THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 226

Unapproved

Court of Appeal Record

No. 2020/79

Costello J.

BETWEEN/

FIONA O'DONNELL

PLAINTIFF/RESPONDENT

- AND -

SALTAN PROPERTIES LIMITED

DEFENDANT/APPELLANT

- AND -

ELK HOUSE COMPANY IRELAND LIMITED
ELK-FERTIGHAUS AG TRADING AS ELK BUILDING SYSTEMS,
McHUGH O'COFAIGH, MARK O'REILLY TRADING AS MARK O'REILLY AND ASSOCIATES AND MARK O'REILLY AND ASSOCIATES LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 6th day of August, 2020

1. The plaintiff/respondent ("the plaintiff") issued a notice of motion seeking an order requiring the appellant to provide security for costs of its appeal of the orders of the High Court refusing discovery sought by the appellant and ordering the appellant to make

discovery to the plaintiff. The application is brought pursuant to s.52 of the Companies Act 2014 ("the Act of 2014") and Order 86, rule 9 of the Rules of the Superior Courts ("RSC"). The plaintiff asks the court to determine the form and amount of such security, to stay the appeal until the security is provided and to strike out the appeal if the security is not provided within a period as may be specified by the court.

Background

2. The plaintiff is the owner of an apartment at Riverwalk Court in Ratoath, County Meath. It is situated in a development which was constructed in or around 2003/2004. The appellant was the developer of the development. The other defendants are contractors and professional advisors who were involved in the development.

3. A series of defects presented in structural and other elements of the development as constructed. Part of the cost of remeding these defects and the damage occasioned was covered by latent defects insurance held by the plaintiff, but considerable damage was not covered by the policy. As a result of the defects throughout the development, twenty-six sets of proceedings (one for each apartment) were issued in 2012 on a subrogated basis against the appellant and the other defendants involved in the construction of the development. Three of these proceedings, including this action, are been pursued as master claims pursuant to case management directions of the High Court and the agreement of the parties.

4. On 6 and 20 November 2019, the judge in charge of the case management of the proceedings heard motions for discovery which the parties had issued against each other, and a reserved judgment was delivered on 18 December 2019. The trial judge in large measure refused the categories of discovery sought by the appellant against the plaintiff, and conversely awarded the plaintiff the discovery she sought against appellant. The discovery was to be made by 30 April 2020. The appellant has appealed those orders.

5. The appellant is grossly insolvent on a balance sheet basis and unable to meet its debts. Unaudited abridged financial statements filed in the CRO on 28 September 2019 show total net liabilities in the sum of €32,375,318. Net current liabilities are €2,632,556 and liabilities due after more than one year in the sum of €29,742,762. In a replying affidavit sworn on behalf of the appellant, its solicitor, Mr. Michael Nugent, accepted that it is insolvent and as such will be unable to pay the plaintiff's cost of the appeal if an order for costs is made against it. It was in these circumstances that the plaintiff brought the motion seeking security for costs.

The legal basis for the claim

6. The motions are brought pursuant to s.52 of the Companies Act 2014 and O.86, r.9 RSC, as I have said. It is common case that the rule applies to the application, but the appellant denies that s.52 of the Act of 2014 applies in circumstances where it is an insolvent *defendant*, not an impecunious *plaintiff*. I shall consider the application first from the perspective of the Rules of the Superior Courts before, if necessary, considering the application pursuant to s.52 of the Act of 2014.

Order 86, Rule 9 RSC

7. Order 86, r.9 provides as follows:-

> *"The Court of Appeal may under special circumstances direct that a deposit or other security in the amount fixed by the Court of Appeal be made or given for the costs to be occasioned by any appeal."*

8. The starting point is that any application for security for costs is an exception to the rule. In *Farrell v. Bank of Ireland* [2012] IESC 42, Clarke J. in the Supreme Court said at para. 4.17:-

> *"... the jurisprudence in relation to all of the areas where security for costs is considered ... starts from a default position that, in the absence of some significant*

countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made."

9. In its terms, O.86 RSC applies to all appeals to the Court of Appeal and to all types of litigation and all parties. It, therefore, applies to appeals in respect of procedural motions, such as this appeal, and to appeals after a full hearing. It applies whether the appellant is the plaintiff or the defendant in the proceedings.

10. The rule requires that special circumstances be established before the court may order a party to provide security for the costs of the appeal; otherwise, there is no guidance from the rules as to the manner in which the court should exercise its discretion.

11. The onus is on the moving party to establish special circumstances (see *Malone v. Brown Thomas & Co. Limited* [1995] 1 ILRM 369).

12. While a plaintiff may not seek security for costs from a defendant at first instance, a successful plaintiff may obtain an order for security for the cost of an appeal from an unsuccessful defendant/appellant. In *Midland Bank Limited v. Crossley-Cooke* [1969] I.R. 56, at p. 62, Walsh J. held:-

"The position of a plaintiff who brings a defendant into court for the first time is quite different from that of an unsuccessful litigant who is bringing the winning party a stage further by appealing the case. ... In my view the fact that the party moving for security on the appeal is the plaintiff is not a matter to be taken into consideration in ease of the appellant or defendant."

13. In that case, the Supreme Court confirmed that the court will not ordinarily order security for costs where the appeal involves a point of law of public importance.

14. Poverty or impecuniosity of the appellant, and thus an inability to meet any award of costs which might be made in favour of the applicant for security, is a pre-requisite to an application for security for costs but it is not a sufficient basis upon which to order that security be provided (see *Farrell v. Bank of Ireland* and *Midland Bank Ltd. v. Crossley-Cooke).*

15. In *Midland Bank* at p.61 of the report Walsh J. stated:-

> *"It would appear that in the circumstances of any particular case the Court could have felt itself justified in making such an order [for security] when there was* ***a combination of poverty of the appellant and any one or more of the several factors mentioned in those cases,*** *such as a party being resident out of the jurisdiction, or there being no apparent prima facie grounds for the appeal, or the complexity of the issues, or long delays on the part of the appellant in the conduct of the litigation, or where the appellant is simply a nominal appellant; or, where there are several appellants and poverty is common to each of them, a combination of that and one or more of the other factors even if the other factors affected only one of the appellants."* (emphasis added)

16. He held that the court:-

> *"... would consider the special circumstances of each case and the effect of the combination of various grounds which might arise in each case, and that it would consider whether, in all those circumstances, the justice of the case required that the Court should exercise its discretion in favour of ordering security to be given."*

17. In *Farrell,* Clarke J. noted at para. 4.31:-

"... The overall approach, as noted by Walsh J., is that it requires some significant countervailing or special circumstance to justify the making of the order. The reason why that requires to be so seems to me to derive from the analysis of the constitutional rights engaged which appears earlier in this judgment. In order that a requirement that security for costs be provided might amount to a proportionate interference with the right of an appellant to this court to have a fair process in pursuing an appeal, it seems to me that two factors need to be present. First, there must be a countervailing potential interference with the right of the respondent such as would justify directing security for costs as a proportionate response to the situation shown to exist. Second, the nature and scope of the security directed must, itself, be a proportionate response to that situation."

18. The list of factors which the court has found as constituting special circumstances within the meaning of the rule is not closed (see *Farrell*). Courts have considered the following, or a combination of the following, grounds as constituting special circumstances: whether the appellant is resident outside the jurisdiction – now the European Union; whether the appellant has no assets within the jurisdiction; whether there were no prima facie grounds of appeal; the conduct of the litigation, including long delays by the applicant for security in the prosecution of the litigation; or improper behaviour on the part of the litigant, if sufficiently serious and if likely to add appreciably to the costs of the other party meeting the litigation.

19. In *Farrell*, at para. 4.34, Clarke J. analysed the various cases where security for costs on an appeal was considered and concluded that in each of the cases there was:-

"...a sufficient countervailing potential impairment of the right of the respondent to justify an order for security for costs notwithstanding the constitutional rights of appeal and the right to a fair process in pursuing such appeal...".

20. He held that the essential question was:-

> *"... whether the special circumstance or circumstances identified by the respondent demonstrate a* ***sufficient risk of added and unnecessary injustice (beyond the inevitable injustice that will apply to any respondent who successfully defends an appeal brought by an impecunious plaintiff)*** *such as warrants the proportionate response of directing security for costs of a type or extent which itself is proportionate to the circumstances warranting the order in the first place."*
>
> (emphasis added)

Application of the *jurisprudence* to the facts in this case

21. Where the application is brought pursuant to O.86, r.9 RSC, the onus rests on the moving party, the respondent to the appeal, to establish special circumstances which meet the test propounded by Clarke J. in *Farrell*, cited above. In this case, the appellant conceded that it would not be in a position to meet any award of costs which might be made against it on the appeal. This satisfies the precondition of impecuniosity.

22. The plaintiff says that *prima facia* it has a defence to the appeal. The judge case managing the litigation heard the applications for discovery over two days and delivered a reserved written judgment. In *Rayan Restaurant Limited v. Gerald Kean Practising as Keans Solicitors & Anor.* [2015] IECA 264, Irvine J. held that in an application for security for costs in respect of an appeal, the respondents are entitled to rely upon the judgments of the High Court to satisfy the first leg of the test for security for costs under the Act of 1963, that they have a *prima facie* defence to the appeal, on the application for security for costs. In addition to the fact that she succeeded in the High Court, the plaintiff relies upon *Tobin v. The Minister for Defence* [2019] IESC 57 (para. 7.27) that where there is an appeal against orders for discovery made by the judge who is actively case managing the proceedings two principles apply:-

"(a) As the application of the principles pertaining to discovery is one for judges dealing with the preparation of cases, and since issues as to relevance, necessity and proportionality involve an adjudication based on a detailed understanding of the case, in general decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance.

(b) Where litigation is under case management by a judge with an intimate knowledge of the issues involved, those considerations heighten."

23. The plaintiff submits that the appreciation afforded to a decision of the High Court in determining the substance of any application relating to discovery is equally applicable where security for costs of such an appeal is sought, such that a respondent to an appeal who succeeded in the High Court on a question of discovery will, as a matter of principle, meet the *prima facie* threshold set in the *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7.

24. It is not disputed that it is necessary that the respondent to an appeal establishes that *prima facie* it has a defence to the appeal. I agree with the submissions of the plaintiff and am satisfied that the plaintiff has met the threshold of establishing a *prima facie* defence to the appeal, and I do not understand that this was contested by the appellant.

25. Thus the plaintiff has satisfied the two preconditions for an order for security for costs of an appeal and the remaining issue is whether the plaintiff has established special circumstances which "demonstrate a risk of added and unnecessary injustice in the bringing of the appeal" in the circumstances of this case.

26. The plaintiff argues that the appellant is a necessary party to the proceedings by virtue of the provisions of section 35 of the Civil Liability Act 1961 as it was the developer of the estate. It is an insolvent limited liability company which has vigorously defended the

proceedings for eight years, by implication for no good reason. It is said, and the appellant does not deny it, that it is being funded in the litigation, but it is not a mark for any order for costs made against it. The plaintiff contends this amounts to special circumstances which satisfies the rule.

27. In addition, the plaintiff says that she will be prejudiced by the delay entailed in hearing the appeal and that the continued existence of these proceedings prejudices her and other owners of apartments in the development, where at least one such owner has lost a sale of his apartment by reason of the existence of these proceedings. She says this is a factor to which the court may have regard in this application. The plaintiff also points to the fact that the appellant has not said that it cannot proceed with the appeal if security for costs is ordered, which is an important factor when considering the proportionality of any order.

28. The plaintiff says that the principles applicable to s.52 of the Act of 2014 should be applied to an application for security for costs under O.86, r.9 RSC by analogy where the appellant is a limited company. She says that this is what occurred in *Rayan*, although she accepts that there was no discussion of this point in that case.

29. I have carefully reviewed the decision in *Rayan*. In the first paragraph, it indicates that there were two separate applications for security for costs each brought pursuant to s.390 of the Companies Act 1963, the precursor of s.52. At para. 21, under the heading 'Section 390 of the Companies Act 1963' the court identified the jurisdiction for the Court of Appeal as being found in O.86 RSC, s.390 of the Companies Act 1963 and a number of well-rehearsed legal authorities. While the judgment recites the text of O.86A, r.9 RSC, the court makes no further reference to that order. Significantly, at para. 25 Irvine J. said:-

> *"The rationale behind an order for security for costs is that it is acknowledged that individuals such as Mr Mennad and Ms Azizi, the shareholders of Rayan, will get the*

benefit of this action if Rayan succeeds, but they will be spared the adverse costs consequences should the company prove unsuccessful in its action, given that the assumption must be that if this happens the costs are most unlikely to be paid."

To my mind this indicates that she was considering the issue from the perspective of an application under s.390 and not under O.86, r.9. Thereafter, she applied the well-known authorities for applications for security for costs under the Companies Act 1963. This is not surprising as in *Rayan* the plaintiff was also the appellant and it was an impecunious company and so the application came within the scope of s.390. There is nothing in the judgment to suggest that the court considered, much less held, that a court hearing an application for security brought under O.86, r.9 RSC, against an appellant who was a corporate *defendant*, should apply the principles applicable to applications brought under s.390 by way of analogy.

30. In my judgment, the situation is not analogous to the application of those principles to applications for security for costs brought pursuant to O.29 RSC against companies incorporated outside of the state. In such instances the provisions of the Companies Act 2014 do not apply as the foreign incorporated plaintiff is not a company incorporated under the Act. The courts have addressed the anomaly and consequential potential injustice that can arise from the difference in the rules requiring the provision of security for costs between a company incorporated in the state, who may be required to provide security pursuant to s.52, and a company in an identical situation to an Irish company, save that it was not incorporated in the state, by applying the test under s.52 by analogy to applications under O.29 RSC. No such anomaly arises where a corporate defendant appeals a decision to this court which can be resolved under the provisions of the rules without recourse to the principles developed pursuant to the separate statutory provision governing security for costs set out in s. 52 of the Act of 2014. It is both unnecessary and fails to have regard to

the difference between the jurisdiction to order security for costs under O.29 RSC and O.86 RSC, and that under s.52 of the Act of 2014. In *Thalle v. Soares & Ors.* [1957] I.R. 182, at p. 192, the Supreme Court said:-

> *"The origin and history of the two jurisdictions are different, one being inherent and discretionary, the other statutory: the foundations are different, one being based on the local character of jurisdiction, the other upon the nature of limited liability: the underlying reasons are different, in the one case possible unwillingness to pay, in the other presumptive inability."*

See also, the decision of Keane J. in the Supreme Court in *Mooreview Developments Limited (In Receivership) v. William Fanagan Limited* (Unreported , Supreme Court, 9 June 2004) where the jurisdiction under s.390 was stated to be quite different to the normal, wider jurisdiction under the rules of court. The jurisdiction under O.86, r.9 RSC is at least as wide, if not wider, than that under O.29 RSC and so I accept that this observation of Keane J. applies equally to O.86, r.9 as to O.29 RSC.

31. I am not satisfied in the circumstances that it is appropriate to apply different principles to applications for security for the costs of an appeal under O.86, r.9 RSC to different appellants, depending on whether they are natural or corporate persons. I see no reason, in principle, why this should be so and no authority where this has occurred has been cited to me. If the appellant is the plaintiff, then the provisions of s.52 apply equally to the appeal as to the claim at first instance and reflects the choice of the Oireachtas regarding the limitations which may apply to the right of a company to pursue litigation it initiates. It is otherwise where a company is sued and there is nothing to suggest that the interests of justice require that the principles applicable to claims brought by a company as plaintiff should apply to appeals brought by a defendant company. I, therefore, approach this application on the basis of the principles discussed above, without reference to the

principles applicable to applications brought pursuant to s.52, or its equivalent predecessor, s.390.

32. It follows that the obligation is on the plaintiff to establish special circumstances and the onus does not shift to the appellant, as occurs in applications brought under s.52.

33. The plaintiff points to the prejudice she and the other plaintiffs have suffered and will suffer by reason of the delay which will have been unnecessarily incurred by the bringing of this appeal in the event that the appellant fails in its appeal. To my mind, this, though real, does not go "beyond the inevitable injustice that will apply to any respondent who successfully defends an appeal brought by an impecunious plaintiff". In *Farrell*, Clarke J. emphasised that the applicant for security for costs in respect of an appeal must establish "a sufficient risk of *added and unnecessary* injustice" beyond that which he identified. This circumstance does not meet this threshold in my judgment. Likewise, the other grounds identified by the plaintiff, set out in para. 26 above, do not to my mind meet this threshold. As was said by counsel for the appellant, it cannot be held responsible for the provisions of the Civil Liability Act 1961 and, accordingly, the fact that it was a necessary party to the proceedings cannot afford a reason to require it to provide security for costs pursuant to O.86, r.9 RSC. The plaintiff was required to sue an insolvent limited company and to take with it the attendant disadvantages. The fact that the appellant is an insolvent company cannot mean that it is not entitled to defend the litigation, nor can it mean that it is improper for it to be funded in so defending the litigation, on the assumption that it is not conducted in an abusive or vexatious manner. There is nothing in the evidence before the court which suggests that the conduct of the appellant in these proceedings has been improper. The mere fact that it has defended the proceedings for eight years falls very far short of the behaviour identified in *Farrell*. I am not satisfied that the appellant has conducted the litigation in a manner which could be described as abusive.

The plaintiff has not, to my mind, demonstrated a risk of added and unnecessary injustice in the bringing of the appeal and, accordingly, I refuse the application for security for costs brought pursuant to O.86, r.9 RSC.

Section 52 of the Companies Act 2014

34. The plaintiff also brings her application pursuant to s.52 of the Companies Act 2014. This provides:-

> *"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."*

35. This section applies where a company is a plaintiff in any action or other legal proceedings. The word 'plaintiff' in s.52 has been applied to applicants for judicial review in *Village Residents Association Limited v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321 and in *Usk District Residents Association Limited v. The Environmental Protection Agency and Greenstar Recycling Holdings Limited (Notice party)* [2006] 1 I.L.R.M. 363. The word 'defendant' has been taken to apply to a respondent in judicial review proceedings (*Village Residents*) and a notice party in judicial review proceedings (*Usk District Residents Association*). The section (and before that, s.390), has been applied to company plaintiffs who were appellants in respect of applications for security for costs of appeals (see for example, *Bula Limited v. Tara Mines Limited* (Unreported, Supreme Court, 26 March 1998)). It may apply in a case where a corporate defendant counterclaims, if in substance the counterclaimant is the plaintiff in respect of its counterclaim and it is not in effect a defence to the claim against it. No authority has been cited where the section, or its equivalent, has been applied to an appeal brought by a corporate defendant.

36. The plaintiff relies upon para. 6.023 of Courtney, *The Law of Companies* (4th ed., Bloomsbury, 2016) where the learned author cites *Usk District Residents* as authority for a proposition that:-

> *"... The plaintiff company will normally be a plaintiff who institutes proceedings but can include an appellant (who might be a plaintiff or defendant in an action) or a counterclaiming defendant, for a substantial amount, or a notice party in judicial review proceedings".*

37. With the greatest respect to the learned author, in *Usk District Residents* the Supreme Court was not concerned with a corporate defendant appellant, and it is not authority for the proposition that the section can be applied to an appellant who is a defendant in an action. Thus, the proposition contended for by the plaintiff on this motion is one which is not supported by authority.

38. I agree with the submissions of the appellant. The section contemplates an application for security for costs being made by a defendant against a plaintiff in an action or other legal proceedings. The security contemplated is security for the costs of the defendant "if successful in his or her defence". This is a reference to his or her defence of the action or other legal proceedings (including, where appropriate, a counterclaim). I do not accept that a defendant who has appealed a court order, irrespective of whether the order appealed is interlocutory or final, becomes a plaintiff within the meaning of s.52 simply because, as an appellant, it is the moving party on the appeal. The same logic would apply if the defendant brought any motion seeking relief in the High Court and there is no suggestion that the plaintiff would be entitled to seek security for costs in respect of such a motion.

39. The interpretation advanced by the plaintiff would allow a plaintiff to sue an insolvent company and effectively deprive it of the right to appeal any interlocutory orders

made during the course of the litigation prior to trial by seeking security for costs under s. 52. The plaintiff usually would be able to show that the defendant/appellant would be unable to meet an award of costs and that the plaintiff had a prima facie defence to the appeal, and therefore shift the onus of establishing the existence of special circumstances which would justify the refusal of security to the insolvent defendant. This potentially could work a grave injustice against a defendant and hinder it in its defence of the claim brought against it.

40. I agree with the submissions of counsel for the appellant that, as a simple matter of statutory interpretation, the section cannot extend to seeking security for costs against a defendant who brings any motion before the High Court, or appeals a decision to this court (or indeed the Supreme Court). A purposive interpretation of the section does not require the court to go that far because of the existence of the alternative jurisdiction under which this court may order the provision of security for costs of the appeal (O.86, r.9 RSC). It is clear from the decision in *Midland Bank* that it is possible under that order to obtain security for costs against an appellant defendant where the applicant for security satisfies the requirements of the rule.

41. In my judgment, s.52 does not apply to an appeal by a defendant, as it cannot be regarded as a plaintiff and thus, it is outside the scope of the section.

42. It follows that I refuse the reliefs sought in the notice of motion under both s.52 of the Act of 2014 and O.86, r.9 RSC.