no doubt that it would be in the public interest for proceedings to be brought. There has been no significant delay and the defendant was warned in the counter schedule that contempt proceedings might be taken.*'

In the second case, the defendant (the claimant in the underlying proceedings) suffered a whiplash injury in a road traffic accident in August 2001. She claimed substantial

damages, at some point claiming £1.7million, but the claim was settled in March 2006 on terms that she received only £5,000, and had to pay the defendant's costs in the sum of £40,000. Following the resolution of the proceedings, the matter was referred to the police, and by early 2008, it was apparent that the defendant would not be prosecuted. The application to commit her for contempt of court was not made until two years later, and Hooper LJ said, in refusing to grant permission (at paragraph 74):

'*I have no doubt that the delay in this case is such that the application should be refused. To permit the application would, in the circumstances of this case, now be oppressive.*'

In the third case, in which permission was granted, the defendant (the claimant in the underlying proceedings) was a fireman who brought proceedings against his employer, alleging that he had slipped on a pool of water in the fire station when climbing out of the cab of a fire engine. The defendant claimed that he was not working, whereas it was contended that he was in fact working full-time as a taxi driver. He was alleged to have made both a false disclosure statement and false statements verified with a statement of truth in order to obtain damages in the sum of £15,000 for net loss of earnings over two years. Hooper LJ said (at paragraph 79):

'*In my view the material put before us reveals a strong case against the defendant that he knowingly made false statements verified by truth which were very material as to a central issue in the proceedings, namely the amount of damages that would be awarded. It is right to say that the sum claimed is not huge, some £15,000, nonetheless it is a significant sum. I have no doubt that it would be in the public interest for proceedings to be brought. There has been no significant delay and the defendant was warned in June 2006 that contempt proceedings would be taken.*'

(2) Employers' Liability Insurance 'Trigger' Litigation [2010] EWCA Civ 1096

The Court of Appeal gave judgment in October 2010 in the 'EL Trigger' litigation. This extensive and long-running litigation concerns the liability of insurers for mesothelioma, a fatal disease caused by exposure to asbestos. Mesothelioma is unusual in having an extremely long period of gestation, which can be in excess of 40 years between exposure to asbestos and manifestation. This gives rise to particular issues in the context of employers' liability insurance, as described by Rix LJ (at paragraph 2):

'*In particular, this appeal asks the question as to what has to happen in any particular policy year to make the insurer on risk during that year liable to respond and so to indemnify the employer insured. Is it the tortious exposure to asbestos which has caused the mesothelioma that must occur in that policy year? Or is it the onset of mesothelioma itself which must occur in that policy year?*'

The central issue in the case was the construction of various insurance policy wordings, and in particular the meaning of '*injury sustained*' and '*disease contracted*' (and similar wordings), against the background of the decision of the Court of Appeal in Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd [2006] EWCA Civ 50, [2006] 1 WLR 192. Bolton considered the meaning, in the context of a public liability policy of insurance, of the wording '*injuries occurring during the period of insurance*'.

The three judges in the Court of Appeal took differing approaches and to varying extents reached different conclusions, including as to the importance or even relevance of the commercial purpose of employers' liability insurance generally in construing particular policy wording: for Rix LJ, it was determinative in relation to one of the wordings (see paragraph 244), whereas for Stanley Burnton LJ it was virtually irrelevant (see paragraph 333). Rix LJ summarised the outcome of the appeal, in terms of winners and losers, as follows (at paragraph 308):

'*... I wish to essay a résumé of where our three judgments have arrived at ... Although our reasoning may differ, it seems to me that for one reason or another, the claimants have retained much, but not all, of their initial success. Where they have succeeded in terms of my judgment, they have succeeded in this court, because Lady Justice Smith would dismiss the appeal and uphold the judge in total. Where, however, they have failed in terms of my judgment, and on the other hand the insurers have succeeded, they have failed in this court and the insurers have succeeded, because Lord Justice Burnton's judgment goes at least as far as I do (and in fact further) in allowing the insurers' appeals.*'

Permission has been granted to all losing parties to appeal to the Supreme Court. The appeal will be heard in December 2011.

(3) Ghadami v Lyon Cole Insurance Group Ltd [2010] EWCA Civ 767

Policies of liability insurance usually include cover for defence costs. Typically, a solicitor is retained by an insurer to act for both the insurer and the insured (for a description of the classic '*tripartite arrangement*' between solicitor, insured and insurer which results in this situation, see Brown v Guardian Royal Exchange [1994] 2 Lloyd's Rep 325, CA, Neill LJ at 330). The insurer is liable to indemnify the insured for the solicitor's costs, and usually renders invoices to the insured, which enables the insured to pay and then recover from HM Revenue and Customs the VAT element of the invoice. The insurer pays the balance of the invoice (ie the fees excluding VAT).

From time to time, an issue arises which requires the court to analyse the principles which underlie this arrangement. In Brown v Guardian Royal Exchange, for example, the issue was the entitlement of the insurer to information provided by the insured before a conflict of interest had arisen between the insurer and insured. Similarly, the later case of TSB Bank plc v Robert Irving & Burns [1999] Lloyd's Rep IR 528, CA explored in more detail the issue of the insurer's entitlement to information in situations of potential and actual conflict of interest between insurer and insured.

In Ghadami v Lyon Cole, the issue arose in a relatively unusual way. Lyon Cole was insured under a professional indemnity insurance policy, and its insurer, Markel, appointed solicitors to act for it in defence of a claim brought by the claimants, Mr and Mrs Ghadami. The claim was subject to an excess of £1,000. The claimants were ultimately unsuccessful in the claim, and were ordered to pay Lyon Cole's costs on an indemnity basis, and to make a payment on account of costs of £20,000. On the assessment of costs, the district judge accepted the claimants' argument that, on the indemnity principle as regards costs, they were liable to pay only the £1,000 that Lyon Cole itself had paid out, assessed their liability at £1,000 and ordered repayment of £19,000 in respect of the interim payment. A circuit judge allowed Lyon Cole's appeal, and permission was subsequently granted to appeal to the Court of Appeal.

In the Court of Appeal, Lloyd LJ, with whom Etherton and Elias LJJ agreed, upheld the decision of the circuit judge. Lloyd LJ reviewed the line of cases in which the point has been taken unsuccessfully in the past, including Adams v London Improved Motor Coaches Ltd [1921] 1 KB 495, CA, Lewis v Averay (No 2) [1973] 1 WLR 510, CA and Davies v Taylor (No 2) [1974] AC 225, HL. Lloyd LJ cited (at paragraph 12) the following remark of Lord Cross in Davies v Taylor (No 2):

'*No doubt if it were shown that the respondent's solicitor had agreed with him that in no circumstances would he be liable to pay any part of them then the costs though incurred by the solicitor in defending the case would not be costs incurred by the respondent.*'

This remark encapsulates the applicable principle. Lloyd LJ considered one case in which the point was taken successfully, British Waterways Board v Norman, Queen's Bench Divisional Court, unreported, 26 November 1993, in which it was argued that there had been an agreement between Mrs Norman and her solicitor that he would not in any circumstances look to her for any part of the costs. Lloyd LJ said (at paragraph 13):

'*McCowan LJ held that the relevant agreement need not be express but could be implied from the circumstances. He considered the evidence, which included a history of silence between solicitor and client as to liability for costs until a very late stage*

when the prosecutor (the respondent) was told not to worry if the court did not make a costs order, but that did not occur until after the magistrates had retired to consider their verdict. He said that it was clear that if the point had been raised at any earlier stage she would have been told the same and he said:

> *"Moreover had an officious bystander intervened at an earlier stage and asked if she would have to pay the solicitor's costs in the event of that prosecution failing the answer forthcoming would undoubtedly have been no".'*

In Ghadami v Lyon Cole, the solicitors had sent a client care letter to Markel, its insurer client, but not to Lyon Cole, the insured. It was however common ground that both Lyon Cole and Markel were clients of the solicitors. Lloyd LJ reviewed the material before the court and found that there was no agreement such as the claimants would have to show in accordance with Adams and Davies v Taylor, and as was found in British Waterways Board v Norman, but that there was an implicit agreement that the solicitors would act as Lyon Cole's solicitors in relation to the claim brought by the claimants, although without any express terms as to charging rates or the like. Having earlier observed that it was highly regrettable that the solicitors had failed to comply with their professional obligations as regards a client care letter in relation to Lyon Cole, Lloyd LJ said, applying Garbutt v Edwards [2005] EWCA Civ 1206, [2006] 1 WLR 2907, that the solicitors' failure to comply with the Solicitors Cost Information and Client Care Code did not prevent them from recovering fees or disbursements.

Ghadami v Lyon Cole is a reminder of the importance of solicitors ensuring that they have properly considered the implications of accepting instructions from an insurer to act on behalf of both insurer and insured and the resulting 'tripartite arrangement', including the requirement that a retainer letter be sent not only to the insurer but also to the insured client. Although a challenge such as that made by the claimants in Ghadami v Lyon Cole is relatively unusual, the same principles are relevant in other factual situations, such as the recovery of fees from the insured client on the insolvency of an insurer.

(4) Omega Proteins Ltd v Aspen Insurance UK Ltd [2010] EWHC 2280 (Comm)

Omega Proteins v Aspen Insurance is the latest in the line of cases, stretching back to the judgment of Devlin J in West Wake Price & Co v Ching [1957] 1 WLR 54, which consider the issue of whether, for the purposes of determining whether an insured is entitled to an indemnity under a policy of liability insurance in respect of liability to a third party, the insured and insurer are bound by a judgment or award which has established the insured's liability to that third party, or whether they are entitled to go

outside the four corners of the judgment or award for the purposes of determining that question.

In Omega Proteins v Aspen Insurance, Christopher Clarke J considered the earlier authorities and summarised the position as follows (at paragraph 49):

'1. *The insured must establish that it has suffered a loss which is covered by one of the perils insured against: West Wake; Post Office v Norwich Union [1967] 2 QB 363; Bradley v Eagle Star Insurance Co Ltd [1989] 1 AC 191; Horbury Building Systems Ltd v Hampden Insurance NV [2004] EWCA Civ 418, [2007] Lloyd's Rep IR 237, 245;*

2. *That may be done by showing a judgment or an arbitration award against the insured or an agreement to pay;*

3. *The loss must be within the scope of the cover provided by the policy;*

4. *As a matter of practicality, the judgment, award, or agreement may settle the question as to whether the loss is covered by the policy because the insurers will accept it as showing a basis of liability which is within the scope of the cover;*

5. *But neither the judgment nor the agreement are determinative of whether or not the loss is covered by the policy (assuming that the insurer is not a party to either and that there is no agreement by the insurer to be bound).*

6. *It is, therefore, open to the insurers to dispute that the insured was in fact liable, or that it was liable on the basis specified in the judgment; or to show that the true basis of his liability fell within an exception;*

7. *Thus, an insured against whom a claim is made in negligence, which is the subject of a judgment, may find that his insurer seeks to show that in reality the claim was for fraud or for something else which was not covered, or excluded by, the policy: MDIS Ltd v Swinbank [1999] Lloyd's Rep IR 516;*

8. *Similarly, an insured who is held liable in fraud (which the policy does not cover) may be able to establish, in a dispute with his insurers, that, whatever the judge found, he was not in fact fraudulent, but only negligent and that he was entitled to cover under the policy on that account.*'

Having set out these general principles derived from the authorities, Christopher Clarke J analysed the decision in London Borough of Redbridge v Municipal Mutual Insurance

Limited [2001] Lloyd's Rep IR 545, in which Tomlinson J refused to allow an insurer to go behind determinations of the Pensions Ombudsman, which obliged the insured local authority to pay compensation to 14 of its employees, in order to establish that the insured's liability to the employees fell within an exclusion to the policy. Christopher Clarke J disagreed with Tomlinson J's approach, and set out his reasoning in some detail.

In declining to follow Tomlinson J's decision in the Redbridge case, Christopher Clarke J considered the decision of Aikens J in Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm), [2006] 1 Lloyd's Rep 500. Aikens J said (giving his reasons for disagreeing with the reasoning and conclusion of Colman J in Lumbermens Mutual Casualty Company v Bovis Lease Lend Limited [2004] EWHC 1614 (Comm), [2005] 1 Lloyd's Rep 494):

'*The most important, if obvious, point is that an insurer always has the right to challenge whether the insured's right to indemnity under the policy has been established. Therefore it has the right to challenge whether the insured was, in fact and law, liable to the third party. It has the right to challenge the quantum of the liability. And it must also have the right to challenge whether, on the facts of the case, the insured's liability to the third party is a loss within the scope of the liability policy, whatever is stated in a judgment, award or settlement. Apart from anything else, the insurer will not be a party to the judgment, award or settlement, unless specifically involved. I accept that in the case of judgments and awards, the conclusion of a competent tribunal on the merits as to liability and quantum is unlikely to be upset in an action on the liability policy. But I cannot see why, in principle, it should not be challenged.*'

Christopher Clarke J said that he agreed with this conclusion, and that the insured must, equally, as between himself and the insurer, be able to claim that any finding in the judgment was not correct, or to claim that he was also liable on other grounds.

As Redbridge, Lumbermens, Enterprise Oil and Omega Proteins are all first instance decisions, these issues have not yet been definitively decided. It is however probably fair to say that the approach taken in the Enterprise Oil and Omega Proteins line of authority is generally regarded as being correct.

(5) Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc [2010] EWHC 1705 (Comm)

Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc was a claim by Persimmon under the Third Parties (Rights Against Insurers) Act 1930. Persimmon brought the claim against the legal expenses insurer of its former adversary, a company called

CPH, which was the unsuccessful claimant in earlier proceedings brought against Persimmon. Following the dismissal of CPH's claims in those proceedings, Persimmon made a successful application for indemnity costs. It was the findings of the trial judge in relation to both the underlying claims and the application for security for costs which formed the basis of the insurers' avoidance of the legal expenses insurance policy for material misrepresentation and non-disclosure.

The case is interesting not so much for the judgment itself, which applies well-established legal principles, but for its context, and the implications for the funding of litigation and in particular applications for security for costs against parties who have the benefit of legal expenses insurance. The case achieved notoriety even before trial, when it was referred to at paragraph 3.14 of the *Review of Civil Litigation Costs: Final Report* by Lord Justice Jackson as exemplifying a perceived injustice, that '*the event which triggers entitlement under the policy also triggers the insurers' repudiation*'.

The misrepresentations relied on by the insurers related to the facts of the underlying claim and the status of a note of a meeting, which CPH represented to be a contemporaneous record. The non-disclosures related both to the facts of the underlying claim and to wider factual issues affecting credibility and motive, such as the bankruptcy of a key individual and the fact that CPH had been in serious financial difficulties at a relevant date. Persimmon was, as David Steel J noted at the beginning of his judgment, '*in the unusual position of seeking to adopt the rights of someone whose dishonest evidence it has established*'.

The expert underwriters agreed that the alleged misrepresentations and non-disclosures were material, and David Steel J found (unsurprisingly, on the basis of the findings of the trial judge) that the misrepresentations and non-disclosures had been made as a matter of fact, and that the underwriter had thereby been induced to write the policy. David Steel J also rejected Persimmon's arguments based on waiver. Accordingly, the insurer was entitled to avoid the policy, and Persimmon's claim was dismissed. Persimmon was therefore left to bear the whole of its own costs in relation to its successful defence of CPH's claim against it in the underlying action and, presumably (costs are not dealt with in the report), to pay the insurer's costs of the avoidance action as well as bearing its own costs of that action.

If CPH had been ordered to pay security for Persimmon's costs of the underlying action, Persimmon's situation would have been very different. In describing the procedural history of the underlying proceedings, David Steel J summarised the correspondence between the parties in relation to the adequacy (or otherwise) of the policy as security for Persimmon's costs. Having been informed by CPH's solicitors that there was no limit of liability in respect of cover for adverse costs under the policy of

legal expenses insurance, Persimmon's solicitors stated, in a communication which David Steel J described in his judgment as '*somewhat prescient*', that:

'*We do not regard an After the Event Insurance Policy as being adequate security for costs. 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. We trust therefore that your client will not seek to offer any AEI policy as security for costs.*'

The impact of the existence of a legal expenses insurance policy on an application for security for costs against the insured party was considered by the Court of Appeal in Al-Koronky v Time-Life Entertainment Group Ltd [2006] EWCA Civ 1123. Sedley LJ (giving the judgment of the Court of Appeal) referred to a passage in the judgment of Mance LJ in Nasser v United Bank of Kuwait [2001] EWCA Civ 556 (paragraph 60) which included the following:

'*The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere.*'

Sedley J then said:

'*35. ... 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.*

36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective. '

More recently, in Michael Phillips Architects Ltd v Riklin [2010] EWHC 834 (TCC), Akenhead J considered Nasser v United Bank of Kuwait and Al-Koronky v Time-Life,

together with Belco Trading Co v Kondo [2008] EWCA Civ 205. Having reviewed the authorities, Akenhead J said (at paragraph 18):

'*These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the defendant in circumstances where security for costs should be provided by the claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:*

(a) There is no reason in principle why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.

(b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.

(c) It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.

(d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the defendant.'

Of course, the adequacy of the security is only one of the issues to be considered on an application for security for costs. In the event, Persimmon did not make any such application – David Steel J observed that this decision was made '*following it would appear gloomy advice from counsel*' – and the unfortunate consequences for Persimmon were as set out above.

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