[2021] IEHC 111

THE HIGH COURT
CHANCERY

[2020 No. 1875P]

BETWEEN

THE ALFRED BEIT FOUNDATION

PLAINTIFF

AND
DAVID EGAR

DEFENDANT

RULING of Mr Justice David Keane delivered on the 19th February 2021

Introduction

1. On 29 January 2021, I gave judgment granting the Alfred Beit Foundation ('the Foundation') interlocutory injunctions against Mr Egar. This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2021] IEHC 65. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to file concise written submissions, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.

2. The parties did not reach any agreement and, on 9 February, the Foundation electronically filed its written submissions. On 12 February, the last day of the two-week period allowed, Mr Egar emailed the court through the registrar to request an additional four weeks to file his. I replied on the same date, refusing that request on the grounds that it had not been properly made and that no reasons had been provided for it. That correspondence was copied to the legal representatives of the Foundation.

Form of order

3. The Foundation seeks an order pursuant to Order 50, rule 6(2) of the Rules of the Superior Courts ('RSC') reciting in curial part as follows:

> 'IT IS ORDERED that from the 7th day next after service of this order and thereafter pending the trial of the action the defendant his servants or agents and all any persons acting with his authority or on his behalf or served with a copy of this order or on notice thereof:
>
> 1. be restrained from all and any trespass on the plaintiff's lands more particularly described in the schedule to the plenary summons and outlined in red on the map annexed to it, a copy of which map is annexed to this order;
> 2. be restrained from causing, occasioning, permitting or encouraging trespass by other persons on the said lands, whether or not by placing animals thereon;
> 3. do vacate the said lands, removing from them all and any of his property including, but not limited to, animals, gate locks and electric fences;
> 4. be restrained thereafter from entering on or occupying the said lands;

5. be restrained from any slander to the plaintiff's title to the said lands; and
6. be restrained from any interference with the plaintiff's use of the said lands and the plaintiff's relations with any other person or persons concerning the use of the said lands.'

4. The Foundation submits, and I accept, that the proposed terms reflect both the intent of the judgment on the scope of the interlocutory injunctions to be granted and the requirement that those injunctions must be certain and definite in their terms, a requirement explained in the following way by Lord Nicholls of Birkenhead for the United Kingdom House of Lords in *Attorney General v Punch Ltd* [2003] 1 AC 1046 (at 1055):

> 'An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly-based principle.'

5. Hence, I will make an order in the terms suggested.

The costs of the application

i. applicable rules and principles

6. Order 99, rule 2(3) of the RSC, as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), reproduces the former O. 99, r. 1(4A), which had been introduced by the Rules of the Superior Courts (Costs) 2008 (S.I No. 12 of 2008). That rule states in material part:

> 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.'

7. Order 99, rule 3(1) of the RSC provides in material part:

> 'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

8. Section 169(1) of the Act of 2015 states:

'A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.'

9. Thus, the rule is that the costs of an interlocutory application (including an interlocutory injunction application) must be awarded to the party who is successful against the party who is not successful, unless having regard to the nature and circumstances of the case and the conduct of the parties it is just to order otherwise, and an award of costs must be made unless it is not possible to do so justly at the interlocutory stage.

10. As Murray J explained in *Heffernan v Hibernia College Unlimited Company* [2020] IECA 121 (Unreported, Court of Appeal, 29 April 2020) (at para. 29), in respect of the former O. 99, r. 1(4A):

> 'That provision reflected both the preference articulated in the case law pre-dating [its introduction] that those bringing and defending interlocutory applications should face a costs risk in the event that the Court determines that the stance they adopted was wrong (*Allied Irish Banks v Diamond* (Unreported, High Court, 7 November 2011) at p. 6 of the transcript of the *ex tempore* judgment of Clarke J.), and the fact that there will be cases in which it is not possible to determine where the proper burden of the costs of an interlocutory application should lie without the benefit of discovery, a complete marshalling by the parties of relevant evidence and in some cases an oral hearing (*Dubcap Ltd v Microchip Ltd* (Ex tempore Unreported, Supreme Court, 9 December 1997 at p.4)).'

11. In the earlier Supreme Court decision in *ACC Bank plc v Hanrahan* [2014] 1 IR 1, Clarke J had elaborated on the basis for the introduction of O. 99, r. 1(4A) in the following terms (at 5-6):

> '[8] The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will

especially be so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by motion. For example, if there is a dispute over discovery then that dispute will have been resolved before the case comes to trial. Of course, discovered documents may well be relied on at the trial and, indeed, in some cases may turn out to be decisive. But, at least in the vast majority of cases, the fact that the documents, with the benefit of hindsight, have turned out to be either very useful or of very little use, will not add very much, if anything, to an assessment of whether the positions adopted by the parties on a discovery motion were reasonable or appropriate. A judge hearing a discovery motion will, therefore, in almost all cases, be in a better position than the trial judge to decide where the costs of such a motion should lie. Like considerations apply to many other cases such as motions for further and better particulars.

[9] It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of those motions are not, in the vast majority of cases, in any way revisited at the trial.

[10] Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 and as approved by Laffoy J. in *Tekenable Limited v. Morrissey & ors* [2012] IEHC 391, (Unreported, High Court, Laffoy J., 1st October, 2012) somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in *Allied Irish Banks v. Diamond* [2011] IEHC 505 and which Laffoy J. cited in *Tekenable Limited v. Morrissey & ors* [2012] IEHC 391'turn on aspects of the merits of the case which are based on the facts'. It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependent on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.

[11] However, the point made in *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on

the basis of the evidence before the court at the interlocutory state, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts as finally determined by the court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted.'

12. In *Glaxo Group Ltd v Rowex Ltd* [2015] 1 IR 185 (at 210), Barrett J succinctly stated the relevant distinction in the following terms (at 210):

> '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 *(Haughey v. Synnott* [2012] IEHC 403, (Unreported, High Court, Laffoy J., 8th October, 2012); *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549; *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1).'

ii. the event that costs should follow

13. The hearing of the interlocutory injunction application was spread over several days. In view of the Foundation's undisputed ownership of the lands, the issues in the application were: first, whether Mr Egar could establish an arguable case that he has some right to occupation of the lands that deprives the Foundation of the entitlement as of right to an injunction to restrain him from trespass upon them; and second, if Mr Egar could establish an arguable case to that effect, whether the Foundation could then establish both a strong case to the contrary and that the balance of convenience favours the grant of an injunction pending trial.

14. The Foundation succeeded, and Mr Egar failed, on both issues.

15. That is the event and I can find nothing in the nature or circumstances of the case, or in the conduct of the proceedings by the parties, that would warrant a departure from the principle that the costs of the application should follow it.

ii. the possibility of a just adjudication on the issue of costs.

16. If a different picture is to emerge at trial on the issue of Mr Egar's claim to an existing lease over the lands or an equitable entitlement to be granted one, that can only happen by reference to arguments not yet raised or facts not so far identified, or both. In other words, this is not simply an application in which the applicant has established a strong case to be tried but, rather, is also one in which the respondent has failed to put forward any evidence of the existence of a defence that goes beyond the stage of mere assertion. It follows that Mr Egar has failed to establish the existence of a meaningful dispute that may yet be the subject of properly detailed analysis at trial.

17. Separately, the question of the balance of convenience has also been resolved against Mr Egar and that is a not a question that will be revisited at trial.

18. For those reasons, I conclude that it is possible to justly adjudicate on the costs of the present interlocutory injunction application and that those costs should follow the event.

19. I will make an order for the costs of the interlocutory injunction application in favour of the Foundation against Mr Egar, such costs to be adjudicated upon in default of agreement.

20. In deference to Mr Egar's status as a litigant in person and anxious to limit any prejudice to his position due to his unexplained failure to comply with the two-week deadline fixed for the electronic delivery of submissions, I have also considered whether I should stay the execution of the costs order pending trial. In doing so, I bear in mind that, while every effort must be made to avoid unfairness to a litigant in person, it would be just as unfair to advantage such a litigant over a represented party.

21. In *Thompson v Tennant* [2020] IEHC 693, (Unreported, High Court, 17 December 2020), Butler J awarded the costs of a successful interlocutory injunction application to the applicants but stayed the execution of that order, 'mindful of the fact there is ongoing litigation between the parties and of the fact that the questions which have been raised may not at trial be disposed of in the plaintiffs' favour.' In contrast, I am constrained by the finding I have made that Mr Egar has failed to raise any meaningful question to be disposed of at trial beyond the stage of mere assertion. For that reason, it would not be just to place a stay on the order for costs in favour of the Foundation and I do not propose to do so.

Order accordingly.