THE HIGH COURT

[2024] IEHC 529

[Record No. 2020/341COS]

IN THE MATTER OF PASRM LIMITED

AND

IN THE MATTER OF SECTION 212 OF THE COMPANIES ACTS, 2014

AND

IN THE MATTER OF THE COMPANIES ACTS, 1963-2014

BETWEEN

NEAL CYR

APPLICANT

AND

PLANITAS AIRLINE SYSTEMS LIMITED, LUKE MOONEY, PHILIP CONNELL, BRENDAN DELANEY AND PASRM LIMITED

RESPONDENTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 26th day of August 2024.

1. In a judgment delivered on 22 March 2023, reported at [2023] IEHC 149, I refused the respondents' application pursuant to O.29, r.1 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court for a direction that the applicant provide security for costs for the respondents' costs of the proceedings. At the conclusion of that judgment, I

invited submissions from the respondents in the event that they considered that I should make any order in relation to costs other than an order in favour of the applicant. The respondents duly proffered written submissions, and the applicant, in accordance with the court's direction, responded with his own submissions.

2. The respondents consider that the appropriate order in relation to the costs of the security for costs application is that those costs should be costs in the cause. The respondents fairly concede that, in accordance with the requirements of O.99, r.2(3) of the Rules of the Superior Courts, the issue of costs can be determined at this juncture rather than reserved to the trial judge.

3. The respondents accept that s.169(1) of the Legal Services Regulation Act 2015 governs the issue of costs, particularly as O.99, r.3 provides that the High Court shall have regard to the matters set out in that sub-section. They rely particularly on s.169(1)(b), by which the court is entitled, in deciding whether to order otherwise than costs following the event, to consider "whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings".

4. A number of grounds are advanced by the respondents as to why the court should conclude that costs should not follow the event. They acknowledge that the application required the court to be satisfied that the applicant resided outside the jurisdiction or EU/Lugano Convention countries; that the respondents had to establish a *prima facie* defence; and that there were no special circumstances such that the court should not grant security.

5. The respondents make the point that they succeeded on the first two of these grounds, but that "the outcome of the motion turned on special circumstances". It was suggested that the court's exercise of its discretion in this latter regard "turned, per para. 152, on an inference". It was suggested that various arguments made by the applicant regarding the

context of an oppression application (paras. 15 to 19 of his submissions) and proportionality (paras. 10 to 14 of his submissions) were rejected by the court.

6. The respondents also suggest that, in all the circumstances, "it was both reasonable to bring the motion and to contest the various points made in response by Mr Cyr".

7. An application for security for costs is, as the respondents acknowledge, "a discrete matter which will not be revisited at the trial of the action". A defendant applying for the order is unlikely to make the application unless it is confident that it can establish, at a minimum, that the plaintiff resides outside the jurisdiction or an EU/Lugano Convention country, and that it has a *prima facie* defence to the proceedings. The third element – whether or not there are special circumstances which the court may consider militate against the making of the order – usually depends on the affidavit evidence and the circumstances of the case. The defendant knows that the plaintiff is likely to argue that such "special circumstances" exist, and must be in a position to persuade the court that any such circumstances do not warrant the exercise of the court's discretion in favour of the plaintiff.

8. In many, if not most O.29 applications, this third element is where the real contest between the parties lies. A defendant usually brings the application knowing that the success or otherwise of the application is uncertain, as the court's view of whether or not there are special circumstances will determine whether or not the motion succeeds. A decision to initiate such an application is generally brought with a view to either procuring the security sought in respect of costs, or imposing a financial burden on the plaintiff which he cannot discharge, thereby bringing about the collapse or withdrawal of the proceedings.

9. However, success in all three of the elements of the application is necessary for the defendant to succeed; in my view, the defendant cannot have a "consequence-free" shot at procuring an order for security for costs, particularly in what the respondents in the present case accept is a "discrete matter which will not be revisited at the trial of the action", and

must – barring some very unusual circumstance – be liable for the plaintiff's costs of the application in the event that it is unsuccessful.

10. In the exercise of my discretion as to the award of costs, I am also mindful that, as set out in the judgment, it appears that the applicant leaving the jurisdiction and returning to the United States – thus enabling the respondents to satisfy the first of the three elements necessary to succeed in the application – appears to have been at least to some degree prompted or procured by inaccurate statements as to the law in a letter from the respondents' solicitor. At para. 155 of the judgment, I stated as follows: -

> "If Mr Cyr had remained in the country and initiated the s.212 proceedings, the jurisprudence would seem to indicate that a security for costs application could not be brought against him, as he would most likely be regarded as ordinarily resident in this country. In that case, the respondents would be facing the situation often experienced by a well-resourced defendant sued by an impecunious plaintiff, in that an award of costs after a successful defence of the action could not be executed or recovered against the plaintiff. What has given them the opportunity to bring the application is the return of Mr Cyr to the US, in circumstances to which, it seems to me, they themselves have contributed by the erroneous statements as to the legality of Mr Cyr's residence in this country in the letter of 04 June 2020 and the meeting of 30 July 2020."

11. The respondents argue that the applicant's costs should be costs in the cause, "as was done in *Paddy Burke (Builders) Limited (In liquidation and in receivership) v Tullyvaraga Management Company Limited* & *Ors.* [2020] IEHC 170" (McDonald J), and note that the approach to costs in that case was followed by Keane J in *Hafeez v CPM Consulting Limited* [2020] IEHC 583.

12. These cases do not assist the respondents. In both cases, an application for an interlocutory injunction was refused; the court in each case considered, *inter alia*, that the applicant for the injunction had failed to establish a serious issue to be tried, but that, given that a different picture might emerge on this issue at trial, the costs of the party successfully opposing the grant of the injunction – and only those costs – should be made costs in the cause.

13. Whether the respondents in the present case are ultimately successful in defending the proceedings – and my substantive judgment acknowledges that "it is clear that the respondents will strongly defend the action" (para. 159) – I took the view that "…in all of the circumstances, the greater injustice would be to make an order the effect of which would be to prevent the applicant from proceeding with the matter and to have his grievances determined in a full trial" (para. 160). That conclusion will not be affected by the outcome of the trial. In that respect the circumstances of the present case are fundamentally different from those which applied in *Paddy Burke Builders* and *Hafeez*.

14. In all the circumstances, I consider that the respondents must bear the applicant's costs of the motion. It is not appropriate to analyse the findings of the court with a view to identifying issues upon which the respondents succeeded with a view to reducing the costs of the applicant; the event was determined decisively in the applicant's favour, and the costs must follow.

15. Accordingly, I will order that the applicant's costs of opposing the respondents' application be payable by the respondents in favour of the applicant, to be adjudicated in default of agreement. I will however order a stay on those costs pending the determination of the proceedings.

16. The applicant in the submissions on his behalf sought costs "on a legal practitioner and client basis as permitted by O.99, r.10(3)". I do not consider that the circumstances warrant the making of such an order. The costs will be ordered on a party and party basis.

17. Orders will be required as to how the action is to progress. Hopefully the parties can agree an appropriate timetable with a view to getting the matter on for trial. In the event that they cannot, both parties have liberty to apply.