Neutral Citation Number: [2011] IEHC 173

THE HIGH COURT

2007 2283 S

BETWEEN

VALEBROOK DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

PLAINTIFF

AND

KEELGROVE PROPERTIES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 8th April, 2011

1. Introduction

1.1 A novel point in relation to security for costs has arisen in these proceedings. The plaintiff ("Valebrook") is a company within the Cunningham Group. There has been longstanding litigation in which companies within that group (including Valebrook) and its principal, Mr. Brian Cunningham, have sued First Active Plc and Mr. Ray Jackson, who was appointed by First Active Plc to act as receiver in respect of some of the companies in the Cunningham Group. For a broad description of the issues which have arisen see *Moorview Developments Limited & Ors v. First Active Plc & Ors* [2009] IEHC 214.

1.2 Valebrook is in receivership and Mr. Jackson is the receiver. In these proceedings Valebrook claims against the defendant ("Keelgrove") for a sum of €474,878.23 together with interest. The sum is said to be due on foot of monies lent by Valebrook to Keelgrove. Keelgrove itself has a connection with Mr. Cunningham and/or the Cunningham Group, but the precise nature of that connection is in dispute. However, what is clear is that Keelgrove is a joint venture vehicle between Treasury Holdings Plc (the large Irish property company) and interests connected with Mr. Cunningham. Both sides respectively own 50% of Keelgrove. It is as to whether the 50% owned on the Cunningham side is held by Mr. Brian Cunningham personally or by Valebrook that the dispute arises. That dispute is the subject of separate proceedings to which it will be necessary to turn in due course.

1.3 In any event, Keelgrove has sought security for costs as against Valebrook in these proceedings. This judgment is directed to that question. In order to understand the novel issue which arises on this application it is necessary to refer in more detail to the argument advanced at the hearing. I, therefore, turn to the issues.

2. The Issues

2.1 It is not disputed but that Keelgrove is, in general terms, insolvent and would not (subject to one point to which I will return) be in a position to pay the costs of these proceedings should it lose. Second, it is not disputed but that Keelgrove has put forward a *prima facie* defence to these proceedings. In simple terms it is accepted by Keelgrove that monies were lent to it by Valebrook in the amount claimed. However, it is said that Keelgrove is a joint venture and that the relevant monies were advanced on foot of a shareholders' agreement under the terms of which, it is argued, the monies are not repayable until either the development project, which was the subject of the joint venture, is abandoned, comes to fruition, or is refinanced. It is accepted that, in the event that the project were abandoned, its assets would be sold and, insofar as was possible, monies borrowed by the joint venture vehicle (*i.e.* Keelgrove) would be repaid to its respective shareholders. In the event that the project comes to fruition and makes sufficient profits, then it is again accepted that the monies would be repaid. Likewise, in the event that it proved possible to refinance the arrangement with borrowings by the joint venture vehicle itself, then the original monies lent by the shareholders would be repaid. However, in the event of none of those things having as yet, it is said, happened, it is argued that the monies while owing are not yet due.

2.2 The basic principles applicable to an application for security for costs are well settled (see for example*, Inter Finance Group Ltd v. KPMG Peat Marwick* (Unreported, High Court, Morris P., 29th June, 1998) and *Tribune Newspapers v. Associated Newspapers Ireland* (Unreported, High Court, Finlay Geoghegan J., 25th March, 2011)). Thus, it is clear that an onus rests on Keelgrove to establish both the impecuniosity of Valebrook and the existence of a *prima facie* defence. Subject to one point to which I will turn, both of those matters are accepted as having been established.

2.3 In those circumstances the authorities make clear that security will ordinarily be ordered unless special circumstances exist. While a number of types of special circumstance have been identified in the jurisprudence, it is clear from many of the authorities (see, for example, *West Donegal Land League Ltd v. Udaras Na Gaeltachta & Ors* [2006] IESC 29) that the categories of special circumstances are not necessarily closed. The circumstance put forward on the facts of this case is unusual and requires a brief consideration of a separate set of proceedings namely, *Valebrook Developments Limited (In Receivership) v. Cunningham*. In those proceedings Valebrook are plaintiffs and Mr. Cunningham is personally the defendant. The proceedings bear Record No. 2007/9299 P ("the Cunningham case"). In the Cunningham case, Valebrook claims that the 50% shareholding in Keelgrove which is attributable to what I might call the Cunningham side (as opposed to the Treasury Holdings' side) is held by Valebrook rather than Mr. Cunningham personally. That question is of real substance because Valebrook is in receivership so that the assets of Valebrook are (to a very great extent) available to meet the liabilities of the Cunningham Group generally to First Active. There has already been an issue between the parties to both sets of proceedings as to whether, as Valebrook asserts, the two proceedings should be linked and tried together. In that context, I have already determined that it is premature to make a final decision on that question. Both cases have been linked for case management purposes with a decision on whether it is more convenient and appropriate that they be tried separately or together to be taken when the precise issues of law and of fact, which will require to be determined, are clarified by the exchange of witness statements, written submission and the like. There is, however, undoubtedly something of a connection between the two cases. The issue in the Cunningham case is as to whether Valebrook or Mr. Cunningham personally is beneficially entitled to a 50% shareholding in Keelgrove. The issue in the Keelgrove proceedings is as to whether the shareholders' agreement, under which it is said that the monies undoubtedly lent by Valebrook to Keelgrove were advanced, provides a defence in the manner already described.

2.4 In essence, the position taken by Valebrook is that it must win one but also, in all likelihood, must lose one of the relevant proceedings. It is argued that, if the true beneficial shareholder in Keelgrove is in fact Valebrook, then Mr. Cunningham will necessarily

lose the Cunningham case but that Keelgrove is likely to win the Keelgrove proceedings for the loan will have been advanced by its shareholder. Conversely it is said on behalf of Valebrook that if Mr. Cunningham is found to be the beneficial owner of the shares then, while he will win the Cunningham case, it is difficult to see how Valebrook can succeed in these proceedings for in that eventuality the lender (*i.e.* Valebrook) will not be a shareholder and, therefore, the only defence put forward, being based on the shareholders' agreement, could not, it is said, succeed.

2.5 Finally, and importantly, it should be noted that Mr. Cunningham has already successfully brought an application for security for costs in the Cunningham case. The amount of the relevant security has been fixed and the security been provided. It is said on behalf of Valebrook that it is willing to make the security already provided in the Cunningham case available also to Keelgrove in the event that Keelgrove are successful in these proceedings. In those circumstances Valebrook argues that it should not be required to put up a second set of security on the basis that the same sum of money will be available to meet the costs of either Mr. Cunningham personally or Keelgrove, depending on which of them should win. It is, of course, argued that both cannot win.

3. Discussion

3.1 As indicated earlier the concession by Valebrook that it is insolvent is subject to one important caveat. As noted earlier, Keelgrove does not contest but that it owes the relevant monies to Valebrook. Indeed, it is clear from the evidence currently available that the basis on which Mr. Jackson came to the view that Keelgrove owed the relevant monies to Valebrook was by analysing the books and records of Valebrook which show the sum as being due and owing as of the 30th April, 2003. In addition, the statutory accounts of Keelgrove for the year ended 31st December, 2006 show a similar (although not identical) sum due. Valebrook would, therefore, appear to have an asset in the form of the monies owing by Keelgrove. It should also be noted that the sum owing exceeds, by a considerable margin, the sum already fixed in respect of security for costs in favour of Mr. Cunningham in the related proceedings. The problem, however, is that it is by no means clear as to whether those funds would, in truth, be available to discharge any costs that might be awarded in favour of Keelgrove.

3.2 Should Keelgrove be successful then it will be entitled, ordinarily, to an order for costs. Keelgrove has, of course, a liability to Valebrook but on the supposition that it succeeds in these proceedings it follows that the court will have been satisfied that the relevant money was not immediately due. Thus, on the basis of such a finding, Keelgrove would have no immediate obligation to pay any money to Valebrook and indeed it might well be that any such obligation would be unlikely to arise for a considerable period of time given the more or less moribund nature of the property market at the moment. Out of what funds could it then be said that Keelgrove was to receive its costs? There is no doubt that Valebrook has no ready assets from which the costs could actually be paid. If it is said that the costs might be "paid" by being set off against the amounts owing by Keelgrove to Valebrook, then it seems to me that a clear injustice would arise. If Keelgrove is successful then the court will have held that those monies were not immediately due. If Keelgrove had to accept a set off as the only means of being paid its costs then it would, in effect, be paying the monies immediately after the costs have been ascertained for the only way in which a set off could work is by reducing Keelgrove's liability to Valebrook by the amount of the costs. The net effect of such a transaction would be that Keelgrove would have paid back part of the loan (by an amount equivalent to the costs) prior to the time when the court would have held that it was legally obliged so to do.

3.3 It does not, therefore, seem to me that the fact that there is an undoubted debt as and between Keelgrove and Valebrook leads to the conclusion that Valebrook would be able to pay costs if it lost. By definition if Valebrook loses, the court will have found that Valebrook is not entitled to an immediate payment of the monies concerned. Those monies could not, therefore, be used to make a payment of the costs (whether by set off or otherwise) until such time as the monies became due as well as owing.

3.4 I am, therefore, satisfied that Valebrook would not be able to meet the costs of Keelgrove should Keelgrove succeed. As pointed out it is accepted that Keelgrove has established a *prima facie* defence. It follows that it is necessary to consider whether the unusual circumstances of this case reveal a further category of special circumstance in which it is appropriate to decline to order security for costs (or, perhaps, more accurately allow something other than strict security to be given).

3.5 There can be little doubt but that there are cases where, in the light of the position adopted by all parties, a plaintiff is bound to succeed against one defendant but fail against another. In the simplest of cases a plaintiff may sue two defendants in the alternative. Perhaps a case of an agent, who purports to act on behalf of a disclosed principal, but where the relevant principal denies the agent's authority, is a simple case in point. Assuming that the alleged agent accepts that he entered into the relevant obligation and purported to do so on behalf of the named principal, then it seems inevitable that the plaintiff will succeed against one or other but not both. If the agent had authority and the court so finds, then the plaintiff must succeed against the principal. If the agent had not authority, then the plaintiff must succeed against the agent for breach of warranty of authority. I assume, for the purposes of the example, that there is no overall defence such as would avail both agent and principal.

3.6 Again, to take a simplified version, it is possible to envisage a single case in which a corporate entity which was impecunious brought such proceedings. Both defendants might independently seek security for costs. Assuming the facts to be as I have stated them, it is difficult to see how the justice of the situation would be met by requiring the relevant corporate plaintiff to put up separate security for each of the defendants. The same security would be sufficient to meet the reasonable requirements of whichever defendant turns out to be successful. There is no real basis on which it could be envisaged that the plaintiff would lose against both defendants or otherwise be required to pay the costs of both defendants. Why then should the plaintiff be required to put up security beyond that which could reasonably be envisaged as being likely to materialise by way of liability?

3.7 I am satisfied, therefore, that, at the level of principle, it is appropriate for the court to consider, as a special circumstance, the possibility that a relevant plaintiff might suffer an injustice by being required to put up two sets of security when it is highly improbable that both could materialise. Against that general principle, it seems to me that three specific questions arise on the facts of this case:-

1. Does anything turn on the fact that here there are two sets of proceedings rather than one?;

2. To what extent it is necessary for the court to be satisfied as to the improbability of both defendants obtaining an order for costs?; and

3. In what way should the security be provided so that it can potentially benefit both defendants?

3.8 The first and third of those issues seem to me to be easily dealt with. First, it does not seem to me that there is any rational basis for distinguishing between a case where, on the one hand, the plaintiff sues two defendants in the same proceedings and, on the other hand, separately sues the relevant defendants in different proceedings. It seems to me that in a case where both defendants were joined in the same proceedings it would be appropriate for the court to direct that a single set of security be put up

by the plaintiff which could be available to either defendant in those proceedings. Where, as here, there are separate proceedings and the court has already directed security in one of them, then it seems to me that an undertaking given by the plaintiff in the second set of proceedings should suffice. The relevant undertaking should be to the effect that:-

> "The plaintiff will not, without further order in these proceedings, secure a release of the security for costs provided in (inserting the name of the other proceedings). The plaintiff will make the said security, in the event that it is not called on in those proceedings, available to meet any costs which might be awarded in favour of the defendant in these proceedings."

3.9 In those circumstances it seems to me that a defendant in a second set of proceedings is secure. Whatever security is put up in the first set of proceedings will be available in those later proceedings. If the security is not called on in the first proceedings (which presupposes that the defendant in those proceedings loses), then it will be available to meet costs in the second case. The only circumstances in which there might be any difficulty is if the plaintiff were ordered to pay costs in both proceedings, for in that eventuality the security would go to meet its original end of paying the costs in the first proceedings and would no longer be available to meet the costs of the second proceedings. However, the whole point of the issue with which I am concerned is to deal with circumstances where it is not envisaged that there is any significant likelihood of that eventuality occurring. That deals with the third point. It also leads to the second point.

3.10 It is important to start a consideration of this point by noting that a court will, necessarily and understandably, be reluctant to make any definitive findings of liability (even on a tentative basis) at the relatively early stage of proceedings when any application for security for costs is likely to be moved. It will not, therefore, be possible, in at least some cases, to be absolutely certain that the case (or, as here, cases) are in the "either/or" category where one but not both of the relevant defendants must lose. However, it is clear that, in order to move an application for security for costs, a defendant has to put forward a *prima facie* defence. The court, therefore, has available to it at least a general outline of the position adopted by the respective defendants. The issue only arises where both defendants (whether in a single or in separate proceedings) seeks security for costs. If both seek security then both must put forward their defence. The court is, therefore, given at least a general outline of the basis on which the respective defendants propose defending the proceedings. There will be at least some cases where it will be possible, on that basis, to reach a view as to the likelihood of both defendants being successful. It seems to me that, where the court is satisfied that there is a high degree of likelihood that both defendants cannot successfully defend, then the principle which I have identified should be applied. It will, of course, be always open to either or both defendants to point to a basis on which it might be possible that the plaintiff could lose both cases.

3.11 What then is the situation in this case? The starting point has to be the fact that the books and records of Valebrook (now in the possession of Mr. Jackson as receiver) together with the statutory accounts of Keelgrove both make clear that the sum claimed in these proceedings is owing by Keelgrove to Valebrook as being monies advanced by Valebrook to Keelgrove. In addition, Keelgrove does not dispute that the monies in question are owing to Valebrook. While one can never rule out developments between now and the end of any possible trial, there seems, nevertheless, to be a very high degree of probability that the court will be satisfied of the indebtedness of Keelgrove. As pointed out earlier the defence of Keelgrove is based on an interpretation of the shareholders' agreement. The shareholders' agreement on which Keelgrove places reliance is dated the 4th September, 1997. Valebrook is the party of the first part to that agreement. The basis put forward by Keelgrove for resisting the proposition that those monies are now due is confined to the terms of the shareholders' agreement. There is no suggestion on the part of Keelgrove of any variation in that agreement which would allow the benefit of the agreement to pass to Mr. Cunningham personally in the event that he were to personally become the owner of the disputed 50% shareholding in Keelgrove.

3.12 In substance, the funding of Keelgrove came from shareholder loans together the provision of nominal share capital. If Valebrook provided that funding then it will undoubtedly be found to be the shareholder and the beneficiary of the loan agreement in its own right unless there were a subsequent transaction (and there is no suggestion on Mr. Cunningham's part that any such subsequent transaction took place), as a result of which there was a transfer of the entitlements of Valebrook under the shareholders' agreement to Mr. Cunningham. If Valebrook provided the money but Mr. Cunningham was, at all times, the shareholder then how can the Valebrook loan be seen as a shareholder loan governed by the shareholders' agreement?

3.13 While one should never exclude the possibility of matters emerging prior to or at trial, it seems, on the basis of the evidence currently available, that it is highly improbable that Keelgrove could succeed in defending these proceedings if it were to transpire that Mr. Cunningham had become the beneficial shareholder in Keelgrove. In those circumstances Valebrook would no longer be a shareholder. It is not immediately clear how Keelgrove could then rely on the shareholders' agreement against Valebrook to suggest that Valebrook was no longer entitled to a repayment of the relevant monies. It might well be that, in those circumstances, Keelgrove would be entitled to insist on Mr. Cunningham personally putting up an equivalent amount of monies, but that is a different question. I did not understand Keelgrove to point to any particular basis on which it might be possible for Valebrook to lose both cases other than to comment generally that little is certain in litigation.

3.14 As pointed out earlier, it would be entirely inappropriate to make any finding on the issues which are likely to arise in these proceedings at this early stage. However, I am satisfied that this is one of those cases where it is highly probable that the plaintiff is bound to succeed against one of the relevant defendants. In those circumstances it seems to me that one set of security is sufficient, for that security can be made available to pay the costs of whichever defendant is successful. In the event that Mr. Cunningham is successful then the security is available to him on foot of the order already made in the Cunningham case. In the event that Keelgrove is successful (and on the assumption that Mr. Cunningham is unsuccessful) the security will, by virtue of the undertaking to which I have referred, be available to meet Keelgrove's costs in this case. It is only if both defendants were to succeed that that model would not provide adequate security to both. For the reasons analysed it seems to me that that is a highly improbable eventuality. It would, in those circumstances, be disproportionate to require Valebrook to put up two sets of security against such a highly improbable eventuality.

4. Conclusions

4.1 Subject, therefore, to Valebrook being in a position to give an undertaking along the lines of that identified above, for the benefit of Keelgrove in these proceedings, it does not seem to me to be appropriate to order security for costs.