Neutral Citation Number: [2011] IEHC 394

THE HIGH COURT

2010 9587 P

BETWEEN

MAULBAWN LIMITED (IN RECEIVERSHIP)

PLAINTIFF

AND

HAULBOWLINE INDUSTRY LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 7th day of October, 2011.

1. The applications in the context of the chronology

1.1 The plenary summons in these proceedings issued on 19th October, 2010. The statement of claim was delivered on 16th March, 2011. A motion returnable on 28th March, 2011 sought an order pursuant to Order 63A of the Rules of the Superior Courts (the Rules) to enter the proceedings in the Commercial Court. That application was refused and costs were awarded to the defendant, as I understand it, to be paid at the conclusion of the proceedings. No defence has been delivered by the defendant.

1.2 The first in time of the two applications to be addressed in this judgment is the plaintiff's motion, on foot of a notice of motion dated 20th May, 2011, which was returnable on 27th June, 2011, for judgment in default of defence pursuant to Order 27, rule 8(1) of the Rules.

1.3 By notice of motion dated 27th May, 2011, returnable for 11th July, 2011, the defendant applied for an order pursuant to Order 29, rule 1 of the Rules directing the plaintiff to provide security for costs.

1.4 Both applications were heard together. Logically, the defendant's application must be considered first.

2. Factual and legal basis of the plaintiff's claim

2.1 The following outline is based primarily on the plaintiff's statement of claim. The factual component is supported by affidavit evidence.

2.2 Prior to 2006 the plaintiff company was incorporated under the name Haulbowline Industries Limited. It was owned by Mr. Charles Hill, Mr. Orlando Hill and Mr. Rodger Hill (the Hills). It carried on the business of stevedores at Passage West, County Cork. It owned land at Passage West, part of which was registered on Folio 91623F of the Register of Freeholders, County Cork and part of which was held on unregistered title.

2.3 In 2006, three individuals, Mr. Gregory Coughlan, Mr. Brendan Murtagh and Mr. Brian Madden (the Investors) entered into negotiations with the Hills for the acquisition of the lands at Passage West, which they intended to develop. Agreement was reached. However, because it was advantageous "tax-wise", the manner in which the transaction was structured was that the Investors, through the medium of a company incorporated by them, Maulbawn Holdings Ltd. (Holdings) agreed to purchase the shares in the plaintiff from the Hills. As part of the transaction, the name of the plaintiff was changed from Haulbowline Industries Limited to Maulbawn Limited. The agreed purchase price was €27,540,000.

2.4 The transaction was completed on 10th August, 2006. The manner in which the completion was funded was that Holdings obtained a loan of €22,540,000 from Anglo Irish Bank Corporation Plc, now Anglo Irish Bank Corporation Limited (Anglo). The balance of the purchase price, €5m, was to be paid by Holdings over two years and the liability of Holdings to the Hills was guaranteed by the Investors.

2.5 The security which Anglo obtained was a Mortgage Debenture dated 10th August, 2006 issued by Holdings in its favour. Additionally, the plaintiff guaranteed the liability of Holdings to Anglo and the guarantee was secured by a mortgage dated 10th August, 2006 made between the plaintiff of the one part and Anglo of the other part whereby the lands in Passage West were mortgaged to Anglo.

2.6 On completion, the Hills retained part of the shareholding in the plaintiff proportionate to the deferred part of the purchase price, but nothing turns on that for present purposes. What is of relevance is that, as part of the transaction, a licence agreement dated 10th August, 2006 was entered into between the plaintiff of the one part and a company owned by the Hills, which was originally incorporated under the name Florgant Limited but had changed its name to Haulbowline Industries Limited, that is to say, the defendant, of the other part (the 2006 Licence Agreement), whereby the lands registered on Folio 91623F of the Register of Freeholders, County Cork known as Passage West Docks, with the exception of a specified car park, were licensed by the plaintiff to the defendant pending an application for planning permission for the term expressed as follows:

> "1 year from 7th July, 2006 terminable on 3 month's notice after 9 months of the term and thereafter terminable on 3 month's notice from either party PROVIDED THAT in no event shall this licence persist after 31st March, 2008."

The permitted user was expressed to be the loading and unloading of cargo, warehousing and offices as had formerly been carried on in the previous twelve months. The licence fee payable was €1 per annum for the first year of the term and thereafter €1,000 per

month or such increased licence fee as might become payable.

2.7 Holdings, apparently, only discharged €2m of the purchase price left outstanding on completion of the transaction. In 2009 the Hills sued the Investors on the guarantee in the Commercial Court (Record No. 2009/1881S). The proceedings were compromised by a Consent dated 19th June, 2009 under which the Investors consented to judgment against them jointly and severally in the sum of €3,162,954.37 together with interest from 2nd April, 2009 until payment and the plaintiff's costs of the proceedings, to include reserved costs, to be taxed in default of agreement. There was a separate agreement ancillary to the Consent dealing with the method of payment of the sums outstanding. What is of significance for present purposes is that there was a further agreement of the same date which was expressed to be made between Holdings and the defendant (the Licence Variation Agreement), wherein it was provided as follows:

> "The terms of the licence in place between the parties hereto in respect of the Docklands, at Passage West dated 10th August, 2006 shall be altered to provide that [the defendant] shall be entitled to remain on possession of the said property for a period of not more than 3 years from the date hereof at a peppercorn rent and on the specific agreement that the terms regarding notice, that is to say 3 months notice on the part of either party shall remain."

It was further provided that –

> "in any event [the defendant] shall not be obliged to vacate the property until all such sums have been paid by [the Investors] to [the Hills] under an agreement dated 19th June, 2009."

That document was signed by Mr. Gregory Coughlan on behalf of Holdings. Holdings had not been a party to the 2006 Licence Agreement, nor did it have title to the lands at Passage West. Although Holdings and the defendant are represented as having been parties to the proceedings in the Commercial Court in the heading of the Licence Variation Agreement, that clearly was not the case.

2.8 On 15th January, 2010 Anglo appointed Kieran Wallace (the Receiver) to be receiver pursuant to the mortgage given by the plaintiff to Anglo and on the same day Mr. Wallace was appointed receiver under the debenture given by Holdings to Anglo. On 6th and 7th July, 2010 the Receiver served notice on the defendant, in which the 2006 Licence Agreement was recited, terminating the 2006 Licence Agreement as and from 8th October, 2010 and requiring the defendant to vacate the premises at Passage West on or before 8th October, 2010. The defendant remains in occupation of the premises.

2.9 Essentially, the purpose of these proceedings is to procure possession of the premises for the Receiver, as receiver of the plaintiff, from the defendant. It is pleaded in the statement of claim that the "purported" Licence Variation Agreement cannot bind the plaintiff as it was not a party to the same. Further, it is pleaded that it was void for want of consideration in circumstances where it enhanced the position of the defendant at the expense of the plaintiff by reason of the personal financial obligations of the Investors and not for any other reason. Further, it is pleaded that it is not valid without the approval of Anglo and that Anglo did not consent to it. For those reasons it is pleaded that the Licence Variation Agreement in no way varied the 2006 Licence Agreement.

2.10 The primary relief sought by the plaintiff is a declaration that the 2006 Licence Agreement was validly terminated by the service of notice of termination effective as of 8th October, 2010. Various forms of ancillary relief are claimed, including an order for possession of the premises.

3. Security for costs: legal principles

3.1 The legal principles which are applicable to an application for security for costs under s. 390 of the Companies Act 1963 (the Act of 1963), which, although not cited by the parties, is the statutory provision which governs an application by a defendant for security for costs against a plaintiff company on the basis that the plaintiff company will be unable to pay the defendant's costs if the defendant is successful in his defence, are well settled. It is convenient to set them out by reference to the recent judgment of this Court (Clarke J.) in *Connnaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7. In his judgment (at para. 2.1) Clarke J. quoted the test for determination of an application for security for costs set out by Morris P. in *Interfinance Group Ltd. v. KPMG Peat Marwick,* which was approved by the Supreme Court in *Usk and District Residents Association v. Environmental Protection Agency* [2006] 1 ILRM 363, in the following terms:

> "(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 with ought to cause the court to exercise its discretion not the make the order sought.

In this regard the onus rests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's liability 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.

The list of special circumstances referred to is not of course, exhaustive."

3.2 On the issue whether delay by a defendant seeking security for costs constitutes a reason for refusing to grant security, the relevant authorities were reviewed by the Supreme Court in *Hidden Ireland Heritage Holidays v. Indigo Services Ltd. & Ors*. [2005] IESC 38. In his judgment, Fennelly J. stated (at p. 122):

> "A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The Court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances, and, in the end, will seek a fair balance."

4. Security for costs: the issues

4.1 At the hearing of the application for security for costs it was accepted on behalf of the Receiver that the plaintiff is insolvent and that such insolvency was not caused by the matters at issue in these proceedings.

4.2 Accordingly, the issues which arise for determination on the defendant's application for security for costs are as follows:

(a) Has the defendant established that it has a prima facie defence to the plaintiff's claim?

(b) If the answer to question (a) is positive, has the plaintiff established that there are specific circumstances in this case which militate against the Court exercising its jurisdiction to order security and, in particular:

(i) Was there delay on the part of the defendant which would render it unfair to make the order?

(ii) Does any other special circumstance exist?

I will consider each of those issues in turn.

5. *Prima facie* defence?

5.1 It was submitted on behalf of the defendant that the Licence Variation Agreement was a continuation or extension of the 2006 Licence Agreement and that it was a logical consequence of it in the context where the deferred consideration payable by the Investors to the Hills had not been discharged. It was submitted that the Investors, as directors, had authority to enter into the Licence Variation Agreement. Further, it was submitted that they were not precluded from doing so by reason of the existence of the mortgage in favour of Anglo. At the time when it was executed, that is to say, on 19th June, 2009, no enforcement event had arisen under the Anglo mortgage, it was contended. Further, it was submitted that Anglo had constructive notice of the creation of the Licence Variation Agreement and that it is estopped from contending that it is not valid.

5.2 None of those propositions, in my view, stands up to scrutiny. It is worth reiterating the basic facts. The plaintiff owns the land at Passage West. The vast majority of the shares in the plaintiff are owned by Holdings, which in turn is owned by the Investors. The shares were purchased by the Investors, through the medium of Holdings, from the Hills and the Hills have received €24,540,000 of the consideration. All but €5m thereof was funded by Anglo and is secured by the mortgage in favour of Anglo. As regards the outstanding €3m due to the Hills, while Holdings was primarily liable for that sum, the Hills have procured the Consent dated 19th June, 2009 arising from the secondary liability of the Investors as guarantors. In essence, the intended effect of the Licence Variation Agreement was to gratuitously dispose of the use of the land at Passage West for an indefinite period until the Investors discharge the amount due by them to the Hills on foot of the Consent, because a peppercorn rent has no value. The intended effect, if legally permissible, would have benefited each of the Investors in his personal capacity. It would not have benefited the plaintiff, the owner of the lands, in any way. Having regard to the fundamental principles of company law, in my view, that intended effect is not legally permissible. It is only necessary to mention two of the basic principles of company law. First, the company, in this case, the plaintiff, has a separate and distinct legal personality from its members (*Salomon v. Salomon & Co. Ltd*. [1897] AC 22). Secondly, it has been settled law for over a century that a company, in this case the plaintiff, cannot spend money or dispose of property except for purposes which are reasonably incidental to the carrying on of the business of the company (*Re Greendale Developments Ltd*. [1998] 1 I.R. 8). I find it unnecessary to consider those basic principles of company law in any greater depth, nor do I consider it necessary to consider whether either s. 60 of the Act of 1963 or, indeed, s. 99 of that Act, which were the subject of submissions, are of relevance to the creation of the Licence Variation Agreement.

5.3 On the facts, Mr. Coughlan, on behalf of the Investors, purported to create the Licence Variation Agreement on behalf of Holdings. As I have stated, Holdings does not have title to the lands at Passage West. Further, even if they purported to do so in the name of the plaintiff, the Investors, whom I assume are the directors and shareholders of the plaintiff, would have no authority to bind the plaintiff to the terms of the Licence Variation Agreement, which would be *ultra vires* the powers of the plaintiff.

5.4 Even if the rights in favour of the defendant over the lands at Passage West secured by the mortgage given by the plaintiff were *intra vires* and validly created, given the terms of the mortgage by the plaintiff in favour of Anglo, they could not have been created without the prior consent of Anglo. It is expressly provided in the mortgage (clause 6) that the plaintiff is not entitled, without the prior consent of Anglo, which may be granted or withheld at Anglo's absolute discretion, to create or permit to subsist "any Encumbrance" on or affecting the land at Passage West the subject of Anglo's security. "Encumbrance" is broadly defined in the mortgage as including any "agreement . . .or other instrument creating or evidencing any rights over the relevant Mortgaged Properties in favour of any other party". There is no evidence before the Court that Anglo gave prior consent to the Licence Variation Agreement. There is evidence that over two months after the Licence Variation Agreement was executed, the consent of Anglo to it was sought. The response of Anglo, was that no consent would be given unless the defendant "is paying rent on a proper lease". There is no evidence before the Court of conduct on the part of Anglo which would estop it from contending that the purported Licence Variation Agreement was in breach of the terms of the mortgage. However, that is very much a subsidiary point because, in my view, the purported Licence Variation Agreement has no validity.

5.5 For the reasons set out above, in my view, the defendant has not established that it has a *prima facie* defence to the plaintiff's claim. I have come to that conclusion acutely conscious of the fact that a Court should be very cautious about reaching such a conclusion on an interlocutory application.

6. Delay/other special circumstance

6.1 As I have found that the defendant has not established that it has a prima facie defence to the plaintiff's claim, the remaining issues outlined at para. 4.2 above, strictly speaking, do not arise. However, for completeness, I would make the following observations.

6.2 On the facts of this case, I am of the view that there was not delay on the part of the defendant in bringing the application for security such as would tilt the balance against ordering security, if the defendant had established that it had a *prima facie* defence. The statement of claim, which comprehensively set out the basis of the plaintiff's claim, which was delivered on 16th March, 2011, was immediately followed by the application for admission to the Commercial Court which was unsuccessful. The only action taken by the plaintiff after the determination to refuse admission to the Commercial Court was the plaintiff's motion for judgment in default of defence. While it is reasonable to infer that the defendant's application for security was a reaction to the plaintiff's motion, I do not think that delay of over two months after delivery of the statement of claim before initiating the application for security, which I think

is the material period, when viewed in the context of the unsuccessful application for admission to the Commercial Court, was such as would militate against the making of an order for security for costs, if the defendant were otherwise entitled to it.

6.3 It is disclosed in the replying affidavit of the Receiver that the interest of Anglo in the security given by the plaintiff to it in the lands at Passage West was assigned to the National Asset Management Agency (NAMA) on or about 1st November, 2010 as part of the transfer of all such commercial property loans held by Anglo. It was further disclosed that NAMA approved the bringing of the application to have the proceedings admitted to the Commercial Court. It was submitted that it is in the public interest that the litigation is progressed and that a proper commercial return can be achieved from the secured property as soon as possible. While one would not take issue with that proposition, the private law rights of the parties are not superseded by public interest considerations.

7. Motion for judgment in default of defence

7.1 In accordance with usual practice, if the defendant wishes to defend these proceedings notwithstanding the conclusion I have come to that on the evidence before the Court there is no *prima facie* defence to the plaintiff's claim, I consider that, the defendant should be granted a short extension of time within which to deliver a defence, subject, however, to discharging the costs of the motion for judgment, which the defendant's delay in delivering the defence rendered necessary.

7.2 In the event that the matter proceeds, I would propose that it should be case managed with a view to procuring an early trial.

8. Orders

8.1 The defendant's application for security for costs will be dismissed. I will hear submissions on the issue of the costs of that application.

8.2 On the plaintiff's motion for judgment in default, the time for delivery of defence by the defendant will be extended for two weeks from today's date, and the costs of the motion will be awarded to the plaintiff.