

Group Briefing

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Show me the money – How to protect yourself against a plaintiff in a weak financial position

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A recent judgment of the Irish High Court provides welcome clarity on the principles which apply to applications seeking security for costs.

The normal rule in Irish litigation is that costs follow the event, i.e. the losing party pays the other party's legal costs. Where there is a real concern about the financial position of the party bringing the proceedings, the defendant may look for what is known as an order for security for costs. This is a court order requiring the plaintiff to provide security (usually cash lodged in court or a bond) to meet the legal costs that the defendant is likely to incur in defending the case. If the Court makes an order for security for costs, the proceedings are suspended until the plaintiff lodges the security in court and, ultimately, may be dismissed if the security is not lodged.

We recently acted for a defendant in a Commercial Court case who succeeded in getting an order requiring the plaintiff to provide security for our client's estimated defence costs. Rather than paying the amount of security for costs which had been ordered, the plaintiff decided to discontinue its case against our client.

HOW TO GET SECURITY FOR COSTS

The basis for seeking an order for security for costs against a company is

section 52 of the Companies Act 2014.

A defendant seeking security for costs must show the Court that (i) it has a prima facie defence to the claim; and (ii) there is reason to believe that the plaintiff will be unable to pay its costs if the plaintiff loses the case.

If the defendant can establish these two conditions, the Court will ordinarily make an order for security for costs unless there are some special circumstances that persuade it not to do so.

"REASON TO BELIEVE"

Courts require the defendant to show something more than a mere risk of the plaintiff being unable to pay its costs in the event that the plaintiff loses the case.

The available accounts or financial statements of a plaintiff may be very relevant. However, they are not necessarily determinative and the Court must consider all available evidence. This was made clear in a recent decision of the High Court, Coolbrook Developments Ltd v Lington Development Ltd and Another (in which we acted for a defendant who

brought an application seeking security for costs), where the Court made the following points:

- » A positive net asset position in the accounts or financial statements may not be sufficient to defeat the application for security for costs.
- » The date of the accounts or financial statements actually provided is relevant. Where they are out of date, it is for the plaintiff company to explain why that is so.
- » The Court can draw inferences from any unexplained gaps or uncertainties in the accounts or in the evidence before the Court.

HOW MUCH?

If the Court decides to order security for costs, the next question is for how much.

Prior to 2014, the legislation required a plaintiff company to provide “sufficient security”. However, the 2014 Act simply refers to “security”. There is no express requirement that the security be “sufficient”.

This led some commentators to query whether the Court would adopt what is colloquially referred to as the ‘one-third’ rule, i.e. to only require a plaintiff company to pay one third of the estimated costs as security. The ‘one-third’ rule is often applied in applications for security for costs against individual plaintiffs who are resident outside the EU.

However, in a detailed and comprehensive judgment, the High Court in the Coolbrook decision confirmed that where security is being sought from a limited company, the Court is not bound by the one-third rule and it has full discretion as to the amount of security. It stated that unless there are other factors which persuade the Court to order a reduced amount, it will in most cases order the provision of full security.

The Court will balance the right of the plaintiff to have its case conducted fairly against the right of the defendant to be paid its legal costs if successful in the defence of the proceedings. If the plaintiff company gives evidence that if ordered to provide full security it will not be able to proceed with the case, and there is a basis for this, the Court will factor this into its considerations. The Court will also consider any evidence from a plaintiff that its impecuniosity arises as a result of the alleged wrongdoing of the defendant which is at issue in the proceedings.

In the Coolbrook case, the Court was satisfied that the defendants had established there was a “reason to believe” that the plaintiff would be unable to pay the defendants’ costs if they were successful. The Court then went on to consider the evidence presented. In so doing, the Court noted that there were various gaps in the financial information put forward by

the plaintiff and applying the *Parolen* principles, determined that it was not in a position to fill those gaps. The Court concluded that the evidence established that the plaintiff would not be in a position to pay the defendants’ costs, ordered the plaintiff to pay a sum as security for the defendants’ costs and stayed the proceedings pending the payment of same.

The Court of Appeal, in a separate case in which we also acted for a successful defendant (**Hedgcroft Limited T/A Breary Capital Partners v Htremfa Limited and Others**), has since affirmed this position.

COMFORT FOR COMPANIES

The Coolbrook decision is a welcome clarification for those facing litigation by a limited company in an uncertain financial position. It confirms that in determining whether to order security for costs, the Court will look at all of the evidence and a positive net asset position in the company’s accounts is not a bar to getting security. Importantly, as regards the amount of security, it clarifies that the Court has full discretion as to the amount of security it can order and unless there are factors which persuade the Court to order a reduced amount, in most cases it may well require full security.

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