

Paper protection

Andrew Hogan on ATE insurance, security for costs and the Cayman comparison

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 in the litigation process 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. After-the-event insurance as or in place of security for costs therefore raises an obvious difficulty. If a substantial insurer has undertaken to meet an adverse costs order, the risk that security is designed to meet 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. But insurance cover might cease in such circumstances, unless the contractual arrangements say otherwise. This article looks at how the courts of England and Wales have approached this problem, and examines the parallel position in Cayman.

ENGLAND AND WALES

The present English jurisdiction is contained in CPR 25.26 and 25.27, following the substitution of Part 25 with effect from 6 April 2025. The court may make an order under CPR 25.27 if, having regard to all the circumstances, it is just to do so and one of the jurisdictional conditions is satisfied. For commercial litigation, the familiar condition – now CPR 25.27(b)(ii) – is that the claimant is a company or other body and there is reason to believe 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* [1995] 3 All ER 534 (CA) the Court of Appeal put the issue in these terms: the court must weigh the injustice to a claimant if an order stifles a genuine claim, against the injustice to a defendant which defeats the claim, but cannot recover its costs. *Keary* is sometimes remembered principally as an authority about stifling. Its wider importance is that security is not an entitlement to the best possible protection at the claimant's expense. The jurisdiction is intended to achieve justice between the parties, not to confer a collateral litigation advantage on the defendant. That proposition leads to the related principle considered below: where two forms of security provide equal protection, the court should prefer the form least onerous to the claimant.

In *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872 the Court of Appeal accepted that an appropriately framed 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. ATE is not necessarily an alternative form of security considered only after the jurisdiction has arisen. If the claimant has a reliable contractual entitlement to have the defendant's costs paid, the premise that it will be unable to pay them may be undermined. But *Premier Motorauctions* equally rejected the proposition

that the existence of a policy ends the enquiry. The policies there were capable of avoidance for misrepresentation or non-disclosure, and the defendants were entitled to some assurance that this was not a realistic risk. The Court of Appeal therefore accepted that the jurisdictional threshold was crossed. The case established the essential point: ATE may answer an application, but only after examination of the actual contractual obligations the insurer has assumed.

Longmore LJ observed in *Premier Motorauctions* that it is 'unfortunate that the court's jurisdiction to order security for costs should depend on a detailed analysis of a claimant's ATE insurance policies into which the defendants have had no input, and which they have no direct right to enforce.' The authorities discourage security applications being inflated into large interlocutory hearings involving great expenditure

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of money and time. That concern cuts both ways. It supports the requirement, considered below in the context of the first *Lloyds Developments* judgment, that a defendant who contends that proposed security is defective should identify its objections early so that they can, if possible, be cured. It also limits the depth of scrutiny that can sensibly be undertaken at an interlocutory stage.

As the case law has developed, that examination has become progressively more exacting. The analytical framework was laid down at first instance by Akenhead J in *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC), who identified four governing propositions: ATE can in principle provide some element of security; it will rarely be as good as cash; it must be demonstrated actually to provide some protection; and the amount of security may be reduced to reflect the realistic probability that the ATE will cover costs. Applying that framework, in *Asertis Ltd v Bloch* [2024] EWHC 2393 (Ch) the policy was supported by an anti-avoidance endorsement, but the court nevertheless found a real risk that it would not respond in full. Among the difficulties were gaps in temporal cover, a potentially inadequate limit, the lack of direct enforcement by the defendant, conditions whose observance the defendant could not readily police, and uncertainty about the consequences of termination. The governing test was whether there was a real, rather than fanciful, risk that the policy would not meet the costs liability. A defendant cannot defeat ATE merely by pointing to remote theoretical possibilities which exist under any contract. Conversely, the existence of a policy with a substantial indemnity limit does not answer the question whether the insurer may in the circumstances decline to pay. The court is concerned with the substance of protection, not the appearance of it.

This is also where the jurisdiction may be used tactically. There is nothing improper in a defendant asking for security because the claimant may not be able to pay. But once protection that is objectively adequate has been offered, insistence on cash can serve a different

purpose. Cash paid into court is cash that cannot fund experts, disclosure, solicitors or counsel. A demand for cash may therefore do more than protect the defendant against credit risk: it may alter the claimant's ability to litigate. *Recovery Partners GB Ltd v Rukhadze* [2018] EWHC 95 (Comm) illustrates the point. The court accepted, applying by analogy the principle in *Rosengrens v Safe Deposit Ltd* [1984] 1 WLR 1334, that where two forms of security provide equal protection, 'all else being equal', the court should choose the form least onerous to the claimant. A defendant need not accept inferior security merely because it is cheaper for the claimant, and *Recovery Partners* itself refused to replace superior existing cash-backed undertakings where no material hardship justified doing so.

Once adequate protection against the relevant risk has been provided, the jurisdiction does not require a claimant to provide a more onerous form of security merely because the defendant would prefer it. ATE and third-party funding frequently travel together: the funder finances the claim and the policy protects against adverse costs. A professional funder may make it more likely that cover will be maintained and policy conditions observed, but its presence does not answer whether the particular policy terms provide sufficient protection.

The possibility of abuse runs the other way. A claimant may rely on the headline value of an ATE policy while the small print leaves the defendant bearing much the same risk as before. The policy may permit termination if prospects fall below a stated percentage. It may exclude costs incurred before inception, costs generated by particular applications, or liabilities following conduct said to amount to fraud or dishonesty. It may require continuing cooperation by the insured, allow the insurer to reduce or avoid liability for breach, or contain limits capable of being exhausted by other insured liabilities. The proceeds may be payable to the claimant rather than the defendant, creating a risk of diversion or insolvency. None of these matters is answered by saying that the insurer is solvent.

Modern ATE security has consequently developed by removing those features of ordinary insurance that create the relevant risk. *Recovery Partners* provides a useful model. The insurer executed a deed under which it unconditionally and irrevocably undertook to pay costs directly to the defendants, including costs determined by summary assessment, detailed assessment and orders for payment on account. It acted as principal debtor rather than merely as surety, and the deed was governed by English law with exclusive English jurisdiction. More recent decisions have carried the exercise further. In *Lloyds Developments Ltd v Accor Hotel Services UK Ltd* [2025] EWHC 1238 (TCC), Constable J required attention to the precise wording of the policy and anti-avoidance endorsement, including termination, notice and fraud. The defendant was not entitled simply to announce that cash was preferable and withhold its substantive objections until the hearing; if it contended that the proposed security was defective, fairness and sensible case management required those defects to be identified so that they could, if possible, be cured.

The second *Lloyds Developments* judgment ([2025] EWHC 2011 (TCC)) records the result of that process. The approved wording made the secured cover non-voidable and non-cancellable, prevented the insurer from refusing payment by relying on exclusions or on fraud, dishonesty, misrepresentation or non-disclosure by relevant persons, directed payment to the secured party, preserved protection



through insolvency, restricted adverse amendments, provided direct enforcement by the defendant, and subjected the insurer to English law and the English courts. By that stage the policy had acquired many of the characteristics of an on-demand financial obligation. The closer ATE comes to conventional security, the less room there is for a principled objection to it. Where the claimant proposes ATE because it prefers not to provide cash, however, the court can properly require wording that removes material uncertainty.

Contis Group Ltd v Swipewallet Holdings Ltd [2025] EWHC 3065 (Comm) shows the same functional approach applied flexibly. The court accepted the ATE policy as providing security for costs already incurred and for future costs while the policy remained in force, but regarded prospective termination if merits deteriorated as a real, not fanciful, risk. Rather than either accepting the policy in full or ordering the entire sum into court, the court required notification and evidential safeguards together with a £300,000 layer of conventional security which would allow the defendant to return to court if the position changed. The decision illustrates the residual-risk approach: the court identified the risk left by the policy and ordered conventional security against it, rather than treating cash as an end in itself.

The more recent costs decision in *Bargain Busting Ltd v Shenzhen SKE Technology Co Ltd* [2026] EWHC 1476 (Ch) points in the same

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direction: the defendants were justified in pursuing security until ATE cover in a form sufficiently protecting their interests had actually been put in place. *Contis* may therefore provide a useful model where the policy is broadly sound but leaves identifiable gaps: accept the ATE for what it reliably covers and require conventional security for the residual risk.

A CAYMAN COMPARISON

A comparison with the Cayman Islands is useful. The jurisdictions share the same common law foundations, but may place different weight on the practical characteristics of the proposed security. Order 23 rule 1 of the Grand Court Rules permits security in specified circumstances, including where a plaintiff is ordinarily resident outside the jurisdiction, if the court considers an order just in all the circumstances; rule 2 permits the court to determine the manner, time and terms on which security is given.

Corporate impecuniosity is addressed separately by section 74 of the Companies Act (2026 Revision), which permits security where a company is plaintiff and there is reason to believe that its assets will be insufficient to pay the defendant's costs if the defence succeeds. In *R&A Heavy Equipment Services LLC v Scotts Equipment Ltd* [2025] CIGC (Civ) 7, Asif J addressed the relationship between these two provisions. The question was whether a foreign corporate claimant could resist an Order 23 application on the ground that it was not ordinarily resident outside the jurisdiction for the purposes of that rule, while the real concern was its ability to pay. The court held that the Order 23 jurisdiction against a foreign corporation should be exercised consistently with section 74. A foreign corporate claimant is not protected merely by the rule which, in the case of a foreign natural person, generally confines security based on residence to the additional burdens of overseas enforcement. The court may protect the defendant against corporate impecuniosity itself, thereby placing foreign and Cayman companies on a broadly level footing.

English authority remains embedded in the Cayman approach. In *Arnage Holdings Ltd v Walkers (A Firm)* [2025] CICA (Civ) 17, the Cayman Islands Court of Appeal in 2025 considered the familiar question of whether security would stifle a genuine claim. The court referred directly to *Keary* and the principles summarised by Peter Gibson LJ, applying them to determine whether an impecunious corporate claimant had demonstrated that an order for security would prevent it from pursuing its claim. The decision confirms that Cayman courts treat the English balancing exercise – weighing the injustice of stifling against the injustice of an unrecoverable costs order – as an integral part of their own jurisdiction. Cayman has not developed an autonomous doctrine unrelated to England and Wales. The question is whether the common principles lead to the same answer when the proposed security is an overseas insurance obligation. On that question, *Caribbean Islands Development Ltd (in official liquidation) v First Caribbean International Bank (Cayman) Ltd* 2014 (2) CILR 220 provides the most useful existing indication. The claimant proposed ATE cover supported by an unconditional and irrevocable bond from QBE, a reputable and financially sound insurer. The difficulty was not simply the insurer's solvency. The bond was governed by English law, QBE had no presence in Cayman, and enforcement would not provide the defendant with the ready local recourse that the court regarded

as an important feature of 'real security'. Smellie CJ rejected the proposal.

Caribbean Islands Development should not be converted into a rule that security must invariably consist of cash in Cayman or that every insurer must own Cayman assets. The case arose against an unattractive procedural history: the claimant had already been ordered to provide security, had failed to comply, and was in effect asking the court to accept an alternative form of security after the event and in circumstances which did not inspire confidence in its willingness to meet procedural obligations. The proposed bond had to be assessed in that context, and it is difficult to separate the court's scepticism about the instrument from its scepticism about the party offering it. But it does reveal a difference of emphasis. Modern English authority is increasingly prepared to address defects in ATE through careful drafting: direct rights, anti-avoidance wording, restrictions on cancellation, notification provisions, English governing law and, where necessary, a supplementary layer of conventional security. The Cayman decision places appreciably greater weight on the successful defendant being able to realise its protection without having to undertake foreign enforcement. In England, the dominant question is increasingly whether payment is sufficiently certain. In Cayman, the existing authority suggests that the court may additionally ask where, and by what practical process, that certainty can be converted into money.

That leaves a question that Cayman authority does not yet appear squarely to have answered. Suppose a claimant offered the Grand Court the modern *Lloyds Developments* product: a substantial insurer; an irrevocable and non-avoidable obligation; express protection against fraud by the insured; payment directly to the defendant; protection on insolvency; no adverse amendment without consent; and clear rights of direct enforcement. Suppose, however, that the insurer remained outside Cayman and had no assets or presence there. Would the contractual certainty now be sufficient, or would *Caribbean Islands Development* still require something more local? I would suggest that the issue remains open. Cayman has adopted much of the English analysis, but it has not necessarily adopted the English willingness to treat sufficiently certain overseas obligations as satisfactory security.

THE ATE SPECTRUM

ATE insurance therefore lies on a spectrum. At one end is an ordinary policy whose continued value depends on the conduct of an impecunious claimant and a series of contractual conditions that the defendant cannot control. At the other is an irrevocable, non-avoidable and directly enforceable obligation by a creditworthy insurer to satisfy specified costs orders. By the time the instrument reaches the latter end, it may have begun life as insurance, but functionally it has become security. An ordinary policy that leaves a material risk of non-payment should not be treated as security. Equally, once adequate protection has been provided, the defendant is not entitled to cash merely because this is more onerous for the claimant. The jurisdiction has served its purpose when the defendant has real protection against the risk of non-payment. The remaining Cayman question is whether 'real' protection must still possess a local dimension.

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