Neutral Citation: [2014] IEHC 164

THE HIGH COURT

[2010 2447 P]

BETWEEN

INTERFUND GLOBAL SERVICES LIMITED

PLAINTIFF

AND

PASCARN SERVICES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered the 28th day of March, 2014

Background

1. The plaintiff in this action is a company incorporated under the laws of Nigeria. The defendant is an Irish company which has its registered office at Chequepoint House, Clifton House, Fitzwilliam Street Lower, Dublin 2. On or about 30th May, 2008, the plaintiff entered into a written agreement with the defendant whereby the plaintiff agreed to disperse remittances collected by the defendant from third parties in various jurisdictions and to pay these to beneficiaries in the Federal Republic of Nigeria. The business operated in the following manner. People would deposit money with the defendant at various outlets throughout the United Kingdom. The defendant would take details of the intended beneficiaries in Nigeria. The defendant would then instruct the plaintiff in Nigeria to disperse the funds to the designated beneficiaries. The defendant was to reimburse the plaintiff in pounds sterling and to pay interest on the remittances on the Monday and Thursday of each week.

2. Unfortunately, the contract between the parties did not work out in the manner intended. The plaintiff claims that the defendant has failed to pay to it the sum of STG£785,067.77 which it says is lawfully due and owing to it under the contract. The proceedings have had a fairly tortuous progress to date. For reasons that will become apparent later in this judgment, it is necessary to set out the chronology of the proceedings to date:

09.03.2010 Plenary summons

24.03.2010 Entry of appearance

19.04.2010 Statement of claim

29.11.2010 Plaintiffs motion for judgment in default of defence

19.01.2011 Defence and counterclaim

14.02.2011 Plaintiffs notice for particulars

27.05.2011 Defendant's replies to particulars

07.07.2011 Rejoinders

30.01.2012 Plaintiffs first motion to compel replies to particulars

27.04.2012 Defendant's second replies to particulars

25.05.2012 Second motion to compel defendant's replies

30.07.2012 Order of Gilligan J. compelling replies to particulars

10.01.2013 Plaintiffs third motion seeking replies to particulars

20.02.2013 Defendant issues motion to dismiss claim pursuant to Order 19, rule 28 and/or for security for costs

04.03.2013 Return date for plaintiff’s motion for particulars

22.04.2013 Return date for defendant's motion

08.07.2013 Defendant's third replies to particulars

16.12.2013 Hearing of both motions.

3. The plaintiff had to bring three motions in order to obtain particulars from the defendant of its defence and counterclaim. When the matter was before me on 16th December, 2013, I directed that the plaintiff should set out the areas in which it is felt that the latest set of replies were deficient. The defendant then had four weeks to furnish the replies. The costs of the motion were awarded to the plaintiff.

4. The second matter before me on that occasion was an application by the defendant seeking security for costs. There was quite some confusion as to whether the application was to be moved under O. 29 of the Rules of the Superior Courts, or s. 390 of the Companies Act 1963. The notice of motion sought the following reliefs:-

(1) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the plaintiffs action on the basis that the case is frivolous and vexatious and there is no reasonable cause of action.

(2) In the alternative, an order for security pursuant to s. 390 of the Companies Act 1963.

5. However, at the hearing of the motion and in their written submissions, the defendants sought to move the application pursuant to O. 29 of the Rules of the Superior Courts. The defendant maintains that the legal principles applicable to applications pursuant to s. 390 of the Companies Act 1963, would apply to this case. Counsel for the defendant pointed to the decision in *Harlequin Property (SVG) Ltd & Anor v. O'Halloran & Anor* [2013] 1 ILRM 124. It is to be noted that, at para. 1.3 of his judgment, Clarke J. stated as follows:

A. That, by virtue of the fact that the Companies Act 1963 ('the 1963 Act') did not apply to either of the plaintiff companies (both being foreign companies), the application fell to be considered under O. 29 of the Rules of the Superior Courts ('Order 29 ').

B. That the parties agreed that, in all the circumstances of the case, the question of whether Harlequin should be required to provide security for costs under Order 29 fell to be considered by reference to the same principles as would, in fact, apply in an application for security for costs under s. 390 of the 1963 Act.

6. Before coming to the substantive matter in this motion, it is necessary to deal with a technical issue which was raised by the defendant.

Technical Deficiencies in the Affidavits

7. The defendant made the point that there were a number of technical deficiencies in the affidavits sworn on behalf of the plaintiff in Nigeria. In particular, it is argued that the jurats in a number of the affidavits were deficient in that it was not stated therein that the Commissioner for Oaths knew the deponent. Furthermore, it was noted that various exhibits had not been signed by the deponent.

8. Order 40, rule 15 of the Rules of the Superior Courts provides as follows:-

The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

9. In *S.A. v. Refugee Appeals Tribunal & Ors* [2012] IEHC 8, Hogan J. set out the following principles that should be applied when the court is considering a breach of the rules of court:-

11. In this regard, I would venture to repeat what I said in the context of an application to extend time to deliver a defence in O'Connor v. Nurendale Ltd. [2010] IEHC 387:-

> *'None of this, however, requires that the judicial discretion to strike out for want of defence must be exercised in an unbending, mechanical or unforgiving fashion. Quite the contrary: the courts must, to some extent, accommodate ordinary human frailties, failings and foibles, at least where it is possible to do so without material injustice to the other party.*

12. This general approach to non compliance with procedural rules has been consistently followed in this jurisdiction. Thus, for example in Director of Public Prosecutions v. Corbett [1992] I.L.R.M 674, 678 Lynch J articulated similar sentiments, again, admittedly, in the content of an application to amend pleadings:-

> *The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While Courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendments should be made. If there might be prejudice which could be overcome by an adjournment then the amendments should be made and an adjournment also granted to overcome the possible prejudice and if the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses.*

13. In O'Leary v. Minister for Transport [2000] IESC 16, [2000] 1 I.L.R.M 132 McGuinness J. expressly approved this passage, saying that it represented 'an application of principle which is in accordance with justice'

14. To this I would add the comments of Millett L.J. in Gale v. Superdrug Stores plc [1996] EWCA Civ 1306, [1996] 1 W.L.R. 1089:-

> *'The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The Rules provide for misjoinder and nonjoinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice.*
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> *The general principles which govern the Court's approach to an application to amend the pleadings is to be found in the well-known and often cited passage in the judgment of Bowen LJ in Cropper v Smith (1883), 26 Ch.D. 700, 710-11:-*
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> *'It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or grace....It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.*

10. I am satisfied that the affidavits are readily intelligible in the form in which they have been sworn in Nigeria. While there are technical deficiencies in the jurats on a number of the affidavits and while the exhibits do not appear to have been signed by the deponents, I am satisfied that it would impose an injustice on the plaintiff to refuse to admit the affidavits in evidence on this account. In the circumstances, it is appropriate for the court to exercise its discretion under O. 40, r. 15 to admit the affidavits in evidence.

Consideration of the Section 390 Principles
11. It has longed been settled that in pursuing an application under s. 390 of the Companies Act 1963, the applicant has to establish that it has a *prima facie* defence and that the plaintiff is unlikely to be in a position to discharge an order for costs which may be made against it in favour of the defendant at the end of the proceedings. If the defendant can establish these two matters, the onus then shifts to the plaintiff to establish special circumstances which would lead the court to exercise its discretion against the making of an order for security for costs.

12. In this case, the plaintiff resists the application on two grounds: first, that the financial evidence before the court establishes that the plaintiff is solvent and would be in a position to discharge any order for costs that may be made against it in the proceedings; and secondly, that there has been delay on a part of the defendant in seeking security for costs, such that they are disentitled to such relief this late in the day. It is necessary to consider both of these issues.

The Financial Position of the Plaintiff
13. An affidavit was sworn by Mr. Uduma Kalu on 11th October, 2013. He is a director and shareholder in the plaintiff company. In the course of that affidavit, he exhibited the company's accounts for the period 2008 to 2012. He stated as follows in relation to the accounts for 2012:-

> *4.2 For the purpose of this application, I believe that it is appropriate to consider the most current accounts, namely the 2012 accounts. This is because this reflects the financial state of the company at the latest possible time in order to give the most recent and relevant picture.*
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> *4.3 In order to be solvent, a business needs to have its working capital, that is, its current assets greater than its current liabilities. The plaintiff's accounts clearly demonstrated solvency following this definition. Current assets for the year ended 3 F1 December, 2012, amounts to Nigerian Naira (N), N909,362,000. This converts to the sum of€4,158,090 at the rate of N219,21(€1) ...*
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> *4.5 Fixed assets over the same period amounts to N99,442,000 (€454,702). This produced a total of N1,008,804,000 (€4,706,340). Over the same period the current liabilities amount to N403,805,000 (€1,883,860) producing a surplus of N604,999,000. Profit before tax amounts to N304,239,000 (€2,822,480) and the provision for tax N93,242,000 (£434,999). Profit after tax is there shown as N210,997,000 (£984,357).*

14. This evidence has not been contradicted by the defendant. There is no evidence led on behalf of the defendant to the effect that the plaintiff would not be able to discharge the costs in the event that it looses the action. In these circumstances, I find that the defendant has not established the second limb of the test under section 390. It has not been established that the plaintiff would be unlikely to be able to pay the costs should it loose the action. Accordingly, I hold that the defendant is not entitled to an order for costs pursuant to s. 390 of the Companies Act 1963.

Delay
15. In this case, the proceedings were commenced by plenary summons issued on 9th March, 2010. By letter dated 13th June, 2012, the defendant wrote to the plaintiff informing it that the evidence of the defendants would be that the cost of a two or three day hearing in the High Court would be likely to amount to the sum of €180,000. The letter went on to call on the plaintiff, pursuant to O. 29, r. 1 of the Rules of the Superior Courts, to confirm within 48 hours that it would provide security for costs. In the event of this conformation not being forthcoming, the defendant said that it would proceed by notice of motion. There was no response to this letter. The present motion issued on 20th February, 2013.

16. It has long been held that delay in seeking security for costs will disentitle a party to the reliefs sought. In *SEE v. Public Lighting Services* [1987] ILRM 255, McCarthy J., giving the unanimous judgment of the Supreme Court, held that a delay of seven months between the serving of a notice of appeal and the bringing of the motion was excessive, having regard to the fact that during that period the plaintiff/appellant had undertaken the expense of preparing a transcript of the evidence from the notes of counsel.

17. In *Hidden Ireland Heritage Holdings Limited v. Indigo Services Limited & Ors* [2005] 2 IR 115, the Supreme Court held that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances and, in the end, will seek to find a fair balance. In that case, Fennely J., at pp. 123-124 of the report, stated that a delay of approximately of one year was a material matter:-

> *40. More importantly, I believe that the delay in seeking security, amounting to approximately one year, is a material matter. Being fully aware of the financial weakness of the plaintiff, they allowed and even encouraged the action to proceed. In addition, on the 1st March, 2002, at a time when it was open to him to apply for security, the second defendant chose instead to address an entirely improper communication to one of the plaintiff's members. If this letter by fax had any purpose other than being merely abusive, it can only have been to bring pressure to bear to have the litigation stopped, inter alia, by threatening that the second defendant would be unable to meet the costs of the action himself ..*
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> *42. I am satisfied that, in the particular circumstances of the present case, the second and third defendants, particularly the former, have delayed to such an extent and have otherwise behaved in the conduct of the litigation so as to deprive themselves of the entitlement to ask the court to exercise its discretion in their favour. I believe these matters qualify as special circumstances. I would allow the appeal and substitute an order dismissing the application.*

18. In *County Monaghan Anti-Pylon Limited v. Eirgrid Plc* [2012] IEHC 103, Charleton J. looked at the matters which could form special circumstances such as to persuade a court to exercise its discretion against making an order for security for costs. In relation to the issue of delay, he stated as follows:-

> *14. Secondly, there may be delay in bringing a security for costs application. The reason for that may be important. Such delay, however, can be an important factor in refusing to make that order; S.E.E. Co Ltd v Public Lighting Services Ltd [1987] I.L.R.M 255. In the Interfinance Group case, Morris P referred to delay by the moving party as being among*

the most common examples of special circumstances for refusing to make the order. The court would need to analyse the nature of the delay, in the light of the means of knowledge of the moving party as to what that party knew or ought reasonably to have known, and assess its impact on the course of the case in order to decide whether the order should be made. Delay as a reason for refusing to make the order can occur where the plaintiff company has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security; S.E.E. Co. Ltd. v. Public Lighting Services Ltd. [1987] I.L.R.M 255.

19. A similar approach was taken by Morris P. in *Beauross Limited v. Kennedy* (Unreported, High Court, 18th October, 1995).

20. In the present case, the proceedings commenced by plenary summons issued on 9th March, 2010. The letter requesting security for costs was issued on 13th June, 2012. The notice of motion seeking security for costs did not issue until 20th February, 2013. During the almost three year period between the commencement of the action and issuing of the motion seeking security for costs, the plaintiff had to issue numerous motions against the defendant in respect of this case. First, the plaintiff had to issue a motion seeking delivery of a defence by the defendant. This was eventually delivered some eight months after receipt of the statement of claim. The plaintiff then had to issue a number of motions seeking replies to the notice for particulars issued by the plaintiff. It was necessary to return to the court on a number of further occasions to secure compliance with the orders made by the court. Indeed, the plaintiff maintained at the hearing of this application that the defendant had not yet furnished adequate replies to the matters raised by the plaintiff in the notice for particulars. In this regard, it was argued that the defendant continued to be in breach of the order made by Gilligan J. on 30th July, 2012. This state of affairs was established in evidence and the defendant was given a further period within which to furnish the replies sought.

21. In addition, after the motion seeking security for costs had issued, the plaintiff incurred considerable costs in countering allegations made by the defendant to the effect that the plaintiff company did not exist and that the lawyer who had sworn affidavits on behalf of the plaintiff was not licensed to work in Nigeria. These allegations were untrue. The plaintiff had to go to considerable trouble and expense to have affidavits sworn and documents exhibited proving that the plaintiff company did, in fact, exist in Nigeria and that the deponent was a practising lawyer in Nigeria. While this expense occurred after the notice of motion, it is still relevant to a consideration of the case at this juncture.

22. In the circumstances, I am satisfied that there has been a significant delay by the defendant in bringing the application seeking security for costs. On this ground, the defendant's application for security for costs is refused.

The Application under Order 29 of the Rules of the Superior Courts

23. It was not clear to what extent the defendant was pursuing the application under Order 29. The relevant part of that rule provides as follows:-

1. 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.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. 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 defendant has a defence upon the merits.

4. 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.

24. In *Ditt v. Krohne* [2012] IEHC 312, O'Neill J. gave the following analysis of the operation of this provision in the rules:-

15. 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.

16. 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.

17. In this context, it is to be observed that impecuniosity would have to be considered an irrelevance because if impecuniosity of an Irish resident plaintiff is not a ground for security for costs, then impecuniosity of a foreign resident should, in like manner, be discounted. To do otherwise is to risk breaching the principle of equality before the law as set down in Article 40.1 of the Constitution.

25. While the plaintiff is a company registered in Nigeria, I am satisfied that the defendant is not entitled to an order for security for costs under this rule due to the inordinate delay on the part of the defendant in bringing this application.

Conclusion

26. For the reasons set out in this judgment, I am refusing the defendant's application for an order that the plaintiff should provide security for costs.