[2020] IEHC 199

THE HIGH COURT
CIRCUIT APPEAL

[2020 47 C.A.]

SOUTH-WESTERN CIRCUIT
COUNTY OF CLARE

BETWEEN
PADDY BURKE (BUILDERS) LIMITED (IN LIQUIDATION AND IN RECEIVERSHIP)
PLAINTIFF

AND
TULLYVARAGA MANAGEMENT COMPANY LIMITED

DEFENDANT

AND
BY ORDER DATED 27TH NOVEMBER 2019 STEPHEN TENNANT AND PROMONTORIA (ARROW) LIMITED

DEFENDANTS TO COUNTERCLAIM

JUDGMENT on costs of Mr. Justice Denis McDonald delivered on 30th April, 2020

1. On 8th April, 2020 I delivered judgment in this case ([2020] IEHC 170) in which I upheld the appeal of the defendants to the counterclaim ("the receiver" and "Promontoria" respectively) against an interlocutory injunction granted against them by the Circuit Court, on the application of the defendant/counterclaimant ("the management company"). In particular, I determined that I should set aside the interlocutory injunction granted by the learned Circuit Court judge and, its place, I made an order dismissing the application for the injunction. This judgment now deals with the costs of the application for the injunction heard in the Circuit Court in Ennis on 29th January, 2020 and in the High Court on 11th March, 2020.

2. I do not propose, in this judgment, to rehearse the underlying facts. They are set out in the judgment delivered by me on 8th April. It is sufficient, for present purposes, to note that, in that judgment, I held that the management company had failed to make out either a strong case to justify the grant of mandatory relief or a serious issue to be tried (by reference to classic *Campus Oil* principles) to sustain the application for the interlocutory injunction. I also found that the balance of convenience lay against the grant of the injunction. In taking that view on the balance of convenience, I held that damages would adequately compensate the management company in the event that it ultimately succeeds at the trial. I also took into account what I consider to have been an element of delay on the part of the management company in moving for relief.

3. In considering the question of costs, I am obliged to approach the matter in accordance with the provisions of O.99 r.2 (3) R.S.C. which replaces the former O.99 r.1 (4A). Order 99 r.2 (3) provides as follows:-

> *"The High Court… upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

4. Order 99 r.2 (3) is in identical terms to the former O.99 r.1 (4A). The latter rule has been addressed in a number of authorities including the decision of Laffoy J. in *Tekenable Ltd v.*

Morrissey [2012] IEHC 391 which was expressly approved by the Supreme Court in *ACC Bank Plc v. Hanrahan* [2014] 1 I.R. 1. In turn, the decision of Laffoy J. in *Tekenable* was influenced by the earlier decisions of Clarke J. (as he then was) in *Allied Irish Banks v. Diamond* (High Court, unreported, 7th November, 2011) referred to in Delaney & McGrath on "*Civil Procedure in the Superior Courts*", 4th ed., 2018, at para. 24-79 and the previous decision of Laffoy J. herself in *O'Dea v. Dublin City Council* [2011] IEHC 100.

5. While I have been referred to a number of additional authorities by the parties in their very helpful written submissions on the issue of costs, I find that the guidance given by Laffoy J. in *O'Dea* to be particularly helpful for present purposes. Having quoted the text of O.99 r.1 (4A) which was then of relatively recent origin (having been introduced on 21st February, 2008), Laffoy J., at paras. 6.5 to 6.6 of her judgment, explained how that rule operates in the context of applications for interlocutory injunctions in the following way:-

> "*6.5 A large variety of interlocutory applications come with the ambit of rule 1(4A). Most, by their nature, are susceptible to a determination as to where liability for costs should lie, without giving rise to concern that an injustice or an unfairness may be perpetrated. In my view, an application for an interlocutory injunction is not in that category, as is illustrated by the course which was usually adopted in relation to the costs of an interlocutory injunction prior to the coming into operation of rule 1(4A) - that the costs were reserved for the trial Judge to determine at the conclusion of the substantive hearing. The rationale underlying that approach was explained by Keane J., as he then was, in Dubcap Ltd. v. Microcrop Ltd. (Unreported, the Supreme Court, 9th December, 1997) as follows:*
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> > *'It is right to say, of course, that while there is no rule of court or even a practice to that effect, the normal procedure on the hearing of an interlocutory application is to reserve the costs to the trial judge. The reason for that is obvious: there may and very frequently will be matters which can only be resolved by the court of trial on oral evidence at a plenary hearing of the action and indeed matters may come to light by way of discovery or by way of new evidence not available to the parties at the time of the hearing of an interlocutory application which will bring about a result which seemed unlikely or improbable at the time of the hearing of the interlocutory application, so for that reason it is quite normal on the hearing of the interlocutory applications to reserve the costs.'*
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> *6.6 The factors outlined in that passage, which informed the 'normal procedure' prior to the coming into operation of rule 1(4A), are the very factors which a Court is likely to have regard to in considering whether, having decided whether to grant or refuse an application for an interlocutory injunction, it is possible to justly adjudicate at that stage on whom liability for the costs of the application should lie. ..."*

6. Subsequently, in Tekenable, Laffoy J. suggested, at para. 19 of her judgment, that another factor which will inevitably bear on the court's determination under the rule is:-

> *"…the inherent nature of an application for an interlocutory injunction, in relation to which it is necessary to go back to basics, that is to say, to the judgment of the Supreme Court in Campus Oil v. Minister for Industry …. As O'Higgins C.J. stated in his judgment (at p. 105), relief in the form of an interlocutory injunction is given because a period must necessarily elapse before the action can come to trial and for the purpose of keeping matters in statu quo until the hearing…".*

7. The relevant principles have been considered in a number of authorities since *O'Dea* and *Tekenable* including a subsequent decision of Laffoy J. in *Haughey v. Sinnott* [2012] IEHC 403 where Laffoy J. expressly approved the observations of the authors of Delaney & McGrath that the court, on an application under the rule, retains a wide discretion in deciding what costs order to make following the determination of an interlocutory application. The relevant principles (and the authorities on which they are based) were also comprehensively considered by Barrett J. in his judgment in *Glaxo Group Ltd v. Rowex Ltd* [2015] 1 I.R. 185 at p.p. 208-215.

8. In circumstances where I have held (inter alia) that the balance of convenience lay against the grant of the injunction sought by the management company, the receiver and Promontoria have emphasised the following passage in the judgment of Barrett J. in Glaxo at p. 210:-

> *"xi. A distinction falls to be drawn between (a) cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and (b) cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application; in the latter the same risk may not arise."*

9. However, it is important to note that, in the immediately following paragraph of his judgment, Barrett J. also stated:-

> *"xii. Factors making an application for an interlocutory injunction less susceptible to a determination as to liability for costs include (a) that there may be matters which can only be resolved by the court of trial on oral evidence at plenary hearing of the action, and (b) matters may come to light by way of discovery or new evidence not available to the parties at the time of the interlocutory application which will bring about a result which seemed unlikely or improbable at the time that application was heard. (O'Dea v. Dublin City Council…);Dubcap Ltd v. Microcrop Ltd…*". In my view, the observations of Barrett J. in that paragraph (which succinctly summarise the approach suggested by Laffoy J. in O'Dea and of Keane J. (as he then was) in *Dubcap*) are of particular relevance in the present case. As appears from the judgment which I delivered on 8th April, 2020, the issue of priority as between

Promontoria, the secured creditor, on the one hand and the management company, on the other, was critical to my conclusion that, on the basis of the evidence and arguments currently before the court, the management company had failed to make out either a strong case or even a serious issue to be tried. On the basis of the evidence before the court at this point in the proceedings, it appeared to me to be clear that the mortgage in favour of Promontoria has priority over any of the management agreements with the management company.

10. As noted by me in paras. 31-37 of my judgment of 8th April, there was no evidence before the court at this stage that Anglo Irish Bank Corporation (the original mortgagee) had actual knowledge, before the first mortgage in its favour was created, that the plaintiff building company would enter into the management agreements with the management company on the terms set out in any of the management agreements in issue. However, I made clear that this finding by me was based on the evidence as it currently exists. I was very conscious, in making that finding, that it had been asserted by the management company that the entry by the plaintiff into the management agreements was "clearly assented to by the original Secured Lender at the time". For reasons which I explained in the judgment, I took the view that this was no more than an assertion on the part of the deponent who swore the affidavit on behalf of the management company. However, as counsel for the management company have argued in their written submissions on costs, a different picture may possibly emerge following discovery.

11. In addition, at a full oral hearing, it may be possible for the management company to call witnesses who may potentially be in a position to give evidence of their own knowledge on this issue. If such evidence becomes available (either through discovery or through the calling of witnesses) this has the potential to have a very significant impact on the ultimate outcome in the proceedings even though, on the evidence currently available, this may seem unlikely. This seems to me to be a significant factor to be borne in mind in considering whether a determination on costs can justly be made at this point in the proceedings.

12. I must also, however, bear in mind the point strongly urged in the submissions made by counsel on behalf of the receiver and Promontoria that the outcome of the appeal was determined not only on the basis that the management company, on the evidence and arguments currently before the court, has not established a sufficiently strong case to meet the *Lingam v. HSE* standard or a serious issue to be tried (by reference to *Campus Oil* principles) but also on the basis that the balance of convenience lay against the grant of an injunction. As the judgment of Barrett J. in *Glaxo* demonstrates, there may be a lesser risk of injustice in making costs orders in the case of applications for interlocutory injunctions which are determined on balance of convenience grounds. The underlying rationale is that, in cases which turn on the balance of convenience, nothing is likely to emerge at trial which would in any way alter the question of where the balance of convenience lay at the time the application for the interlocutory injunction was made.

13. In light of the fact that I held against the management company on the balance of convenience, it seems to me, on the basis of *Glaxo*, that there are no circumstances in which it would be just that the management company should recover its costs against the receiver and/or Promontoria in respect of the application for the interlocutory injunction either in this court or in the Circuit Court - even if it should ultimately transpire, on the basis of more extensive legal argument and oral evidence at the trial, that the management company succeeds in obtaining permanent orders in its favour.

14. On the other hand, it seems to me that there would be a real risk of injustice if I were to determine, at this stage, that the receiver and Promontoria should now be awarded their costs of the hearing of the interlocutory application either in this court or in the Circuit Court. This can best be illustrated by considering what may potentially arise following discovery of documents by the receiver and Promontoria and the receiver which has yet to take place in the substantive Circuit Court proceedings.

15. At this stage, I do not know whether something will emerge from the discovery to be made by Promontoria or the receiver that will support what, at the moment, is no more than the assertion made by the management company that, as recorded in para. 11 above, the management agreements were assented to by the secured lender. Should it transpire that, after such discovery, the management company succeeds in its claim at trial and demonstrates, by reference to material gleaned from the discovery made by Promontoria and/or the receiver, that the management agreements had priority over the mortgage, it would seem to me to be wholly unjust that it should have to bear the costs of the application for the interlocutory injunction either in the Circuit Court or in the High Court even where it has lost the application on balance of convenience grounds.

16. If the management company succeeds at a full hearing on that basis, it would mean that these proceedings should never have been defended by the receiver or by Promontoria. If the documents within their procurement substantiate the case sought to be made by the management company in relation to priority, it seems to me that it would be wrong that the receiver and Promontoria should be entitled to recover the costs of the application brought by the management company or of the subsequent appeal to this court. To my mind, to fix the management company with the costs in such circumstances would be inappropriate and unjust. While the onus of proof in relation to the counterclaim lies on the management company, one would not expect a responsible secured creditor or a receiver to maintain an entitlement to priority against the management company if there were documents available to them which proves that the management company had priority over the mortgage.

17. In making those observations, I fully appreciate that there is, at present, nothing to demonstrate or even to suggest that documents of that kind may exist. However, I bear in mind the warning of Keane J. (as he then was) in *Dubcap*, that discovery may occasionally reveal material that changes the complexion of a case in a way that may seem unlikely at the time the application for an interlocutory injunction is determined. In light of that possibility, I believe that there is a risk that an injustice might be done to the

management company were I, at this point, to determine that a costs order should be made in favour of the receiver and Promontoria.

18. On the other hand, if the management company fails in its claim against the receiver and Promontoria at the trial, no injustice will be done to the management company by having to pay the costs of the application and hearing in the Circuit Court and the costs of the appeal to this court.

Conclusion

19. In these circumstances, it seems to me that the just order to make in the present case is to direct that the costs of the receiver and Promontoria both of the hearing and application in the Circuit Court and the appeal to this court should be costs in the cause such that, if the receiver and Promontoria succeed in their defence to the counterclaim of the management company at trial, they will be entitled to their costs as against the management company but, on the other hand, if they fail to succeed in their defence, they will not be entitled to their costs of the hearing in the Circuit Court or in this court in relation to the application for an interlocutory injunction. For the reasons discussed in paras. 13 -14 above, I will also make a declaration that, irrespective of the outcome of these proceedings, the management company will have no entitlement to the costs of the application for the injunction in the Circuit Court or the costs of this appeal