THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 8
Record Number 2019/174

Baker J.
Costello J.
Collins J.

BETWEEN/

CHARLES KELLY LIMITED

PLAINTIFF/APPELLANT

- AND -

ULSTER BANK IRELAND LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 29th day of January 2020

1. This is an appeal against the Order of Reynolds J. of 8 March 2019 that the plaintiff provide security for the costs of the defendants in the amount of €220,000, and a stay on the proceedings until the security for the costs awarded had been provided ([2019] IEHC 120).

Background

2. On 19 August 2015 the plaintiff instituted proceedings against the defendant seeking a declaration that the defendant had acted without proper authority in dealing with the plaintiff's banking facilities and that it had "failed to action" the plaintiff's proper instructions in relation to its banking business, and sought damages for the loss said to be caused by the defendant's negligence, breach of duty and/or breach of statutory duty and/or breach of fiduciary duty and/or pursuant to s.44 of the Central Bank (Supervision and Enforcement) Act 2013. A statement of claim was delivered on 30 July 2017 and a defence on 19 October 2018.

3. On 15 February 2018 the defendant issued a motion pursuant to O. 29, r.1 of the Rules of the Superior Courts, and/or s.52 of the Companies Act 2014, seeking orders directing the plaintiff to furnish security for costs to be incurred by the defendant in defending the proceedings, and ancillary relief. There was an exchange of affidavits between the parties on 25 April 2018, 15 January 2019 and 16 January 2019. The motion was heard on 16 and 17 January 2019 and the trial judge delivered judgment on 13 February 2019. As stated above, she ordered the plaintiff to provide security for the costs of the defendant in the amount of €220,000.

The Appeal

4. The plaintiff appealed the order on the grounds that the trial judge erred in holding that the defendant had established a prima facie defence, that the plaintiff would be unable to pay the costs of the defendant if it were successful in its defence and in fixing security for costs at 100% of the estimated costs of the defendant in meeting the case.

Section 52 of the Companies Act 2014

5. Section 52 of the Companies Act 2014 provides:-

> *"Where a company is plaintiff in any action or other legal proceeding, any judge 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 costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."*

6. The formulation of the test which the court must apply when considering an application under the section was set out by Clarke J. in *Usk District Residents Association Limited v. The Environmental Protection Agency* [2006] 1 ILRM 363 in the following terms:-

> *"1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:-*
>
> *(a) that he has a prima facie defence to the plaintiff's claim, and*
>
> *(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;*
>
> *2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus rests upon the party resisting the order.*
>
> *The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought."*

7. The parties were agreed that this was the appropriate test to be applied and this passage was followed by the trial judge in her judgment.

The circumstances in which the disputed payments were honoured

8. First it is necessary, therefore, to consider the claim and the nature of the defendant's defence to that claim. The requirement is for a defendant to establish that it has a *prima facie* defence to the claim advanced. What constitutes a *prima facie* defence is considered below.

9. The claim had its genesis in previous litigation concerning the joint shareholders and directors of the plaintiff, Mr. Gerard Kelly and Mr. William Kelly. In 2008, Mr. Gerard Kelly petitioned for, and was granted, orders against Mr. William Kelly under s. 205 of the

Companies Act 1963 on the basis that he had made out a case of oppression against Mr. William Kelly. One of the issues in dispute was whether Mr. William Kelly had been expending money from the plaintiff's accounts that was not for the benefit of the company. Ultimately, Laffoy J. held that four payments from the account constituted the misappropriation of company funds by Mr. William Kelly.

10. The plaintiff's claim in these proceedings is that the defendant was on notice of an alleged misappropriation of funds and of ongoing litigation between the two principals of the plaintiff. It pleads that the defendant wrongly honoured four payments which it knew, or ought to have known, were not being made for the benefit of the plaintiff and which had not been properly authorised by the plaintiff . The four disputed payments were to Gibson & Associates for the following amounts:

- *€30,000 on 29 October 2009;*
- *€100,000 on 9 December 2009;*
- *€35,000 on 12 February 2010 and;*
- *€15,000 on 12 February 2010.*

These were the four payments which Laffoy J. found constituted a misappropriation of company funds. It also pleaded that the defendant proceeded to continue to operate an unsanctioned overdraft facility of €2.5 million without legal authority and to the detriment of the plaintiff. It sued for declaratory relief and damages arising out of these alleged wrongs.

11. In its defence the defendant pleaded that the plaintiff's claim was statute barred and that a claim in relation to the overdraft of €2.5 million was, in essence, a claim of reckless lending and a cause of action not known to the law. The substantive defence amounted to a traverse of the statement of claim and put the plaintiff on proof of the matters as set out. In relation to the plea that four payments were wrongfully honoured by the defendant, and were not properly authorised by the plaintiff, the defendant merely denied that it wrongfully honoured the payment requests, whether in the manner pleaded at para. 18 of the statement of claim or at all. It advanced no positive plea by way of defence, whether based on the mandate, or contract, or otherwise. At para. 28 of the defence, it pleads that if the plaintiff had suffered the alleged, or any, loss or damage then same had been caused wholly and exclusively, or in the alternative contributed to, by the negligence on the part of the plaintiff, its servants or agents. In particularising the alleged negligence on the part of the plaintiff, it asserted that the plaintiff failed, refused and neglected to take such steps as would be necessary to vary the account mandate of the plaintiff.

12. In 2009, the senior manager of the defendant dealing with the account of the plaintiff was Mr. Niall Kavanagh. Mr. Kavanagh did not swear the affidavit grounding the defendant's motion seeking security for costs. This was sworn by Mr. Ted Mahon who is also a senior

manager employed by the defendant. His means of knowledge in relation to the events the subject of the proceedings, and in particular of the motion, was based exclusively upon the books and records of the defendant and not from any personal involvement in the affairs of the plaintiff at the relevant time. Mr. Mahon set out the defence of the defendant to the allegation that it wrongfully honoured payments drawn on the account of the plaintiff which had not been validly submitted in paras. 37 to 41 of his affidavit. He referred to the mandate of the account of the plaintiff dated 29 September 2006 which provided that most transactions on the current account of the plaintiff, including the presentation of cheques for sums up to €250,000, could be completed provided there were two signatories on behalf of the plaintiff. He averred that the defendant accepted that the plaintiff submitted "a request" on 15 September 2009 "to the effect that the Defendant should not make any further payments to Gibson & Associates." He then averred, by reference to a letter dated 21 May 2014, that "the Defendant clearly and repeatedly advised the Plaintiff that for such a restriction to be imposed, a board resolution from the [plaintiff] (sic) would be required." He then exhibited correspondence between 15 September 2009 and 3 November 2009. Paragraph 40 of his affidavit says:-

> *"As is apparent therefrom, the Plaintiff was clearly advised by the Defendant that, in the absence of a board resolution, the account mandate dated 29 September 2006 would continue to have effect as between the parties. Subsequent to this correspondence, the Defendant honoured the payments to Gibson & Associates in the manner which it was contractually obliged to do. In this regard, each of the documents on foot of which the aforesaid payments were made was duly executed in compliance with the terms of the account mandate."*

This suggests a defence based upon an alleged contractual obligation of the defendant to operate the plaintiff's account in accordance with the mandate, but it does not elaborate upon the basis for this assertion in light of the correspondence which immediately preceded the first of the four disputed payments where a contrary approach was taken. Nor does Mr. Mahon engage in any meaningful way with the correspondence he exhibits and, in particular, the repeated assertions by the defendant in that correspondence that it had the authority to depart from the mandate in the circumstances which had been brought to its notice by the plaintiff. This correspondence is addressed below.

13. The plaintiff wrote to the defendant on 15 September 2009 stating that payments made to Gibson & Associates Solicitors had been in breach of the company's established internal payment approval procedures. The payments related only to the personal expenditure of one of the directors and in making the payments the director acted outside of his authority. The bank was advised of this previously. The letter formally advised the defendant that in the event that it "breaches this instruction, the company will rely on this letter and the Bank's previous knowledge, to legally recover any payments and any resulting damages the Company may incur as a result." The defendant replied on 21 September 2009 stating that, as a result of the ongoing difficulties, the defendant believed that it would be in the plaintiff's best interest to make alternative banking arrangement and stated that it intended to cancel the existing overdraft facility within

twenty-one days. In two separate letters of the same date, addressed to Mr. William Kelly and Mr. Gerard Kelly, the defendant notified the principals of the plaintiff that "we will require a board resolution from the Company authorising any payments or transfers to be made to Gibson Associates Solicitors" (per the letter to Mr. William Kelly) and "[p]lease note that in the event of cheques presented in favour of Gibson Associates Solicitors…the Bank will require a Board Resolution from the company in order to effect payment of same" (per the letter to Mr. Gerard Kelly).

14. Two and a half weeks later, on 9 October 2009, the defendant wrote to Mr. Gerard Kelly noting that the defendant had been put on notice of payment issues "that cannot be ignored". The letter stated:-

> *"The Bank is now effectively on notice of an alleged* ***misappropriation of company funds****. This is a serious allegation and as such the Bank has been put on enquiry of circumstances whereby it should not honour the payment instruction contained in the company mandate.*
>
> *The Bank requires a board resolution revoking or amending the existing mandate. If a board resolution is not furnished by 16 October 2009 then the signing authority on the account will be revised by the Bank to "Two to Sign", namely you and William Kelly.* ***The Bank has authority to change the signing authority on the account, in light of the serious allegation of misappropriation of company funds…****[T]his is a serious situation which must be addressed in the short term to facilitate the smooth operation of the company working account." (emphasis added)*

15. The defendant wrote again to both Gerard and William Kelly on 15 October 2009 stating that the defendant required a board resolution revoking or amending the existing mandate. If it was not furnished with a board resolution to that effect by 21 October 2009 it intended to revise the signing authority on the accounts to *"Two to Sign"*, namely Gerard and William Kelly. It should be noted that this letter reiterated that the defendant had authority to change the signing authority on the accounts in light of the serious allegation of misappropriation of company funds. It enclosed a new company mandate to be completed in accordance with revised signing instructions "to enable [their] records to be updated in this regard."

16. No new mandate was executed by the company and the defendant wrote again to Messrs. Kelly, personally, on 22 October 2009. At this point in time, Mr. Kavanagh informed Messrs. Kelly that the defendant had altered its position. He said that the defendant "has been advised that the original company mandate should continue to operate and it is, therefore, the intention of the bank to continue to operate the account in accordance with the terms of the mandate." The letter noted that if either party had any difficulty with what was contained in the letter it was open for them to apply to the court for appropriate relief and he stressed that it was not the intention of the defendant to become involved in any application to the court. The letter concluded stating:-

"The bank is aware that an allegation of wrongful appropriation has been made with regards to the use of company funds and this is an issue for resolution between the parties in the context of existing proceedings."

17. It may be observed in this context that, as the defendant was aware, there was effectively a deadlock between Gerard and William Kelly concerning the affairs of the plaintiff. In practical terms, therefore, there was little or no prospect of any change to the mandate being agreed, whether by way of board resolution, or otherwise. There were s. 205 proceedings in being but, as of September/October 2009, there was an unresolved dispute as to whether the petitioner, Gerard Kelly, was a member of the plaintiff and so his standing to maintain the proceedings was a matter of dispute. In those circumstances, any application for orders restraining payments from the plaintiff's account with the defendant would not have been straight-forward.

18. Thereafter, on 29 October 2009, the defendant authorised the first of the payments, the subject of these proceedings, to Gibson & Associates in the sum of €30,000.

Decision of the High Court

19. The trial judge considered whether the defendant had established a *prima facie* defence in paras. 11-19 of her judgment. She did not address the defence filed by the defendant nor did she analyse the evidence before the court to any significant extent.

20. She stated:-

"13. The defendant accepts that it received a request from the plaintiff in September 2009, to the effect that it should not make any further payments to this third party but advised the plaintiff that a board resolution would be required to alter the existing mandate. No board resolution was forthcoming and the defendant authorised the payments.

14. There can be no dispute but that the defendant advised the plaintiff on numerous occasions of the necessity to procure a board resolution. Further, having become aware of the ongoing dispute between the directors of the company, the defendant suggested that an application be brought for the appropriate relief through the courts."

21. This summary of the correspondence is not entirely accurate in that it does not reference the defendant's repeated statements that it had the authority to change the signing arrangements, in light of the allegations of wrongdoing that had been brought to its notice. It was in that context that reference had been made to the need to procure a board resolution. In other words, the defendant's initial position was not that it could not depart from the mandate in the absence of a board resolution but rather that, in the absence of a resolution, it could and would do so: see, for instance, the letter of 15 October 2015 to which I have already referred.

22. The trial judge referred to the test set out by Finlay Geoghegan J. in *Tribune Newspapers (In Receivership) v. Associated Newspapers (Ireland) Limited* (Ex Tempore, High Court, 25 March, 2011) in relation to the establishment of a prima facie defence as follows:-

> *"In my judgment, what is required is for a defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial judge, provide a defence to the plaintiff's claim."*

23. After quoting this passage the trial judge concluded:-

> *"Having considered the factual evidence upon which the defendant seeks to rely in establishing a prima facie defence to the within proceedings, this Court is satisfied that the defendant has made out a reasonably sustainable defence and indeed a sound arguable legal basis for that defence."*

Discussion

24. The appellant submitted on appeal that the onus is on the defendant to establish that it has a *prima facie* defence to each of the claims in the proceedings. If it fails to establish a *prima facie* defence in respect of any one claim, then security for costs ought not to be ordered.

25. The appellant says that this defence must be found in the pleadings and that the affidavit grounding the application is for the purposes of placing before the court admissible evidence in support of that defence, not for expanding the grounds of defence beyond those pleaded. Counsel for the appellant argued that the trial judge did not engage sufficiently with its argument that the defendant had not established a *prima facie* defence to its claim, and she erred in law and in fact in concluding that the defendant had made out a *prima facie* defence to the claim that it had wrongfully honoured payments in favour of Gibson & Associates.

26. I agree. The defence relied upon by a defendant who seeks an order for security for costs, and asserts that it has an arguable defence to the plaintiff's claim, must be that pleaded in the defence and the replies to particulars (if any). Even at the end of the hearing of the appeal the precise basis upon which the respondent maintains that it was not liable to the appellant for making the four impugned payments was not clear. The respondent did not plead that it was obliged to honour all payments in accordance with the mandate or, in the alternative, if it was not so obliged, that payment out in accordance with the mandate afforded an absolute defence to the claim. It also does not advance any defence based upon an alleged inability to dis-apply, or vary, the mandate. During the hearing of the appeal, counsel for the respondent was invited to show where the defence even referred to the mandate – much less relied upon an alleged obligation to operate the account in accordance with the mandate – as a defence to the claim. Counsel referred to para. 28 of the defence, quoted above, which contains an allegation of contributory negligence against the plaintiff. There is no positive plea in the defence referable to the mandate.

27. The respondent's application was grounded upon the affidavit of Mr. Mahon, as I have noted above, and he is unable to give any contemporary evidence in relation to the events at issue in these proceedings. He does no more than refer to the fact of the correspondence which I have cited above. He does not and cannot add anything to the defence of the defendant to the claim. This leaves the court simply with the correspondence. The correspondence sets out a number of inconsistent positions adopted by the respondent. Initially, it suggests that it was of the view that it had authority, unilaterally, to vary the mandate or, in the alternative, not to honour specific instructions, even if made in accordance with the existing mandate. It then said it was advised that it should operate the account in accordance with the existing mandate but did not state the basis for this change in its position. It did not say that it could not follow either of the two alternatives previously suggested. While the correspondence, in all probability, will be adduced at trial, I am not satisfied that the correspondence alone, without more, establishes an evidential basis for a *prima facie* defence and, therefore, the respondent in this application has not met the test set out in Tribune Newspapers. In any event, in the absence of a pleaded defence, the correspondence does not assist the respondent in establishing a *prima facie* defence to the claim.

28. Counsel for the respondent relied upon the decision of *Lipkin Gorman v. Karpnale Limited* [1989] 1 WLR 1340, in support of his argument that the respondent was either obliged or entitled to operate the account of the company in accordance with the existing mandate, despite its knowledge of the allegation of misappropriation of funds. But this possible defence to the claim was not pleaded and so cannot be relied upon as a *prima facie* defence to the plaintiff's claim in its application for security for costs. I have already concluded that any such defence must be found in the pleadings and the affidavits are to establish the evidential basis for that defence, so it seems to me that I may not have regard to this argument on this appeal. For this reason, I refrain from addressing it and make no observations on it, other than to point out that, as is apparent from the passage from the judgment of May LJ. relied on by the respondent, Lipkin Gorman does not suggest that a bank's entitlement/duty to rely on the terms of a mandate is absolute.

29. It follows, in my view, that the respondent has not established relevant arguable legal submissions applicable to admissible evidence and to the pleaded case which, if accepted by a trial judge, would provide a defence to the plaintiff's claim and, therefore, it has not established a *prima facie* defence to the plaintiff's claim.

30. It is important to emphasise that I am not holding that the respondent may not have a defence to the appellant's claim. However, on the pleadings and the evidence before the High Court, the respondent had not advanced a *prima facie* defence to one aspect of the claim advanced by the appellant. In my judgment, the trial judge erred in holding otherwise. She did so because she failed to analyse the pleaded defence and the precise legal basis upon which the defendant asserted that it had a defence to the plaintiff's claim. In my opinion, the trial judge ought not to have awarded security for costs in the circumstances and, accordingly, I would allow the appeal.

31. In light of this conclusion, it is not necessary to consider the appeal in relation to quantum of security ordered by the High Court.