

## THE HIGH COURT

[1989 No. 7315P]

## BETWEEN

**SUPERWOOD HOLDINGS PLC, SUPERWOOD LIMITED, SUPERWOOD EXPORTS LIMITED, SUPERCHIP LIMITED, SUPERWOOD INTERNATIONAL LIMITED AND SUPERWOOD (UK) LIMITED**

PLAINTIFF

**AND**  
**SUN ALLIANCE AND LONDON INSURANCE PLC T/A**  
**SUN ALLIANCE INSURANCE GROUP,**  
**PRUDENTIAL ASSURANCE COMPANY LIMITED,**  
**CHURCH AND GENERAL INSURANCE COMPANY LIMITED**  
**AND RAYMOND P. MCGOVERN AS LLOYDS UNDERWRITERS**  
**SOLE REPRESENTATIVE REPUBLIC OF IRELAND**

DEFENDANTS

**Judgment of the Honourable Mr. Justice Quirke delivered the 26th day of April 2006.**

This is an application made on behalf of the first, second, and third named defendants for an order, pursuant to the provisions of S. 390 of the Companies Act, 1963, directing that the plaintiffs furnish security for the first, second and third named defendants' costs of an application to be made on behalf of the plaintiffs for an order, pursuant to O. 99 r. 38(3) of the Rules of the Superior Courts, to review an order for taxation of the plaintiffs' costs made by the Taxing Master on the 17th December, 1997. The first, second, and third named defendants also seek consequential ancillary relief.

**Relevant Facts**

1. The substantive claim made on behalf of the plaintiffs in these proceedings was for damages for loss and damage sustained by the plaintiffs as a result of the refusal of the first, second and third named defendants to indemnify the plaintiffs in respect of their losses arising out of a fire which occurred on the plaintiffs premises on 26th October, 1997.

2. The substantive proceedings were first heard in the High Court in the early 1990s. After a hearing which continued for a period of 116 days the plaintiffs' claim against the defendants was dismissed.

3. On 27th June, 1995, an appeal on behalf of the plaintiffs to the Supreme Court was upheld and the issue of liability in the proceedings was determined in favour of the plaintiffs. The proceedings were remitted to the High Court solely for the purpose of assessing the damages to be paid by the defendants to the plaintiffs.

The plaintiffs were awarded their full costs of the proceedings in the High Court and in the Supreme Court.

4. Before December of 1996, (and prior to taxation by the plaintiffs of the costs awarded to them by the Supreme Court), the defendants paid to the plaintiffs the sum of IR£1,000,000 on account of those costs. The balance of the costs to which the plaintiffs were then entitled was determined by the Taxing Master in two rulings dated 17th December, 1997.

The plaintiffs, being dissatisfied with the decisions of the Taxing Master lodged objections thereto pursuant to O. 99 r. 38(1) of the Rules of the Superior Courts. Those written objections were lodged on 19th July, 1999.

5. No further steps were taken by the plaintiffs to advance their objections until 13th February, 2001, when the plaintiff applied to the Taxing Master (a), for leave to extend the time limited for the filing of written submissions and (b), for interim certificates of taxation.

6. On the 1st March, 2001, the Taxing Master refused to extend the time limited for filing written submissions. He adjourned the plaintiffs' application for interim certificates for further hearing at a later date. He also adjourned to the same date a concurrent application then made on behalf of the first, second and third named defendants to strike out the plaintiffs' objections.

On the 15th July, 2002, the plaintiffs formally withdrew their application for interim certificates of taxation and requested a date for the hearing of their objections.

7. On 19th November, 1996, the first, second, and third named defendants lodged a sum of IR £3,152,751.00 to the plaintiffs' claim. On the same day, the fourth named defendant lodged the sum of IR £1,600,000.00 to the plaintiffs' claim.

The substantive proceedings came again before the High Court (Smyth J.) on 19th February, 1997, for the purpose of determining the damages to which the plaintiffs were entitled. That hearing continued for 281 days.

In April, 1998 during the course of the proceedings the plaintiffs agreed with the fourth named defendant to accept the sum of IR£3,000,000.00 in full and final satisfaction of the plaintiffs claim against the fourth named defendant. That sum was agreed and deemed by those parties to include all costs incurred by the plaintiffs in prosecuting their claim against the fourth named defendant.

8. In April, 2001 the High Court (Smyth J.) assessed the damages to which the plaintiffs were entitled at IR £314,940. Having taken into account the payment of IR £3,000,000 made by the fourth-named defendant to the plaintiffs the court applied the provisions of s. 17 (2) of the Civil Liability Act, 1961 to the award and reduced it to nil.

The plaintiffs having failed to recover damages in excess of the lodgement made on behalf of the first, second, and third named defendants; the High Court awarded the plaintiff their costs of the assessment of damages against the first, second, and third named defendants up to and including the date of lodgement on the 19th November, 1996. Thereafter the court awarded the first, second, and third named defendants their full costs of the action against the plaintiffs.

In consequence the first, second, and third named defendants became entitled to the entire of their costs of the 281 day hearing between 19th February, 1997 and 3rd March, 2000, together with all costs incurred by the first, second, and third named defendants between 19th November, 1996 and 19th February, 1997.

9. The order of the High Court (Smyth J.) was appealed by the plaintiffs to the Supreme Court. On the 8th February, 2002, the High Court made an order directing the plaintiffs to furnish security for the first, second, and third named defendants' costs of defending

the appeal. That order of the High Court directing security for costs was upheld on appeal to the Supreme Court.

10. On 30th October, 2002, the Master of the High Court fixed the amount of security for costs in the sum of IR £1,592,102.56.

Applications to set aside that order were dismissed by the High Court (Peart J.) on 2nd April, 2003 and by the Supreme Court on 17th October, 2003. The plaintiffs were ordered to furnish security within three months from 16th October, 2003.

11. On the 15th March, 2004, on the application of the first, second, and third named defendants, the Supreme Court struck out at the plaintiffs' appeal against the order of the High Court (Smyth J.) made in April, 2001 in the substantive proceedings.

12. On 19th July, 2002, the Taxing Master directed the parties to lodge written submissions in relation to the remaining issues for determination by the Master.

On the 1st, 2nd, and 3rd July, 2003, the objections made by the plaintiffs to the rulings of the Taxing Master were heard in full. On 16th January, 2004, the Taxing Master delivered his judgment. He wholly disallowed and rejected the objections lodged on behalf of the plaintiff.

13. By Notice of Motion dated 4th February, 2002, the plaintiffs applied for an order pursuant to the provisions of O. 99 r. 38(3) of the Rules of the Superior Courts to review the order for taxation of the plaintiff's costs made by the Taxing Master.

By Notice of Motion dated 9th May, 2005, the first, second, and third named defendants have applied for the relief which has been sought herein.

14. Messrs O'Neill and Company, legal costs accountants estimate that the likely sum which the first, second, and third named defendants will be awarded on taxation of the costs which they have been awarded will be a sum in excess of €5,000,000. Taxation of the costs awarded will attract an additional liability of 6% in respect of court duty together with further fees. These additional costs of taxation can be reasonably estimated in the region of €500,000. The plaintiff companies are insolvent.

### **The Law**

Section 390 of the Companies Act, 1963 provides as follows:

*"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."*

In *Gannon v. Flynn* 3 I.R. 531 [2001] the Supreme Court (Geoghegan J.) held that a review before the High Court of an order of the Taxing Master was not part of the taxation of the costs but a

*"...procedure under O. 99, r. 38(6) whereby after the determination by the High Court the matter has to be remitted to the respondent to complete the taxation in accordance with the decision of the court and to issue a final certificate of taxation." (at p. 534).*

I respectfully adopt that conclusion. A review of a decision of the Taxing Master under O. 99 r. 38 is a separate and distinct proceeding authorised by the Rules of the Superior Courts and commenced by Notice of Motion to the High Court.

Order 99 r. 38(4) describes the procedure which must be followed where such an application is to be made.

I am satisfied that a review by the High Court of a decision of the Taxing Master pursuant to the provision of O. 99 r. 38 of the Rules of the Superior Courts comes within the definition of "...other legal proceedings" within the meaning ascribed to those words by s. 390 of the Companies Act, 1963.

Since the review of the taxation which is the subject of this application comes within that definition this court has jurisdiction to make an order requiring the party seeking the review to lodge security for costs on such terms as the court may consider necessary.

Mr. Forde S.C on behalf of the plaintiffs has quite properly, acknowledged that the court has such jurisdiction and has not sought to argue to the contrary.

### **Security for Costs – Applicable Principles**

The principles applicable to applications for orders directing the furnishing of security for costs are well settled. They have been usefully summarised by the High Court (Morris P.) in *Interfinance Group Ltd. v. KPMG Peat Marwick* (Unreported, High Court, 29th June, 1998) in the following terms:

*"there is an onus on the moving party the defendant to establish (a) that he has a prima facie defence to the plaintiff's claim and (b) that the defendant will not be able to pay the defendant's costs if successful in his defence.*

*On establishing these two facts then the order sought should be made unless it can be shown that there are specific circumstances in the case which would cause the court to exercise its discretion not to make the order sought.*

*Such circumstances might be;*

*(I) that the plaintiff's inability to discharge the defendants costs of successfully defending the action flow from the wrong allegedly committed by the parties seeking the security or*

*(II) there has been delay by the moving party in seeking the relief now claimed.*

*(III) Some other circumstances which might arise in the case."*

In the event that the above facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise discretion not to 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 such cases where the plaintiffs inability to discharge the defendants costs of successfully defending the action concerned flow from the wrong alleged 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.

### **Decision**

On the evidence the first, second, and third named defendants have been awarded the costs of a trial which continued for a period of 281 days in the High Court between 1997 and 2001.

Mr. Durcan, solicitor on behalf of the first, second, and third named defendants has averred that he has not as yet sought to tax those costs because the plaintiffs are insolvent. He has instructed Messrs O'Neill and Company, legal costs accountants to ascertain the likely sum which the first, second, and third named defendants will be awarded on taxation of the costs which they have been awarded. Messrs O'Neills have estimated that the costs will be taxed in a sum in excess of €5,000,000.

Mr Durcan has also averred that taxation of the costs awarded will attract an additional liability of 6% in respect of court duty together with further fees. He estimates that these additional costs of taxation can be reasonably estimated in the region of €500,000. He points to the fact that the plaintiff companies are all insolvent and says that the first, second and, third defendants have no prospect of recovering such an additional costs (or, indeed any costs), from the plaintiffs.

The decision of the Taxing Master which the plaintiffs now seek to review is a decision which calculated (i), the costs which the plaintiffs were awarded in respect of substantive proceedings which continued for 117 days in 1991 and (ii), the plaintiffs' successful appeal to the Supreme Court. Those costs were taxed at a combined total sum of €1,595,118.60. The sum of €1,259,738.00 (IR1.000.000), was paid to the plaintiffs solicitors on account by the defendants in December of 1996. The sum of €335,380.80 remains payable to the plaintiffs on foot of the order for taxation.

It is contended on behalf of the first, second, and third named defendants that, on the evidence they are entitled to a sum reliably estimated to be in excess of €5,000,000 from the plaintiffs on foot of final orders for costs from the Supreme and High Court. It is argued that this sum is far in excess of anything which the plaintiffs will be enabled to recover from the first, second, and third named defendants on foot of the award for costs which they obtained from the Supreme Court on 25th June, 1995.

Those costs have been calculated by the Taxing Master in the amount of €1,595,118.60. Only €335,380.80 of that sum remains unpaid. The final decisions of the Taxing Master were made after hearings which extended over a total of some fifteen days.

The prospect of the plaintiffs successfully establishing in the High Court that the Taxing Master's decisions were in error by a margin in excess of €5,000,000 must be regarded as remote in the extreme.

It is contended on behalf of the plaintiffs that the defendants are not entitled to set off against the award of costs made in favour of the plaintiffs in 1995, the subsequent award of costs made in favour of the first, second and third named defendants in 2001.

Order 99 Rule 37,(14), of the Rules of the Superior Courts provides as follows;

*"In any case in which a party entitled to receive costs is liable to pay any costs to any other party, the Taxing Master may tax the costs such party is liable to pay and may adjust the same by way of deduction or set-off"*

It is argued by Mr Forde S.C. that, as a matter of law, the first, second and third named defendants will not be entitled to recover any of the costs which they have been awarded against the plaintiff until they have first taxed those costs. He says that the costs awarded to the first, second, and third named defendants cannot be set off against the costs awarded to the plaintiffs because no costs are, as yet recoverable by the first, second and third named defendants from the plaintiffs.

I do not accept that contention. The jurisdiction of this court in respect of orders requiring security for costs is discretionary.

If the plaintiffs are permitted to pursue their claim for a review of the decision of the Taxing Master without lodging any security for costs then the first, second, and third named defendants will have no option other than to proceed to taxation in respect of the award of costs which has been made in their favour.

On the evidence the overwhelming likelihood will be judgment in favour of the first, second, and third named defendants for a very substantial sum against four wholly insolvent companies.

This exercise in futility will be undertaken at very substantial and unnecessary expense and inconvenience to the parties to the proceedings.

I am satisfied that an appropriate judicial exercise of the court's discretion requires that such an exercise in futility shall not be permitted. Accordingly the first, second and third named defendants are entitled to an order pursuant to s. 390 of the Companies Act, requiring that the plaintiffs furnish security for the first, second, and third named defendants costs of the review of taxation sought.

I am directing that the proceedings be remitted to the Master of the High Court for the purpose of fixing the amount of the security to be furnished.

I will make an order staying the review of taxation pending the furnishing of such security as may be fixed.

Mr. Forde S.C. argued that, in making its determination this Court should take into account Article 6 of the European Convention on Human Rights which provides as follows:

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

Mr. Forde argued that by reason of the decision of the European Court of Human Rights in *Tolstoy Miloslavsk v. United Kingdom* (1995) 20 E.H.R.R. 432 the courts in this jurisdiction must now take a "*tentative view*" of the overall merits of the substantive proceedings when considering applications for security for costs of the kind which is before this court.

He says that in this case it is necessary for the court to take into account the cause of the plaintiffs' impecuniosity and the prospects for the plaintiffs' eventual success in the proceedings.

He says that the plaintiffs had sought to seek relief by way of an application to the European Court of Human Rights but their claims have been struck out.

I do not see how consideration of the merits of the substantial proceedings in this case can be either of assistance or of relevance to the taxation of costs or indeed how or why it could or should be undertaken at all in the context of the review of taxation which has been sought. The High Court has considered the merits of those proceedings in extraordinary detail on two separate occasions.

I have taken a view which is somewhat more than "*tentative*" on what can be described as "the merits" of the outcomes of the final taxation of the orders for costs in the proceedings as a whole.

I make no findings on the question whether the principles applicable to applications for security for costs have been affected by the decision in *Tolstoy*. It is sufficient to say that I am satisfied that on the evidence and on the facts of this application that an order should be made requiring the plaintiffs to furnish security for the first, second, and third named defendants' costs as outlined earlier.