THE HIGH COURT

CHANCERY

[2015 No. 3544 P.]

BETWEEN

GREENVILLE PRIMARY CARE LIMITED

PLAINTIFF

AND

ST. BRENDAN'S TRUST

DEFENDANT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 10th day of November, 2017.

1. This matter came before the Court on foot of the defendant's notice of motion seeking relief pursuant to s. 52 of the Companies Act 2014 and/or Order 29 of the Rules of the Superior Courts, whereby the defendant seeks an order that the corporate plaintiff provide to the defendant security for the costs of these proceedings.

2. The defendant is a religious trust and the owner of a property situated in Killarney, Co. Kerry. On foot of a summary summons issued on 8th May, 2015, the plaintiff seeks declaratory relief from the Court regarding the validity of a contract for sale between the defendant and the plaintiff dated 28th February, 2012, in respect of lands situated in Curraghatoosane comprising of 1.2529 hectares situated in the town and parish of Listowel, Barony of Iraghticonnor in the County of Kerry, upon a portion of which stands the Presentation Convent of Listowel. The plaintiff is a limited liability company incorporated on 3rd January, 2013. It appears to not be in dispute that the plaintiff company was established as a single purpose vehicle (hereinafter referred to as an SPV) for the purposes of taking the conveyance of the property from the defendant.

3. The background to this matter is that, on 28th February, 2012, the defendant agreed to sell the property to a purchaser. The purchaser at that time was Ms. Mary Ryan, a solicitor acting for the trust. An email by Ms. Ryan, sent in and around the time of the contract was signed, indicates that she was acting for two individuals, Mr. John J. Whelan and Mr. Moss Kelly. The contract for sale was subject to two pre-conditions:

> A. that the purchaser obtain planning permission in respect of the lands; and,
>
> B. that the consent of the Charities Commissioner for the proposed sale be forthcoming.

4. A planning application was lodged in early 2012 in the name of Austin Dennany. Planning permission was granted but the matter was appealed to An Bord Pleanála. It was affirmed on the 8th February, 2013, and was subsequently issued. The Charities Commissioner consented to the proposed sale of the land on the 18th June, 2013. In accordance with the terms of the contract for sale, once those steps had been completed, the proposed closing date for the transactions was nominated. The 15th July, 2013, was selected. Notwithstanding numerous attempts to complete the conveyance between July, 2013 and the date of the hearing, no completion has in fact taken place. It appears that the plaintiff lacked the funding to complete the transaction. On the 11th February, 2014, a completion notice was served. On the 19th May, 2014, the defendant herein issued specific performance proceedings against the plaintiff (Rec. No. 2014/4574P), to which Greenville did not enter an appearance. At the same time, there were a number of formal and informal attempts to bring the matter to a satisfactory conclusion. The specific performance proceedings were eventually discontinued.

5. In early 2015, the property the subject matter of the proposed contract for sale was offered for sale by private tender. At that point, the plaintiff in these proceedings issued a plenary summons in which they sought:

> (a) a declaration that the contract for sale dated the 28th February, 2012, made between the defendant and the plaintiff was valid and subsisting,
>
> (b) a declaration that the purported forfeiting of the plaintiff's legal deposit pursuant to the contract for sale dated the 28th February, 2012, was wrongful and not in accordance with the express and/or implied terms of the contract,
>
> (c) a declaration that the defendant is estopped from relying on any forfeiture notice or any notice purported to terminate the contract,
>
> (d) an injunction restraining the defendant from taking any steps to sell the land the subject matter of the aforesaid contract,
>
> (e) an order restraining the defendant, its servants or agents from advertising the lands as being for sale or going through an auctioneer or estate agent or otherwise; and,
>
> (f) a mandatory injunction compelling the defendant to remove any material on daft.ie suggesting that the said property and lands are for sale.

6. An appearance was entered on behalf of the defendant on 21st May, 2015. A statement of claim was delivered on 7th April, 2016. However, it appears this was delivered in the context of a notice of motion from the defendant seeking to dismiss the plaintiff's proceedings, dated 5th February, 2016. This was dealt with by consent of the Court on 11th April, 2016, when the motion was struck out and the plaintiff was directed to pay the defendant's costs of the motion, to be taxed in default of agreement. On the 28th July, 2016, the defendant raised a notice for particulars and delivered its defence and counter-claim.

7. Regarding the notice of motion seeking security for costs, it was issued on 5th February, 2016, and grounded on the affidavit of Mr. Nicholas Flynn, sworn on the 1st February, 2016. Mr. Flynn is the Company Secretary for the defendant. He avers that the company documentation indicates that the plaintiff has no assets and has €100 of share capital, which is registered in the name of

John Whelan. Mr. Flynn outlines the background to the proceedings, culminating in the discontinuance of the defendant's specific performance proceedings, and its attempts to put the property back on the market. He avers that attempts at sale have been frustrated by the issuance of these proceedings and the registration of a *lis pendens* over the property by the plaintiff. He also sets out a series of correspondence between the parties, in which the plaintiff insists that the contact remains valid and the defendant insists that the contract has been rescinded and the deposit forfeited on foot of the plaintiff's continued failure to complete the contract.

8. Regarding this application for security for costs, Mr. Flynn highlights the plaintiff's lack of assets. He also highlights the defendant's repeated and unsatisfied requests that the plaintiff complete the contract and/or provide proof that it can afford to pay the costs incurred in defending these proceedings. With regard to the defendant's *prima facie* defence to these proceedings, Mr, Flynn relies on the terms of the contract (which clearly state that the deposit is non-refundable) and the plaintiff's behaviour in dealing with this matter (including their failure to complete the contract and their lack of *bona fides* in seeking to maintain a contract they have no intention of performing).

9. Lorna Larkin, solicitor for the defendant, swore a supplemental affidavit dated 9th March, 2017, in which she sets out an assessment of these proceedings, which was carried out by a legal costs accountant. That assessment sets out the projected costs involved in this matter and concludes that, based on the documentation available, the plaintiff would be unable to pay such monies.

10. John Whelan swore an affidavit dated 10th April, 2016, in which he sets out his version of events, including his understanding that the completion notice had been waived by the issuance of proceedings. He also avers that he took the seeking of specific performance to mean that the contract remained in place and the deposit was not forfeited. He avers that he secured an investor to forward funds and questions why this was not referred to in Mr. Flynn's affidavit. He also expresses his dis-satisfaction at the defendant's refusal to hand over title documentation that would assist in the completion of due diligence procedures, so that the contract could be executed. He also alleges that this refusal has occasioned loss. He avers that the continued frustration of the contract is of the defendant's making and that the defendant will unfairly accrue the benefit of a valuable planning permission if this contract were rescinded. Mr. Whelan avers that any *prima facie* defence the defendant may rely on is undermined by the waiver and/or conditionality of notices served between February – October 2014, which was brought about by the defendant's attempts to enforce and rescind the contract at the same time. He avers that the defendant has frustrated the contract, delayed in seeking security for costs and constructed a set of circumstances where it will unfairly accrue a financial benefit. He states further that, even if the Court were satisfied that the *prima facie* defence and inability to pay requirements were met, it should refuse to do so on grounds of the special circumstances outlined above. Mr. Whelan characterises these circumstances within the context of the defendant being the cause of the plaintiff's inability to pay costs.

11. On 5th May, 2016, Ms. Larkin swore a second supplemental affidavit in which she questions how the plaintiff can claim that these proceedings seek to enforce the contract when the plaintiff has not sought specific performance. Any express or implied waiver of the completion notice is wholly denied. Ms. Larkin also highlights that no proof has been exhibited of the loss or expense suffered by the plaintiff to date in complying with the contract. Regarding the defendant's failure to refer to investors secured by the plaintiff, Ms. Larkin avers that the correspondence evidencing these investors is marked "without prejudice" and was therefore not put before the Court. She also notes that said correspondence is not proof that an investor has been secured, as it refers to the need for "board approval" from this other party and it seems to suggest that the plaintiff has attempted to sell the property on without first securing ownership for itself. The allegation that the defendant has failed to provide title documentation is also denied, as it has been forwarded to both the plaintiff's current and former solicitors. Ms. Larkin draws the Court's attention to the fact that the plaintiff has provided no proof whatsoever that it can afford to meet the costs of these proceedings. The alleged delay in bringing the security for costs motion is attributed to the plaintiff's failure to promptly deliver a statement of claim, which resulted in the motion being issued before the statement of claim was finally delivered.

Submissions

12. The defendant submits that the two criteria it must meet in order to secure security for costs are 1) the presence of a *prima facie* defence, and 2) proof that the plaintiff will be unable to pay the costs of this action should the defendant succeed. It is submitted that both these criteria have been met, in that the contract has been repudiated on foot of the plaintiff's failure to conclude it and the plaintiff's company accounts make clear that it cannot afford the costs of these proceedings. The defendant denies that it is responsible in any way for the plaintiff's inability to pay costs. It also denies that any other special circumstances exist in this case that would warrant refusal to grant security for costs. In making its submissions, the defendant places reliance on Baker J.'s decision in *Pebble Beach Owners Management Company Ltd. v. Neville & Ors* [2016] IEHC 446.

13. The plaintiff submits that the defendant has failed to establish a *prima facie* defence because they have failed to elect under the contract. It is submitted that the defendant has two choices before it: to forfeit the deposit and institute proceedings for damages or to institute proceedings for specific performance. In the plaintiff's submission, this election has not occurred and so a *prima facie* defence has not been established. The plaintiff characterises the defendant as attempting to have it both ways by issuing proceedings for specific performance and then seeking to rescind the contract and put the property back on the market. The plaintiff protests this behaviour on grounds that it will not know what case it is meeting until the day of hearing. The plaintiff questions the exact date on which the contract was rescinded and the deposit forfeited. It is submitted that the correspondence dated 1st October, 2014, could not be construed as establishing the date of rescission because it is not a completion notice. In the absence of a clear election, the plaintiff submits that the defendant cannot proceed at all. In cases where an election has occurred, the plaintiff submits that the defendant is bound by that election and cannot opt for the alternative at a later juncture. In making these submissions, the plaintiff relies on Conditions 40 and 41 of the Law Society's General Conditions for Sale, which deal with completion notices and forfeiture of the deposit. The plaintiff does not understand how the defendant could seek to have the deposit forfeited and the property re-sold in circumstances where it had specific performance proceedings in being. The plaintiff submits that this is the only issue between the parties. As regards case law on this issue, the plaintiff submits that the only case of relevance is the decision in *Mills v. Healy* [1937] I.R. 437.

14. In response to the above, the defendant directs the Court's attention to para. 13.03 of *Irish Conveyancing Law* by Wylie and Woods, which clearly states that a party can seek a number of reliefs, each of which may act as alternatives to each other. Regarding the deposit, the defendant dismisses this issue as a red herring. Per the terms of the contract, the deposit became non-refundable as soon as permission issued from the Charities Commissioner. In response to the question of when the defendant viewed the contract as having been rescinded, the defendant refers back to the correspondence of 1st October, 2014, which states that the defendant would put the property back on the market if the plaintiff had not forwarded the monies by 22nd October, 2014. In any event, the defendant reiterates that, when seeking security for costs, the defendant does not need to prove that it will win this case. Rather, it need only establish a *prima facie* defence.

Decision

15. The law in respect of security for costs applications taken against a corporate plaintiff is contained in Section 52 of the Companies Act 2014, which provides that:-

> *"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."*

16. The test for the grant of security for costs was set forth in the following terms in *Usk and District Residents Association Ltd. v. Environmental Protection Agency* [2006] IESC 1, quoting from Morris J.'s decision in Interfinance Group Limited v. KPMG Pete Marwick (High Court, Unreported, 29th June, 1998) :-

> *"1. In order to succeed in obtaining security for costs an initial onus rests on 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 cause the court to exercise its discretion not to make the order sought. In that regard the onus rests on the party resisting the order."*

17. In *I.B.B. Internet Services Ltd. v. Motorola Ltd*. [2013] IESC 53, Clarke J. (as he then was) made clear that it was not necessary for the Defendant to prove on the balance of probabilities that the Plaintiff will be unable to pay costs if its action is unsuccessful. Rather, it is a question of the Court being satisfied that there truly is reason to believe that the company will be unable to pay costs, should it lose. Clarke J. stated at paragraph 5.8 of the judgment that:-

> *"It must, of course, be taken into account that the court, in considering inability to pay costs, is, in a sense, predicting a future uncertain event.*
>
> *5.16. …all of this goes to show that an assessment of the ability of a company to pay costs after a loss of proceedings occurring at some future date involves a whole range of estimates and hypotheses which, in my view, would render attempting to reach an assessment on the balance of probabilities inappropriate in any event. For that reason, it seems to me that the use of the term 'reason to believe' is appropriate. It is for that reason that I agree with the analysis in [Jirehouse Capital and anor v. Beller and Anor [2009] 1 W.L.R. 751] which suggest that 'reason to believe' differs from a matter being established on the 'balance of probabilities'. Indeed I would go further and suggest that a test of 'balance of probabilities' would be inherently inappropriate to an assessment of a hypothetical future event redolent with estimates. As was pointed out in Jirehouse the fact that there must be reason to believe that a company 'will' be unable to pay necessarily implies that what must be established is something a lot stronger that a mere risk. The phrase 'reason to believe' should not be further defined, again for the reasons set out in Jirehouse, to avoid the risk of changing the test. While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is 'reason to believe' that the company 'will' be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."*

18. Clarke J. therefore upheld the decision of the High Court Judge refusing the application, noting the expert evidence placed before the Court by the plaintiff that it held a broadband spectrum worth a minimum value of €50 million.

19. In *James Elliott Construction Ltd. v. Irish Asphalt* [2010] IEHC 234, the Clarke J. found that the plaintiff would not be able to meet the costs of the proceedings. Having regard to its 2008 and 2009 accounts, he stated at para. 5.2:-

> *"I should also take into account, for reasons similar to those which I identified in Parolen Ltd. v. Doherty & anor. [2010] IEHC 71, the fact that Elliott Construction has not chosen to put any more up to date figures before the court. It must, of course, be noted that in Parolen the last published statutory accounts the company in question (which were before the court) showed an asset deficit. Against that fact, the relevant Plaintiff argued that it had been able to meet its debts as they fell due and was, therefore, solvent. The principal focus in Parolen lay in the fact that a company might be solvent, in the sense that it can meet its debts as they fall due, but might not necessarily (in the absence of an explanation for that fact and the presence of an asset deficit which is consistent with there being monies available to meet costs in the event that the proceedings should fail), be able to meet costs should it lose. This case is, of course, very different in that the last published statutory accounts of Elliott Construction showed a very significant surplus rather than the deficit which appeared in the relevant accounts in Parolen. Nonetheless the general point made in Parolen is of some relevance. Where there are circumstances that require explanation where a company does not put before the court evidence sufficient to give such an explanation, the court to lean against filling in such unexplained gap in a manner favourable to the party who could have provided the relevant explanation."*

In that case, Clarke J. was able to identify that, if the wrong had not occurred, the plaintiff would have access to a further €2.2 million in funds (reflecting the amount of money which they had spent on remedying problems allegedly caused by pyrite contamination).

20. In Parolen (*supra*), Clarke J. stated at para. 3.9:-

> *"Pointing to the fact that [the Plaintiff] has, to date, been able to meet its debts as they fell due, without producing up to date management accounts showing the current position or some other additional information to provide a basis for suggesting that it would have available to it sufficient unencumbered and liquid assets to pay significant costs in the event that it lost, means, in my view, that Parolen has not displaced the prima facie position that derives from the asset deficiency to which I have referred."*

21. In *Flannery and Lexington Services Ltd. v. Walters* [2015] IECA 147, the Court of Appeal overturned the High Court's decision to refuse the application for security for costs. Finlay Geoghegan J. quoted from Murphy J.'s decision in *Bula v. Tara Mines* [1987] IR 494

as follows:-

> *"However, I do not think it is necessary for me to enter into a detailed analysis of the assets and liabilities of Bula Ltd. All that the section requires is that it should appear by credible testimony 'that there is reason to believe that the company would be unable to pay the costs of the Defendant if successful in its defence.' The Defendants believe that to be the position and the fact that the company's bankers have been pressing unsuccessfully for some five years to procure payment of the monies due to them must surely justify the pessimistic views of the Defendants."*

22. In *Flannery*, the High Court had refused to grant an application for security for costs because the accounts of the second plaintiff disclosed that it held assets of €4.5 million. The appellants maintained that, on a full reading of the accounts, the second plaintiff was not trading, was not generating any income or profits in the periods addressed in its filed returns and had no assets, besides a shareholding in an unquoted company. It was pointed out that the second plaintiff had failed to file accounts from 2010 to 2012. Accounts were filed for 2013 and accounts were exhibited for 2014. The Court noted at para. 24 of its judgment that the financial statements of the second plaintiff required explanation in accordance with the approach of Clarke J. in *James Elliott Construction Ltd.* Furthermore, the Court found that any uncertainties in the financial statements relating to the ability to meet the costs of successful defendants should not be resolved in favour of the plaintiff. The Court noted the contents of the second plaintiff's financial statements. In the context of there being "at minimum, an ambiguity between" different sections of these statements and there being no evidenced income or operating activities in 2012, 2013, or the first half of 2014, the Court allowed the appeal and made an order that the second plaintiff provide security for costs.

23. In *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7, Clarke J. stated at paragraph 3.4 that, in order for a Plaintiff to be correct in his assertion that his inability to pay stems from the defendant's wrongdoing, four propositions must necessarily be true:-

> *"1. That there was an 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 losses 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."*

The Court found that each of these principles need only be established on a *prima facie* basis.

24. In respect of point 4, Clarke J stated at paragraph 3.6 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's company will be unable to pay the defendants costs in the event that the Defendant was successful. That this is so can be seen from the comment of Murray J (speaking from the Supreme Court) in Framus Ltd. v. CRH Plc. [2004] 2 IR 21 at pages 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 seeking to establish the precise quantum of damages which it might recover in the event of it being successful. But is must show, at least on a prima facie basis that the losses 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… 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 Plaintiff's inability to pay costs in the event of losing, to the asserted wrongdoing."*

25. Greenville Primary Care Limited was set up as an SPV for the purpose of taking the conveyance of the property the subject matter of these proceedings from the defendant, the contact for sale having originally been signed by a solicitor acting on behalf of Mr. John J. Whelan and Mr. Moss Kelly. Subsequent to the reduction of the agreement to writing, the plaintiff company herein was incorporated as an SPV. As stated earlier, there is no issue between the parties but that the sole purpose of the incorporation of the plaintiff company was to take the conveyance of the lands. The plaintiff company is a single member private company limited by shares. Its registered address is 4 The Crescent, Limerick, Co. Limerick. There were two directors, namely John J. Whelan of 116 Kilteragh, Dooradoyle, Limerick, Co. Limerick and Con Whelan, Moybella North, Lisselton, Listowel, Co. Kerry. The company was incorporated on 3rd January, 2013. The company documentation before the Court indicates that it has no assets and that it has €100 worth of share capital issued to John Whelan. The documentation relating to the company is exhibited to the affidavit of Nicholas Flynn dated 1st February, 2016, and sworn in support of this application. It seems clear from the accounts exhibited that the company has no assets, no cash reserves and no funds out of which it would be in a position to pay an award of costs or damages in the event that the defendant successfully defends this action. The defendant has also put before the Court the affidavit of Lorna Larkin, the defendant's solicitor, currently employed in Downing Courtney & Larkin Solicitors, 84 New Street, Killarney, Co. Kerry. She avers at para. 3 therein that she instructed Lowes Legal Costs Accountants and O'Brien Hartnett & Associates to assess the expected legal costs of this claim and the plaintiff company's capacity to pay same in the event that the defendant is successful at the trial of the action. The reports from Lowes Legal Costs Accountants, dated 16th February, 2016, and a report from Donal O'Brien of O'Brien Hartnett & Associates dated 24th February, 2016, were exhibited to that affidavit. Lowes has estimated the costs of the proceedings at approximately €110,454, inclusive of VAT. Furthermore, Mr. O'Brien examined the corporate documentation available in relation to the plaintiff in light of the said costs estimates and, on the basis of the documentation available, he concluded that the company would not be in a position to meet the estimated costs of these proceedings. He also offered the opinion, and reasonably so in my view, that his findings were subject to a review in the event of any subsequent change in the company's financial position. No evidence of any change and/or improvement in the company's financial position has been put before the Court by or on behalf of the plaintiff company. It seems abundantly clear to me that the plaintiff is not presently, and there is a real risk that it will not be into the future, in a position to discharge the likely costs that would be incurred by the defendant in defending these proceedings successfully at trial, in circumstances where the defendant believes that it has a good and strong defence to the proceedings and will succeed at trial. I am so satisfied that it has a *prima facie* defence to these proceedings.

26. I am not satisfied that there are any exceptional circumstances which would warrant the Court refusing to apply the provisions of

s. 52 of the Companies Act 2014. The defendants contend, and I accept, that, in the case of a corporate plaintiff, the defendant is entitled to seek security for costs. It does not have to demonstrate that the company is insolvent, rather that the company lacks the funds to pay for the ultimate costs of the action in the event that the plaintiff is unsuccessful. An order for security for costs should not be made only if the plaintiff had successfully argued that the defendant has somehow wrongfully deprived the plaintiff of assets or that the plaintiff had expended money on the planning process, which does not appear to be the case pertaining here. In order for the Court to decide not to apply the rule in respect of security for costs, the plaintiff would have to persuade the Court that the plaintiff's inability to provide or have funds to meet the costs can in some way be attributable to a wrongful act by the defendant. There is nothing before the Court to suggest that this is the case and I am of the view that that the defendant in this case has afforded significant and ample opportunity to the plaintiff to conclude the agreement. The plaintiff has singularly failed to do so.

27. In the circumstances, I am satisfied 1) that the defendant has established a *prima facie* defence to the proceedings, 2) that the plaintiff does not have the funds to pay costs in the event of the defendant being successful in defending the claim, and 3) that the plaintiff has not established any special factors which would warrant the Court refusing to apply the rule in respect of security for costs. The plaintiff is a corporate plaintiff without any assets. It has not demonstrated any ability to pay the costs of the defendant in the event that the plaintiff was unsuccessful in the action. The plaintiff has the advantage of being a corporate purchaser and therefore, in my view, must accept the downside of that position by providing security for the defendant's costs.

28. As regards the amount of the security, I will hear Counsel as to the appropriate figure in respect of same.