THE HIGH COURT

[2021] IEHC 139

[2020 No. 6649 P.]

BETWEEN

CONSTRUGOMES & CARLOS GOMES SA

PLAINTIFF

AND

DRAGADOS IRELAND LIMITED, BAM CIVIL ENGINEERING LIMITED AND BANCO BPI SA

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 1st day of March, 2021

Introduction

1. This judgment follows on the court's earlier judgment in the same case [2021] IEHC 79 and should be read therewith. In my earlier judgment, I refused the plaintiff's application for an interlocutory injunction restraining payment by the third named defendant (the Bank) on foot of the first and second named defendants' call on an on-demand performance bond provided by the plaintiff as part of the contractual arrangements between the parties. Two issues now fall to be resolved in light of that judgment, namely the first and second named defendants' application for the costs of the interlocutory injunction and the plaintiff's application for a stay. The parties have provided helpful written submissions on these issues in accordance with the Covid-19 Notice issued on 20th March 2020 and this judgment is issued pursuant to that Notice.

Costs

2. The first and second named defendants ("the defendants") seek the costs of the interlocutory injunction stating firstly, that the court should, as a matter of principle, decide the issue of costs on the determination of the interlocutory application; secondly, that the circumstances of the case do not make it impossible for the court to adjudicate justly on the issue of costs between the parties; and, thirdly, that, having regard to O. 99, r. 2(1) and (3), O. 99, r. 3 and s. 169(1) of the Legal Services Regulation Act, 2015, the court should exercise its discretion to make an order for costs in the defendants' favour. The plaintiff, on the other hand, urges the court to reserve the question of costs to the trial of the action. It argues that it is not possible for the court to fairly adjudicate on costs at this stage as the central issue in the case, namely whether the plaintiff had established a seriously arguable case of fraud, is one which will be revisited in the substantive proceedings with the benefit of cross-examination of witnesses and discovery. The plaintiff also argues that, pursuant to changes made to the rules in 2019, the court now has a greater discretion regarding the costs of interlocutory applications than previously. In its written submissions, the plaintiff refers only to O. 99, r. 2(1) and (3) and does not address how O. 99, r. 3 or s. 169(1) of the 2015 Act might impact on the court's decision.

3. The legal framework within which the decision on costs in respect of this interlocutory application falls to be made is bounded by O. 99 of the Rules of the Superior Courts and s. 169(1) of the 2015 Act. Order 99, insofar as relevant, provides as follows:-

"Rule 2 Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

…

(3) 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.

…

Rule 3. (1) 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 2015 Act, where applicable."

The operative part of s.169(1) of the 2015 Act provides as follows:-

"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—[there follows a list of matters to be considered].

4. Two things are clear from O. 99, r. 2. Firstly, the court retains the discretion it has always had in respect of the making of an order for costs. That discretion, although broad, is not and has never been unlimited. Apart from the possibility of statutory intervention to govern costs in particular types of proceedings (for example, the special costs rules that apply to planning and environmental litigation under s. 50B of the Planning and Development Act, 2000 and other similar provisions), the need to provide some certainty to litigants as regards how, and indeed when, the costs of proceedings are likely to be disposed of has long been recognised. Accepting always the discretionary nature of the court's power to award costs, it is nonetheless important that litigants embarking upon what might be costly legal proceedings and the lawyers advising them have some idea where the costs burden of that litigation is likely to fall. This is particularly so in commercial litigation where decisions are made on the prosecution and defence of proceedings in light not only of what the costs of the proceedings might be but also the likelihood of those costs being recovered and the very real possibility that, if a party is not successful, it will also have to bear the legal costs incurred by the opposing side.

5. The plaintiff's argument that the court now has a somewhat greater discretion as regards the costs of interlocutory matters appears to be based on the fact that O. 99 itself no longer expressly cites the "costs follow the event" rule. The original version of O. 99, r. 1(4) (SI 15 of 1986) provided that "*the costs of every issue of fact or law raised upon a*

claim or counterclaim shall, unless otherwise ordered, follow the event". This reflected a long-standing default position that costs would be awarded to the victor in litigation to be paid by the losing party, unless there were particular reasons why this should not be so. The burden of establishing that this general rule or principle should not be applied lay on a party seeking to take the case outside the scope of the rule (see Denham J. in *Grimes v. Punchestown Developments Company Ltd* [2002] 4 IR 515). The current version of O. 99 (SI 584 of 2019) no longer contains an express statement of the principle that costs should follow the event. Instead, s. 169(1) of the 2015 Act confers a statutory entitlement to an award of costs to the party who has been entirely successful in civil proceedings against the unsuccessful party unless the court orders otherwise. Section 169(1) also lists a number of factors to which a court might have regard in deciding whether to exercise its discretion in this regard. In circumstances where the current version of O. 99 was re-drafted in 2019 to take account of the commencement of Part 11 of the 2015 Act on 7th October 2019 (SI 502 of 2019), it is hard to construe that change as reflecting an intention to alter the scope of the court's discretion. Instead, it seems the Rules Committee took the view that as the "costs follow the event" principle had now been given statutory expression, a reference in the Rules to the relevant statutory provision would be sufficient to ensure that the principle would continue to apply. As it happens, I am not convinced, even if the scope of the court's discretion had been altered in the subtle way contended for by the plaintiff, that it would have a material bearing on the question of costs in this case.

6. I note the obiter comments of Haughton J. in *McFadden v. Muckno Hotels Ltd* [2020] IECA 110 to the effect that the language used in s. 169(1) (i.e. the reference to a party who has been "entirely successful in civil proceedings") appears to apply to costs on the conclusion of proceedings, rather than at the interlocutory stage. However, the section was not opened for the purposes of that appeal and the Court of Appeal was not required to address the effect that O. 99, r. 3(1) might or might not have in making s. 169(1) applicable to interlocutory costs orders. If s.169(1) does not on its face apply to the benefit of a party who has entirely succeeded in an interlocutory application, can the reference to "the costs of any …step in any proceedings" in a rule of court make it so applicable? Is the reference to "the matters set out in s.169(1)" intended to include the principle that costs follow the event which is the central focus of the section or only the matters listed at (a) to (g) as being matters which a court might have regard? My initial view is that O.99, r.3(1) does have the effect of making s.169(1) and the costs follow the event rule applicable to the costs of interlocutory applications. However, I think the costs of this application can be disposed of without reaching a final view on this issue.

7. The second thing that is clear from O.99, r. 2 is that in principle the court should rule on the costs of the interlocutory application at this stage. Traditionally, the general practice was for the court not to make an award of costs but to reserve the costs of the interlocutory application to the trial of the action. This meant that costs incurred at an interlocutory stage would be ruled on by the trial judge who would be in a better position to assess how relevant or necessary those interlocutory applications were to the ultimate outcome of the proceedings and, of course, who would know which of the parties

ultimately prevailed. That general practice was made the subject of specific rules introduced in 2008 which required courts to make costs orders in respect of interlocutory applications as they were determined, rather than reserving all costs to the trial of the action. Order 99, rule 2(3) is a successor to the rule originally introduced in 2008. This rule means that, as a matter of principle, the court should make a decision in respect of the costs of the interlocutory application at the time it determines that application unless it would not be possible to adjudicate upon liability for costs "justly". Hence, the first issue for the court is to decide whether it is possible "justly to adjudicate upon liability for costs" at this stage as, if not, that decision should be reserved to the trial judge. If it is possible to justly adjudicate on costs, then the court should proceed to do so.

8. The plaintiff points to a line of authority postdating the 2008 rules change in which courts have declined to make orders for the costs of interlocutory injunctions where the issues before the court at the interlocutory stage are likely to be revisited at the substantive trial. Whilst the standard of proof will be different at trial than at the interlocutory stage, the court will essentially be considering the same issue, in this case whether the plaintiff has made out its claim that the defendants' call on the bond was fraudulent (see, for example, Clarke J. in *ACC v. Hanrahan* [2014] IESC 40 citing his own ex tempore costs judgment in AIB v. Diamond and the comments of Barrett J. in *Glaxo Group Ltd v. Rowex Ltd* [2015] IEHC 467). The type of difficulties which can arise are identified by Clarke J. in *ACC v. Hanrahan* as follows:-

> *"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. However, the point made in Diamond 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."*

9. It is, I think, significant that in this case the threshold faced by the plaintiff in applying for an interlocutory injunction was not the "*fair issue*" or "*arguable case*" standard discussed by Clarke J. in the two cases mentioned above and the other cases relied on by the plaintiff in its written submissions. Instead, the plaintiff had to meet a higher threshold of "*seriously arguable*". This is relevant to the question of costs because, at all times, the plaintiff was aware that its application would be assessed by reference to this higher standard. In many, if not most, interlocutory injunction applications, the respondent accepts that the litigation raises a fair issue to be tried and the dispute between the parties is as to where the balance of convenience lies pending the resolution of the litigation. In cases of this type – applications to restrain payment on foot of an on-demand bond or a letter of credit – the respondent is far less likely to concede that it is seriously arguable the payment should not be made. One obvious reason for this is that a respondent is unlikely to concede that it is seriously arguable it has acted fraudulently,

which to date is the only legal basis identified for the grant of such an injunction. It is also extremely rare for such an injunction to be granted. Thus, the plaintiff in making this application was knowingly undertaking the difficult challenge of meeting this higher threshold and, in my view, must be taken as accepting that there would be a costs risk if it failed to do so.

10. Added to this is a factor highlighted by the Supreme Court recently in its judgment in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65. At para. 36 of his judgment in that case, O'Donnell J. observed:-

> *"In particular, the underlying assumption on which the decision proceeds is that the interlocutory injunction is to be considered pending trial, which it is assumed will take place and finally resolve the merits of the action. If, however, it is unlikely that a trial will take place (for example, if the injunction sought is the entire remedy, such as an injunction restraining a strike or other industrial action, or restraining some form of public protest), then the grant of the injunction will almost always determine the case and the parties will have little practical incentive to proceed to trial and incur the time and expense necessary to do so."*

The Supreme Court held the likelihood of the case proceeding to a full trial relevant both to the manner in which a court approaches the "fair issue to be tried" question and to how the court should assess the balance of convenience (*per* para. 64 of the same judgment). In my view, the likelihood of the case proceeding to trial is also relevant to how a court should approach the issue of costs. If there is to be no trial, it may be fundamentally unfair to the party which has succeeded at the interlocutory stage not to have an order for costs made at that point. The defendants point out that in practical terms a stay on any order for costs made in their favour could mean that they would never be able to recover the costs awarded to them. Going back one step, reserving costs to a substantive trial which is unlikely to ever take place would have the same effect.

11. Leaving aside for a moment the question of a stay, the consequence for the plaintiff of having failed in this application is that payment will be made by the Bank to the defendants on foot of the bond. Once payment is made, there must then be a very high likelihood that the case will not proceed to trial. Whilst the plenary summons includes a claim for damages for breach of contract and fraud (the latter a necessary plea to sustain an application to restrain payment), the relief is mainly framed in terms of declarations that the defendants are not entitled to claim and the Bank is not entitled to not entitled to pay on foot of the bond pending resolution of all disputes between the parties by arbitration pursuant to clause 25 of the subcontract and injunctions are sought to restrain the making of a claim or payment on foot of such a claim pending arbitration. If the payment is now made, the plaintiff may have little, if any, interest in pursuing this case and, indeed, may face a claim of mootness from the defendants if it proposes to do so.

12. In those circumstances, I do not think it would be fair to the defendants not to rule on costs at this stage. Further, I am satisfied that in the circumstances of this case a just adjudication of liability for interlocutory costs is possible. The main reason for my opinion

in this regard has been adverted to above. The courts will only grant an injunction to restrain payment out of an on-demand bond in exceptional circumstances where there is a clear or established case of fraud. The plaintiff brought this application knowing that it had to meet this very high threshold and failed to meet it. There are strong public policy considerations underlying the approach taken by the courts to applications seeking to restrain payment of on-demand bonds. In circumstances where the plaintiff could not and did not meet the high threshold which was necessary to obtain the very exceptional relief sought, it follows that this is an application which, in reality, should not have been brought.

13. For all of these reasons, the court will make an order for costs (to include reserved costs) in favour of the first and second named defendants against the plaintiff in respect of the interlocutory injunction application. I have noted above the defendants' argument as to why that order should not be stayed to the trial of the action. I accept that defendants should not be left in a position where they have recovered an order for costs, the execution of which is indefinitely stayed and dependent solely on the extent to which the plaintiff chooses to pursue this litigation. I note also the plaintiff's submissions (albeit on the related application for a stay) to the effect that it intends to appeal the court's earlier judgment. As the plaintiff has an unrestricted of appeal to the Court of Appeal which it currently indicates that it intends to exercise, I propose to impose a stay on the execution of the order for costs for a period of three months only. That time should be sufficient to allow the plaintiff to decide whether it wishes to pursue an appeal and/or the underlying litigation and to take the necessary steps to bring the matter before the Court of Appeal. It will then be a matter for the plaintiff to seek any further stay it might require from the Court of Appeal.

Stay on Court Order

14. The plaintiff seeks a "*stay pending appeal*". The plaintiff's written submissions do not identify precisely what it seeks to stay, an omission which is pertinent in light of the observations made by the defendants that in circumstances where the court has refused the plaintiff the relief sought, there is no order the operation of which can be stayed pending any appeal that the plaintiff might bring. The plaintiff does anticipate an argument by the defendants that to grant a stay "*would be to de facto grant the interlocutory injunction sought as the interim order would remain in place precluding* [the Bank] *from paying out on the performance bond".* In fact, the defendants do not make that argument. Instead, they argue, correctly in my view, that the interim order made on 8th October, 2020 does not extend beyond the date of determination of the interlocutory motion. The interim order is expressed as restraining the Bank *"pending resolution of this motion or until further order in the meantime from paying out"*. As the motion has now been resolved and no other order was made in the meantime, the interim order lapses automatically and would not remain in place unless the court were now to make a positive order to that effect.

15. All of this begs the question as to whether the court should now make an order restraining the Bank from making payment out on foot of the bond pending the

determination of any appeal the plaintiff might bring – an order which would have the same effect as the interlocutory injunction which has been refused. The defendants argue that such an application simply has no merit.

16. The plaintiff invokes the decision of the Supreme Court in *Redmond v. Ireland* [1992] 2 IR 362 which is the leading authority in this jurisdiction on stays pending appeal. Accepting as a given the observations of McCarthy J. in that case that "*[t]he overall consideration is to maintain a balance so that justice will not be denied to either party*", the guidance offered in *Redmond* is not of great assistance in a case of this nature. This is because in *Redmond*, the Supreme Court was considering circumstances where, at the conclusion of a personal injury trial, the High Court had made an award of damages in the plaintiff's favour. The defendant (not having applied for a stay from the trial judge) sought a stay on payment of the award when lodging its appeal to the Supreme Court. The criteria set out by McCarthy J. are expressly stated to be matters to be taken into account *"in an application for a stay of execution upon the whole or part of an award for damages for personal injury*". Doubtless some of these matters are also relevant to the staying of other types of awards of damages. However, leaving aside the fact that what is sought in this case is not actually a stay at all, it is difficult to draw an analogy between the circumstances in which a stay should be granted on payment of an award made at the conclusion of a substantive trial and a "stay" on refusal of interlocutory relief.

17. The plaintiff's written submissions focus on the fact that liability (one of the *Redmond* criteria) will be an issue in its proposed appeal. The emphasis placed whether on liability remained in issue on the appeal in *Redmond* is due to the fact that in personal injuries cases many appeals are taken by defendants against the quantum of damages only. In those cases, it is acknowledged that in principle the successful plaintiff is entitled to some damages. Consequently, it may be unjust to deprive the plaintiff of the benefit of an award made in his favour pending the appeal. It does not necessarily follow that in other types of cases where an appeal is brought placing "liability" in issue, that fact alone must weigh in favour of staying the effects of the judgment under appeal. The logic of the plaintiff's argument is that in all cases where an interlocutory injunction has been refused the court should nonetheless lean towards granting a "stay" or otherwise continuing a restraint imposed on an *ex parte* basis. Whilst it may well be appropriate to do this in some instances, it cannot be that the mere taking of an appeal from a decision refusing relief entitles the unsuccessful applicant to the relief which has been refused pending determination of the appeal.

18. The plaintiff contends that the court applied the wrong test to the central issue, namely whether fraud could be inferred from the defendants' conduct. I accept that the plaintiff is fully entitled to appeal the manner in which the court determined this issue and may well succeed in doing so. It is no part of the court's function on this application to assess whether that appeal will succeed. However, I note that in arguing that the court has applied a test which was too stringent "*namely was fraud the only realistic inference to be drawn"*, the plaintiff mis-states the test actually applied by the court. The test which the court applied was whether it was seriously arguable that the only realistic inference to be

drawn was one of fraud (see paras. 28 and 39 of the court's judgment). Further, on the facts the court held not just that an inference of fraud was not the only one which could be drawn, but, in the circumstances, that an inference of fraud could not be readily drawn at all (see para. 42).

19. Even accepting that liability will be an issue on any appeal, I nonetheless have a fundamental concern as to whether an order should now be made which would, in effect, extend the interim order granted by Reynolds J. on 8th October, 2020. That interim order was initially made on foot of an *ex parte* application made on 29th September, 2020 at which point the making of a claim against the bond and payment out on foot of any such claim were both restrained until 8th October, 2020. On 8th October the restraint was continued as against the Bank only in circumstances where the defendants had made the call on the bond without notice of the Court's earlier order and before the date of expiry of the bond and arrangements were made for the early trial of the *inter partes* application. The *ex parte* application was brought by the plaintiff on foot of an affidavit which asserted that the defendants' threat to call upon the performance bond was fraudulent because it was based on alleged defects in the work carried out by the plaintiff which had been the subject of an adjudicator's decision in which the defendants' crossclaim was rejected by the adjudicator. In the very first replying affidavit filed by the defendants, it was pointed out that the plaintiff's deponent had completely ignored the defendants' claim for liquidated damages, which far exceeded the amount of the bond, and which had not been raised nor adjudicated on in the adjudication process. The defendants also disputed the contention that defects relied upon by them to ground the call upon the bond were the same as the defects which had been dealt with in the adjudication process. They pointed out that although the plaintiff had exhibited certain correspondence in its grounding affidavit, it had not exhibited the attachments to that correspondence in which the defects the subject matter of the call on the bond were set out in detail. In a replying affidavit Mr. Lima, on behalf of the plaintiff, conceded both that the original affidavit had not dealt with the issue of liquidated damages and that the defendants' current claim for liquidated damages did not fall within the scope of the adjudicator's decision. The basis of the plaintiff's claim then shifted to asserting that there was an obligation on the defendants to bring forward the entire of any claim they might make against the plaintiff in the adjudication process. It was also acknowledged that the attachments to the relevant correspondence detailing the defects now claimed by the defendants had been omitted from the original exhibits, albeit apparently through oversight.

20. There is a material difference between saying that the defendants' claim has already been adjudicated upon and refused and accepting that the claim is one which has not been previously adjudicated upon but making a legal argument that it should have been made in the earlier adjudication process. Leaving aside the dispute between the parties as to whether the defects now claimed for are new defects and whether the omission of the detailed claim in respect of these defects from the exhibits in the plaintiff's grounding affidavit was material, there is, in my view, a material omission from the affidavit which grounded the *ex parte* application in relation to the claim for liquidated damages.

Manifestly, saying that a claim has already been made and refused and, therefore, is being advanced a second time on a fraudulent basis is substantively different from accepting that that claim has not been previously made or adjudicated upon but asserting that it should have been brought forward at an earlier stage. It is difficult to see how the latter argument, even if ultimately successful, could ever ground an inference of fraud against the defendants. In reality, a very substantial part of the plaintiff's claim of fraud melted away as soon as the first affidavit was sworn on behalf of the defendants. This raises a serious concern as to why the grounding affidavit did not fairly acknowledge that the claim for liquidated damages now made by the defendants was a different one to that ruled upon by the adjudicator. In my view it must be open to question whether the court would have granted an interim injunction on an *ex parte* basis restraining payment of an on-demand bond had it been properly informed of the nature of the dispute between the parties.

21. Finally, the public policy underlying the cautious approach adopted by the courts to on-demand bonds (discussed at para. 21 *et seq* of my earlier judgment) remains relevant to the question of whether a stay should be granted. The effect of a stay would be to interfere with the commercial consequences of the agreement made by the parties putting in place an unconditional bond as part of their contractual arrangements. Whilst this is something a court should be very reluctant to do at any stage save in cases of clear or obvious case of fraud, it would require something wholly exceptional to warrant such interference where the court has found that the plaintiff has not established that fraud is seriously arguable. This plaintiff goes no further than asserting that the application of the *Redmond* factors weigh in favour of granting a stay because liability will be in issue on the appeal and contending that the defendants will not suffer specific prejudice if the interim order remains in place. I do not think that either of these arguments are sufficiently weighty to justify continuing the restraint on the operation of an on-demand bond.

22. For all of these reasons, I am not prepared to make an order restraining payment out on foot of the bond whether by way of staying the judgment which the court has delivered or by way of extending the interim order or replacing it with a further order. I will instead make the orders requested by the defendants, namely an order refusing the relief sought by the plaintiff in its notice of motion dated 29th September, 2020; for the purposes of clarity, an order vacating the order of 8th October, 2020 which restrained the Bank from releasing payment (lest there should be any question as to the automatic lapsing of that order) and finally an order for the costs of the motion to include all reserved costs to the first and second named defendant to be stayed on the terms indicated at para.13 of this judgment.