Neutral Citation Number: [2013] IEHC 74

THE HIGH COURT

[2009 No. 7548 P]

BETWEEN

GREENCLEAN WASTE MANAGEMENT LIMITED

PLAINTIFF

AND

MAURICE LEAHY PRACTISING UNDER THE SYLE AND TITLE OF MAURICE LEAHY & CO. SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 19th February, 2013

1. After the event ("ATE") insurance is a relatively new form of insurance product, at least so far as this jurisdiction is concerned. As the name implies, it is a form of insurance taken out in the wake of the specific event and it is often closely linked with "no win no fee" arrangements. The premium is generally high, but is only payable following successful costs recovery against another party.

2. While one could not deny but that features of this type of policy may suggest to some a form of contingency fee arrangement and may also possibly involve features of champerty (*i.e.*, sharing in the profits of litigation in which the party has no legitimate interest), it should also be acknowledged that ATE may well assist many in securing access to justice in a manner to which they might not otherwise have ready access. For my part, however, I should make it clear that I am not here at all concerned with the underlying merits of ATE and still less any questions of its legality having regard to the traditional tort of champerty.

3. The question which arises in this application for security for costs brought by the defendant is rather a different one, namely, whether the plaintiff's ATE insurance is a factor to which I properly can have regard in determining whether to order security for costs, whether pursuant to O. 29 of the Rules of the Superior Courts 1986 or s. 390 of the Companies Act 1963 ("the 1963 Act").

4. The claim itself is in essence an action for professional negligence brought by the company against its former solicitors arising from advices which were given initially in relation to the lease of certain industrial premises in 2001/2002. The plaintiff claims that the premises in question were in very poor condition at the end of the lease due to lack of effective maintenance coupled with wear and tear, so that total refurbishment of the premises was require. The complaint here is that the defendants failed to advise it of the extent of its obligations under the repairing covenants under the lease.

5. In 2006 the lessor commenced an action in this Court claiming damages for breach of covenant against the plaintiff. These proceedings were ultimately settled the sum of €310,000, together with a contribution for costs of some €150,000.

6. In these proceedings, however, the plaintiff contends that the defendants were guilty of further and independent acts of breach of contract and professional negligence by, *inter alia*, failing to advise in relation to a relevant limitation period and by failing to disclose a material conflict of interest. So far as the latter point is concerned, it is contended that the defendants ought to have advised of the plaintiff that it had a cause of action against a former principal of the firm who had given the original advice in relation to the lease.

7. Contingent perhaps on the outcome of this application, the defendants have prepared a draft defence (which has been exhibited in an affidavit) which takes full and detailed issue with these pleas. It is sufficient to say following a review of that draft defence that this Court could not possibly form any view of the underlying merits, save to observe that the terms of that draft defence, if duly established, affords a *prima facie* defence to the action.

8. The plaintiff went into voluntary liquidation in December 2011 and there would seem to be no doubt but that it is currently hopelessly insolvent. In principle, therefore, the defendants are prima facie entitled to an order for security for costs, unless it can be shown the plaintiff's ATE insurance sufficiently mitigates the risk that the plaintiff would be unable to discharge the defendant's costs.

Section 390 of the Companies Act 1963

9. Section 390 of the 1963 Act provides in material part that:

> "…. any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

10. The section does not in terms say that the party seeking security must establish as a matter of probability the likelihood of the company's inability to pay the costs. Yet it is nonetheless clear that the risks of this occurring must be significant, appreciable and weighty. The Oireachtas, after all, stipulated that these risks must be established by "credible testimony". Furthermore, the fact the section makes reference to the existence of a "reason to believe", strongly suggests that the risks must be objectively evaluated and weighed dispassionately, even if they are incapable of precise measurement.

11. At the same time, the section provides that the Court must have reason to believe "that the company *will* be unable to pay the costs of the defendant…" (emphasis supplied). It will not suffice that the Court should think that the company *might* not be in a position to discharge these costs.

12. It may be of some interest that the words "reason to believe" (or, at least, some close version of these words) are also employed by the 1963 Act in other contexts. Thus, for example, s. 311(1) of the 1963 Act provides:

> "(1) Where the Registrar of Companies has reasonable cause to believe that a company is not carrying on business, he may send to the company by post a letter inquiring whether the company is carrying on business."

13. In that specific context, it could not be the case that the Registrar would have to be satisfied that it was more likely than not the company had ceased trading before this statutory power might be exercised, since this would be very high threshold to cross before the Registrar might cause to send a letter of inquiry to the company in question. At the same time, the Oireachtas did not intend that the Registrar should lightly or casually send such a letter and the sub-section proceeds from the premise that the Registrar stands possessed of information which would make the reasonable person inquire into these matters.

14. All of this re-inforces my view that the rather comparable language of section 390 requires the Court to evaluate the risk that a particular event (*i.e.*, inability to pay costs) *will* come about at some stage in the future based on all the relevant information presently before the Court. As already stated, I do not consider that the phrase "reason to believe" requires the Court to be satisfied that this has been established on the balance of probabilities before any such order can be made: see in this context the very helpful analysis of the meaning of almost the exact same language found in r. 25.13(2)(c) of the Civil Procedure Rules for England and Wales which is contained in the judgment of Arden L.J. in *Jirehouse Capital v. Beller* [2008] EWCA Civ 908, [2009] 1 WLR 751 at 759-762. Rather the Court must be satisfied following an evaluation of all the relevant evidence that there are weighty and objectively reasonable grounds to believe that this event will happen.

The plaintiff's policy of insurance

15. Given that the plaintiff is insolvent, one cannot but assume that it would be unable to pay these costs in the ordinary course. The real question is whether the existence of the plaintiff's ATE insurance policy requires one to alter this assessment.

16. While counsel for the defendant, Mr. Allen SC, laid much emphasis on the special and unusual features of ATE insurance – a matter to which I will shortly return – it must be accepted that in the ordinary way, the existence of a policy of insurance would generally be highly relevant to an assessment of this nature. If, for example, a court were to enter judgment in a routine commercial claim, one could not generally say that there would be "reason to believe" that a properly insured defendant "will" be unable to discharge this award. At the risk of stating the obvious, this is because one may fairly assume in such circumstances that the insurer will meet the costs of the award. It might, of course, be different if there was reason to believe that the award was not within the scope of the policy in question or that the defendant was guilty of conduct such as would enable the insurer to void the policy or would otherwise repudiate liability or even perhaps that significant doubts had emerged about the financial capacity of the insurer.

17. Here we come to the crux of the matter. The defendants contend that such is the breadth of the avoidance provisions contained in the ATE policy that it does not operate to give the defendants any real comfort or security in the event that they obtained an award of costs against the plaintiff.

18. The policy in question is expressed in admirably clear and succinct language. Among the relevant provisions are as follows:-

> "Your policy only covers you if you agree to pay your insurance premium and you have entered into a no win no fee agreement for your claim with your solicitor.
>
> Your policy is linked to your no win no fee agreement and (unless it is ended earlier, in line with its terms) operates for the duration of your no win no fee agreement. The insurance premium due for your policy is payable at the end of your claim (by court decision or settlement) or when your policy ends if this is sooner. We can end cover under your policy if we and your solicitor agree that it is more likely than not that you will lose your claim."

19. The policy then continues referring to what is described as "a prospects clause". This provides:-

> "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."

20. It goes on to say that the coverage extends to paying:-

> "Your outlays and your opponent's legal expenses and outlays and we will indemnify you for your insurance premium for your policy;
>
> (a) if you lose; or
>
> (b) if your claim is withdrawn by agreement on us and your solicitor after the start date of your no win no fee agreement; or
>
> (c) if, after a lodgement or tender, you win but a court awards you damages that are less than the offer to settle, provided your solicitor has advised you not to accept the lodgement or tender.
>
> We will pay your opponent's legal expenses and outlays arising from any order the court makes against you but not for order for costs where there has been non-compliance with the rules or order of the court."

21. Outlays are defined earlier in the agreement as:-

> "Payments you or your solicitor make to others involved in your claim. These include the costs of mediation which you are liable, court fees, expert fees, accident report fees and Commissioner for Oath fees but not things like postage, travelling and other similar expenses".

22. The policy further recites that the insurer will appoint the claimant's solicitor "to represent you according to our standard terms of appointment." The claimant is then further required to co-operate with the solicitor and the policy also states that the cover will end at once if:-

> "(a) your solicitor refuses to continue to acting for you with good reason; or
>
> (b) you dismiss your solicitor without good reason; or
>
> (c) your no-win no-fee arrangement ends for any reason; or
>
> (d) you stop your claim without our agreement and that of your solicitor; or

(e) you do not give suitable instructions to your solicitor."

23. This general issue of the adequacy of ATE insurance in the context of a motion for security for costs was discussed by Akenhead J. in *Michael Phillips Architects Ltd. v. Rilkin* [2010] EWHC 834, [2010] Lloyd's Rep. IR 479. Having reviewed the English case-law on the topic of ATE insurance, he then observed:-

> "These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the defendant in circumstances where security for costs should be provided by the claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:
>
> (a) There is no reason in principle why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs, subject to its terms, could not provide some or some element of security for the defendant's costs. It can provide sufficient protection.
>
> (b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.
>
> (c) It is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs.
>
> (d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the defendant."

24. It is clear that Akenhead J. did not exclude on some ex ante basis the possibility that the existence of ATE insurance might provide sufficient protection in terms. As he pointed out (and I respectfully agree), the crucial question is the extent to which the insurer can legitimately repudiate liability so as effectively to eviscerate the insurance policy so as to deprive the insured (and, by extension, the defendant) of any real security in respect of costs.

25. In *Michael Philips* Akenhead J. concluded that the ATE policy at issue there provided no real security or assurance for the following reasons:-

> "Clause 8 deals with "Fraudulent Claims":
>
> "If you make any claim which is a fraudulent or false, the policy shall become void and all benefit under it will be forfeited."
>
> Although there is no issue of fraud raised on the pleadings in this case, the claimant's claim is based on the time said to have been spent. The money claim, for just under £150,000, is based on time recorded by a number of different members of the claimant's staff. At first blush, it might be thought that a claim for £150,000's worth of architectural time for a project, which was estimated to cost some £383,000 (and thus about 40% of that cost), in circumstances where it seems to be the case that after three or four months' work, the contractor having gone into administration and the claimant is said to have done little further work, seems very high. Obviously, and I can make no findings about this, it is at least within the realms of possibility that there could be findings of fact that the time claim was more than insignificantly exaggerated. In those circumstances it could well be open to the insurer to avoid the policy under Clause 8. This also raises the insurers' right to avoid the policy if there was a material misrepresentation or non-disclosure in the period leading up to the provision of cover."

26. I would pause at this point to say that nothing of the kind arises in the present case. Akenhead J. then continued:-

> "Clause 9 deals with "Cancellation". It gives the insurer extensive rights to cancel the policy, for example:-
>
> "(c) The insurer may cancel the policy immediately…and reclaim any payments made under the policy, if
> (i) you fail to meet any of your responsibilities under this policy; or…
>
> (iv) you make any claim which is fraudulent or false
>
> (d) The insurer may cancel the policy immediately, if
> (i) your conditional fee agreement terminates for whatever reason, or…
>
> (iii) we believe your claim is unlikely to be successful
>
> (e) The insurer may cancel the policy at any time by giving at least 21 days' notice to you…"
>
> Any failure by the claimants to fulfil its "responsibilities" could lead to cancellation. If the CFA [contingent fee arrangement], which has not been disclosed, terminates, the policy can be cancelled. If the insurer, in good faith, gets to the stage at which it believes that the claimant's claim is unlikely to be successful, for instance after the disclosure of documents or after the exchange of witness statements or expert reports, the insurer appears to have an unfettered right to cancel and avoid paying under the policy. Finally it has a right to cancel the policy for no reason (bad or good); that seems to be to be an extraordinary insurance provision. Whilst it might be said it is subject at the very least to a need on the part of the insurer to act in good faith, it is potentially a draconian right. There is nothing in the policy which spells out what the financial consequences of a cancellation are. It is at least highly arguable that the insurer, following a valid cancellation, has no obligation to indemnify the insured unless the obligation had already accrued, for instance if there was already a court order requiring the claimant to pay the defendants' costs. It is at least foreseeable that, if the cancellation occurred before the commencement of the trial, the insurer would have no obligation with regard to costs orders made thereafter. This would negate any potential benefit or security with regard to the defendants' costs."

27. Unlike *Michael Philips*, the policy in the present case does not enable the insurer to terminate for no reason. But, as in that case, the insurer does have the right to end the policy at any time once it is agreed following discussion with the plaintiff's legal advisers that it is more likely than not that the plaintiff will lose the claim. This could potentially arise at any stage in the proceedings, so that, for example, the insurer might form this view after extensive discovery or, indeed, if an important witness were to be perform poorly in the witness box.

28. The uncertainty attending the potential exercise of this clause makes the risks involved almost impossible to evaluate. At this juncture, I cannot assess what the plaintiff's legal advisers might say to the plaintiff (and, by extension, the insurer) regarding the prospects of success and, indeed, given that such advices are necessarily privileged, it would not be permissible for me to inquire into such matters.

Conclusions

29. One can, therefore, sum up this present dilemma by saying that whereas security would be ordered if the plaintiff was not insured because it is clearly insolvent, conversely I would take the contrary view if it were insured in the ordinary way. The difficulty presented by ATE insurance is that such is the breadth of the repudiation clause and the fact that its operation is made contingent on precisely those matters into which a court cannot legitimately inquire that the risk that the plaintiff will not be in a position to discharge an award of costs defies any objective appraisal. In that respect, ATE insurance cannot be regarded in quite the same way as a standard contract of insurance.

30. In these circumstances, I find myself coerced by the very novelty of the issues presented by ATE insurance to approach this matter somewhat differently than in the case of the standard s. 390 application. I propose accordingly to adjourn the present application to a date no greater than three months hence to enable the plaintiff, its legal advisers and its insurers to take final counsel regarding its prospects in the litigation.

31. At that point, I shall 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. In the event that such an assurance is forthcoming – and I stress that this is entirely a matter for the insurer – I will not make an order for security for costs. If, on the other hand, no such assurance is forthcoming, then I will be compelled to conclude that, in the words of s. 390, I have reason to believe that the plaintiff will be unable be unable to discharge a costs award which might be made in favour of the defendant and in those circumstances will direct the making of an order for security for costs.