Neutral Citation [2015] IEHC 654

THE HIGH COURT

Record No. 2014/8344P.

BETWEEN/

NIALL GREENE

Plaintiff

– and–
HIGHCROSS BARS LIMITED

Defendant

JUDGMENT of Mr Justice Max Barrett dated 22ndOctober, 2015.

PART I: OVERVIEW

1. In September, 2013, Mr Greene, who has a permanent contract of employment as a teacher in a National School, though he is presently on leave of absence abroad, was 'glassed' in the face while at the defendant's bar and restaurant in Galway. He has arrived at a settlement with the individual who attacked him but wishes to continue an action for personal injuries against the defendant. For its part, the defendant is concerned at the amount of money that it will have to expend on defending High Court proceedings to which it considers itself to have an ironclad defence. As a result, the defendant has now come to court seeking an order for security for costs.

2. At its simplest, an order for security for costs requires that a paying party (almost certainly a plaintiff) who is ordinarily resident outside Ireland pay money into court as security for an opponent's costs in the event that the paying party eventually loses its case. It typically issues when certain pre-conditions (considered hereafter) are satisfied. However, the now typically very high cost of coming armed with legal representation to the High Court means that such an order is something ofa nonsense in the case of a young man such as Mr Greene who is at the start of his professional career and, unsurprisingly, does not have masses of free assets to begin with. Mr Greene has pointed also to the fact that he has a constitutional right of access to the courts and that this right may well be frustrated if an order for security for costs is now made against him. That said, the defendant too has no little justice on its side. It is trying to run a business and the fact that it has a stream of income does not mean that it has an unending pool of money from which to finance the defence of any High Court proceedings that may be brought against it.

3. The issues presented by the within application likely would not present at all, or to the same extent, if the costs of coming to the High Court armed with legal representation had not reached the very high levels that typically now pertain. The solution to this issue is a matter of public policy. But there seems something awry when the costs of civil litigation before the High Court are now often so great that merely by determining where the risk of bearing those costs ought for now to lie, the court may, however it decides matters, determine the future course of the within proceedings. If it grants the order sought, the court may effectively force Mr Greene to abandon his proceedings for want of present resources; if it refuses the order sought, the court runs the risk of forcing the defendant to settle the proceedings for fear of future costs. Questions of legal principle should not be reduced to questions of available principal; the present cost of legal representation has the result that in all too many cases they are.

PART II: BACKGROUND FACTS

4. Mr Greene is a 27–year old man who holds a permanent contract as a teacher at a National School. At the present time, he is on leave of absence, enhancing his credentials and savouring a little of the world, working in Dubai. At the end of the term of his leave of absence, Mr Greene's job will be waiting for him back in Ireland, should he then wish to return.

5. In September, 2013, Mr Greene was present on the defendant's bar and restaurant in Galway when he was 'glassed' in the face by another patron. He has settled his cause of action against the individual who attacked him. However, he wishes to continue a personal injuries action against the defendant.

6. For its part, the defendant considers that it has an ironclad legal defence against the said personal injuries proceedings. It is so confident of winning the proceedings that it has commenced its present application for security for costs. This is because the defendant is concerned that if (the defendant would say 'when') Mr Greene loses his case, with an order for costs then being likely to issue against him, those costs will in truth prove irrecoverable, leaving the defendant with a Pyrrhic victory in which it has won its case but lost its money. The application is brought under Order 29 of the Rules of the Superior Courts (1986), as amended.

PART III: ORDER 29 OF THE RULES OF THE SUPERIOR COURTS

i. Overview.

7. Order 29 provides for the making of an order requiring a party (almost certainly a plaintiff) to grant security for costs where that party is resident outside Ireland. The rationale for such an order is to provide a measure of protection to those involved in litigation where a party to that litigation is situate outside Ireland and thus well placed to evade any order for costs that may later be made against her, him or it. However, the process is clearly open to abuse by the unscrupulous in that it can be used as a tactical ploy, *e.g.*, to frustrate a good claim being brought by a plaintiff of middling means. The courts have historically been alive to this possibility, though as the court has indicated in its introductory comments, such a possibility would not present to the extent that it does if the cost of coming armed with legal representation to the High Court had not reached the often very high levels that it has.

ii. Pre-conditions to granting of order for security for costs under O.29.

8. As counsel for Mr Greene noted in argument, there are usually two pre-conditions to the granting of an order for security for costs against a plaintiff under O.29:

> (1) that the defendant have a *prima facie* defence on the merits to the plaintiff's claim. (This pre-condition arises because O.29, r.3 provides that *"No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such a defendant has a defence upon the merits.").*
>
> (2) that the party against whom the order is sought be resident outside the jurisdiction. Order 29 does not expressly provide that the party must be resident or 'ordinarily resident' outside the jurisdiction. But the wording of O.29, r.4 suggests that the latter is what is anticipated. (Order 29, rule 4 provides that *"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction").* Moreover, the judgment of Clarke J. in *Salthill Properties Limited and Anor v. Royal Bank of Scotland plc and Ors* [2010] IEHC 31, at para. 4.3 contemplates that this is what is anticipated. This Court respectfully agrees with Clarke J.'s observations in this regard, though it would suggest that in the fullness of time O.29 might usefully be amended to make express what is presently implicit.

9. Even when the above pre-conditions are satisfied, it is clear from the case-law that the court retains a wide discretion to refuse an order for security for costs in light of all the circumstances presenting. (See, *e.g.*, the judgment of Clarke J. in *Salthill Properties*, at para.4.3).

iii. Prima facie defence.
10. It did not seem to the court, at the hearing of this application, that it was seriously contended by Mr Greene that the defendant does not meet the, in truth fairly low, standard of having a *prima facie* defence to the plaintiff's claim. To the extent that this is contended, the court has had regard to *Power v. Irish Civil Service (Permanent) Building Society* [1968] 1 I.R. 158, a case concerned with an application for security for costs, made under the then applicable Rules of the Superior Courts, in respect of a plaintiff resident outside the jurisdiction. There, FitzGerald J. observes, at 165, that *"Before ordering security to be given, the court has to be satisfied that the defendant has a stateable defence to the action and that consequently there is an issue to be tried."* One also finds reference to the need for a "*stateable or prima facie defence"* in the High Court judgment of Cooke J. in *Goode Concrete v. CRH plc and Others* [2012] IEHC 116, and to the need for a "*prima facie defence*" in *Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland (t/a The Irish Mail on Sunday) (ex tempore*, High Court 25th March 2011 (Finlay Geoghegan J)). Having regard to the aforementioned case-law and having considered the affidavit sworn by Mr McMahon, the General Manager of the bar and restaurant where the 'glassing' incident occurred, the court is satisfied that the defendant has established on affidavit that it has a stateable, *prima facie* defence on the merits to Mr Greene's claim.

iv. Ordinary residence.
11. Mr Greene is undoubtedly resident outside Ireland. In support of the contention that he remains 'ordinarily resident' in Ireland, he points to the fact that he is a citizen of Ireland, that he has a permanent job in Ireland, that he is merely abroad on leave of absence from that job, and that he retains an address (it is not clear to the court from the evidence that he has continuing tenure of a residence) in Ireland. There are perhaps two approaches to be taken when it comes to determining what is meant by the phrase "*ordinarily resident*". These might be styled the 'dictionary definition' approach and the '*S v. S'* approach.

(1). The 'dictionary definition' approach
12. The first approach is to look at the usual meaning of the adverb "*ordinarily*"; the *Oxford Online Dictionary* defines it to mean "*usually*". This Court considers that it would strain credulity to suggest that a gentleman who presently lives and works far outside Ireland, and who typically spends both his 'working week' and his weekends outside Ireland, can properly be described as "*usually*" resident in Ireland, just because he holds an Irish passport, lived here in the past and presently, it seems, manifests an intention to return in the future. In this regard, the court is mindful of the observation of Hardiman J., albeit in a different context, in *Maguire v. Ardagh* [2002] 1 I.R. 385, 669, that *"I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law."* Mr Greene, at this time, has emigrated to, and lives and works in, Dubai. The principal focus of his life is in Dubai. It is only when he is on holiday from his current employment in Dubai that he can visit Ireland. It may be that his place of domicile continues to be Ireland but it seems to the court that as a matter of fact and law he can no longer properly be described as resident or even "*ordinarily resident*" here.

(2). The S v. S approach
13. A different approach to the determination of 'ordinary residence' was espoused by Abbott J. in *S v. S* [2009] IEHC 559. Making reference to this approach in *E.L. v. S.K.* [2011] IEHC 557, Abbott J. states as follows, at p.7 of his judgment:

> *"In that case it was abundantly clear that tax domicile or residence would not be absolutely determinative for the purpose of the 1989 Act and that ordinary residence would be primarily determined on the basis of a residence to which a person always intended to return notwithstanding regular and sometimes sustained absences".*

14. A possible difficulty that might perhaps be contended to arise with this approach is that it is so generous in its definition of 'ordinary residence' that it would may run the risk of legally ascribing 'ordinary residence' in Ireland to a person when to do so would not make practical sense to the so-called 'ordinary' man on the DART or the woman on the LUAS. In addition, when one looks to *S v. S.*, esp. para. 38 thereof, the notion of 'ordinary residence' appears to be equated with some form of continuing tenure of a physical premises in Ireland. However, in this regard the test, with respect, seems too narrow: while such tenure may often present, this Court would respectfully be of the view that it need not always present. Two examples spring to mind:

(1) A young resident of Ireland graduates from college, decides that instead of getting on the infamous 'property ladder' she will do a spot of travel abroad, and for whatever reason settles down for a while in some country she visits, though always intending to come back to Ireland.

(2) A retired resident of Ireland sells up her house in Cork, lodges the sale proceeds in her bank account, and moves to Spain for an indefinite time but intends to move back in the foreseeable future.

15. It seems to this Court that, for a time at least, each of the persons mentioned in these examples could be found to be 'ordinarily resident' in Ireland, notwithstanding that they do not enjoy any tenure of a physical premises here.

16. This Court respectfully prefers the 'dictionary definition' approach to determining 'ordinary residence' identified under sub-heading (1) above. Thus the court, for the reasons stated under sub-heading (1), considers that Mr Greene is not now ordinarily resident in Ireland; indeed at this time he seems only 'extraordinarily' to be resident here, and then only when he is on holidays from work abroad.

v. Discretion to refuse order for security for costs.
17. Notwithstanding that the court considers that (i) the defendant has established on affidavit that it has a *prima facie* defence on the merits to Mr Greene's claim, and (ii) Mr Greene is ordinarily resident outside Ireland, the court, as mentioned above, retains a wide discretion to refuse an order for security for costs in light of all the circumstances presenting. But what test is the court to apply in determining how to exercise this discretion? In this regard, the court recalls the decision last year in *Jack F. McCarthy III v. Football Association of Ireland and Others* [2014] IEHC 666, in which White J. observed, at para. 13:

> *"If residence outside the jurisdiction and impecuniosity are not of themselves the factors which entitle a defendant or respondent to an order for security for costs, but are merely matters to be taken into account by the court in exercising its discretion, what then is the decisive or determinative factor which establishes a threshold or test which will lead the court to exercise its discretion in favour of the granting or refusing of the order.*
>
> *In my opinion, this can only be the impossibility of enforcement of a costs order against the plaintiff in question, or substantially increased difficulty or expense in enforcing such costs order as compared to the enforcement of such an order against a plaintiff resident in Ireland or who had sufficient assets in Ireland."*

18. This Court respectfully agrees with this statement of the applicable law.

PART IV: THE PRESENT COST OF LEGAL REPRESENTATION

19. The court does not understand there to have been any suggestion by the defendant that it will be impossible for it to recover costs from Mr Greene. Indeed the monies that Mr Greene has already been paid by his assailant, coupled with the fact that Mr Greene, though now on leave of absence, holds a permanent contract of employment as a National School-teacher, offers the court a basis for concluding on the balance of probabilities, as it does, that such impossibility does not at this time present.

20. One oddity that does of course present is that the current cost of legal representation, as already touched upon by the court herein, is now often so great that the scale of a costs order emanating from the High Court in the event of Mr Greene being unsuccessful in his claim is likely to be such that Mr Greene may in any event face *some* difficulty in meeting it to the full. This being so the court finds itself in the curious position that it must conclude that Mr Greene's presently being ordinarily resident in Dubai does not yield the result that the defendant will face "*substantially increased difficulty or expense in enforcing such costs order*". This is because the defendant will likely face some such difficulty anyway. This, in turn, is because there are few plaintiffs who now have the resources immediately to hand to meet in full the type of costs now so often incurred by an opponent who enjoys legal representation during the course of High Court litigation.

21. These days, it sometimes seems that the only people who can bring High Court proceedings without fear of the costs arising are the very rich and the very poor. The very rich, blessed materially in life, have money to squander. The very poor, battered financially by life, have nothing more to lose. Meanwhile, the costs of legal representation now so often arising in civil litigation before the High Court are such that the great mass of people on middling incomes are generally fearful that they will be sued or may have need to commence court proceedings in order to vindicate their legal rights. Perhaps it was ever so; that does not mean it ought to be so; in point of fact, it should not. That it is so, however, seems to give a particular relevance to the observation of Hamilton C.J., at p.7 of his judgment in *Malone v. Brown Thomas & Company Limited and Anor* (Unreported, Supreme Court, 25th November, 1994), drawing on the judgment of Fitzgibbon J. in *Perry v. Stratham Limited* [1928] I.R. 580, that "*poverty*" (want of resources) is no justification for compelling a party to lodge security for costs. Transmuted into the context of the within proceedings, the court finds that Mr Greene's present want of cash-in-hand to meet fully the typically very high cost of legal representation at High Court proceedings is no justification for compelling him to lodge security for costs.

22. All the foregoing being so, the court is minded to exercise its discretion so as not to require any security for costs of Mr Greene.

PART V: CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

23. When it comes to applications for security for costs, the law falls to be considered within the penumbra of the constitutional right of access to the courts to defend and vindicate one's legal entitlements. This is a right of signal importance in any democracy, a right that received perhaps its finest articulation in the judgment of Walsh J. in *Byrne v. Ireland* [1972] 1 I.R. 241, and which was also considered by the Supreme Court in *Malone*. There, Hamilton C.J. observed as follows, at 12:

> *"Access to the courts is the constitutional right of every citizen: it is access not merely to the High Court* [and now also the Court of Appeal] *but also to this Court and no unnecessary monetary obstacle should be placed in the path of those who seek access to the courts."*

24. The court has indicated above why it is minded to exercise its discretion so as not to require any security for costs of Mr Greene. Were the court to decide otherwise it considers that it would, to borrow from *Malone*, be placing an "*unnecessary monetary obstacle*" in the way of Mr Greene in terms of his constitutional right of access to the courts. This conclusion further buttresses the court's resolve as to how it is minded in any event to exercise its discretion in this case.

PART VI: CONCLUSION

25. The court is not without sympathy for the defendant as it faces into the heightened level of expense that unfortunately, and unnecessarily, s at this time an almost standard feature of High Court proceedings in which parties are legally represented. However, for the reasons stated above, the court is coerced to refuse the order for security for costs sought in the within application.