MAPLES

After the Event Insurance – Effect on Litigation and Security for Costs Applications

A recent Irish High Court case has considered the effectiveness of an 'after the event' insurance policy ("**ATE insurance**") in the context of a security for costs application.

Greenclean Waste Management Limited v Maurice Leahy Practising under the Style and Title of Maurice Leahy & Co. Solicitors[1] concerned a professional negligence claim by the plaintiff company that the defendant solicitors failed to advise on the extent of the plaintiff's obligations to make certain reparations under a lease, failed to advise the plaintiff in relation to a relevant limitation period and to disclose a relevant conflict of interest.

An application was brought by the defendant for security for costs under section 390 of the Companies Act 1963, where it was mutually accepted that the plaintiff was "hopelessly insolvent" although the plaintiff had ATE insurance to ensure the defendant was paid its party and party legal costs in the event that the plaintiff was unsuccessful and a costs order was made against it. Should the plaintiff succeed, a relatively high premium would be paid to the plaintiff's insurers.

Legal Considerations

The judge had to assess the defendant's application for security for costs having regard to the ATE insurance. The key consideration was the extent to which the insurer could legitimately repudiate on its liability under the policy. If the extent was great enough, it could be said that the insurance provided no real security for costs.

The defendant argued that whilst policies of insurance were generally relevant to these applications, the plaintiff's ATE insurance policy had so many avoidance provisions that it had serious doubts it would be able to recover costs if successful.

The judge noted that as the plaintiff was in voluntary liquidation, there was "no doubt" that it was hopelessly insolvent. He also acknowledged that the defendant had provided a *prima facie* defence and was, therefore, *prima facie* entitled to an order for security for costs unless the ATE insurance sufficiently mitigated the risk that the plaintiff would be unable to discharge the defendant's costs.

The judge looked at English case law on the issue and followed the rationale that the existence of a policy was in no way determinative that the insured was, in fact, covered. What mattered was whether the policy actually provided an effective means of protecting the defendant's position should the plaintiff lose.

ATE Policy

The judge acknowledged that ordinarily an insurance policy would be relevant to the proceedings, as an insured party would be expected to be able to pay any award made against it. A distinction was drawn however with situations where there was reason to believe that the award was not within the scope of the policy in question or where the party was guilty of conduct that would enable the insurer to repudiate liability.

In this case, the defendant contended that such was the scope of the avoidance provisions in the plaintiff's ATE policy, that it did not give the defendant any real security if he obtained an award of costs against the plaintiff. A number of clauses were brought to the court's attention,

[1] [2013] IEHC 7

most pertinently a "prospects clause", which provided:

"*We can end cover under this policy if we, after discussion with your solicitor, are of the opinion that it is more likely than not that you will lose your claim.*"

Other clauses in the policy were examined, such as a "fraudulent claims clause" and a "cancellation clause", both of which, while perhaps not phrased as generally as the "prospects clause", allowed the insurer to repudiate liability based on the occurrence of certain events.

Evaluating the policy as a whole, the judge concluded that while the insurer was not entitled to terminate for no reason, under the prospects clause it could do so if agreed following discussions with the plaintiff's legal advisors that the action was likely to fail. This right to terminate could therefore theoretically arise at any stage of the proceedings.

Conclusion

Ultimately the judge adjourned the application to allow the plaintiff to review its policy with its insurers, but made it clear that security for costs would be ordered in the circumstances, given the policy as it then stood. He made specific reference to the novelty ATE insurance brought to such security for costs applications, and the additional factors that needed to be considered in this regard.

The judge stated that, before he would consider the policy sufficient to 'ward off' an order for security, he would require a "*binding assurance from the plaintiff's insurers that it does not propose to exercise the right to repudiate based on the prospects clause*", stressing however that this was entirely a matter for the insurers to decide.

If no such assurance was forthcoming, then he would be compelled to conclude that the plaintiff would be unable to discharge a costs award which might be made in favour of the defendant, and in those circumstances would make an order for security for costs.

The judgment is a timely reminder to plaintiffs and defendants alike that, while the court may, in principle, accept the role ATE insurance can play in litigation, a specific exclusion clause in a policy may result in a court refusing to acknowledge the effectiveness of that policy, which would render the policy redundant.

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