THE COURT OF APPEAL

2014 No. 728

[Article 64 Transfer]

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN:

PAULSON INVESTMENTS LIMITED AND ALBERT ENTERPRISES LIMITED

PLAINTIFFS/APPELLANTS

AND

JONS CIVIL ENGINEERING LIMITED AND

P.J. EDWARDS & COMPANY LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan on the 8th day of June 2016

1. This is an appeal against an order of the High Court (Birmingham J.) of the 6th December, 2012, that the plaintiff furnished security for costs to each of the defendants. The order was made pursuant to a judgment in writing delivered on the 2nd November, 2012.

2. The orders of the High Court were made pursuant to s. 390 of the Companies Act 1963. It remains the applicable provision to the determination of the appeal notwithstanding the enactment of the Companies Act 2014.

3. There has been one significant and material development in the litigation which whilst indicated in the course of the hearing of the appeal occurred subsequent to the hearing. The Court has been informed that the plaintiffs have lodged €500,000 with their solicitors to be held to the credit of the action to meet any costs orders made against the plaintiffs in the substantive action by which I understand is meant following the full hearing. At the appeal hearing, it had been indicated on behalf of the plaintiffs that this would be done and the court directed that it should be told if such a sum was provided to its solicitors.

4. It is appropriate to note at the commencement of this judgment that the parties were in agreement that the figures which had been estimated for the defence costs of trial namely, €784,983 plus VAT in the case of the first defendant and €769,000.73 plus VAT in the case of the second defendant calculated on the basis of a twenty day hearing were simply estimates agreed for the purposes of the application for security for costs. It is agreed that they were estimates of the entire costs and were not intended to form the basis of the amount for which security would be ordered in the event that the defendants' applications were successful. The amount for which the order should be made was not in issue in the High Court and it appears that the parties had envisaged that if orders for security were made that the determination of the amount might be remitted to the Master.

5. In the course of the hearing I raised a question as to whether the amount had been estimated in accordance with the Supreme Court judgment in *SEE Company Limited v. Public Lighting Services Limited* [1987] ILRM 255, i.e. costs incurred after the demand for security was made. On the facts herein proceedings commenced on the 1st November, 2005 and the applications for security was made by the first defendant in April 2011 and by the second defendant in May 2011. Irrespective of the outcome of the substantive appeal, the parties, through their counsel at the hearing were in agreement that the part of the order made in the High Court which specifies the estimated amounts as the amounts payable would have to be vacated and in the event that the appeal against the order for security failed there would have to be a determination of the amount to be provided by reference to an estimate of costs after the date of demand for security.

Background to the proceedings

6. The first named plaintiff, Paulson Investments Limited ("Paulson") is the owner of a site at Dyer Street, Drogheda, beside the river Boyne. In 2000 it was decided that the site would be developed and the development would take place through the second named plaintiff Albert Enterprises Limited ("Albert"). Both companies are part of the Mirella Group of which Mr. William Smyth is a director and principal shareholder.

7. In 2000 there were discussions with the first named defendant Jons Engineering Limited ("Jons") in relation to a fixed price contract to construct the three storey basement of a proposed nine floor development on the site. Ultimately agreement was reached but no written contract entered into which contributes significantly to the complexity of the factual and legal issues in the proceedings. P.J. Edwards & Company Limited ("Edwards") the second named defendant is a specialist piling contractor who in response to a tender agreed to carry out piling works on the site. The plaintiffs retained Consulting Engineers, Hendrick Ryan and Associates who issued drawing specifications and instructions for the construction of the basement and associated piling works. Jons retained AGL Consulting to provide geo-technical design consultancy works.

8. Work commenced without any contractual documents being entered into. The first element of the works was the construction of what is referred to a secant pile wall around the full perimeter of the development site. There is a dispute as to whether this wall forms part of the temporary works or the permanent works with potentially different consequences as to the persons responsible. Jons went on site in September 2000 and Edwards entered on site and commenced piling work in February 2001. Almost immediately, problems ensued. The piling operations gave rise to settlement which exceeded parameters specified by Hendrick Ryan and Associates. Piling work stopped in March 2001. Further investigations were carried out, other expert engineers engaged and ultimately the defendants left the site in September and November 2001. The plaintiffs subsequently constructed a modified development

consisting of a seven storey over ground structure.

9. The initial proceedings relating to the works carried out on the site were plenary proceedings by Jons against Mr. William Smyth in 2001. Subsequently, in those proceedings, Jons applied to join Paulson and Albert as defendants and the proceedings appear to have reached the stage of delivery of an amended defence in 2009. In 2001, Edwards issued summary proceedings against Albert which were subsequently remitted to plenary hearing and the defence delivered by 2005. Neither of these proceedings has been set down for trial.

10. These proceedings commenced on the 1st November, 2005, with a contemporaneous delivery of a statement of claim. The claim against Jons is in contract and negligence. The claim against Edwards is in negligence alone. The total damages claimed are in the order of €25 million. Defences were delivered in 2007 and in 2008 voluntary discovery sought. There was either agreement or orders requiring the plaintiffs and Jons and Edwards to make discovery by different dates in 2008.

11. Edwards made its discovery by November 2008; the plaintiff completed its discovery by October 2010 and then in November 2010, brought a motion to strike out the defence of Jons for failure to make its discovery. Jons completed its initial discovery by February 2011.

12. In early 2011, the defendants became aware that the plaintiffs had entered NAMA and in February 2011, Jons requested security for costs and in May 2011 Edwards did likewise and both refused. Motions were issued in April and December 2011, respectively. Hearing of the two motions for security for costs and the plaintiffs motion to strike out Jons's defence for failure to make discovery, commenced on the 21st February, 2012 and adjourned on the fourth day, as counsel for Jons informed the High Court that certain missing records for the "Casa Grande Rig 26" which had been the subject of much discussion and comment had been found. Thereafter the hearing of the motions was adjourned to June 2012, further discovery made and affidavits sworn. The trial judge permitted cross examination of Mr. Pentony of Jons and Mr. Gogarty its solicitor on the application of counsel for the plaintiff. The hearing of the motions lasted a further four days. The trial judge delivered on the 6th December, 2012, a single judgment on both the applications for security for costs and on the application to strike out the defence of Jons. He refused the application to strike out and he made orders for security for costs.

13. This judgment is only concerned with the appeal against the decision to grant security for costs. Nevertheless it is of relevance to this appeal that the trial judge decided the application for security for costs contemporaneously with the motion to strike our for failure to make discovery and heard the matter in total over eight days based upon a significant number of affidavits and exhibits thereto including expert reports.

High Court judgment

14. The application was made pursuant to s. 390 of the Act of 1963 which provides:-

> "Where a limited 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 defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

15. As noted by the trial judge the applicable principles were not seriously in dispute. The applicant must establish by credible evidence that the respondent will not be able to meet an order for costs. It was agreed that on the estimate of costs for each of the defendants and the available financial information in relation to the plaintiffs, that the defendants had each discharged the onus of so establishing.

16. The defendants, as applicants then must show that each has a *prima facie* defence to the plaintiffs' claim. If a *bona fide* defence is established then unless the plaintiff can establish the existence of some special circumstances which would justify the refusal of an order for security for costs the order pursuant to s. 390 will be made.

17. In the High Court each defendant contended that it had a *prima facie* defence or as has been sometimes put, a sustainable defence to the plaintiffs' claim against it. That was hotly disputed by the plaintiffs.

18. The plaintiffs submitted that, in any event, there were special circumstances and in the High Court identified those as:-

> (a) "Inordinate delay on the part of the defendants in seeking security for costs, during which period of delay the plaintiffs incurred considerable costs particularly in relation to discovery"; and
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> (b) "That there has been default on the part of the first named defendant in complying with the agreement in relation discovery. This contention was made as an alternative to the application to strike out. The default is such that it is contended that the defence of the first named defendant should be struck out, but if that is not done, then in any event the order for security for costs should be refused."

19. The trial judge concluded that each of the defendants had made out in accordance with the applicable legal principles a *prima facie* defence to the plaintiffs' claim. He then considered the special circumstances contended for by the plaintiff and rejected both the delay and the failures of the first named defendant in relation to discovery as constituting special circumstances which would justify the refusal of the order sought.

Appeal

20. The plaintiffs in their appeal submit that the decision of the trial judge both on *bona fide* defences and the absence of special circumstances should not stand.

21. In pursuing the appeal against the determination of the trial judge that each of the defendants had made out a *prima facie* defence it is not contended that the trial judge erred in the legal approach to the consideration of the issues save that it is submitted that he failed to engage with certain of the evidence adduced and in particular certain of the expert evidence adduced by the plaintiffs.

22. The trial judge in a very careful judgment identified the standard required to be met by each defendant in accordance with what I had stated in an ex tempore judgment in *Tribune Newspapers v. Associated Newspapers Ireland t/a The Irish Mail on Sunday* (Unreported, High Court, Finlay Geoghegan J., 25th March, 2011):-

> ". . . in my judgment, what is required 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."

23. The trial judge also referred to a number of other authorities which indicate that once the court is satisfied that the defendant has made out a *prima facie* defence it is not the function of the court to assess the strengths or weaknesses of the parties' respective cases. He also expressly considered the plaintiffs' submission that the defendants had failed to deal with what was termed "critical evidence" from a Mr. Luby of SLR Global Environment Solutions and his conclusion that ground conditions on site were not unforeseen in the context of the Supreme Court decision in *Hidden Ireland Heritage Holidays Limited t/a The Hidden Ireland Association v. Indigo Services Limited and Others* [2005] IESC 38, [2005] 2 I.R. 115.

24. The trial judge having considered the *prima facie* defences of each of the defendants contended for concluded that on the evidence adduced by the defendants on the motions and the legal arguments relied upon, notwithstanding the evidence and submissions of the plaintiff that they did meet the threshold of a *prima facie* defence in accordance with the relevant authorities.

25. The trial judge whilst he reached that conclusion expressly at para. 42 recognised that he may not have referred to all the issues canvassed by the defendants which they relied upon as establishing a *bona fide* defence at this stage and then stated:-

> "42. . . . For my part, I find myself in a position very similar to that described by Clarke J. in *Parolen Limited v. Doherty & Lindat Limited* (Unreported, High Court, Clarke J. 12th March, 2010). In the course of his judgment, Clarke J. had this to say:-
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> > 'There are very many issues both of law and fact which will need to be resolved before the case can come to a proper conclusion. It does not seem to me appropriate to enter into anymore detailed analysis of the legal principles at this stage for the trial is the best place to come to a fair conclusion on these matters. Suffice it to say that I am satisfied that there is a possibility that Mr. Doherty may succeed in persuading the court that, both on the law and on the facts, circumstances are such that he is not obliged to account to *Parolen* for the option agreement which he has entered into with the purchaser. In these circumstances, I am satisfied that Mr. Doherty has made out an arguable case or *prima facie* defence.'
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> 43. As Clarke J. was, I am of the view that there are very many issues both of law and fact which will need to be resolved before the case can come to a proper conclusion. Like him, I am of the view that it is not appropriate to enter into any more detailed analysis of the legal principles at this stage for the trial is the best place to come to a fair conclusion on these matters. It is possible that the defendants will succeed on the law and the facts and possible that the plaintiff's claim will fail. In the circumstances, I am satisfied that both defendants have made out an arguable case and accordingly, it is necessary to consider whether the plaintiffs have established special circumstances by virtue of which they ought not to be required to provide security for costs."

26. Whilst the trial judge used the term "arguable case" in para. 43 it is clear from the authority of the judgment that he was using the term in the sense of a *prima facie* defence of a standard required by the authorities.

27. Counsel for the plaintiffs on appeal accepted, as he must do on the authorities, that the court cannot consider the strengths or weaknesses of the respective positions of the parties if the defendant meets the *prima facie* threshold. Nevertheless in able and detailed submissions, but more appropriate in my view to the trial of the proceedings he sought in essence to persuade the court of the inability of the defendants to succeed in their defence, principally by reference to evidence to be adduced on behalf of the plaintiffs and the strength of the plaintiffs' case.

28. With the exception of one issue to which I will refer, I have concluded that there is no basis upon which this Court should interfere with the conclusion reached by the trial judge in accordance with the correct legal principles and on a consideration, in some detail, of the issues relating to different aspects of the *prima facie* defences relied upon by each of the defendants. The absence of any written contractual provisions between the parties; a significant factual disputed issue as to whether the secant piles form part of the permanent or temporary works; disputes as to the responsibilities of different parties for different aspects of the work and the significant factual disputes in relation to the site investigations and alleged unforeseen ground conditions make the resolution of the plaintiffs' claims and the defences of each defendant thereto complex both in the determination of many disputed factual issues and the consequent legal responsibilities for the failure of the piling works and the damage caused thereby to the site.

29. The one issue in which it appears that the trial judge may have been in error in concluding that Jons had established a *prima facie* defence related to the contention which it sought to make that it contracted with Mr. Smyth personally and not with the second named plaintiff. The Court at the appeal hearing drew the parties' attention to the fact that Jons had not pleaded in its defence that it had contracted with Mr. Smyth rather than with either of the plaintiffs. Counsel for both parties admitted that no one had had adverted to this in the High Court. In the absence of such a defence being pleaded it does not appear that it ought to have been considered as available to the defendants on the application for security for costs as a *prima facie* defence. Nevertheless my conclusion on that issue does not alter my overall view that there is no basis on appeal to interfere with the conclusion reached by the trial judge that the first named defendant, Jons, had made out a *prima facie* defence. Certain of the other *prima facie* defences of Jons identified by the trial judge also relate to the entirety of the claim. In particular the defence in reliance upon the contention that the piling work should properly be considered as forming part of the permanent or temporary works for the purposes of the IEI standard form of contract which provisions are contended to apply to the relationship between the plaintiffs and the first defendant.

Special circumstances

30. The applicable legal principles are not in dispute. What constitutes a special circumstance is not a closed class: *West Donegal Land League Ltd. v. Údarás Na Gaeltachta and Others* [2006] IESC 29, [2007] 1 ILRM 1. The onus of establishing special circumstances is on the plaintiff. Special circumstances must be considered by the court in the context of the particular facts of the individual case.

31. In an application to which s. 390 applies, the court is not bound to make an order for security once the *prima facie* defence and inability of the plaintiff to meet the costs of the defendant if successful is established: *SEE Company v. Public Lighting Services* [1987] ILRM 255. It may refuse to do so if special circumstances are made out. However the discretion given the court to refuse an order for security is one which must be exercised in the interests of justice. On the one hand as has been repeatedly stated the requirement for the provision of security for costs by a limited company serves a legitimate aim and purpose both to protect against the potential abuse of the privilege of limited liability and also to protect defendants against litigation costs would be irrecoverable where they can establish that they may succeed in their defence. However, such an order also risks impeding the constitutional right

of access to the courts if the security fixed results in a limited company being incapable of pursuing its claim.

32. It is relevant to the exercise of the discretion in this case that in accordance with the decision of the Supreme Court in *Lismore Homes Limited (In Receivership) v. Bank of Ireland Finance Limited* [1992] 2 I.R. 57, it is agreed between the parties that any order for security made pursuant to s. 390 of the 1963 Act, must be for the full amount of the estimated or probable costs of the defendant after the date upon which the application for security was made. The court does not have a discretion to make an order for security of a lesser amount.

33. In the High Court the plaintiff only contended for two grounds of special circumstances, delay and the first named defendant's failures in its obligations in relation to discovery. Delay applied to both defendants. The period of delay identified by the plaintiffs was only between January or early February 2010 and February 2011, in the case of the first named defendant. The plaintiffs submitted that accounts for the year ended 31st March, 2009, had been filed in the company's registration office on the 26th January, 2010, and that those accounts which showed a combined net asset position of €1.23 million should have given rise to concern for the defendants and been further investigated. Even if those accounts ought to have been considered and the defendants should be considered as having been in a position to bring an application in 2010 the trial judge concluded that the period of approximately one year's delay was not such as to justify the refusal of an order for security for costs. He took into account that in that period the plaintiffs had completed its discovery in October 2010 and expended €125,000 on preparing its discovery.

34. On the second special circumstance whilst the trial judge held that the first defendant had been in breach of its obligations nevertheless he also found as a fact that there was "no element of deliberate suppression of documentation or any deliberate attempt to disadvantage the plaintiffs by withholding documents until late in the day. What occurred happened as a result of human error, culpable error certainly, but not as a result of the pursuit of an intentional strategy". The first defendant's discovery which had wrongly not included these documents was completed in February 2011. The trial judge concluded that the punishing of the first named defendant by withholding an order for security for costs would be "an entirely disproportionate response".

35. The special circumstances relied upon on appeal now include a very significant additional matter namely, the fact that there has been lodged with the solicitors for the plaintiffs €500,000 to be held to the credit of the proceedings for the purpose of discharging any order for costs of the substantive trial (I understand this not to include interlocutory orders already granted) award in favour of either defendant against either of the plaintiffs.

36. The lodgement of a sum of money in such a way as to make it exclusively available for the purpose of discharging orders for costs in favour of the defendants if successful in the defence of these proceedings is, in my view, a special circumstances which it is permissible for this Court on the hearing of the appeal to take into account. I recognise that the amount is as a matter of probability less than the full amount of the probable amount of security if the High Court order were upheld and the amount was to be determined upon the basis of the estimated twenty day trial but only costs incurred after the respective dates of application for security. The work on discovery by each defendant was or ought to have to have been completed prior to that date which will have involved substantive costs. Nevertheless €500,000 is a considerable sum.

37. The circumstances of these proceedings which the Court must now take into account include that they are proceedings which commenced in 2005 and which relate to events in 2001 in respect of which there are also plenary debt proceedings. These proceedings are at an advanced stage as pleadings are closed and significant and expensive discovery completed. Whilst they are not in the commercial list, nevertheless they are proceedings which would be appropriate for case management and an application to that effect can be made by any of the parties to the High Court.

Conclusion

38. I have concluded that the plaintiffs in lodging €500,000 with their solicitors have discharged the burden of establishing that there are now special circumstances which when viewed in the context of the stage reached in the proceedings in the High Court is such that it is in the interests of justice between the plaintiffs and the defendants in these proceedings that the Court should allow the appeal and vacate the order for security for costs made in the High Court.

39. As the notification to the court that the monies had been lodged with the solicitor for the plaintiffs occurred subsequent to the date of hearing, I have also concluded that the Court should hear the parties as to any particular requirements in terms of undertakings or acknowledgements by the solicitor for the plaintiff in relation to the terms upon which they now hold the monies to satisfy the intention that those monies be exclusively available for the purpose of discharging any orders for costs in favour of either defendant against either plaintiff following the determination of these proceedings in the High Court.