Neutral Citation No: [2023] NIMaster 1 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **2023NIMaster1** ***ICOS No:*** **20/70566/01** ***Delivered:*** **09/01/2023**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Joseph Braddell & Son Ltd

Plaintiff;

and

Zurich Insurance Public Liability Company

Defendant.

Master Bell

[1] This is an application by the defendant under Order 23 rule 1 of the Rules of the Court of Judicature that the plaintiff should be required to give security for costs. The defendant was represented by Mr Ringland and the plaintiff by Mr Gibson. I am grateful to counsel for their written and oral submissions.

[2] The context of the litigation is that the plaintiff, a gunsmith and fishing tackle business, obtained a policy of insurance from the defendant on 15 July 2014. On 9 December 2014 an incident occurred at the plaintiff's business premises at 11 North Street, Belfast which resulted in one of the directors being injured and the premises being set alight, destroying the plaintiff's stock. There was no suggestion that any of the plaintiff's servants or agents were in any way responsible for this incident. The plaintiff thereafter presented a claim to the defendant in respect of damage to the premises and stock located therein. Having conducted lengthy and comprehensive investigations, the defendant declined to provide the plaintiff with an indemnity.

[3] The plaintiff subsequently issued a writ, alleging that the defendant's failure to indemnify it constituted a breach of the contract of insurance. The defendant now makes an application for security of costs. The affidavits in the application were sworn by solicitors acting for the parties, Ms McCullough for the defendant and Mr

McKay for the plaintiff, rather than by the directors of the plaintiff company or the underwriters for the defendant company.

THE LAW

[4] The relevant portion of Order 23 rule 1 provides:

> "1. - (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-
>
> ….
>
> (e) that the plaintiff is a company 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 proceeding as it thinks just."

[5] The issue of security for costs was considered in this jurisdiction in *McAteer and Beechfinch Ltd v Lismore* [2000] NI 477. Girvan J referred to the domestic law prior to the Human Rights Act 1998 and summarised that a court hearing an application for security of costs must exercise its discretion in deciding whether to make an order and that that discretion must be exercised on judicial lines considering all the circumstances. He stated:

> "Relevant circumstances will be whether the claim is bona fide, whether the plaintiff has a reasonably good prospect of success, whether there is any admission, whether the application for security is being used oppressively so as to stifle a genuine claim and whether the company's want of means had been brought about by any conduct on the part of the defendant such as delay in payment."

[6] The approach adopted by Girvan J was subsequently followed in a trio of decisions by Weatherup J: *GWM Developments Ltd and Greenback Investments Ltd v Lambert Smith Hampton Group Ltd* [2010] NIQB 33, *Brookview Developments Ltd. v Ferguson and Another* [2011] NIQB 37, *Tennyson v Inmark (NI) Ltd. and Others* [2013] NIQB 9.

[7] In his decision in *GWM Developments Ltd v Lambert Smith Hampton Ltd,* Weatherup J stated that there are three stages to applications for security for costs. Firstly, there must be reason to believe that the plaintiff is unable to pay the

defendant's costs. Secondly, the Court has a discretion whether to require security for costs (during which it considers the relevant circumstances as explained by Girvan J in *McAteer and Beechfield Ltd*). Thirdly, if an order is to be granted, then the court has a discretion as to the amount of the security for costs. In considering this application I adopt that three-stage approach.

DISCUSSION

Is the plaintiff unable to pay the defendant's costs?

[8] Ms McCullough averred that the plaintiff's most recent filed accounts show that the company was indebted to creditors in the sum of £96,000. In describing the plaintiff's financial state, Mr Ringland expressed the view that the company "was *en route* from the Intensive Care Unit to the morgue."

[9] Ms McCullough made an assessment of her client's likely costs, should this action proceed to trial, and has calculated the total figure is likely to be £118,500 plus VAT. This figure is comprised of solicitors' costs of £45,000, court fees of £1,000, counsel's fees of £30,000, an underwriting expert's fee of £17,500 and an expert forensic accountant's fee of £25,000. She wrote to the plaintiff's solicitor and asked that one third of the total estimated amount should be paid by the client to his own solicitor or an application for security of costs would be made to the court.

[10] Mr McKay stated in his affidavit that the plaintiff did not deny that discharging a total estimated costs figure of £142,000 would be difficult for the plaintiff. However, he criticised the absence of a formal bill of costs and the fact that no explanation was given for how the £45,000 for solicitors' costs and £30,000 for counsel's fees were made up.

[11] Mr Ringland observed that no explanation had been provided for Mr. McKay's use of the word "difficult" in preference to the word "impossible". He submitted that 'impossible' was the only appropriate word to employ in circumstances.

[12] Of course a consideration of a corporate entity's means is not necessarily the end of this issue. In *McAteer and Beechfinch Ltd v Lismore* Girvan J said:

> "When faced with an application for security for costs against a limited company the court is enjoined by the authorities to examine the application in the concrete circumstances of the case. In the context of a limited company without apparent means in the examination of the circumstances of the case the court in appropriate cases would be justified in looking behind the corporate veil at the economic reality of the situation."

[13] However it has not been suggested on behalf of the plaintiff that in this case assets outside the corporate context are available to satisfy an order for security of costs. Mr Ringland noted that the plaintiff's representatives had not referred to any borrowing capacity they might have or assets outside the company context. Given that the plaintiff has not sought to place such evidence before me, I must reach a conclusion that such assets are not available. I therefore conclude that the plaintiff would be unable to pay the defendant's costs if it loses the action.

[14] I am therefore required to move to the second stage of the approach referred to by Weatherup J in *GWM Developments Ltd v Lambert Smith Hampton Ltd* and consider the relevant circumstances so as to conclude how the court's discretion ought to be exercised.

Is the claim bona fide?

[15] The defendant made no suggestion that the plaintiff's claim is not *bona fide*. It accepts that the plaintiff is genuinely seeking to enforce what it considers to be its rights pursuant to a legitimate policy of insurance.

Has the plaintiff a reasonably good prospect of success?

[16] In her first affidavit on behalf of the defendant, Ms McCullough averred that the defendant's defence to the action was that the plaintiff had under-declared sales with the intention of minimising its VAT liabilities and that criminal behaviour by the directors of a company constituted a material fact which should have been disclosed to the defendant. On the other hand, Mr McKay for the plaintiff observed that the defendant has not yet served a defence, even though the plaintiff's Statement of Claim issued over two years ago. Mr Gibson submits that the lack of a pleaded defence should weigh heavily with the court. I agree with that submission.

[17] Mr McKay for the plaintiff averred that the plaintiff did have issues with HMRC and with its VAT returns following the retirement of a bookkeeper in the firm. However, although those issues were interpreted by the defendant as a "moral hazard" and tax evasion was alleged, Mr McKay says that the issues between the plaintiff and the HMRC were ultimately resolved and that the "leap" to an interpretation of tax evasion was totally and utterly inappropriate.

[18] In *Munchie Foods v Eagle Star Insurance Company Limited* [1993] 5 NIJB 34, Carswell J dealt with an application by a defendant which sought an order for security for costs that was in receivership and by comment consent would be unable to pay the defendant's cost if it lost the action. The plaintiff opposed the application on the ground that, to make it provide security for costs would in effect drive it from the judgment seat since it would be impossible for it to put forward a sufficient sum and so it would have been prevented from proceeding with what it contended was a well-founded action.

[19] The plaintiff company manufactured potato crisps and operated from premises in Duncrue Street, Belfast. It had an insurance policy with the defendant company in the amount of £1,000,000. In 1991 a fire broke out in the plaintiff's premises and a claim was made under the policy. Detailed evidence was put before Carswell J in affidavit form as to the defendant's defence. Carswell J, however, agreed with the observations of Sir Nicholas Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074, where he said:

> "This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time. Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that 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 is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."

[20] In respect of the case before him, Carswell J was of the view that it was sufficient to say that, on the facts available at that stage, the defendant had a real defence to the claim and that the outcome of the action was in considerable doubt.

[21] On the affidavit evidence before me I understand the line of the proposed defence, namely that the directors had under-declared sales with the intention of dishonestly minimising its VAT liabilities. Nevertheless I cannot assess whether that defence has any probability of success and therefore it is not a matter which can be weighed in the balance of my decision.

Is the application being used oppressively so as to stifle a genuine claim?

[22] Sir Nicholas Browne-Wilkinson V-C said in *Porzelack KG v Porzelack (UK) Ltd*:

> "The next matter that I take into account is that, on the evidence before me, there is little doubt that if I order security on anything like the scale asked for, the plaintiff's action will in fact be stifled. It simply does not have the means to put up the money. It is always a matter to be taken into account that any plaintiff should not be driven from the

> judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings."

[23] Mr Gibson referred me to a similar view expressed by Peter Gibson LJ in *Keary Developments –v- Tarmac Constructions* [1995] 3 All ER 534 CA where the Court set out guidelines for the balancing exercise in relation to claims being stifled;

> "On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company."

[24] Mr Ringland asks me to differentiate between an *intention* to stifle a claim and the *effect* of stifling a claim.

[25] In the application before me I have taken the view that granting an order in the terms which the defendant seeks would have the effect of stifling the action against it.

Has the company's want of means been brought about by any conduct on the part of the defendant?

[26] Another factual issue between the parties was whether the plaintiff's financial malaise was contributed to by the defendant's refusal to sanction an interim payment which would have allowed the plaintiff to purchase new stock and continue trading.

[27] Mr McKay in his affidavit stated that the plaintiff did not deny that trading conditions were difficult. However, he stated that the failure of the defendant to indemnify the plaintiff in respect of stock led to the subsequent trading difficulties which, in turn, influenced the ability of the plaintiff to satisfy any prospective bill of costs. He suggested that what the defendant was doing was retrospectively assessing the vitality of the plaintiff's business during a confined period of time, coming to the

subjective conclusion that it would have decided that the business (which had begun trading in 1950) was not worth continuing.

[28] On the other hand, Ms McCullough referred to comments allegedly made by the plaintiff's directors. The difficulty with assessing these is that the comments were "curated into the format of witness statements" by the defendant's claims investigator from conversations he had had with the plaintiff's directors. The notes that the claims investigator made were not read back by him to the directors prior to the creation of the witness statements. Some of the claims investigator's drafting of the views expressed by the directors seems to be accepted but other comments appear to be disputed. One director expressed the view that business had been "quite rubbish for a while" and that the plaintiff had been "trying to weather the storm". Those comments appear to be accepted. The other director appears to dispute the sentence, "I can confirm that had the incident not occurred, Neil and I would in all likelihood, ceased trading and I would have retired." This was crossed out in his witness statement before it was signed. Mr McKay averred that one of the directors considered some of the material in his witness statement had not been said by him and that other comments attributed to him had been misinterpreted.

[29] In such circumstances it would be inappropriate for the court to rely on evidence of written statements made by the plaintiff's directors as being their unchallenged views on the financial affairs of the company. There is at very least an argument to be had as regards the effect on the company of the defendant's failure to sanction an interim payment under the insurance policy.

CONCLUSION

[30] By way of comparison, in the *Munchie Foods* decision Carswell J declined to make an order for security of costs. In exercising his discretion, he took into account a number of factors. Firstly, it was a case where there was what the court considered to be "an undeniable fact that the plaintiff could not pay the defendant's costs" if the latter succeeded in the action. Secondly, the defendant also had the benefit of having persuaded the court that there was a real defence to the claim and the outcome of the action was in considerable doubt. Thirdly, the plaintiff's impecunious situation had been brought about to a large extent by the defendant's refusal to pay out on the policy. Fourthly, that there might be force in the plaintiff's contention that if the defendant had paid out promptly – as it should have if the plaintiff's case was well founded – the company could have had a chance of survival.

[31] In the case now before the court, the plaintiff's position is significantly stronger that the plaintiff's position in *Munchie Foods* in that I am unable to assess whether or not the defendant has a real defence to the claim. Accordingly, in the light of all the relevant circumstances I must exercise my discretion in favour of the plaintiff and dismiss the application.

[32] I propose that the costs of the application should follow the event in line with Order 62 rule 3 and that I certify for counsel. In the event that either party wishes to make contrary submissions, they should notify the Masters' office within 5 days and I will have the matter relisted so that they may be heard.