

THE HIGH COURT

2005 793 S

BETWEEN

MOORVIEW DEVELOPMENTS LIMITED

PLAINTIFF

AND

BRIAN CUNNINGHAM

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 5th of February, 2010

1. Introduction

1.1 These proceedings are one of the proceedings linked to the case of *Moorview Development Limited & Ors v. First Active Plc & Ors.* which linked proceedings have already been the subject of a number of judgments including a judgment delivered on the 6th March, 2009 (*Moorview Developments & Ors v. First Active Plc & Ors.* [2009] IEHC 214, ("the Main Judgment")) which disposed of a large number of the issues arising in the linked proceedings.

1.2 As appears from the main judgment, some of the issues which arose in the linked proceedings were deferred where it was not considered advantageous to try the issues concerned at the same time as the majority of the issues which were the subject of the main judgment. One of the matters left over was a consideration of the issues which arise in these proceedings, which were described as Case K and so included in the relevant Schedule attached to the main judgment.

1.3 In the substantive proceedings the plaintiff ("Moorview"), which is in receivership, claims against the defendant ("Mr. Cunningham") for director's loans. In substance, Mr. Cunningham seeks to defend these proceedings, in the main, on two bases. Firstly, he says that some of the sums which are alleged to represent director's loans are, when properly analysed, legitimate expenses incurred by Mr. Cunningham in the course of carrying out duties on behalf of Moorview, and, as such, should not be classified as a director's loan. In addition, Mr. Cunningham asserts that certain monies were paid out by him to potential vendors of property (for example, as a deposit) where, it is said, it was acknowledged by Moorview that the relevant contract was for the benefit of Moorview. In consequence, it is said that it was agreed that Mr. Cunningham be recompensed by Moorview for monies so expended. It is said by Mr. Cunningham that the above two matters give him a full defence to these proceedings.

1.4 Against that background, Mr. Cunningham has brought an application before the court seeking security for costs in these proceedings. I turn to the issues raised on this application.

2. The Issues

2.1 As is clear from the oft quoted judgment of Morris J. in *Inter Finance Group Limited v. KPMG Peat Marwick* [1998] IEHC 217, in an application for security for costs as against a corporate plaintiff, an initial onus rests on the party seeking security (normally the defendant) to establish that the corporate plaintiff concerned would not be in a position to pay costs in the event that the claim was successfully defended and that there is a *prima facie* defence. Where those two matters are established, the onus shifts to the relevant plaintiff to establish some special circumstances which would justify security not being ordered.

2.2 In this case, it is accepted that Moorview is insolvent. Moorview is in receivership and in substance, though not in form, these proceedings are being maintained by the receiver. It was also quite properly accepted by counsel on behalf of Moorview that the matters urged on behalf of Mr. Cunningham as a defence, establish a *prima facie* defence sufficient for the purposes of an application such as this. It is noted that some of those matters were not originally pleaded in Mr. Cunningham's defence and have only become issues as a result of a recent amendment to that defence. However, it is accepted that there is a *prima facie* defence to the case as it is now pleaded. It follows that security for costs should be awarded unless special circumstances are established. In that context, it is necessary to turn to the special circumstances urged on the facts of this case.

3. Special circumstances?

3.1 The special circumstances relied on by Moorview in resisting the application for security for costs in this case is what are said to be inordinate and calculated tactical delay on the part of Mr. Cunningham in seeking security for costs. In that regard, counsel for Moorview places reliance on the judgment of Fennelly J. in *Hidden Ireland (Heritage Holidays Ltd v. Indigo Services Ltd* [2005] 2 I.R. 115). In that case, Fennelly J. said the following:-

"A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances and in the end will seek to again find balance."

3.2 I am satisfied, on the basis of *Hidden Ireland*, that delay on the part of a defendant seeking security for costs is a factor that needs to be taken into account by the court in determining whether there are special circumstances such as would justify a refusal of security. It seems to me that the extent of the delay, any explanation or reason for the delay, any prejudice (and the degree thereof) which may have been incurred, for example, by additional costs having been incurred by the relevant plaintiff, together with any other factors that may arise in the circumstances of the individual case, should be taken into account.

3.3 In this case there was undoubtedly a significant delay. It does seem to me that it is reasonable for a defendant to wait until the pleadings in the relevant proceedings are or should be closed before seeking security for costs. In the ordinary way, security will be ordered, based on an assessment of the likely costs which the relevant defendant would incur in defending the proceedings. It would be very difficult to assess those costs until such time as some degree of understanding of the issues, whether of fact or law, which are likely to arise at the trial, has been arrived at.

3.4 However, it should be said, in that context, that where the pleadings close some considerable time after the statement of claim has been filed due to tardiness on the part of the defendant concerned, it can hardly be that too much reliance can be placed on the period between the filing of the statement of claim and the defence. In the ordinary way, a defendant should be reasonably clear as to the issues which are likely to arise in the proceedings when it has had the opportunity to consider the plaintiff's statement of claim together with any reasonable particulars sought and answered. If the defence is filed in a timely fashion, then it seems that the time for seeking security should be in or around the same time as the defence is filed. If the defence is filed late, then it may well be open to the plaintiff concerned to point to any prejudice in the form of additional expenditure incurred after the time when it might have been expected that the defence would have been filed and, thus, the defendant be broadly aware of the parameters of the case that was likely to go to trial.

3.5 In this case, there has been a very significant delay from the time when the pleadings closed. I set out here a Schedule of the relevant pleadings.

Schedule

- A summary summons dated the 15th June, 2005, was served on Mr. Cunningham on the 15th July, 2005.
- On the 7th July, 2007, the President of the High Court made an order that the action be adjourned for plenary hearing.
- A statement of claim was delivered on the 11th August, 2006.
- A defence was delivered on the 13th September, 2006.
- Correspondence between the parties seeking particulars and replying to particulars dates from between the 16th August, 2006, and the 19th February, 2008.
- Discovery was made on behalf of Moorview on the 14th January, 2008.
- The motion for security for costs was issued on the 8th October, 2009.

3.6 *Prima facie* the relevant delay would have to be described as being very significant. However, in fairness to Mr. Cunningham, it should be pointed out that all of the proceedings linked as part of the process whereby the issues between the Cunningham Group, First Active, Mr. Jackson, as receiver, and a Mr. Duffy, came to be tried, were complex and difficult proceedings. It should also be pointed out that the attention and efforts of Mr. Cunningham and the Cunningham Group were, for much of the last two and a half years, directed towards the preparation and conduct of the main trial and certain other issues which have arisen since. The delay needs to be seen against that background.

3.7 Some prejudice has been asserted on behalf of Moorview. In procedural terms, it would appear that the most significant step taken by Moorview during the period after when an application for security for costs might ordinarily have been expected to have been brought, was the making of discovery. It is clear from *Hidden Ireland* that the incurring of expenditure by a plaintiff during a period of delay in bringing an application for security for costs is a relevant factor. When an order for security of costs is made against a plaintiff, that plaintiff has to make a decision as to whether it wishes to continue with the proceedings. It may well do so. However, it has to balance various factors in considering whether continuing with the proceedings is a beneficial course of action for it to adopt. Doubtless regard will be had to the prospects of success, the extent of the damages or other relief which might be obtained, and the amount of costs which will have to be incurred, both in pursuing the proceedings and in putting up security for the defendant's costs. Similar considerations apply to all litigants in any form of litigation. However, an order for security for costs is an added factor to be taken into account by a plaintiff in a case where security is ordered. 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.

3.8 In those circumstances, it seems to me that there is a not insignificant element of prejudice on the part of Moorview in having incurred the expense of making discovery against a background of not having been told that security for costs was going to be sought and in circumstances where, therefore, any decision as to the merits or otherwise of progressing the proceedings was made, due to the delay in moving for security for costs, without the benefit of full information.

3.9 It, therefore, follows that there has been a significant (although partly explained), delay and a not insignificant degree of prejudice.

3.10 In those circumstances, I am satisfied that Moorview has made out special circumstances such as would warrant not ordering security for costs.

4. Conclusion

4.1 In those circumstances the application must be refused.