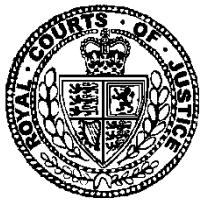

Neutral Citation Number: [2025] EWHC 2011 (TCC)

Case No: HT-2022-000022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 31 July 2025

Before:

MR JUSTICE CONSTABLE
- -

Between:

Lloyds Developments Limited

Claimant

- and –

Accor HotelServices UK Limited

Defendant

- -
- -

William Webb KC (instructed by Hill Dickinson LLP) for the Claimant
Robert Blackett and Jack Spence of Haynes and Boone LLP for the Defendant

Hearing date: 25 July 2025
- -

JUDGMENT

This judgment was handed down at 2pm on 31 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Constable:

Introduction

1. This is a further short judgment the possibility of which was foreshadowed in a previous judgment following a hearing on 13 May 2025 ('the First Hearing') reported at [2025] EWHC 1238 (TCC). The Defendant, Accor HotelServices UK Limited ('Accor'), applied for security for costs to be paid into Court. It was determined that the Claimant, Lloyds Developments Limited ('Lloyds'), could, in principle, provide security by way of an ATE ('After the Event') insurance policy instead of a payment into Court. Accor sought further security in the sum of £1,162,336. The total further security to be given was ordered to be £882,336.

2. Paragraphs 5 to 15 of the earlier judgment set out the chronology leading to the First Hearing, and it was concluded that Lloyds had been deprived of the opportunity of (at least potentially) providing a policy which met any legitimate concerns raised by Accor because of Accor's failure to engage in any substantive communications in advance of the hearing. As a result of this, although I considered that there were two remaining areas of concern such that I was not prepared to order that ATE Insurance in line with the draft policy then being debated, I permitted 10 days in which Lloyds could address those points and provide a satisfactory policy. Accor complain of delays on the part of Lloyds in providing further proposed policies; Lloyds complain that Accor have identified new and additional grounds upon which to assert that the ATE Insurance policy was not suitable. Lloyds made various changes in the face of further points without prejudice to their position that they were not necessary/not permissible in light of the remaining issues following the First Hearing. The policy wording before the Court by 25 July 2025 ('the Second Hearing') was in its seventh iteration (the third iteration being a version served following the First Hearing). The parties were unable to reach agreement on a final, acceptable policy wording, and there remained the question of reserved and further incurred costs.

3. At the Second Hearing, I determined the final wording of a policy with Anti-Avoidance Endorsement ('AAE') which would be suitable, to the Court, for provision in lieu of a payment during the course of the Second Hearing, giving brief reasons orally. I indicated that I would, in addition, provide a short written judgment appending the acceptable policy, given its potential interest to the relevant industry. The approved policy (with financial information redacted) is set out at Appendix A. I reserved the question of costs, providing for short further submissions relating to quantum.

The ATE Policy

Fraud

4. The principal issue of substance dividing the parties was how the policy dealt with the potential avoidance for fraud. Following a review of the relevant authorities, it was previously held that "*by reason of the generality of wording, there is (at a minimum) a realistic risk of the insurer properly arguing that as a matter of construction it would be under no liability in the case of fraud by the Claimant (or its principal or agents) in placing the policy, whether or not the insurance was placed in the name of the Claimant or the litigation funder.*"

5. The original terms of the AAE did not include any specific reference to honouring the policy irrespective of fraud at clause 3(b), set out at paragraph 18 of the previous judgment. In response to the determination above, Lloyds proposed a policy in which the Insurer confirmed that '*any claim made against this Policy will be honoured in full irrespective of:*

> ***iii) any fraud, dishonesty, deceit, duress, inducement or undue influence whatsoever by the Policyholder and/or the Claimant including, without limitation, in making or failing to make any representation or disclosure or giving or offering any bribe or benefit.***'

6. Accor pointed out that no reference was made to 'principals or agents'. This remained the case in all revisions up to a version served on the eve of the Second Hearing, following the service of skeleton arguments. Accor's point went further: it considered that it was both appropriate and straight forward for Insurers to include an express wording reflecting the fact that fraud by *any person* would not provide a basis upon which Insurers could refuse to honour the policy.

7. The Defendant sought to rely upon HIH Casualty & General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6 in which Lord Bingham of Cornhill stated at [16]:

> *"For it is in my opinion plain beyond argument that if a party to a written contract seeks to exclude the ordinary consequences of fraudulent or dishonest misrepresentation or deceit by his agent, acting as such, inducing the making of the contract, such intention must be expressed in clear and unmistakable terms on the face of the contract. The decision of the House in Pearson v Dublin Corporation does at least make plain that general language will not be construed to relieve a principal of liability for the fraud of an agent: see in particular the speeches of Lord Loreburn LC at page 354, Lord Ashbourne at page 360 and Lord Atkinson at page 365. General words, however comprehensive the legal analyst might find them to be, will not serve: the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make."*

8. On the basis of this passage, Mr Blackett contended that the case law is clear that any exclusion of liability for fraud by one's agent has to be set out in terms. This, as a proposition of law, is undoubtedly correct. Mr Webb KC relied upon the same passage however, to contend that Lord Bingham was concerned about a party avoiding for their own fraud (which would be 'an extraordinary bargain') and the wording provided (without reference to principals or agents) makes clear that the policy cannot be avoided even for the party's own fraud. In other words, there is no lacuna requiring further wording because either the alleged fraud is one which can be attributed to the policyholder or claimant, in which case it is covered by the clause (each being bound by the acts of their principals or agents), or the alleged fraud is not one which can be attributed to the Policyholder of Claimant, in which case it does not need any special wording.

9. Whilst there is a logic to Mr Webb KC's analysis from which one could conclude that the risk of the insurer successfully arguing that there was a basis to refuse cover was, at most, negligible, I consider that Accor's position in relation to the express inclusion of 'principals or agents' was plainly justified, particularly in light of the express terms of my previous judgment. Insofar as Accor has maintained the need for yet wider wording covering, expressly, any fraud by any person, Mr Webb KC's logic applies equally. Nevertheless,

(1) the argument has to be set against the purpose intended to be fulfilled by the ATE policy: it is in lieu of a payment into court which, if ordered, provides Accor with zero uncertainty as to the risks attendant upon, or difficulty involved in, securing a payment out;

(2) this is not a case in which (ultimately) an argument that an order to make a payment in would stifle a genuine claim was advanced by Lloyds. As such, security by way of ATE insurance was therefore, in the circumstances of this case, a preference rather than a necessity;

(3) Mr Webb KC fell short of submitting that the wider wording sought by Accor meant, if ordered by the Court, that the insurer would refuse to incept the policy. Put another way, however fanciful the risk Mr Blackett posited, it was not suggested that dealing with that actual or perceived risk by adopting the language proposed by Accor would prevent, for some reason, Lloyds' ability to provide security by way of ATE policy. There is no suggestion, for example, that the inclusion of Accor's proposed wording is in any way prejudicial to insurers, by, for example, providing some rights to the ultimate beneficiary which are inappropriate or creating some other problematic infelicity of drafting.

10. As such, it may well be that the concerns raised by Mr Blackett are unrealistic both factually and legally, but equally there is little rational basis for the exclusion of wording which puts the matter beyond doubt, even if that wording is, upon a strict analysis, unnecessary. I therefore conclude that it is appropriate that the policy expresses, in the clearest possible terms, namely those sought by Accor, the inability of insurers to refuse to honour the policy by reason of any sort of fraud. The wording of clause 3b as approved by the Court reads as follows:

> "any fraud, dishonesty, deceit, duress, inducement or undue influence whatsoever by or affecting any person including, without limitation, in making or failing to make any representation or disclosure or giving or offering any bribe or benefit".

Other matters

11. Mr Blackett took objection to various aspects of drafting which effectively introduced (absent order of the Court) a requirement that it was only with the policyholder/insurer's approval that agreement between Accor and Lloyds as to the amount of any costs payable would become the sum to be paid. Mr Blackett argued that the position should not depart from that which would pertain if money had been paid into court, in which case the policyholder's agreement would not be relevant.

12. This argument ignores the practical reality that the insurer would be sitting behind Lloyds and determining what, if any, agreement Lloyds could reach as to any costs were payable. The wording had a clear and obvious benefit to insurers in maintaining control over the circumstances in which, at least by agreement, costs became payable under the policy but would likely have no practical effect on the ability of Accor either to obtain agreement, if such agreement were ever to be forthcoming, and no effect whatsoever, in the absence of agreement, on the ability to obtain an order of Court. The wording proposed by Insurers (see for example the definition of 'Incurred Adverse Costs'; and paragraphs 2 and 12(iii) of the AAE) is acceptable.

13. A further issue was raised as to the definition of 'Limit'. Mr Blackett argued that there was a drafting mistake. 'Limit' is defined as the limit amount stated in the Policy schedule "*less any sum paid to the Opponent by the Insurer pursuant to a Security Instrument or which the Insurer is liable to pay to the Opponent pursuant to a Security Instrument*" (i.e. pursuant to the Endorsement). It was said that this makes no sense: suppose Lloyds is ordered to pay Accor the full amount insured under the Policy; the Insurer is then "*liable to pay*" Accor that amount. However, Mr Blackett argues, that unpaid liability is subtracted from the "*Limit*" reducing the "*Limit*" to zero, so the Insurer does not have to pay Accor anything. That this clause has such an effect is beyond fanciful. The wording plainly serves the purpose of reducing the pot available once a liability to pay costs arises even if payment out has not happened. It is readily foreseeable that pursuant to a Court order there is a period between a liability arising to pay costs and payment. In some circumstances, that may be some time. The clause has the obvious, and benign, effect of reflecting that reality in the reduction of the available limit within the policy by reference to liability, rather than payment. It would plainly not have the effect of defeating the entire purpose of the policy by allowing insurers to claim that a liability incurred (which they refuse to meet) reduces the limit (and thus the obligation to pay). The insurers' proposed definition of 'Limit' was appropriate.

14. A final concern was raised by Mr Blackett in circumstances where Accor declined to accept an offer of payment of costs, preferring instead to seek assessment. Pursuant to Clause 7 as originally drafted, it was argued that the Insurer could pay the amount offered to the Policyholder (Omni), and Accor's protection under the policy would be reduced by a like amount. Accor proposed the wording be amended to refer only to a situation where the Security Payee "*unreasonably and unjustifiably*" declined a payment. Accor accepted that Omni would, in these circumstances, no doubt hold the sum on trust for it, but regarded that as inferior to a payment into court in circumstances where it was entitled, at least if acting reasonably, to decline offer of payment and seek assessment by the Court. This was a legitimate issue to raise and the proposed wording appropriate. Mr Webb KC did not suggest that the wording (which he said was unnecessary) caused a particular prejudice which meant that the policy could or would not as a result be incepted.

15. I therefore order that Lloyds be permitted to provide security for costs, in the sum previously ordered, by way of ATE Policy with AAE in the form appended at Appendix A.

Costs

16. Each side submitted Statements of Costs for Summary Assessment for both hearings. Lloyds' costs were £39,205.50 for the First Hearing and £51,268.00 for the Second Hearing. Accor's costs were £42,468.00 for the First Hearing and £51,888.00 for the Second Hearing.

17. Mr Blackett sought Accor's costs in respect of its application for security, contending that Accor was the successful party. It obtained security. Although this was in a lesser sum than that sought, it was in a greater sum than that offered. Whilst he acknowledged the criticism of the Court for Accor's lack of engagement prior to the First Hearing, Mr Blackett argued that there was sufficient sanction imposed by the fact, in itself, that Lloyds had been given a further opportunity to seek to provide a suitable policy. In respect of the time spent between the First Hearing and the Second Hearing, Mr Blackett emphasized the fact that the main points of principle dividing the parties were either conceded immediately prior to the hearing, or he succeeded on at the hearing.

18. Mr Blackett also relied upon a wider point of principle. The starting point was that, in the usual way, security is given by way of a payment into court. That can be effected quickly and cheaply (at least from Accor's perspective) by a Court order. As already noted, this was a case in which Lloyds' request to provide security by way of ATE Insurance reflected a preference rather than an absolute necessity. Mr Blackett points out that if the policy proved ineffective, this would ultimately be a problem for Accor, not Lloyds. With the risk of an ineffective policy placed on the defendant, Accor had no choice but to comb through all the detail of whatever policy was presented. Mr Blackett draws an analogy with wider policy that defendants should not be required to meet the cost of claimants providing security, in line with, for example, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which changed the law so premiums paid for ATE insurance would generally no longer be recoverable as costs. Mr Blackett refers to the decision of the Court of Appeal in Infinity Distribution Ltd v The Khan Partnership LLP [2021] EWCA Civ 565, in which, citing Rowe & Ors v Ingenious Media Holdings PLC & Ors [2021] EWCA Civ 29, Nugee LJ said:

> "*it seems to me that where, as here, the choice is between a form of security which imposes a substantial potential extra cost on [the defendant] and one which does not, that constitutes a good reason for the Court to favour the latter unless there is evidence that it would make it difficult or impossible for [the claimant] to pursue its claim if it were required to make a payment into court. But there is no such evidence …*".

19. Mr Blackett argued that all the costs of correspondence and hearings about Lloyds' various policies and their suitability or otherwise as a means of giving security for flow from Lloyds' decision to try giving security in a complicated way.

20. Mr Webb KC's principal points in response were that (a) it had succeeded in principle at the First Hearing when provision by ATE policy was objected to unsuccessfully by Accor, and which had been preceded by non-engagement by Accor in circumstances criticized by the Court; and (b) that lack of engagement meant that all the points taken in the First and Second Hearings could, had there been appropriate engagement, been resolved prior to or – if there was no agreement – determined at, the First Hearing. In these circumstances, the need for two hearings was firmly caused by Accor's approach. Having won the ATE Insurance point in principle, Lloyds should receive its costs, reduced to some degree to reflect mixed success.

Liability for Costs

21. Mr Blackett is undoubtedly right that, at least in circumstances where ATE insurance is offered by way of security as a preference rather than necessary, that preference places a burden upon the defendant to ensure the policy was suitable. However, it does not follow from this that a defendant is entitled, as of right, to a form of indemnification of all costs in meeting that burden, irrespective of the outcome of the litigation. Had the terms of the ATE Policy and AAE themselves been agreed, but the only dispute had been whether Accor was entitled to be paid its reasonable costs of investigating the appropriateness of the policy as a condition for Lloyds having the right to rely upon it in lieu of security, it is not clear on what basis such an order would be sought. By analogy, an application for security for costs may ordinarily be preceded by a period during which the parties engage, through investigation of the claimant's financial position, the ability and need for security.

If the matter is resolved by an agreement, the costs of such investigations and debate fall naturally as costs in the case. The authorities relied upon by Mr Blackett do not suggest otherwise.

22. Providing the approach of both sides to the provision of alternative security is reasonable, in the ordinary course, the costs incurred on either side should not be substantial, and should, following the analogy above, ordinarily be costs in the case. If the defendant succeeds at trial, it would recover its (reasonable) costs of dealing with the ATE insurance issue; if the defendant does not succeed, it will have to bear those costs, but it incurred them as the collateral result of unsuccessfully defending litigation.

23. In the present case, it is clear to me that (a) had Accor engaged properly when the issue was first raised, then there is no reason why all the matters eventually ventilated would have been identified, and resolved, at a single hearing; (b) the key point of the remaining dispute in principle – namely the manner in which fraud was dealt with within the policy – was resolved in Accor's favour; and (c) an approach by Lloyds and/or their insurers to decline changes which did not deleteriously affect their position in any way, but which they simply thought were unnecessary, was not a particularly constructive approach to agreeing suitable wording.

24. Stepping back and reflecting these conclusions in a single costs order, I conclude that Accor ought to be awarded 55% of its reasonable costs of dealing with the question of security for costs.

Quantum of Costs

25. As to the reasonableness of the sums claimed, Mr Webb KC challenges in relation to the First Hearing (a) time related to 2 May 2025 hearing; (b) time spent on the Consent Order; (c) excessive time on the skeleton; (d) travel and waiting on a remote hearing. In relation to the Second Hearing, Mr Webb KC challenges (a) sums relating, directly and indirectly, to counsel work (a total of approximately £27,000 when compared with around £10,000 for Lloyds); 37.3 hours spent on correspondence.

26. In short responsive submissions, Mr Spence defended each of these as reasonable, emphasizing in particular the extent to which Accor was required to deal with iterations of the policy as a result of Lloyds' actions.

27. As to the First Hearing, I accept that time spent on the abortive hearing of 2 May and relating to the Consent Order should not be recoverable as part of the matters before me on this application. I also accept that 33 hours is excessive for drafting the skeleton, even taking at face value the points made by Mr Spence. I do not make any further deduction to account for the failure to have engaged in discussions in advance, as contended for by Mr Webb KC, as this is reflected in the percentage deduction to be applied. I summarily assess the recoverable sum for the First Hearing as £30,000. Similarly, I accept that the time spent both on preparation and review of the skeleton argument as excessive in relation to the Second Hearing. I summarily assess costs at £40,000. The total of £70,000 is subject to a deduction of 45% as set out above. Costs to be paid by Lloyds to Accor are £38,500.

28. The parties are to draw up an appropriate order. Security in the form of Appendix A, and payment of costs, are to be provided within 14 days.

Appendix A:

ADVERSE COSTS INSURANCE POLICY

UNDERWRITTEN BY

AMTRUST SPECIALTY LIMITED

Policy Number:	
Policyholder:	Omni Bridgeway (Fund 5) S2 L.P.

Based on the information that the Policyholder has provided to the Insurer and in return for the Policyholder's agreement to pay the Premium, the Insurer agrees to provide insurance coverage in accordance with the terms, limitations and exclusions specified in the Policy.

1. What is covered

1.1. The Policyholder will be indemnified for or the Insurer will otherwise pay or satisfy the Insured Liability.

2. What is not covered

2.1. The Insurer will not pay a claim under the Policy:

2.1.1. relating to an appeal of the first instance proceedings in the Case unless the Insurer has consented in advance for the Policy to extend coverage to the Incurred Adverse Costs of such appeal;

2.1.2. for Incurred Adverse Costs incurred after the Litigation Funding Agreement has been terminated;

2.1.3. caused or attributable to a failure of the Claimant or any relevant party in the Case to comply with any security for costs requirement by order or agreement or otherwise; or

2.1.4. where payment would amount to a duplication.

2.2. We will not be deemed to provide cover for and We will not be liable to pay any claim under the Policy to the extent that the provision of such cover, and or payment of such claim would expose Us to any sanction, prohibition or restriction under United Nations resolutions and or the trade or economic sanctions, laws and or regulations of the European Union, United Kingdom or United States of America and or the laws or regulations of Australia.

3. Period of insurance

3.1. Subject to clause 3.2, the Policy will commence on the Inception Date.

3.2. The Policy will not incept and no Participating Insurer will have any liability under it unless and until all Participating Insurers have signed and dated the Policy.

4. Premium payment

4.1. The Policyholder has paid the Premium which is nonrefundable irrespective of the outcome of the Case.

5. Termination of Litigation Funding Agreement

5.1 If a notice of termination is issued by the Policyholder or Claimant pursuant to the terms of

the Litigation Funding Agreement, the Policyholder must give 5 days prior written notice of termination of the Litigation Funding Agreement becoming effective to:

5.1.1 the Insurer; and

5.1.2 if a Security Instrument has been issued, the Opponent.

6. Reimbursement and offset

6.1. Any offset or reimbursement owed to the Insurer under this Policy shall be paid within 14 days of the Insurer making the payment.

7. Increase in cover

7.1. If the Policyholder wishes to increase the Limit in respect of the Case, then it must submit a written request to the Insurer. If the Insurer consents to such increase, which consent not to be unreasonably withheld, then the Insured Liability will be adjusted accordingly.

8. Reporting

8.1. The Policyholder will submit to the Insurer a quarterly report showing brief details of the status of the Case and reporting on details of costs (including, current funding commitment, costs incurred and the estimated current exposure to adverse costs).

9. Claims

9.1. The following terms will apply in respect of any claim or potential claim under the Policy:

9.1.1. A claim will be handled by AmTrust Management Services Limited (or such claims handler as may be appointed by the Insurer and notified to the Policyholder from time to time).

9.1.2. Initial notification of a claim should be sent to:

...

NB. Proof of transmission does not constitute

proof of delivery.

9.1.3. A claim can only arise where the Claimant and/or Policyholder has incurred an Insured Liability on an interim basis, final basis or otherwise. A claim will be paid by the Insurer to the Policyholder within 10 Business Days of the date of its approval.

9.1.4. Where a claim has been paid in respect of an interim adverse costs award, the Policyholder undertakes to use all reasonable endeavours to recoup the cost of such claim if the Case is successful and will reimburse the Insurer for claims paid to the extent the claim paid is recouped from the Opponent.

9.1.5. Where a claim has been paid in respect of an adverse costs award which is subsequently reversed, the Policyholder will use all reasonable endeavours to effect reimbursement from the Opponent to the Insurer of an amount equivalent to the paid claim.

9.1.6. If there is a Security Instrument, the Insurer shall make payment to the Opponent under the Security Instrument and will not pay any claim underthe Policy until any and all Security Instruments have been exhausted.

10. Not applicable

11. General conditions

Change in the law

11.1. In the event of any change in the law by which the Insurer's liability hereunder is materially increased or extended, the parties agree to take up for immediate discussion a suitable revision to the terms of the Policy. If the parties fail to agree a suitable revision then the Policy will operate from the effective date of the change of law as if the change had not occurred.

Inspection

11.2. The Policyholder will, upon request by the Insurer, make available for inspection at any reasonable time by such representatives as may be authorized by the Insurer for that purpose, all information relating to the Case that is in the Policyholder's possession or under its control. Such representatives may arrange for copies to be made at the Insurer's expense of such information as they may require subject to legal privilege or any restriction imposed by legal privilege or protective orders.

Confidentiality

11.3. The parties agree to keep the Policy and any information disclosed hereunder ("Confidential Information") confidential.

11.4. Without prejudice to 11.3, both parties may disclose Confidential Information to their respective group companies, wherever so domiciled.

11.5. Without prejudice to 11.3, the Policyholder is permitted to disclose Confidential Information to:

11.5.1. a related body corporate of the Policyholder;

11.5.2. an entity or trust:

11.5.2.1. that directly or indirectly is controlled or manager by the Policyholder or a related body corporate of the Policyholder;

11.5.2.2. that is directly or indirectly under the common control or management of the Policyholder, or a related body corporate

of the Policyholder, or another person or persons; or

11.5.2.3. that has appointed the Policyholder or a related body corporate of the Policyholder as its agent and investment manager or adviser.

11.5.3. the Representatives of the entities described in clauses 11.5.1 and 11.5.2;

11.5.4. a security holder or proposed security holder (and the Representatives of each) of the entities described in clauses 11.5.1 and 11.5.2;

11.5.5. a debt capital provider or proposed debt capital provider (and the Representatives of each) to the entities described in clauses 11.5.1 and 11.5.2; and

11.5.6. any person who enters or proposes to enter into (and the Representatives of each), a co-funding, participation or similar arrangement with the Policyholder in respect of the Case

11.6. For the purposes of this clause, "control" has the same meaning as in section 50AA of the Corporations Act 2001 (Cth) and "related body corporate" has the same meaning as in section 50 of the Corporations Act 2001 (Cth).

11.7. Nothing contained in this Policy shall act as a waiver or enable any party to waive any privilege existing over the Confidential Information.

11.8. Without prejudice to clause 11.3, the Policyholder may provide a copy of the Policy to the Claimant and the solicitors acting for the Claimant in the Case provided that they first obtain the express written agreement from each that they agree to keep the Policy confidential consistently with the confidentiality provisions at 11.3 to 11.7 above.

Data protection

11.9. It is agreed by the Policyholder that any information provided to the Insurer will be processed in compliance with the provisions of the Regulation (EU) 2016/679 (the General Data Protection Regulation) and Data Protection Act 2018 (UK), for the purpose of providing insurance and handling claims, if any, which may necessitate providing such information to third parties or transferring data outside of the UK. Data subjects have various rights, including to see a copy of the personal information held about them and to lodge a complaint with the local data protection authority. Personal data will be retained in line with the Insurer's data retention policy. More information, as to how the Insurer will process personal data is available at www.amtrustinternational.com/dpn

Errors and omissions

11.10. Any inadvertent delays, errors or omissions on the part of the Insurer or the Policyholder will not relieve the other party from any liability which would otherwise have attached under the Policy provided that such delays, errors or omissions are rectified as soon as possible after discovery. Payment by the Insurer does not constitute a waiver of any rights or remedies under the Policy to rectify an incorrect payment or any payment that is found not to be due and owing.

Variation or amendment

11.11. No variation or amendment to the Policy will be effective unless evidenced in writing.

Assignment

11.12. Neither party may assign their rights under the Policy without the prior written consent of the other.

Contracts (Rights of Third Parties) Act 1999

11.13. A person who is not a party to the Policy has no right under the Contracts (Rights of Third Parties) Act 1999 (UK) to enforce any term of the Policy but this does not affect any right or remedy of a third party which exists or is available other than by virtue of the Act.

Subrogation

11.14. If the Insurer makes a payment under the Policy, then the Insurer is subrogated to any and all of the Policyholder's rights in connection with such payment. The Policyholder also agrees to use its best endeavours to assist the Insurer in exercising its subrogated rights.

Dishonest and fraudulent claims

11.15. If the Policyholder makes any claim under the Policy which is fraudulent or dishonest in any way, the Policy will be cancelled on an ab initio basis and all rights that the Policyholder has under the Policy will be forfeit. The Insurer will be entitled to recover any payments previously made under the Policy and may retain any Premium paid.

Interpretation

11.16. In the Policy:

11.16.1. Subject always to clause 11.1 (Change in Law) above, reference to any statute or statutory provision and orders or regulations thereunder will include a reference to that provision, order or regulation as amended, re- enacted or replaced from time to time whether before or after the Inception Date.

11.16.2. Words importing the singular will include the plural and vice versa and references to persons include bodies corporate or unincorporated. Words importing any gender will include all genders.

11.16.3. If any term, condition, exclusion or endorsement or part thereof is found to be invalid or unenforceable the remainder will remain in full force and effect.

11.16.4. The headings in the Policy are for reference only and will not be considered when determining the meaning of the Policy.

12. Notices

12.1. Except as otherwise provided in the Policy, all communications and notices served in accordance with any of the provisions of the Policy must be in writing and will be addressed to the Insurer or Policyholder (as appropriate) at the addresses specified in the

Policy.

13. Disputes

13.1. In the event of a dispute between the Policyholder and the Insurer the dispute or the point(s) in issue will be referred to a single arbitrator who will be a barrister with insurance expertise to be mutually agreed upon by the Policyholder and the Insurer or, failing agreement, appointed by the President of the England and Wales Bar Association. The arbitration will take place in London and will take the form of written and/or oral submissions (at the discretion of the arbitrator). The decision of the arbitrator will be final and binding. The arbitrator will have the power to award costs (including his fee for conducting the arbitration) and any costs payable by the Policyholder will not be recoverable under the Policy.

14. Applicable Law

14.1. The laws of England and Wales will govern the validity, construction andperformance of the Policy and any dispute or matter in relation thereto. The Insurer further agrees to submit to the jurisdiction of the English courts.

15. Endorsement

15.1. In the event of any conflict or other ambiguity between the terms of the Policy (excluding reference to Appendix 1) and the terms of the Policy as amended by Appendix 1, then the terms of the Policy amended by Appendix 1 shall prevail in all cases.

Definitions

"**Anti-Avoidance Endorsement**" means an Endorsement acceptable to the Court, or agreed with the Opponents or any of them (if more than one), given by the Insurer, the terms of which are intended to benefit that Opponent(s) such that they may directly enforce under the Policy for the Insurer's payment of that Opponent's (or those Opponents') Incurred Adverse Costs in the Case (including pursuant to the provisions of the *Contracts (Rights of Third Parties) Act* 1999).

"**Business Day**" means a day on which banks generally are open in the City of Sydney for the transaction of normal banking business (other than a Saturday).

"**Case**" means the case specified in Item 4 of the **Schedule**.

"**Claimant**" means the Claimant specified in Item 4 of the **Schedule**.

"**Court**" the Court in which the Case is heard.

"**Currency**" means the currency in which the Policy is denominated specified in Item 6 of the Schedule.

"**Endorsement**" means any endorsement appended to the Policy and noted in Item 9 of the Schedule.

"**Inception Date**" means the date of commencement of the Policy specified in Item 5 of the Schedule.

"Incurred Adverse Costs" means costs incurred in the Case by any or all Opponents which

(i) the Claimant is ordered by the Court to pay to the Opponent or which, (ii) with the Policyholder's approval, the Claimant (a) agrees to become liable for; or (b) becomes liable by making or accepting a settlement offer; or (iii) becomes liable by discontinuing the Case in whole or in part, or which (iv) the Policyholder is ordered by the Court to pay to the Opponent or agrees to pay with the Insurer's approval, save where such costs are excluded by the terms of the Policy.

"**Insured Liability**" means the obligation to pay Incurred Adverse Costs which are not the subject of clause 2, in respect of the Case which (i) the Policyholder has agreed to indemnify pursuant to the Litigation Funding Agreement, or (ii) the Policyholder is ordered to pay or agrees to pay with the Insurer's approval, up to the Limit.

"**Insurer**" means the parties specified as Participating Insurers in the Policy Schedule.

"**Litigation Funding Agreement**" means the third party litigation funding agreement whereby the Policyholder has agreed to fund the Case and accept liability for the Claimant's adverse costs exposure.

"Limit" means the Insurer's maximum limit of liability under the Policy specified in Item 8 of the Schedule, less any sum paid to the Opponent by the Insurer pursuant to a Security Instrument or which the Insurer is liable to pay to the Opponent pursuant to a Security Instrument.

"**Opponent**" means the opponent specified in Item 4 of the Schedule.

“**Payment**” means any Consideration payable or to be provided by a party to any other party under or in connection with this Policy including, but not limited to, the Premium.

“**Policyholder**” means the person named in Item 2 of the Schedule.

“**Policy**” means this policy of insurance and the Schedule.

“**Premium**” means the amount specified in Item 7 of the Schedule.

“**Representatives**” means, as applicable, the respective directors, officers, employees, agents, auditors, and professional advisers of a person.

“**Schedule**” means the schedules to the Policy.

"**Security Instrument”** means an Anti-Avoidance Endorsement.

Schedule

Policy Details

1.	**Policy Number**:	
2.	**Policyholder:**	Omni Bridgeway (Fund 5) S2 L.P. (in respect of 405893)
3.	**Policyholder's address:**	
4.	**Case:** **Claimant:** **Opponent:**	Claim by the Claimant against the Opponent in the High Court, action number HT-2022-000022, where Claimant and Opponent are defined as set out below. Lloyds Developments Ltd Accor Hotelservices UK Ltd
5.	**Inception Date:**	
6.	**Currency:**	British Pounds (GBP)
7.	**Premium:**	
8.	**Limit:**	
9.	**Endorsement:**	(i) In return for the **Policyholder** having paid **Premium**, the **Insurer** endorses the **Policy** as per Appendix 1 from the **Inception Date** in respect of security for costs in the **Case** at the **Policyholder's** request. **(ii)** Where security for costs is capable of being dealt with in tranches, the **Insurer** will provide a separate endorsement for each tranche but subject always to the **Security Limit of Indemnity** (as defined in Appendix 1) and the **Limit.**
10.	**Participating Insurers**	

Name and details of Insurer	**Reference**	**Monetary Line**	**Signed Line**
AmTrust Specialty Limited (previously AmTrust Europe Limited) ("Amtrust") whose registered office is at … AmTrust Specialty Limited is authorized by the Prudential Regulation Authority, and regulated by the Financial Conduct Authority and the Prudential Regulation Authority. These details can be checked on the Financial Services Register by visiting www.fca.org.uk			100%

Several Liability Notice

Insurers Liability Clause

The liability of a **Participating Insurer** under this **Policy** is several and not joint with any other **Participating Insurer** party to this **Policy**. A **Participating Insurer** is liable only for the proportion of liability it has underwritten. A **Participating Insurer** is not jointly liable for the proportion of liability underwritten by any other insurer or any other **Participating Insurer**. Nor is a **Participating Insurer** otherwise responsible for any liability of any other insurer that may underwrite this **Policy**.

Each **Participating Insurer** named hereon binds itself for its own part and not for one another. Each **Participating Insurer's** liability under the **Policy** shall not exceed that percentage or amount of the risk shown against that **Participating Insurer's** name.

Although reference is made at various points in this clause to "this **Policy**" in the singular, where the circumstances so require this should be read as a reference to policies in the plural.

Date of Issue:

Signature: **…….**

AmTrust Specialty Limited

Appendix 1

Anti Avoidance Endorsement (AAE)

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On inception of this **AAE** the definition of **Insured Liability** under the **Policy** will be deleted and replaced with the following definition.

> "**Insured Liability**" means the obligation to pay Incurred Adverse Costs which are not the subject of clause 2, in respect of the Case which (i) the Policyholder has agreed to indemnify pursuant to the Litigation Funding Agreement, or (ii) the **Claimant** and/or Policyholder is ordered to pay or agrees to pay with the Insurer's approval, up to the Limit;

For the purposes of this AAE, the words "save where such costs are excluded by the terms of the Policy" will be deleted from the definition of **Incurred Adverse Cost**s under the **Policy**;

Definitions

1. The following defined terms shall be added to the **Policy**:

   a. "**Security Payee**" means a person or party nominated by the **Opponent** and notified to the **Insurer**.

   b. "**Security Claim**" means a claim under the terms of this **Endorsement** made by the **Security Payee**, on behalf of the **Opponent**, or any of them, which relates to **Incurred Adverse Costs** and which satisfies the criteria set out in clause 12 of this **Endorsement**.

   c. "**Security Limit of Indemnity**" means the total aggregate payment stated herein that the **Insurer** will pay under the **Policy** in respect of a **Security Claim**. The **Security Limit of Indemnity** is within rather than additional to the **Limit**. The **Security Limit of Indemnity** is GBP 1,557,336 .00

Security

2. Provided that the **Security Payee** makes a **Security Claim**, the **Insurer** will pay to the **Security Payee** the **Incurred Adverse Costs** quantified by a final costs certificate or order of the Court or by agreement between the **Insurer** and the Opponent subject always to the **Security Limit of Indemnity**.

3. Subject to clause 4 of this **Endorsement** 1, for the purposes of this AAE, the **Insurer** Confirms:

   a. that this **Policy** is non-voidable and non-cancellable; and

   b. any claim made against this **Policy** will be honoured in full irrespective of:

      i. any exclusions or any provisions of the **Policy**; or

      ii. any provisions of general law; or

      iii. any fraud, dishonesty, deceit, duress, inducement or undue influence whatsoever by or affecting any person including, without limitation, in making or failing to make any representation or disclosure or giving or offering any bribe

or benefit

which would have otherwise rendered the **Policy** or the claim unenforceable or entitled the **Insurer** to avoid, rescind, discharge, cancel or vitiate the **Policy** or avoid, reduce, exclude or deny cover or otherwise repudiate liability under any of the terms of the **Policy** including without limitation Clause 11.15.

This clause shall in no way prejudice the **Insurer's** rights as against any other party including the **Policyholder**. In the event that the **Insurer** is subject to a claim which the **Insurer** would not have been subject to but for the terms of this **Endorsement** 1, the **Policyholder** will fully indemnify the **Insurer** and shall be immediately liable to reimburse the **Insurer** for all of the costs of the claim which shall include all costs incurred by the **Insurer** arising from the claim. The **Insurer** retains full subrogation rights.

4. For the purposes of this AAE:

   i. the following defined terms continue to apply: **Incurred Adverse Costs**, **Insurer, Case, Limit**; **Policy**, **Policyholder**; and

   ii. the **Insurer** will not make any payment:

      a. where making any payment to the **Security Payee** would expose the **Insurer** to any sanction, prohibition or restriction under United Nations resolutions, and or trade and economic sanctions, laws and or regulations of the European Union, United Kingdom, United States of America and / or Australia;

      b. where making any payment to the **Security Payee** would be in breach of any criminal or regulatory law or provision;

      c. relating to an appeal of the first instance proceedings in the Case unless the Insurer has consented in advance for the Policy to extend coverage to the Incurred Adverse Costs of such appeal;

      d. to the extent that the requested payment will cause the **Security Limit of Indemnity** to be exceeded.

5. Each payment to the **Security Payee** or **Opponent** shall be a valid discharge of the **Insurer's** obligations to the **Security Payee** and the **Opponent**. The **Insurer** shall not be concerned with how monies paid to the **Security Payee** are distributed.

6. Subject to clause 7 of this **Endorsement** 1, until such time as the **Insurer's** obligation to pay the **Security Payee** up to the **Security Limit of Indemnity** is fully extinguished, all payments under the **Policy** in respect of any claim will be made solely to the **Security Payee**.

7. In the event the **Security Payee** declines unreasonably and unjustifiably to accept any payment and such payment is made to the **Policyholder**, such payment will reduce the cover available under the **Security Limit of Indemnity** and/or **Security Limit of Indemnity** and the **Limit**.

9. The **Security Limit of Indemnity** and the **Limit** will also each be reduced by any payment made to the **Policyholder** pursuant to clause 7 of this Endorsement 1 or to the **Opponent** or to the **Security Payee** in respect of a claim by the **Security Payee** in respect of a **Security Claim**.

10. The **Policyholder** irrevocably authorises and instructs the **Insurer** to pay, and the **Insurer** agrees to pay, any claims payment arising from a claim by the **Policyholder** on the **Policy** and/or a **Security Claim** to the **Security Payee** by paying such claims payment to such bank account as the **Security Payee** may from time to time specify to the **Insurer** in writing at the address given in clause 12 of this **Endorsement** 1. No instruction whether by the **Policyholder** or by any other person other than the **Security Payee** to make payment to any other entity or account shall be honoured by the **Insurer** unless also independently given or confirmed by the **Security Payee** to the **Insurer** in writing.

Security Claim

11. Any request for payment by the **Security Payee** will constitute notification of a claim on the **Policy**.

12. In order to make a **Security Claim**, the **Security Payee** must:

    a. Advise the **Insurer** as soon as practically possible of any claim the **Security Payee** may have against the **Insurer** under this **Endorsement** 1.

    b. Submit a claim to the **Insurer** which,

        i. is expressed as being made under this **Endorsement** 1, referencing the policy number; and

        ii. is for a sum being no greater than the balance of the cover remaining available under the **Policy** subject to the **Security Limit of Indemnity**, which has not been paid by the **Insurer**; and

        iii. is accompanied by a relevant court order or final costs certificate or agreement by the Policyholder as to the amount of costs to be paid by the Policyholder which has been agreed by the Insurer; and

        iv. which specifies any sums which have been paid to the **Security Payee** by the **Insurer**.

    c. Submit the claim to the addresses below (or to such addresses as is notified in writing by one party to the others from time to time) by hand or by pre-paid first class recorded delivery post. A notification should be copied to the email addresses stated below for information only, but for the avoidance of doubt, an email copy will not constitute service of a notification.

        In respect of AmTrust

        …

        NB. Proof of transmission does not constitute proof of delivery.

Consequential

13. The parties to this **Policy** agree that irrespective of any other provisions of the **Policy**, the terms of this **Endorsement** 1 are intended to benefit the **Opponent and the Security Payee** and may be enforced by the **Opponent** and the **Security Payee** directly pursuant to the provisions of the Contracts (Rights of Third Parties) Act 1999. No other third party is entitled to the benefit of or to enforce any term of this **Endorsement** 1 under any provision of the Contracts (Rights of Third Parties) Act 1999 or otherwise.

14. The arrangements contained in this **Endorsement** 1 shall continue to apply notwithstanding the liquidation or insolvency of the **Policyholder** or the **Insurer.**

15. No material amendments to the terms set out in the **Policy** which would limit the effect of this **Endorsement** 1 (including but not limited to reductions of the **Security Limit of Indemnity**, reduction of the risks covered, or widening of the exclusions) shall be made without the agreement in writing of the **Insurer**, the **Policyholder** and the **Security Payee**.

16. The laws of England and Wales will govern the validity, construction and performance of this Endorsement and any dispute or matter in relation thereto. The Insurer further agrees to submit to the jurisdiction of the English courts.

All other terms and conditions remain unaltered.

Name and details of Insurer	Reference	Monetary Line	Signed Line
AmTrust Specialty Limited whose registered office is at … AmTrust Specialty Limited is authorized by the Prudential Regulation Authority, and regulated by the Financial Conduct Authority and the Prudential Regulation Authority. These details can be checked on the Financial Services Register by visiting www.fca.org.uk			100%

Several Liability Notice – Insurers Liability Clause

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