

BETWEEN

CHARLES KELLY LIMITED

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Reynolds delivered on the 13th day of February, 2019**Background**

1. This is an application for an order pursuant to O. 29, r. 1 of the Rules of the Superior Court, 1986 and/or s. 52 of the Companies Act, 2014, directing the plaintiff to furnish security for costs to be incurred by the defendant in defending the within proceedings.

2. The within proceedings succeed separate proceedings commenced in 2008 between the then Directors and shareholders of the plaintiff company. Those proceedings were substantially determined by the High Court (Ms. Justice Laffoy) in four separate reserved judgments delivered between February, 2010 and July, 2012.

3. In the within proceedings, the plaintiff seeks damages for negligence, breach of duty, breach of statutory duty, and/or breach of fiduciary duty arising from various complaints made against the defendant, which can be summarised as follows:

(a) An allegation that the defendant honoured payments drawn on the accounts of the plaintiff which were not validly submitted;

(b) An allegation that the defendant wrongfully permitted the plaintiff to exceed its overdraft limit of €1,600,000;

(c) An allegation that the defendant wrongfully refused to transfer the liabilities of the plaintiff from its overdraft facility to one or more term loan facilities.

4. The defendant asserts that it is a full defence to the matters complained of and, therefore, seeks security to be given for costs to be incurred in defending the proceedings in circumstances where it contends that the plaintiff company will be unable to meet its costs, if successful.

5. The estimate of the likely costs provided to this Court is €180,000 approximately.

Security for Costs

6. The jurisdiction to require that security be provided by a corporate plaintiff is governed by s. 52 of the Companies Act 2014, which provides as follows:-

"Where a company is plaintiff in any action or other legal proceeding, 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 or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

7. The principles applicable to the grant of security for costs are well established.

8. In *USK District Residence Association Limited v. Environmental Protection Agency & Ors* [2006] IEHC 435, Clarke J. endorsed the approach by Morris J. in *Interfinance Group Limited v. KPMG, Pete Marwick* (Unreported, High Court, Morris J., 29th June, 1998) as follows:-

"1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:-

(a) that he has a *prima facie* defence to the plaintiff's claim, and

(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;

2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought."

9. Clearly, therefore, the list of special circumstances as envisaged and referred to in the judgment is not exhaustive.

10. The issues, therefore, for this Court to determine are as follows:-

(i) has the defendant established a *prima facie* defence to the plaintiff's claim;

(ii) if so, has the defendant satisfied the court that the plaintiff would be unable to meet its costs, if successful; and

(iii) further, and in the event that the court is so satisfied, has the plaintiff established specific or special circumstances which cause the court to exercise its discretion not to make the order.

First Issue – whether the defendant has established a *prima facie* defence

11. In 2006, the plaintiff executed a mandate which provided that most transactions on its current account with the defendant could be completed provided there were two authorised signatories on behalf of the plaintiff.

12. The plaintiff takes issue in the within proceedings in respect of four payments made by the defendant to a third party between October 2009 and February 2010 and alleges that these payments were not properly authorised by it and amounted to the misappropriation of funds by Mr. William Kelly, a former director of the plaintiff company.

13. The defendant accepts that it received a request from the plaintiff in September 2009, to the effect that it should not make any further payments to this third party but advised the plaintiff that a board resolution would be required to alter the existing mandate. No board resolution was forthcoming and the defendant authorised the payments.

14. There can be no dispute but that the defendant advised the plaintiff on numerous occasions of the necessity to procure a board resolution. Further, having become aware of the ongoing dispute between the directors of the company, the defendant suggested that an application be brought for the appropriate relief through the courts.

15. Indeed, proceedings were already before the courts at that stage and every opportunity was available to the plaintiff to bring the matter to the court's attention and seek the appropriate relief.

16. The plaintiff makes further allegations against the defendant in negligence for allowing an increase in its overdraft limit. There appears to be no dispute but that this was at the plaintiff's request and was implicitly agreed between the parties with a view to enabling the plaintiff to continue trading. In respect of the further matters pleaded as against the defendant, the plaintiff alleges that the defendant wrongfully refused to transfer the liabilities of the plaintiff from its overdraft facility to one or more loan facilities. However, it is clear that extensive efforts were made by the defendant, through meetings and correspondence, to agree facilities with the plaintiff and that the parties failed to reach agreement in this regard.

17. Indeed, in the judgment of Laffoy J. in the company proceedings (*Edward Gerry Kelly v. William Kelly & Charles Kelly Limited* [2011] IEHC 349), the court commended the defendant for the constructive approach adapted by it in its dealings with the plaintiff as follows:-

"Despite what I consider to be unnecessarily belligerent correspondence from the petitioner, the Bank has maintained the company's overdraft facility in place, notwithstanding that it has been unable to procure a properly executed acceptance on behalf of the company of the facility from the company and notwithstanding that, as with the world at large, it has not seen any audited financial statements of the company from 2006 onwards. In short, the Bank has demonstrated considerable forbearance towards the company and its directors."

18. In determining the question of whether a defendant has established a *prima facie* defence, Finlay Geoghegan J. in *Tribune Newspapers (In Receivership) v. Associated Newspapers (Ireland) Limited (Ex Tempore*, High Court, 25th March, 2011) stated as follows:-

"In my judgment, what is required is 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."

19. Having considered the factual evidence upon which the defendant seeks to rely in establishing a *prima facie* defence to the within proceedings, this Court is satisfied that the defendant has made out a reasonably sustainable defence and indeed a sound arguable legal basis for that defence.

Second Issue – has the plaintiff the ability to meet an order for costs?

20. The defendant contends that the financial position of the plaintiff company is such that it will not be in a position to meet any order for costs that the court might make in favour of the defendant should it succeed in these proceedings.

21. The defendant relies on the audited accounts of the plaintiff for the financial years ending 31st October, 2011 to 31st October, 2016, in demonstrating that the plaintiff company is insolvent and that its financial position continues to deteriorate.

22. In addition, the defendant relies upon the most recent, unaudited abridged financial statements for the financial year ended 31st October, 2017.

23. In response, the plaintiff avers to the fact that its status in the Company Registrations Office is normal and contends that it is now fully funded and continues to trade, having moved its banking portfolio to Allied Irish Banks.

24. Further, the plaintiff relies on a report dated 27th September, 2018, from Vision.net, a financial research company which provides credit information on commercial entities and private individuals. It is notable from the said report that the plaintiff company operates within a very constrained credit limit, and currently has a net worth of approximately minus €2m.

25. Having considered all of the relevant financial documentation, this Court can only conclude that the plaintiff will be unable to meet an order for costs in the event that the defendant succeeds in its defence herein.

Third Issue – are there special circumstances to justify the refusal of the relief?

26. The onus clearly rests on the plaintiff to establish "special circumstances" as to why an order for security for costs should not be made.

27. No such case has been made out by the plaintiff in the affidavits before the court save and except for an assertion that it would be unjust for the defendant to profit from its wrongdoing by attempting to erect a barrier to the plaintiff maintaining its proceedings against it.

28. Given that the court has already satisfied itself that the defendant has established a *prima facie* defence to the within proceedings, there can be no basis upon which the court could refuse the reliefs sought herein.

29. In all the circumstances, I will grant the relief sought in the within application.