[2017] IEHC 266

THE HIGH COURT

2016 No. 10682P

Between:

FIDES CAPITAL LIMITED

Plaintiff

– and –

ALCHEMY PROJECTS LIMITED

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 5th May, 2017.

I. Overview

1. This is an application for security for costs brought in the context of a case for, inter alia, specific performance or damages, pursuant to an alleged breach of contract.

2. The plaintiff and defendant are Irish-registered companies. According to its statement of claim, the plaintiff was retained by the defendant to provide professional services to Renewable Energy Dynamic Holdings Limited ('RedH') for the benefit of RedH's shareholders, including the defendant. An argument has arisen between the parties over the remuneration owing to the plaintiff, with the plaintiff relying in particular on cl. 3.3 of a 'Financial Advisory/Executive Services Agreement' dated 12th August, 2010, and signed by two individuals ostensibly acting for the plaintiff and defendant respectively. Under cl. 3.3 of that purported agreement (it is denied by the defendant that the agreement was entered into on the terms alleged or at all), remuneration falls to be calculated as a percentage of funds raised/consideration arising in the course of an anticipated funding processes. If the plaintiff is successful at trial, this arrangement has the potential to provide it with a lucrative return on such work as it claims to have done for the defendant.

3. The specific reliefs sought in the notice of motion are: (1) an order pursuant to s.52 of the Companies Act 2014 directing the plaintiff to provide security for the defendant's costs; (2) further, or in the alternative, an order pursuant to O.29, r.1 of the Rules of the Superior Courts 1986, as amended, that the plaintiff furnish security for the defendant's costs; (3) an order measuring the security to be given by the plaintiff for the defendant's costs and the form thereof; (4) an order staying the within proceedings until such time as security for costs is provided by the plaintiff; and (5) certain ancillary reliefs.

4. By way of guiding case-law, the court proposes to rely upon *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, as well as such other case-law as is referred to below. Those cases, applied in the context of the within proceedings, require the court firstly to determine whether (i) the defendant has established a *prima facie* defence, and (ii) the plaintiff is so financially challenged that it will not be able to pay the defendant's costs, if the defendant is successful.

II. Prima Facie Defence?

5. As to whether the defendant has established a *prima facie* defence, the defendant maintains, *inter alia*, that what it claims is but a purported agreement of 12th August, 2010, (a) was entirely contingent on the completion of a then proposed purchase of RedH by Enervest Capital Limited, and that (b) as that transaction did not proceed, cl. 3.3 is of no effect. There was what has been described in an e-mail of 6th July last written by Mr McCann (a director and, it seems, the prime mover within the plaintiff) an arrangement referred to by him as the "*roll-in*" arrangement which, it seems, he points to as the relevant transaction by which the percentage fee amount that he maintains to be owing under cl.3.3 falls now to be calculated. One or more expert witnesses will be called by the defendant at trial to contest that the "*roll-in*" arrangement offers a sound basis on which to invoke cl.3.3.

6. The court considers that in circumstances where (a) a defendant denies a contract to exist, (b) maintains that, if the contract exists, the events necessary for a clause to take effect have not in fact occurred, and (c) intends to call expert evidence that is supportive of proposition (b), that defendant has established a *prima facie* defence. Whether that defence will ultimately succeed is not, of course, a matter on which the court offers or holds any view.

III. Inability to Meet Defendant's Costs?

7. It does not appear to be seriously contested that the plaintiff *is* so financially challenged that it will not be able to pay the defendant's costs, if the defendant is successful. Were the contrary to be contested, there is nothing in the plaintiff's most recent publicly filed financial statements to suggest that it would be able to meet the costs of what looks likely at this time to be a 3-4 day trial, the costs of which will run to the hundreds of thousands of euro. (The defendant estimates that the party and party costs likely to be recoverable by it in the event that it is the eventual victor in these proceedings would be €274,500). The plaintiff, if one has regard to its latest filed accounts, does not have the funds to pay such a sum. There is, it is fair to note, a time-gap between the year to which the plaintiff's latest filed annual accounts relate and the present. However, if there has been some sea-change in the plaintiff's fortunes since those latest accounts were filed, and it is not suggested that there has, no evidence of this has been placed before the court.

8. By letter of 13th March, Mr McCann has offered a personal guarantee for the defendant's costs in the amount of €91,667. However, it seems to the court that there are at least two difficulties with the proposed personal guarantee arrangement. First, even if the court were minded to factor the personal guarantee arrangement into its considerations, no evidence of Mr McCann's personal financial position, and hence his ability to make payment under the guarantee, has been placed before the court. Second, the offer of a personal guarantee runs against the basic thrust of a security for costs application which, simply put, is 'if plaintiff company loses, plaintiff company can generally be expected to be liable for costs, and plaintiff company will have granted security for costs'; that is a very different proposition from 'if plaintiff company loses, plaintiff company can generally be expected to be liable for costs and, although plaintiff company has not granted security for costs, a portion of them may be recoverable from a third party who will need to be sued separately on his guarantee in the event that he does not pay upon demand.'

IV. Specific Circumstances Justifying Not Making the Orders Now Sought?

9. The court finds, for the reasons stated above, that the defendant has established a *prima facie* defence to the within proceedings and an inability on the part of the plaintiff to meet the defendant's likely costs. The onus therefore falls on the plaintiff to show that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. The plaintiff company points, in effect, to two special circumstances: first, that its impecuniosity is due to the alleged wrongdoing of the defendant; second, it seems, that the offer of the personal guarantee is a special circumstance. As to the second point, it seems to the court to fail for the reasons identified previously above as to the general unsuitability of the proposed personal guarantee arrangement. As to the first point, there is no trading history before the court to justify the claim that other valuable work could have been done in lieu of the work done for the defendant. Moreover, while time expended on work cannot be measured simply by reference to amount of paper generated thereby, it is perhaps of note that the amount of work purported to have been done by the plaintiff thus far can be contained within three A4 folders that sat easily on counsels' desk in the course of the hearing of the within application, a fact which is possibly suggestive of an availability for that other work of which there is no trading history to suggest has gone undone because of the workload imposed by the defendant.

V. Quantum of Security to be Ordered

10. Having regard to the foregoing, the court will order security for costs. But what is the quantum of security to be ordered? And does the omission of the word "*sufficient*" from s.52 of the Companies Act, 2014, in circumstances where that word appeared in its statutory forerunner, have the result that the court now enjoys a complete discretion as to the level of security to be ordered? In *Euro Safety and Training Services Ltd v. FÁS* [2016] IEHC 161, the court observed that the Oireachtas was unlikely to have intended that by dropping the word "*sufficient*" the courts should order security that is insufficient. However, the imbued meaning of terms like sufficiency and insufficiency, following the debate that took flight after the Supreme Court decision in *Lismore Homes Ltd v. Bank of Ireland Ltd* and ors [2001] 3 IR 536 is such that it is in truth preferable to eschew the use of any variants of same and to view the law simply as restored to the position before that terminology moved centre-stage post-*Lismore Homes* (albeit that *Lismore Homes* and other case-law continues to be of interest, save as regards the issue of sufficiency). Viewed so, the task of the court in the within application is as described in *Thalle v. Soares* [1957] IR 182 where Kingsmill Moore J., at 194, viewed security as not being intended "*as an indemnity against all costs or as an encouragement to luxurious litigation*", and as described in *Framus Ltd v. CRH plc* [2004] 2 IR 20 (post-*Lismore Homes*) where Murray J., at 60, refers to the courts navigating between the Scylla and Charybdis of "*ensuring that the security is not a mere token and at the same time not an obstacle to a full and fair disposal of the issues between the parties*." In reconciling these objectives, the usual approach prior to Lismore Homes was to order one-third of the amount of a defendant's likely costs, absent particular circumstances. The particular circumstance contended for here is that the plaintiff has never averred, nor has its counsel submitted, that if security for the full amount of the likely costs is ordered, this will collapse the proceedings. However, it seems to the court that the plaintiff has but proceeded on the basis that, having regard to pre-*Lismore Homes* authorities, one-third of costs should be sufficient by way of security, absent special circumstances. (In this last regard, the relatively recent decision of the Court of Appeal in *Flannery & Lexington Services Ltd v. Walters & Ors* [2015] IECA 147 makes clear that, even following the enactment of s.52, the court can (though not must, as was indicated obiter in *Euro Safety* by reference to the post-*Lismore Homes decision in Oltech (Systems) Limited v. Olivetti UK Ltd* [2012] IEHC 512) order security for all of the likely costs). Viewed in light of the foregoing, it does not seem to the court that a failure to make the averment/submission aforesaid is here a special circumstance that would justify the court ordering full security for costs. That would be to approach an order for security as though it were an "*indemnity against all costs*". By setting the security at one-third of €274,500, it seems to the court that, in the circumstances of this application, it would be setting security at a level which is neither an "*encouragement to luxurious litigation" nor a "mere token", but also not an "indemnity against all costs*" or an "*obstacle to a full and fair disposal of the issues between the parties*".

VI. Conclusion

11. For the reasons stated above, the court will, pursuant to s.52 of the Companies Act 2014: (1) direct the plaintiff to provide security for the defendant's costs; (2) measure the security in the amount of €91,500 (= €274,500 x 1/3), with the form of security to be determined after hearing further from the parties; and (3) stay the within proceedings until such time as the said security for costs is provided by the plaintiff in the required form.