Harbour Underwriting

in partnership with

GS GROUP

ATE insurance
– a guide for Scottish lawyers

How to put After the Event insurance in place
for your commercial litigation clients

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Contents

What lawyers should know about ATE insurance and how HUL can help put cover in place for their clients

Lawyers have been familiar with After the Event (ATE) insurance since 1995 when it emerged alongside the introduction of conditional fee agreements. In Scotland, one of the most significant elements of the 2018 Civil Litigation (Expenses and Group Proceedings) (Scotland) Act is the introduction of damages based agreements. The Act provides that from 27 April 2020, Scottish lawyers have been able to enter into damages based agreements where the solicitor shares in the damages paid out in successful claims and in speculative fee agreements where an uplift of additional fees can be paid to the solicitor from damages recovered by a successful claimant. As most lawyers know, there have been twists and turns over the years about whether ATE premiums are recoverable from the losing defendant. The position in Scotland as we understand it is that as in England insured parties have to bear the costs of ATE premiums themselves.

This isn't the only important change in relation to ATE insurance in recent years. Of more pertinence to the legal profession are the changes to lawyer's obligations when advising clients involved in commercial disputes about ATE. In England, the introduction of the SRA Standards and Regulations (STaRs) has significantly altered solicitors' professional obligations in this regard. It may well be that although there is no similar express obligation on a solicitor in Scotland, it could nevertheless be regarded as inadequate professional service to fail to advise a client about the potential availability of ATE cover.

In England, STaRs was launched in November 2019 to much fanfare, with many articles in the legal press outlining the main changes to solicitors' professional obligations. Surprisingly, few of these articles focused on a litigation lawyer's duties regarding ATE insurance.

I have spoken extensively about ATE insurance and STaRs to solicitors' firms of all sizes across the UK, and it is clear that most are not fully aware of what these duties are. As a result, many solicitors risk breaching their obligations and exposing both themselves and their firms to potential penalties.

As the written standards that apply in England and Wales seem likely to have relevance in Scotland, it is important to continue to make reference to them. You can read a complete blow-by-blow account of a solicitor's obligations in relation to STaRs in the appendix, but I would like to highlight a few key provisions here:

1. Solicitors need to give their clients proactive advice about how they will handle each case, including how it is funded, the likely cost and the suitability of products such as ATE insurance. This obligation is personal, and solicitors cannot hide behind "the way the firm does things".
2. Strict rules apply when a solicitor "gives a client a personal recommendation for a contract of insurance". They should only do so if they have analysed a sufficiently large number of insurance contracts available on the market. Again, these rules apply to solicitors personally.

Many solicitors we have spoken to feel that this second obligation is too onerous due to the amount of time and work it involves. Instead, they prefer to refer their client to a reputable insurance broker who can advise them and recommend an insurer or managing agent such as Harbour Underwriting Ltd (HUL).

HUL has partnered with commercial insurance brokers, GS Group, to provide a service to law firms to procure ATE insurance through us.

In the pages that follow, you can find details of the types of cover we provide and how premiums are funded, including some worked examples.

We certainly don't pretend to know as much as lawyers and law firms do about commercial litigation and arbitration. But we are familiar with the costs risks for both claimants and defendants involved in commercial disputes. And we know that clients can mitigate these risks by taking out ATE insurance, enabling them to litigate from a secure position.

If you or your firm is involved in a commercial dispute, either going through the courts or arbitration, we can, through GS Group, help you put ATE insurance in place.

Sharon Brown, Managing Director, Harbour Underwriting Ltd

GS Group has recognised the need for ATE insurance in Scotland due to the growing number of commercial disputes. GS Group and Harbour Underwriting Limited have partnered together to provide the Scottish market with an ATE commercial insurance product 'bar none'

Important note: this document was originally produced for lawyers in England and Wales and while some changes have been made to reflect the position in Scotland we have retained some of the original terminology. In particular, we are aware that in Scotland what we refer to as "costs" are known as "expenses", "disbursements" are known as "outlays" and "security for costs" is known as "caution for expenses". Please read the original terms as if the Scottish terminology has been used.

CASE STUDY

After the Event insurance (ATE) helps family company beat Bentley Motors in long-running trademark battle

The Court of Appeal has upheld a High Court decision made last year that determined Bentley Motors had infringed the registered trademarks of Bentley Clothing by using identical trademarks on its clothing range. Harbour Underwriting provided family company Bentley Clothing with ATE to cover adverse costs to manage its exposure if it was unsuccessful at trial.

Background

Bentley Clothing is a family business established in 1962 that has had trademarks for clothing sold under the name 'Bentley' since 1982. Since about 1987, Bentley Motors moved into the sale of clothing and headgear.

Bentley Clothing first contacted Bentley Motors in 1998 about granting a licence. Despite Bentley Clothing's continued desire over the next few years to licence their trademarks, no agreement was reached.

Dispute with Bentley Motors

Bentley Motors increasingly used the name Bentley on its clothing leading to a dispute with Bentley Clothing. As attempts to agree a licence had failed, the family business was left with no option but to bring High Court proceedings against Bentley Motors for trademark infringement.

High Court proceedings

Bentley Clothing was aware that it would be liable to pay Bentley Motors' costs if it lost its case. As a result, on the advice of its solicitors Fox Williams, the company sought to limit its financial risk by taking out ATE insurance with Harbour Underwriting so that it could manage its exposure if it was unsuccessful at trial.

High Court trial

Despite various attempts by Bentley Clothing to engage in settlement discussions, Bentley Motors ran the action to trial knowing that it was in a stronger financial position. Indeed, it threatened to bring a security for costs application against Bentley Clothing.

Harbour Underwriting issued an anti-avoidance endorsement to the ATE policy that Bentley Motors accepted as security for costs.

Bentley Clothing succeeded in the High Court, with His Honour Judge Hacon saying Bentley Motors' use of the name 'Bentley' on its clothing "amounted to a steady encroachment on Bentley Clothing's goodwill".

Appeal to Court of Appeal

Bentley Motors appealed the decision in the Court of Appeal. To manage Bentley Clothing's further costs exposure in the appeal, Harbour Underwriting agreed to extend the policy to cover the appeal.

The Court of Appeal unanimously dismissed the appeal, saying Bentley Motors had infringed Bentley Clothing's trademarks by using an identical mark on its clothing range. The court held that Bentley Motors could not rely on the defence of "honest concurrent use" and was, therefore, not considered to have acted honestly with regards to Bentley Clothing's rights.

> "We used Harbour Underwriting for a particularly sensitive case where a number of unexpected and challenging issues arose. At each point, Harbour Underwriting provided a solution in a very user-friendly and efficient way"

Simon Bennett, partner at Fox Williams LLP who acted for Bentley Clothing in the case

History of ATE insurance

The market for ATE insurance grew on the back of conditional fee arrangements becoming lawful in England and Wales in 1995. At the time, many civil claims were still funded by Legal Aid. ATE insurance was developed to insure claimants against an adverse costs award and their own disbursements. At first, claimants financed ATE premiums through a reduction in damages, but in April 2000 the rules changed and the ATE premium could be recovered from the losing defendant.

This did not remain the case for long, however, and the position changed following the implementation of the civil litigation reforms proposed by Lord Justice Jackson in April 2013.

The current position is that ATE premiums can no longer be recovered from the losing party. The insured must now (subject to a few exceptions) bear the cost of any premium themselves, although sometimes a litigation funder will agree to cover the cost of the premium as part of their finance package.

Although the position in Scotland has developed differently, the use of ATE is well known. The increasingly important role ATE insurance plays in litigation and arbitration matters is shown by the duties imposed on lawyers to give proper advice in relation to it. This is something you can read more about in the Appendix.

What is ATE insurance?

After the Event (ATE) insurance provides cover against the costs incurred in bringing or defending legal or arbitration proceedings. It protects the insured from the potential exposure of having to pay the other side's costs ('adverse costs').

Under the 'loser pays' principle in Scots law, the losing party in a dispute is usually ordered to pay the successful party's costs. ATE insurance mitigates against this. It is also possible to obtain ATE cover in respect of a party's own costs ('own side costs' cover). See more below about the cover available under Types of Cover.

ATE insurance can be taken out however a case is funded, whether the party is paying all its own bills, has involved a litigation funder, or asked its solicitors to act on the basis that they are paid from the recoveries in the case.

We are aware that there is new statutory regulation, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which is not yet fully in effect. It is not for me to comment on its application, but it makes reference to the prospect that success fee agreements would be permissible, unlike the present. Section 10 makes specific reference to third party funding of civil litigation. We will take full account of the statute once it is in effect, but we do not think it is going to alter the proposal set out in this document.

When is ATE insurance taken out?

ATE insurance can be purchased by either the claimant or defendant at any time after a legal claim has started. This is in contrast to Before the Event cover, which must be in place before a claim begins.

What types of cases can you provide ATE cover for?

The ATE market has moved from bodily injury cases to all types of commercial disputes and arbitration claims. Although some insurers continue to cover bodily injury cases, many ATE providers (including Harbour Underwriting) now only cover commercial cases.

Cases within appetite

- Boardroom liabilities
- Breach of contract
- Breaches of competition law
- Class actions
- Commercial arbitrations
- Construction and engineering disputes
- Corporate disputes
- Cyber/data breaches
- Employment disputes
- Environmental liabilities
- Financial mis-selling claims
- Fraud and white-collar crime
- Insolvency claims
- Insurance disputes
- Mergers and acquisitions – breach of warranty
- Shareholder disputes
- Monetary and non-monetary claims
- Professional negligence
- Property litigation
- Securities fraud
- Shareholder disputes

Cases out of appetite

- Bodily injury (personal injury or clinical negligence) claims
- Claims from claims management companies
- Defamation

Types of cover

HUL's core products

1. Adverse costs cover
2. Own side disbursements cover
3. Own side solicitor's fees cover
4. Anti-avoidance endorsements and deeds of indemnity to provide security for costs
5. Appeals insurance

These core products are applicable to:

All forms of dispute resolution: litigation and arbitration

All stages of litigation: initial litigation, appeal, etc.

All forms of financing options: self-funded, third-party funding.

1 Adverse costs cover

This covers the policyholder's potential liability for 100% of their opponent's solicitor's fees and 100% of their opponent's disbursements.

The policyholder insures against the risk of adverse costs, i.e. their potential liability for the opponent's legal costs if the case is discontinued or lost at trial and a costs award is made against the policyholder.

This product covers the policyholder's potential liability for 100% of their opponent's solicitor's fees and 100% of their opponent's disbursements (including barristers' fees) up to the limit of indemnity provided under the terms of the policy. This cover can be purchased standalone or in conjunction with our own side disbursements cover and/or own side solicitor's fees cover.

2 Own side disbursements cover

This covers the policyholder for 100% of the disbursements paid by the policyholder to its own advisers and experts, other than solicitors.

Disbursements can become a major cost in any case, particularly one that requires expert reports. It provides reassurance that if that the policyholder is unsuccessful, they are covered for those fees up to the limit of indemnity provided under the terms of the policy.

The cover can be purchased as a standalone insurance product, or in conjunction with our adverse costs cover and/or own side solicitor's fees cover.

3 Own side solicitor's fees cover

This covers the policyholder's own solicitor's fees, less a deductible payable by the policyholder, which is usually 25%.

It provides reassurance that if the policyholder is unsuccessful, they are covered for those fees up to the limit of indemnity provided under the terms of the policy. The cover can be purchased as a standalone insurance product, or in conjunction with our adverse costs cover and/or own side disbursements cover.

4 Anti-avoidance endorsements (AAE) and deeds of indemnity for security for costs

This is an extension of adverse cost cover and is used to reduce the financial impact of a request for security for costs.

An AAE is an extension of existing cover (for adverse costs only). It ensures that the insurer cannot avoid or cancel the policy and will always pay claims up to the limit of indemnity.

The motivation for purchasing this type of cover is to avoid paying money into court when the defendant is seeking security for costs. Security for costs orders can frustrate the pursuit of even the most meritorious commercial disputes as defendants seek to stifle claims by insisting on the payment of security into court that can tie up the claimant's capital.

Forcing the claimant to pay money into court could put them under financial pressure and reduce the return on this capital.

An AAE enables the claimant to satisfy the defendant and the court that adverse costs will be paid in the event of an unsuccessful outcome. It is a more cost-effective way of providing the required security, as the premium payable would be approximately 10% of the value of the requested security.

In circumstances where an insurance policy is deemed to be inadequate security, HUL can advise on alternatives to satisfy an order for security for costs, such as a deed of indemnity, which has been accepted as adequate security for costs in a number of common law jurisdictions.

5 Appeals insurance

This covers the policyholder's risk of a decision being reversed.

Adverse costs, own side disbursements, own side solicitor's fees and AAE are not just available for new disputes but also for appeals i.e. mitigating the financial impact of a decision being 'reversed'.

Existing policyholder

Appeals insurance is available for pursuers and defenders where we provided cover for the first instance trial. The policy can be extended by endorsement to cover the appeal of a successful or unsuccessful claim.

New policyholder

Appeals insurance is available for pursuers and defenders that were successful at the first instance trial and the case proceeds to appeal.

Retrospective cover can be made available to cover the first instance trial.

A note about ATE cover in Scotland

We are aware that ATE insurance is well understood in Scotland, albeit its use has primarily been for relatively high value until now. A feature of our cover that may be new to Scottish lawyers and their clients is the potential for indemnity for own disbursements (outlays) and own costs including solicitor's fees.

Premium payment options

The premium is calculated as a percentage of the total limit of indemnity. The most common payment structures are deposit and contingent premiums and staged premiums. However, HUL has a flexible approach to premium payments that can be structured in many different ways to suit the insured.

HUL does not provide an entirely contingent premium model.

Deposit and contingent premiums

Part of the premium (the deposit), is paid up front, typically 18-20% of the limit of indemnity, with a further 30%-40% of the limit of indemnity due only if there is a successful recovery in the case. See the deposit and contingent premium payment example on pages 16 and 17 below.

Staged premiums

The premium is paid at specified stages in the litigation (in most cases three), with each premium instalment only paid if the relevant stage in the proceedings is reached. Typically, in England and Wales, the overall premium is 30% to 40%. The example below assumes three stages but there are often more. In Scotland, for example, we are aware that a second stage payment might become payable on a fixed date, say three months after the commencement of litigation.

Stage 1: 12% payable on the inception of the policy

Stage 2: a further 8% on the date first ordered by the court for the exchange of lists of documents; and

Stage 3: a further 10-20% 60 days before the liability trial commencement date

See the staged premium payment example on pages 18 and 19 below.

> “We work with HUL to support local law firms to procure ATE insurance on behalf of their clients and are always delighted with the highly professional service we receive”
>
> *George Stubbs, GS Group*

Deposit and contingent premium payment example

Deposit and contingent premium payment example – claimant with a comprehensive policy

A large construction company, Claimant Ltd, is claiming damages for breach of contract. The merits of the claim are strong and cash flow is available to cover the legal costs. However, on behalf of its shareholders, the board is concerned that in the event of an adverse outcome, the company would be left with its own legal costs and the possibility of having to pay its opponent's (Contractbreacher Ltd) costs.

Claimant Ltd's costs exposure	Limit of indemnity required
Own solicitor's fees	£750,000
Own disbursements	£750,000
Contractbreacher Ltd's costs (solicitors and disbursements)	£1,000,000
Total limit of indemnity	**£2,500,000**

The chief financial officer of Claimant Ltd can mitigate the risk of an adverse outcome by purchasing an ATE insurance policy from Harbour Underwriting via its law firm. In the event of a loss at trial, this will pay (up to each limit of indemnity):

- 100% of Contractbreacher Ltd's cost award
- 100% of its own disbursements, and
- after a 25% risk-sharing deductible, 75% of its own solicitor's fees.

The policy pays out up to the individual limit of indemnity purchased under each of the three sections of cover. For example, if the limit of indemnity under 'own solicitor's fees' is exhausted, the excess fees cannot be recovered from either of the other two sections.

The total premium to provide the required limit of indemnity is £1,375,000 plus 12% insurance premium tax (IPT), making a total of £1,540,000.

The premium is payable in two instalments: the deposit premium payable on inception of the policy, with the second (contingent premium) only payable if Claimant Ltd achieves a successful outcome (as defined in the policy wording), whether before or at trial.

Premium stage	Premium	Premium including IPT
Deposit premium	£500,000	£560,000
Contingent premium	£875,000	£980,000
Total	**£1,375,000**	**£1,540,000**

The actual premium paid by Claimant Ltd will depend on the lifecycle of the case:

- if a successful outcome (as defined in the policy wording) is not achieved before or at trial, only the deposit premium of £560,000 will be payable
- if a successful outcome (as defined in the policy wording) is achieved before or at trial, the contingent premium of £980,000 will be payable from the recoveries made, making the total premium £1,540,000

Summary

By purchasing the ATE policy, Claimant Ltd crystallises the cost impact on its business arising from the dispute by reducing its costs exposure if the action is unsuccessful from £2,500,000 to £747,500 (a reduction of £1,752,500/70%).

Claimant Ltd's costs exposure	Indemnity purchased	Policy pays out	Costs to Claimant Ltd	
			Without ATE insurance	With ATE insurance
Own solicitor's fees	£750,000	£562,500*	£750,000	£187,500**
Own disbursements	£750,000	£750,000	£750,000	£0
Contractbreacher Ltd's costs	£1,000,000	£1,000,000	£1,000,000	£0
Insurance policy premium	N/A	N/A	N/A	£560,000
Total	**£2,500,000**	**£2,312,500**	**£2,500,000**	**£747,500**

* limit of indemnity less the risk-sharing 25% deductible payable by the policyholder
** the 25% risk-sharing deductible payable by the policyholder

Staged premium payment example - defendant with a comprehensive policy

Defendant Ltd, a software development business, receives an unexpected claim from Opponent Ltd for £10m of damages for an alleged patent infringement. The claim appears spurious, but nonetheless is going to be expensive to defend. Defendant Ltd has three options:

1. Enter negotiations to settle the claim at the lowest cost. Some legal costs would be incurred to progress the negotiation and an element of the £10m of claimed damages payable. Opponent Ltd would be able to decide the terms on which they would be willing to settle.
2. Engage lawyers and allocate a budget to fight the claim. The expected cost exposure increases from the possibility of losing at trial with own solicitor costs, the cost of own disbursements, plus a possible award of Opponent Ltd's costs.
3. Fight the claim but reduce the potential cost of a loss at trial by purchasing an ATE insurance policy with a limit of indemnity in line with the expected cost exposure.

Defendant Ltd is advised that its costs exposure is:

Defendant Ltd's costs exposure	Required limit of indemnity
Own solicitor's fees	£750,000
Own disbursements	£750,000
Opponent Ltd's costs (solicitors and disbursements)	£1,000,000
Total limit of indemnity	**£2,500,000**

Defendant Ltd decides to fight the claim and purchase an ATE insurance policy from Harbour Underwriting. In doing so, the risk of an adverse outcome is mitigated by reducing the expected cost exposure from defending the claim.

In the event of a loss at trial, the policy would pay (up to each limit of indemnity):
- 100% of Opponent Ltd's cost award,
- 100% of Defendant Ltd's own disbursements and,
- after a 25% risk-sharing deductible, 75% of their own solicitor's fees.

The policy pays out up to the individual limit of indemnity purchased under each of the three sections of cover. For example, if the limit of indemnity under 'own solicitor's fees' is exhausted, the excess fees cannot be recovered from either of the other two sections. The total premium to provide this level of indemnity is £875,000 plus 12% insurance premium tax (IPT), making a total of £980,000, which is payable in three stages.

Premium stage	Premium	Premium including IPT
Stage 1: on inception of the policy	£300,000	£336,000
Stage 2: on the date first ordered by the court for the exchange of lists of documents	£150,000	£168,000
Stage 3: 60 days before the liability trial commencement date or trial window	£425,000	£476,000
Total	**£875,000**	**£980,000**

The actual premium paid by Defendant Ltd will depend on the lifecycle of the case:

- if the case settles in the early stages of the action (i.e. before the second or third stage premiums are due), the premium paid will only be £336,000
- if the case settles after the second stage premium is paid but before the third stage premium is due, the total premium paid will be £504,000 (£336,000 plus £168,000)
- if the case does not settle so that the third stage premium is due, the total premium payable will be £980,000

Summary

By purchasing the ATE policy, Defendant Ltd crystallises the cost impact on the business arising from the dispute by reducing its costs exposure if the action is unsuccessful from £2,500,000 to £1,167,500 (a reduction of £1,332,500/53%).

Defendant Ltd's costs exposure	Indemnity purchased	Policy pays out	Costs to Defendant Ltd	
			Without ATE insurance	With ATE insurance
Own solicitor's fees	£750,000	£562,500*	£750,000	£187,500**
Own disbursements	£750,000	£750,000	£750,000	£0
Opponent Ltd's costs	£1,000,000	£1,000,000	£1,000,000	£0
Insurance policy premium	N/A	N/A	N/A	£980,000
Total	**£2,500,000**	**£2,312,500**	**£2,500,000**	**£1,167,500**

* limit of indemnity less the risk-sharing 25% deductible payable by the policyholder
** the 25% risk-sharing deductible payable by the policyholder

Our underwriting criteria

Factors that an underwriter will consider before issuing an ATE policy include the limit of indemnity being requested (Harbour Underwriting covers limits ranging from £150,000 to £20m), whether the prospects of success are better than even and whether the legal team has the relevant experience.

The following outlines what HUL can underwrite under the terms of its binding authority agreement.

General underwriting rules:

- Commercial disputes – court proceedings, arbitrations, tribunals or appeals regardless of what stage they have reached
- Limits of indemnity ranging from £150,000 to £20m (higher limits available)
- Cases introduced by the parties, their lawyers or other agents
- Where the prospects of success are at least 51%
- The proposer's legal representative(s) and any expert(s) have the requisite experience for the case
- The proposer is assessed to be reasonable and commercial
- The proposer, or a third-party funder, has funds to pay the premium
- ATE is available irrespective of the type of retainer in place

HUL will consider the following

- Cover for pursuers and defenders
- Retrospective cover – where cover is backdated to the beginning of the dispute to provide a full indemnity
- Co-insurance – where another insurer is involved
- Excess insurance – where layers of insurance are required
- Top up insurance – increasing levels of existing cover
- Portfolios – where a law firm can purchase an annual policy for an aggregate limit of indemnity

If you have a case which you are not sure fits the criteria, please do not hesitate to speak with us.

ATE insurance may also be of interest in relation to D&O cover. With the cost of D&O insurance escalating, some businesses will be priced out of the market or seek to reduce the level of cover. This could leave many directors and senior professionals exposed. ATE insurance could help plug this gap if a claim is made against them.

HUL jurisdictions

For HUL to provide cover, the case and the legal representative(s) must be domiciled in one of the following jurisdictions:

- UK
- Channel Islands
- Cayman Islands
- Bermuda (on a non-admitted basis)
- Any other country where the insurer can issue ATE policies, subject to prior approval, such as Australia or New Zealand.

HUL is working on expanding its global presence and if a party is interested, we will explore adding further jurisdictions.

Our insurance capacity is provided by Hamilton Insurance DAC (A- (Excellent) A. M. Best).

> "Their experience, quick turnaround of cases and excellent service sets a gold standard for the industry as a whole – I wouldn't hesitate to recommend them"
>
> *Martin Scott, Partner, Walker Morris LLP*

CASE STUDY

Surprise failure at trial shows the importance of ATE insurance

The claimant, a global wine merchant, brought an action in the High Court against a well-known London firm of solicitors for around £50m. Despite the claimant, his legal team and his litigation funders being confident of succeeding at trial, the claim failed due to the claimant's poor performance in the witness box.

What happened?

The claimant alleged that his solicitors had given negligent advice, were in breach of their fiduciary duty and had committed a breach of confidence. The action was brought with the benefit of litigation funding, and the funders were confident that the claim would succeed.

So much so that prior to trial, it increased its funding beyond its initial investment of £2m to £3.8m.

The claimant's solicitors and barristers, including Queen's Counsel, agreed to reduce their usual hourly rate in return for a share of the monies recovered, illustrating their collective confidence in the action succeeding.

Harbour Underwriting provided cover for adverse costs of £1m. This was the second tranche of adverse costs cover, the first tranche of £2m being provided by another insurer.

Subsequently, a third insurer provided an additional tranche of adverse costs cover of £550,000.

Also, as the claimant was based overseas, security for costs was given to the defendant by way of deeds of indemnity from the insurers, including Harbour Underwriting.

The fact that all these third parties were willing to offer such a level of financial support to the claim shows the extent to which they believed it would succeed.

The action proceeded to trial.

Outcome

Despite receiving witness training before the trial, the claimant undermined his case when being cross-examined. As a result, it was clear the court would reject the claimant's evidence, and the action was settled on the basis that the defendant's costs would be paid.

We were kept advised of developments throughout the hearing and agreed to the claimant discontinuing the action on this basis. Harbour Underwriting and the other insurers paid out adverse costs under the respective ATE insurance policies.

Summary

Despite the confidence in the action from the litigation funder, insurers and the claimant's legal team, this action demonstrates the inherent risks of going to trial. In this case, the key witness did not perform well on the day. This is one of the many risks of litigation and shows why winning at trial can never be taken for granted.

This is why ATE insurance should be obtained even in the cases where parties and their legal team and funders are confident about their chances of success.

The process

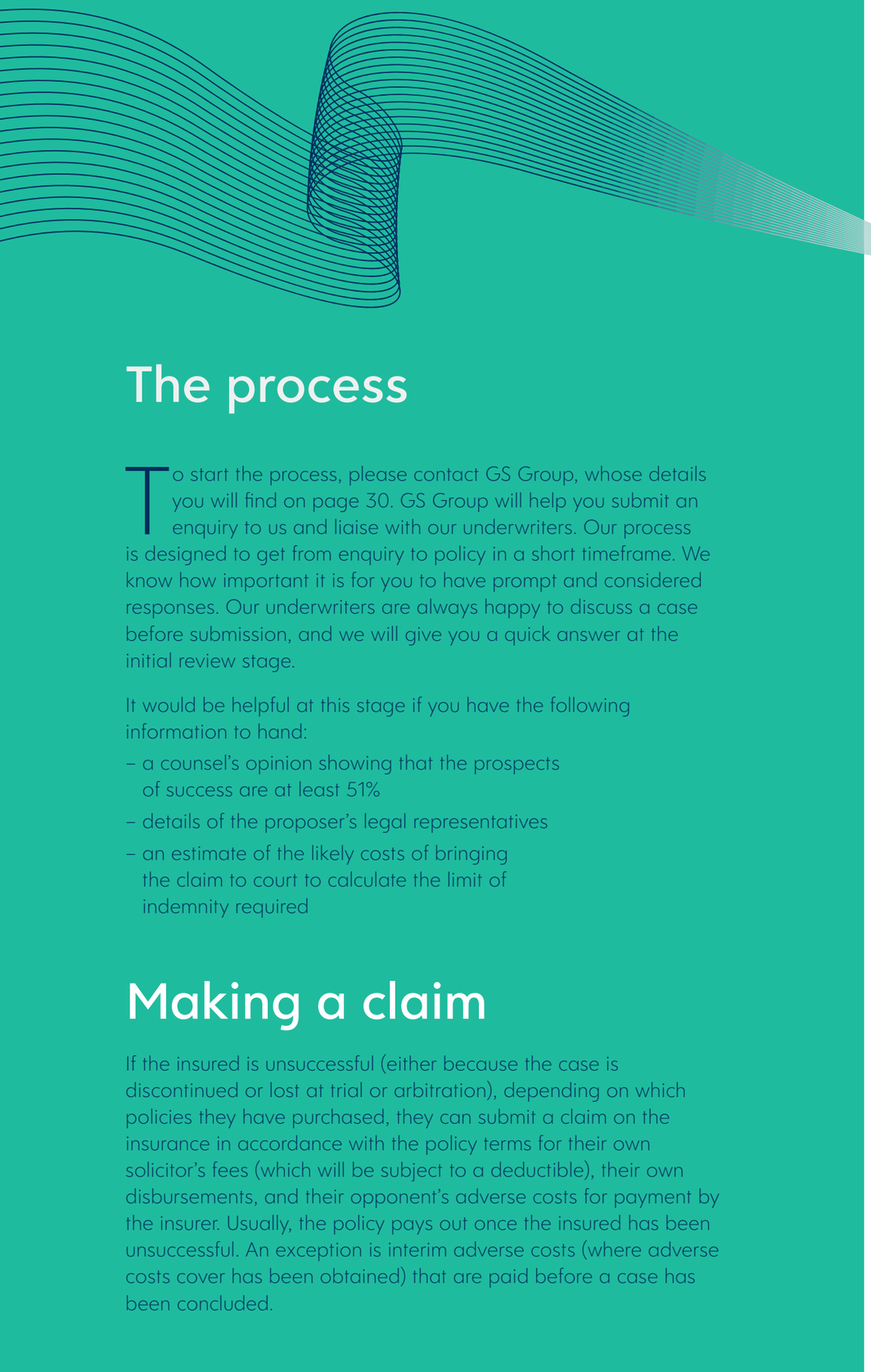
To start the process, please contact GS Group, whose details you will find on page 30. GS Group will help you submit an enquiry to us and liaise with our underwriters. Our process is designed to get from enquiry to policy in a short timeframe. We know how important it is for you to have prompt and considered responses. Our underwriters are always happy to discuss a case before submission, and we will give you a quick answer at the initial review stage.

It would be helpful at this stage if you have the following information to hand:

- a counsel's opinion showing that the prospects of success are at least 51%
- details of the proposer's legal representatives
- an estimate of the likely costs of bringing the claim to court to calculate the limit of indemnity required

Making a claim

If the insured is unsuccessful (either because the case is discontinued or lost at trial or arbitration), depending on which policies they have purchased, they can submit a claim on the insurance in accordance with the policy terms for their own solicitor's fees (which will be subject to a deductible), their own disbursements, and their opponent's adverse costs for payment by the insurer. Usually, the policy pays out once the insured has been unsuccessful. An exception is interim adverse costs (where adverse costs cover has been obtained) that are paid before a case has been concluded.



Request a quote

A proposal form and supporting papers regarding the dispute should be assembled by you, together with assistance from GS Group and your solicitors, and provided to HUL.

If our underwriters are satisfied that there are good prospects of success (at least 51%) then they would provide a quotation with the terms for the cover, the limit of indemnity, and the basis for paying the premium. A referral process will be agreed. Once the policy is incepted, policy documentation will be provided, and invoices issued for each instalment of the insurance premium (whether on a deposit and contingent, staged or bespoke basis).

HUL will require a number of documents in order to underwrite the case:

- Completed proposal form
- Copies of all counsel's advice obtained (or attendance note if counsel advised in a conference)
- Case summary (if counsel's advice is not available)
- Pleadings, including applications and court orders relating to case management and costs management
- Cost budget
- Witness statements
- Expert reports
- Relevant correspondence between the parties
- Retainer details

We can work GS Group and/or your law firm in the provision of these papers. Please send documentation to GS Group at insinfo@gs-group.uk.com

About GS Group

GS Group is Scotland largest independent insurance broker, with offices in Glasgow, Perth, Dundee, Aberdeen and Falkirk. GS Group holds Chartered Insurance Broker status and is one of the UK's top 75 brokers overall.

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Appendix

How can solicitors in England and Wales comply with STaRs when advising clients about ATE insurance in commercial disputes?

The introduction of the SRA Standards and Regulations (STaRs) has significantly altered solicitors' professional obligations to their clients in many different ways. In this article, we examine a litigator's responsibilities when advising clients about After the Event (ATE) insurance in commercial disputes.

The launch of STaRs in November 2019 was met with much fanfare, and many articles followed outlining the key changes solicitors needed to be aware of. One area that was largely overlooked at the time relates to a litigation lawyer's personal obligations when advising clients on ATE insurance in commercial disputes.

As a result, many litigators may unwittingly find themselves in breach of various SRA duties and requirements when acting for clients in commercial disputes. In the process, they would not just be exposing their firms to potential penalties but may find themselves personally liable too.

To understand what these duties and requirements are and how solicitors may fall foul of them, we need to look at:

1. SRA Standards and Regulations 2019 (STaRs) including the SRA Principles and the SRA Code of conduct, and
2. SRA Financial Services (Conduct of Business) Rules.

1. SRA Standards and Regulations 2019

The SRA Standards and Regulations introduced in November 2019 mark a sea change by the SRA. Gone is the narrow focus on law firms and entity-based regulation; instead, the emphasis is now on an individual solicitor's personal professional responsibility.

SRA Principles

The starting point is the SRA's seven principles, which apply to "all individuals authorised [by the SRA] to provide legal services" as well as authorised firms and their employees.

Among these principles are the requirements for individuals to act in "in a way that upholds public trust and confidence" in the profession and "in the best interests of each client".

Code of Conduct for Solicitors

The principles are supported by two codes of conduct: one for firms and one for individuals. A solicitor's personal responsibilities are therefore separated from those of their firm for the first time.

The SRA says that individuals (referred to as "you") are personally accountable for compliance with the code. The standards apply to an individual "irrespective of your role or the environment or organisation in which you work".

Among the specific requirements imposed on solicitors are the following:

"8.6 You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them."

"8.7 You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred."

Solicitors need, therefore, to be proactive about the advice they give concerning the handling of each case. This includes how it is funded, the likely costs, and the suitability of products such as ATE insurance.

As a result, depending on the facts of the case, a litigator may be personally in breach of STaRs if they fail to advise about the suitability of ATE.

They cannot hide behind "the way the firm does things" and must, as the principles say, "always be prepared to justify [their] decisions and actions".

Nor can they simply refer a client to a litigation funder or After the Event insurer with whom their firm has a relationship and assume they have fulfilled their personal obligations.

2. SRA Financial Services (Conduct of Business) Rules

The SRA is a designated professional body under Part 20 of the Financial Services and Markets Act 2000 (FSMA). This enables law firms to carry on certain financial services activities without being directly regulated by the Financial Conduct Authority.

If a firm is satisfied that it can rely on Part 20 of FSMA, it must notify the SRA of this fact and confirm the financial activities it carries on. Such activities include advising on contracts of insurance such as After the Event insurance.

The SRA Financial Services (Conduct of Business) Rules regulate how firms and individual solicitors carry out these activities.

The relevant rule in relation to After the Event insurance is Rule 11. Rule 11.1 states:

"11.1 Where you propose, or give a client a personal recommendation for, a contract of insurance, then in good time before the conclusion of an initial contract of insurance and if necessary, on its amendment or renewal, you must provide the client with information on whether you:

(a) give a personal recommendation on the basis of a fair and personal analysis;

(b) are under a contractual obligation to conduct insurance distribution exclusively with one or more insurance undertakings, in which case you must provide the names of those insurance undertakings; or

(c) are not under a contractual obligation to conduct insurance distribution exclusively with one or more insurance undertakings and do not give advice on the basis of a fair and personal analysis, in which case you must provide the names of the insurance undertakings with which you may and do conduct business."

Solicitors should be aware that this obligation is now a personal one and not one that can be discharged by the law firm (NB use of the word "you" here, as in the Code of Conduct). From our experience, previously, many solicitors would recommend a litigation costs insurer with whom the firm had a relationship and consider their job done. Now, if they make a recommendation, it must be a "personal recommendation on the basis of a fair and personal analysis".

Rule 11.2 goes on to expand upon a solicitor's duties when making a recommendation:

"11.2 If you inform a client that you give a personal recommendation on the basis of a fair and personal analysis:

(a) you must give that personal recommendation on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make that recommendation; and

(b) that personal recommendation must be in accordance with professional criteria regarding which contract of insurance would be adequate to meet the client's needs."

Many solicitors may feel that this obligation is too onerous due to the amount of work and time involved. If so, they would be wise to avoid making any kind of recommendation. At this point, we would suggest they contact a reputable local insurance broker who can advise them and recommend an insurer or managing agent such as Harbour Underwriting.

The law firm would then work with the broker to ensure that underwriting requirements are met.

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