THE COURT OF APPEAL

Kelly J.
Peart J.
Irvine J.

2014 857

239/13

Article 64 Transfer

Between

Greenclean Waste Management Limited

Plaintiff/Respondent

and

Maurice Leahy practising under the style and title of

Maurice Leahy Wade and Company Solicitors

Defendant/Appellant

Judgment of Mr. Justice Kelly delivered on the 8th day of May, 2015.

Introduction
1. This is the first occasion upon which this court has been called upon to consider the effect of the existence of a policy of "after the event" (ATE) insurance on an application for security for costs.

2. In the High Court, Hogan J. declined to require the plaintiff to provide security for the costs of this litigation. It is clear from his judgment that, were it not for the existence of such a policy of insurance, he would have made the order sought pursuant to the provisions of s. 390 of the Companies Act 1963.

3. The question that arises on this appeal is whether the trial judge was correct in declining the order sought.

The litigation
4. This action commenced on the 17th August, 2009. The plaintiff seeks damages for professional negligence against the defendant (Mr. Leahy) who was its former solicitor.

5. Mr. Leahy is alleged to have taken over the practice of a Mr. Declan Wade solicitor, in August 2001.

6. The plaintiff alleges that in July 1999, it retained Mr. Wade to act as its solicitor, to advise, assist and represent it in respect of negotiations for and acceptance of a lease of industrial premises in Cloghran, Co. Dublin. Acting on Mr. Wade's advice, the plaintiff, in June 2000, accepted a lease of the premises for a term of two years from the 6th January, 2000. The plaintiff contends that the premises were in a very bad condition and had effectively reached the end of their economic life and required total refurbishment. The plaintiff complains that the solicitor failed to advise it of the extent of its obligations under the repairing covenants of the lease.

7. The lease expired in January 2002, but the plaintiff remained in possession of the premises.

8. In 2005 the lessor commenced proceedings for ejectment which resulted in an order for possession being made in July 2005.

9. In January 2006, the lessor commenced proceedings against the plaintiff claiming damages for breach of covenant arising from the plaintiff's failure to comply with the repairing covenants. Those proceedings were settled in 2009. Under the terms of settlement the plaintiff had to pay a sum of €310,000 in respect of the lessor's claim, €50,000 of which was attributable to *mesne* rates. It also had to pay €150,000 in respect of the lessor's costs of those proceedings.

10. The plaintiff contends that there were further independent acts of breach of contract and professional negligence by Mr. Leahy in failing to advise that it had a cause of action against Mr. Wade the former principal of the firm. Mr. Wade allegedly gave the original advice in relation to the lease. It is alleged that there was a failure to disclose a material conflict of interest on the part of Mr. Leahy in this regard and also a failure to advise on the relevant limitation period in respect of a claim against Mr. Wade.

11. A draft defence was placed before the High Court which took full issue with the pleas contained in the plaintiff's statement of claim. The trial judge said that, following a review of that draft, he could not possibly form any view of the underlying merits, save to observe that the terms of the draft defence, if duly established, would afford a *prima facie* defence to the action. The plaintiff does not agree with the judge's views on this topic and I will address this aspect of the case later in this judgment.

12. The plaintiff went into liquidation in December 2011 and the trial judge described it is as "hopelessly insolvent". He was undoubtedly correct in that and neither party seeks to suggest otherwise.

13. In view of his finding of insolvency on the part of the plaintiff and the existence of a *prima facie* defence to the action, the judge concluded that there was an entitlement on the part of the defendant to an order for security for costs, unless it could be shown that the plaintiffs ATE insurance sufficiently mitigated the risk that the plaintiff would be unable to discharge the defendants costs. He took the view that such insurance did sufficiently mitigate such risk and therefore declined to make the order.

Section 390 of the Companies Act 1963
14. Insofar as it is material, this section provides 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."

15. The section requires an applicant for security for costs to establish that: (a) there is reason to believe that the plaintiff will be unable to pay the defendant's costs if the defendant is successful in his defence; and (b) the existence of a *prima facie* defence to the claim. The mere establishment of those two matters does not necessarily result in an order being made under the section. The reason for this is clear. Both the wording of the section and the voluminous jurisprudence which it has generated, make it clear that the jurisdiction conferred by the section is a discretionary one. The court retains a discretion which may be exercised in special circumstances. It is neither possible or wise to exhaustively list such special circumstances. The case law has identified a number of them, eg. delay, the existence of a point of exceptional public importance, or the fact that the wrongful acts of defendant for which it is being sued are the cause of the plaintiff's impecuniosity. The category of such circumstances is not closed. (See *West Donegal Land League Limited v. Udaras na Gaeltachta* [2006] IESC 29).

***Prima facie* defence**

16. The plaintiff contends that the trial judge was wrong to conclude that a *prima facie* defence had been demonstrated. Thus, he ought to have dismissed the application on that basis. There was, it is submitted, no need for him to consider anything pertaining to the policy of insurance.

17. The plaintiff argues that a solicitor advising a client in relation to accepting a lease is obliged to provide advice concerning the repairing obligations to be assumed under such lease. In the absence of exceptional circumstances, the plaintiff contends that it is inappropriate for a client who is accepting a lease of dilapidated buildings for a term of a mere two years to bind himself to a full repairing covenant under which he is obliged to renew both the interior and exterior of the demised premises at the end of the term such as allegedly occurred here.

18. When subsequently sued by the landlord for damages for breach of the repairing obligations, he ought, it is said, to have been advised of a claim that he might have against his former solicitor. That, it is said, did not happen here. In fact Mr. Leahy, far from advising on this, actually engaged Mr. Wade the former solicitor as junior counsel to represent the plaintiff since he had since become a member of the Bar.

19. The draft defence is a full one and inter alia asserts that the plaintiff did not give any instructions on the question of whether it had a possible cause of action against its former solicitor and therefore there was no obligation to offer any advice on that topic. The plaintiff contends that that line of defence is unsustainable in the light of the judgment of Barron J. in *McMullan v. Farrell* [1993] 1 I.R. 123.

20. The test to be applied by the court in determining whether the defendant has established a *prima facie* defence was identified by Finlay Geoghegan J. in *Tribune Newspapers v. Associated Newspaper Ireland* (25th March, 2011). She said:-

"In my judgment, what is required for a defendant, seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto, which, if accepted by a trial judge, provide a defence to the plaintiff's claim."

21. The trial judge took the view that the draft defence, if duly established, afforded a *prima facie* defence to the action. In my view he was correct in so concluding.

22. There may well be cases that are so clear as to admit of a conclusion being reached that no *prima facie* defence has been made out. This is not one of them.

23. All of the relevant facts are put in issue by the draft defence and there is a specific plea concerning lack of instructions which I have already mentioned. It is not clear that the factual background in McMullen v. Farrell is similar or comparable here. An application for security for costs should not be elevated into a sort of mini-trial or strike out in *limine* type application.

24. I would affirm the view of Hogan J. that the defendant has demonstrated a *prima facie* defence. That, however, is not to be taken as a warranty of ultimate success at trial.

The insurance policy

25. In the first replying affidavit sworn in response to the application for security for costs, the solicitor for the plaintiff said:-

"The simple answer to the defendant's application is that the plaintiff has taken out a policy of insurance which will provide cover for the defendant's legal costs up to a limit of €210,000.00 and that, accordingly, the plaintiff will be in a position to discharge the defendant's costs in the event of the plaintiff's claim against the defendant being dismissed and costs being awarded against the plaintiff and in this regard I beg to refer to a true copy of the said insurance policy upon which marked WE1, I have signed my name prior to my swearing hereof".

26. In fact the policy was not exhibited. Instead what was exhibited was a single page of a document from a company called DAS Legal Expenses Insurance Company. It was headed "Justice Solutions Schedule of Insurance". The document then set out the following:

"Policy number: ATE/7130700

Reason for issue: Amended policy

Insured name: Greenclean Waste Management Limited

Solicitor Names: William Egan and Associates

Solicitors Ref:

Premium: EUR52,500, Pre. Inc. levy EUR2,625, EUR55,125

Limit of indemnity: EUR210,000, plus the amount, if any, you are liable to pay for your insurance premium, subject to the policy wording.

Cover : Own solicitor's disbursements and opponent's costs and disbursements.

Date of fee agreement with solicitor/section 68:letter 01 February 08

Date policy issued : 27th September 12

Schedule attaches to your Justice Solutions Legal Protection policy and your fee arrangement with your solicitor/section 68 letter."

27. It was hardly surprising that issue was taken in correspondence from the defendant's solicitors with this purported exhibition of the policy of insurance. The response to this protest took the form of a letter from the plaintiff's solicitors of 31st October 2012. Unfortunately, that letter did not enclose a copy of the policy but rather a letter from a person called Vivienne Matthews O'Neill dated 24th October 2012 addressed to the plaintiff's solicitors. This is what the letter said:-

"Re Greenclean Waste Management Limited v. Maurice Leahy.

Dear Sirs,

I refer to the above matter and to your recent letter of 17th inst. received today following annual leave.

In relation to the issues raised I would like to outline as follows:-

• We confirm that the case Greenclean Waste Management Limited v. Maurice Leahy is the only insured case for this policy.

• In relation to what cover is in place this can be addressed by exhibiting the policy documentation.

• In relation to the cost to be paid to the defendants we confirm that the cists (sic) if awarded would be paid directly to Sols (sic) on record for D (sic) and not the comp. (sic) directly can clarify that these costs shall be paid directly to the solicitors on record for the defendant rather. (sic)

• The query in relation to the plaintiff's solicitor costs we confirm that these are not insured costs under the insurance policy. The policy covers the disbursements for the plaintiff if the case is lost only.

I hope this clarifies the queries raised by Mr. Buttanshaw and if there are any other queries please do not hesitate to contact us."

28. This letter was described in one of the affidavits as being difficult to understand and I sympathise with that point of view. Ultimately, on 2nd November 2012 a copy of the policy of insurance was sent by email to the defendant's solicitors.

The wording of the policy

29. The policy indicates that it will "help" the insured in the following circumstances:

• "If you lose

While you will not have to pay any legal expenses to your solicitor, you will have to pay for your own outlays and your opponents' legal expenses and outlays.

• If your claim is withdrawn:-

You may have to pay your own outlays and your opponent's legal expenses and outlays.

• If there is a failure to beat: -

A lodgement (a payment of money that a defendant in an action may make into court) or

- A tender (an offer to pay a sum of money to the other party or parties in an action which one party believes is sufficient to satisfy the other party or parties claim).

You may have to pay some of your own outlays and opponents legal expenses and outlays.

Justice Solutions will protect you against these expenses until the conclusion of your claim."

30. The document stipulates that the policy is provided by an entity called 80e.

31. 80e is described as a specialist provider of ATE insurance. The policy stipulates:-

"Your policy only covers you if you have agreed to pay your insurance premium and you have entered into a no-win no-fee agreement for your claim with your solicitor."

It is of significance that at no stage has that 'no-win no-fee agreement' been put in evidence.

32. The policy wording goes on

"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."

Under the heading 'Premium" the following is to be found:-

"The insurance premium (plus levies) due for your policy is payable at the end of your claim (by court decision or settlement) or if your claim ends for any reason.

The level of the insurance premium depends on the type of claim.

Your solicitor will inform you of the insurance premium that applies at the start of your claim.

The insurance premium is shown on your schedule of insurance, and is payable if you win your claim.

Prospects Clause

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.

90 – Days rule:

If your claim is withdrawn by agreement between us and your solicitor within 90 days of the start date of your policy:

(a) Your policy is then treated as never having come into force;

(b) You will not be liable to pay your insurance premium;

(c) We will be entitled to reclaim from you any payments made under your policy."

33. The policy then goes on to provide a number of definitions, just a few of which are relevant. They are the definition of "no-win no-fee agreement" which is defined as "an agreement in writing between you and your solicitor which complies with s. 68 of the Solicitors (Amendment) Act 1994. It relates to the payment of your solicitor/client fees for the claim shown in your schedule". The territorial limit is defined as "the Republic of Ireland".

34. The policy then goes on to provide for what is covered. It says:

"1. The most we will pay under your policy is shown in your schedule of insurance, plus the amount you are liable to pay for your insurance premium.

2. We will pay your outlays and your opponents' 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 between 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.

3. We will pay your opponents legal expenses and outlays arising from any order the court makes against you, but not orders for costs where there has been non compliance with the rules or orders of the court."

35. The policy then sets out "What is not Covered". This is what it says:

"1. Any costs or outlays incurred before the start date of your no-win no-fee agreement.

2. Fines, penalties, compensation or damages that a court orders you to pay.

3. Any counterclaim against you or any appeal you make against the final judgment or order without our agreement.

4. Any costs or outlays arising from a fraudulent or dishonest claim.

5. Any costs or outlays arising from action you have taken which we or your solicitors have not agreed to, or where you

do anything that hinders us or your solicitor.

6. Any costs or outlays arising from any applications to court brought by your solicitor without our agreement.

7. Any increased costs or outlays arising from any delay or other default by you which, in our opinion and the opinion of your solicitors, affects the way the claim is handled.

8. We will not pay any costs or outlays covered under any other policy, or any costs of outlays that would have been covered by any other policy if your policy did not exist.

9. We will not pay any costs or outlays where we have not been notified by you or your solicitor within 180 days that you have lost your claim.

10. An application for judicial review.

11. Any claim brought outside the territorial limit."

36. The policy then sets out a number of conditions, they are:

"1. You must:

(a) keep to the terms and conditions of your policy;

(b) take reasonable steps to keep any amount we have to pay as low as possible;

(c) send to us, in writing, everything we ask you for, or instruct your solicitor to do so.

2 (a) We will appoint your solicitor to represent you according to our standard terms of appointment.

(b) You must cooperate fully with us and your solicitor and must keep us up to date with the progress of the claim. You must also instruct your solicitor to contact us direct when doing so.

(c) You must give your solicitor any instructions that we reasonably require.

3 (a) You must tell your solicitor if anyone offers to settle your claim

(b) If you do not accept a reasonable offer to settle your claim, which your solicitor has advised you to accept, we may refuse to pay your outlays and your opponent's costs and to indemnify you for your insurance premium for your policy.

(c) You must not negotiate or agree to settle your claim without your solicitor's approval.

4. If you win, you must pay your insurance premium to us within fourteen days of receipt of your damages.

5. The cover we provide will end at once if:

(a) your solicitor refuses to continue acting for you with good reason; or

(b) you dismiss your solicitor without good reason; or

(c) your no-win no-fee agreement 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

6. You must tell us if you take another policy to cover your claim.

7. Your policy is governed by the laws of the Republic of Ireland."

Critique

37. Having been apprised of the contents of the policy, the defendant's solicitor in an affidavit sworn on the 21st November, 2012, identified some fourteen criticisms of it. They were as follows:-

1. That such indemnity as the policy provides was provided to the plaintiff and not the defendant who was neither privy nor party to it.

2. That the policy was subject to the ordinary requirements of full disclosure, for which the defendant could have no knowledge and over which the defendant had no control.

3. That the policy only applied when and for so long as there was a no-win no-fee agreement in place between the plaintiff and the plaintiff's solicitor and that agreement had never been produced.

4. That the cover might be ended by the unilateral decision of the insurer under the so called "Prospects Clause".

5. The policy provided (separately) that cover might be ended in the event of an agreement between the insurer and the solicitor in relation to the prospects of success.

6. The cover did not extend to costs and outlays arising from any order that the court might make against the plaintiff

where there had been non compliance with the rules or orders of the court.

7 The cover did not extend to costs and outlays incurred before the start date of the no-win no-fee arrangement.

8. The cover did not extend to costs and outlays arising from any action taken by the plaintiff which either the insurer or the solicitors had not agreed to or where the plaintiff might do anything that might hinder the insurer or the solicitor.

9. The cover did not extend to costs and outlays arising from any application to court brought without the insurer's agreement.

10. The cover did not extend to any increased costs and outlays arising from any delay or other default by the plaintiff which, in the opinion of the insurer or the plaintiff solicitors, might affect the way the claim is handled.

11. The cover did not extend to costs and outlays in circumstances in which the insurer might not be notified by the plaintiff or its solicitors within 180 days that the claim had been lost.

12. The cover was conditional upon ongoing obligations on the part of the plaintiff to provide information and cooperation over which the defendant would have no control.

13. The policy contemplated that the insurer might repudiate if the plaintiff's solicitor refused to continue acting with good reason; if the plaintiff should dismiss its solicitor for any reason; if the plaintiff's no-win no-fee agreement should end for any reason; if the plaintiff should stop its claim for any reason without the agreement of the insurer and that of its solicitor; or if the plaintiff might not give "suitable instructions" to its solicitor.

14. The indemnity available under the policy was available in respect of the plaintiff's outlays as well as the plaintiff's liability for the defendant's costs.

This latter point is made in the context of the policy providing a limit of indemnity of €210,000. The defendant's legal costs accountant has estimated the defendant's costs at about €200,000. But if the policy were to include counsels' and experts' fees on the part of the plaintiff on a solicitor and client basis there was a risk that a significant percentage of the defendant's costs would not be secured.

38. The plaintiff did not file any affidavit in response to this critique and never at any stage put before the trial court or this court, the no-win no-fee agreement.

The trial judge's view
39. The judge held that the plaintiff was insolvent and unable to pay the defendant's costs. In that he was correct. He then said that the real question was whether the existence of the policy required one to alter this assessment.

40. In my view he was incorrect in adopting that approach. It is clear from the wording of s. 390, that the first question which has to be considered is the inability on the part of the company to pay the costs of the defendant. Then one moves to considering whether a *prima facie* defence has been made. If the court is satisfied on both of those matters it then proceeds to consider matters that touch on its discretion.

41. In the present case, the plaintiff is unable to pay the costs of the defendant. It does not have the assets to do so. But the proceeds of the policy in question do not and will not ever form part of the assets of the company. That is clear both from the terms of the policy itself and the letter of the 24th October, 2012. Accordingly, I am of opinion that the judge was not entitled to have regard to the existence of the policy in the context of making an assessment of the plaintiff company's ability to discharge costs. It is of no relevance to that issue.

42. The presence of the policy of insurance is of course a matter to be taken into consideration in the exercise of the court's discretion. Indeed, 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. That said, I am satisfied on the basis of the information put before the court in respect of the instant policy that a court would not be justified in refusing an order for security for costs. In doing so in this case, I am of opinion that the trial judge was in error.

The Prospects Clause
43. The judge took an unusual course of action in the present case. He delivered his judgment on the 19th February, 2013. In that judgment he concluded that there was reason to believe that the plaintiff would be unable to pay the costs of the defendant and that a *prima facie* defence had been made out. But then he adjourned the application for a number of months to enable the plaintiff, its legal advisers and its insurers to taken final counsel regarding its prospects in the litigation. He went on:

> "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 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."

44. On the 18th April, 2013, the insurer wrote to the plaintiff's solicitors on this topic and said:

> "Having considered all matters and correspondence received from both the plaintiff solicitors and counsel for the plaintiff, we hereby confirm, that for this particular case, we will not invoke the prospects clause within the contract of insurance."

45. Having been apprised of that letter, the judge declined to make the order.

ATE Insurance
46. In 1999 the Access to Justice Act, was brought into force in England and Wales. It brought about major changes in legal practice in that jurisdiction. It sought to provide an alternative to the traditional way of funding litigation there which was up until then by legal aid. The Act introduced for the first time the use of conditional fee agreements. These are sometimes called no-win no-fee

agreements. It also introduced ATE Insurance. The Act allowed clients to insure against the risk of having to pay the defendant's costs should their case be unsuccessful.

47. Despite the absence of legislative change of the type that was introduced in England in 1999, ATE Insurance has nonetheless crept into this jurisdiction. It is still comparatively novel.

48. An examination of the policy in the present case would suggest that it was originally written for the English market and has undergone minor modifications for use in this jurisdiction. One obvious error in the modifications is the provision that the insurance policy is governed by the laws of the Republic of Ireland. The "Republic of Ireland" is the description and not the name of this State.

49. ATE policies have figured in the context of security for costs applications in the English courts. In this regard I find the decision of Akenhead J. in *Michael Philips Architects Limited v. Riklin* EWHC 834 (TCC), very helpful. There, that judge reviewed a number of authorities in this context and having done so, reached the following conclusions. He said:-

> *"(a) There is no reason in principle why an ATE Insurance policy which covers the claimants 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. This 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."*

50. I am of the view that those views of Akenhead J. apply in this jurisdiction.

51. Having set out those principles that judge then conducted an analysis of the policy in suit in that case. Having done so, he said:

> "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."

The present case

52. Hogan J. concerned himself only with the 'prospects clause' of the ATE policy under consideration. Having received an assurance in that regard, he declined to make the order sought.

53. In my view, the 'prospects clause' was just one of a number of matters which required to be taken into consideration. The first, and most important, was the failure to put before the court the no-win no-fee agreement which is a condition precedent to the policy being in effect at all. That, to my mind, was a fundamental proof to put before the court in endeavouring to establish the effectiveness of this ATE policy. Such an agreement would (a) have to be in existence and (b) comply with s. 8 of the Solicitors (Amendment) Act 1994, before the ATE policy would be effective.

54. Even if the policy is in force, it is clear that it is highly conditional and could be avoided for a substantial number of reasons over which the defendant had no control or, in some instances, could have no knowledge.

Conclusions

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

56. Even if such proof had been placed before the court, the policy here is so conditional (even with the "prospects clause" neutralised) 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. None of these were taken into account by the trial judge whose sole concern was the "prospects clause".

57. This ATE policy does not, in my view, 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 a security as a payment into court or a bank or insurance bond.

58. I am satisfied that the judge was in error in coming to the conclusion which he did for the reasons which I have stated and, accordingly, I would allow the appeal.

Peart and Irvine JJ. agreed