THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 264

Court of Appeal No: 2014 997

Supreme Court No. 483/2013

Kelly J.
Irvine J.
Hogan J.

Between/

Rayan Restaurant Limited

Plaintiff/Appellant

- And -

Gerald Kean Practicing as Keans Solicitors

First Named Defendant/Respondent

- And -

Francis McGagh

Second Named Defendant/Respondent

JUDGMENT of the Court delivered by Ms. Justice Irvine on the 9th day of November 2015

1. This judgment relates to two separate applications for security for costs brought by the defendants/respondents pursuant to s. 390 of the Companies Act 1963. Each seeks an order of the court directing the plaintiff/appellant to provide security for their costs in respect of its appeal pending before this court.

Background

2. The within proceedings concern a claim for alleged professional negligence instituted in the High Court by the plaintiff ("Rayan") against its former legal representatives who were retained to defend its interests in Circuit Court proceedings concerning the forfeiture of a commercial lease relating to premises at High Street, Athlone, Co. Westmeath ("the premises") and in respect of which Rayan was the tenant. The first named defendant (Mr. Kean) was Rayan's solicitor and the second defendant (Mr McGagh) its counsel.

3. The plaintiff's statement of claim was delivered on the 23rd December 2010. Therein it is alleged that by reason of the defendants' negligence Rayan was unsuccessful in its claim to remain in occupation of the premises as the lawful tenant. Further, Rayan maintains that the defendants' failure to properly represent and defend its interests on an application for security for costs, brought in its appeal against the decision of the circuit court, resulted in the appeal being dismissed, thus causing it significant financial loss.

4. In April 2011, by separate notices of motion, the defendants sought to invoke Order 19, r. 28 of the Rules of the Superior Courts and the court's inherent jurisdiction for the purpose of seeking to have the proceedings dismissed on the grounds that they were bound to fail and/or that the pleadings failed to disclose a reasonable cause of action and/or were frivolous and/or vexatious. The second defendant also sought an order pursuant to Order 29 requiring Rayan to provide security in respect of his costs of defending the proceedings.

5. Those applications were heard in November 2011 following which a written judgement was delivered by White J. on 17 January 2012. In his judgment he referred to the fact that certain information critical to his determination of the issues had not been made available to him and, accordingly, he adjourned the motions to permit further affidavits to be filed. Thereafter, following a consideration of the further evidence, a second judgment was delivered on 12 June 2013. In that second judgment White J. concluded that certain aspects of the plaintiff's claim were frivolous and vexatious and that other aspects were bound to fail. Consequently, by order dated 26 June 2013 he dismissed the proceedings against both defendants. In light of that dismissal he refused the second named defendant's application seeking security for costs.

6. By notice of appeal dated 23 October 2013 Rayan has appealed the order striking out its proceedings and in response the respondents in the have issued the within application seeking security for their costs.

7. For the purposes of advancing their application and of establishing a prima facie defence to Rayan's appeal, Mr. Gerald Kean, on behalf of the first named respondent, and Mr. McGagh on his own behalf, have sworn detailed affidavits concerning the manner in which they represented Rayan in the Circuit Court and defended its interest on a security for costs application brought in the appeal from that decision. An extensive replying affidavit was sworn by Mr Djamel-Mennad and Ms Fatima Azizi, who are directors and each 50% shareholders in Rayan.

8. Relying upon their affidavits and the conclusions of Mr. Justice White in his judgments, the respondents assert that they have provided sufficient evidence to demonstrate first, that they have a good prospect of resisting Rayan's appeal, second, that in such circumstances Rayan will not be able to discharge their costs and, third, that there are no special circumstances that could justify this court refusing their application.

9. Having regard to the fact that Rayan has refuted each of these contentions it is probably necessary, notwithstanding the very detailed judgements of White J. and the extensive affidavit evidence, to set out in some greater detail the nature of the circuit court proceedings and the more substantial allegations of negligence made against the defendants in the present action.

The Circuit Court Proceedings.
10. It is not disputed that Rayan took an assignment of the original lessee's interest in the premises by Indenture of Assignment dated the 1 August 2002. By its terms, the annual rent of €45,000 was to be paid quarterly in advance. A separate company, Julia's Restaurant Company Limited ("Julia's) was incorporated to run a restaurant from the premises. Mr. Mennad and a Ms. Claudia Puscas each owned 50% of the shareholding in Julia's. Rayan maintains that it entered into an oral agreement with Julia's that it would run the restaurant and would discharge all outgoings on the premises including rent and that Ms. Puschas would be its manager.

11. The instalment of rent due on the 1st July 2003 was, according to the lessor, Mr. Bartholomew Flynn, not paid and as a result he re-entered and took possession of the premises on 24th July 2003. Thereafter, Julia's remained *in situ* as the caretaker to Mr. Flynn and the restaurant continued to operate.

12. Further to legal advice from its then solicitors, Circuit Court proceedings were issued on Rayan's behalf in which it maintained it was lawfully entitled to possession of the premises. Later, following legal advice from the defendants, an amended equity civil bill was issued on 12th September 2003. Therein, Rayan claimed that Julia's had repudiated the terms of the oral agreement in failing to pay the rent due on 1 July 2003 and that as a result Julia's and Ms Puschas were in unlawful occupation. It was also claimed that Mr Flynn had unlawfully re-entered the premises and that Rayan remained the lawful tenant and as such was entitled to possession of the premises. Rayan maintained as a result of the wrongdoing of all three defendants it had lost, *inter alia*, approximately €110,000 which it had spent on fitting out the premises.

13. A defence and counter claim was delivered by Mr Flynn wherein he sought an order declaring as lawful his forfeiture of the lease and also claiming payment of €22,500 in respect of arrears of rent which he maintained was then outstanding. As a result, on 4th February 2004, Rayan further amended its equity civil bill seeking a declaration that it remained in lawful occupation the purported forfeiture of its interest notwithstanding. In response to a motion brought by Mr Flynn seeking judgment in respect of the rent allegedly outstanding, Rayan agreed to lodge the sum of €11,250 in court which is duly did on the 5th November 2003,

14. As already stated, Rayan lost its Circuit Court proceedings in November 2004. Further, Mr Flynn was successful on his counterclaim and obtained a declaration that his re entry of the premises had been lawful. Thereafter, Rayan lodged a notice of appeal against the decision of Her Honour Judge Reynolds Buckley.

15. A successful application was then brought by the respondents to that appeal seeking security for their costs under s. 390 of the Companies Act 1963. Rayan was represented on that application by the respondents. The application was successful, apparently on the grounds that Rayan was not able to demonstrate that its inability to provide the security sought stemmed from the alleged wrongdoing on the part of the lessor. Security of €51,000 was later measured by the County Registrar. As Rayan was unable to provide that security as a result of which the appeal was dismissed by DeValera J. on 23 January 2006.

The High Court Proceedings
16. The statement of claim delivered on 18 June 2010 sets out a multitude of allegations of professional negligence against the defendants. Those which appear core to its claim are that the respondents negligently:-

> 1) Conceded, in the course of the Circuit Court proceedings, that the rent due under the lease was in arrears at the date the landlord re-entered the premises;
>
> 2) Failed to advance a case that Rayan remained in lawful possession and also failed to pursue relief against forfeiture, and
>
> 3) Failed to properly advise and defend the application for security for costs brought against Rayan in the Circuit Court appeal.

17. As to conceding that the rent due on 1 July 2003 had not been paid, the respondents contend that this was entirely appropriate and in accordance with their instructions. They rely upon the equity civil bill wherein Rayan sought to rely upon the non payment of the rent due on the 1st July 2003 as the basis for claiming that Julia's had repudiated its agreement with Rayan. They also rely on the fact that in defending the lessor's application for summary judgment in respect of the rent outstanding, Rayan gave an undertaking to, and later did, lodge the sum of €11,115 in court. They also refer to the affidavit of Ms. Asizi of 18 February 2005, sworn on the security for costs application wherein she accepted that the rent had not been paid on the due date and wherein she confined her complaint to an assertion that lessor had acted immorally in retaking possession with undue haste.

18. The respondents maintain that it is clear from the pleadings that they sought to maintain that Ryan remained in lawful possession of the premises. As to pursuing relief against forfeiture they rely upon the declaratory relief in the amended equity civil bill which they say makes clear that relief against forfeiture would, if necessary, be sought. That the Circuit judge was urged to consider granting relief against forfeiture is, they submit, borne out by a letter of advices furnished by Mr. McGagh dated the 16th October 2003 wherein he stated "If we are successful in convincing the judge to grant relief, the plaintiff will be returned his lease". Finally they refer to that aspect of Ms. Azizi's affidavit of 18 February 2005 which complained that relief ought to have been granted by the court against the harsh "harsh consequences of forfeiture" in light of the fact that the arrears of rent had been lodged in the Circuit Court.

19. As to the management of the 2005 security for costs application brought against Rayan following its appeal against the decision of the Circuit Court, the respondents each maintain that Rayan can have no legitimate complaint as to their conduct. They say that they advised Rayan fully as to the evidence that would be needed to resist the application and that it failed to produce the requisite evidence. It was not thus in a position to counter the defendants' assertion that Rayan had financial difficulties prior to the forfeiture and that its inability to provide security could not be linked to the defendant's alleged wrongdoing.

Discussion
20. Before this court, Mr Mennad filed a very extensive affidavit restating all of the allegations of negligence already mentioned together with very many more. He also filed detailed legal submissions for the purposes of demonstrating, firstly, as a matter of law that he was entitled to maintain proceedings for professional negligence against his solicitor and counsel and, secondly, to demonstrate as a matter of fact that he has evidence to support each of the complaints made against the respondents. Mr. Mennad urged that the security sought should be refused principally on the basis that it was the wrongdoing of the respondents that had placed Rayan in financial situation whereby it was unable to meet the security sought. His evidence in this regard and is legal submissions have been fully considered by this court.

Section 390 of the Companies Act 1963
21. The jurisdiction for this court on present application is relatively well settled. It is to be found in Order 86 of the Rules of the

Superior Courts, s. 390 of the Companies Acct 1963 and a number of well rehearsed legal authorities.

22. Order 86A, r. .9 provides: –

> "The Court of Appeal may under special circumstances direct that a deposit or other security and the amount fixed by the Court of Appeal be made given for the costs to be occasional [on] any appeal"

23. Section 390 of the 1963 Act provides:-

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in its defence, requires sufficient security to be given for those costs and may stay all proceedings until the security is given."

24. In *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7 Clarke J. summarised the relevant principles to be applied on such an application in the following manner:-

> "(1) In order to succeed in obtaining security for costs, an initial onus rests upon the moving party to establish: "
>
> (a) that he has a prima facie defence to the plaintiff's claim, and
>
> (b) that the plaintiff will not be able to pay the moving parties costs if the moving party be successful.
>
> (2) In the event that the above two facts were established, then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard, the onus rests on the party resisting the order. The most common examples of such special circumstances include cases were a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by them moving party or where there has been delay by the moving party in seeking the order sought. The list of special circumstances referred to is not, of course, exhaustive."

25. The rationale behind an order for security for costs is that it is acknowledged that individuals such as Mr Mennad and Ms Azizi, the shareholders of Rayan, will get the benefit of this action if Rayan succeeds, but they will be spared the adverse costs consequences should the company prove unsuccessful in its action, given that the assumption must be that if this happens the costs are most unlikely to be paid. One might reasonably ask why those who may benefit from the action should not be exposed to an order for costs if they fail. While the logic underlying the availability of the relief is obvious, it is nonetheless important to recognise that the effect of a successful application for security for costs at this point will have the effect of restricting Rayan's access to the court and potentially deny it a right of appeal against the High Court order, a matter of no small importance

Whether the defendant has established a *prima facie* defence.
26. The first leg of the test in *Connaughton* has to be altered somewhat having regard to the circumstances in which the present application for security for costs is brought. The onus on the respondents is confined to establishing a *prima facie* defence to Rayan's contention that its proceedings should not have been dismissed rather than that they have a *prima facie* defence to the substantive proceedings. Accordingly, this application is substantially different from an application by a defendant seeking security for costs in the High Court. There, the court must adjudicate upon the application without the benefit of any prior determination as to the likely merit of the defence. The judge has the unenviable task of deciding whether or not the defendant has established a prima facie a defence based upon evidence which is likely to be partisan.

27. Here, however, the application is brought against the backdrop of two detailed judgments of the High Court which adjudicated upon the precise issue under consideration on this appeal and then found in the respondents favour. Thus, the respondents are entitled to rely upon those judgements to satisfy the first leg of the test on the present application. In fact they have done more than was required of them to meet this test. They have complied with the guidance of Finlay Geoghegan J. in *Tribune Newspapers (in receivership) v. Associated Newspapers (Ireland) Limited* (ex. tempore, High Court, 25th March 2011) where at page ….of her judgement she stated as follows: –

> "What appears from the judgments, in a manner similar to the judgments relating to summary judgment, is that a defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish those facts. Mere assertions will not suffice.

28. The evidence upon which the respondents will rely to resist Rayan's appeal has been put before the court in great detail and there is nothing in the affidavit sworn by Mr. Mennad and Ms. Azizi which could cause this court to come to a conclusion other than that the respondents have established a *prima facie* defence to this appeal.

Rayan's ability to meet an Order for costs on the appeal.
29. It is accepted that Rayan will not be in a position to meet any order for costs that this court might make in favour of the respondents should it fail on the present appeal. That this is so is not surprising having regard to the fact that its appeal against the decision of the Circuit Court made on November 2004 was ultimately dismissed by DeValera J. due to the fact that Rayan was unable to provide security for costs of €51,000 as had been directed in the course of that appeal. Further, it is not disputed that the only reason that Rayan has not been wound up is that it is being kept alive for the purposes of prosecuting this action. Thus the only remaining issue to be determined on this application is whether or not there are special circumstances to justify refusing the relief sought.

Are there special circumstances to justify the refusal of the relief?
30. The special circumstances relied upon by Rayan is its assertion, on affidavit and in submission, that it is the respondents wrongdoing that has placed it in a position whereby it will be unable to discharge any order for costs as may be made against it on the conclusion of this appeal.

31. As to burden faced by the party who wishes to rely upon such an argument the judgement of Clarke J in *Connaughton* is informative. This is what he states is required by the party who seeks to advance such an argument:

> "in order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems

to me that for propositions must necessarily be true:

(1) that there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);

(2) that there is a causal connection between that actionable wrong and practical consequence consequences for the plaintiff;

(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which losses recoverable as a matter of law (for example by not being too remote) ; and

(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position".

32. Clarke J. proceeds to state further:

"3.8: in attempting to show special circumstances, it was incumbent on such a company to show, at least at a prima facie level, that were it not for the wrongdoing asserted is not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant.

It seems to me that if a plaintiff is not in a position to establish that fact (on a prima facie basis) , then a plaintiff will not have been able to show that its inability to pay costs is due to the wrongdoing which is at the heart of the proceedings".

3.10 :` in particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful".

33. This line of legal authority will be familiar to Rayan and its directors given that it faced an equivalent application in its appeal against the decision of the Circuit Court of November 2004. It is also relevant that in the present proceedings Rayan claims that the respondents were negligent in failing to represent it adequately on that application and, in particular, criticise their failure to properly advise as to the proofs required to successfully defend that application. Indeed, at paragraph 38 of Rayan's submissions on this aspect of its claim it asserts as follows:

"Without any aggregate exhibits in the affidavit of Fatima Zohora- Azizi before the court, the plaintiff (Rayan Restaurant Ltd) had no real prospect of successfully resisting the security for costs application and, on the very-well established state of the law at the relevant time this ought to have been very clear to the solicitor [Mr.Kean and counsel Mr. McGath)."

34. Mr Mennad in his replying affidavit also complains that Budd J. in his judgement on the security for costs application on the Circuit Court appeal was influenced by the fact that documents which might have been placed before the court by Rayan had not been produced. This is what he says about the judgement of Budd J at para.39: –

"He [Budd J.] emphasised that the plaintiff had not produced the necessary evidence for the court to find that special circumstances did apply in view of the lack of the establishment of prima facie special circumstances, such as the proving by the production of accounts or documents indicating assets held by the plaintiff company, and this despite the second defendant's solicitor having sought particulars and suggesting the furnishing of documents in support. He contended that the plaintiff company had considerable debts prior to 23 July, 2003, and that the plaintiff company had failed to adduce evidence that the court should not exercise its discretion to make an order for security for costs is no proofs of the special circumstances indicated in the O'Toole case had been given."

35. Of further significance is the fact that the present application follows a like application made by the second named respondent seeking security for costs in the High Court and wherein Ms Azizi and Rayan's accountant, Mr Nick Linnane both swore affidavits. Having considered that evidence White J. concluded that Rayan's evidence was wholly unsatisfactory for the purposes for which it had been advanced. In particular at paragraph 30 of his judgement of 12 June 2013 he referred to the absence of documents such as primary accounts, tax returns, VAT returns, audited accounts, bank statements, bank borrowings etc. He further referred to the affidavit of Ms. Azizi of 11 April 2005 wherein she averred that no tax returns had been filed on behalf of the company and that no assets were held by Rayan other than the lease at issue in the original proceedings.

36. Accordingly, it is clear that Rayan well knows that it shoulders the burden of demonstrating the existence of special circumstances and of its need to exhibit evidence to support its assertion that its inability to provide security stems from the respondent's wrongdoing.

37. It is somewhat surprising in light of Rayan's complaints against its own lawyers and its understanding of the criticisms made of its failure to produce documentary evidence in support of its financial status for the purposes of defending the two earlier applications for security for costs that it has yet again failed on this application to provide the necessary documentary evidence to support the loss it maintains it has suffered by reason of the respondent's negligence, together with evidence that but for that negligence it would have made sufficient profits such that it would be in a position to discharge the likely costs of a successful defendant. Its failure in this regard is even starker in light of the detailed evidence put before this court in the affidavit of Mr John Harding, chartered accountant, sworn on 27 March 2015 on the respondent's behalf and who in reaching his conclusions took into account the affidavit which had been sworn by Mr Linnane in the High Court security for costs application.

38. In his detailed report Mr Harding advised as follows:-

(a) that Rayan has not made available through the companies registration office its financial statements, abridged otherwise, for the period from its date of incorporation, 16th of April 2002 until 30 April 2005;

(b) that the company's stated liabilities exceeded its stated assets by €12,622 at 30 April 2013 and based on Mr Linnane's analysis the company had an excess of liabilities over assets of €12,129 Euro on 23 July 2003;

(c) that Rayan's impecuniosity predated 24 July 2003, the date upon which the lease was forfeited on the premises;

(d) that Rayan would be unable to pay an order for costs of the magnitude of €40,528.50 should it be unsuccessful in the present appeal.

(e) that Rayan was under financial pressure by reason prior to the 24th July 2003 by reason of the failure of the second named defendant in the Circuit Court proceedings, Ms. Pascau, to lodge the takings of the restaurant to the bank account of Julia's. Thus by July 2003 Rayan was not in control of either the operation of the restaurant or the takings of the restaurant.

39. The last of Mr Harding's conclusions are grounded in the averments of Ms. Azizi in an affidavit which she swore on 13 August 2003 in the Circuit Court proceedings for the purposes of supporting an application for an interlocutory injunction brought by Rayan against the defendants. Starting at paragraph 10 of her affidavit she deposed as follows: –

"(10). I say that pursuant to a management agreement between the plaintiff and the first named defendant [Julia's] it was agreed that the first named defendant would pay all outgoings on the premises out of the takings of the restaurant.

(11) I say that the restaurant opened for business in or around 20 May 2003. I say that I am aware that the restaurant has taken a substantial sum of money since its opening, being the sum of in or around €68,700, and furthermore that the weekly turnover of the restaurant is in or around a sum of €10,000.

(12) I say that the first named defendant, it servants or agents, wrongfully and in breach of contract did not discharge the said outgoings as agreed and I say and am advised that this was due to the actions of the second named defendant in failing to lodge the said takings into the first named defendant's company bank account and in failing to account to the first named defendant therefore.

(13) I say that the plaintiff has discharged the rent up to the end of June 2003 due to the landlord without recourse to the said restaurant takings but due to financial pressures the Plaintiff has been unable to discharge the arrears since the beginning of July 2003 which are in the order of €11,250. I say that I am fearful that the landlord will seek to exercise his right to forfeiture and re-entry onto the lease".

40. Accordingly, whilst Rayan submits that "it would be manifestly unfair to penalise the plaintiff by an order for security for costs when the defendants herein are directly responsible for the state of the plaintiff's finance", it has failed to demonstrate the likelihood of that proposition. It has failed to produce evidence to support the nature of the loss which it claims flows from the defendant's wrongdoing. Neither has it demonstrated that but for the wrongdoing asserted against the respondents it would not have sustained that loss and that it would have made sufficient profits such that it would be in a position to pay the likely costs of a successful defendant. In this regard it must be remembered that it was Julia's that was running the restaurant and that Rayan had no access to the takings of the restaurant at the time the lease was forfeited. It was these factors that lead to the non payment of the rent and the consequential forfeiture of the lease.

41. Why no effort was made to counter the conclusions of Mr Harding is unclear. The directors of Rayan have produced a very lengthy affidavit and equally detailed written submissions. However, it has not discharged the burden of proof of establishing the existence of special circumstances which would deny the respondents the relief which they seek.

42. Mr James Flynn, legal cost accountant of Lowe Redmond and Associates, has in his affidavit of the 9th March 2015 assessed the legal costs likely to be incurred by the second named respondent on the appeal in the sum of €40,528.50 based upon a possible one day hearing. No evidence has been produced by Rayan to challenge the validity of that estimate.

43. The first named defendant at para. 84 of its affidavit dated 19th June, 2015, refers to the potential costs of the second defendant as outlined in the aforementioned affidavit of Mr. James Flynn. Mr Kean avers to the fact that the scale of his firm's costs on the appeal will at the very least match those of the second named defendant. That being so and in the absence of any contest by Rayan to that assertion, this Court is prepared to accept that the first named defendant's costs of defending the appeal will be not less €40,528.50

Conclusion

44. For all of the reasons advanced in the course of this judgment the Court will make an order that Rayan's appeal be stayed until such time as it provides in respect of each defendant a sum of €40,528.50 as security for their costs of the appeal.