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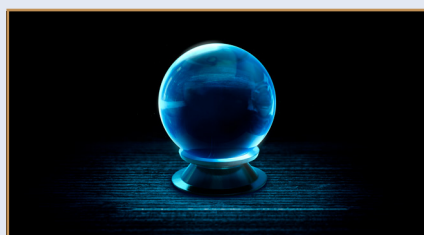
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Welcome to the latest edition of “Commercially Minded”.

Starting this issue are predictions in 5 key areas of commercial litigation for 2022 followed by an update on why ATE insurance works as well for defendants as it does for claimants. Elsewhere there is a look at what can happen for a case with deteriorating prospects and why you can't be too careful when advising clients about funding. Just click on the image or gold colour heading below and you'll go straight to that article. Enjoy reading our views; if you'd like to share yours, please get in touch with our team - contact details are on page 9.



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Crystal balls? 5 key areas of commercial litigation for 2022

Insolvency 'tidal waves' and Twitter storms

By Matthew Pascall, Senior Underwriting Manager

As in previous years, our first newsletter of 2022 honours a tradition of making some predictions. These are to be treated with caution, but I've looked at some key areas of litigation where we might see some developments and trends in the year ahead.

Insolvency

I have met with many IPs in recent months. Opinion seems divided on whether we are going to see an upsurge in insolvency-related litigation. My impression has been that, given the apparently solid recovery of many businesses over the last few months (notwithstanding Omicron), the 'tidal wave of insolvencies' predicted by some is unlikely.

However, there are signs of an increase. Registered company insolvencies in November 2021 were 88% higher than the November 2020 total - driven largely by CVLs. It is interesting to note that the November 2021 statistics recorded a fall in individual insolvencies with 33% fewer bankruptcies in November 2021 when compared with November 2020.

Of course an increase in corporate insolvencies does not necessarily mean an increase in related litigation but, at the very least, it suggests we might see an increase. It goes without saying that Temple works directly with firms and in partnership with our broker colleagues and is well placed to provide market leading ATE insurance cover for IPs.

Professional Negligence

At some point this year I think we will start to see the extent to which Manchester Building Society v Grant Thornton has led to any fundamental change in the way courts approach professional negligence claims when trying cases. As an underwriter I have done my best to try and apply the decision to cases I have been asked to assess. It is undoubtedly complex and I'm always glad to have the assistance of expert counsel with an excellent grasp of the case.

We continue to see professional negligence claims brought by groups of foreign buyers against solicitors who

had advised them when exchanging contracts to purchase flats 'off-plan', having paid very significant deposits. On the whole, these have been successful claims but are not always straightforward and can involve complex PII coverage issues.

In a recent case - Various North Point Pall Mall Purchasers v 174 Law Solicitors Limited, Key Manchester Limited (formerly Amie Tsang and Company Limited) [2022] EWHC 4 (Ch) - investors relied on alleged breaches of the stakeholder agreements under which deposits were held, rather than allegations of professional negligence; the buyers' claims were dismissed at trial. This case illustrates these actions can go wrong and the importance of ATE insurance to protect claimants.

Media - Twitter storms continue to rage

Our national press can still be relied on to defame the great and the good as well as the ordinary person in the street. There is no such thing as a typical defamation case, but I'm pleased to say we continue to insure significant numbers of them.

The phone hacking litigation continues but the issue of limitation may well become a significant issue in the months ahead. The resolution of this may well involve some complex but fascinating arguments both of broad principle and around the detailed specifics of each claimant's personal knowledge and circumstances.

The decision in Riley v Murray [2021] EWHC 3437 (QB) provides an interesting and very thorough analysis of almost all the key principles at play in defamation cases - and yet the case was confined to a remarkably short exchange of tweets.

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Litigation Insurance for Defendants in Commercial Disputes

By David Pipkin, Non-Executive Director

For commercial disputes there is a perception that litigation insurance is only for claimants - and not for insuring defendants. Here at Temple, whilst the vast majority of our insured are claimants we are only occasionally asked about insuring defendants. In this article we get under the skin of why that perception exists with commercial litigators.

It's time to dispel the myth. Litigation insurance (also known as after-the-event or ATE insurance) works as well for defendants as it does for claimants. Each faces an adverse costs risk. Each wants to mitigate and off-set that risk to give them a freer hand in the conduct of the litigation. It is easy to think that the adverse costs risk only arises once proceedings are issued. The reality is that unsuccessful claimants and defendants both have to pay adverse costs that will include significant costs incurred by the successful party before any claim was issued.

Subject to its terms, litigation insurance meets all the adverse costs an unsuccessful party is liable to pay following a detailed assessment or as agreed, along with that party's own disbursements. That cover is available for defendants as well as claimants. After all, many defendants are there because they didn't issue first - for example when there are cross disputes. If a defendant can show a meritable defence and viable counterclaim why shouldn't they have the benefit of the protection of litigation insurance?

How and when does a defendant pay for litigation insurance?

In common with all our litigation insurance, it is only payable in the event of a win. When insuring a defendant, our policy provides that the premium is only payable if the insured is successful and the policy further provides that they are only successful "Where the Legal Action is settled on terms substantially in favour of the Insured or the Insured obtains judgment substantially in its favour." If a more closely defined term needs to be incorporated into the policy, just ask.

A successful defendant does not have a pot of damages out of which to pay the premium and that can make litigation insurance less attractive to defendants. Some see it as just another bill to pay at the end of an expensive and, at times, exhausting process.

The key is to understand the saving an insured defendant makes by insuring their case and it's easy to calculate: it's simply the difference between the premium the defendant has to pay (but only if they win) and the adverse costs they would have paid - had they lost uninsured.

Modern commercial clients understand the need to hedge, manage and mitigate risk and that's exactly what litigation insurance does. Defendants often have less control than claimants - they have to roll with the punches. Litigation insurance gives them control over their adverse costs exposure. It also allows a sensible defendant to deploy its resources to fund the work you need to do for them to get the best outcome.

Temples underwriters have much experience of tailoring litigation insurance to the needs of the customer and are happy to discuss the options available and the insurance premiums that might be payable in any given circumstances.

We have recently insured a Defendant in a high profile defamation case and if your defendant client has a meritable defence get in touch with us to see if we can help.

To find out more about our flexible approach for defendant cases, please contact our please contact our commercial underwriting team by phone on **01483 577877** or by email to matthew.pascall@temple-legal.co.uk



Eroding confidence - when things go south with ATE insurance

By Nicholas Ellor, Senior Underwriter

In the context of ATE insurance and before the trial of the claim, this often will mean the confidence in the insured's case has been seriously eroded. Unsurprisingly the cause of such erosion can be a number of factors - disclosure may throw up inconvenient evidence, an expert's report may be less than supportive, or inconsistencies identified in a key witness's recollection of events that took place a long time ago.

In such circumstances, the insured's solicitors will need to co-operate and consult with all other relevant stakeholders, including the insurer, to collectively agree a strategy and way forward to enable the insured to extract themselves from the litigation on the most favourable terms possible.

Such a strategy will have to be formulated and agreed at pace, due to the insurer's understandable desire to limit as far as possible the size of its liability for adverse costs under the policy.

A steady hand on the tiller and cool heads are required by all.

Although not required in legal actions where the ATE insurance premium is irrecoverable from the opponent, it is invariably the case that the opponent will have been put on notice that the insured has ATE insurance and the limit of indemnity disclosed.

This may be because the insured wants to demonstrate the strength of its position or because a policy was required for security for costs purposes. Clearly from a negotiating point of view, it is essential that the ATE insurance remains in place and the impression given to the opposition that the insured still has the backing and support of its insurer.

There may however be instances where the insured is prepared to continue with the case uninsured, but this, in our experience, very rarely if ever happens. Behind the scenes of course, there will be negotiation between the insurer and the insured's solicitors as to what is to happen and by when.

Deteriorating prospects? Our modus operandi

Under the terms of Temple's insurance policy, we have the right to terminate the policy if there has been a material deterioration in the prospects of a successful outcome at trial for the insured. If we terminate in these circumstances, subject to the insured having complied with its obligations under the policy, the policy will cover the insured for adverse costs up to the date of termination and up to the agreed limit of indemnity.

Any sudden offers made by the insured at substantially discounted terms compared with previous offer, will inevitably sound alarm bells and put the opponent on notice something is afoot. Often discontinuance on a drop-hands basis will prove to be the most beneficial outcome and similarly the end position will be discontinuance based on an agreed sum by way of contribution to the opponent's costs.

Temple takes a commercial, realistic and pragmatic approach when the insured's case becomes compromised. Our objective and purpose in such circumstances is to support the insured and the legal team to extract them from the proceedings on the most beneficial terms possible.

If you have any further questions about this article or would like to find out about litigation/ATE insurance for your clients' commercial disputes, please call Nicholas Ellor on 01483 514815 or email nicholas.ellor@temple-legal.co.uk



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You Can't be too Careful when Advising Clients About Funding

By David Pipkin, Non-Executive Director

Whenever I am discussing Temple's funding options with lawyers, invariably I ask what their clients need to know to help them make the right decisions. Whilst there is little doubt personal injury clients anticipate some form of conditional fee and ATE insurance package being offered by their lawyer, that is not the case with commercial client's disputes.

There are a substantial number of commercial lawyers able to offer their clients funding options including ATE insurance, but still many who do not.

So what does a lawyer have to do to remain compliant when having these discussions? The SRA code of conduct is a little vague requiring that lawyers "... 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."

I am sure some years ago the SRA muttered something about providing more detailed guidance about funding, but nothing has been forthcoming so far.

You may be one of those lawyers that feels funding is overrated, too expensive or just not worth the hassle - but can you afford to ignore funding options? In any event you consider your client's case to have strong prospects of success and your very experienced barrister agrees. Even the best of cases can take a turn for the worst.

Here is a case study (details have been changed to preserve privacy). A claimant pursued a claim against his former solicitors for negligence in failing to advise him of his funding options, especially the availability of ATE insurance. He had sought a greater share of his late father's estate. His solicitor and senior counsel had from time to time assured him his claim had strong prospects and that ATE insurance was too costly. No enquiries were made with ATE insurers and the case lost at trial. Adverse costs alone exceed £500,000. Expert evidence from an experienced ATE insurance

underwriter supports the view the claim could have been insured at proportionate cost.

The claim was worth many millions of pounds and the ATE insurance premium would have been contingent upon success. I am aware of several other cases where former solicitors are being sued for professional negligence in failing to advise appropriately about funding options (suffice for a few lines in the client care letters).

It seems the stronger the case the lighter the touch regarding funding advice.

A case with good prospects will invariably get an offer of ATE insurance. It will then be the client's decision whether to accept the terms or not. I do not consider it a sign of any weakness or uncertainty for a lawyer to actively advise a client to explore funding. I can assure you litigation is a perilous pursuit and many "good cases" fail even with leading counsel providing strong support!

It will be no surprise I advocate a consistent approach to funding advice and especially ATE insurance. I suggest you review the written generic advice you give your clients regarding funding options. There are guides available and I recommend [Temple's Solicitor's Guide](#) and our [Commercial Client's Guide](#) which can be accessed from our website.

It won't be long before one of the cases I have referred to above reach trial and I have little doubt we shall be seeing many more such claims soon. Please don't expose your law firm to the potential of such a claim.



The Reality of the Value of ATE insurance for High-Net-Worth Clients

By Andy Lyalle, Senior Business Development Manager

I often hear commercial dispute resolution practitioners, unlike their personal injury and clinical negligence colleagues, say "Our clients are not interested in ATE Insurance or disbursement funding because they can afford to pay disbursements and bear the opponents costs if the case is unsuccessful". I have a few things to say about this view.

In relation to ATE Insurance and disbursement funding high-net-worth clients and businesses may weigh up the options and decide against insuring their case or taking advantage of disbursement funding. However, many do (for reasons I will expand upon) or are pleased to have at least had the options explained to them.

Defamation and privacy cases can be put to one side because this is the one area of law whereby an ATE insurance premium is still recoverable to the successful party. In every other case the insurance premium is irrecoverable.

For example if you approach Temple and we agree that, prima facie, there are reasonable prospects of success - we will give you a non-binding, indication of the premium you can take to your client. A proposal form will ultimately need to be completed and if we offer insurance terms the client can weigh up the premium.

A high-net-worth client or business may decide that the case prospects are good and that their lawyer and Temple as the insurer concur with that; they are "all in" and ready for the cost if the case is unsuccessful. However, we find that many high-net-worth clients like the option of "hedging". That is, the certainty of knowing what their financial outcome will be - whether they win or lose their case.

Also, with no premium payable until a successful case is settled plus damages recovered and no premium payable if the case is unsuccessful all adds extra value to this strategy. A very successful investor will often "hedge" their position even if the odds are hugely in their favour.

An example of the above is where a law firm has agreed terms with a bank to pursue lender claims. Clearly the bank can cover the cost of unsuccessful cases and fund disbursements. However, the bank appreciates the position

whereby if a case is successful they will recover their damages minus an insurance premium and disbursement funding interest. If the case is unsuccessful they will have nothing to pay as the adverse costs are insured and any disbursements incurred by them are also insured. The lawyer and Counsel will often be signed up to a specific deal with the bank.

Why would a high-net-worth client or company take advantage of disbursement funding where there is interest to be paid? Temple has a competitive interest rate of 10% but the client will pay 0% if using their own money or a lot lower if the money is obtained from a bank...

...So why would they use disbursement funding? Wealthy clients often like the idea of using other people's money to fund cases rather than tie up their own. They will not pay the disbursements back until the case has finished and damages recovered. Also, if the case is unsuccessful they will not pay the disbursements or interest back. If they are funding the case themselves or via a bank, they will be paying out money immediately and have to start paying the bank back very quickly.

In summary, it is good to give all your clients all the options and let them decide if they wish to utilise any of them. It is better that they hear about ATE insurance and disbursement funding from you rather than someone else after their case has been unsuccessful.

To find out more about litigation Insurance and disbursement funding and our information guides for solicitors and for clients please contact Andy Lyalle, Senior Business Development Manager on 07936 903767 or via email to andy.lyalle@temple-legal.co.uk

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Crystal balls? 5 key areas of commercial litigation for 2022

Financial mis-selling

At Temple we are exploring insuring a range of financial mis-selling claims, working with several experts in the field. Motor finance claims may well become an important part of the work we do insuring large volumes of relatively low value claims on a delegated authority basis. You can read more about our approach to these types of case [here](#).

And finally...

Has there been a Covid effect?

At the risk of misrepresenting the Government's statistics for the number of claims issued in the Business and Property Courts, the Q3 (July to September) figures for 2018 through to 2021 make for interesting reading: -

2018	4,795
2019	4,108
2020	2,586
2021	2,262

On the assumption that we have either seen the worst of Covid or are learning to live with it, I suspect we will start to see an overall increase in business back to pre-Covid levels. This may well coincide with a downturn in the economy that tends to drive-up litigation. If the economy does take a turn for the worse, those issuing claims will need full adverse costs protection and the means to provide security for costs.

We are here to help. If you would like more information on our litigation insurance and disbursement funding products for professional negligence, or you have any other legal expenses insurance query, please email matthew.pascall@temple-legal.co.uk or call him on 01483 514428



Brain and Spinal Injuries - Supporting Rehabilitation

Temple Legal Protection were delighted to host a drinks reception at the prestigious Lowry Hotel in Manchester last October supporting well-known local charity BASIC (Brain and Spinal Injury Centre), based in nearby Salford.

The event was a welcome opportunity to catch up with old friends and meet up with new business partners we had previously only spoken with via Zoom or Teams, over the past few years.

The event concluded with a raffle to raise money for the work, carried out by BASIC, to assist people recovering from acquired brain injury and spinal injury including their families. Temple directors Laurence Pipkin and David Pipkin were invited to BASIC's rehabilitation centre before the evening event to see first-hand the facilities available.

Temple MD Laurence Pipkin commented "We are proud to support a charity that does so much to assist those recovering from significant injuries in their local community. The facilities available are really impressive but most of all it is the people at BASIC who really shine for their commitment to improving the lives of their clients and families"

We hope to see you at more events such as these during 2022. If you wish to donate to Basic you can do so via their website <https://www.basiccharity.org.uk/>.

Don't just take our word for it

Matthew Kelly from Freeths had this to say:

"We and our clients have used Temple for ATE insurance on many occasions. Most recently we acted for a liquidator pursuing claims to recover assets for the liquidation estate. After lengthy and heavily contested litigation, ultimately settlement was achieved at mediation. That settlement was only possible with the assistance of Temple's direct, pragmatic and commercial approach. This was much appreciated by both us and the client."

[Click here](#) to read more testimonials.

Contacts:

Matthew Pascall

Senior Underwriting Manager

Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team and his wide-ranging knowledge experience of the commercial legal sector is invaluable to our client firms.

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Andy Lyalle

Senior Business Development Manager

Andy has 25 years' experience in the legal services sector, working in technical and managerial roles. Based in our Bristol office, Andy works predominantly with the Commercial team, meeting with existing and potential clients nationwide and is always ready to discuss your litigation insurance and disbursement funding requirements.

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Amy Edgington

Underwriting Support Manager

Amy provides underwriting support for the Commercial team as well as managing our underwriting assistants. Committed to providing the highest levels of service, her role includes the swift and efficient creation of quotes, issuance of policies and fielding of enquiries.

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Nicholas Ellor

Senior Underwriter

Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Sam Knight

Underwriter

After achieving an Outstanding the Bar Training Course and being called to the Bar of England and Wales, Sam joined Temple in July 2021 to capitalise on his love for complex commercial cases and to put his legal knowledge into action. Sam's technical understanding of the law and the realities of litigation means he understands the value of getting things done quickly and correctly. He is always willing to go the extra mile and aims to provide the highest quality service at every stage of the case.

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Litigation Insurance or ATE insurance?

Is litigation insurance the same as ATE insurance? Traditional legal expenses insurance is often known as Before-the-Event or 'BTE' cover. Litigation insurance used by solicitors is commonly known as After-the-Event or 'ATE' insurance.

The latter is the technically correct term, but your clients may better understand 'litigation insurance'

