

The principles of avoidance and waiver considered in the ATE legal expenses insurance context: *Persimmon v Great Lakes Reinsurance*

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A claimant takes out after-the-event legal expenses insurance (“ATE insurance”) to cover adverse cost liabilities in its action against the defendant. The defendant wins the case. The ATE insurers decide to avoid liability based upon the facts as found by the judge in the course of dismissing the claimant’s action. In effect, the event which triggers entitlement under the policy also triggers the insurers’ avoidance of cover. Should a special approach be taken by the courts in such circumstances? More specifically, are the legal tests for materiality and inducement in the ATE insurance context any different? These were among the issues between the parties in *Persimmon v Great Lakes Reinsurance*, a significant case in which the Commercial Court considered for the first time the principles of avoidance and waiver in the ATE insurance context. The case is also of obvious interest to those seeking security for costs from parties with ATE insurance cover.

The case concerned an ATE legal expenses policy written in 2005 (“the Policy”) to cover the adverse costs liabilities of CPH enterprises (“CPH”) in its proceedings against the Claimants (“Persimmon”). The Policy was in effect underwritten by the Defendant (“Great Lakes”), but it was administered for all practical purposes by FirstAssist Insurance Services Ltd (“FISL”) under a binding authority. In order to obtain the insurance, CPH had made a detailed presentation, which included a proposal form, summary of claim, and draft witness statements. CPH signed declarations in the usual form confirming the accuracy and completeness of the material supplied.

The underlying proceedings between CPH and Persimmon involved a dispute over a property transaction. Prior to the trial, Persimmon expressed concerns about CPH’s financial standing and considered making an application for security for costs. CPH stated that they and FISL would resist such an application on the basis that the ATE insurance policy was adequate security. No application was made.

During the course of the trial, Persimmon exposed a series of dishonest documents and statements made by two of CPH’s key witnesses. At the conclusion of the trial, the Judge

dismissed CPH's claim and awarded indemnity costs. The Judge found that CPH had been systematically dishonest and had put forward a claim which it knew was baseless.

Upon reviewing the judgment and transcripts of evidence, FISL (on behalf of Great Lakes) decided to avoid the Policy and to refuse CPH's claim for an indemnity in respect of its costs liabilities. The decision to avoid was based upon a series of instances of material non-disclosure and misrepresentation. In addition, FISL relied upon breaches of various claims conditions. When CPH was not able to meet its liability to pay costs, Persimmon had the company wound up and sought to enforce the Policy for its own benefit, pursuant to The Third Parties (Rights Against Insurers) Act 1930. Persimmon was thereby placed in the unusual position of seeking to espouse the rights of the adversary whose fraud it had successfully proved.

Persimmon's approach in the trial against Great Lakes was three-fold:

- (1) Persimmon sought to defend CPH against most of the charges of misrepresentation and non-disclosure. In particular, it suggested that the key CPH witnesses gave to FISL/Great Lakes an account of events which was "truthful to the best of their belief".
- (2) Persimmon denied that Great Lakes had ever acquired the right to avoid the Policy. It maintained that the instances of non-disclosure and misrepresentation on which Great Lakes relied were not material and/or did not induce Great Lakes to grant cover. To support that submission, Persimmon argued that a special approach was required to be taken to materiality and inducement in the context of ATE insurance. It was contended that what was material to the relevant risk was not the detailed factual account of the events underlying the litigation but the risk assessment of the solicitors conducting the case. Persimmon also sought to argue that any misrepresentation/non-disclosure did not induce the insurer to offer terms at inception because Great Lakes had not avoided the Policy when presented, very shortly before trial, with some of the material used to discredit the CPH witnesses.
- (3) Finally, Persimmon asserted that Great Lakes was precluded from relying upon any misrepresentation, non-disclosure or breach of policy conditions. It was argued that the Policy had been affirmed and that an estoppel arose.

After a 4 day trial in the Commercial Court, Persimmon's claim was dismissed in its entirety. In his judgment, Steel J. applied the conventional principles of insurance law governing avoidance and waiver to the ATE insurance context. His Lordship found that this had been a case that had involved the starkest instances of misrepresentation and non-disclosure at the inception stage. Great Lakes were therefore entitled to avoid cover. Further, the facts of the case did not come close to establishing the necessary conditions for waiver by election or waiver by estoppel. The fact that the experts were able to agree that all of the alleged misrepresentations and non-disclosures were material led to Persimmon abandoning its pleaded case that a special approach to materiality/inducement was required in the context of ATE insurance, a concession that Steel J. agreed was rightly made as a matter of law, following *Al-Koronky v. Time-Life Entertainment Group* [2006] EWCA Civ 1123. Further, inducement was plainly made out, based on witness evidence and documentary evidence in the case.

The case confirms that ATE insurance is subject to the ordinary legal principles governing avoidance of cover and waiver in insurance contracts. It also points to the possibility that where a dispute is heavily factual and there is a real likelihood of dishonesty on the part of the insured, there may be an argument that an ATE insurance policy does not constitute adequate security.

*** Counsel for Great Lakes were Sue Carr Q.C. and Jonathan Hough, both of Four New Square Chambers.**