

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

**[2014 No. 10087 P.]**

**BETWEEN**

**CARLO TASSARA ASSETS MANAGEMENT S.A.**

**PLAINTIFF**

**AND**

**ÉIRE COMPOSITES TEORANTA, WILLIAM COSTELLO, PATRICK FEERICK, CONCHUR Ó BRÁDAIGH AND THOMAS FLANAGAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 15th day of April, 2015**

1. In this application, the first defendant applies for an order pursuant to O. 29 of the Rules of the Superior Courts and s. 390 of the Companies Act 1963, directing the plaintiff to provide security for costs in respect of these proceedings. The first defendant also seeks an order under the inherent jurisdiction of the court striking out paras. 24 and 25 and the reliefs sought at para. (h) of the statement of claim.

**Security for Costs**

2. Section 390 of the Companies Act only applies to Irish registered companies. However, this Court in *Flannery & Anor v. Walters & Ors* [2014] IEHC 373, held that the principles applicable in respect of companies registered outside the jurisdiction were the same as those found in s. 390 and that the appropriate test is whether there exists:-

*"...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 ..."*

3. The question before the court is not one of the solvency, but rather whether the company will be able to meet the costs of the action if ordered against it. This does not involve a detailed analysis of the assets and liabilities of the plaintiff.

4. Whether or not to make an order directing that security for costs be furnished is a discretionary matter for the courts.

5. The plaintiff is a company registered in Luxembourg. As it is appropriate to apply the principles applicable in an application under s. 390 of the Companies Act in this application for security for costs, the applicants must show two things:-

(i) the existence of a *prima facie* defence to the plaintiff's claim; and

(ii) that there is credible testimony that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant's successful defence of the proceedings.

6. I am satisfied on the evidence outlined in the affidavit that the applicant (first named defendant) has met the threshold required of showing that it has a *prima facie* defence to the plaintiff's claim. The defendant's position is set out clearly in paras. 34, 35 and 36 of its written submissions and in terms which meet the test of establishing a *prima facie* defence. This is supported by the evidence set out in the affidavits filed for the purpose of this motion. In determining whether the second test is met, it is not necessary for the court to carry out a detailed analysis of the assets and liabilities of the plaintiff.

7. Note 5 of the 2013 accounts states:-

*"The receivables of less than one year are subordinated to the repayment of loans from Carlo Tassara SpA as its lending bank."*

8. These loans do not appear on the balance sheet. It is not possible to assess whether the plaintiff is solvent or insolvent without details of the loans, to which the receivables of less than one year are subordinated, being disclosed. Although Grant Thornton Limited in a letter of 6th February, 2015, confirmed the plaintiff's net asset position of €6.8m, they are not the company's auditors and it is based on the 2013 accounts. Those accounts contain a certificate from its auditors which state an *"inability to express an opinion"*. The auditors advised that they *"were unable to obtain sufficient and appropriate audit evidence to provide a basis for an audit opinion"* and added that they were *"...unable to express an opinion on the financial statements of the company"*. Given the different opinions expressed by Grant Thornton on the one hand and the company auditors on the other, I prefer to rely on the auditor's opinion and the notes to the accounts.

9. The first named defendant has sought further information concerning the accounts but this has not been furnished by the plaintiff. There is at least a question as to whether or not the plaintiff is balance sheet insolvent and even cash flow insolvent as its income and accumulated funds are controlled by Carlo Tassara SpA and may not be available to discharge any costs awarded without the express approval of that company. Furthermore its income is subordinated to repay an unidentified debt to that company.

10. In the circumstances, I exercise my discretion in favour of making an order directing the plaintiff to furnish security for costs in this case.

**Extent of Security to be Provided**

11. As this application is to be approached in the same way as an application under s. 390, I see no reason why the plaintiff company should be treated differently than an Irish company would be under the provisions of that section. Therefore, the security to be

ordered is sufficient security for the costs of the defendant which means full security. Traditionally, applications for security for costs under O. 29 of the Rules of the Superior Courts have been fixed against individuals on the basis of one third security. But that does not appear to be the appropriate way in which to fix security in this case as to do so would discriminate between Irish companies and foreign companies.

12. I considered the estimate of costs set out by Behan and Associates on behalf of the plaintiff and Connolly Lowe on behalf of the first defendant. There is disagreement between the Legal Cost Accountants both on the number of senior counsel that is appropriate to brief and the length of time that the case will take. For the purpose of fixing security for costs, it seems to me that I should do so on the basis of one senior counsel being briefed. Having considered the reports of the Legal Cost Accountants, I propose fixing security on the following basis.

Senior Counsel Fees

Paperwork, advice and proofs, consultation €2,500

Brief fee €40,000

Case management hearing fees €2,000

Refreshers €12,000

Submissions €3,500

Total €60,000

Junior Counsel Fees

Paperwork, consultations €1,500

Brief fee €26,666

Case management hearing fees €1,000

Refreshers €7,050

Submissions €2,350

Total €38,566

Solicitor's Professional Fees €85,000

Witnesses expenses €15,000

Stamp duties, consultation rooms, Commissioners fees €1,500

Postage, telephone and sundry expenses €1,500

Court duty, Taxing Master stamp duty €0

Total €103,000

On this basis and for the purpose of fixing security for costs only, I estimate that a reasonable sum for security for costs is €200,000 in this case and I will fix the security at that amount.

13. The other issue before the court is whether or not paras. 24 and 25 and the relief sought at para. (h) of the statement of claim should be struck out. The first named defendant says that the statement of claim delivered on 26th January, 2015, sought new relief not referred to in the plenary summons and that this relief included damages for conspiracy which is claimed at para. (h) at the relief sought in the statement of claim and also paras. 24 and 25.

14. Conspiracy is not alleged in the general endorsement of claim. I accept the submission made on behalf of the plaintiff that the allegations of conspiracy do not arise out of any additional facts which were pleaded. Counsel for the plaintiff contends that if a formal application had been made to amend the statement of claim, it is inconceivable that such an application would not be granted. Counsel for the first named defendant argues that a plaintiff cannot simply be allowed to add into the statement of claim an allegation of conspiracy where it is not referred to in the plenary summons. This is not an application by the plaintiff to amend a statement of claim but rather involves a motion brought by the first named defendant to strike out matters which are not referred to in the plenary summons but arise out of the same facts supporting the pleas made in the writ. In my view, the first defendant has not shown that it would be unfairly prejudiced by admitting the statement of claim in the form in which it was filed. If these allegations are contested they can be properly dealt with in a defence which has yet to be delivered.

15. I refuse the first defendant's motion to strike out para. (h) of the relief sought in the statement of claim and paragraphs 24 and 25.