

**THE HIGH COURT**  
**COMMERCIAL**

2008 4767 P

BETWEEN

JAMES ELLIOTT CONSTRUCTION LIMITED

PLAINTIFF

AND

IRISH ASPHALT LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Clarke delivered the 4th June, 2010****1. Introduction**

1.1 In these proceedings the plaintiffs ("Elliott Construction") claim that the defendants ("Irish Asphalt") supplied it with infill material which, due to the presence of pyrite, was defective such that it led to a significant construction project (being the Ballymun Youth Facility), in which Elliott Construction was engaged, being defective. The allegations of Elliott Construction are strongly contested by Irish Asphalt.

1.2 This judgment is directed to an application made by Irish Asphalt for security for costs under s. 390 of the Companies Act 1963, as amended ("the 1963 Act"). However, the application arises in unusual circumstances. The proceedings were listed for trial. However, the trial judge took the view that there had been insufficient engagement between the relevant experts intended to be called on both sides and proposed adjourning the case and making further directions, which were designed to seek to narrow the expert issues which arose in the case. Up to that point in time no application for security for costs had been made. In the course of putting forward an argument against the course of action intended to be adopted by the trial judge, counsel for Elliott Construction made certain comments which implied that the financial position of Elliott Construction was precarious. It was arising out of those comments that Irish Asphalt moved to seek security for costs.

1.3 However, despite the unusual circumstances in which this application for security for costs arises, the general principles applicable to the consideration by the court of an application for security for costs such as this were not in dispute between counsel. I, therefore, turn briefly to the relevant legal principles and the issues which arise on the facts of this case.

**2. Principles and Issues**

2.1 It is now very well settled that a defendant moving for security for costs under s. 390 of the 1963 Act must establish two things. First, the defendant must establish a bona fide defence and second, the defendant must produce credible evidence to the effect that the plaintiff would not be able to discharge costs in the event that the defendant was successful and awarded its costs. If both of those matters are established, then the onus rests on the relevant plaintiff to establish special circumstances. See *Interfinance Group Ltd v. K.P.M.G. Peat Marwick* (Unreported, High Court, Morris P., 29th June, 1998). The most common special circumstance put forward is an assertion that any inability on the part of the relevant plaintiff to discharge the defendant's costs stems from the very wrongdoing which is the subject of the proceedings. In such circumstances, it is well settled that the court will ordinarily exercise its discretion against ordering security for costs. In addition, delay on the part of the relevant defendant in moving is frequently put forward as a special circumstance such as would justify declining to make an order for security for costs.

2.2 Given that these proceedings were at the point of trial, with the exchange of witness statements and the like, it is hardly surprising that there was no dispute between the parties but that the defendants have established a *bona fide* defence. Three issues, therefore, arose. The first was as to whether Irish Asphalt had discharged the onus of proof on it, in establishing that Elliott Construction would not be able to meet Irish Asphalt's costs in the event that Irish Asphalt were successful. Second, and this is clearly a closely connected point, Elliott Construction argues that, even if the court were to take the view that Irish Asphalt had established an inability to pay costs, that fact stems, it is said, from the wrongdoing which is the subject of the proceedings. Third, Elliott Construction alleges that there was delay on the part of Irish Asphalt in bringing this application.

2.3 On the facts of this case, there is a particularly close connection between the first two issues referred to above. Both involve an analysis of the accounts of Elliott Construction in the context of these proceedings and the comments made by counsel on behalf of Elliott Construction on the occasion when there was a proposal that the proceedings be adjourned. I, therefore, turn to the financial position of Elliott Construction.

**3. Elliott Construction's Finance**

3.1 Elliott Construction produces its statutory accounts to a year ending the 31st January in each year. Its last formal accounts are to the year ended the 31st January, 2009. It should be noted that time has not yet run for the production of the next accounts which would be to the year ending the 31st January, 2010. It should also be noted that Elliott Construction did not put before the court any more up to date detailed financial information, whether from management accounts or otherwise. This is a matter to which it will be necessary to return to in due course.

3.2 The accounts of Elliott Construction for the years ending 31st January, 2008 and 31st January, 2009, show a company in significant financial health. While turnover dropped significantly between the 2008 and 2009 accounts (from a figure in excess of €69,000,000 to a figure just over €30,000,000) nonetheless the accounts for both years show significant retained profit carried forward of, in the case of 2008, €5,387,000 and in the case of 2009 €4,986,000. The balance sheet in each case reflects a slightly higher sum, taking into account called up share capital of €62,500 for each year.

3.3 While it will be necessary to analyse those accounts in slightly greater detail in due course, some points immediately need to be

made about the overall picture shown. First, the accounts to January, 2009 include a significant provision (in a sum just in excess of €2,200,000) which, according to the accounts, had been committed in respect of remedial work relating to the building which is the subject of this litigation. The 2009 accounts, therefore, reflect the losses which Elliott Construction seek to recover in these proceedings. It follows that, had those losses not occurred (and whether, of course, those losses are the fault of Irish Asphalt is a matter which will come to be determined in these proceedings) the accounts for 2009 would look even healthier. In those circumstances, Elliott Construction would have made a profit in excess of €1,800,000 in the year to January 31st, 2009, (despite a significantly reduced turnover) and would have had equity shareholders funds of around €7,025,000 as of that date.

3.4 As its name implies, Elliott Construction is a company in the building business which sector has suffered particularly over recent years. It should, however, be noted that Elliott Construction appears to operate as a building company rather than as a development company. Its balance sheet does not reveal any significant property assets. It is not a company, therefore, in respect of which the large fall in property values would have had any significant effect. On the other hand, the significant drop off in construction activity necessarily has had a significant effect on its turnover which fact is, indeed, reflected in the significant drop in turnover between the year ending January, 2008 and the year ending January, 2009, to which I have already referred.

3.5 It follows that had the accounts to which I have referred been the only financial information before the court, no realistic case could be made out for the proposition that Elliott Construction would be unable to pay Irish Asphalt's costs in the event that Irish Asphalt should succeed. While these proceedings would, undoubtedly, be complex, lengthy and, therefore, expensive (I will come to the precise estimate of costs in due course) Elliott Construction, as of the 31st January, 2009, had shareholders funds of the order of €5,000,000 which would be more than sufficient to meet any costs which might become due.

3.6 However, Irish Asphalt places reliance on comments made by counsel on the occasion when Elliott Construction sought to resist an adjournment of the proceedings, coupled with a financial analysis produced by Grant Thornton Accountants. On the basis of those materials it was suggested on behalf of Irish Asphalt that the situation had clearly changed as and between January, 2009 and the period some year or so later when the case was listed for trial. It was suggested that the proper inference to draw was that the change was sufficiently significant such as had now placed Elliott Construction in a position where it would no longer be able to meet the costs that might be awarded to Irish Asphalt in circumstances where Irish Asphalt was successful.

3.7 In that context, it is appropriate to turn, therefore, to the case made by Irish Asphalt.

#### **4. The Irish Asphalt Case**

4.1 The comments of counsel, on which reliance is placed, commenced with a submission on the 18th February of this year in which counsel said the following:-

"In circumstances where my clients, to put it bluntly and baldly, may not be around at the end of March in circumstances where they have had to incur expenditure of €1,700,000 where they have had to fund this litigation and where they do not even know come 25th March that the action will in fact proceed."

4.2 Thereafter the case was listed again for mention on the 25th March when counsel for Elliott Construction told the court that Elliott Construction had spent €2,300,000 since May, 2008 on investigation, remediation and trial preparation and suggested that the continued survival of Elliott Construction was dependent on the action proceeding, that staff had been put on a form of protective notice and that Elliott Construction had not taken on any new contracts. Reference was also made to the fact that there were other developments in which similar problems to those which are at the heart of these proceedings had been encountered. It seems clear that there will be a similar dispute between Elliott Construction and Irish Asphalt as to whether those other problems are also as a result of the presence of pyrite in materials supplied by Irish Asphalt or are as a result of defective workmanship by Elliott Construction.

4.3 On the basis of those comments it is said on behalf of Irish Asphalt that it is clear that the financial position of Elliott Construction has significantly worsened since its last published accounts. This must, at least to some extent, be true. It is clear that Elliott Construction has taken the view that it cannot, in the current circumstances, take on any new work. Without expressing a definitive view as to whether that position is correct or not, it is worth noting that the scale of the additional works which are the subject of further dispute between the parties is clearly such as would not allow Elliott Construction to adopt the practice which it did in relation to the dispute which is at the heart of these proceedings.

4.4 As is clear both from the accounts of Elliott Construction and the comments of counsel, the response of Elliott Construction to the problems encountered at the Ballymun Youth Facility was to remedy those problems at a cost, it would appear, of something in excess of €2,000,000. It is clear from the accounts that Elliott Construction was in a position to bear that cost. Whether it recovers those sums from Irish Asphalt is, of course, the issue in these proceedings. However, it is equally clear that Elliott Construction would not be able to continue to adopt a policy of paying for the costs of remedial works on the further projects which may suffer from the same type of problem, while hoping to recover those costs from Irish Asphalt in the event of successfully establishing that the presence of pyrite was the problem. Elliott Construction does not have the resources to continue with further large scale remedial works for which it will not be immediately paid and in respect of which it will have to await the outcome of court proceedings to determine whether it is going to be compensated.

4.5 In those circumstances, it does not seem to me to have been unreasonable for the directors of Elliott Construction to take the view that it was not prudent to take on significant new work when it is clear that a failure to establish, to the satisfaction of a court, that pyrite was likely to have caused the type of problems which it has encountered will inevitably lead to the insolvency of the company.

4.6 The Grant Thornton report, to which I have referred, raises a number of issues. Principally reference is made to the fact that a significant portion of the balance sheet of Elliott Construction as of January, 2009 (as indeed applied as of January, 2008), was attributable to debtors. It is pointed out, correctly so far as it goes, by Grant Thornton that the financial position of Elliott Construction would deteriorate very substantially in the event that a significant question arose over the likelihood of being able to recover such debts. In both sets of accounts the level of debtors is between €10,000,000 and €11,000,000. It follows that a 30% reduction in recoverability of those debtors would, of course, diminish the assets of the company by a sum of over €3,000,000.

4.7 In addition, it is suggested that, in the context of Elliott Construction not taking on any new work, its turnover must, necessarily, have been greatly reduced.

4.8 Against the background of those facts, together with certain other points raised in the Grant Thornton report, it is necessary to return to the two questions which must be answered under this heading which are as to whether Irish Asphalt has established that

Elliott Construction would be unable to pay costs in the event that Irish Asphalt were successful and whether, if that be so, it can be said that Elliott Construction have established that that state of affairs is due to the wrong alleged in this case. I, therefore, turn to those questions.

## **5. Could Elliott Construction pay Costs?**

5.1 This first question which arises under this heading is as to the precise costs which are in contemplation. Section 390 speaks of the costs of a successful defendant which obviously, in the ordinary way, refers to all the costs of the proceedings. However, it does seem to me that, in the exercise of the courts discretion, it is also appropriate to have regard to the level of costs not yet incurred by the relevant defendant. To the extent that a defendant has already incurred costs prior to bringing an application before the court for security, then the ordering of security is unlikely to provide any significant additional comfort to such a defendant in respect of those costs, for if the security is not put up, the defendant will never get security in respect of such costs already incurred while also, if security is directed, it is likely that the court will have regard principally, at least in most cases, in determining the amount of security, to giving the relevant defendant cover for costs not yet incurred. In the unusual circumstances of this case there is a very large difference between the two sums. Irish Asphalt placed before the court a report from a cost drawer (which is not in substance contested on behalf of Elliott Construction) which suggested that the entire costs of defending the proceedings, in the event that Irish Asphalt were successful, would be of the order of €2,700,000. However, Elliott Construction also pointed out that a significant preponderance of those costs would already have been incurred, given that these proceedings were ready to start such that, for example, all pre-trial work and brief fees for counsel and a significant portion of the solicitors instruction fee, would already have become due as of the original listing of the case for trial. In those circumstances it is suggested that less than €700,000 of the total sum remains to be incurred by Irish Asphalt. As a matter of calculation, there was no dispute between the parties as to the two relevant sums so that I can proceed on the basis that the full costs of the action would be of the order of €2,700,000 while the costs yet to be incurred represent approximately €700,000 of that larger sum.

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 of 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 show 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 and where a company does not put before the court evidence sufficient to give such an explanation, the court should lean against filling in such unexplained gaps in a manner favourable to the party who could have provided the relevant explanation.

5.3 Against that background, I have come to the view that Irish Asphalt has established by credible evidence that Elliott Construction will be unable to pay costs in the event that Irish Asphalt should succeed. While noting the context in which counsel for Elliott Construction's comments were made and while also noting that counsel did go on, on a subsequent occasion, to indicate that he may have slightly overstated the position, nonetheless the only inference to draw from the general position adopted by Elliott Construction on the adjournment occasion is that its current financial position is significantly worse than that represented in the January, 2009 accounts. If that inference were not appropriate, then it would have been open to Elliott Construction to put management or other similar accounts before the court to displace any such inference. That was not done. However, it does remain the case that Elliott Construction, despite taking a conservative approach, seems still able to trade although in a limited way. The only inference to draw from that fact is that Elliott Construction is not insolvent in the Companies Act sense of that term. It follows that while there has been a significant deterioration in its overall position (whether for the reasons suggested by Grant Thornton or otherwise), that deterioration is not such as leads Elliott Construction to a position where it cannot meet its debts as they fall due.

5.4 My primary reason for coming to the view that Irish Asphalt had met the burden of proof on it is that, having regard to that undoubtedly significant deterioration, it was, in my view, incumbent on Elliott Construction to put evidence before the court to suggest that, notwithstanding that deterioration, it still would be in a position to meet costs in the event that it should lose. Having failed to do so, it seems to me that Irish Asphalt have discharged the burden of proof on them. In that context it is necessary to turn to special circumstances.

## **6. Special Circumstances**

6.1 I have, however, come to a different view in relation to the question of whether, giving Elliott Construction credit for the damages which it alleges in these proceedings were caused by Irish Asphalt, Elliott Construction would be in a position to meet costs in the event that it should lose.

6.2 The fact that Elliott Construction is still solvent implies that it has sufficient funds available to it to meet its debts as they fall due. The fact that its position is precarious, as indicated by counsel, may mean that it does not achieve that position by a comfortable margin but that does not take away from the fact that it nonetheless remains in a position where it does appear to be able to meet its debts as they fall due.

6.3 In addition, it should be noted that the balance sheet of Elliott Construction contains fixed assets as of the 31st January, 2009, in the sum of €1,224,788. As pointed out by Grant Thornton it is likely that the value of those assets will have been reduced by depreciation in the period since. It is also suggested that the book value might, in any event, exceed the realisable value. On the other hand it cannot be suggested that the value of the fixed assets would have disappeared altogether. In the circumstances it seems highly improbable that Elliott Construction does not retain fixed assets which have at least a significant part of the value given and, in any event, not less than a sum of the order of €500,000 to €750,000. It is also clear, as was pointed out, that the accounts to January, 2009 have already made provision for Elliott Construction's claim which is of the order of €2,200,000. In addition, it would appear on the evidence that Elliott Construction has been paying its advisers (whether legal or expert witness) in relation to these proceedings as it went along. It, therefore, follows that some further proportion of its current position is attributable to costs incurred in prosecuting these proceedings post January, 2009 for which provision was not made in the 2009 accounts, but which nonetheless are directly attributable to the wrong alleged in these proceedings. Even looking at the full value of the costs estimated by Irish Asphalt (€2,700,000), but also having regard to the value of fixed assets, the contingency already put into the company's accounts in respect of this claim, and such further sums as might have been incurred post January, 2009 in prosecuting this claim, the total of those three latter amounts well exceeds the full value of the costs.

6.4 I should pause to comment on an argument put forward on behalf of Irish Asphalt which drew attention to the fact that the relevant provision in Elliott Construction's accounts did not prevent Elliott Construction from remaining significantly solvent as of

January, 2009. In those circumstances it is said that the current position of Elliott Construction cannot be due to the wrong if it be established. In so doing counsel drew attention to a passage from my judgment in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7 where, at para. 3.4, I ruled, at point (4), that it was necessary for the party alleging special circumstances to show that any relevant loss is sufficient to make the difference between being and not being able to meet costs. However, that analysis does not seem to me to be correct.

6.5 It is, of course, the case that Elliott Construction's current position is not solely due to the alleged wrong. If it were, then the company's position would be exactly the same (more or less) now as it was in January, 2009 (because provision had already been made for the claim and the only additional sum that might have arisen would be the costs of prosecuting the claim as paid to date). However, that seems to me to miss the point. If the wrong had not occurred, Elliott Construction's position as of 2009 would have been of the order of €2,200,000 better. It would, therefore, have been, by that margin, in a better position to withstand whatever financial difficulties have arisen since. Given that Elliott Construction remains solvent today, then if the wrong (on the assumption that it was a wrong) did not occur, then Elliott Construction would have in excess of €2,200,000 more in its balance sheet today, which sum would be available to meet costs. In addition, the fixed assets are not, obviously, available to meet day to day expenses but would, at least in part, be available to meet costs.

6.6 The fact that Elliott Construction can meet its liabilities as they fall due means that the fixed assets remain as an additional resource available to pay costs. Given that the combined effect of all of those matters is more than sufficient to meet any likely costs which would be awarded, it seems to me to be clear that the reason why Elliott Construction is not now able to meet costs in the event that it should lose is because of the wrong alleged, for if it were not for the wrong alleged, Elliott Construction would have a sum very close to the amount of the costs available to it to meet those costs and in addition, would be able to make up any shortfall out of fixed assets.

6.7 In those circumstances, I am satisfied that Elliott Construction has made out special circumstances and that I should exercise my discretion not to make an order for security for costs. I should before concluding deal with two other issues.

## **7. Some Other Issues**

7.1 The first concerns the amount of costs which should be taken into account in considering whether the relevant plaintiff would be unable to meet those costs in the event of losing. As indicated above, the full costs would be of the order of €2,700,000, but the costs not as yet incurred would be under €700,000. The analysis which I have conducted, and which led me to the view that security should not be ordered, was based on that full sum of €2,700,000. However, it seems to me that in the special circumstances of a case such as this, where the vast bulk of those costs have already been incurred, it might well have been inappropriate to order security for costs in circumstances where I was satisfied that Elliott Construction could meet a reasonable proportion of the costs (having regard to the quantum of the costs yet to be incurred), but could not meet the full amount. This would also be so if the lesser sum in costs could be met factoring back in the amount said to be due to Irish Asphalt's wrong. However, I would defer a final decision on whether such is the appropriate approach to a case in which it appeared to be decisive. For the reasons which I have sought to analyse I am satisfied, on the facts of this case, that, giving Elliott Construction credit for the amounts which it has *prima facie* established can be placed at the door of Irish Asphalt on the basis of wrongdoing, Elliott Construction would have been in a position to meet the full costs.

7.2 The second point concerns delay. Other than the effect which delay might have on the proper approach to the quantum of costs by reference to which the court should conduct its analysis, I am not satisfied that delay is a significant factor in this case. I agree with counsel for Irish Asphalt that, at any time up to March of this year, when the relevant comments by counsel on behalf of Elliott Construction were made to the court, Irish Asphalt would have had no legitimate basis for seeking security for costs. It is manifestly clear that had Irish Asphalt brought an application for security at the normal time in these proceedings, Irish Asphalt would have been met with the statutory accounts of Elliott Construction which would have shown a clear ability to pay costs at that time. It does not seem to me that a party can be blamed for delay in such circumstances. Delay can only be measured from the time when the relevant party would have had a legitimate basis (on reasonable inquiry) for pursuing an application. There was nothing in any published materials concerning Elliott Construction (or any other information available to Irish Asphalt) that would have given such a basis until March of this year. There was not, therefore, in my view any applicable delay in the actions of Irish Asphalt.

## **8. Conclusions**

8.1 I am, therefore, satisfied that Irish Asphalt have established that, in the event that Irish Asphalt were to succeed, there is a credible basis for suggesting that Elliott Construction would not be able to meet the full costs of the proceedings.

8.2 However, I am satisfied that that state of affairs is due to the wrong alleged in these proceedings on the assumption that that wrong can be established and the full amount for which a credible case has been made out, brought home. In those circumstances, there are special circumstances which lead to the exercise of the courts discretion against making an order for security for costs and I, therefore, refuse the application.