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

Delivered: 21/01/2013

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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CONOR TENNYSON

and

INMARK (NI) LTD

Plaintiffs;

-v-

JOSEPH LAURENCE DEVLIN

and

ALAN ROONEY AND JOHN ROONEY
T/AS ROONEY'S SCRAP YARD

and

ROONEY METALS LIMITED

Defendants.

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WEATHERUP J

[1] This is the second and third and fourth defendants' application for security for costs to be provided by the second plaintiff. Mr Fee appeared on behalf of the plaintiffs and Mr Valentine on behalf of the moving parties to the application.

[2] The Statement of Claim pleads that the first plaintiff is a shareholder in the second plaintiff. On 1 May 2010 the first defendant is said to have converted to his own use certain scrap metal belonging to the plaintiffs and on 29 July 2010 these goods were passed to the other defendants at Rooney's Scrapyard. The goods are

listed as 8 items in a schedule and the plaintiffs' valuation of the goods is £73,722. There was partial recovery of goods from Rooney's Scrapyard and the recovered items have been valued at £952. Thus the plaintiffs claim is for the unrecovered goods.

[3] I refer to the second, third and fourth defendants as the Rooneys. The defence on behalf of the Rooneys admit that in 2010 they received scrap metal from the first defendant, which they understood belonged to the first defendant. They paid the first defendant for the scrap metal and thus plead that they were innocent purchasers. The matter was investigated by the police and that led to the recovery of some items as referred to above. The Rooneys' case is that they only received that scrap metal which was subsequently returned to the plaintiffs.

[4] The grounding affidavit on this application for security for costs sets out the history and avers that the Rooneys engaged a firm of accountants to conduct a search into the second plaintiff. They exhibit a letter from the accountants setting out the results of the search from Companies House. That letter dated 2 November 2011 states that the second plaintiff was previously known as Techrec (NI) Limited and prior to that COD International Limited and that the present company was acquired in 2009 by Clear Circle Environmental (NI) Limited for the sum of £2.6M. The company accounts for the year ending 2010 indicate that the company did not trade in the previous year and there were no sales and there were no purchases or operating expenses and the company was filed as dormant. The balance sheet of the company had only one asset and that was the debt of £2.6M owed by Clear Circle Environment (NI) Limited which was the purchase price of the company. The accountants expressed the view that they found it strange that the acquisition had still not been paid a year after the transaction took place. The view was also expressed that the claim that the Rooneys had removed goods to the value claimed was at odds with the accounts as they reflected nil stocks and nil equipment held by the company. The company did not have any funds in any bank account.

[5] Under Order 23 Rule 1(e), where there is reason to believe that a plaintiff company will be unable to pay the defendants' costs if unsuccessful in the action, the Court may order the plaintiff company to give security for the defendants' costs. The issue of security for costs was considered in Brookview Developments Ltd v Ferguson [2001] NIQB 37 and I adopt the approach there outlined. First of all there must be reason for the Court to believe that the plaintiff company will be unable to pay the defendants' costs. Secondly, the Court has a discretion whether to order security for costs. Thirdly, the Court has a discretion as to the amount of any security for costs.

[6] As to the first matter I am satisfied on the information provided by the accountants that the plaintiff company will not able to pay the defendants costs if the company is unsuccessful in the action.

[7] As to the second matter, whether to order security for costs, Mr Valentine referred to there being an individual plaintiff as well as a corporate plaintiff and contended that the individual plaintiff would be liable for the defendants' costs if the defendants should win the case. The existence of an individual plaintiff and a corporate plaintiff does not prevent an order for security for costs being made against the corporate plaintiff but it is a factor to take into account in deciding whether to make such an order against a corporate plaintiff.

[8] In Pearson v Naydler (1977) 1 WLR 899 Megarry V-C discussed the presence of co-plaintiffs who were individuals and companies. At page 904F reference was made to the essential distinction between natural persons and limited companies as plaintiffs. For a natural person, the basic rule is that the person will not be ordered to give security for costs, however poor that person may be. To that basic rule there are certain exceptions. The exceptions that now apply under Order 23 Rule 1 relate to an individual plaintiff who is ordinarily resident out of the jurisdiction, a nominal plaintiff, a plaintiff whose name and address are not stated on the Writ and a plaintiff who has changed address to evade the consequences of litigation. Megarry V-C noted that the exception for a plaintiff resident abroad did not apply where the person resident abroad was co-plaintiff with a person who resided within the jurisdiction, this being a parallel which Counsel for the company in that case sought to apply to a natural plaintiff and a corporate plaintiff. By contrast, Megarry V-C stated, in the case of a limited company there is no basic rule conferring immunity from liability to give security for costs and the basic rule is the opposite. That rule is found in Northern Ireland today in Order 23 Rule 1 (e) and applies to all limited companies and subjects them all to the liability to give security for costs, if there is reason to believe the company will be unable to pay costs. A different approach to corporate plaintiffs is justified as a person may set up any number of limited companies with the privilege of limited liability. Megarry V-C rejected the parallel with the exception being removed with a plaintiff within and a plaintiff without the jurisdiction. He concluded that the presence of an individual plaintiff and a corporate plaintiff does not preclude an order for security for costs against the company. However the presence of the individual plaintiff is a factor to take into account in exercising the discretion whether to order security for costs against the corporate plaintiff.

[9] In addition to the presence of an individual plaintiff the considerations in deciding whether to order security for costs against the corporate plaintiff include –
(1) whether the claim is bona fide, which I accept is the case, although there remains a need to examine the claim in light of the information produced by the accountants (2) whether the plaintiff has a reasonably good prospect of success, where the same comment applies (3) whether there has been any admission, which is not the case (4) whether the application for security is being oppressively so as to stifle a genuine claim, which I do not accept is what is intended, although the impact of an order for security for costs will be considered below (5) whether the plaintiff's want of means has been brought about by any conduct on the part of the defendant, which is not the case. Two further matters that are prominent in the present case, as in Brookview

Developments, are the presence of a financial backer for the plaintiff company 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.

[10] As to financial backers the Court will 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. The first plaintiff is in effect a financial backer of the corporate plaintiff. Counsel for the plaintiffs suggested that the individual plaintiff will be responsible for the defendants' costs if the plaintiffs are unsuccessful although that may not extend to all the defendants' costs. However Counsel for the plaintiffs gave an undertaking on behalf of the first plaintiff that the first plaintiff would be responsible for the defendants' costs.

[11] A distinction must be made between the first plaintiff as an individual plaintiff in the action and the first plaintiff as a financial backer of the company. In the former capacity the plaintiff would not have any liability to account for his financial position and would not produce any evidence in that regard. In the latter capacity a corporate plaintiff who sought to rely on a financial backer may adduce evidence of the financial position of the financial backer to inform the Court in the exercise of its discretion whether to order security for costs or the amount of any security for costs. I do not have evidence from the first plaintiff as financial backer of the company and am not aware of the financial circumstances of the first plaintiff or his capacity to meet an order for payment of the defendants' costs.

[12] In respect of the second plaintiff I take account of the first plaintiff as an individual plaintiff and of his undertaking to be responsible for the defendants' costs if the defendants are successful. Further I take account of the first plaintiff's status as a financial backer of the company who has not disclosed any information as to his financial circumstances.

[13] The second matter that I draw particular attention to is the delay by the Rooneys in making the application for security for costs. The Rooneys knew of the second plaintiff's existence in 2011 when the proceedings commenced and they could have carried out a search at that time to see what information they could obtain concerning the financial position of the second plaintiff. The Rooneys did not obtain the information about the second plaintiff's finances until November 2012 and therefore were not in a position to make the application for security for costs until after that time, although they delayed until January 2013 to do so. The trial of the action is fixed for hearing in March 2013. Mr Valentine contends that the delay puts the plaintiffs in a difficult position because they will have limited time to produce security if required to do so and might have had the opportunity to raise certain funds had they had longer notice and might not have the opportunity to such funds at short notice. Again I am not aware of the finances of the first plaintiff

as the financial backer of the company and have no evidence of difficulties that would arise if security were required, although there are obvious difficulties inherent in anyone having to raise any significant sum of money at short notice.

[14] I take all the above considerations into account and I am satisfied that I should exercise my discretion to make an order for security for costs against the second plaintiff.

[15] As to the third matter, namely the amount of the security, the Rooneys' solicitors have lodged a Bill of Costs for a sum in excess of £20,000. I accept that the delay in making the application may have an impact on the capacity to raise funds in the short period prior to the trial of the action. I consider that the appropriate Order is to require security for costs in the sum of £7,500 to be lodged by 11 February 2013. The Rooneys have their costs of the application.