THE HIGH COURT

[2021] IEHC 500

[2020 No. 2909 P]

BETWEEN

FORTBERRY LIMITED

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED

LUKE CHARLETON

ANDREW DOLLIVER

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 19th day of July, 2021

INTRODUCTION

1. Judges regularly reference the backlog in cases in the courts, in part no doubt due to the excessive length of time some cases take. A security for costs application pursuant to s. 52 of the Companies Act 2014 is one of the occasions when one party, the plaintiff, may be arguing that the trial could be dealt with in a shorter period of time (for the very good reason that he is being asked to provide security for the costs for the hearing) while the defendant (who is the beneficiary of that security) may be arguing that a longer period of time is required for the hearing.

2. Such instances therefore can be an opportunity for the courts, in fixing the security, to encourage the parties to deal with the case in as efficient and as short a timeframe as possible, particularly when there is expert evidence from a legal costs accountant to the effect that the matter could be dealt with in a shorter period of time. This is such a case.

BACKGROUND

3. This is an application by the first defendant ("Promontoria") for security for costs against the plaintiff ("Fortberry") in relation to a claim by Fortberry for damages in connection with the sale by the second and third defendants (the "Receivers") who were appointed by Promontoria as receivers of property charged in favour of Promontoria.

4. The property in question is a medieval castle and adjacent Victorian manor house known as Dowth Castle and Netterville Manor in Dowth, County Meath (the "Castle").

5. A director of Fortberry Limited is James Flynn, solicitor, ("Mr. Flynn") and he was the owner of a property adjacent to the Castle and access to the Castle was gained through these adjacent lands. Mr Flynn's wife, Ms. Carmel Flynn ("Ms. Flynn"), was the lessee of the Castle at the time of its sale.

6. There is no dispute between the parties regarding the extending of the loan, the transfer of the security to Promontoria, demand having been made, the default on repayment and the formal appointment of the Receivers. However, Fortberry claims that the defendants acted unlawfully and in bad faith in relation to the appointment of the Receivers and the sale of the Castle, in particular because they say the sale was unnecessary as they had an agreement for the sale of the Castle at a greater price (€2.2 million) than that achieved (which was €1.95 million) and that the defendants acted in bad faith as the sale was delayed for the purposes of increasing costs.

7. On 16th March, 2016 a letter was sent from Capita Asset Services (Ireland) Limited (on behalf of Promontoria) to Fortberry. This letter states in part that:

> "Following careful consideration of your application including your Business Plan and other supporting documentation, your application for an Alternative Repayment Arrangement ("ARA") has been declined. The reason why it has been declined is due to the fact that your business plan has been deemed insufficient, as your proposal does not adequately address the balance outstanding of €1,599,893.51. Promontoria Aran Limited has requested the disposal of the secured asset with full par debt repayment remitted against the loan facility."

8. On 12th May, 2016 a letter of demand is sent to Fortberry in relation to the loan demanding immediate repayment of the outstanding loan of approx. €1.6 million.

9. Receivers were appointed on the 17th June, 2016, but prior to their appointment, the response of Fortberry on 20th May, 2016 is not to deny that the money is owed but rather, Mr. Flynn issues a letter as a director of Fortberry Limited to Promontoria in which he states:

> "Re: Sale of Netterville Manor, Dowth, County Meath.
>
> Fortberry Limited/Carmel Flynn/and James Flynn
>
> Dear Sirs,
>
> I wish to advise that I have agreed the sale of the above property for a price of €2.2 Million.
>
> The purchasers are local and have money.
>
> Contracts have been sent to the purchaser for execution.
>
> Ulster Bank Ireland Limited, from whom you purchased the mortgage overcharged on interest and while I am prepared to discharge all sums due and owing as per the mortgage with Ulster Bank Ireland Limited, I would ask that you deal with the overcharge prior to finalisation.
>
> I would also appreciate if you would provide a name in Capita Asset Services, that I could engage with and resolve this matter [interest overcharge] with as I have had no success to date
>
> I look forward to hearing from you
>
> Yours Faithfully,
>
> James Flynn, Director

Fortberry Limited"

10. It should be borne in mind that in their Defence, Promontoria pleads that access to the Castle was over land owned by Mr. Flynn, who is a director/shareholder of Fortberry and it was necessary for the Receivers to undertake the sale of the Castle in conjunction with the separate and parallel sale by Mr. Flynn of his land which serviced the Castle. Similarly, Promontoria pleads that Promontoria issued High Court proceedings seeking directions as to the invalidity of a lease in respect of the Castle between Fortberry and Ms. Flynn on the grounds that it was granted in contravention of the mortgage dated 27th August, 2003 between Promontoria's predecessor in title (Ulster Bank) and Fortberry (the "Mortgage").

11. There are a number of important matters concerning this letter, since Fortberry rely upon it to support its claim that there was an agreement for the sale of the Castle for €2.2 million, such that the defendants acted unlawfully and in bad faith and only to increase costs in appointing the Receivers and then agreeing to sell the Castle on 15th August, 2018 for €1.95 million.

12. The first point to note is that this letter references the sale of the Castle and lists three separate parties, where the sellers would normally be listed in such a letter, namely Fortberry, Ms. Flynn and Mr. Flynn. For this reason, the letter gives the impression that this letter concerns not simply the sale by Fortberry of its interest in the Castle, but also the sale by Mr. Flynn of his interest in the adjacent land and the assignment by Ms. Flynn of the lease of the Castle. It is not clear from this letter how much of the €2.2 million relates to the sale of the freehold interest in the Castle. Next and of more concern is the fact that this letter provides that contracts had been sent to the purchaser for execution, notwithstanding the fact that no consent had been obtained from the mortgagee as required by Clause 5(c) of the Mortgage. This point is of particular significance in this case because the letter was written by Mr. Flynn, who is a solicitor, and who would know, or should know, that the consent of a mortgagee is required to the sale of a mortgaged property. Thirdly, this letter is by its very terms a conditional sale of the Castle and neighbouring lands, since it makes it clear that Mr. Flynn requires clarification of an alleged overcharge which he requires to be dealt with *'prior to finalisation'*.

13. In considering Fortberry's claim therefore in these proceedings that there was a pre-existing agreement for the sale of the Castle, which they say justifies their claims of illegality and bad faith on the part of Promontoria, this letter falls well short of providing compelling evidence of such an agreement.

14. As noted hereunder, the first step in considering a security for costs application is establishing that the defendant has a *prima facie* defence. In considering therefore, whether Promontoria has provided a *prima facie* defence to the claims made, this Court does not consider this matter in a vacuum. Rather it must consider whether a defence is a *prima facie* defence to the claims made in the context of the evidence supporting those

claims – in this instance it is a claim that the defendants did not act *bona fide* because there existed an agreement for the sale of the Castle. However, all that supports the agreement for the sale of the Castle is the foregoing letter which is deficient in a number of respects. This Court must also have regard to the duties of receivers. As noted by McGovern J. in *Komady Limited v. Ulster Bank* [2015] IEHC 314 at para. 23, a mortgagee is entitled to look to his own interests in deciding to exercise or not exercise its powers and only risks liability if he acts in bad faith. It is against this backdrop that one must consider what occurred in this case to determine, *inter alia*, whether the defendants have a *prima facie* defence.

15. In addition, this is a case where Fortberry Limited on 22nd May, 2017 issued a letter to the Receivers in which it stated, in part, that:

> "As directors and shareholders of Fortberry Limited (the "Company"), we confirm that we and the Company consent to the sale of the Property by you as joint receivers to Owen Brennan and Alice Stanton for the consideration of €1,825,000.
>
> We further irrevocably and unconditionally confirm that we and the Company have no claim howsoever arising either against the receivers Luke Charleton and Andrew Dolliver (and any of them) and/or Promontoria (Aran) Limited."

16. In an attempt to withdraw from this waiver, by letter dated 4th July, 2017, solicitors for Fortberry wrote to solicitors for Promontoria and stated in part that:

> "It is important that you understand that the Indemnity enclosed herewith is furnished under duress and solely and exclusively for the purpose completing the sale of the property and driveway. Our client is driven to the conclusion that in order to mitigate their own position the sale must complete and it appears to us that your client will not progress the sale in the absence of the enclosed document and therefore same is provided to that end only."

17. By letter dated 7th July, 2017 solicitors for Promontoria replied to this letter and stated in part that:

> "As has been made clear to you, the provision of this letter from the Company is a pre-condition to our clients agreeing to sale of the lands and premises subject to their appointment in parallel to a sale by your client of the lands adjacent thereto to the same purchaser.
>
> This position has been adopted by our clients because of your client's various previous threats of litigation against our clients.
>
> While the required waiver letter has been furnished to us, your covering letter suggests that the waiver letter has been furnished under duress. Quite how this can be the case in circumstances where the Company and its board is advised by solicitors is unclear to us.

> What is clear however is that our clients cannot and will not accept the letter if the allegation of duress remains extant.
>
> If the allegation is not withdrawn, our clients will not complete the sale of the property as currently envisaged and instead will either take the property off the market in the short term or seek an alternative purchaser."

18. By letter dated 11th July, 2017, solicitors for Fortberry replied to this letter and stated in part that:

> "We understand that your client has a difficulty in respect of our client's proposition that the Waiver/Indemnity furnished herein was only done so under duress. We further understand that your clients will not progress the sale unless and until our clients withdraw that allegation. Our clients are reluctantly prepared to withdraw that allegation and to proceed with the sale without further delay."

19. Therefore, the *prima facie* position is that Fortberry has confirmed that it has no claim against any of the defendants. While Fortberry withdrew its claim of duress in order to progress the sale, it seems that having got what it wanted, namely the sale of the Castle, it wishes to now pursue its claim of duress and in these proceedings is claiming economic duress and it may well be successful in advancing that claim at the substantive hearing of this action.

Law in relation to security for costs

20. There is no dispute between the parties regarding the law applicable to the grant of security for costs, are set down by the Supreme Court in *Quinn Insurance Ltd (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2021] IESC 15 and *Protégé International Group (Cyprus) Limited v. Irish Distillers Limited* [2021] IESC 16.

21. Thus, a defendant seeking security for his costs from a plaintiff must establish first that he has a *prima facie* defence and second that the plaintiff will not be able to pay the defendant's costs if the defendant is successful. If this is the case, the default position is that security of costs will be ordered unless there are special circumstances entitling the court to exercise its discretion not to order security for costs.

Do the defendants have a prima facie defence?

22. It seems clear to this Court from the foregoing facts that the first step for the granting of security for costs is satisfied, namely that the defendant has a *prima facie* defence to the proceedings. This is because the evidence to support the plaintiff's claim is weak for the foregoing reasons. Also, in light of the very limited duties of receivers, the evidence provided to this Court of the defendants' compliance with its security rights (making a demand *etc*) amounts to a *prima facie* defence, particularly when one bears in mind the existence of the waiver. Of course the fact that the defendants have a *prima facie* defence does not mean that at the substantive hearing the plaintiff might not be successful in having the wavier ruled invalid on the grounds of economic duress.

Will the plaintiff be able to pay the defendants' costs if the plaintiff loses?

23. The next step is whether Fortberry will be able to pay the defendants' costs if the defendants win the action. In this case, there is evidence that this is not the case. This is because the only objective and independent facts before this Court regarding the state of the plaintiff's finances are its accounts filed in the Companies Office. In this regard, there are two salient facts. First, we are not dealing with a company that is a few months or even a year or so late in filing its accounts but rather a company which is in egregious default of its company law obligations since the last set of accounts filed are those for the period ending February 2012. Secondly, these accounts show a balance sheet with a deficit of €3.68 million.

24. Mr. Flynn, on affidavit, claims that the company was subject to other receiverships, besides the current one, and that in relation to one of those he expected the company to receive back an apartment worth at least €400,000.

25. However, in this Court's view this amounts to a bald assertion since no credible evidence was provided to the Court to support this contention.

26. In addition, Promontoria provided expert evidence from a forensic accountant to the effect that the assets taken into possession by the three sets of receivers will realise only a portion of the value of the total debts of the company.

27. In the circumstances this Court would have little hesitation in concluding that Fortberry will not be able to pay the defendant's legal costs if the defendants were to win this litigation.

Are there special circumstances which justify no order of security for costs?

28. The next issue to consider is whether there are any special circumstances which would cause the court to exercise its discretion not to order security for costs. In this regard Fortberry claims that its claim that receivers should not get waivers from borrowers, such as Fortberry, not to sue them, amounts to economic duress and is contrary to public policy and thus this is a case which justifies no security for costs as it is a matter of exceptional public importance.

29. It is common case that the relevant principles governing this issue is set out in the judgment of Clarke C.J. in *Protégé* at para. 5.9, where he states:

> "In respect of the second ground of appeal advanced by Protégé, being that the trial judge had erred in concluding that the case raised no point of exceptional public importance, Costello J. held that that **the threshold for a plaintiff to demonstrate a point of exceptional public importance is a high one, which requires the plaintiff to identify a point of law that is of such gravity that it transcends the interests of the parties and serves the common good**. Costello J. found that the present proceedings did not raise any such issue which could be said to touch on the common good in a way that transcended the interests of the parties. On this basis, Costello J. held that the trial judge was correct in concluding that these proceedings constituted private litigation between private

operators, the principal purpose of which was to secure a long term agreement and damages for Protégé." (Emphasis added)

30. The high bar which applies to such exceptions to the security for costs rule is clear from the words used by Costello J. (in the Court of Appeal) and adopted by Clarke C.J., namely '*exceptional', 'high' 'of such gravity', 'transcends'*.

31. If one applies the principles set out in this paragraph to the current situation it seems clear to this Court that this case concerns a borrower who failed to repay its loan who is disgruntled at the bank and its receivers for exercising their security rights and is seeking damages of circa €400,000 as a result. It is a private dispute between private parties and does not in this Court's view, come anywhere close to amounting to a point of exceptional public importance which transcends the interests of the parties. Thus, this Court cannot see any basis for refusing to apply the default rule of granting security for costs. In this regard, it must be borne in mind that if Fortberry believes that it has a point of exceptional public importance, the decision of this Court (which is only at an interlocutory stage, and therefore it has not heard all the facts) does not prevent Fortberry from pursuing a point that it regards as being one of exceptional public importance. However, it must simply do so with 'skin in the game' and not on the basis of 'consequence-free' litigation or to use another adage, it needs to 'put its money where its mouth is'.

A security for costs order simply applies a level playing field to the litigation

32. This is because all that the decision of this Court does is put the plaintiff and defendant on a level playing field when it comes to the costs of the litigation. In other words, Fortberry cannot pursue what it believes is a point of public importance on a 'win-no lose' basis and lose-lose basis for the defendants. It would be 'win-no lose' for Fortberry because it has no money to pay the defendant's legal costs if it loses. It would be 'lose-lose' for the defendants because even if they win the case, they will not recover their legal costs. Instead, Fortberry has to pursue this litigation like any other litigant (unless they are impecunious), i.e. on a win/lose basis. The fact that Fortberry can pursue a point, which it believes if of public importance, on the basis that it must pay the costs of an action it loses, is not an injustice in this Court's view.

33. That is the end of the matter and so security for costs will be ordered in this case.

34. Although not determinative, reference will however be made to the issue of whether the grant of security for costs in this case would stifle the litigation, as this was raised during the hearing.

Fact that security for costs will stifle litigation will rarely lead to refusal of order

35. However, it seems to this Court that based on the analysis at paragraph 7.15 *et seq*. of Clarke C.J.'s judgment in *Quinn Insurance*, that simply because the grant of security for costs will stifle the litigation is rarely sufficient reason to refuse security for costs.

36. This seems clear from Clarke C.J.'s adoption of Keane J.'s statement in *Lismore Homes (in receivership) v. Bank of Ireland Finance Ltd* [1992] 2 I.R. 57 that if the stifling of litigation were a reason to refuse security for costs it would render s. 52 of the Companies

Act 2014 practically futile, for the simple reason that in most cases the effect of the order will be to stifle litigation. Indeed, Clarke C.J. recognises the reality of litigation by a plaintiff who would like to litigate with 'no skin in the game', since at para. he notes that:

> "It will always be easy for a plaintiff company to say that it does not have the money and cannot get it"

such that the litigation will be stifled, if it has to pay security for costs.

37. Equally however Clarke C.J. did not interpret Keane J.'s statement to mean that a court should never have regard to the fact that it may be appropriate for a court to refuse to grant security if such an order would have the effect of stifling litigation in circumstances where the litigation is of such a nature that it should be allowed it to continue on unlevel playing field.

38. The *Quinn* case was such an exceptional case where consideration was given to whether the litigation was so exceptional, such that the Court should have regard to whether an order for security of costs would stifle that litigation. The exceptional circumstances in the Quinn case were one of the most significant claims in the history of the State since it involved a claim for damages in the sum of €900 million against PwC for, *inter alia*, breach of contract, breach of duty and negligence, which Quinn claimed led to the collapse of Quinn Insurance. The legal costs in that case were estimated at over €30 million.

39. The proceedings in this case are very far removed from those in the Quinn case and so it seems to this Court that even if the grant of security of costs does have the effect of stifling the litigation, this is, as noted by Keane J., an expected effect of s. 52 of the 2014 Act and therefore it is not a reason not to grant security for costs.

40. In any case, what evidence there is before the Court indicates that this is not a case where the litigation will be stifled. This is because averments were made on behalf of Promontoria to the effect that Mr. Flynn seems to be funding Fortberry to run the proceedings and so the litigation will not be stifled if a security for costs order is made. This averment was replied to, but not contradicted, by Mr. Flynn. Indeed, submissions were made on behalf of Fortberry that rather than security for costs, guarantees could be provided in respect of legal costs by Mr. Flynn and his son, also a director of Fortberry, which would appear to indicate that there is funding for this litigation.

Amount of security

41. This Court was provided with the opinion of legal costs accountants on behalf of Fortberrry to the effect that the likely costs of these proceedings would come to €112,500 excluding VAT. This was based on a hearing of three days. Legal costs accountants on behalf of the defendants provided an opinion that the likely costs would be €197,350 excluding VAT, based on a hearing lasting two weeks i.e. eight days.

42. It seems to this Court that the main difference between the two sets of legal costs are the estimated duration of the trial and the difference of €84,850 between the two estimates

could also be viewed as amounting to a difference of €16,970 for each of the additional five days. In light of the issues of dispute between the parties and the need for witness evidence, it seems to this Court that it is certainly possible for this matter to be heard within four days.

43. From the perspective of encouraging the parties to be as efficient as possible with the use of taxpayers' funds (i.e. the time of registrars and other court facilities) and with the added benefit of seeking to reduce court lists (by encouraging the shortening of cases), it is this Court's view that, in considering the appropriate amount of security for costs, both parties should be encouraged to have this dispute dealt with as quickly and as efficiently as possible. It is this Court's view that if Promontoria knows that it has security for costs for 'only' four days of hearing, it will be incentivised to be as efficient as possible in its use of court time. Similarly, since Fortberry has averred that it is likely to receive an asset worth €400,000 in the near future, it is likely to be incentivised to be similarly efficient, so as to recover some of the security, even if it were to lose the litigation, and also to ensure that the assets of circa €400,000 which it expects to receive after the other receiverships are finalised, is not reduced by legal costs (if it were to lose the litigation).

44. On this basis, this Court proposes to increase the plaintiff's estimate for three days by a notional one day (i.e.€16,970) to come up with the sum of €129,470, excluding VAT, as the security for costs to be provided by the plaintiff.

45. Insofar as the form of order is concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention one week from delivery of this judgment, at 10.45am.