

THE HIGH COURT

[2024] IEHC 572
Record No. 2022 No. 3219P

CREDEBT EXCHANGE LIMITED

PLAINTIFF

AND

AVENTIS SOLUTIONS LIMITED AND HARRY PARKINSON

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 9th day of October, 2024.

INTRODUCTION

1. This matter comes before me on an application for security for costs pursuant to Order 29 of the Rules of the Superior Court, 1986 (as amended) and/or s. 52 of the Companies Act, 2014 (hereinafter “the 2014 Act”).

2. In these proceedings, the Plaintiff sues the First Named Defendant, a limited liability company with registered offices in the UK and a former client of the Plaintiff together with the Second Named Defendant, who is the former managing director of a division of the Plaintiff. The proceedings arise in respect of an alleged unlawful disclosure of confidential documents by the Second Named Defendant to the First Named Defendant. These documents were then in turn deployed, it is claimed unlawfully, by the First Named Defendant in its separate proceedings (*Aventis Solutions Limited v. Credebt Exchange Limited* [2024] IEHC 573) against the Plaintiff arising from its provision of trade finance facilities during the summer of 2020 (hereinafter “the trade finance facilities proceedings”).

3. This application for security for costs was heard together with an application pursuant to Order 29 of the Rules of the Superior Court, 1986 (as amended) in the trade finance facilities proceedings. The same legal team appeared on both applications. The central dispute in the trade finance facilities proceedings concerns the charging of disputed fees in respect of trade credit facilities provided by the Plaintiff as more fully set out in a separate judgment delivered contemporaneously with this one in that case.

4. I refer to the judgment in the trade finance facilities proceedings (*Aventis Solutions Limited v Credebt Exchange Limited* [2024] IEHC 573) for a consideration of the applicable legal principles, which it is not proposed to repeat in this judgment. I also rely on the background to those proceedings, the nature of the claim, and the summary of evidence set out in the judgment without here repeating same. I propose in this ruling to expand on matters addressed in my judgment in the trade facilities proceedings only as to relevant differences between the two cases.

BACKGROUND AND NATURE OF THE CLAIM

5. In support of its application for summary judgment in the trade facility proceedings, the First Named Defendant exhibited certain internal documents emanating from the Plaintiff. It is claimed in these proceedings that the documents are confidential and commercially sensitive. The Plaintiff claims that these documents were supplied to the First Named Defendant by the former managing director of a division of the Plaintiff upon leaving the employment of the Plaintiff. The Plaintiff maintains that these documents (21 documents and 119 emails) were disclosed by the Second Named Defendant in breach of a non-disclosure agreement he had signed when commencing work with the Plaintiff and that this is contrary to his contract of employment.

6. Documents exhibited in the summary judgment application in the related trade finance facilities proceedings include a number of emails which appear to have been transferred from the Second Named Defendant's employee email account to his personal email account after leaving the Plaintiff's employment. It is claimed as against the First Named Defendant that, *inter alia*, it is in breach of duty to the Plaintiff, it induced a breach of contract, it breached copyright, conspired to use documents in breach of contract, and benefits from protections afforded to whistle-blowers under the Protected Disclosures Act, 2014.

7. All claims are denied, albeit that some pleading points are made in relation to the denial of sole or predominant purpose of injuring or causing loss to the Plaintiff as opposed to any purpose (treated by the Plaintiff as an admission of an unlawful purpose). Specifically, it is denied that the First Named Defendant owed a duty of care to the Plaintiff, had any knowledge of the contractual position between the Second Named Defendant and the Plaintiff

or that the Defendants shared a common intent or purpose of disclosing documentation to cause injury or loss to the Plaintiff such as to establish the tort of conspiracy. It is further pleaded that losses have not been particularised.

8. By letter dated the 29th of November, 2022, the Second Named Defendant's then solicitors wrote seeking security for costs on the basis of the nature of the claims against it which it asserted were "*bound to fail*" and asserted concerns in relation to the financial viability of Credebt. The Plaintiff's solicitors replied by letter dated 1st of December, 2022 disputing the Plaintiff's contentions in relation to the merits of the proceedings and asserting that it was "*abundantly clear from our client's audited accounts that our client's financial position is a strong one and certainly is such that it would be able to meet an order for costs made against it in the unlikely event that it is unsuccessful in these proceedings.*"

9. The within application comes before me on foot of a Notice of Motion issuing on the 27th of October, 2023.

EVIDENCE GROUNDING APPLICATION

10. Affidavits were sworn in support of the application by one Mr. Farrell on behalf of the Defendants and resisting the application by Mr. Reynolds on behalf of the Plaintiff. The affidavits filed in respect of the summary judgment application in relation to the trade finance facilities proceedings were also exhibited on behalf of the Defendants.

11. In support of the claim for breach of contract and a duty of confidentiality the Plaintiff relies, *inter alia*, on the fixed term contract of employment in which terms of employment of the Second Named Defendant with the Plaintiff were set out in writing and the trade finance contract between the Plaintiff and the First Named Defendant, both of which contain confidentiality clauses as well as a non-disclosure agreement and a confidentiality undertaking provided by the Second Named Defendant. Specifically, the Second Named Defendant's contract of employment states:

"you will be required to sign the company's confidentiality agreement which shall be provided to you under separate cover. You shall not, except as authorised in writing by the company or specifically required by your duties or by law, reveal to any person,

company or association any confidential information concerning the Company, which may come to your knowledge during your employment. This restriction shall continue to apply after the termination of this contract without limit in point of time.”

12. Reliance is also placed on the admission by the First Named Defendant that the documents were disclosed, albeit it is asserted that the documents disclosed were not confidential.

13. On affidavit on behalf of the First Named Defendant, Mr. Farrell avers that the documents exhibited in the application for summary judgment in the trade finance facilities proceedings were received by its solicitors from a whistle-blower on an unsolicited basis and that no consideration was given to the contractual position of the Second Named Defendant by the First Named Defendant in relying on the documentation in the trade finance facilities proceedings.

14. The First Named Defendant relies on exhibited audited accounts (2020 and 2021) to suggest that the Plaintiff is in a precarious financial position. The audited accounts for 2020 demonstrate a turnover of €158,332,600.00 and gross profits on sales of €3,453,153.00 and net annual profits after tax of €671,731.00. It has total cash reserves of €5,840,000.00 and net assets €1,871,984.00. A similar picture emerges from the audited accounts for 2021 which demonstrate net profits after tax of €462,063.00 and cash reserves of €2,334,047.00 (an increase on the previous year). Cash reserves evidenced on the audited accounts for 2021 demonstrates a cash and cash equivalent of €27,625,592.00.

15. Finally, reliance was placed in grounding this application on “*Credebt’s weak defence to the Aventis proceedings*” and the claims made in trade finance facilities proceedings are repeated.

APPLICATION OF THE TEST

16. As set out in my judgment in *Aventis Solutions Limited v. Credebt Exchange Limited* (Record No. 2021 No. 652S), a two-prong test applies on applications for security for costs and a defendant seeking security for costs must establish both that they have a *prima facie* defence to the proceedings and that there is a real risk that the plaintiff will be unable to

discharge a cost order should that defendant be successful in defending proceedings. In the normal course an order should be made where the two-prong test or general test is met unless special circumstances arise for consideration. Whether special circumstances warranting a refusal of an order for security for costs exist therefore only requires to be determined where both prongs of the general test are met but circumstances are also identified which may nonetheless justify the Court refusing to make an order granting security for costs.

17. In advancing its claim in these proceedings, the Plaintiff places significant reliance on contractual confidentiality clauses binding on the Second Named Defendant and the deployment by the First Named Defendant of the Plaintiff's proprietary documentation and confidential material in its proceedings against the Plaintiff. The Defendants maintain that they have a *prima facie* defence to the claims made on the basis, *inter alia*, that:

- I. the First Named Defendant denies knowledge, albeit in bare terms, that the documentation deployed was confidential;
- II. the Protected Disclosures Act, 2014 applies to provide a lawful basis for disclosure of confidential and/or proprietary information to the Gardai and the Court (although relying on s. 5 of the Protected Disclosure Act, 2014 in argument without having pleaded said reliance in their Defence); and
- III. the Second Named Defendant was under an implied duty to clients of the Plaintiff, his former employer, to disclose material to them in support of wrongdoing alleged by them against his former employer.

18. It seems to me that while avenues of potential defence in relation to the disclosure of confidential or proprietary material have been identified in the Defence delivered or in argument, they either lack apparent merit or legal substance, or have not been developed in satisfactory terms for the purpose of this application.

19. By way of example, the asserted lack of knowledge on the part of the First Named Defendant that the documents disclosed to it were confidential is supported by bare assertion only and lacks plausibility. Furthermore, the asserted implied duty on the part of an employee (or former employee) to a client of his former employer in the face of contractual confidentiality obligations has not been supported by authority or adequately developed in a manner which demonstrates that this line of defence has real substance.

20. To the extent that it is claimed that documentation was furnished in unsolicited fashion by the Second Named Defendant to the First Named Defendant's solicitor in response to an allegation of conspiracy to cause harm or loss, I confess that I find the exhortation that a *prima facie* defence is established on the basis of this assertion to be unconvincing. While the question of whether or not there was any solicitation of a breach of contract may amount to "a swearing match" as argued on behalf of the First Named Defendant, no affidavit has been sworn by the Second Named Defendant explaining the circumstances in which he came to contact the First Named Defendant's solicitors in unsolicited fashion to disclose documents.

21. As for the line of defence advanced in reliance on the provisions of the Protected Disclosure Act, 2014, the basis for defence invoked has neither been properly pleaded nor developed in any coherent manner in argument.

22. Of the lines of defence identified on the pleadings and in argument, the invocation of the Protected Disclosure Act, 2014, coupled with the fact that there is an ongoing criminal investigation in reliance on these documents gives me greatest pause for reflection. Notwithstanding inadequacies in pleading a defence under the Protected Disclosure Act, 2014 which are such that it might be open to me to conclude no real defence has been demonstrated solely on the basis that the Defendants are not entitled to rely on a case not pleaded and despite general misgivings as to the nature and strength of the lines of defence identified, I am nonetheless reluctant to conclude that a *prima facie* defence has not been established. This reluctance springs in large part from the legal complexities inherent in the proper interpretation and application of the Protected Disclosure Act, 2014, which to my mind require careful consideration with the benefit of properly developed argument before a view which might have precedential value is expressed.

23. In the course of fuller consideration of this application in the round in the light of both limbs of the two-pronged test, I have concluded that it is not necessary for me to address in any further depth the merits of the lines of defence identified and the reality of the Defendants prospects of successfully resisting the Plaintiff's claims in these proceedings if, on the evidence before me, it has not been established that there is a real risk that the Plaintiff will be unable to discharge a cost order made against it in these proceedings. Accordingly, in the circumstances of this case, I propose to turn to this second question without first arriving at a concluded position on whether a *prima facie* line of defence has been demonstrated.

24. Even when regard is had to the fact that the Plaintiff is engaged in the provision of trade finance facilities in considering its financial accounts by not treating its annual turnover as evidence of good financial health, the fact remains that the Plaintiff's audited accounts for 2020 demonstrate net annual profits after tax of €671,731.00, total cash reserves of €5,840,000.00 and net assets €1,871,984.00. The figures for cash reserves and net assets were better again in 2021 with cash reserves shown exceeding €27,000,000.00.

25. In the face of the financial evidence before me, I am not satisfied that the Plaintiff has established a real risk of impecuniosity on the part of the Plaintiff such that an order for costs could not be enforced in this jurisdiction against it, a company established in the State. Although no evidence as to the likely costs of these proceedings has been adduced in support of this application (other than by reference in unsatisfactory manner to the costs of the trade finance services proceedings), it seems to me that it cannot reasonably be concluded that they could be of an order which could not be met from the cash reserves of the Plaintiff in the event of an adverse costs order against it, should the Defendants succeed in the defence of these proceedings.

26. The financial statements available constitute objective evidence demonstrating that the Plaintiff will be able to pay the costs of the defendant, whatever they are and notwithstanding that they have not been particularised in support of the application for security for costs (other than by reference to an exercise carried out by costs accountants in a related but different case).

27. In view of the clear evidence in relation to the Plaintiff's financial position and my conclusions in respect of same, I am satisfied that in deciding this application it is not necessary for me to consider further the merits of the lines of defence identified or any special circumstances which might warrant a refusal to make an order where the two-prong test is met. The financial evidence before me supports a conclusion that the Plaintiff is in robust financial health and has significant assets in this jurisdiction to meet an award of costs should it be required to do so.

28. As I have found that the Defendants have failed to establish that there is reason to believe that the Plaintiff will be unable to pay costs in the event that the claim is successfully defended, it is not necessary to consider the further argument made that there are special

circumstances which might justify me refusing to make an order having regard to what is described in submissions as a determination on the part of the Defendants to inflict as much reputational damage as possible on the Plaintiff through a negative online review and a criminal complaint to the Gardaí in order to extract a settlement from the Plaintiff.

29. Finally, insofar as reliance has been placed by the Defendants on the disputed merits of the related but separate trade finance facilities proceedings in resisting this application, the general principle that a defendant cannot be required to provide security for costs (see *Leonard v. Scofield* [1936] IR 715) has informed the weight (negligible) I have attached to this submission in concluding that there is no proper basis for ordering security for costs on this application.

CONCLUSION

30. For the reasons given above, I refuse to order security for costs on this application. This matter will be listed for mention together with *Aventis Solutions Limited v. Credebt Exchange Limited* [2024] IEHC 573 following the passage of 14 days from the delivery of this judgment for the purpose of hearing the parties before finalising orders.