THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 308

Appeal No.: 2017/563

Baker J.
Donnelly J.
Power J.

BETWEEN/

WELCOME IRELAND HOSPITALITY LIMITED

PLAINTIFF/
APPELLANT

- AND -

CEDARCOURT DEVELOPMENTS LIMITED

DEFENDANT/
RESPONDENT

JUDGMENT of Ms Justice Baker delivered on the 17th day of December, 2019

1. This is an appeal from the order of McGovern J. made on 27 November 2017, that the plaintiff appellant should provide security for the costs of the defendant respondent measured in the sum of €150,000. The order was made following the delivery of an *ex tempore* judgment in which he set out the material facts and the relevant legal principles. The argument on appeal is that the trial judge failed to give adequate weight to the contention that special circumstances existed by reason of the assertion that the current impecuniosity of the plaintiff appellant arose from the wrongdoing in respect of which the action is brought.

2. For convenience, I propose referring to the plaintiff appellant as "Welcome" and the defendant respondent as "Cedarcourt".

Background facts

3. The facts may briefly be stated.

4. By document in writing dated 12 June 2017, Cedarcourt granted to Welcome an option to take a lease of premises at Cedars Hotel, Rosslare, County Wexford, for the term of five years from 30 June 2017 at an initial annual rent of €20,000, increasing in accordance with its provisions to €100,000 by year five. The case made by Welcome is that it intended to use the premises, formerly a hotel premises but not at the time of the agreement in use for that purpose, as an emergency reception and orientation centre for asylum seekers.

5. The substantive issue between the parties is whether the agreement for lease expressly or by implication limited the use of the premises to a hotel, and whether the proposed use by Welcome was within the contemplation of the parties. One issue likely to be controversial at trial is whether the insertion of the letters "RIA" by Welcome in the user

clause in the lease before the option agreement was executed on its behalf is sufficient, whether on a construction of the lease or in the light of negotiations between the parties, to permit the intended use. The plenary summons sought specific performance, but the claim now is one for damages in lieu.

6. Because of the manner in which the appeal was conducted, it is not necessary to engage the question of whether Cedarcourt has a stateable defence that it was entitled to refuse to grant the lease on account of the pleaded misrepresentation or because the proposed use constituted a fundamental breach of the agreement entitling Cedarcourt. The parties are agreed that the appeal may proceed on the basis that it is accepted that the plaintiff is impecunious, the defendant has a *prima facie* defence to the action, and that the sole issue for determination is whether the trial judge was correct that special circumstances did not exist to displace the requirement that security be provided.

7. The focus of the trial judge was somewhat different from that engaged in the course of the appeal. The argument crystalized and narrowed somewhat at appeal stage and, at first instance, it would appear that some time was taken in the argument regarding the credibility of the plaintiff's claim.

The law

8. Section 52 of the Companies Act 2014 provides as follows:

> "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."

9. From the authorities, a number of principles are uncontroversial. Section 52 of the Companies Act 2014 imposes what has been described as an "initial onus" on the moving party to establish two cumulative requirements, that it has a *bona fide* defence to the claim of the plaintiff, and that the plaintiff will not be able to pay the moving party's costs if that party is successful. It is accepted that this onus has been satisfied.

10. Once that hurdle is crossed, security ought to be ordered unless it can be shown that special circumstances justify the exercise by the court of its discretion, and the onus of establishing "special circumstances" rests on the party resisting the order. This is clear from the judgment of Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7, 28 ILT 242, at paras. 2.1 *et seq*. This proposition is a reflection of the fact that the statutory jurisdiction to award costs is discretionary and that the discretionary nature of the jurisdiction permits consideration of special circumstances.

11. The notice of appeal contained several grounds but at the hearing they were condensed to this single ground.

12. The case law has established a number of categories of cases where a resisting party might successfully defend an application for security for costs. The one relied on in the

present case is that the impecuniosity or admitted inability to pay is caused by the alleged wrongdoing. Clarke J. described that test at para. 3.4 of his judgment in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* as follows:

> "In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:
>
> "(1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
> (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
> (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

13. The Supreme Court considered the equivalent test contained in s. 390 of the Companies Act 1963 (the only material difference between which and s. 52 of the Companies Act 2014 being the quantum of security to be given) in *Usk and District Residents Associations Ltd v. The Environmental Protection Agency* [2006] IESC 1, [2006] 1 ILRM 363. The Court approved the analysis provided by Morris J. in *Inter Finance Group Ltd v. KPMG Peat Marwick t/a KPMG* (Unreported, High Court, 29 June 1998) where there was identified as a common example of special circumstances that a plaintiff's inability to discharge the costs of a defendant flowed from the wrong allegedly committed. The test was followed in a number of cases by this Court, including *Rayan Restaurant Ltd v. Kean t/a Keans Solicitors & McGagh* [2015] IECA 264, *Tír Na N-Óg Projects (Ireland) Ltd v. P.J. O'Driscoll & Sons (A Firm)* [2019] IECA 154, *National Private Hire & Taxi Association Ltd v. AXA Insurance Ltd* [2015] IECA 75, and in a number of reasoned and detailed judgments in the High Court. None of the cases have thrown any doubt on the correctness of the analysis of Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*.

14. Causation, therefore, is important, and the resisting party must show that the loss pleaded to have been caused by the asserted wrongdoing can be established on a *prima facie* basis sufficient to, as Clarke J. later put it at para. 3.6, "reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful."

15. The quantum of the alleged losses the subject matter of the proceedings must be sufficient to meet the test and that, *prima facie* at least, it is the alleged wrongdoing that caused the inability to pay.

Alleged losses

16. The application was grounded on the affidavit of Colm Menton of 14 November 2017, to which a replying affidavit of Daniel Hughes sworn on the 16 November 2017 was filed. A final affidavit of Colm Menton of 19 November 2017 completed the evidence.

17. From the evidence of Mr Hughes on behalf of Welcome it appears that, as a result of the refusal by Cedarcourt to execute a lease in accordance with the option agreement, Welcome was unable to complete negotiations then in train with the Department of Justice, Equality and Law Reform ("the Department of Justice") for the operation of an emergency reception and accommodation centre. Mr Hughes's own evidence is that the company has suffered the loss of €1.24m, a figure calculated after corporation tax and net of repairs, sundry, administration, and professional fees. Mr Hughes's evidence is based on calculations contained in a short document dated 24 October 2017 of O'Connell Consulting Chartered Certified Accountants showing the estimated loss of profits.

18. It is useful to analyse this in some detail.

19. The document from O'Connell Consulting consists of two pages, the first a letter of 24 October 2017 addressed to Mr Hughes as managing director of Welcome. The letter is short, and the material part may be quoted in full:

> "With regard to the above I confirm that I have analysed your projections and in this regard would not consider them unreasonable in relation to the terms of the contract you had with the Department of Justice.
>
> I have adjusted your figures accordingly to account for some additional costs such as Repairs, sundry administration and Professional fees."

20. The letter is headed "Projections Welcome Ireland Limited. First 4 years of operation" and takes no account of the rent of €100,000 for the fifth year reserved by the lease. That sum of €100,000 would make some difference to the calculation, but it is not material.

21. A number of observations may be made regarding this evidence. Insofar as it can be understood from the affidavit, when read in conjunction with the letter, the projections were prepared by Mr Hughes who describes himself as "events manager" and the sole director of Welcome. He says that he engaged a chartered engineer, a solicitor, and an accountant to advise in regard to the proposed provision of a reception and accommodation centre and to advise him with regard to compliance with building regulations, fire safety requirements, and compliance with the requirements of the Department of Justice.

22. It seems that, on 31 May 2017, an agreement in principle was reached between a representative from the Department of Justice and the Welcome that it would be paid €32.50 per person per night for a minimum of ninety persons per night from August 2017 and that any initial agreement with the Department of Justice for the provision of the centre would be for two years with an option for an extension by a further two years. There is exhibited a short memo in handwriting, which seems to be Mr Hughes's, which is

not otherwise explained, showing details of the number and type of rooms that will be provided, basic household equipment needed, a reference to planning and regulation compliance, fire alarms, *etc.*, and the sum of €32.50 does appear on the last page.

23. The memorandum and other documentation exhibited give no indication of the matters that would fall for consideration for the renewal of the two-year intended term of the contract with the Department of Justice.

Nature of evidence

24. The first point for consideration is the nature of the evidence of the causative link between the impecuniosity of Welcome and the wrong the subject matter of the claim. In *Jack O'Toole Ltd v. MacEoin Kelly Associates* [1986] 1 IR 277, at p 284, Finlay C.J. said that the test was not met where a plaintiff made "a mere bald statement of fact". The proposition is reflected in the general requirement from the authorities and from Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*, that the evidence adduced of the causal connection be credible.

25. As to what might amount to prima facie evidence, Peart J., with whose judgment in *Tír Na N-Óg Projects (Ireland) Ltd v P.J. O'Driscoll & Sons* the other two judges of the Court of Appeal agreed, having stated that whilst establishing the matter on a *prima facie* basis required a lower standard of proof than the civil standard that would apply at trial, that a plaintiff had to do more than merely assert a proposition but:

> "must bring forth some evidence which is cogent and credible, which corroborates the contention being made", at para. 31.

26. It is worth noting that in the early leading case on security for costs, *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd (No. 2)* [1999] 1 IR 501, the Supreme Court analysed the evidence and considered that the plaintiff had adduced credible expert evidence which had not been doubted by the defendant.

27. It is also clear from the judgment of Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*, at paras. 4.14 *et seq*., that the evidence required must be such that enables a court to form a view as to whether the causative connection between the financial difficulties and the alleged wrongdoing can be established. What has been the required in the reported cases is at least "some approximate accounts" to enable the court to carry out the exercise of analysing the current financial position of a plaintiff and to draw inference from the comparison between that and likely projection absent the alleged wrongdoing.

Application of the test to the present appeal

28. In the light of the authorities, and because what is required is *prima facie* credible evidence and more than mere assertions on the part of the resisting party, I consider the evidence in the present case is not sufficient. The evidence is that negotiations were well advanced for the provision by Welcome of a reception centre, that a possible agreement with the Department of Justice for two years was actively under discussion, and that a payment of €32.50 per person per night for a minimum of ninety persons would be made.

The agreement was subject to compliance with a number of regulations, then under active discussion, and was not a concluded agreement.

29. No correspondence or documentation from the solicitor, engineer, or accountant said by Mr Hughes to have been employed by the Company was exhibited nor was their advice described in his affidavit. At its height, his affidavit says that he engaged such persons to "advise in respect of compliance" what any necessary measures to ensure compliance would cost, or whether compliance was likely to be achieved whether on time or at all. He does not say whether, in the time frame he envisaged, compliance was likely to be achieved.

30. I am not satisfied in the circumstances that the affidavit contains sufficient evidence of the pleaded causative link between the alleged wrongdoing and the impecuniosity of Welcome. I further have regard to the fact that the short letter from O'Connell Consulting, whilst it makes reference to the projections of Mr Hughes, does not positively state a view from an accounting prospective. The letter is stated in the negative that the writer "would not consider them unreasonable". That expression is not evidence of the view of Mr O'Connell who signed the letter of actual projections and, more importantly, of the basis on which they were calculated.

31. This evidence of the causative connection between the wrongdoing and the admitted impecuniosity of Welcome in the present case does not meet this threshold even on a *prima facie* basis. It is based on a single assertion stated in the negative by an accountant. The factual basis of the projected figures remains unclear, save with regard to payment of €32.50 per person per night for each asylum seeker who avails of the centre, and amounts to no more than a statement as to the reasonableness of figures provided by a non-expert.

32. Mr Hughes's evidence states that compliance with various regulatory and statutory requirements was needed and that he had sought advice in respect of such compliance, but not how much it would cost. His evidence was that he personally intended to fund the "renovation" of the premises estimated at €100,000, but not whether those renovations would meet the advice of his engineer, solicitor, and accountant, or even the requirements of the Department of Justice. In fact, he does not say in his affidavit that he obtained, and was in a position to act on the advice of the engineer, solicitor, and accountant, what advice they had given him, how much it would cost to meet the concrete terms of their advice, and how this was to be met.

Special purpose vehicle

33. Counsel for Cedarcourt argues that regard is to be had to the fact Welcome had no assets and was a special purpose vehicle established for the purpose of taking the lease and running the reception centre. It is argued that those circumstances suggest that the claim of the plaintiff is essentially one to "establish an asset" in the proceedings, but I am not satisfied that the principles explained in the authorities are sufficient to find that special circumstances do not exist merely on account of the fact that a wholly impecunious

plaintiff might have commenced proceedings seeking damages where those damages would be the sole or a primary asset of the company were it to succeed.

34. That argument may have some force with regard to the credibility or weight of the evidence adduced by the party resisting an application for security for costs, and a wholly impecunious entity established as a special purpose vehicle which, without the asset or profits said to have been lost as a result of the wrongful action the subject matter of the proceedings, may, in a suitable case, seek to rely on special circumstances. But the evidence needed to adduce to so establish these circumstances might fail to meet the test of credibility if they were mere assertion of a hope that a business might succeed.

35. It is for that reason that it is commonplace for such a company resisting an application for security for cost to provide credible and detailed evidence from an accountant or suitably qualified expert regarding projected losses in a form that does more than the short letter on which Mr Hughes relies. This type of evidence will depend on the circumstances of the case, but the evidence must be credible and more than mere assertion and would have to credibly point to projected costs and likely profit by reference to some objectively ascertainable evidence.

Some general observations

36. In giving his ruling, McGovern J. noted his view that the defence of special circumstances arising from the alleged causal connection between the wrongdoing the subject matter of the proceedings and the inability to pay are:

> "more generally ones which arise where the dispute is one on a debt and where the defendant is the party who has not discharged the debt".

Insofar as the trial judge came to his conclusion based on that assertion, it is not one which is properly derived from the authorities.

37. Furthermore, insofar as the trial judge came to his decision on the grounds that there was as he described:

> "a major issue arising on whether or not a binding contract exists",

I note it was accepted by the parties at appeal stage that this is not a correct statement of the test.

38. Nothing, however, turns on those observations for the purpose of the appeal and the parties accepted correctly that the jurisdiction of this Court is to hear the matter in the light of the affidavit evidence and argument and having regard to the nature of the appellate jurisdiction in discretion interlocutory applications as explained by the judgment of Irvine J. in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by Peart J. in *Tír Na N-Óg Projects (Ireland) Ltd v. P.J. O'Driscoll & Sons*.

Conclusion

39. I consider that the evidence put on affidavit by Mr Hughes does not meet the threshold. His affidavit amounts to mere assertions not supported by any credible evidence. In

particular, he has not produced any evidence of having reached a concluded agreement with the Department of Justice subject only to obtaining a satisfactory lease or letting of the premises. Further, he has not established credible expert figures regarding the cost of complying with unspecified regulatory requirements, nor has he adduced any positive evidence of the likely costs.

40. The evidence does not enable any coherent analysis to be carried out of his projected figures. At its height, Welcome is shown to have been in negotiations, described as "ongoing contractual discussions" in an email of 19 June 2017, with the principal officer of the relevant agency within the Department of Justice. The height of their assertion is that a contract with the Department of Justice has been lost, that profits are likely to have been made by Welcome from that contract, and a credible causative connection has not been shown between the loss of those profits and the alleged wrongdoing asserted in the proceedings.

41. In my view, the trial judge was correct and the defence to the application for security for costs must fail.

42. I would dismiss the appeal.