[2020] IEHC 139

THE HIGH COURT

[2017 No. 4639 P.]

BETWEEN

3V BENELUX BV

PLAINTIFF

AND

SAFECHARGE CARD SERVICES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 6th day of March, 2020

1. On 16th October, 2019, for the reasons given in a lengthy written judgment, I decided that the defendant had established that it had a *prima facie* defence to the plaintiff's claim; that the defendant had established that there was reason to believe that the plaintiff would be unable to pay the costs of the action if it were to fail; and that the plaintiff had failed to establish on a *prima facie* basis that the cause of the apprehended inability to pay costs was actionable wrongdoing on the part of the defendant.

2. At the opening of the application for security for costs, counsel informed the court that, subject to the court, the parties had agreed to leave over any issue as to the amount of the costs which should be secured if the court was persuaded to make an order. That issue as to the amount of the security was the issue as to the percentage or fraction of the costs for which security (if any) should be given, and not the amount of the defendant's costs.

3. At the substantive hearing, the defendant put forward an estimate of its party and party costs of €394,700 and the plaintiff an estimate of €252,000. For the reasons given, I preferred the defendant's estimate to the plaintiff's estimate and considered the issue of the apprehended inability to pay on the basis of the higher estimate. What remained to be decided was whether the plaintiff should give security for the full amount of the defendant's estimate, or a fraction or percentage.

4. To an officious bystander there might, I suppose, have been some ambiguity in the final sentence of my judgment - that the amount of the security would be left over - but it should, I think, have been clear to the parties that what I postponed was what I had been asked to postpone.

5. The estimates of the likely costs of the security for costs application were both based on the assumption that it could be disposed of in one day. The plaintiff's estimate assumed that only junior counsel would be instructed – at least on behalf of the defendant. In the event, there was a protracted exchange of affidavits and expert reports and the motion (apart from the issue the subject of this ruling) took three days.

6. When the motion came back into the list for argument in relation to the issue which had been left over, it transpired that further affidavits had been filed which sought to reopen the amount of the estimates. The defendant sought to make the case that the previous estimate of the costs of the security for costs application of €35,400 should be revised to

€205,664.55, and the initial overall estimate of €394,700 should be revised to €688,214.55.

7. While steadfastly maintaining that the exercise was not one which had been contemplated by the judgment, the plaintiff commissioned a revised estimate on more or less the same basis which took the estimate of the costs of the application for security for costs to €116,779.04 and increased the overall estimate by €162,779.04. I have to say that, like the legal costs accountant instructed on behalf of the plaintiff, I was taken aback by the level of fees proposed for the motion for security for costs. On the defendant's revised estimate, the costs of the motion for security for costs are more than half of the estimated costs of a six day trial of the substantive action.

8. In any event, absent the agreement which had been made between the parties, any issue as to the percentage or fraction of the costs for which security is to be given would ordinarily have been argued and decided as part of the application for security, in which event, no issue as to revisiting the estimates could have arisen.

9. Having read the additional affidavits, I ruled that the only issue before the court was the fraction or percentage of the estimate which I had previously preferred and I heard counsel on that issue.

10. For the purpose of dealing with the outstanding issue, both sides filed further affidavits and elaborate written submissions.

11. The defendant, in a nutshell, wants security for the full amount of the estimate, and wants cash or a bond.

12. I confess that I find the plaintiff's position on this issue rather puzzling. On the one hand, it offers what is said to be security for €417,642. On the other, there was a complex legal argument which canvassed the difference between "*sufficient security*" in s. 390 of the Companies Act, 1963 and "*security*" in s. 52 of the Companies Act, 2014; the balancing of the plaintiff's right of access to justice against the risk that the defendant's costs will not be paid; the requirement for proportionality; and the risk that a meritorious claim might be stifled.

13. It seems to me that if what the plaintiff offers is good security for more than the higher estimate, and the plaintiff is willing to provide that security, it is not necessary to get tied up in nice questions of law.

14. In my judgment of 16th October, 2019 I dealt in some detail with the plaintiff's argument that there was no reason to believe that it would be unable to pay the costs. Much of the argument on both sides addressed the likely availability to the plaintiff of so-called "*inactivity fees*" derived from the plaintiff's ability to surcharge dormant debit card accounts for €1.50 per month and, at the end of 2021, to pay to itself all that will remain of the credit balances.

15. On the plaintiff's estimates, which the defendant contested, the plaintiff projected a balloon or bullet payment at the end of 2021 of €556,856. In an affidavit of Mr. Paul Jacobs sworn on 20th December, 2019, with the authority of the plaintiff, it was proposed that that balloon or bullet would secure the defendant's costs. As explained in my earlier judgment, one of the issues in dispute in the action is whether the defendant is entitled to 25% of the inactivity fees. What was suggested was that even allowing for the defendant's claim to 25%, the balloon would provide a figure of €417,642 by way of security.

16. In a letter of 21st January, 2020 the plaintiff appeared to row back a bit, suggesting that the security proposed might be for a portion only of the estimated costs.

17. The plaintiff's proposal is that the defendant should have security in the nature of a first priority fixed charge over a specific bank account into which the funds will be paid. The funds received into that account, it is said, will be available to meet any order for costs in favour of the defendant whenever it might be made.

18. In my clear view, the proposed security would for all practical purposes be no security at all. It is certainly not comparable to cash or a bond.

19. What is suggested is that for about two years the defendants should have a first fixed charge over an empty bank account. Between now and then, the money which it is hoped will eventually find its way into that account is the plaintiff's customers' money which, if any of them were to ask, they are entitled to be paid. If what is proposed was, as it is said to be, truly security for €417,642, it would be security for a loan or bond which would allow the plaintiff to put up cash or a bond.

20. As I explained in my earlier judgment, the plaintiff's projections as to profits for the years 2019 to 2021 were plainly wrong because they made no provision for the payment of the plaintiff's costs of the litigation on an ongoing basis.

21. The recent affidavit of Mr. Jacobs shows that the plaintiff currently has about €200,000 in cash but that all of this is required to fund its business. Mr. Jacobs refers to revised budget forecasts for 2020 to 2023. These forecasts, he says, assume consultancy costs of €80,000. The €80,000, Mr. Jacobs quite candidly says, would be insufficient to cover the plaintiff's legal and professional costs to run a full hearing of these legal proceedings. From this, it seems to me, two conclusions are inescapable. The first is that someone is prepared to fund the litigation. The second, it seems to me, is that these forecasts, like the earlier forecasts, are unreliable because they do not include an estimate of the plaintiff's costs or give any indication as to how the gap between the assumed €80,000 and the amount of the plaintiff's costs is to be bridged.

22. On the authorities, most notably *Coolbrook Developments Limited v. Lington Developments Limited* [2018] IEHC 634, *Hedgecroft Limited v. Htremfta Limited* [2018] IECA 364, and *Farrell v. Bank of Ireland* [2013] ILRM 183, the court has a full discretion as to the amount of security for costs which is to be provided. In the exercise of that

discretion, the court is required to strike a balance, in a proportionate way, between the risk of injustice to both parties.

23. It is submitted on behalf of the plaintiff that the defendant's application for security for costs is "*designed*" to stifle the claim: but there is no evidence that it will.

24. This is a large and complex claim. The evidence is that the plaintiff is unable to fund its own costs, and unable to provide any security whatsoever for the defendant's costs from its immediate resources. The evidence on the substantive application was that the plaintiff was paying its costs on an ongoing basis and the additional affidavit of Mr. Jacobs sworn on 20th December, 2019 shows that in the eleven months to November, 2019 the plaintiff "*recognised*" a further amount of €152,553 for the costs of these proceedings. The inference is irresistible that the plaintiff has a financial backer which will ensure that the plaintiff's costs are paid on an ongoing basis.

25. On the evidence, the party and party costs litigation routinely tax at significantly less than the costs actually incurred: so that an order for security for the full amount of the party and party estimate is in reality already limited security. The evidence is that at present and for the next two years the plaintiff will be unable to provide any security at all from its own direct resources.

26. There is no evidence in this case that an order for security for costs, whether full or limited, would or might stifle the claim. To my mind, it would be unjust to contemplate that whoever it is is willing to finance the litigation should be able to finance the plaintiff's costs on an ongoing basis but expose the defendant to an even greater risk that it should have to bear the costs of defending a claim that the court might ultimately find to be unmeritorious than is necessarily inherent in the system of adjudication of costs.

27. *Farrell* was an application under s. 390 of the Companies Act, 1963 but it seems to me that the fundamental underlying rationale explained in that case applies equally to s. 52 of the Act of 2014. As explained by Clarke J., the underlying rationale for corporate security for costs is that there is no good reason why the financial backers of a plaintiff who stand to gain if the action is successful should not also be exposed to the costs of failure.

28. When I dealt with the substantive application there was no suggestion that an order for security for costs would stifle the claim. That, it is well established, is a relevant consideration. As was the case in *Hedgecroft and Hot Radio Co. Ltd. t/a Pulse FM v. IRTC* [2000] IESC 55 there is no suggestion in this case that the action might be stifled by an order for security in the full amount of the estimate, but that the plaintiff would be in position to lodge a lesser sum.

29. Mr. McGrath referred the court to the *dictum* of Fitzgibbon J. in *Perry v. Stratham* [1928] I.R. 580, approved by Kingsmill Moore J. in *Thalle v. Soares* [1957] I.R. 182, and by Barniville J. in *Coolbrook* that security for costs is not intended either as an indemnity against all costs which may be incurred or as an encouragement to luxurious litigation.

While it could fairly be said the fees raised and paid for the defendant's costs of the motion for security for costs - a total €319,450.80, of which the solicitors' professional fee accounts for €150,000 – are not exactly frugal, there is no scope in the initial overall estimate of €394,700 for the plaintiff to be visited with the consequences of luxurious litigation.

30. In support of his argument that the plaintiff's proposal will have the effect that the necessary funds will be available by the time any order for costs might be made against the plaintiff, Mr. McGrath refers to a decision of the English High Court in a case of *Jirhouse Capital v. Stanley Sherwin Beller [2008] EWHC 725. That was a case in which the court ordered the provision of security* in two instalments - £140,000 within 21 days and £112,000 five weeks before the trial. Mr. Howard makes much of the fact that the order made in that case was the order which had been sought by the defendant, which is true, but I would not rule out the possibility of staged security in an appropriate case.

31. This, it seems to me, is not such a case. There is no proposal for staged security. The plaintiff currently has no means obviously available to it to provide any security but hopes that by the time the action has been heard it will have. It seems to me that to postpone the provision of security while at the same time allowing the action to proceed would be unfair to the defendant. The plaintiff hopes and expects that it will continue in business. Inferentially the plaintiff, for the moment, has financial support or the prospect of financial support but there is no evidence as to the nature or extent of that support, or any evidence from which comfort might be drawn that such support will continue. In my view it would be unjust to expose the defendant to the risk that the plaintiff might for whatever reason go out of business or that the financial support presently available to it might be withdrawn before the security is put in place.

32. In support of his argument that the court should consider ordering security for a percentage of the estimated costs, Mr. McGrath urges the court to take into account the fact that the defendant did not, at the substantive hearing, establish that it had a *prima facie* defence on the ground that the contract was frustrated. If that is so, it is said, all that is left in the case is whether the plaintiff suffered loss and, so the argument goes, it is inherently unlikely that the plaintiff did not suffer some loss. It seems to me that this submission effectively asks the court to go behind the finding already made that the defendant has established that it has a *prima facie* defence and to make a tentative assessment of the merits of the claim in deciding the level of security that is to be provided. I decline to do so. If the court, in deciding in principle whether there should be security for costs is precluded from attempting to assess the weight of the claim or defence, it seems to me that the same must apply when the court comes to decide the level of security. Otherwise, a consideration of the case by reference to the probability of success or failure would be introduced by the back door.

33. The plaintiff has not proposed any alternative to cash or a bond, other than the first fixed charge over the empty bank account. The defendant is entitled to security by cash or a bond.

34. The premise of the plaintiff's offer is that at the end of 2021 it will be able to put up €417,642 in cash.

35. The evidence is that the plaintiff is now, and until the end of 2021 will be, unable to put up security from its own resources, but the plaintiff is nevertheless entitled to time to provide security.

36. In the ordinary way, I would have thought that a period of nearly two years is at the very outside of any time that might reasonably be allowed for the provision of security. Counsel were agreed that it would be far less than ideal to put the action on hold for a substantial period of time, but Mr. Howard did not make the case that a postponement of the progress of the action would seriously prejudice the prospect of a fair trial. Rightly or wrongly, I take into account the fact that the fixing of a substantially shorter period within which security is to be provided might precipitate an appeal which, in any event, would delay the progress of the action.

37. I will make an order that the plaintiff is to provide security for costs, by way of cash or bond, in the sum of €417,642 by no later than 5th January, 2022, which is three business days after 31st December, 2021, and I will stay all further proceedings in the action until that security is provided.