

THE HIGH COURT

[2013 No. 7426 P]

BETWEEN

PAUL SHEERAN JEWELLERS (JOHNSONS COURT) LIMITED

PLAINTIFF

AND

GRANT THORNTON

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 4th day of June, 2015.

1. This is an application pursuant to s. 390 of the Companies Act 1963 seeking an order directing the plaintiff to provide security for the defendant's costs in these proceedings and an order fixing the amount of such security.
2. The plaintiff is a limited liability company having its registered place of business at 7 Johnson's Court, Grafton Street, Dublin 2 and trades under the name of Paul Sheeran Jewellers from that premises.
3. The defendant is a partnership and carries on business as a firm of chartered accountants and business advisors providing accountancy, business, tax and specialist advice.
4. In or about 2005 the plaintiff engaged the defendant to provide advisory services and carry out a number of reviews as a result of which three reports relating to the plaintiff's business were produced.
5. The plaintiff claims that one of the main recommendations made by the defendants was for the recruitment of a Chief Financial Officer (CFO). They agreed to provide a recruitment service to the plaintiff and to find an appropriate candidate for this role. A successful candidate declined to accept the post and it is claimed that the defendant informed the plaintiff that a Mr David Ryan was a suitable candidate for the role. Mr Ryan was an employee of the defendant. The plaintiff claims that the defendant caused the plaintiff to employ Mr Ryan as the CFO when it knew or ought to have known that Mr Ryan was incapable of carrying out the role because he did not have the necessary skills or expertise. The plaintiff also claims that the defendant failed to supervise Mr Ryan in the performance of his duties in breach of an agreement that it would oversee mentor and supervise Mr Ryan in the role of CFO and would report to the plaintiff in relation to his performance.
6. The plaintiff also claims that the defendant caused the plaintiff to install a defective information technology (IT) system. It is claimed that the defendant recommended and oversaw the selection, installation and implementation of a new IT system but that this was not properly carried out and support for the system was not forthcoming when failures were identified.
7. The plaintiff claims damages for breach of contract, negligence, breach of duty, negligence misstatement and misrepresentation by the defendant, its servants or agents. The defendant denies all allegations.
8. It is accepted for the purpose of this application that the defendant has a *prima facie* defence to the plaintiff's claim.
9. This application for security for costs is made under s. 390 of the Companies Act 1963 which 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."

The application is brought under O. 29 of the Rules of the Superior Courts.

10. The test to be applied is that stated by Morris J. (as he then was) in *Inter Finance Group Ltd v. KPMG Peat Marwick* (Unreported, High Court, 29th June 1998) in which he stated:-

"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 plaintiffs 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 inability 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."

11. There are only two issues in this application. The first question is whether the defendant has established that there is reason to believe that the plaintiff will not be able to pay the moving party's costs if the moving party is successful on the balance of probabilities. The second element of the test requires the defendant to establish a *prima facie* defence to the plaintiff's claim: in this

case it is accepted that the defendant has such a defence. The only remaining matter to be determined is whether there are special circumstances in this case on the basis of which the court ought not to make an order. The plaintiff in this case contends that it is in a position to discharge the defendant's costs but also contends that if the court is not satisfied of its ability to do so, that is because of the defendant's wrongdoing which qualifies as a special circumstance. Therefore, it is submitted that the court should exercise its discretion against making the order.

The plaintiff's ability to pay the defendant's costs

12. The defendant has adduced evidence that the estimated costs of defending these proceedings amount to €637,076. It is an estimate received from Peter Fitzpatrick & Co, Legal Costs Accountants. No breakdown of that amount is supplied but neither is any evidence produced by the plaintiff as to what the estimated costs will be though the defendant's figure is disputed.

13. The defendant relies upon a letter from Liam Grant of Grant Sugrue, Forensic Accountants, dated 26th February 2014, in which they advise on the financial ability of the plaintiff to meet any award of costs. They examined extracts from financial statements of the plaintiff company for the years ended 31st January 2008, 2009, 2010 and 2011. They tracked what they considered to be a major decline in the gross margin from €4.67 million in the year ended 31st January 2008 to €2.45 million in the year ended 31st January 2009 which further declined to €1.75 million in 2010 and €1.1 million in 2011. It was stated that the company had been trading with an excess of liabilities over assets as disclosed in the company's balance sheets from the year ended 31st January 2010 and subsequent years. The last financial statement filed for the year ended 31st January 2013 demonstrated that the company had a substantial excess of liabilities over assets quantified at €3,634,473. The accountants concluded that the effect of the recession was evident in the company accounts and financial statements in 2008 and 2009. Current liabilities (payable within 12 months of the balance sheet date) including bank overdraft and loan facilities were approximately €9.5 million at 31st January 2013. This compared with current assets realisable within 12 months of the balance sheet date of approximately €4.4 million. A conclusion was reached that the balance sheet demonstrated an excess of current liabilities over current assets of €5.1 million. Bank borrowings as per the balance sheet at 31st January 2013 were shown to be €7,965,084 and it was stated that the company was substantially insolvent.

14. In reply the plaintiff acknowledged that it had an excess of liabilities over assets in the sum of €3.5 million for the year ended January 2014. However at that time the plaintiff explained that it was at "an advanced stage in negotiations...regarding a restructure of its debt facility, which will address in a material way the overall balance sheet position". A debt restructuring agreement was finalised and new finance was procured from "an Irish pillar bank, which in turn has secured its loans by way of first fixing and floating charges over the plaintiff's assets". It is claimed that as a result of this settlement agreement, the plaintiff's balance sheet has improved considerably and that it now has assets in excess of €3 million. This was supported by a letter dated 2nd December 2014 prepared by Mr Patrick Lane of South Quay Auditors Ltd which is said to reflect the new trading position. As a result, the plaintiff claims that it is wholly solvent and trading profitably. In particular, it is claimed that management accounts for the year ended January 2014 demonstrated that profit before tax will increase on the 2013 figure to €107,000 from €49,000.

15. The defendant's solicitors raised a number of questions in relation to the restructuring of the company's finances. In particular, by letter dated 26th May, 2014 the defendant requested confirmation of the cash resources currently available to the plaintiff company, the current level of its indebtedness to the plaintiff company and how that was secured together with an outline of the facilities capable of being called in by the plaintiff's lenders. The plaintiff was unable to supply all of this information to the defendant's solicitors because of "commercial sensitivity and the obligations on our client regarding same".

16. A *pro forma* Balance Sheet (PBS) was produced by Mr. Lane dated 2nd December 2014 and purports to show "the very healthy financial position expected on the Financial Statements for the year ended 31st January 2015". It is said to show the effects of the financial restructuring of the company "assuming all other things being equal".

17. A transfer of 7 Johnson's Court to the company by the directors was valued at €1.65 million, a new long term loan from Bank of Ireland of €2 million was secured and a director's loan was obtained of €600,000. The *pro forma* Balance Sheet showed no change of cash at bank and in hand from 31st January 2014 to 31st January 2015 nor was there any change in the stock figure sum given for both dates. The defendant claims that the liabilities still far exceed the net assets of the company.

18. The plaintiff acknowledges that the *pro forma* Balance Sheet was prepared solely for the purpose of contesting the application for security for costs. It is clear that the figures from year ending 31st January 2014 have been applied to the draft *pro forma* Balance Sheet with the sole change being the capital position of the company which was altered by the debt restructuring agreement already described. The plaintiff contends that this balance sheet does not take into account the current trading position of the plaintiff for the past year which it claims has improved and that the plaintiff's cash at bank was in excess of the *pro forma* Balance Sheet figure of €25,000 and as of 6th January 2015 stood at €300,000.

19. The plaintiff also claims that the property at 7 Johnson's Court is now an asset of the company and was introduced to it as part of the overall debt restructuring agreement with new finance being provided by Bank of Ireland. The property was introduced at a value of €1,650,000 and in addition, the directors were required to provide a loan to the company in the sum of €600,000. Responding to criticisms made by the defendant, the plaintiff stated that the company's liabilities of €2.1 million to Bank of Ireland and €600,000 to the directors is fully accounted for and clearly set out in the first part of the *pro forma* Balance Sheet. Even if that property were to be discounted or excluded the net asset value would only be reduced by €1.65 million and the net position of the company would still be €1,506,842 and the company would therefore be in a position to discharge in full any award of costs made against it. Furthermore, the plaintiff company maintains that it does not have to establish that it has sufficient net cash to meet an award of costs but in any event, contends that it would have enough to discharge any such award.

20. It appears that prior to the restructuring in November 2014 the plaintiff had an excess of liability over assets of €3.5 million approximately. However, the plaintiff contends that following financial restructuring the position has been completely reversed. The defendants, for their part, complain that they have sought further information and retain serious reservations about the reality of the plaintiff's financial position. Evidence adduced by the plaintiff, if accepted, indicates an improving trading position with increased profit projection together with a restructured financing of its debts and liabilities. The onus of proof lies on the moving party in this motion to establish on credible evidence that there is reason to believe that the plaintiff will not be able to meet an award of costs in the future. The onus is on the defendant to establish the facts relied upon on the balance of probabilities. While there may be a number of questions over the financial restructuring of the plaintiff and while it may face serious challenges as it emerges from the recession, I am not satisfied on the evidence that as a matter of probability it will not be able to discharge an award of costs in the future. Therefore, I am not satisfied that I should make an order directing the plaintiff to provide security for costs.

21. It is therefore unnecessary, in the circumstances, to consider the second question as to whether there are special circumstances which would require the court to exercise its discretion against making such an order.

