O'TOOLE

1984 No 6051P 377

THE HIGH COURT

BETWEEN:-

JACK O'TOOLE LIMITED

Plaintiff

AND

MacEOIN KELLY ASSOCIATES

First Defendant

AND THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

Second Defendant

Judgment of Barr J. delivered the 10th day of February 1986

THE FACTS

The Plaintiff is a limited liability company which has not been trading for several years but which previously carried on the business of building contractor. The first Defendant is a firm of architects and the second Defendant is a local authority. The Plaintiff's claim against Murray O'Brien and Partners, who were joined as Defendants originally, has been struck out. On 22nd March, 1976 the Plaintiff entered into a substantial building contract with the second Defendant which in turn employed the first Defendant as its architect to supervise the contract and, in particular, to measure and evaluate the works to be performed by the Plaintiff and its agents thereunder. This action relates to a dispute which has arisen regarding the amount of the final payment properly due and payable by the second Defendant to the Plaintiff after completion of the contract works. A claim for damages is also

made against each Defendant. It appears that the combined value of the Plaintiff's claims exceeds £200,000.

An amended Statement of Claim has been delivered and two affidavits have been sworn by Mr. Jack O'Toole, a director of the Plaintiff company, on its behalf. One of these relates to the present motion and the other concerns an earlier motion brought by the original first and second Defendants which resulted in Murray O'Brien and Partners being struck out of the action on the ground that at all material times they were acting merely as agent for the first Defendant. These documents disclose, inter alia, that in essence the Plaintiff's claim against the first Defendant (the architects) is that

(i) they deliberately failed to deal with the accounts and supporting records furnished on behalf of the Plaintiff in connection with the final payment due to them by the second Defendant;

(ii) they failed to have measured and to certify a proper sum in satisfaction of the Plaintiff's final account and

(iii) their motives for so behaving were

(a) to create a serious financial crisis for the Plaintiff which, as they were aware, urgently required funds in connection with other unrelated contract works on which they were then engaged;

(b) to use a financial crisis thus induced to coerce the Plaintiff into accepting a lesser sum in purported settlement of their final account with the second Defendant than ought to have been paid,

and

(c) to promote their professional interest with the second Defendant by assisting in bringing about a settlement of the Plaintiff's final account for much

less than the amount which ought to have been measured in settlement thereof.

It is also pleaded and deposed to on behalf of the Plaintiff that at a meeting which took place on 30th May, 1980 between Mr. O'Toole on behalf of the Plaintiff company, the second Defendant's chief engineer and Mr. Murray, quantity surveyor, acting for the first Defendant, Mr. O'Toole was coerced into accepting on the Plaintiff's behalf that the net amount due and payable by the second Defendant in full discharge and settlement of the final account relating to the building contract was the sum of £9,000 notwithstanding that the Plaintiff's engineer and architect had submitted a detailed claim in support of a much larger final payment. Mr. O'Toole has deposed that he asked to have his own engineer/architect present at the meeting but this request was refused. It is contended that there was a conspiracy between the Defendants to isolate the Plaintiff's representative in that way and that this conspiracy was part of the plot to coerce the Plaintiff into accepting less than was properly due to it under the contract.

The first Defendant's application on this motion is made pursuant to section 390 of the Companies Act, 1963 and an order directing that the Plaintiff shall provide security for the first Defendant's costs in the action is sought. At the hearing of the motion it was conceded by counsel for the Plaintiff company that if it fails in its claims against both Defendants it will not have sufficient assets out of which to satisfy any order for costs which may be made against it.

THE LAW

I have considered the following authorities:-

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Heaney .v. Malocca 1958 I.R. 111

Peppard & Co. Ltd. .v. Bogoff 1962 I.R. 180

Personal Service Laundry Ltd. .v. The National Bank Ltd 1964 I.R. 4

Cohane .v. Cohane 1968 I.R. 176

Collins .v. Doyle 1982 I.L.M.R. 495

These decisions establish, inter alia, that an order pursuant to section 390 of the Companies Act, 1963 is discretionary and a court in exercising its discretion should take into account all relevant factors. These include the capacity of the Plaintiff company to pay the costs of a successful Defendant. Where it is established by evidence, or it is conceded on behalf of a Plaintiff company, that it has not sufficient assets out of which to pay such costs then, prima facie, the Defendant is entitled to an order directing the Plaintiff to give security for his costs in the action.

However, where, as in the present case, prima facie evidence is adduced to the effect that the Plaintiff's inability to give such security stems from a wrong allegedly committed by the Defendant for which redress is sought in the action, then that amounts to a special circumstance which may deprive the latter of his prima facie right to security for costs.

Mr. O'Toole's affidavits to which I have referred establish a prima facie case that, in effect, the Plaintiff company has been put out of business by the wrong-doing of both Defendants as pleaded in the Statement of Claim and that its inability to give security for costs is a consequence of that wrong-doing. It follows that if I were to make the Order sought by the first Defendant the practical effect would be to allow the applicant to use a procedural advantage to defeat the Plaintiff's claim for damages against them to remedy the alleged wrong which it is

contended gave rise to the Plaintiff's impecunious state and which in turn prevents it from complying with an order directing it to give security for the Defendant's costs. It would be patently unjust to make the order sought in such circumstances unless evidence on affidavit had been adduced on behalf of the first Defendant which established that in fact there was no substance in the Plaintiff's claim. The first Defendant has not put forward any such evidence, though a full defence has been delivered which contests all issues. I appreciate that it is often not possible to establish on affidavit that claims made by or on behalf of a Plaintiff are not well founded. This is particularly so in a case such as that under review. However, that difficulty would not justify a court in ignoring a Plaintiff's contention established by way of prima facie evidence that its impecuniosity resulted from the wrong-doing of the Defendant for which redress is sought in the action. Having considered all of the factors in the case I am satisfied that I should exercise my discretion in favour of the Plaintiff company and refuse the first Defendant's application.

11th March, 1986.