Neutral Citation No. [2011] NIQB 37 | *Ref:* **WEA8148**

Judgment: approved by the Court for handing down | *Delivered:* **30/03/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BROOKVIEW DEVELOPMENTS LIMITED

Plaintiff;

-v-

DAVID FERGUSON

trading as DAVID FERGUSON AND ASSOCIATES

First Defendant;

and

BRIAN SPEERS, JONATHAN HEWITT, MICHAEL BOYD and

AUDREY ACHESON

practising as CARNSON MORROW GRAHAM, SOLICITORS

Second Defendant.

WEATHERUP J

[1] This is the defendants' application for security for costs under Order 23, Rule 1(e) of the Rules of the Court of Judicature, which provides that where 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 proceedings as it thinks just. Mr Humphreys appeared for the plaintiff, Mr Hanna QC for the first defendant and Mr Ringland QC for the second defendant.

[2] The Statement of Claim pleads that the plaintiff is a property developer based in Maghera and the majority shareholder and Managing Director is Denis Heaney. The first defendant is a firm of Chartered Architects from Holywood and the second defendant is a firm of Solicitors from Belfast. The plaintiff was interested in purchasing 20 hectares of land at Drumahoe. In February 2002 the plaintiff agreed with the first defendant to provide all necessary professional services in relation to planning for the Drumahoe lands. In November 2002 the plaintiff completed the purchase of the lands. In December 2005 the plaintiff engaged the second defendant to provide specialist legal services for the completion of Article 40 agreements and outline planning permission in respect of the lands.

[3] In 2006 the plaintiff proposed to sell the Drumahoe lands. Negotiations for the sale were completed on 31 May 2006, at which time it is said that the first defendant, with the concurrence of the second defendant, continued to represent that the Article 40 agreement and the outline planning permission could be concluded speedily. The sale agreement contained conditions about obtaining the Article 40 agreement and outline planning permission and there was a long stop date of 31 December 2008 for completion to the satisfaction of the purchasers.

[4] However, difficulties arose in relation to the Article 40 agreement and the outline planning permission within the time contemplated. Further the plaintiffs allege that the first defendant failed to provide relevant design drawings for the project. Ultimately the money was lost on the sale. Particulars of loss and damage in the amended Statement of Claim include the loss of the value of the lands at £15M and expenses of some £170,000 claimed against the first defendant for additional works and repair works.

[5] The defence of the first defendant is a denial of liability. The first defendant counterclaimed against the plaintiff for some £127,000 for professional fees or in the alternative £97,000 if there was a certain agreement entered into in respect of reduced fees.

[6] The second defendant's defence also denies liability to the plaintiff. In addition the second defendant relies on a novation agreement of 30 March 2007 entered into between the plaintiff and others whereby the plaintiff was not entitled to receive any sum other than £7.5M for the Drumahoe lands, so that, if the plaintiff received that amount, there was no loss sustained by the plaintiff. In any event the second defendant contends that the plaintiff did not instruct any solicitor to act in connection with an alleged side agreement

until mid-June 2007 and even then they instructed other solicitors who did not complete the exercise.

[7] The affidavits filed on behalf of the defendants grounding the application rely on a report of Goldblatt McGuigan, Accountants, who have examined the plaintiff's abbreviated financial statements for the years ending 31 March 2008 and 2009. The latest financial statement included an abbreviated balance sheet indicating a deficit of some £6.4M compared with the prior year deficit of £4.1M indicating a loss of £2.3M having been incurred in the financial year to 31 March 2009. The defendants each attach a draft Bill of Costs in the sum of £450,000.

[8] The plaintiff's affidavit resisting the application indicated that there was no prospect of the plaintiff company providing any security "in anything like the amount sought". The plaintiff relied on three particular matters by way of defence in the application -

(1) That there has been gross and inordinate delay in bringing the application.

(2) That the financial difficulties of the plaintiff have been caused by the conduct of the defendants.

(3) That there are queries over the level of costs.

[9] In relation to the first matter, delay, the Writ was issued on 13 February 2009, the Statement of Claim delivered on 17 December 2009, the first defendant's defence and counterclaim delivered on 26 January 2011 and the second defendant's defence on 15 December 2010. The case came before the Court for review on 4 May 2010 when a date was fixed for hearing, namely 3 May 2011, which is now some six weeks away. The accounts for the plaintiff for the year ending 2008 were filed on 18 May 2010 and for the year ending 2009 on 18 October 2010 which the plaintiff says might have been occasions for the defendants to move their application. In the event a solicitor's letter from the defendants was sent on 20 January 2011 asking for proposals for security for costs and the application for security was made on 18 February 2011. Thus the plaintiff contends that the defendants have waited until the last minute to make this application.

[10] In relation to the second matter, the defendants contribution to the financial difficulties of the plaintiff, it is said that if the defendants had provided a realistic time frame and appropriate warnings of possible delays then the plaintiff would have sold the lands without planning permission for a substantial sum. It is contended that the plaintiff could have sold the Drumahoe lands together with lands at Limavady for a total of £24M and while they did complete the sale of the Limavady lands for some £4M, they

did not complete the sale of the Drumahoe lands in the way that was anticipated and that gives rise to the claim for £15M. A schedule has been prepared on their behalf by PriceWaterhouseCoopers and it seeks to set out the impact of the loss of these funds on the company finances. The result is stated to be that if the plaintiff had completed the sale of the lands at the contracted price it might have had net assets of £10M and if they had sold it without planning permission they might have had net assets of £7.7M. Hence the plaintiff contends that the issues giving rise to this action have contributed to the plaintiff's current financial position.

[11] In relation to the third matter, the level of costs, the plaintiff says the costs are far too high. Certain costs have been incurred by the second defendants original solicitors prior to a change of solicitors in October 2010 where a sum of £60,000 was claimed and the plaintiff contends that the amount claimed cannot be justified as the defence had not even been served at that stage. In the months from October 2010 to the application in February 2011 the new solicitors have claimed costs of £71,000 which the plaintiff also contends cannot be justified. Thus the plaintiff raises a question mark over the level of costs set out in the defendants Bills of Costs.

[12] In GWM Developments Ltd v Lambert Smith Hampton Ltd [2010] NIQB 33, where the plaintiff had a financial backer, it was stated that there are three stages to these applications for security for costs. First of all that there must be reason to believe that the plaintiff is unable to pay the defendants costs. Secondly the Court has a discretion whether to require security for costs. Thirdly the Court has a discretion as to the amount of the security for costs.

[13] In relation to the first stage it is not in dispute that at the level of costs claimed by the defendants the plaintiff would not be in a position to pay those costs. Even if the costs claimed were to be substantially reduced I am satisfied that the plaintiff would be unable to pay the defendants' costs if ordered to do so.

[14] In relation to the second stage, whether to order security for costs, the Court should take into account all the relevant circumstances which include (1) whether the claim is bona fide, (2) whether the plaintiff has a reasonably good prospect of success, (3) whether there has been any admission, (4) whether the application for security is being oppressively so as to stifle a genuine claim, (5) whether the plaintiff's want of means has been brought about by any conduct on the part of the defendant. To those particular circumstances referred to in GWM Developments Ltd may be added two further matters that were prominent in the present case, namely the presence of a financial backer for the plaintiff and the delay of the defendants in making the application for security for costs, given that the hearing date for the action is now imminent.

[15] In relation to the third stage, the amount of security for costs, the amount should be proportionate and should not be such as to destroy the essence of the right of access to the court. The overall balance is to avoid injustice to the plaintiff if prevented from continuing with the action by an order for costs and also avoiding injustice to the defendant if unable to recover the costs if successful.

[16] The defendants raised the issue of financial backers for the plaintiff and referred to Keary Developments Ltd v Tarmac Construction Ltd[1995] 3 All ER 534 which set out a number of principles that I summarise as follows –

(1) The Court has complete discretion whether to order security for costs in the light of all the relevant circumstances.

(2) The possibility or probability that the plaintiff will be deterred from pursuing its claim by an Order for security for costs is not, without more, sufficient reason for not ordering security.

(3) The Court must carry out a balancing exercise between the plaintiff being prevented from pursuing a proper claim and the defendant being prevented from recovering costs if successful.

(4) In considering all the circumstances the Court will have regard to the plaintiff's prospect of success but it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

(5) The Court may order any amount up to the full amount claimed by way of security for costs, provided that it is more than simply a nominal amount; it is not bound to make an order of a substantial amount.

(6) Before the Court refuses to order security for costs on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that in all the circumstances it is probable that the claim would be stifled. There may be cases where this could probably be inferred without direct evidence. There followed a passage relied on by the defendants –

"However the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order of security from continuing the litigation."

(7) The lateness of the application for security is a circumstance which can properly be taken into account. There followed a passage relied on by the plaintiff –

"But what weight, if any, this factor should have and in what direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."

[17] The defendants emphasised the need for the plaintiff to account for the financial position of those supporting the plaintiff company. The plaintiff was given leave to file a further affidavit in that regard. Denis Heaney, Managing Director of the plaintiff company, referred to the current position of the plaintiff, which was involved in construction in Derry of ten houses, three of which have been sold and five of which had been agreed for sale; he personally had paid the costs the plaintiff had incurred in the litigation to date; he had a farm in Garvagh which was unencumbered; he referred to the delay of the defendants in applying for security for costs and stated his belief that if the defendants had brought their application at an earlier date, namely when the May accounts or the October accounts were published, this would have provided the plaintiff with sufficient time to raise funds in advance of the hearing; he stated that the plaintiff's current financial difficulties had been caused by the failure to realise sufficient funds from the sale of the Drumahoe lands, which was brought about by the default of the defendants; finally he proposed that the deeds on the farm should be lodged as security, the farm of 40 acres having been purchased in July 2008 for £500,000, having planning permission for a house with another application pending and a current value of some £350,000.

[18] The defendants objected to the form of the plaintiff's further affidavit because it was stated that it had not fulfilled the obligation which rests on the plaintiff to explain the extent of the financial backing that is available to the plaintiff and did not state the source of the means by which Mr Heaney has been able to discharge the plaintiff's costs to date.

[19] Turning to the relevant considerations and first of all as to whether the claim is bona fide, this is a matter I have no reason to doubt. Secondly, as to whether the plaintiff has a reasonably good prospect of success, the claim is set out in great detail and there are experts' reports which seek to support the claim. I am satisfied that there is a case to answer on the papers but I am not in a position at this stage to adjudicate on the strength or otherwise of the plaintiff's case. It is not obviously a case that is bound to fail, nor necessarily is it a case that is bound to succeed. Thirdly, as to whether there has been any admission, that is not the case. Fourthly, as to whether the application for

security for costs is being used oppressively so as to stifle a genuine claim, I do not have any reason to believe that the defendants are making this application as an exercise in trying to quash the plaintiff's claim. The other aspect of this consideration is whether the application will have the effect of stifling a genuine claim. Regard will be had to the existence of and the resources of any financial backers of the plaintiff. While there may be a prospect that an Order for security for costs could cause a plaintiff to discontinue the proceedings, and that by itself is not a ground for not ordering security, regard may be had to the financial support for the company, as there may be less likelihood of the claim being stifled if financial support is available. In the present case there is a financial backer for the company, Mr Heaney, who has provided funds from sources that he has not identified to meet the plaintiff's own costs to date. In addition he states that he is the owner of an unencumbered farm that he purchased in 2008 and that farm would provide substantial security, even if it does not match the full extent of the claim for costs being made on behalf of the defendants. I also take into account that the extent of Mr Heaney's capacity to provide other support is not stated in the papers.

[20] The next consideration is whether the plaintiff company's want of means has been brought about by the conduct of the defendants. If the plaintiff is correct in this action there has been a substantial financial loss occasioned to the plaintiff and as the figures produced on behalf of the plaintiff seek to show, there may not have been a deficit in the latest financial statements if the money claimed had been obtained by the plaintiff from the sale of the lands. It is arguable that the defendants' conduct has contributed to the current financial position of the plaintiff.

[21] The further consideration relates to delay on the part of the defendants in making the application for security for costs. The plaintiff contends that its ability to arrange security has been handicapped by the defendants waiting until this late stage to raise the issue of security for costs. It is not clear what might have been done had the application been made six months ago, other than Mr Heaney lodging with the bank the title deeds to the farm in order to raise capital to provide security for costs.

[22] Balancing all these considerations I am satisfied that the plaintiff should be ordered to provide security for costs.

[23] As to the amount of the security for costs I note first of all that the plaintiff challenges the amounts of the Bills of Costs. Even if the Bills of Costs were to be reduced substantially there is no evidence that the plaintiff or its financial backers have the means to meet those costs. The exercise is one of proportionality so that the amount imposed on the plaintiff should not be such as to drive the plaintiff from the Court. One consideration to which I pay particular attention is the delay by the defendants in making the

application. That delay has had the effect of preventing the plaintiff and its financial backers from raising the funds that they might otherwise have raised, whether on the security of Mr Heaney's farm or by whatever other methods were available. The other aspect of the defendants' delay has been that it has allowed the plaintiff to run up its own costs in preparation for the hearing of the action, which costs would be lost to the plaintiff if an amount of security for costs were now to be imposed that the plaintiff and its financial backers could not meet. I attach considerable weight to the late application made by the defendants as there was a basis for an earlier application when the plaintiff's accounts were first published and it appeared that the plaintiff was trading at a loss.

[24] I propose to order the deposit, with the plaintiff's solicitors, of the title documents to the farm at Terkeenan Road, Garvagh as security for the defendants' costs in this action, to be retained unencumbered by the plaintiff's solicitors until further Order.