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| **Neutral Citation No: [2023] NIKB 56**<br><br>*Judgment: approved by the court for handing down (subject to editorial corrections)** | *Ref:* **McB12144**<br><br>*ICOS No:*<br><br>*Delivered:* **20/04/2023** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**

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**Between:**

**JOSEPH BRADDELL & SON LTD**

**Plaintiff**

**and**

**ZURICH INSURANCE PUBLIC LIABILITY COMPANY**

**Defendant**

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**Mr Christopher Ringland (instructed by Clyde and Co (NI) LLP, Solicitors) for the Defendant/Appellant**
**Mr Gibson (instructed by McCartan, Turkington and Breen, Solicitors) for the Plaintiff/Respondent**

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**Ex Tempore Judgment**

**McBRIDE J**

*Introduction*

[1] This is an appeal from the decision of Master Bell who refused the defendant's application for security for costs.

[2] The defendant/appellant was represented by Mr Christopher Ringland of counsel. The plaintiff/respondent was represented by Mr Gibson of counsel. I am grateful to all counsel for their detailed oral and written submissions.

[3] The plaintiff is a gunsmith and fishing tackle business. It obtained a policy of insurance from the defendant on 15 July 2014. On 9 December 2014 one of the directors was present at the plaintiff's business premises at 11 North Street, Belfast, when an intruder entered the premises causing significant injury to the plaintiff and then set the premises on fire. As a result, the premises and stock were severely damaged.

[4] The plaintiff presented a claim to the defendant in respect of the damage to the premises and stock. After lengthy investigations, some six years post incident in 2020, the defendants declined to provide the plaintiff with an indemnity. Correspondence dated 27 August 2020 sets out the bases upon which the indemnity was refused. It identifies the two bases as follows:

(i) Financial viability of the business/wrongful trading/tax evasion affecting the policy position overall; and

(ii) Claim presentation.

[5] Under the heading of Financial Viability of the Business, the correspondence asserts the plaintiff company was insolvent, was wrongfully trading and questioned the accuracy of the companies accounts which recorded in December 2013 that the business was balance sheet solvent. It identified the moral hazard as tax evasion and wrongful trading. In this correspondence it does not rely on failure to disclose an HMRC investigation. As appears from the correspondence, at that time, the defendant did not have any information to establish when the HMRC investigation commenced. The only information available to it was that HMRC visited the premises on 18 September 2014, which was after the policy of insurance was effected. The letter sought further disclosure from the plaintiff company to enable it to establish when and if there was an HMRC investigation.

[6] Under the heading Claim presentation the defendant argued that it may rely on a fraud condition arising from alleged false statements by the plaintiff regarding the claim for business interruption. It further indicated that it may rely on a lack of co-operation as a ground for refusing indemnity.

[7] The plaintiff issued the present proceedings seeking damages for loss and damage to stock, fixtures and fittings and made a claim for business interruption indicating that details of this were to be confirmed. The claim arises from the defendant's alleged breach of the contract of insurance. The defendant has now filed a draft defence in which the defendant seeks to defend the plaintiff's claim on the basis that:

(a) The plaintiff failed to disclosure that there was an ongoing HMRC investigation at the time it obtained insurance cover. The defendant alleges that had it done so the defendant would have characterised this as a moral hazard and its underwriter would have refused cover on this basis.

(b) The plaintiff failed, contrary to its contractual obligations, to co-operate with the defendant after it made the claim.

[8] There is no suggestion that either the plaintiff or its servants or agents were in anyway responsible for the fire which caused the damaged to the plaintiff's property and stock.

[9] The defendant's application for security costs was grounded on the affidavit of Ms McCullough, solicitor, dated 21 March 2022. The plaintiff's solicitor, Mr McKay, replied on the plaintiff's behalf on 13 May 2022 and Ms McCullough filed a rejoinder on 9 August 2022.

[10] Having read these affidavits the court takes this opportunity to remind practitioners that an affidavit must comply with the provisions of Order 41 of the Rules of the Court of Judicature. In particular, affidavit evidence should state the facts only. Affidavits should not contain legal argument and submissions or expressions of opinion on the facts.

[11] In this case I consider that much of the material contained within some of the affidavits flagrantly contravened these rules. The affidavits read like acrimonious inter-parte correspondence and much of what they contained contributed nothing to assisting the court in the fact-finding process. Such an approach not only wastes the court's time but also does a disservice to the parties. In the future the court may well disallow the costs of affidavits which breach the rules.

***The relevant legal framework***

[12] The defendant's application for security for costs is made pursuant to Order 23 Rule 1(e) of the Rules of the Court of Judicature which provides that where the plaintiff is a corporation or other body (whether incorporated inside or outside Northern Ireland) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so, then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

[13] This provision has been the subject of judicial consideration within this jurisdiction in the cases of *Munchie Foods Ltd v Eagle Star Insurance Ltd* [1993] 5 NIJB 34 and on appeal at [1993] 9 NIJB 69, *McAteer v Lismore* [2000] NI 477, *GWM Developments Ltd, Greenback Investments Ltd v Lambert Smith Hampton Group Ltd* [2010] NIQB 33, *Brookview Developments Ltd v Ferguson and others* [2011] NIQB 37 and *Tennyson v Inmark (NI) Ltd v Rooney and others* [2013] NIQB 9. Similar provision regarding security for costs has also been considered in the English Court of Appeal in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534.

[14] I consider the following principles can be drawn from the jurisdiction. There are three stages in relation to considering an order for security for costs. At stage 1 there must be reason to believe that the plaintiff is unable to pay the defendant's costs. At stage 2 the court has to exercise its discretion. In relation to this stage the following principles apply:

(i) The court has a complete discretion whether to order security and will, in the exercise of this discretion, take into account all the relevant circumstances in deciding whether it is "just to do so."

(ii) In exercising its discretion the court is carrying out a balancing exercise. It weighs in one hand, the injustice to the plaintiff, if it is prevented from pursuing a proper claim by an order for security and, on the other hand, weighs the injustice of the defendant if no security is ordered and the defendant finds himself unable to recover costs awarded against the plaintiff at final trial.

(iii) The factors which weigh in the balance include, non-exhaustively, the following:

(a) The possibility or probability that the plaintiff company will be prevented from pursuing its claim by an order for security, is not, alone a sufficient reason for not ordering security as such a situation is clearly envisaged by the terms of Order 23.

(b) The plaintiff's prospects of success. The court should not go into a detailed examination of the possibilities of success or failure. If it can clearly be demonstrated that the plaintiff has a very high probability of success, then that is a matter which can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that again, is a matter to weigh in the balance. The assessment of the respective strengths of the plaintiff's and defendant's cases is made on the basis of a cursory perusal of all the available materials and the court, should not, at this stage engage in a detailed examination of the possibilities of success or failure as at this interlocutory stage the court has inadequate material and does not have the benefit of hearing any evidence. In the context of assessing the plaintiff's prospects of success the court can take account of any materials which are indicative of either the plaintiff's prospects of success or the defendant's prospect of success, for example, any agreed facts, any admissions, any offers, whether there are any pure legal arguments which would undermine either the plaintiff's case or the defence and any other documentary materials which are indicative of the strength of the plaintiff's case.

(c) The power to order security for costs will not be allowed to be used as an instrument of oppression, examples of this would include:

(i) Where an order's effect would be to stifle a genuine or meritorious claim especially by an indigent company against a more prosperous company. In this context the court must be

satisfied that it is probable that the claim would be stifled. In some cases, this can be inferred without direct evidence. In others the onus is on the plaintiff to satisfy the court such an order would prevent it continuing the litigation by establishing it has no alternative resources open to it.

(ii) Where the plaintiff's inability to meet the order for security has been caused by the defendant's conduct, such as the defendant delaying or refusing payment.

(iii) Where the delay by the defendant in making the application has had an adverse impact on the plaintiff.

[15] At stage 3 the court continues to have a discretion in respect of the amount of security ordered. The amount should be proportionate, and it should be more than simply a nominal amount.

*Consideration*

[16] It is accepted by all the parties that the plaintiff does not have the means to pay the defendant's costs and, therefore, stage 1 is satisfied.

[17] Turning to stage 2, in the exercise of my discretion I take into account the following matters. First, I am satisfied that the plaintiff's claim is bona fide and there is no suspicion that it is a fraudulent insurance claim. Second, I consider that the plaintiff has a reasonable prospect of success. The claim, as set out in the papers, establishes that there is a good arguable case. The defendant's draft defence is that it would not have offered insurance if it had known of the HMRC investigation, and it can now refuse indemnity on the basis of a lack of co-operation by the plaintiff post making the claim. Whether the case can be successfully defended will depend on expert evidence in relation to underwriting. It will also depend on factual findings in respect of when the HMRC investigation commenced or was known about and factual findings about the actual level of co-operation by the plaintiff. At this interlocutory stage it is impossible for the court, in the absence of hearing all the evidence, and having before it the expert evidence to make a finding that either the plaintiff or the defendant has a very high probability of success.

[18] At this stage, based on the material before the court, I consider that the plaintiff's case is not one which is bound to fail, nor necessarily is it a case which is bound to succeed. It is, however, a genuine claim and although the defendant has raised a viable defence, I consider that the delay by the defendant in refusing indemnity on the basis of non-cooperation and the basis upon which it now alleges moral hazard are all matters which I consider strengthen the plaintiff's prospect of success. In the correspondence the defendant stated that it did not know when the HMRC investigation had commenced. The information that was available to it at that time was that the HMRC investigation commenced after the policy of insurance

was effected. In the affidavit evidence before this court, the defendant does not refer to any new evidence which shows that the HMRC investigation had commenced prior to the policy of insurance being obtained. Ultimately, it will be a matter for evidence, but at this stage, in the absence of any documentary evidence showing an HMRC investigation was actually in play at the time the policy was effected and on the basis that the available information shows HMRC did not commence an investigation until after the policy was effected, I consider that this increases the prospect of success for the plaintiff. I place great weight upon the fact that the plaintiff has a genuine claim which, I consider, has a reasonable prospect of success.

[19] The effect of ordering security for costs in this case would, I consider, work to stifle a genuine claim. It is agreed by both the plaintiff and defendant that the making of such an order would prevent the plaintiff continuing the litigation. The plaintiff is a small company, and the defendant is a large corporation. In all the circumstances I consider that the making of an order for security would cause greater prejudice to the plaintiff than the defendant. The making of such an order would mean the plaintiff would be unable to pursue a genuine claim, whereas, the prejudice to the defendant is that it would be unable to recover the costs of this action which must be viewed in the context of the defendant being a large public liability company. In such circumstances, I consider there is less prejudice to the defendant.

[20] There was much discussion before the court about whether the plaintiff's inability to pay was caused by the defendant's action in refusing to provide insurance cover.

[21] Mr Gibson sought to rely on *Munchie* to establish that the failure of the defendant as an insurer to pay out affected the ability of the trader to trade and, thus, have the means to provide security for costs. I consider that *Munchie* can be distinguished on its facts from the present case. In *Munchie* the dispute was over whether the company went into receivership, thereby leading to its inability to pay security, as a result of the insurer's failure to indemnify. In the present case the plaintiff company continued to trade, and therefore, the issue is whether the defendant's failure to provide indemnity has affected the plaintiff's ability to give security for costs. This therefore involves a consideration of whether the company was in a position to give security at the time of the incident and as a result of the defendant's actions is not now in such a position.

[22] Mr Ringland, on behalf of the defendant, submitted that the plaintiff's impecuniosity was not brought about by the defendant's conduct. He submitted that the company was not in a position to give security for costs at the time of the incident and, in particular, referred to the 2014 company accounts. He relied on the fact that it owed debts and, in particular, owed debts to HMRC and others for rent arrears and that at that time it was working at its overdraft limit. He also relied on comments made by the company directors to the defendant's claims investigator

about the state of the company and their intentions regarding the future of the business.

[23] I note from the 2014 accounts that the plaintiff was balance sheet solvent. There is no doubt that it had debts and that business was challenging but there is no expert evidence it was insolvent or close to insolvency. I also note, that although the directors accepted the business had many challenges, they specifically deleted from the claims manager's note that the business was no longer viable. In all the circumstances, especially in the absence of expert evidence about this issue, I am not satisfied that the plaintiff would not have been in a position to give security for costs at that stage. Further I cannot make such a finding as the company may have been able to raise money at that time from other resources to continue litigation.

[24] The question which then arises is whether the defendant's conduct in refusing indemnity caused the plaintiff to be unable to provide security as of today's date. The most recent accounts show that the position of the company has indeed worsened since 2014. It is therefore difficult to dismiss the argument that in circumstances where the plaintiff had lost its stock in the fire and could not trade without stock, that if the defendant had promptly paid on the policy the plaintiff might have been able to trade more profitably and, therefore, be in a position to pay security for costs. In these circumstances, I cannot conclude with certainty on the available evidence that its inability to find security as of today's date is not due to the defendant's conduct in refusing to pay on the policy.

[25] Since the court cannot, however, be certain about the effect of the defendant's conduct on the plaintiff's ability to pay security without a protracted investigation on the evidence on this issue, something which, in my view, the court should not do at this interlocutory stage, I give this factor very limited weight in the balancing exercise.

[26] Weighing all the factors in this case in the balance, I consider, I ought not to order the plaintiff to provide security for the defendant's costs, especially as I consider such an order would deprive the plaintiff from advancing what might eventually be found to be a sustainable claim and, therefore, would have an effect of driving the plaintiff from the judgment seat. I therefore dismiss the appeal.

[26] Having heard the parties' submissions on costs I condemn the defendant in the costs of this application.