Neutral Citation Number: [2011] IEHC 145

THE HIGH COURT

2009 1546 P

BETWEEN

PIERSE DESMOND LIMITED

PLAINTIFF

AND

DEIRDRE NICFHIONNLAOICH (PRACTISING UNDER THE STYLE AND TITLE OF MACGINLEY SOLICITORS)

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 5th April, 2011

1. This application for security for costs under s. 390 of the Companies Act 1963, arises in the following fashion. The defendant is the former solicitor for the plaintiff company who was retained in connection with the purchase of certain lands in Co. Kerry. By reason of events which I will shortly describe, the plaintiff is now suing the defendant for professional negligence. The directors of the company are a Mr. Patrick Pierse and Mr. Daniel McAteer and they are 20% and 80% shareholders respectively in the company.

2. In its statement of claim delivered on 17th April, 2009, the plaintiff contends that it entered into a contract in February, 2007 with Mr. Pierse to purchase some 53 acres of registered land in Kerry . The purchase price was €2.5m. and the deposit of €500,000 was duly paid. It is further pleaded that a 28 day completion notice was served by the vendor on 29th February, 2008, and that the plaintiff endeavoured at that point to contact the defendant to enable the company respond to the completion notice. While the plaintiff contends that it was ready, willing and able to complete the transaction, the gist of the negligence claim is that the defendant failed in her duty to advise the plaintiff with regard to the implications of the notice and nor did she take any "effective action to protect the plaintiff's interests". It is further pleaded that the plaintiff encountered considerable difficulty in contacting the defendant at this juncture with the result that the completion notice expired. This lead to the forfeiture of the deposit and the plaintiff claims further consequential losses as a result which are said to exceed €5.3m.

3. The defence of the defendant is perfectly straightforward. She contends that the plaintiff was never in a position to complete the sale and that she was never put in funds such as would enable this to have been done. If this is correct, then this is, of course, a complete defence to the present professional negligence action.

4. Before examining the present application for security, it behoves us to consider in some detail the critical events of March, 2008 in the light of both the pleadings and the correspondence. From the very detailed particulars which have been exchanged, it is clear that the plaintiff's case is that the balance of the monies - some €2m. - were made available (at least in principle) to it in March, 2008. The replies to particulars further confirm that the plaintiff's position is that "it had several funding options available at the date of completion" (composite replies to particulars, reply 4(d)). It further pleads that funding "was secured privately" by the plaintiff and that a "letter of offer received from the funding institution" (composite replies to particulars, reply 4(e)).

5. The correspondence put before the Court suggests that as of 19th March, 2008, the company had an offer of funding through a mortgage broker, albeit conditional on the payment of the €500,000 deposit and approval by its board. The question of board approval was one which appeared to provide the company with some difficulty. On the one hand, Mr. Pierse was demanding that the company complete the transaction, while on the other - according to Mr. McAteer - he was refusing to attend board meetings. If this were correct, then the endeavours of the company to secure board approval and, hence, to put the necessary resolution in place such as would be a prerequisite to secure the funding were, putting matters no higher, likely to prove problematic.

6. These were matters to which Mr. McAteer alluded in his correspondence with Ms. McGinley dated 24th March, 2008, and 27th March, 2008. What is striking is about this correspondence is that Mr. McAteer thereby seems to admit that the conduct of Mr. Pierse was making it all but impossible for the company to secure that funding. Thus, for example, in his letter of 27th March - just on the eve of the expiry notice - Mr. McAteer observed that "we cannot fulfill the second condition [requiring Board approval for the loan] until the meeting takes place with Pat Pierse".

7. If the company could not put its solicitor in funds, then it is difficult to see how she could be liable in damages for negligence for the failure to complete the transaction as the company simply would not have been in a position to close the sale. There is no suggestion, for example, that the defendant had any role in the procuring of the funds and it is not easy to see what advice she could have given which would have alleviated the company's dilemma during the month of March, 2008.

8. While the exact date on which the deposit was forfeited is not clear from the affidavits, I was informed during the hearing that this happened on 28th March, 2008. If this is correct, then the subsequent conduct of the plaintiff and the defendant after that date would seem to be irrelevant to any question of negligence. At all events, it is against this general background that the present application falls to be considered.

Section 390: Some General Principles

9. Although the jurisdiction of the courts in s. 390 applications has been the subject of extensive consideration in a host of cases, it would be difficult to improve on the pithy manner in which some of the general principles governing the exercise of the courts' discretion were summarized thus by Clarke J. in *James Elliott Construction Co. Ltd. v. Irish Asphalt Ltd.* [2010] IEHC 234:-

> "It is now very well settled that a defendant moving for security for costs under s. 390 of the 1963 Act must establish two things. First, the defendant must establish a *bona fide* defence and second, the defendant must produce credible evidence to the effect that the plaintiff would not be able to discharge costs in the event that the defendant was successful and awarded its costs. If both of those matters are established, then the onus rests on the relevant plaintiff

to establish special circumstances. See *Interfinance Group Ltd v. K.P.M.G. Peat Marwick* (Unreported, High Court, Morris P., 29th June, 1998). The most common special circumstance put forward is an assertion that any inability on the part of the relevant plaintiff to discharge the defendant's costs stems from the very wrongdoing which is the subject of the proceedings. In such circumstances, it is well settled that the court will ordinarily exercise its discretion against ordering security for costs. In addition, delay on the part of the relevant defendant in moving is frequently put forward as a special factor such as would justify declining to make an order for security for costs."

10. As we shall now see, nearly of all of the features of the typical s. 390 application identified by Clarke J. in this passage are present in the present application.

11. We may commence with the question of a *bona fide* defence. It is absolutely plain that the defendant clearly has established such a defence, since it must remain an open question - at least for the purposes of the evidence tendered in this application - as to whether the plaintiff was ever in a position to complete the transaction within the time period specified by the completion notice, quite irrespective of any advice which the defendant may or may not have given or, indeed, anything which she may or may not have done during this period. Certainly, nothing has been put before me which would show - or even tend to show - that the company was in a position to complete the transaction during this period.

12. Next, there is the question of whether the plaintiff would be unable to discharge the defendant's costs. On this point there is no real dispute, given that its annual accounts for 2009 show that the only real asset of substance available to the plaintiff is the sum of €4,625,000. The notes to the accounts show, however, that this sum "relates to a High Court case against the company's former solicitor for negligence" and that it is stated therein "as the amount recoverable [as] assessed by the company's legal team". In truth, therefore, the company presently has no assets really worth speaking of and it thus would not be in a position to discharge any order for costs.

The Existence of Special Circumstances

13. In these circumstances it is clear from the case-law that the onus is on the plaintiff to advance particular reasons why no such order for security should be made. While, as McCarthy J. pointed out in *SEE Co. Ltd. v. Public Lighting Services Ltd*. [1987] I.L.R.M. 255, the court always retains a discretion in the matter, the parameters of that discretion have by now been firmly delineated by the case-law.

14. It is, of course, true to say that there may be particular cases presenting transcendant considerations where an order for security of costs would inappropriate as not being in the public interest. One such example is supplied by *Millstream Recycling Ltd. v. Gerard Tierney and Newtown Lodge Ltd*. [2010] IEHC 55. Here the ultimate question for resolution was the identity of the party or parties responsible for a major controversy which came to public attention in December, 2008 when it became known that pork products produced in several locations in Ireland had been contaminated by dioxins. This controversy had huge implications both here and abroad for the reputation of Irish pork products and, indeed, for our agricultural produce generally. Charleton J. concluded that "the determination of the facts behind the scandal transcends the individual claims and counterclaims of the parties", so that in these circumstances he refused to order security. *Millstream Recycling* is, in effect, a case where the court concluded that the ultimate resolution of the litigation was in the public interest.

15. Nothing of the kind arises here. Rather the special circumstances relied on is the familiar argument that the plaintiff alleges that its impecuniosity was caused directly by the negligence of the defendant. The principles applicable in cases of this kind were articulated by Clarke J. in his seminal decision in *Connaughton Road Construction Ltd. v. Laing O'Rourke (Ireland) Ltd*. [2009] IEHC 7. Here Clarke J. observed that a plaintiff seeking to establish the existence of special circumstances by reason of the fact that its inability to pay has been caused by the wrongful acts of the defendant which are the subject matter of the litigation must establish four propositions:

> "(1) That there was actionable wrongdoing on the part of the defendant (for example, a breach of contract or tort);
>
> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
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> (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
>
> (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

16. I will assume for present purposes that a *prima facie* case can be made that the defendant was negligent, so that the first proposition can be established. In this regard, it may be observed that - somewhat surprisingly, it might be thought - that nothing by way of a response from the defendant during these critical weeks in March, 2008 has been exhibited. One might have expected that the defendant would have either corresponded with the plaintiff during this period or that if there were communications by other means, an attendance note would have been taken. No such correspondence or attendance notes have, however, been exhibited, at least for the purposes of this application. It is only fair to record that at the full hearing a more complete picture of the exchanges between the parties during this critical period may well emerge.

17. Nevertheless, in these circumstances I am constrained to hold that, based on the materials before the court, the plaintiff has satisfied the first test inasmuch as there is an arguable or plausible case that the defendant was negligent.

18. It is otherwise so far as the second proposition is concerned. Even if it were to be accepted that the defendant was negligent - and I am very far from saying that she was - there is presently, at least, simply no evidence to suggest that such negligence was the cause of the losses for which the plaintiff contends. The vendor caused a 28 day notice to be served on the plaintiff company. Like any ordinary purchaser, the plaintiff was fully aware of the necessity to raise the appropriate funds, but, unfortunately, it was simply unable to raise the necessary finance to complete the sale. The deposit was forfeited as a consequence and this was probably not the end of the plaintiff's losses. While the plaintiff's failure to raise the funds may be put down either to mischance or, perhaps, to the actions of others, the stark fact remains that there is absolutely nothing to suggest that the defendant was either responsible for the lack of funding or that she contributed to this by some act or omission on her part.

19. In this regard, I am conscious of the fact that this application is only a preliminary motion and that I must abstain from purporting

to make any finding on the merits of a matter in respect of which I have presently but imperfect knowledge. Again, it is proper to note that it may well be that at the full hearing the plaintiff would in fact be able to establish the existence of such a causal connection between negligence and loss, albeit by reference, for example, to oral evidence which has not yet been heard or by reference to documentation (including, perhaps, documents in the possession of third parties) which has yet to be discovered. All I can say is that for the purposes *of this particular application* the plaintiff has not adduced *any* evidence which would enable the court to conclude that this second proposition either was or could be established.

20. Since the plaintiff cannot bring itself within the second proposition identified by Clarke J. in *Connaughton Roads*, it follows that it is simply unable to satisfy the four requirements necessary to establish special circumstances in a case such as this. It follows that this is a case in which security for costs should be ordered and it is therefore unnecessary for me to consider the other arguments advanced on behalf of the defendant with regard to the third and fourth *Connaughton Road* propositions.

Delay
21. The plaintiff also contended that the defendant was precluded from seeking security by reason of delay. The present proceedings issued on 17th February, 2009, and the motion for security for costs was issued on 8th July, 2010. In the meantime, the defendant pursued the matter by raising a series of highly focused notices for particulars. It may be that there has been some delay on the defendant's part, but I would not see this delay as material. There is no suggestion that the plaintiff has been prejudiced. This is not, for example, a case where the application is made on the eve of the trial or where the belated nature of the application would have the effect of frustrating the capacity of the plaintiff to raise the necessary funds. Nor is it a case where contumelious delay on the part of the moving party resulted in the effective forfeiture of that party's right to apply for security under s. 390. On the contrary, the present case is several months away from a hearing date and, as I have just indicated, such delay as there has been is not material in the context of this application.

22. In these circumstances I would reject the argument that any delay on the part of the defendant in applying for security for costs should be regarded as disentitling her to the relief to which she is otherwise entitled.

Conclusions
23. In these circumstances, I feel that it would be appropriate to direct the plaintiff to provide security in the manner envisaged by s. 390 of the 1963 Act. I propose to discuss with counsel the appropriate amount of the security to be fixed.