Neutral Citation [2015] IEHC 291

THE HIGH COURT

CHANCERY

[2014 No. 2827 P]

BETWEEN

THE PROPERTY AND INVESTMENT COMPANY (SE) LIMITED

Plaintiff

AND

GEORGE MALONEY

Defendant

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Notice Party

Judgment of Mr. Justice Keane delivered on the 15th May 2015

Introduction

1. This judgment concerns an application for security for costs brought on behalf of both the defendant and the notice party against the plaintiff.

2. It would appear that the plaintiff company ("the company") was incorporated in England and Wales on the 23rd August 2012.

3. It is asserted that, by deed of appointment dated the 13th February 2014, the notice party ("the bank") appointed the defendant ("the receiver") as receiver over certain lands and premises ("the property") at Grange, Balrothery West, described in Folio 96695F for the County of Dublin. It is asserted that the property is the subject of a deed of charge executed on the 10th July 2007 in favour of the bank by one Jeremiah Donovan. The said charge was registered on the folio as a charge for present and future advances on the 18th July 2007. It is common case that, at that time, the said Mr Donovan was the owner of the property. The company was registered on the folio as the full owner of the property in place of the said Mr Donovan on the 28th March 2013. The company contends that the said Mr Donovan transferred the property to it on that date.

The underlying proceedings

4. The underlying proceedings were commenced by way of plenary summons issued on the 28th of February 2014. In that plenary summons, the plaintiff seeks a number of reliefs against the receiver, including: an injunction restraining the receiver from trespassing on the property; a declaration that the charge registered against the property on the 18th of July 2007 is null and void; a declaration that a deed of mortgage and charge executed by the said Mr Donovan in favour of the bank in respect of the property, and dated the 10th of July 2007, is void and of no effect; and a declaration that the deed of appointment of the receiver over the property by the bank dated the 13th February 2014 is null and void and of no effect.

The present application

5. In the present application, commenced by way of motion filed on the 1st July 2014 and initially made returnable for the 21st July 2014, the receiver and bank seek, *inter alia*, an order pursuant to s. 390 of the Companies Act 1963, as amended ("the 1963 Act"), directing the company to furnish security for costs to the receiver or, in the alternative, an order to the same effect pursuant to order 29, rule 1, of the Rules of the Superior Courts ("RSC"). They also seek an order staying the within proceedings pending the furnishing of such security.

Relevant legal provisions

6. S. 390 of the 1963 Act provides as follows:

> "390.—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."

7. Order 29, rule 1 RSC provides as follows:

> "When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security."

Legal principles

8. The legal principles governing applications of this sort are not in controversy.

9. In *Usk and District Residents Association Ltd v. The Environmental Protection Agency* (Unreported, Supreme Court, 13th January 2006) Clarke J. (*nem.diss*) quoted with approval the following statement of the law by Morris P. in *Interfinance Group Limited v. KPMG Peat Marwickt/a KPMG Management Consulting* [1998] IEHC 217:

"1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:-

(a) that he has a prima facie defence to the plaintiff's claim, and

(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;

2. In the event that the above two 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 its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendants costs of successfully defending the action concerned flow from the wrong allegedly committed 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."

Prima facie defence

10. The receiver, George Maloney, swore an affidavit to ground the present application on the 1st July 2014. Mr Maloney avers that the defendant has a bona fide defence to the plaintiff's claim.

11. In response to the plaintiff's plea that it is the valid freehold owner of the property and that the receiver is, therefore, a trespasser upon it, the receiver avers as follows.

12. By facility letter dated 28th May 2007 the bank offered to advance a loan facility in the amount of €4,200,000 to Mr Jeremiah Donovan for the purpose of financing the purchase of six properties in Harrow in the United Kingdom. Mr Donovan signed and accepted the said facility on 7th June 2007. The sum of €705,755 was drawn down on the facility on or about the 25th June 2007. It was a condition of that facility letter that "[a]ny security held now, or at any future time, shall be security for all liabilities of the Borrower to the Bank." On the 10th July 2007 the said Mr Donovan executed a deed of mortgage and charge ("the deed"), which was witnessed by his then solicitor. The schedule to the deed indicated that the property was being provided as security for the loan facility advanced. Clause 11 of the deed conferred upon the bank the right to appoint a receiver to the lands in the event of the said Mr Donovan defaulting on his obligations thereunder. On the 8th July 2007, having failed to discharge a payment of interest due, the said Mr Donovan entered into default on his obligations under the facility letter which he had signed on the 7th of June 2007. In a letter dated the 23rd February 2011 the bank demanded payment by the said Mr Donovan within 21 days of all sums outstanding under the facility letter. The said Mr Donovan failed to repay the monies concerned within that period and the bank obtained judgment against him in the sum of €2,153,878.34 on the 8th October 2012.

13. By deed of appointment dated the 12th February 2014 the bank sought to realise its security and appointed the defendant as receiver over the lands. Mr Maloney signed a confirmation of his appointment as receiver over the lands on the 13th February 2014.

14. The receiver submits that, on the basis of the evidence just described, he has a *prima facie* defence to the company's claim. I gather that, while making no concession, the company has not seriously contested that proposition for the purpose of the present application. Accordingly, I am satisfied that the receiver has a *prima facie* defence to the company's claim, though I express no view as to the likelihood of that defence succeeding at trial.

Special circumstances

15. Nor do I understand the company to argue for the existence of any special circumstance in the case which ought to cause the court to exercise its undoubted discretion not to make the order sought.

Inability to pay the receiver's costs

16. Instead, from the written submissions provided on behalf of the company and the arguments advanced in the course of the hearing of the application, I understand that the single issue in controversy between the parties is whether the receiver and bank as moving parties have discharged the initial onus resting upon them to prove that the company will not be able to pay the receiver's legal costs if the receiver is successful in the defence of the action.

17. Initially, the receiver was able to discharge that onus very simply in the following manner. First, he exhibited to his affidavit a report dated the 30th June 2014 from a firm of legal costs accountants in which they estimate that a sum of €199,432.50 would be required to meet the costs that he is likely to incur in defending these proceedings.

18. Second, the receiver averred that his search of the Companies House registry of companies in England and Wales had disclosed that, as of the date upon which the receiver swore his affidavit (the 1st July 2014) the company had only filed one set of unaudited "Abbreviated Accounts" since its inception, being those dated the 31st August 2013, disclosing that on its balance sheet as of that date the company had total fixed assets of £150,000, comprising tangible assets of £150,000, net assets of just £1 and called up share capital of only £1. The said abbreviated accounts were exhibited to the receiver's affidavit.

The company's response

19. In an affidavit sworn on the 11th of November 2014, Patrick Gough, the sole director of the company, avers that the net assets of the company then had a value of £200,001, as disclosed in its director's report and financial statements for the year ended the 31st August 2014, which are exhibited to his affidavit.

20. The said financial statements, which are unaudited, include a balance sheet as of the 31st August 2014 which records that the company then had fixed assets comprising "tangible assets" of £150,000 and "investments" of £200,000. The called up share capital remained £1.

21. In his affidavit, Mr Gough avers that the company's "tangible assets" valued at €150,000 comprise "an investment property" (singular). Mr Gough further avers that the company's "investments" valued at £200,000 comprise 100% of the ordinary share capital – i.e. the single issued share with a nominal value of £1 - in a company named Canview Limited ("Canview") of which Mr Gough is also the sole director.

22. Mr Gough exhibits the unaudited director's report and financial statement of Canview for the year ended 30 April 2014. The

director's report states that the company is engaged in the purchase and sale of development land. By reference to the accompanying unaudited financial statements, Mr Gough avers that the company recorded a profit on ordinary activities of £147,718 during that period and had shareholders' funds of £118,175 at the conclusion of that period. It is noteworthy that the notes to those financial statements record that the company had no tangible assets at the 30th April 2013 but has tangible assets with a cost, and net book, value of £182,010 at the 30th April 2014.

23. Mr Gough avers that Canview owns a substantial portfolio of property assets and that it continues to trade profitably. According to the director's report and unaudited financial statements for the six months prior to the 30th of September 2014, which are also exhibited to his affidavit, it is stated that Canview had shareholders' funds of £703,175 in September 2014. These are represented by the revaluation within that six month period of the tangible fixed assets that were acquired, and valued, in the year ending the 30th April 2014 at £182,010, which exercise resulted in the attribution of an increase in value of £585,000 to those assets, which sum was then added to the existing shareholders funds of £118,174 already described.

The receiver's reply

24. Declan Walsh is a chartered accountant working in the same firm of accountants as the receiver. He swore an affidavit on the receiver's behalf on the 13th November 2014 in reply to Mr Gough's affidavit.

25. Mr Walsh avers that the involvement of Canview in the proceedings is a matter of particular concern to the receiver for the following reason. On the 13th February 2014, the receiver was also appointed as receiver and manager over the assets and undertaking of a company named Irish and European Properties Limited ("Irish and European"), an entity incorporated in this jurisdiction. In investigating significant disposals of property by that entity to third parties, the receiver has had cause to write, through his solicitors, to the secretary of Canview on the 14th March 2014 concerning the transfer of five separate properties to Canview on various dates in 2012 and 2013, all of which properties had been held by Irish and European, one of which passed through the ownership of the said Mr Donovan and another of which passed through the ownership of company named Wimpey Homes Limited *en route* to Canview. Mr Walsh avers that the receiver's solicitors have received no reply to that letter.

26. Mr Walsh further avers that, on the 20th February 2014, he was informed by the tenants of the residential house that forms part of the property at issue that they had been paying rent to a company named Wimpey Homes Limited, which Mr Walsh avers is one that was owned and controlled by the said Mr Donovan and which was struck off the register on the 26th February 2014, despite the plaintiff company's claim that the said Mr Donovan had conveyed the property to it almost a year previously.

27. Mr Walsh goes on to aver that, according to publicly available records, while Mr Gough has been a director of Canview since the 1st December 2011, the said Mr Donovan was a director of that company from the 29th April 2009 to the 18th November 2011 and was the sole owner of the single issued share in that company until he transferred it to the plaintiff company in this case sometime between the 29th April and the 10th October 2014. Mr Walsh points out that, while the cost of the acquisition of that shareholding by the company is recorded in its unaudited financial statement for the period ending the 31st August 2014 as £200,000, the company, according to its own financial statements, simply did not have the funds to make that payment.

28. Mr Walsh notes the remarkable or, as he terms it, highly unusual position whereby, according to its unaudited financial statements, Canview acquired land and buildings for £182,010 during the period for the year ending the 30th April 2014, and revalued those assets at £767,010 (more than four times their previous carrying value) at the 30th September 2014. Mr Walsh points out that no details have been provided to support these valuations.

29. Mr Walsh further points out that it is indisputable that a shareholding held in a private limited company is not readily transferable and is vulnerable to diminution due, *inter alia*, to the trading performance of the company or the allotment of additional shares.

30. Finally, Mr Walsh invites the Court to note that Mr Gough's affidavit was only sworn and served on the receiver's solicitors on the 11th November 2014, in breach of the direction of Gilligan J. made on the 21st July 2014 that any such affidavit be filed within three weeks of the 25th July 2014 (*i.e.* on or before the 15th August 2014) in respect of an application that was due to be heard (and was heard) on the 14th November 2012. In evident anticipation of that complaint, Mr Gough had apologised in his affidavit for the delay in preparing it. This he attributed to a desire to present the Court "with the most up to date picture of the company's financial accounts."

31. In all of the circumstances just described, the receiver submits, through Mr Walsh, that "the net asset position of the [company] and [Canview] has been contrived to aid a defence to the within application for security for costs."

The hearing

32. In the course of the hearing of the present application, it was conceded on behalf of the company that the "investment property," which, Mr Gough has averred, comprises the "tangible fixed assets" ascribed a value of £150,000 in the company's unaudited financial statements, is the property the subject of the present proceedings.

33. It follows that, in opposing the present application, the only evidence that the company can rely on of its ability to pay the receiver's costs if the present action fails is its shareholding in Canview.

Conclusion

34. For the reasons set out above, I am satisfied that the receiver has discharged the onus resting upon him to prove that the company will not be able to pay his legal costs if he is successful in the defence of the action, by demonstrating that the company's only signficant asset as of the 31st August 2013 was the property the subject of these proceedings.

35. I am further satisfied that the company has failed to explain the circumstances in which it thereafter purports to have acquired the entire shareholding in Canview. Nor has the company provided an explanation of the relationship between the said Mr Donovan, Mr Gough, Canview and the company or of the various transactions and interactions between those parties already described. The company has not identified any of the properties comprising the substantial portfolio of property assets which Mr Gough asserts is held by Canview, nor has the company provided an independent valuation of any of them. No attempt has been made to provide audited accounts, bank statements or any other evidence capable of independent verification. Instead, the company seeks to rely entirely on the contents of unaudited financial statements and the otherwise uncorroborated averments of Mr Gough to establish its ability, if necessary, to discharge the receiver's costs. I am entirely unpersuaded by that evidence.

36. I am therefore satisfied to make an order requiring the company to provide the receiver with security for his costs of these proceedings, pursuant to the terms of Order 29, rule 1, of the RSC.