[2020] IEHC 365

THE HIGH COURT

[No. 2019/8023 P]

BETWEEN

FLOR CROWLEY

PLAINTIFF

AND

PROMONTORIA (OYSTER) DAC, DONAL O'SULLIVAN, JOHN BURKE AND DAVID O'CONNOR, RECEIVER

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 24th day of July, 2020

1. On 22nd June, 2020, I gave judgment on the plaintiff's application by notice of motion issued on the 5th of December, 2019 for interlocutory relief against the defendants. The citation for that judgment is [2020] IEHC 309. That judgment should be read in conjunction with the present judgment, which concerns the orders to be made, and in particular the question of the costs of the application.

2. In this regard, having invited the parties to make submissions on the orders, the court received an email of 1st July, 2020 from the plaintiff, who represented himself in the application, urging the court to reserve the costs. An email of 6th July, 2020 was then received from the defendant's solicitors, in which it was submitted that the costs of the application should be awarded to the defendants, with an order for adjudication in default of agreement.

3. By email of 7th July, 2020, the plaintiff emailed the court to object to the defendant's submissions, on the basis primarily that they were sent on the 15th day after the judgment was delivered, and thus outside the fourteen days within which submissions were invited. The plaintiff gave examples of other conduct in the proceedings by the defendants which the plaintiff characterised as "examples of the disrespect of the court rules, orders and directions…". Finally, on 10th July, 2020, the plaintiff emailed a "legal submission" to the court in which the plaintiff submitted that the costs of the application should be reserved, "…and that a stay be put on any power of sale regarding this property, until the plenary action is fully heard by this honourable Court".

4. The fundamental principles in relation to costs are that the award of costs is discretionary, and that generally costs will "follow the event". Section 169(1) of the Legal Services Regulation Act 2015 ('LSRA') sets out a non-exhaustive list of circumstances in which the court may depart from this rule "having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties…". Under O.99, r.2 (3) of the Rules of the Superior Courts, the court is required, "upon determining any interlocutory application", to 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". The court is required by O.99, r.3(1) to "have regard to the matters set out in s.169(1) of the [LSRA] where applicable".

5. O. 99, r.2(3) is in identical terms to the former O.99, r.1(4A). This latter rule was introduced in February 2008, and was addressed by Laffoy J. in her decision in *Tekenable*

Limited v. Morrissey [2012] IEHC 391, a decision which was expressly approved by the Supreme Court in *ACC Bank plc v. Hanrahan* [2014] 1 IR 1. There have been a number of further authorities considering the relevant principles regarding costs in interlocutory applications since *Tekenable*, and these authorities were addressed in a very helpful summary of the law by McDonald J. in the recent decision of *Paddy Burke (Builders) Limited (in liquidation and in receivership) v. Tullyvaraga Management Company Limited* [2020] IEHC 199. In that case, McDonald J. cited with approval the approach of Barrett J. in *Glaxo Group Limited v. Rowex Limited* [2015] 1 IR 185, in which Barrett J. commented as follows:

> *"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."*

6. The gravamen of the plaintiff's motion, as para. 6 of the judgment makes clear, was an attack on the validity of the Receiver's appointment. The plaintiff did not dispute executing the charge of 29th July, 2002. His primary complaint was that the first named defendant had not demonstrated that it had acquired the interest of First Active plc in the charge. The manner in which that acquisition purported to be demonstrated by documents exhibited on behalf of the first named defendant was unsatisfactory: see para. 24 of the court's judgment in this regard. However, I found that the registration of the ownership of the first named defendant on the folio of the property at issue was, pursuant to s.31 of the Registration of Title Act 1964, conclusive evidence of the title of the first named defendant to the charge.

7. A number of technical objections were made by the plaintiff to the appointment of the Receiver. I found that none of those points had any validity. I also found that the plaintiff had not established a fair case to be tried, and that damages would in any event be an adequate remedy at trial if it were shown that the Receiver had not been properly appointed or had otherwise wrongfully caused loss to the plaintiff. I held at para. 32 of the judgment that "no submissions have been made to me which would suggest that it would be appropriate for this Court to make orders preventing the fourth named defendant from exercising [his powers under the charge to take possession of and secure the property, and to employ contractors for that purpose]".

8. The "event" in the application therefore is the refusal of the plaintiff's challenge to the appointment of the Receiver and the consequential orders sought. The issue presently is whether there is any basis upon which I should not award the costs of the application to the defendants.

9. As s.169(1) of the LSRA makes clear, I am entitled to have regard, in deciding the issue of costs, to "the particular nature and circumstances of the case, and the conduct of the

proceedings by the parties". The submissions of the plaintiff make complaints in relation to the conduct of the proceedings by the defendants. The plaintiff cites the late – albeit by one day – delivery of the submissions invited by the court. The plaintiff complains of late service of an appearance on behalf of the defendants, and the late filing of affidavits in the present application.

10. The plaintiff also complains of what he characterises as the failure or refusal or neglect of the defendants to comply with the costs order made by Murphy J. on 18th July, 2019 on an appeal from the Circuit Court. I referred to this particular controversy at paras. 19-21 of my judgment. The plaintiff submits that the failure to address the costs order by the first named defendant, together with the various failures to deal with steps in the litigation in a timely fashion, are "tactics to frustrate the plaintiff".

11. This Court does not condone any failure to comply with an order of this Court or the requirements of the Rules of the Superior Courts, and the defendants would do well to note that the court will have little tolerance in the future for lapses of the type of which the plaintiff complains. Having said that, it does not appear to me that the late entry of the appearance, the late delivery of the affidavits, or the delivery one day late of the submissions on costs unduly prejudiced the plaintiff. As the alleged failure to discharge the costs order of Murphy J. occurred in separate proceedings, I do not believe that I can have regard to it for the purpose of deciding costs in the present proceedings.

12. The plaintiff's submission of 10th July, 2020 raises a number of points. However, these points all relate to the substance of the application; effectively, the plaintiff urges the court to reconsider its decision in a number of respects. As the hearing on the substance of the application has concluded, and judgment has been given, such submissions cannot be entertained.

13. It seems to me that I must decide whether this is a case where the decision on the plaintiff's application turns on issues in respect of which a different picture may emerge at trial. Given that the registration of the first named defendant on the folio is "conclusive evidence" of its ownership of the charge, I do not think that a different picture of the ownership of the charge is likely to emerge at trial. As regards the Receiver's powers and his purported exercise of them, the validity of these matters will be determined by the court's view of the charge itself, and the instrument under which the Receiver was appointed. It is difficult to see what oral evidence or further documentation might emerge at trial which would be likely to affect materially the court's view of such matters.

14. I am of the view that, notwithstanding that the conduct of the defence of the application was unsatisfactory in some respects - in this regard, see the comments at para. 24 of the judgment – the defendants are entitled to the costs of the application. The motion was without merit, and has caused considerable expense and delay in the receivership.

15. Accordingly, I will order that the application be refused, and that the defendant be entitled to the costs of the application, to be adjudicated in default of agreement.