

**Neutral Citation No: [2010] NIQB 33**

*Ref:* **WEA7782**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **05/03/2010**

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

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**QUEEN'S BENCH DIVISION (COMMERICAL)**

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**GWM DEVELOPMENTS LIMITED and  
GREENBACK INVESTMENTS LIMITED**

**Plaintiffs;**

**v.**

**LAMBERT SMITH HAMPTON GROUP LIMITED**

**Defendant.**

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**WEATHERUP J**

[1] This is an application by the defendant under Article 674 of the Companies (Northern Ireland) Order 1986 requiring the plaintiffs to provide sufficient security for the defendant's costs and for an order staying the action until the security has been given. Mr Spence appeared for the defendant and Mr Elliott for the plaintiffs.

[2] According to the Statement of Claim the plaintiffs are property developers and the defendant is a firm of commercial estate agents. In November 1997 the plaintiffs entered an agreement with the defendant in relation to the sale of premises at Mallusk, County Antrim. On 22 November 1998 John Walsh, a director of the plaintiffs arranged to meet a potential purchaser of the property. On that day an employee of the defendant introduced a Patrick Drayne as a potential purchaser of the premises and sought to persuade the plaintiffs to accept an offer from Mr Drayne of £8.2 million. The plaintiffs were permitted a period of approximately 45 minutes to consider the offer and in the circumstances declined. The property was sold to another for £8 million. In April 1999 the lands were agreed for sale with Patrick Drayne at a purchase price of £9.5 million. On that occasion the

defendant acted as adviser and consultant to Mr Drayne. The plaintiffs allege that the defendant knew and concealed and failed to disclose to the plaintiffs a conflict of interest in that Patrick Drayne was connected to an employee of the defendant. The defendant was appointed managing agent of the property. The plaintiffs claim that the defendant's undisclosed conflict of interest resulted in loss to the plaintiffs who should recover the commission paid to the defendant together with the difference between the first sale at £8 million and the second sale at £9.5 million.

[3] The defendant disputes the plaintiffs' claim and Sean Craig, solicitor for the defendant, in his affidavit grounding this application, indicates that the plaintiffs acted without advice from the defendant and had they obtained the advice of the defendant in relation to Mr Drayne they would have secured a higher price for the sale of the premises. Accordingly the defendant contends that it is probable that the defendant will succeed in the action.

[4] Further, Mr Craig states that the first plaintiff is registered in Cardiff and the second in Belfast. Neither company is trading. Both have entered legal charges over their properties in favour of the Bank of Scotland. The first plaintiff has suffered losses and has net liabilities on its balance sheet of some millions of pounds. Correspondence has been entered with the Companies Registrars in Belfast and in Cardiff. The Belfast office indicates that it will recommend striking off the second plaintiff because of failure to file accounts. The Cardiff office has informed the solicitor that an Administrative Receiver has been appointed for the first plaintiff.

[5] The Defendant provides an estimated bill of costs and seeks security for costs in the sum of some £200,000.

[6] The relevant statutory provision is Article 674 of the Companies (Northern Ireland) Order, which provides -

"Where a limited company is plaintiff in an action or other legal proceedings the court 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 defendant's costs if successful in its defence requires sufficient security to be given for those costs and may stay all proceedings until the security is given."

[7] First of all there must be reason to believe that the plaintiffs are unable to pay the defendant's costs, secondly, in those circumstances the Court has a discretion to require sufficient security for costs and thirdly, the Court has a discretion as to the amount of the security for costs.

[8] 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 as outlined in Munchie Foods v Eagle Star Assurance [1993] 5 NIJB 34 before Carswell J and [1993] 9 NIJB 69 in the Court of Appeal. The Court must exercise its discretion in deciding whether to make an order and that discretion must be exercised on judicial lines considering all the circumstances –

“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” per Girvan J at 487b.

[9] Girvan J proceeded to consider the impact of the European Convention on Human Rights 1998. The jurisprudence in the European Court of Human Rights establishes that schemes providing for security for costs are considered to pursue a legitimate aim and are therefore acceptable in principle. Reference was made to Ait Mouhoub v France [1999] EHRLR 215. In proceedings for the imposition of a civil fine where the maximum was 100,000 French Francs the security was fixed at 80,000 French Francs. The ECtHR considered that a requirement for such a large sum by way of security was disproportionate as the plaintiff had no financial resources whatsoever. Requiring the applicant to pay such a large amount amounted in practice to depriving him of his recourse to the Court. Limitations on access to the Court must not restrict or reduce the person’s access to the Court in such a way that the very essence of the right is impaired. The limitation must pursue a legitimate aim and be proportionate (484 e-h).

[10] In McAteer there was a financial backer for the plaintiff. That was a relevant consideration in relation to whether the company would be deprived of the right of access to the Court. If a company had no resources it could not provide any security but if it had a financial backer it could provide some security. In that event an order for security would not in fact deprive the company of a right of access to the Court (485 d).

[11] I am satisfied as to the first aspect of the statutory requirements in relation to the plaintiffs ability to pay the defendant’s costs. In light of what is averred by Mr Craig in relation to the plaintiffs finances and in the absence of evidence to the contrary there is reason to believe that the plaintiffs will be unable to pay the defendant’s costs, if successful in its defence. However it is accepted by the plaintiffs that they have a financial backer who will provide some funds to support the plaintiffs claim.

[12] It is necessary to consider all the circumstances of the case, which include the considerations referred to above namely, whether this is a bona fide claim, which I consider this claim to be; the prospects of success, and I consider that the plaintiffs have a prima facie case and do not accept, as the defendant avers, that the case has no prospect of success; I consider that there have been no admissions in relation to the matter; I consider that this application for security is not being used oppressively by the defendant in an attempt to stifle the claim; I consider that the defendant was not at fault in that their actions have not led to the plaintiffs financial problems; I consider that there is a financial backer for the plaintiffs. I am satisfied that discretion should be exercised to require security for the defendant's costs.

[13] The amount of that security 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 security and also avoiding injustice to the defendant if unable to recover the costs if successful. The defendant seeks security in the sum of £200,000. It is also said that the Court should accept the defendant's figure in the absence of a counter figure from the plaintiff. The 1999 White Book refers to security that should not be nominal and should not be oppressive. Paragraph 23.3.21 states that if the Court does order security it can order any amount up to full security and the amount need not be substantial provided it is more than nominal.

[14] I have considered what would be proportionate costs. An amount of security which, in effect, would compel the abandonment of an action that presented on paper as a prima facie case, may be considered to be disproportionate. In all the circumstances I order security for costs in the sum of £30,000. The action will be stayed until that security is given. The costs of the application go to the defendant.