THE HIGH COURT

[2014 No. 7345 P.]

BETWEEN

PEBBLE BEACH OWNERS MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

SEAMUS NEVILLE AND COLIN NEVILLE AND SEAMUS NEVILLE, LIAM NEVILLE, BRENDAN NEVILLE, COLIN NEVILLE AND ANTHONY NEVILLE TRADING AS THE PEBBLE BEACH HOLIDAY HOME OPERATOR AND BERNARD J. DOYLE AND COLIN J. DOYLE PRACTISING UNDER THE TITLE AND STYLE OF B.J. DOYLE AND COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 18th day of January, 2019

1. This application is brought by the first to seventh named defendants ("the Neville defendants") for an order for security for costs against the plaintiff pursuant to s. 52 of the Companies Act, 2014.

Background Facts

2. The Neville defendants, through an associated construction company, developed a scheme of some 223 holiday homes in Tramore, County Waterford, the last of which was sold in 2003. The development was designed to take advantage of the provisions of the Finance Act, 1995 which provided tax relief for investors in holiday homes. The available tax break extended over a ten year period during which the homes were required to be available for rental to the tourist market. To achieve that objective, the owners of each property entered into a 21 year lease with the Neville defendants who collectively traded as the "Pebble Beach Holiday Homes Operator". The leases contained a break clause after the expiry of the ten year tax relief period.

3. The plaintiff is the management company of the development, the members of which are the owners of the holiday homes. In the normal way, in a multi-unit development of this nature, the ownership of the development would be transferred to the management company on the sale of all the properties. In the present case however, it would appear that the common areas were not transferred to the management company until the 30th December, 2009.

4. Although the management company was theoretically responsible for the upkeep and maintenance of the development and its common areas prior to that time, it would appear that the Neville defendants effectively left the management company dormant and instead of the management company collecting maintenance charges directly from the owners, the Neville defendants, as the operator, collected the rents from the tourists who were renting the properties and deducted the management fees from those rents.

5. The eighth and ninth defendants ("the Doyle defendants") were the accountants and auditors of the plaintiff and it would appear that at least up until the 31st December, 2009, the returns filed with the Companies Registration Office showed a nil figure for both income and expenditure.

6. The plaintiff's claim in the within proceedings arises from an alleged failure on the part of the Neville defendants to maintain the common areas of the estate so that by the time of the transfer to the plaintiff management company, the common areas had fallen into a poor state of repair and there were no funds in the company to address the alleged disrepair. The plaintiff alleges that the defendants failed to operate the plaintiff company properly and intermingled the management charges with the rental income. It is alleged further that the Neville defendants failed to set up a sinking fund to provide for the sort of contingencies that have now arisen and that they failed to collect appropriate management charges on behalf of the plaintiff company over a period of time and to deal with other financial and administrative matters such as setting up a separate bank account for the plaintiff company, keeping proper books of account and making proper returns to the CRO and so forth.

7. The plaintiff alleges that it has suffered substantial losses as a result of the foregoing matters. It is not suggested by the plaintiff that the Neville defendants misappropriated any monies collected for the purpose of maintaining the estate but rather that they failed to either maintain the estate or collect adequate monies for that purpose on behalf of the plaintiff.

8. In response, the Neville defendants, in addition to denying the claim generally, argue that they spent substantial of their own funds on the maintenance of the common areas of the estate but more fundamentally, the plaintiff management company, and by proxy the owners of the individual homes in the estate, have in reality suffered no loss because they are ultimately the parties who would have to fund any want of repair in the estate in any event. The Neville defendants thus contend that the plaintiff's complaint is merely one of the timing of when the funds for that work are required to be made available. While this is the essence of the defence, a number of other issues are raised such as inordinate and inexcusable delay in the commencement and prosecution of this action.

Legal Principles

9. The governing criteria in applications of this nature are by now well settled. Section 52 of the 2014 Act provides:

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

10. Section 52 replaces s. 390 of the Companies Act, 1963 which was in its terms very similar save that the expression "sufficient security" in s. 390 has now been replaced by "security" in s.52. This appears to give the court discretion in terms of the quantum of security that may be ordered.

11. The authorities establish that for a defendant to succeed in an application for security, he must establish (a) that he has a *prima facie* defence to the plaintiff's claim and (b) that the plaintiff would be unable to pay the defendant's costs if the defendant is successful. Once those criteria are established, security will in general be ordered unless there are special circumstances which would require the court to exercise its discretion against ordering security. The onus of establishing such special circumstances rests upon the party opposing the giving of security.

12. A *prima facie* defence must be more than a merely arguable defence but one which is reasonably sustainable. It has been said that it is necessary for the party seeking security to demonstrate by objective means the existence of admissible evidence, supported by relevant arguable legal submissions, which if accepted by a trial judge, would provide a defence to the claim – see *Tribune Newspapers v. Associated Newspapers Ireland* Unreported, High Court, March 25 2011 and *Mike O'Dwyer Motors Ltd v. Mazda Motor Logistics Europe N.V.* [2012] IEHC 560. Apart from the availability of such evidence, a party seeking security may satisfy the test by demonstrating that on undisputed facts, the applicable legal principles ought to result in the dismissal of the claim.

Discussion
13. I am satisfied by reference to these principles that the Neville defendants have demonstrated a *prima facie* defence. In the affidavit grounding this application, these defendants go considerably further than merely denying the claim. They suggest as a matter of law that the claim is unsustainable for the reasons I have already referred to, quite apart from the fact that there is a significant factual dispute between the parties as to the extent to which there is or was disrepair to the common areas of the estate and whether that amounts to an actionable wrong.

14. Turning now to the issue of inability to pay costs, the Doyle defendants previously brought a similar application for security for costs in these proceedings and a judgment was delivered by this court (Baker J.) on the 29th July, 2016 at [2016] IEHC 446. In the course of her judgment in that application, Baker J. concluded that the Doyle defendants had in fact demonstrated an inability on the part of the plaintiff company to meet any order for costs which might ultimately be given against it. The judge noted (at p. 10):

> "The plaintiff company's accounts show difficulties in collecting service and management charges, and that there has been some disimprovement in the level of collection between 2013 and 2014. The 2014 figures show 69% of owners had either not paid their charge, or had not paid on time. The plaintiff company is described by its solicitor as suffering from 'current relative impecuniosity' but she says that it could opt to levy a special charge on owners to meet the costs of the litigation should this be necessary. The proposition that a special levy could be made is one that has some attraction, but no evidence has been furnished by the plaintiff of any resolution passed at a meeting of a company that a special levy should be pursued, and no agreement has been exhibited by which the owners, the members of the company, have agreed to meet such a levy were one to be imposed. Having regard to the level of arrears, it seems unlikely in the present circumstances that the collection of the levy would be straightforward. In that regard, the management company admits that legal proceedings have been commenced against 13% of owners of the units in respect of the 2014 charges, and this fact alone would suggest that it might be difficult to collect an additional levy, and the absence of a resolution, or an agreement suggest an unwarranted degree of optimism on the part of the company that the imposition of an additional levy would readily meet the costs."

15. The court was therefore satisfied that the Doyle defendants had a *prima facie* defence and had established the plaintiff's inability to meet an order for costs. Baker J. then went on to consider the special circumstance raised in that application by the plaintiff, namely that the cause of its impecuniosity was the wrongdoing of the Doyle defendants. That seemed to stem from the argument that the failure to put in place a sinking fund deprived the plaintiff company of its ability to pay costs and it was a matter for which the Doyle defendants were liable.

16. That argument was however rejected by the court essentially on the basis that a sinking fund even if it had been put in place was not for the purpose of the litigation costs and the plaintiff was not entitled to make a profit from the management fees which might otherwise have enabled it to pay such costs. Accordingly the special circumstance had not been established. The question of delay was also raised by the plaintiff but the court concluded that it was not sufficient to defeat the application, security having been sought by the Doyle defendants within about nine months of the delivery of the statement of claim. Accordingly, she granted an order for security.

17. In the present application, broadly speaking the same evidence was put before the court as to the plaintiff's financial position. The Neville defendants' evidence is that its likely costs in these proceedings will amount to some €244,461.50 as appears from the affidavit of its cost drawer. No countervailing evidence has been led by the plaintiff. Accounts for the plaintiff are now available up to March 2017 but in my view do not advance the position significantly beyond that alluded to by Baker J. in her judgment. These accounts suggest that there is still a level of unpaid service charges of in or around €140,000. For the reasons given by Baker J., there must be considerable doubt as to when, or indeed if at all, these charges will be collected.

18. Furthermore, it is clear that in terms of tangible assets, being the common areas of the development, these in themselves have no realisable value on the open market. The plaintiff's cash position indicates that it has something less than €8,000 in its bank account and overall, I am of the view that the reality is that as matters currently stand, the plaintiff will be unable to pay the costs if the Neville defendants succeed in their defence.

19. Further, as alluded to by Baker J., the prospect of a special levy is also unrealistic. Given the difficulty currently and historically encountered by the plaintiff in recovering service charges from the owners, it is not hard to imagine that such difficulty would be compounded even further by seeking to levy the owners for the costs of a failed action.

Special Circumstances - Relevant Chronology
20. In the present case, the plaintiff relies on two special circumstances which it claims should persuade the court to exercise its discretion against the grant of security. The first is delay and the second is described as "inducement and reasonable expectation". Notably, the plaintiff does not argue, as in the Doyle defendants' application, that its inability to pay costs, which in any event it disputes, arises from the alleged wrongdoing of the Neville defendants. In relation to the two special circumstances relied upon by the plaintiff, it is relevant to refer to the course that these proceedings have to date followed:

> 29th May, 2014 - The plaintiff's solicitors wrote an opening letter to the Neville defendants outlining in general terms the basis for the claim. There was no reply to this correspondence.
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> 14th August, 2014 – The plenary summons was issued. The Neville defendants declined to nominate solicitors to accept service. No response was received. It was not until the 28th January, 2015 that solicitors for the Neville defendants confirmed authority to accept service.
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> 18th February, 2014 – The summons was served on the solicitors.
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> 27th March, 2015 – An appearance was entered.
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> 9th April, 2015 – The statement of claim was delivered setting out detailed and comprehensive particulars of the plaintiff's

claim. No steps of any kind were taken by the Neville defendants to engage with this document thereafter by way of notice for particulars or otherwise. The proceedings were issued in the name of Cyclegrove Limited, the plaintiff's previous name before it was changed.

12th November, 2015 – A motion for judgment in default of defence was issued after warning correspondence.

30th November, 2015 – This was responded to by the Neville defendants' solicitors that the title of the plaintiff company was incorrect, and they would apply to strike out the motion on this ground.

7th December, 2015 – The matter came on for hearing before this court when the title was amended and the defendants were given eight weeks to deliver their defence.

1st February, 2016 – The defence was delivered on the last day permitted by the order.

25th April, 2016 – A notice for particulars was raised for the first time by the Neville defendants.

16th May, 2016 – Replies to particulars were delivered by the plaintiff.

13th May, 2016 – The plaintiffs sought voluntary discovery from the Neville defendants. No reply was received.

29th July, 2016 – Baker J. gave judgment in the Doyle defendants' application for security.

20th October, 2016 – The plaintiff discontinued its action against the Doyle defendants.

25th November, 2016 – The plaintiffs issued a motion for discovery.

23rd March, 2017 – The motion was heard and by consent an order for discovery was made which was to be complied with by the 22nd June, 2017. The Neville defendants failed to comply.

6th July, 2017 – The Neville defendants for the first time sought security for costs.

24th July, 2017 – The Neville defendants' affidavit of discovery was delivered.

29th August, 2017 – The within motion issued.

21. As can be seen from the foregoing chronology, a period of almost two and a half years elapsed between the service of the statement of claim and the bringing of the application for security. Although the Neville defendants argue that they had no obligation to engage with a statement of claim delivered under the wrong name, I do not think there is much merit in this technical objection and clearly the court hearing the motion for judgment came to the same conclusion as they were directed to deliver a defence.

22. It is also clear from the foregoing chronology that the approach of the Neville defendants to this litigation has been, at best, dilatory. No real excuse has been forthcoming for this delay. The within application for security appears to have been precipitated by the order made in favour of the Doyle defendants but even then, a further year was allowed to elapse before the application was brought. The best explanation advanced by the Neville defendants for this delay was that they hoped the case might go away after being discontinued against the other defendants.

23. There is no requirement under s. 52 for an application for security for costs to be made at any particular stage in the proceedings. Delay however is a significant factor that has been recognised in a number of cases to be a special circumstance which would justify the court in refusing security - see for example *Oltech (Systems) v. Olivetti UK Ltd* [2012] IEHC 512, *Euro Safety and Training Services Ltd v. An Foras Aiseanna Saothair* [2016] IEHC 161 and *Pagnell Ltd (T/A Snap Printing) v. OCE Ireland Ltd* [2015] IECA 40.

24. Delay without more is not in general a sufficient circumstance to warrant refusal of security but it is the prejudice arising as a result of such delay that may give rise to the exercise of the discretion. The issue to be considered is, as noted by Dunne J. in Ferrotec Ltd v. Myles Brownwell Executive Services Ltd T/A Slimming World [2009] IEHC 46, whether the delay has had any impact on the plaintiff's position.

25. From the time of delivery of the statement of claim, there seems to be no good reason why the Neville defendants could not have sought security for costs. The claim was fully and comprehensively pleaded against them and they had the benefit of solicitor's advice for at least several months at that stage. That advice must have been predicated on the content of the plaintiff's solicitors opening correspondence which gave an outline of the case.

26. To that extent therefore, those defendants should have been in a position to seek security within a reasonably short period after a receipt of the statement of claim. Instead, the plaintiff was permitted to engage in the pursuit of the case and the incurring of significant costs over a period in excess of two years. The question thus arises as to whether it would now be just to compel the plaintiff to furnish security in such circumstances.

27. It is clear by any objective measure that the plaintiff is struggling under significant financial constraints. That much is evident from the judgment of Baker J. and the up to date accounts of the company. One might be forgiven for wondering therefore whether the making of an order for security would in reality bring an end to this case, as it commonly does.

28. Counsel for the Neville defendants suggests that the effect of any delay could be mitigated by confining the quantum of the security to future costs only. However, I think it has to be recognised that if the likely effect of making an order for security is to prevent a case proceeding, the cost, time and effort that have been expended by the plaintiff in getting to the point where security is ordered will likely be lost. That is a prejudice which cannot be compensated for by limiting the amount of security to the defendants' likely costs to be incurred from hereon in. It is a prejudice which stems directly from the delay in making this application and in my view, militates against the making of an order.

29. It seems to me that it must follow that where the likely effect of making an order for security for costs is to bring the proceedings to an end, there is an onus on the moving party to make the application as soon as is reasonably possible. It is not obvious to me why such an application could not have been made in this case at a much earlier juncture, and certainly at least two years before it

was in fact made.

30. The plaintiff here argues that the defendants' approach to the litigation was such as to lead them to believe that security was not being sought and they were in effect induced to continue. That is an important factor in the exercise of the court's discretion, even in circumstances where, as here, there is no clear evidence that the making of an order for security will in fact terminate the proceedings. In that latter regard, it seems to me that the dicta of Clarke J. (as he then was) in *Mooreview Developments Ltd v. Cunningha*m [2010] IEHC 30 are apposite (at p. 3.7):

> "In my view, the rationale behind the delay special circumstance jurisprudence is that a party is entitled (where security is to be ordered) to be able to include that factor in its judgment as to whether to progress the proceedings from as early a time as is reasonably practicable. The test is not as to whether the relevant plaintiff might not nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up."

31. That seems to me to accurately encapsulate the issue which arises in this case. The plaintiff was in my opinion entitled to pursue these proceedings, informed by the knowledge that security for costs was not being sought. Had such an indication been given by the Neville defendants in a timely manner, it is perfectly possible that the plaintiff may have come to a different view about progressing the case.

32. Accordingly, for these reasons, I propose to refuse this application.