

Dispute Resolution Department

# Wise After The Event

## ATE Insurance in Ireland - Wise After the Event

There has been a growing number of complex and intensely litigated disputes in the Irish courts involving a high degree of specialist expert evidence and large scale, and often multi-national, discovery. In many of these cases a party such as a liquidator or receiver who has an otherwise meritorious case, has been constrained in pursuing cases under the long standing Irish law rules prohibiting third party litigation funding.

### After the Event Insurance

One means of potentially mitigating the costs of such litigation, namely After The Event (“ATE”) insurance, was recently considered in a High Court action which may lead to a greater use of this product.

ATE insurance is designed to cover the Plaintiff’s potential exposure to opponent’s legal costs if the Plaintiff loses the litigation and is directed to pay its opponent’s legal costs.

Under ATE insurance a premium is usually only payable if a Plaintiff is successful and therefore the product is a potentially cost effective means of covering adverse legal costs awards which is particularly attractive for those parties who may have a meritorious claim but may be unable or unwilling to carry the risk of an adverse costs order.

### Third Party Litigation Funding

It is illegal in Ireland to provide financial support to litigation by a party who has no direct or legitimate interest in providing such financial support in return for a share of the proceeds of the litigation. In *Greenclean Waste Management Limited v Leahy (No.2)*, Mr Justice Hogan considered whether ATE insurance amounted to the indirect provision of litigation funding to the Plaintiff and was therefore illegal.

In this case the Plaintiff admitted that it was “*hopelessly insolvent*” during an application by the Defendant for security for costs.

Hogan J reiterated that the Irish Law which prohibits third party funding not only continues to exist in Ireland but “*that it has a practical vibrancy*” and went on to consider whether ATE insurance was a form of indirect litigation funding.

The court held that as the ATE insurer provided financial assistance to litigation had a legitimate interest in the outcome of the proceedings, the ATE insurance did not fall foul of the rules.

The court stated that “*It should also be borne in mind that ATE also serves important needs within the community by facilitating access to justice for persons and entities who might otherwise be denied this. In that regard, ATE insurers provide a legitimate service by providing access to justice and this service cannot properly be regarded as simply regarded as either investing in or trafficking in litigation.*”

### Security for Costs

This decision provides some clarity as to the role of ATE insurance in litigation within the Irish courts. It appears likely that the courts will reserve a case by case review of what constitutes third party litigation funding. Where a security for costs application is likely to be made against a Plaintiff then the purchase of an appropriate ATE policy should be considered ahead of such an application.

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