

## THE HIGH COURT

[2010 No. 758 P]

BETWEEN

MARCHBURY PROPERTIES LIMITED

PLAINTIFF

AND

MURPHY CONCRETE (MANUFACTURING) LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Gilligan delivered on the 12th day of November, 2013**

1. In these proceedings, the plaintiff claims that the defendant company, a quarry supplier of concrete, stone, sand, gravel and related products, was negligent and in breach of contract to the plaintiff by supplying stone, described, *inter alia*, as "Clause 804", which allegedly contained pyrite and which the plaintiff alleges was used in the plaintiff's developments of various properties at New Haven, Balbriggan, County Dublin. Some houses in the development have since been affected by the alleged presence of pyrite in the building material used during their construction. The plaintiff is seeking an indemnity and damages from the defendant in respect of the alleged pyrite induced damage.

2. In this particular application, the defendant seeks security for costs as against the plaintiff pursuant to s. 390 of the Companies Act 1963, which provides:-

"where a limited company is plaintiff in any action or other legal proceedings, 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."

And further, pursuant to O. 29, r. 1 of the Rules of the Superior Courts, 1986 as amended, which provides that:-

"When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security."

3. The central elements in an application of this nature in respect of security for costs is that there is an onus on the applicant, being the defendant herein, to show that it has a *prima facie* defence to the respondent's claim and secondly, the court has to be satisfied that the respondent would be unable to pay the applicant's costs in the event of the defendant successfully defending the proceedings. In such instances, unless the plaintiff can prove the existence of some special circumstance that would justify a refusal, security for costs will normally be granted.

4. In the particular circumstances of this case the plaintiff openly admits that it would be unable to pay the applicants costs of successfully defending these proceedings and thus, the second issue to be decided is as to whether or not the applicant satisfies this Court that it has a *prima facie* defence to the plaintiff's claim.

5. In extensive affidavits and accompanying exhibits as sworn by Seamus Murphy on behalf of the defendant company, he denies liability and sets out several grounds of defence denying that the defendant company made any representations or warranties, that it at all times exercised reasonable care and skill and the plaintiff's claim is for pure economic loss and is misconceived, that the Liability of Defective Products Act 1991, has no application, that all or part of the plaintiff's claim is statute barred, that the plaintiff company has failed to identify what loss or damage it alleges has been suffered and that even if the defendant company is found in breach of contract or in breach of duty, both of which are denied, a significant issue in respect of whether the plaintiff is liable for any alleged defects will arise. However, I have given careful consideration to the affidavit of Thomas Durkan, and in particular, to the aspect of the defendant satisfying this Court that it has a *prima facie* defence. The content of the affidavit of Mr. Durkan is impressive in that it meticulously deals with the various aspects as set out on the defendant's behalf and the basis on which they are disputed on the plaintiff's behalf.

6. The nature of the *prima facie* defence that has to be considered by the court in an application such as is being made herein, was considered extensively by this Court (Finlay Geoghegan J.) in *Tribune Newspapers (in receivership) v. Associated Newspapers Ireland* (Unreported, High Court, 25th March, 2011). In her judgment Finlay Geoghegan J. analysed the nature of what had been considered to be a *prima facie* defence in prior case law and concludes as follows:-

"...both the Supreme and High Courts have used slightly different terminology to describe the nature of the defence which must be established on an application for security for costs. Whilst there is generic use of *prima facie* defence there is it appears also references, apparently in the alternative, to good defence, real defence or even to the plaintiff's case as being required to be unanswerable, with the consequential impact on the defendant's defence. What appears from the judgments, in a manner similar to the judgments in relation to summary judgement [cases], is that a defendant seeking to establish a *prima facie* defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertion will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits. If such evidence is adduced then the defendant is entitled to have the court determine whether or not it has established a *prima facie* defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the court may arrive at based upon such evidence. In so far as the plaintiff is admitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the

defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission. Such an exercise would inevitably require the Court at the interlocutory stage of the application for security for costs to assess the strength and weaknesses of the respective parties' contentions and cases. The decisions of the Supreme Court already referred to appear to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a defendant seeking to establish a *prima facie* defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim. I propose applying this test. Further, it appears to me that such a test is supported by s. 390 as enacted by the Oireachtas, which I am applying in this application for security for costs. The section as enacted contains no express reference to the establishment of a *prima facie* defence. The application of the *prima facie* defence test is applicable for the purposes of this section, in the sense that the section requires the company to provide security where it would be unable to pay the costs of the defendant if successful in its defence. It is therefore relevant to consider that, or whether or not, a defendant has a *prima facie* defence in the sense that he might succeed but [this jurisdiction] does not warrant the imposition of a higher threshold. Unless the defendant has a *prima facie* defence the purpose of this section would not come into play."

7. I agree entirely with Finlay Geoghegan J. that this Court has no role to play as to whether or not the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding. In essence, I find the content of the affidavit of Mr. Thomas Durkan more compelling than the contents of the two affidavits and accompanying exhibits as sworn by Seamus Murphy. I note, in particular, that the plaintiff currently relies on tests carried out in relation to No. 51, Newhaven Bay, only, but it does appear that, in fact, the defendant has not actually inspected any of the properties. It is clear that no remedial works were carried out to any of the properties and accordingly the defendant does not, in my view, objectively demonstrate the evidence upon which it would rely to establish that it has a *prima facie* defence to the plaintiff's claim. In my view, the content of the affidavits as sworn on the defendant's behalf are matters of assertion and I am of the view that at this point in time, in order to set out a *prima facie* defence, it would be necessary to at least carry out an inspection with the relevant necessary experts to give credence to, if it be the case, the defendant's assertions.

8. I am not satisfied to maintain that a *prima facie* defence has been set out on the defendant's behalf, and in these circumstances, the second essential proof in respect of this Court making an order for security has not been met and the application on behalf of the defendant accordingly fails.