

BETWEEN

JOHN GERARD CORCORAN

AND

MARTIN CORCORAN

AND

NEAGU ALEXANDRU

AND

AVIVA INSURANCE LIMITED

APPELLANTS/DEFENDANTS

FIRST NAMED RESPONDENT

SECOND NAMED RESPONDENT/PLAINTIFF

JUDGMENT of Ms. Justice Creedon delivered on the 26th day of January, 2018**BACKGROUND**

1. On the 4th of December, 2017, the second named respondent sought an order from this court, pursuant to the provisions of Order 29 of the Rules of the Superior Courts, directing that the appellants provide security for the second named respondent's costs in relation to the appellants' appeal of a decision of the President of the Circuit Court, Judge Groarke, dated 7th of July, 2015.

2. The case arose from a road traffic accident, which was alleged to have occurred on 24th of June, 2012. The President held that the accident was fraudulently staged by the appellants and dismissed their claim.

3. Both appellants currently reside in the United Kingdom.

LAW

4. Order 29 of the Rules of the Superior Courts 1986 was opened to the court by both parties. The pertinent section reads as follows:

"When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security."

5. Counsel for the second named respondent opened the case of *Angela Farrell v. Governor and Company of Bank of Ireland & Ors.* [2013] 2 ILRM 183, and specifically, Clarke J's judgment therein.

6. The case sets out the general principle that the court must be cognisant of when considering whether to grant an order for security for costs. At p. 192, Clarke J, quoting from *Delany and McGrath: Civil Procedure in the Superior Courts*, noted that:

"The authors suggest that the concept of ordering a party to provide security for the costs of an action effectively involves balancing the right of a defendant to recover costs if he successfully defends a claim against the right of a plaintiff, rooted in the Constitution, to have access to the courts."

7. At p. 197, Clarke J also stated:

"So far as individual plaintiffs are concerned the jurisprudence suggests that the High Court will not order security against an individual plaintiff unless that plaintiff is out of the jurisdiction (which in this context now includes, in practice, the European Union in respect of EU nationals)."

8. Clarke J went on to discuss the underlying rationale for such a principle:

"A plaintiff, through impecunious, must be entitled to bring and pursue a case. The awarding of security for costs against plaintiffs from outside the relevant area is based on the difficulty of recovering costs where the plaintiff is not readily amenable to the process of the Irish courts or other courts which, under the provisions of Regulation 44/2001, give a high level of recognition to orders (including cost orders) of the Irish courts."

9. At p. 197, Clarke J noted that the nature of the case necessarily impacts on an application for an order of security for costs:

"There are important differences of principle between the position that pertains before a court of first instance and that which arises in respect of an appeal."

Among these differences, Clarke J noted at p. 198 that by the appeal stage:

"The court has available to it a detailed account of the process which was engaged in by all parties before the court of first instance. Furthermore it is much easier for an appellate court to at least form some view on the likely chances of success or failure of an appeal. The facts have been found by the trial judge. Any argument that findings of fact which were important to the decision could not be sustained on appeal can only be directed to the limited basis on which this court can review findings of fact."

It was stated that an application for security for costs may be influenced by these considerations.

10. Counsel for the appellants opened the case of *Salthill Properties Limited and Brian Cunningham v. Royal Bank of Scotland plc, First Active PLC and Bernard Duffy* [2011] 2 IR 441, where Clarke J, in refusing an order for security for costs against the second plaintiff, stated at p. 450 that the rationale underlying Order 29 of the Rules of the Superior Courts 1986 is:

"To protect defendants from spurious claims which may be brought against them by plaintiffs who reside outside the jurisdiction and who may be able to evade any subsequent order as to costs made against them."

11. At p. 451, a two pronged test was established to guide the court when making such an order:

"In order for security to be ordered against an individual plaintiff, two conditions must be satisfied:

a) the plaintiff must be ordinarily resident outside of the jurisdiction; and

b) the defendant must have a prima facie defence on the merits of the plaintiff's claim."

However, it was suggested that even where both prongs of the test are satisfied, the court retains a significant discretion to decline to grant an order, if special circumstances exist which require said refusal.

12. Citing *Pitt v. Bolger* [1996] 1 IR 108 and *European Fashion Products Ltd & ors v. Eenkhoorn & ors* [2001] IEHC 181, Clarke J, at p. 453, highlighted that a plaintiff's residence outside of the EU is a condition precedent for the attainment of an order for security for costs:

"It seems clear therefore, on all of the authorities that the courts have not, to this point, recognised any jurisdiction to make an order for security for costs against an individual plaintiff who is not resident outside of both Ireland and the states governed by the now Brussels Regulation."

13. At p. 454 of his judgment, Clarke J noted that expansion of court's jurisdiction to grant such orders against plaintiffs resident within the EU would:

"Be properly brought about by a change in the rules or legislative intervention."

14. The appellant opened the case of *Fabiele Marques de Abreu v. Findlater Hotels Limited Trading as the Castle Hotel* [2017] IEHC 446, wherein an order for security for costs was awarded by Barrett J against a Brazilian national.

15. At para 6 of his judgment, Barrett J noted that the defendant would not have succeeded:

"If Ms. Marques de Abreu were now living in another European Union member state...given the relative ease with which judgments can now be enforced in the other 27 member states of the European Union."

16. The case of *Harlequin Property (SVG) Ltd and Harlequin Hotels and Resources Ltd v. Pdraig O' Halloran and Donal O' Halloran* [2013] 1 ILRM 124 was opened by the appellants. This case was decided by Clarke J in the High Court before his Supreme Court decision in *Farrell*. At p. 133 of his judgment, he stated:

It should be noted that the question of security for the costs of an appeal to the Supreme Court is governed by Ord. 58, r.16 of the Rules of the Superior Courts rather than Ord. 29."

RESPONDENT'S CASE

17. Counsel for the second named respondent emphasised that as a Supreme Court case, *Farrell* is binding on this court.

18. Counsel placed particular emphasis on Clarke J's comments in *Farrell*, concerning the impact that the nature of a case has on the court's willingness to grant an order for security for costs. It was highlighted that like the instant case, *Farrell* was an appeal case, as opposed to a case heard before a court of first instance. Note was given to the fact that *Salthill Properties Limited* was heard by a court of first instance.

19. It was conceded that both appellants reside in the United Kingdom and that due to the uncertain climate at present surrounding Britain's imminent departure from the European Union, the most appropriate course of action would be to adjourn the motion generally.

APPELLANTS' CASE

20. Counsel for the appellants relied on precedent set by *de Abreu* and *Salthill Properties Limited*. It was argued that as both appellants live within the European Union at present, the test as enumerated by Clarke J in *Salthill Properties Limited* is not satisfied, and therefore, the court must refuse the respondent's application for an order for security for costs. Emphasis was placed on p. 197 of Clarke J's judgment in *Farrell* to bolster this contention:

"So far as individual plaintiffs are concerned the jurisprudence suggests that the High Court will not order security against an individual plaintiff unless that plaintiff is out of the jurisdiction (which in this context now includes, in practice, the European Union in respect of EU nationals)."

21. It was noted that Clarke J in *Farrell* seemed to say that the court would be more willing to grant an order for security for costs in appeal cases than those heard by a court of first instance. However, counsel argued that Clarke J's distinction did not apply to de novo appeals from the Circuit Court to the High Court, wherein the facts and evidence are not treated by the appellate court as determined.

22. Counsel discussed that the Supreme Court case of *Midland Bank Limited v. David Crossley-Cooke* [1969] IR 56 SC which concerned a security for costs order sought by the defendant pursuant to Order 58 of the Rules of the Superior Courts, 1962. At the time, this was deemed the appropriate rule upon which an application for such an order could be granted in relation to an appeal to the Supreme Court. *Midland Bank Limited* was cited with approval by Clarke J in *Farrell*, another Supreme Court case. As such, counsel for the second named respondent contended that the order made in *Farrell* was granted on foot of Order 58 of the Rules of the Superior Courts, 1986, which deals with appeals and references to the Supreme Court, rather than Order 29 of the Rules of the

Superior Courts, 1986. Counsel for the appellants indicated that Clarke J's judgment in *Harlequin Property (SVG) Ltd*, is instructive as to his reasoning in his later judgment in *Farrell*. At p. 133 of his judgment, in the former, he states:

"It should be noted that the question of security for the costs of an appeal to the Supreme Court is governed by Ord. 58, r.16 of the Rules of the Superior Courts rather than Ord. 29." As such, counsel suggested that the cases of *de Abreu* and *Salthill Properties Limited*, are more pertinent to the instant case, as they both dealt with applications to the High Court for orders for security for costs on foot of Order 29 of the Rules of the Superior Courts, whereas *Farrell* seems to have concerned an application for an order in relation to a Supreme Court appeal, on foot of Ord. 58.

CONCLUSION

23. The test to be applied in this case is two-pronged, as set out by Clarke J in *Salthill*. In order for this court to grant a security for costs order, the following conditions must be satisfied:

- a) the plaintiff must be ordinarily resident outside of the jurisdiction, which is to include EU member states which are subject to the provisions of the Regulation No. 44/2001 or a party to the Brussels Convention; and
- b) the defendant must have a prima facie defence on the merits of the plaintiff's claim.

However, as suggested by Clarke J, it is acknowledged that where both prongs of the test are satisfied, the court retains a significant discretion to decline to grant an order, if special circumstances exist which require said refusal.

24. The reasoning underpinning the first prong of the above test is well-established and reflects the balance that must be struck between the defendant's right to recover costs against an impecunious plaintiff, if successful at trial, and the plaintiff's right to have litigation fairly conducted. A plaintiff must be permitted to pursue a case without unreasonable impediment. To unduly obstruct a plaintiff's access to the courts may be to defeat meritorious claims. Since Irish cost orders are readily enforced across the European Union, the court is generally reluctant to grant an order for security for costs where the plaintiff is ordinarily resident within one of the Union's 27 other Member States. This reluctance would understandably temper if the plaintiff was resident outside of the EU, in a jurisdiction where Irish court orders are not as easily enforced.

25. Both appellants in the instant case are ordinarily resident within the United Kingdom. Therefore, the application falls at its first hurdle.

26. This court is in agreement with Clarke J's statement in *Salthill Properties Limited*: that any expansion of the court's jurisdiction to grant orders for security for costs to cases involving plaintiffs resident within the European Union, is a matter for the legislature.

27. Counsel for the second named respondent argued that Clarke J in *Farrell* seemed to distinguish between appeal cases and cases heard at first instance, in that the court would be more willing to grant an order for security for costs in the former circumstance. Clarke J held at p. 198 that by the appeal stage:

The court has available to it a detailed account of the process which was engaged in by all parties before the court of first instance. Furthermore it is much easier for an appellate court to at least form some view on the likely chances of success or failure of an appeal. The facts have been found by the trial judge. Any argument that findings of fact which were important to the decision could not be sustained on appeal can only be directed to the limited basis on which this court can review findings of fact." Counsel for the appellants argued that Clarke J made this distinction about those cases appealed to the Supreme Court. In this way, the statement was not intended to apply to de novo appeals from the Circuit Court to the High Court, where the facts and evidence are not treated by the appellate court as determined and a full re-hearing is instead conducted. The court is persuaded by this argument.

28. Finally, despite the current political landscape and the uncertainty surrounding future British-EU relations: this court is not minded to grant an adjournment in the instant case. Negotiations pertaining to Britain's departure from the European Union are still ongoing. There is no clear indication as to how Irish orders will be enforced once secession is complete and it will likely be a long time before any instructive legislation is enacted. The court is bound to evaluate the matters before it on the law as it stands and not with an eye to hypothetical scenarios.

29. As such, the court hereby refuses to grant the second named respondent security for costs in this case.