

THE HIGH COURT

[2012 No. 11647 P.]

BETWEEN

JACK F. MCCARTHY III

PLAINTIFF

AND

FOOTBALL ASSOCIATION OF IRELAND("FAI"), JOHN DELANEY, RORY SMYTH, PADRAIG SMITH, NOEL MOONEY, LIMERICK DISTRICT COUNCIL("LDC"), PATRICK O'SULLIVAN AND MUNSTER FOOTBALL CLUB LIMITED

DEFENDANTS

JUDGMENT delivered by Mr. Justice Michael White on the 14th day of October 2014

1. By way of motion the first, second, third, fourth and fifth named Defendants have applied for an order for security for costs against the plaintiff.

2. The plaintiff issued a plenary summons on 16th October, 2012, and served a statement of claim on 30th November, 2012.

3. The first, second, third, fourth and fifth named defendants have not filed their defence. Sarah O'Shea, Legal Director of the FAI in an affidavit sworn on 22nd November, 2013, asserts that the plaintiff's claim against those defendants alleging fraudulent inducement to enter a contract to purchase Limerick FC is without merit and that a full defence will be filed.

4. By letter dated 10th October, 2013, A&L Goodbody Solicitors on behalf of the defendants wrote to the plaintiff seeking security for costs. The plaintiff replied on 6th November, 2013, stating he would oppose any application for security for costs. During this period of time, the plaintiff represented himself.

5. The plaintiff in his affidavit has raised the defence that the defendants' wrongful actions have left him unable to provide security for costs as he has no liquid assets. He also states that he is an Irish citizen with longstanding and deep ties to this jurisdiction. He attempted to commence proceedings in the United States but the US Courts rejected jurisdiction. He denies that the proceedings are frivolous, and asserts he is not insolvent.

6. The plaintiff resides and carries on business outside of the jurisdiction of the European Union. He is a lawyer who works and lives in the State of New Jersey in the United States.

7. When issuing the plenary summons, the plaintiff gave his address as 8 Herbert Place, Dublin 2. The plaintiff accepts that this property is not in his personal ownership but is held by a New Jersey Limited Liability Company, "Herbert Place LLC." The property is a three unit residential Georgian property. The plaintiff assures the court that he has a controlling interest in this company.

8. If the first to fifth named defendants were successful in defending the action they would not be able to enforce any order for costs against this property as the ownership is in the name of a limited liability company.

The Law

9. Order 29 of the Rules of the Superior Courts provides for an application for security for costs

10. The important balance to be observed is the right of a defendant to recover costs when successful in the defence of a claim, against the plaintiffs constitutional right of access to the courts.

11. In an action by an individual plaintiff, two conditions should be satisfied:-

(a) The plaintiff must be ordinarily resident out of the jurisdiction; and

(b) the defendant must have a *prima facie* defence on the merits.

12. However, even when these two conditions are satisfied, the court retains a wide discretion and can refuse to order security where there are special circumstances. In addition, where a plaintiff has made out a *prima facie* case that there is an inability to provide security due to the defendants' wrong, it is unlikely security will be granted (Delaney & McGrath's *Civil Procedure in the Superior Courts*, 3rd Ed., Chapter 13).

13. The issue was addressed in *Ditt v. Krohne* [2012] 3 I.R. 120 at p. 125 where O'Neill J. stated:-

An additional requirement is that expressly stated in O. 29, r. 3, namely, that the defendant disclose on affidavit that he has a defence upon the merits. In this case, as noted earlier and as set out in the affidavits, the claim, having been made by way of summary summons, was remitted for plenary hearing and a statement of claim and defence have been delivered. I am satisfied from all of this that the defendant in this case has satisfied the requirement of demonstrating on affidavit a *prima facie* defence on the merits.

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.”

14. This Court is satisfied that the first to fifth named defendants have a *prima facie* defence on the merits. The plaintiff does not have any assets in his own name in this jurisdiction.

15. The issue of citizenship is irrelevant to the determination of the claim. The court must exercise its discretion based on the ordinary residence of the plaintiff and his place of business, rather than his citizenship.

16. The plaintiff has not made out a case that the inability to provide security for costs flows from the first to fifth named defendants’ wrong.

17. There are no special circumstances which indicate that the court in its discretion should refuse the order sought.

18. The action is a highly controversial one where the parties are in dispute, and in the circumstances it is appropriate to grant an order for security for costs.

19. The court is amenable to have this dealt with by way of an appropriate charge or arrangement in respect of the property, 8 Herbert Place, Dublin 2, as an alternative to a cash lodgement.