WILLIAM FRY

// LITIGATION & DISPUTE RESOLUTION

Impecunious Plaintiffs and Security for Costs – A New Leg to the Test

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INTRODUCTION

A successful security for costs application may be strategically beneficial for defendants. The rationale behind the regime is to provide protection to a defendant from the risk of an impecunious opponent being unable to meet a costs order if the claim against the defendant is unsuccessful. As summarised in our recent briefing here, security for costs applications are carefully scrutinised by the court because of the potential interference with the parties right of access to the courts.

The approach to corporate security for costs is well established. It is a discretionary relief which requires the defendant to establish that it has (i) a *prima facie* defence; and (ii) that the plaintiff will be unable to pay the defendant's costs if successful in its defence. In turn, a plaintiff, in defence of an application for security, may demonstrate "*special circumstances*" which could permit the court to exercise its discretion to refuse the application.

The courts will always seek to find the balance of justice between the parties and are alert to the fact that it may be used tactically to stifle a meritorious claim. The courts will consider all the circumstances of the case and will only grant an order for security for costs if it is satisfied that it is just and equitable to do so.

SPECIAL CIRCUMSTANCE – PLAINTIFF'S IMPECUNIOSITY

As outlined in our previous commentary here, a plaintiff can seek to avail of the commonly invoked special circumstance of *"impecuniosity"*. In other words, a plaintiff must show that its admitted or established inability to pay the likely costs of the defendant arises from the alleged wrongdoing of the defendant. This test for determining the impecuniosity of a plaintiff was established in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7**(Connaughton Road)**.

The *Connaughton Road* test was recently considered and refined in *Quinn Insurance Limited (Under Administration) v PricewaterhouseCoopers (A Firm)* [2021] IESC 15 (**Quinn**). The issue in Quinn was whether the plaintiff had established special circumstances such that security for costs should not be ordered.

THE BACKGROUND TO QUINN

The Supreme Court (**Court**) granted leave to appeal from the Court of Appeal (**CoA**) decision which granted security for costs against the plaintiff company (**QIL**) (see our previous commentary on the CoA judgment here). Leave was granted on the basis that the application concerned matters of general public importance in identifying the appropriate test for security for costs applications.

As noted by the Court, the proceedings have a complex background and the likely costs were estimated at €30 million. QIL was part of the Quinn Group and had an insurance underwriting business. QIL was placed in administration in 2010. It is now insolvent, not trading and reliant on the Insurance Compensation Fund (**ICF**) for funding. QIL's sole remaining purpose was to prosecute the instant proceedings. QIL instituted proceedings against the defendant (**PwC**), alleging breach of contract and negligence arising out of the manner in which PwC audited its business. PwC brought a security for costs application on the basis that QIL was an impecunious corporate plaintiff and that PwC had a *bona fide* defence to the proceedings. The CoA reversed the High Court decision, and ordered QIL to provide security. The findings were partly based on:

- the potential unfairness to PwC, being a partnership with no limited liability, if it had to bear the risk of having to meet the costs;
- granting security would not create an injustice for QIL; and
- a balance could be struck in the amount and mode of security to protect the interests of both parties.

The CoA held that the stifling effect of a potential order for security is a significant factor in balancing the rights of parties to litigation.

APPEAL TO THE SUPREME COURT

It was not in dispute that QIL would be unable to meet the costs of PwC, should costs be awarded against QIL after the proceedings ended. It was also accepted that PwC had a *bona fide* defence to the proceedings. Therefore, the issue turned on whether special circumstances justified refusing security for costs.

The first issue the Court had to address was whether the special circumstances of impecuniosity were made out. The second issue was whether it was appropriate to order security notwithstanding a finding that the impecuniosity is attributable to the alleged wrongdoing. This incorporated consideration of whether the proceedings would be stifled if security was ordered. It was argued before the Court that Irish jurisprudence does not recognise, as a factor, the relevance of whether ordering security for costs will stifle proceedings. This was rejected by the Court. Considering that an order for security may stifle a claim, balanced against the risk that the refusal of security may compromise a defendant's right of defence, the Court held that it should err on the side of inquiry and put some weight on assessing whether an order for security may stifle the claim.

NEW LEG TO THE SPECIAL CIRCUMSTANCES TEST

Clarke CJ held that the proper approach to be adopted where it is alleged that security for costs should not be ordered is to consider:

1. whether the inability to pay costs, should they be awarded, has (on a *Connaughton Road* basis) been shown prima facie to be due to the wrongdoing alleged. If so, then security should not ordinarily be ordered.

2. if the *Connaughton Road* special circumstance is not established, the court should inquire into the likelihood of the proceedings actually being stifled if an order is made, and take that result into account in its overall assessment.

Clarke CJ held that the court should attempt to adopt the course of action giving rise to the least risk of injustice while also recognising that there will inevitably be some risk of injustice no matter what course of action the court determines. Clarke CJ noted that every plaintiff who has a *prima facie* claim for money will be able to show that some of its impecuniosity is potentially due to alleged wrongdoing by a defendant. However, the balance against making an order for security is only tipped where it is shown that the alleged wrongdoing forms *all* of the impecuniosity.

However, in order to ensure that an overly rigid application of the rules might breach the right of access to the courts, Clarke CJ was prepared to recognise a new leg to the special circumstances test i.e. will the proceedings be truly stifled if an order for security is made?

In terms of proof of potential stifling of the proceedings, Clarke CJ stated that the plaintiff who relies on this defence should provide "reasonable detail" as to whether the proceedings will actually be stifled. It is for the plaintiff to put forward whatever information they wish. It is not for the defendant to raise particulars or require additional although a defendant may criticise the extent of the information put forward. If a plaintiff does not put forward sufficient information then the court can reach whatever conclusions are appropriate. The fact that the court may consider that the proceedings would likely be stifled if security is ordered is not a decisive factor, but it must be taken into account in determining where the least risk of injustice lies.

DECISION OF THE SUPREME COURT

LEG 1: IMPECUNIOSITY

Could the plaintiff have avoided administration were it not for PwC's alleged wrongdoing? Clarke CJ found that QIL's explanations in that regard were speculative. Clarke CJ was not satisfied that sufficient evidence was given to justify the contention that QIL would have been able to pay costs were it not for the wrongdoing alleged. He therefore concluded that QIL failed to establish the *"impecuniosity due to alleged wrongdoing"* special circumstance.

LEG 2: STIFLING

Where QIL had at least *prima facie* access to sufficient funds, through the ICF, Clarke CJ was not satisfied that this leg of the test was made out by QIL.

Clarke CJ refused QIL's appeal and upheld the CoA ruling. The plaintiff failed to meet the *Connaughton Road* test and it was unlikely that the proceedings would be stifled due to the potential funding from the ICF.

INTERPLAY WITH THE PUBLIC INTEREST CIRCUMSTANCE

Clarke CJ noted that the question of whether proceedings are likely to be stifled is of central relevance to an assessment of whether the public interest special circumstance has been established. The public interest will only be interfered with where the proceedings are not going ahead. As the Court was not satisfied that the proceedings would be stifled by an order for security, therefore the public interest was not interfered with.

OTHER CONSIDERATIONS

The Court did not take the potential personal exposure of the partners in PwC into account, because no evidence was given on this issue. Clarke CJ stressed that a party who wishes to obtain the benefit of an order for security for costs, must "*put its cards on the table*", otherwise it must accept the consequences.

APPLICABILITY OF THE TWO-LEG TEST IN FURTHER CASES

On the same day that the decision in *Quinn* was handed down, the Supreme Court also delivered another security for costs judgment in *Protégé International Group (Cyprus) Ltd v Irish Distillers* [2021] IESC 16 *(Protégé)*. As previously discussed in our summary here, an order for security for costs was granted by the High Court and upheld by the CoA. The issue in Protégé, like in *Quinn*, concerned the question of whether the plaintiff had demonstrated that special circumstances existed so as to defeat the security for costs application.

Clarke CJ in *Protégé*, applying the principles in *Quinn*, held that both the High Court and the CoA were correct to hold that the plaintiffs had not established, on a *prima facie* basis, that their current impecuniosity was due to the wrongdoing alleged against the defendant. Following *Quinn,* Clarke CJ went on to consider whether the proceedings might be stifled in the event that security was ordered.

The Court held that there was no true evidence presented on behalf of the plaintiff to suggest that the proceedings would be stifled or to enable the Court to assess the circumstances in which security might not reasonably be capable of being put up. In those circumstances, there was no evidential basis on which the Court could have concluded that these proceedings would be stifled should security be ordered. It was on this basis that the *"impecuniosity due to the alleged wrongdoing"* special circumstance was not established and therefore the decision of the CoA granting security for costs was upheld.

CONSISTENT WITH EU LAW

The Court in *Protégé* also considered whether Irish security for costs law complies with the principle of an effective remedy under EU law. The Court was satisfied that the circumstances in which a party can avoid an order for security, reduces the extent to which access to an effective remedy can be interfered with. The Court concluded that Irish security for costs law pursues a legitimate objective and is designed to enhance the rights of defence and discourage unmeritorious claims.

CONCLUSION

In summary, the court will apply a broad approach in security for costs applications. As a discretionary relief, the courts will always seek to ensure that the balance of justice between parties is met and will scrutinise the evidence and circumstances of each case. Security for costs applications remain a useful tool for defendants. However, parties to security for costs applications should now note that the court in making its decision can, in certain circumstances, consider whether directing security would stifle a claim. Evidence of stifling is a factor which can tip the balance for a court in deciding whether to grant security.

Finally, the Court in *Quinn* recognised the possibility of ordering security on a phased basis or in the form of an indemnity. However, the default position remains that full security in monetary form should be provided.

CONTACT US

For more information, please contact any of our team below.

Richard Breen
PARTNER
+353 1 639 5378
richard.breen@williamfry.com

Lisa Carty
PARTNER
+353 1 639 5386
lisa.carty@williamfry.com