Neutral Citation Number: [2018] EWHC 860 (Comm)

Case No: CL-2017-000725

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/18

Before :

PETER MACDONALD EGGERS QC (Sitting as a Deputy High Court Judge)

- -

Between :

LORD LTD	**Claimant**
- and -	
HSBC BANK PLC	**Defendant**

- -
- -

The **Claimant** appeared by its director, **John Mair**
Emily Saunderson (instructed by **Shepherd & Wedderburn LLP**) for the **Defendant**

Hearing dates: 13th April 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR PETER MACDONALD EGGERS QC

Mr Peter MacDonald Eggers QC:

Introduction

1. The Claimant, Lord Ltd, is a privately owned investment company registered in England at an office in Bristol.

2. In 2007, the Claimant invested in two financial products issued by the Defendant ("the Bank"), namely a Sterling bond or policy with a value of £750,000 and a US bond or policy with a value of approximately US$500,000. These products had a minimum term of 5 years. The Claimant alleges that they were surrendered by the Bank and encashed early and in breach of the contractual terms between the Claimant and the Bank. The Claimant claims damages for breach of contract, breach of statutory duty, negligence and fraud.

3. The Claimant issued these proceedings in connection with its claim in November 2017.

4. The Bank has not yet served a Defence in this action, but in its evidence in support of the application currently before the Court (in particular the first witness statement of Ms Laura McMillan of Shepherd and Wedderburn LLP, the Bank's solicitors), the Bank maintains that it intends to defend the claim and alleges that these bonds or policies were used to secure the Claimant's indebtedness to the bank in respect of a loan and overdraft facility extended by the Bank to the Claimant. I was informed by Ms Emily Saunderson, on behalf of the Bank, that the Bank does not currently intend to pursue a counterclaim in these proceedings independent of the claim.

5. The Claimant denies the Bank's case as set out in Ms McMillan's witness statement.

6. The Bank has issued an application seeking two orders:

    i) An order that the Claimant provide security for costs up to and including the filing of the Defence in the sum of £38,023.85 (which is constituted by £28,606.35 of costs already incurred and £9,417.50 not yet incurred).

    ii) The Bank be permitted to serve a Defence, by way of an extension of time, up to 14 days after the provision of security ordered to be provided by the Claimant.

7. On 1st March 2018, the Court ordered that the time for the service of the Defence be extended to a date seven days after the determination of the security for costs application.

8. The Claimant opposes the application for security for costs.

9. At the hearing of the Bank's application, the Claimant was represented by Mr John Mair, a Scottish solicitor, who is also a director, company secretary and shareholder of the Claimant. Although the Claimant has consulted solicitors and counsel in respect of its claim, it has chosen to appear before Court at the hearing of the Bank's application without English legal representation.

Security for costs

10. This case is slightly unusual in that the Bank seeks security at a relatively early stage of the proceedings. Usually, security for costs is sought at the first case management conference. This application is made especially early, but there is no reason to think that it should not have been made, if the application is otherwise justified. Appendix 10 to the Commercial Court Guide provides that "*First applications for security for costs should not be made later than at the Case Management Conference*". Nevertheless, the early stage at which the application is made may be a relevant consideration insofar as the Court has a discretion to exercise to order such security.

11. The Bank seeks security for costs pursuant to CPR rules 25.12 and 25.13(1) and (2)(c), namely on the grounds that it is just to order security for costs having regard to all of the circumstances of the case and that the Claimant is a company or other body (whether incorporated inside or outside Great Britain) and "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*".

(1) Is there reason to believe that the Claimant will be unable to pay?

12. The first question which arises is whether there is reason to believe that the Claimant will be unable to pay the defendant's costs if ordered to do so.

13. In *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 WLR 751, the Court of Appeal considered the meaning of the jurisdictional condition that "*there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*". Arden, LJ concluded, at paragraphs 26-34, that this provision requires, as a pre-condition for the exercise of the Court's jurisdiction to order security for costs, the Court to be satisfied on the totality of the evidence before it that there is reason to believe that, when ordered to do so - which necessarily means at some point in the future - the claimant would not be able to satisfy a costs order made by the Court against the claimant and in favour of the defendant. In particular, if the Court merely entertains a doubt whether the claimant can pay such a costs order, that would not be sufficient; on the other hand, the Court may have reason to believe that the claimant is unable to pay a costs order even if its inability to pay cannot be established on the balance of probabilities.

14. In this case, the principal evidence which was relevant to this jurisdictional question was constituted by (a) the Claimant's unaudited abridged accounts, in particular its balance sheet, for the year ending 31st March 2017, filed by the Claimant, and which were exhibited to Ms McMillan's first witness statement, and (b) the witness statements of Mr Mair opposing the application.

15. The Claimant's accounts were signed by Mr Ali Jafari-Najafabadi, a director of the Claimant. The balance sheet recorded the following information:

    i) The Claimant had fixed assets, being investments in land and companies, of £165,000.

    ii) The Claimant's current assets were constituted by a debt owed to the Claimant by the Bank, in the sum of £1,700,000, being "*capital, profits and interest due on bonds investments which have matured but currently subject to litigation*".

This is a reference to the claim made by the Claimant against the Bank in this action.

iii) For the previous financial year, the Claimant had, in addition, £500,000 "*cash at bank and in hand*", but this was no longer entered as an asset in the Claimant's balance sheet for the year ending 31st March 2017.

iv) The Claimant's liabilities were "*monies due to Lion Limited (Isle of Man) and Shareholders*" in the sum of £1,855,000. This marked a substantial increase of the Claimant's debts from the previous financial year, when the "*creditors*" figure was £808,576. That is, there was an increase in the Claimant's liabilities of more than £1 million.

v) The Claimant had total net assets and shareholders' funds in the sum of £10,000.

16. Ms Saunderson, on behalf of the Bank, submitted that this demonstrates that there is reason to believe that the Claimant would be unable to satisfy a costs order made against it, because if the Bank succeeds in its defence of the Claimant's claim, the Claimant's current asset of £1,700,000 would be removed, leaving the Claimant with very substantial net liabilities (on my calculation, in the sum of £1,690,000).

17. In his evidence, Mr Mair, on behalf of the Claimant, stated that:

i) The Claimant remains "*solvent and very much alive despite having incurred losses and expenses as a direct result of the Defendant's actions and inactions affecting it*" (paragraph 10 of Mr Mair's second witness statement).

ii) The Claimant has since inception relied upon funds invested in it or loaned to it by the Jafari family and/or companies owned and controlled by them (paragraph 13 of Mr Mair's second witness statement).

iii) The Claimant has no liabilities or debts to the Bank or any other bank; it has no secured loans; it has not issued any debentures; and it has not granted security over any of its assets (paragraph 14 of Mr Mair's second witness statement).

iv) The Claimant has assets of land and other investments in a portfolio worth approximately £165,000 (which I note are referred to in the balance sheet), but this portfolio is of a long term maturity and is not readily liquid (paragraph 22 of Mr Mair's second witness statement).

v) The Claimant cannot raise the cash equivalent to £40,000 security sought by the Bank (paragraph 29 of Mr Mair's second witness statement). During his oral submissions, Mr Mair said that the Claimant does not currently have £40,000 in cash if ordered to pay the Bank's costs in that amount. However, Mr Mair also said that it is denied that the Claimant will in the future fail to pay any costs awarded by the Court against it in this action (paragraph 21 of Mr Mair's second witness statement).

vi) There is an additional asset belonging to the Claimant and which is not referred to in the Claimant's balance sheet, namely a debenture issued by Lion Ltd to the Claimant in the sum of £700,000, although this ranks in priority after other secured debts owed by Lion Ltd to the Bank and apparently has now been discharged and no longer attaches to Lion Ltd's property (paragraph 13 of Mr Mair's third witness statement).

18. In Mr Mair's second witness statement (paragraph 24), and in the skeleton argument which he lodged, it is stated by Mr Mair that the Claimant's "*only creditor*", Lion Ltd, "*has agreed Not to seek repayment in part or at all or by way of interest any monies until after this case is finalized and all costs incurred and awarded against Lord paid, either by Lord direct or by Lion Limited*". During his oral submissions, Mr Mair confirmed this undertaking by Lion Ltd, speaking - as he informed me - as a director of Lion Ltd.

19. On one view, it might be said that if the Claimant's only creditor is willing to defer the enforcement of the debt owed to it by the Claimant in preference to the Bank, the balance sheet would show a positive asset position and therefore, the argument would run, it would be in a position to pay the Bank's costs in the sum of £40,000 should the Claimant be ordered to pay such costs.

20. With that argument in mind, together with the evidence of the Claimant's balance sheet, and Mr Mair's evidence, I have concluded that there is reason to believe that the Claimant would not be able to pay the Bank's costs in the approximate sum of £38,000 if ordered to do so. My reasons for this conclusion are as follows:

i) The balance sheet, as prepared by the Claimant, demonstrates substantial net liabilities on the assumption that the Claimant's claim against the Bank fails. It is on that assumption that the Court must ask itself whether the Claimant could pay a costs order made in favour of the Bank, which in most cases would be made if the Bank's defence succeeds. In this case, the Claimant's alleged asset of a debt owed by the Bank in the sum of £1,700,000 would be held to be non-existent.

ii) Although Mr Mair asserts that the company is solvent, that assertion is made on the basis that (a) the Claimant is not required to pay a costs order of £40,000 and (b) Lion Ltd, as its only or principal creditor, does not enforce the debt owed to it by the Claimant.

iii) Mr Mair frankly accepted that the Claimant would find it difficult to raise £40,000 in cash if required to do so.

iv) The undertaking made on behalf of Lion Ltd not to enforce the debt owed to it by the Claimant has some superficial relevance, but there are a number of difficulties with this undertaking.

a) The existence, nature and the amount of the debt owed by the Claimant to Lion Ltd is not in evidence. There is little or no documentation before the Court which establishes such particulars relating to this debt.

b) The undertaking has been made by Mr Mair on behalf of Lion Ltd. However, there is no evidence of the authority required to make such an undertaking.

c) Although Mr Mair describes Lion Ltd as the Claimant's "*only creditor*", the balance sheet records the Claimant's creditors as Lion Ltd and "*Shareholders*". It is unclear whether this is a reference to the Claimant's own shareholders, which seems more likely, or the shareholders of Lion Ltd. There is no evidence as to how much of the debt is owed to the relevant shareholders, and there is no evidence that all of the relevant shareholders are prepared to give a similar undertaking. Further, there is no evidence how much of this debt is owed to each of the relevant shareholders.

d) Ms Saunderson has questioned the validity of any such undertaking in the event of insolvency.

v) The existence of the debenture issued by Lion Ltd to the Claimant in the sum of £700,000, which is not recorded in the balance sheet, does not affect the net liability position if the debt allegedly owed by the Bank is removed. There would still be a net liability of some £1 million.

vi) Although the Claimant has fixed assets said to be worth £165,000, Mr Mair himself stated that these are not liquid assets. Moreover, as Ms Saunderson pointed out, there is no evidence of the true value of such assets.

21. Accordingly, in my judgment, the Court has the jurisdiction to order security for costs against the Claimant in respect of its claim against the Bank if it is just to do so.

<u>(2) Is it just to order security for costs?</u>

22. CPR rule 25.13(1)(a) provides that the Court may order for security for costs if "*it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order*".

23. There are a number of considerations which are to be taken into account upon the Bank's application.

24. First, the allegations raised by the Claimant against the Bank are serious and require an intensive factual inquiry. The sums at stake are substantial and relate to financial investments made by the Claimant. The undertaking of this litigation will be an expensive enterprise. I should add that I am not in a position to draw any preliminary conclusions as to the prospects of success of the Claimant's claim or the Bank's defence, not least because the Bank has not yet served its formal Defence.

25. Second, the Claimant has arranged for various offers of security to be made to the Bank. However, such offers do not include offers to provide security by way of the provision of a bank guarantee or the payment of money into court or to the Bank's solicitor. These offers of security were explained by Ms McMillan in her third witness statement. In addition to Lion Ltd's proposal to defer enforcement of the debt owed to it by the Claimant, apparently Lion Ltd has also offered to provide security. In this

respect, Lion Ltd apparently owns two properties in Glasgow, over which the Bank has the benefit of a charge granted by Lion Ltd in favour of the Bank over those two properties, which secures - along with a personal guarantee provided by Lord Jafari, a former director of the Claimant supported £700,000 held in a deposit account - liabilities said to be owed by Unicorn Tower Ltd to the Bank in the amount of £2,128,548.85 (as at 4th April 2018). There is a dispute on the evidence as to whether the properties in question are worth between £300,000 and £500,000 (as the Bank suggests) or between £3.5 million and £4.2 million (as the Claimant suggests). This is not a dispute I can resolve, especially in circumstances where there is no independent valuation evidence before the Court.

26. Third, I believe that it has been submitted, by reason of Mr Mair's second and third witness statements, that the ordering of security for costs would stifle the Claimant's claim in the sense that the making of an order for security for costs would prevent the Claimant from pursuing its claim against the Bank. In *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, at pages 540-541, Peter Gibson, LJ held that it was incumbent on the respondent to the application - in this case, the Claimant - to establish that it was probable (which I take to mean on the balance of probabilities) that it is unable to provide the security out of its own resources and out of the resources of any other interested person, including directors, shareholders, financial backers and related companies, such that the making of an order for security for costs would necessarily mean that the Claimant would be prevented from pursuing its claim. In this respect, Mr Mair's evidence is that:

i) The Claimant cannot raise the cash equivalent to £40,000 security (paragraph 29 of Mr Mair's second witness statement).

ii) The only cash and assets available to the Claimant or Lion Ltd are already invested with the Bank or subject to security held by them or subject of legal dispute (paragraph 28 of Mr Mair's third witness statement). The Claimant and Lion Ltd have not tried to raise finance from any other banker or to secure their assets as without the Bank's consent, no guarantee could be offered or secured (paragraph 34 of Mr Mair's second witness statement). Ms Saunderson, for the Bank, has questioned whether the Bank's consent is required, provided that such alternative finance does not interfere with the Bank's own security.

iii) The directors of the Claimant are not in a position to offer cash or a bank guarantee (paragraph 22 of Mr Mair's third witness statement). Mr Mair later stated that his "*co-directors are resident in Iran and not in a position to readily provide guarantee on behalf of Lord or Lion*" (paragraph 26 of Mr Mair's third witness statement). Mr Mair also stated that he himself does not have the property assets over which to grant or raise the necessary funds (paragraph 27 of Mr Mair's third witness statement).

iv) Lion Ltd and its directors are not in a position to offer cash or a new bank guarantee (paragraph 23 of Mr Mair's third witness statement).

27. That all said, I am not satisfied that it is probable that the Claimant cannot procure security for costs for £40,000 (if it were ordered) from its own resources or from the resources of any interested person. In particular,

i) Mr Mair referred at paragraph 13 of his second witness statement to the fact that the Claimant has since inception relied upon funds invested in it or loaned to it by the Jafari family and/or companies owned and controlled by them. There is no evidence before the Court that security could not be raised from such sources.

ii) The Claimant has incurred costs by consulting solicitors and counsel and "*is taking steps to instruct English Solicitor and Counsel to deal with this litigation*" (paragraph 4 of Mr Mair's first witness statement). This suggests that the Claimant has the moneys available, from some source, to fund the litigation.

iii) The evidence that the Claimant, Lion Ltd, their respective directors and shareholders are not in a position to procure security are little more than assertions. That does not mean that they are not true. However, there is no evidence adduced by the Claimant demonstrating which persons were interested parties, which persons were approached for the purposes of procuring security, what requests were made, what resources are available to such persons, what difficulties exist in procuring such security, and what responses and reasons for such responses were received from such persons.

iv) Lion Ltd has offered to provide security. If it is able to do so, then it may well have the resources available. On the Claimant's evidence or case, Lion Ltd has property worth between £3.5 million and £4.2 million, which has been used to secure a debt in the approximate sum of £2.1 million. On that basis, if the Claimant's valuation is correct, it would be possible for Lion Ltd to procure security in favour of the Bank (see *AP (UK) Ltd v West Midlands Fire and Civil Defence Authority* [2001] EWCA Civ 1917; [2002] CLC 766, para. 13).

28. Fourth, the Bank argues, and I accept, that as the Claimant is not a trading company, but instead an investment company, with no outstanding indebtedness to a financial institution, the provision of security will not interfere with the operations of the Claimant.

29. Fifth, there would be prejudice to the Bank if the litigation were to proceed without security for its costs in that it might be faced with the risk of being unable to recover a substantial element of its costs if no order for security were made. It is also likely that such costs will increase substantially as the litigation ensues. That said, I also note that the security currently sought by the Bank is in the sum of approximately £38,000, of which the Bank has already incurred approximately £28,000 in costs. Accordingly, the Bank is at risk of not recovering that incurred sum even if a costs order were ultimately made in its favour and even if security were ordered to be provided but were not provided.

30. Sixth, the timing of the application is a relevant consideration. The Commercial Court Guide requires the first application for security to be made no later than the first case management conference. It has been said that an application for security "*should be made promptly as soon as the facts justifying the Order are known*" (*Civil Procedure - White Book Service 2018*, vol. I, para. 25.12.16). The Bank's application is a very early application, but the Bank cannot be criticised for that reason.

31. Taking into account all of these factors, in my judgment, it would be just in all the circumstances to order security for costs to be provided by the Claimant. Any such security should follow a traditional, secure form, such as first class bank guarantee, a payment into court, a payment to the Bank's solicitors and the like or such other form as may be acceptable to the Bank.

The amount of the security

32. As to the amount of the security to be ordered, I have in mind Peter Gibson, LJ's judgment in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, at page 540 that "*The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount*".

33. The Bank applies for security for costs in the sum of £38,023.85. This is said to encompass the costs of preparing the Defence as well as the Bank's costs to date. In considering what is an appropriate amount of the security, I take into account the above circumstances, as well as on the one hand the quantum of the sums claimed by the Claimant in the action and the fact that the Claimant's allegations against the Bank are serious and wide-ranging, and on the other hand the substantial amount claimed by the Bank by way of security at this early stage of the action and the fact that the Particulars of Claim is only a 12 page document. The amount of the security ordered should be proportionate to the task. Accordingly, I consider that the amount of security to be ordered should be reduced from the amount claimed. In my judgment, security for costs should be ordered to be provided in the sum of £27,500.

34. I make the following additional observation. There is something to be said for an application for security for costs to cover the costs of a larger segment of the action at a time when more is known about the parties' respective positions which would be revealed by their statements of case. At that juncture, each of the parties would have a better appreciation of the other party's case, it will be known whether certain claims or allegations or defences are accepted by the other party, and the issues in dispute will have crystallised, allowing the Court a better sense of the direction of the case, the costs involved and, if relevant, the merits of the claim or defence. I had considered alternative forms of order. However, having decided that it is just in all of the circumstances to order security and having decided that such an order would not stifle the claim, I do not see that there is a purpose in delaying the provision of security for costs in accordance with the Bank's entitlement and altering the quantum of the security which ought otherwise to be provided.

Conclusion

35. Accordingly, I will allow the Bank's application for security for costs at this stage in the sum of £27,500 in respect of the costs of this action up to the service of its Defence.

36. I also allow the Bank's application for an extension of time for the service of its Defence to 14 days after the date on which the Claimant provides security for costs in accordance with the Court's order.