Neutral Citation: [2013] IEHC 643

THE HIGH COURT

[2009 No. 8050 P.]

BETWEEN

LEFTBROOK LTD

PLAINTIFF

And

CANICE NICHOLAS

DEFENDANT

Judgment of Mr. Justice Michael White delivered on the 12th day of December, 2013

1. This matter has come before the Court by way of motion seeking an order directing the plaintiff to furnish security for costs pursuant to Order 29 of the Rules of the Superior Courts and s. 390 of the Companies Act 1963, in such amount and in such manner as may be fixed or determined by the Honourable Court.

2. The plaintiff issued a plenary summons on the 4th September, 2009. The dispute between the plaintiff and the defendant referred to a heads of agreement of the 14th February, 2007, relating to the sale of a licensed premises at Main Street Cavan. when it was agreed that the defendant would purchase shares in a new company for the sum of €3,500,000; and that the plaintiff would seek a necessary tax clearance from the Revenue Commissioners. It was envisaged the closing date would be the 17th January, 2008, and that the plaintiff would continue to operate the licensed premises for a period often months after the transfer to the new company. The statement of claim was delivered on the 29th September, 2009 and the defence filed on the 3rd February, 2010.

3. By letter of the 25th January, 2011, Mr. Garry Clarke solicitor for the defendant wrote to James Wall, solicitor for the plaintiff referring, to the company having been put into voluntary liquidation he stated:-

> "Having divested itself of its assets and gone into liquidation, it is clear that a serious question arises as to whether your client can meet any order for costs made against it and should therefore provide security for costs".

4. In the affidavit grounding the motion Mr. Clarke reasserted that view at paragraph 11 in which he stated:-

> "In or about January 2011 the defendant discovered that the plaintiff was in voluntary liquidation with effect from the 20th April, 2010. I beg to refer to a copy of an updated company print-out from the Companies Registration Office upon which marked with the letter G6 I have signed my name prior to the swearing hereof."

5. It has been established in the course of these proceedings that at a general meeting of the company on the 8th April, 2010, the company was placed in voluntary liquidation following a creditors voluntary winding-up and Mr. Anthony J. Fitzpatrick of Fitzpatrick O'Dwyer & Co., Chartered Accountants, Limerick, was appointed liquidator. A statement of assets and liabilities was prepared which estimated the deficit of the plaintiff at €5,316,754. It was predicted that the assets of the plaintiff of €6,453,742 would realise a nil balance. In the course of these proceedings Mr. Fitzpatrick at para. 4 of his affidavit of the 13th February, 2013 stated:-

> "I have carried out extensive enquiries in relation to the statement of affairs which discloses fixed assets of €6,453,742 which are estimated to realise nil funds. From my investigations I say that it has become clear to me that the reason for this estimate of nil (as to the disclosed fixed assets) is that the company could not complete on a contract that it held in relation to a development site at Stradbally, Co. Laois, (hereafter the 'Stradbally project').
>
> I say and believe that as a result of the defendant's default, the company could not pursue the rights that it had in relation to that development. I have been advised by the company's solicitors that there is little point in bringing any case against the vendor of the Stradbally project."

6. A director of the plaintiff, Kieran McKenna, has sworn a number of affidavits setting out in detail the nature of this project at Stradbally, Co. Laois.

7. Section 390 of the Companies Act 1963 states:-

> "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. The Court has considered the decision of *Connaughton Road Construction Ltd. v. Laing O'Rourke (Ireland) Ltd.* (High Court, Clarke J., 2009 I.E.H.C. 7)

9. At para. 2.1 of the judgment, Clarke J states:-

> "In *Usk and District Residents Association Limited v. The Environmental Protection Agency* (Unreported, Supreme Court, Clarke J., 13th January, 2006,) the Supreme Court approved what was described as a helpful summary of the law by Morris P. in *Interfinance Group Limited v. K.P.MG. Pete Marwick* (Unreported, High Court, Morris P., 29th June, 1998,). As adapted by the Supreme Court in *Usk* the test set out by Morris P. in *Interfinance* is in the following terms:-
>
> '(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 rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's 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."

10. The plaintiff relies on three points to resist the motion for security for costs:-

- The company's constitutional rights of access to the court would be prevented if a security order was made.
- Delay.
- The special circumstances that the wrongdoing of the defendant would lead to the plaintiff's inability to discharge the defendant's costs if the defendant was successful in the plenary action.

11. The plaintiff did not pursue the first ground.

Delay

12. The Court is satisfied the defendant did not delay in seeking security for costs. The plaintiff did not notify the defendant that the plaintiff was in voluntary liquidation. On discovering this, the defendant's solicitor immediately put the plaintiff on notice that the defendant was seeking security for costs. The defence had been filed. No steps were taken between the filing of the defence and the letter of 25th January, 2011 seeking security for costs. There was a further delay in the issue of the motion which the Court considers irrelevant.

13. The Court is satisfied that the defendant did not delay once it was established that the company was in voluntary liquidation to seek security for costs.

Alleged wrongdoing of defendant leading to the plaintiff's inability to discharge costs

14. To establish wrongdoing a party has to establish more than "a bald statement of facts".

15. I refer to an extract from *Civil Procedure in the Superior Courts* 3rd Ed., Delaney & McGrath at para. 13.74 which states:-

"In *Peppard & Co. Ltd v. Bogoff* [1962] I.R. 180 Kingsmill Moore J. referred to the poor financial position of the plaintiff company being due to the very actions of the defendant for which he was being sued. This issue was formulated in the following terms by McCarthy J. in *S.E.E. Co. Ltd v. Public Lighting Services Ltd.* [1987] I.L.R.M 255, namely has a *prima facie* case been made to the effect that the inability identified by the section flows from the wrong allegedly committed by the party seeking security?

However, as Finlay C.J. stressed in *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986]1 I.R. 277 at 284:-

'It does not seem to me a sufficient discharge of the onus of proof which I deem to be on a company against whom an application is made under s.390, to make a mere bald statement of fact that the insolvency of the company has been caused by the wrong the subject matter of the claim"

16. Clarke J. in *Connaughton Road Construction Ltd. v. Laing O'Rourke (Ireland) Ltd., supra,* formulated a test as to how the matter should be approached at para. 3.1:-

"As I have already noted, there is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that his inability to pay the costs of the defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing which he asserts in the proceedings. It has, of course, been pointed out that there is a certain superficial illogicality about the court considering such an eventuality. The defendant would only become entitled to its costs if it wins. By definition if it wins then the plaintiff's inability to pay costs cannot have been due to any wrongdoing on the part of the defendant, because the court will have found either that there was no such wrongdoing or no losses (or indeed both)."

17. At para. 3.4 he went on to state:-

"In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-

(1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);

(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;

(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and

(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

18. The Court is satisfied that on a *prima facie* basis the plaintiff has established that there was an actual wrong on the part of the defendant, namely the breach of contract by failure to complete the agreement. Counsel for the defendant in detailed submissions has argued that the plaintiff company has not established the standard of a *prima facie* case in respect of no's 3 and 4 of the test as set out above.

19. In *Connaughton Road Construction Ltd v. Laing O'Rourke (Ireland) Ltd.*, para. 3.6 Clarke J. states:-

> "It follows, in my view, that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v. CRH Plc & Ors* [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a *prima facie* basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiffs inability to pay costs, in the event of losing, to the asserted wrongdoing."

20. The ultimate outcome of these proceedings is a matter for the trial court. The transaction for the purchase and development of the Stradbally site referred to in the affidavit of Kieran McKenna was a stand alone transaction separate from the heads of agreement the subject of this dispute. In his affidavit on behalf of the plaintiff the liquidator has asserted a loss of opportunity. There has been no analysis of any loss, no forfeiture of deposit and no specific loss of money. There has been no analysis of the statement of liabilities. The Court has no information on the financial circumstances of the company leading to the accrual of a deficit of €5,316,000, or how the total sum of €6,453,742 has been written off. The statement of affairs of the plaintiff when put into voluntary liquidation is bald in terms of the information that is provided to the Court.

21. There has been no detailed analysis of the company's assets and deficit to show a causal connection between the alleged loss in respect of the future transaction, including the loss of a right to participate, and the defendant's default.

22. If one looks at the particular test, what it says is that the consequences referred to have given rise to some specific level of loss, not loss of opportunity or future profits in the hands of the plaintiff which loss is recoverable as a matter of law, for example, by not being too remote.

23. It could arise, that loss of opportunity or loss of rights to participate in a future transaction could be relied upon where there is a clear causal connection with the wrong alleged, and the subject matter of the proceedings. In this case the damage claimed is too remote.

24. The fourth part of the test states that the loss concerned is sufficient to make the difference between the plaintiff being in the position to meet the costs of the defendant, in the event that the defendant should succeed, and the plaintiff not being in such a position to discharge costs. The deficit in the plaintiff company is €5,316,000 and has not been explained to the Court. The plaintiff has not addressed the use of the €1,000,000 deposit, paid by the defendant.

25. The plaintiff is relying on special circumstances, where the defendant has established *prima facie* that he has a defence, and where the plaintiff will not be able to pay costs if unsuccessful. Furthermore the court is being asked to exercise its discretion in favour of the plaintiff who has been paid €1,000,000 by the defendant, which will never be repaid even if the defendant is successful in the proceedings.

26. If the defendant is successful in defending the plaintiff's action in the substantive proceedings he will not recover the costs from the plaintiff which is in liquidation in circumstances where the plaintiff itself has acknowledged it gave incorrect information to the Revenue Commissioners.

27. This would certainly, have an impact on any exemplary damages or any damages consistent with a finding that the defendant breached the agreement. The plaintiff has not established the special circumstances which would enable this Court to refuse an order for security of costs. The Court directs the plaintiff to provide security for costs.