

THE HIGH COURT

2005 No. 126 COS

**IN THE MATTER OF THE COMPANIES ACTS 1963-2003
AND IN THE MATTER OF PDC (MOATE) LTD.
(IN OFFICIAL LIQUIDATION)**

BETWEEN**PDC (MOATE) LTD. (IN OFFICIAL LIQUIDATION)****PLAINTIFF****AND****ALLIED IRISH BANKS PLC. AND LIAM CONROY****DEFENDANTS****Judgment of Ms. Justice Finlay Geoghegan delivered on the 25th day of July, 2008**

1. On 12th May, 2005, an order was made for the winding up of PDC (Moate) Ltd. ("the Company") and Mr. Tim Regan was appointed Official Liquidator thereof.
2. By notice of motion dated 9th March, 2007, the Official Liquidator brought an application seeking orders, *inter alia*, pursuant to s. 280 (1) of the Companies Act, 1963 ("the Act"), for the purposes of determining an issue which he contended had arisen in the winding up as to the interest, if any, of the Company in lands at Westmeath which had been acquired in the name of Mr. Liam Conroy and the respective priorities of the Company's interest in the lands with interests claimed by Allied Irish Banks plc., and a Mr. Desmond Mills.
3. On 12th November, 2007, I made an order directing the trial of certain issues for the purpose of determining the matters raised by the Official Liquidator and directed that the Company (the Official Liquidator suing in its name and on its behalf) be the plaintiff on the issues and Liam Conroy, Allied Irish Banks plc., and Desmond Mills be the defendants.
4. Mr. Mills has subsequently decided not to participate further in the proceedings on the basis that he is not contending for any interest in priority to any interest of the Company in the lands. By order of 3rd March, 2008, he was struck out of the proceedings.
5. From the outset of the application by the Official Liquidator, Allied Irish Banks plc. objected to the form of procedure, asserting that any such claim by the Company should be brought by way of plenary proceedings and also indicated an intention to make an application for security for costs pursuant to s. 390 of the Companies Act, 1963. A motion seeking such an order was issued on 31st January, 2008. It has not pursued the objection to the form of procedure.
6. In the meantime, by order of 3rd March, 2008, I directed that any other application for an order pursuant to s. 390 of the Companies Act, 1963, be issued and served no later than 7th April, 2008. No such motion has been issued.
7. Section 390 of the Act of 1963 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."
8. It is not in dispute on this application that trial of the issues set down for determination by order of the court in the motion brought by the Official Liquidator is an "other legal proceeding" within the meaning of s. 390 of the Act of 1963 and that the Company is the plaintiff in that proceeding. Whilst it is not in dispute that the Company is insolvent, counsel for the Official Liquidator did submit that, as there is now €115,926.47 standing to the credit of the liquidation account, AIB has not established that the Company will be unable to pay its costs if it is successful in its defence. Counsel for AIB submits that there is no clarity as to what other sums might have to be paid out of the liquidation account in priority to any order against the Company, as plaintiff on this issue. I accept the submission on this issue made on behalf of AIB. It is not in dispute that the Company is insolvent. The monies standing to the credit of the Liquidation account are subject to the statutory regime, both by reason of the Companies Acts and the Rules of Court applicable to payments in a winding up. Whilst it may happen that an Official Liquidator would be ordered to pay costs awarded against him personally, or the company in liquidation, arising out of proceedings in the course of the liquidation in priority to certain other liabilities, there is no mandatory requirement to this effect.
9. Accordingly, I am satisfied on the facts herein that AIB has established as a matter of probability that the Company will be unable to pay its costs if it is successful in its defence on the issues to be tried, for the purposes of s. 390 of the Act of 1963.
10. In accordance with the well established case law, AIB, as applicant for an order for security for costs, must, in addition, establish that it has a *prima facie* defence to the plaintiff's claim. The primary claim of the Company against AIB is that its alleged interest in the lands ranks in priority to such interest as AIB may have by reason of mortgages created by Mr. Conroy in its favour over the lands. Counsel for AIB submits that it has a *prima facie* defence to that claim. AIB contends that Mr. Conroy created an equitable mortgage and subsequently a first legal mortgage in favour of AIB over the lands prior to the appointment of the Official Liquidator to the Company. It is accepted that the registration of the legal mortgage in the Registry of Deeds took place after the commencement of winding up, but it is contended that, as AIB had no notice of any equitable interest now claimed by the Company, the subsequent registration in the Registry of Deeds of the legal mortgage does not affect the priority of its interest over that of the Company in the lands.
11. Counsel for the Company did not dispute that AIB had made out a *prima facie* defence, but rather sought to rely upon the special circumstances of the trial of these issues and also sought to rely upon the delay of AIB in bringing the application for security for costs.
12. It does not appear to me that the objection on grounds of delay is made out. The trial of the issues which are now the proceedings in respect of which the security for costs is sought only commenced as a separate proceeding, with the Company as plaintiff, with the order of the High Court made on 12th November, 2007. Prior to that there was an application by the Official Liquidator in respect of which no application for security for costs could be made. AIB had already indicated an intention to apply for security for costs and issued a motion to that effect, dated 31st January, 2008. Those facts are quite different to the facts in *S.E.E. Co. Ltd. v. Public Lighting Services Ltd.* [1987] I.L.R.M. 255 and *Hidden Ireland Heritage Holidays Ltd. v. Indigo Services Ltd.* [2005] 2

I.R. 115, relied upon by the Company.

13. The special circumstances relied upon by counsel for the Company is that it is seeking to vindicate a public interest in the sense of the interest of the general body of creditors in this liquidation. It does not appear to me that the interest of creditors in a liquidation can, as such, be regarded as a public interest. It is the private interest of the creditors in the instant liquidation. It is envisageable that there could be special circumstances arising in a winding up which might well justify the court refusing an application for security for costs, where the plaintiff is the company in liquidation. This might be particularly so if the Official Liquidator contended that the proceedings could not be pursued if an order for security was made. No such contention has been made on behalf of the Official Liquidator, in this liquidation. As already stated, he has a sum in excess of €100,000 standing to the credit of this liquidation. If an order for security for costs is made against the Company, then it would be a matter for the Official Liquidator, having taken the appropriate legal advice as to whether he should use some of the funds now standing to the credit of the liquidation for this purpose, and, if necessary, bring an application to the court for approval for him to so do.

14. Counsel for the Official Liquidator also relied upon the fact that two of the Directors of the Company had included the lands the subject matter of the issues as an asset of the Company in the statement of affairs as constituting special circumstances which should justify the Court refusing the order for security for costs. Even if such fact did constitute special circumstances (which I have not determined) it is primarily relevant to the claim against Mr Conroy who has not sought security notwithstanding having been given an opportunity to do so. This was probably wise having regard to his close connection with the Company.

15. On the facts of this application, I am not satisfied that there exist any special circumstances which would justify the refusal of the order sought by AIB as it has established a *prima facie* defence and the probability that the Company will be unable to pay its costs if it successful in its defence.

16. There will be an order pursuant to s. 390 of the Companies Act 1963, directing PDC (Moate) Ltd. (in official liquidation) to give security for costs for the trial of the issues set down for hearing by order of the High Court of 12th November, 2007, and an order staying those proceedings as against AIB until such security is given. The costs should be on the basis of a proceeding commenced by the order of 12th November, 2007.

17. As already stated, no application for security for costs was brought by or on behalf of Mr. Conroy, who is also a defendant, to the issues set down by order of 12th November, 2007, notwithstanding that he was given an opportunity to bring such an application. The order now made does not, of itself, preclude the Company (in liquidation) from proceeding with the claim against Mr. Conroy. This decision does not put a stay on the claim against Mr. Conroy. However, the clear intention of the order of 12th November, 2007, was that the issues as between the Company and Mr. Conroy, and the Company and AIB, be heard and determined together. My recollection is that it was agreed between the parties that the overlap between the factual issues of both claims made this the most efficient method of determining all the relevant issues.

18. The Official Liquidator will now have to consider whether he should provide security for costs. This should be done within a reasonable time frame. In practical terms, the claim against Mr. Conroy cannot be progressed having regard to the terms of the Order of 12th November, 2007. In the event that no security is provided, the Order of 12th November, 2007 will have to be reconsidered.