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Ireland briefing

Irish Court of Appeal considers whether the existence of an ATE policy defeated an application for security for costs

Introductory remarks

The Irish Court of Appeal has recently held in *Greenclean Waste Management Ltd -v- Leahy p/a Maurice Leahy Wade & Company Solicitors* [2015] IECA 97 that the existence of an After The Event (ATE) policy is a matter which may be taken into consideration when a Court exercises its discretion as to whether or not to make an order in favour of a Defendant for security for its costs. In certain circumstances an ATE policy may justify a Court's refusal to make such an order against the Plaintiff, albeit this will be heavily dependent on the policy terms. If those terms allow the insurers various ways in which to terminate the Plaintiff's coverage for any liability the Plaintiff might have for the Defendant's costs, it is likely that the Courts will continue to grant Defendant applications that an ATE-protected Plaintiff should still provide security in the conventional way.

Factual background

The liquidator of an insolvent company in liquidation, *Greenclean Waste Management Limited* (In liquidation), brought a claim alleging that the company's former solicitors, Maurice Leahy & Co ("the Solicitors"), gave negligent advice to *Greenclean* regarding its obligations in relation to a commercial lease, causing it to pay EUR 460,000 to its former landlord on account of its failure to comply with those obligations. The Solicitors applied to the High Court for security for costs given that the Plaintiff was insolvent and unlikely to meet any award for costs should its claim fail. The Plaintiff had ATE insurance and it fell to the High Court to determine whether the existence of that cover provided sufficient security such that the Court did not have to grant the application and order the Plaintiff to provide security for costs.

Given the Plaintiff's insolvency, the Court was conscious that ordering the Plaintiff to provide security would probably force the Plaintiff into giving up its claim and bring an end to the litigation.

The High Court reviewed the terms of the ATE policy in question, focusing its attention on the "prospects clause" in the agreement which, in essence, provided that the insurer had the option of ending cover at any time that it was of the opinion that it was more likely than not that the insured Plaintiff would lose its claim. In light of this clause, the Court concluded that the policy did not provide sufficient security for costs unless the insurer was prepared to provide a binding commitment that it would not exercise its rights under this clause.

Adjourning the proceedings for three months to allow the insurer to take advice on the prospects of the litigation and decide whether it was prepared to provide the assurance sought, the Court deferred the decision whether or not to award security against the Plaintiff.

The insurer did ultimately provide the assurance sought and in light of that, the High Court declined to order that the Plaintiff should provide security for costs.

Further information

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Do ATE policies savour of champerty and maintenance?

The High Court also considered the law of maintenance and champerty in Ireland and noted that, unlike in England and Wales, the scope of those torts has not been directly affected or altered by legislation. The Court defined maintenance as the improper provision of support to litigation in which the supporter has no direct or legitimate interest. It defined champerty as an "aggravated form of maintenance and occurs when a person maintaining another's litigation stipulates for a share of the proceeds of the action or suit". After considering previous case-law of both the English and Irish courts on champerty and maintenance, and concluding that the law on these torts should move in tandem with modern principles and constitutional understanding, the Court concluded that ATE insurance was permissible and need not be regarded as amounting to maintenance or champerty.

Appeal against High Court's decision on security for costs

The maintenance and champerty aspect of the High Court ruling was not appealed by the Defendant Solicitors. The Court of Appeal was, however, asked to consider whether the High Court had been correct in declining to make an order for security for costs because of the existence of the Plaintiff's ATE policy.

The Court of Appeal stated that:

> *"... there is no reason in principle why the existence of such a policy could not provide sufficient security for the defendant's costs so as to justify a refusal of an order under s.390, as a matter of discretion".*

The Court was thus prepared to accept that when exercising its discretion to order security for costs against the Plaintiff, the presence of an ATE policy in favour of that Plaintiff – covering the Plaintiff's liability for the Defendant's costs should the litigation be lost – can legitimately be taken into consideration.

That said, the Court was troubled by the various ways in which the ATE policy in question could terminated by the insurer, thereby endangering any "security" the Defendant might have regarding its costs. The Court noted, for example, that the policy deemed it a condition precedent to cover that there be a no-win no-fee agreement in place that was compliant with s68 of the Solicitors Act (Amendment) Act 1994. However:

> *"In the absence of [evidence of] the no-win no-fee agreement and its compliance with s. 68 of the Solicitors Act (Amendment) Act 1994 [and thus satisfaction of the condition precedent], it cannot be said that there was sufficient evidence before the High Court to demonstrate the existence of an effective ATE policy."*

The Court further noted that:

> *"Even if such proof had been placed before the Court, the policy here is so conditional (even with the "prospects clause" neutralised [by agreement of the insurer]) that it does not provide a sufficient security to the defendant to warrant refusal of an order for security for costs. The policy is voidable for many reasons which are outside the control, responsibility or, by times, knowledge of the defendant …"*

The Court commented that *"none of these [factors] were taken into account by the trial judge whose sole concern was the 'prospects clause'".*

For the above reasons the Court concluded that:

> *"This ATE policy does not … raise a sufficient inference of an ability to discharge the defendant's costs to justify the refusal of the s. 390 order. It falls far short of providing as good security as a payment into court or a bank or insurance bond."*

The Court, in thus concluding that security for costs should be provided, also approved the following statement of Akenhead J in the English case *Michael Philips Architects Limited v Riklin*:

> *"I do not see how it can be said that an insurance policy which does not provide direct benefits to the defendants and under which they are not amongst the insured parties and which does provide for cancellation of the policy either for a large number of reasons or for no reason provides any appreciable benefit or raises any presumption or inference that the claimant will be able to pay the defendant's costs if ordered to do so."*

Accordingly, where reliance was placed on an ATE policy, it was necessary for the party relying on the policy to prove that it did, in reality, provide security. Akenhead J added that the amount fixed by a security for costs order could be "somewhat reduced" to take into account a realistic probability that the ATE policy in question would cover the defendant's costs.

In sum, therefore, the decision of the Court of Appeal in Greenclean clarifies that:

1. ATE cover is relevant to the Irish Court's exercise of its discretion regarding security for costs
2. However, highly conditional ATE terms will render it an ineffective substitute for such security

The conundrum for insurers and prospective ATE plaintiffs going forward, therefore, is what contingencies allowing cover to be terminated will need to be deleted from standard covers before the Irish Courts will accept ATE policies as sufficient to render a security for costs order redundant. On the basis of Greenclean it is clear that an insurer undertaking not to enforce the prospects clause will not be enough.