Neutral Citation: [2014] IEHC 293

THE HIGH COURT

Record Number: 2013 No. 6297P

Between:

Irish Bacon Slicers Limited

Plaintiff

And

Weidemark Fleischwaren GmbH & Co

Defendant

Judgment of Mr Justice Michael Peart delivered on the 30th day of May 2014:

The Court has to decide whether the plaintiff is entitled to its costs of a motion seeking an interlocutory injunction which it issued (having been granted an interim injunction on 21st June 2013), in circumstances where after a number of affidavits were filed on each side, the matter came before Ms. Justice Laffoy on the 23rd July 2013. On that date the defendant informed the Court through its counsel that it was prepared to give an undertaking not to do that which was sought by the plaintiff to be restrained pending any hearing of the issues between the parties.

I should explain the background briefly. By letter dated 14th June 2013 William Fry solicitors for the defendant wrote to the plaintiff company calling upon it to discharge a sum of almost €800,000 by close of business on the 19th June 2013, being a debt which they said was owing to their client. They went on to state that they had been instructed by their client that in the event that this payment was not made within that four day period High Court proceedings would be issued to recover the debt. However, the letter concluded as follows:

> *"Without prejudice to the foregoing, our client reserves its right to rely on all remedies available to it including issuing a Petition to the High Court for the winding up and the appointment of a liquidator to Irish Bacon Slicers Limited "*

The plaintiff company believes that it is not indebted to the defendant company in this sum or indeed any sum, and instructed Michael Powell solicitors to respond to that letter and say so. That firm wrote on the 19th June 2013 saying that the plaintiff was completely taken aback by the demand, and that there was no contractual relationship between the plaintiff and the defendant, and called upon William Fry to set out the basis of their client's claim.

They went on to note the reservation of rights in relation to presenting a Petition to the High Court to wind up their client, and stated that there were no grounds to justify taking such action given the absence of any contractual relationship between their respective clients, and made the point also that the five day period specified for payment did not meet the requirements of the Companies Act, 1963 for the purposes of presenting a Petition. The letter called for an undertaking to be given by 5.30 pm that same evening that no effort would be made to petition the High Court to wind up the plaintiff company, and concluded by stating that if that undertaking was not received, they would have no option but to apply to the High Court for an injunction to restrain their client from proceeding as they had threatened in their letter. No such undertaking was given in response.

In the final paragraph, Michael Powell solicitors stated:

> *"Should it become necessary for us to make such an application, you should note that we will produce a copy of this letter to the court in support of any application which our clients may be advised to make for the recovery of their legal costs."*

As I have said, when the matter came before Ms. Justice Laffoy on the 23rd July 2013, Counsel for the defendant stated to the Court that his client was prepared to give the undertaking not to present a Petition to wind up the plaintiff company, and that separate High Court proceedings would be issued by it in order to recover the amount claimed to be due. Counsel for the plaintiff said that the undertaking was acceptable but it sought its costs of the motion which it had brought seeking the interlocutory i unction. That issue was put back and came before me for argument.

Andrew Fitzpatrick BL for the plaintiff makes a straightforward submission. He says that costs should follow the event in accordance with Order 99 RSC, that event being the disposal of the plaintiff's motion by the giving of an undertaking by the defendant, indeed the very undertaking which the plaintiffs solicitors had sought in their letter to William Fry dated 19th June 2013. He makes the point also that this undertaking by the defendant did not result from any process of negotiation between the parties. The plaintiff was ready to pursue its injunction on the day, and it was the defendant who unilaterally indicated to the Court that it was prepared to give the undertaking in terms of the i unction sought.

Mr Fitzpatrick submits that it was clear from the receipt by the defendant of the plaintiff's solicitors' letter that the claim in respect of the amount referred to in the letter of demand was being contested. It is submitted that once that position was made clear, the defendant could and should have confirmed that no Petition would be presented to wind up the plaintiff company, and that the claim would be pursued in the ordinary way by way of Summary Summons, or indeed by way of Plenary Summons if the defendant so chose, as is now going to happen.

Mr Fitzpatrick submits that the plaintiff company was entitled and obliged to take very seriously a threat from William Fry solicitors (on behalf of its client) to present a Petition to wind up the company if the debt was not discharged within the time specified, and to take it even more seriously when it appeared that the requested undertaking was not forthcoming. He points out that a person or party claiming to be creditor of a company may present a Petition in the Central Office without leave, and having done so may then proceed to publish the Petition as required under the relevant procedures in order to notify other possible creditors of the hearing of the Petition to wind up the company in the High Court. The danger inherent in the threat of such a Petition is obvious for any company which denies the validity of the claim being made, and Mr Fitzpatrick submits that in the absence of any indication that the

requested undertaking would be given it was entitled to issue proceedings seeking injunctive relief in order to protect its reputation, since it regarded any procedure by way of petition to wind up to be an abuse of process.

Ciaran Lewis BL for the defendant resists the application for costs and submits that on the application for the interlocutory injunction the defendant took a pragmatic view that the appropriate way to proceed was to simply give the undertaking to the court, and then bring proceedings to recover the debt in the usual way, when the issues which were raised by each parties in their affidavits filed on the interlocutory application could be determined on oral evidence. He submitted that in these circumstances it was appropriate that the costs of the injunction proceedings should await the outcome of the claim on the debt, and be reserved until that determination.

Mr Lewis has submitted that in so far as Order 99 RSC is concerned, there has in fact been no 'event' for the award of costs to follow. He submits that 'the event' will in due course be the determination of the issue as to whether or not the plaintiff is indebted to the defendant.

He submits that the giving of the undertaking should not be seen as a capitulation or an acceptance that the plaintiff is not indebted to the defendant. His client maintains that money is owed by the plaintiff company, and that the plaintiff has no bona fide defence to the money claim being made. The respective affidavits filed thus far by the parties make clear how that claim is made, but also the basis on which it will be defended in due course. He submits that as the issues between the parties have not yet been determined, the costs issue should await the outcome of the debt recovery proceedings and be reserved to that event.

I have been referred to a couple of cases in particular on the issue of how the Court should approach the award of costs where the matter before the Court does not proceed because there has been some compromise, or where the need to continue to a hearing has been removed, such as in the present case where the defendant gives an undertaking sufficient to remove the need to proceed with the injunction application. Prior to an amendment to Order 99 RSC by the insertion of rule 1(4A) therein in 2008 the almost invariable practice was to simply reserve the costs to the determination of the main proceedings and deal with it then. However, that has now been changed so that the Court is required to make an order on an interlocutory application, save where it is considered that it might be unjust to do so.

The Court has been referred to the judgment of Laffoy J. in *O'Dea v. Dublin City Council* [2011] IEHC 100. That was a case where the plaintiff brought an application for an interlocutory injunction. Having been part-heard the application was adjourned to the following day, and overnight some compromise was reached between the parties which satisfied the plaintiff. Not only was there no need to pursue the injunction application but the Court was informed also that there would be no need for the substantive proceedings to be continued. The Court had to decide how the question of costs should be dealt with in such circumstances - each party seeking costs against the other. She first considered whether there had been any 'event' in these circumstances, and without wishing to express a definitive view in this regard, stated that "*what the Rules envisage is a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event such as an agreement of the parties in which the Court has not been involved*".

In *O'Dea*, Laffoy J. concluded that no order for costs should be made, meaning that each side should bear its own costs. But she appears to have been influenced to make such an order because even if she was to award the defendant its costs, which she seemed inclined to do, the plaintiff was never going to be a mark for those costs. Before reaching her final conclusion, the learned judge considered what issues would have been before the Court for its determination on the application before it, namely the issues necessary to be determined on the application for interlocutory relief, rather than the substantive issues which would await the ultimate trial of the case. The first issue she considered would arise was whether the plaintiff had a strong arguable case, since it was a mandatory injunction that was being sought. She doubted very much if the plaintiff could have surmounted that first hurdle had the injunction application proceeded. But even if she had, and the Court did in fact grant the injunction sought, Laffoy J. considered that it was by no means certain in that case that the Court would have awarded the plaintiff her costs against the defendant because of the saver within O.99, rule (1)(4A) RSC that the Court is not required to make any award at that interlocutory stage if it is not possible to justly adjudicate on the liability for costs.

Mr Fitzpatrick has sought to distinguish the O'Dea case on the basis that in that case there had been a negotiated settlement between the parties which resulted in the plaintiff no longer wishing to proceed with her injunction application and, indeed, the substantive proceedings, whereas the supervening event in the present case is simply that the defendant gave the undertaking unilaterally which the plaintiff had sought in his initial response to the letter of demand made by William Fry, solicitors.

The Court was referred also to the judgment of Laffoy J. in *Tekenable Limited v. Morrissey and others* [2012] IEHC 391. That was another case where an application for interlocutory relief was not proceeded with because the parties negotiated the terms of an undertaking which the defendant gave to the Court, and which was annexed as a schedule to an order of the Court. But the Court had not been required to determine any issue on that application, and the action was then to proceed to a plenary hearing in order to determine the substantive disputes between the parties. The plaintiff sought its costs against the defendant in these circumstances.

In the course of her judgment in Tekenable, Laffoy J. referred to the former regime prior to Order 99, rule 1(4A) RSC when the Court on applications such as these would reserve costs for the very reason that issues had yet to be determined, and that new facts may come to light during the course of discovery or the trial which might have a bearing on the question of costs of the interlocutory injunction application that had not proceeded. She rightly, in my respectful view, stated that those are the very sort of issues which will in any event weigh on the Court's determination under the new rule as to whether the

Court is in a position to justly adjudicate on the question of costs at the interlocutory stage. It will on occasion be that the Court will hesitate about awarding the costs of an interlocutory injunction to a plaintiff at that stage of the proceedings, even where that plaintiff has prevailed on that application, because it may work an injustice on the defendant in the event that issues are ultimately determined in the defendant's favour to the extent that the Court might then consider that the particular plaintiff had not been justified in seeking the interlocutory injunction. The Court must proceed cautiously in this regard, and give serious consideration to the question whether it is possible to justly make an award of costs without awaiting the determination of the many issues that may be in dispute in the substantive claim.

It is of course desirable on policy grounds that parties should not needlessly pursue applications for injunctive interlocutory relief where it is possible to secure an agreed solution short of an injunction order, such as the giving of an undertaking. The fact that the Court is required to make an award of costs where it determines the injunction application, save where it might not be possible to justly do so, should serve to encourage a defendant to give an undertaking to do or not do that which is sought to be restrained by order, especially where it can be anticipated that a court will be satisfied that the relatively low threshold of establishing a fair issue to be tried can be surmounted by the plaintiff, and where either damages can reasonably be seen not to give the plaintiff an adequate remedy, and/or that the balance of convenience favours maintaining the status quo and granting the injunction. It is right

that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no "event" in the sense of a court's determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application.

Moreover, where a defendant faced with these probabilities nevertheless resists the application for an interlocutory injunction in circumstances where he ought to have perhaps considered conceding that the plaintiff would obtain the injunction in any event, he/she can have little complaint in my view if the Court then makes an order for costs against him/her on the basis that costs follow the event, even where the issues to be determined between the parties will have to await a later final determination at the substantive hearing. Nevertheless, I accept that each case will depend on its own facts, and as stated by Laffoy J. there will be cases where the Court will still reserve the question of costs to the hearing where there is a real risk that it is not possible to make a just determination in relation to costs at that stage of the proceedings.. But the days are gone when the Court would, almost as a matter of convenience and routine, simply reserve the question of costs to the hearing of the action.

The defendant has placed considerable reliance on the fact that there has been no 'event' since there has been no court determination of the application in question. The reality in my view is that it was only the defendant which prevented this application being determined by the court, and he did so by offering to the court the very undertaking which he had been called upon by the plaintiff's solicitor to provide some five weeks previously. That is when this undertaking should have been given in the circumstances of this case. Given the facts disclosed on affidavit, it would seem to me that this was never a case in which the defendant company would have been justified in presenting a Petition for the winding up of the plaintiff company. If the defendant had done so, there was a real risk that it would have been seen to be an abuse of process, given the very early engagement by the plaintiff company in relation to the question of liability for the debt claimed. It was the failure to provide the undertaking sought, or to respond in any way to the request for that undertaking by the deadline set that resulted in the granting of the interim injunction, and the pursuit of the interlocutory injunction. Given the defendant's readiness to give the undertaking on the 23rd July 2013, it is hard to see any force in its arguments now that this was simply pragmatism on its part and that it was not in any way conceding the plaintiffs entitlement to the injunction. It is just in my view, whether or not there can be seen to have been 'an event' for the purpose of Order 99 RSC, that the plaintiff should get its costs.

But on that question of whether an even can be seen have occurred, I want to observe the following in the context of interlocutory matters. It is not at all clear that 0.99(1)(4A) - the new rule - requires that on interlocutory applications there must have been an event at all and that costs should follow the event in such interlocutory applications. It is natural and normal that where an interlocutory application is the subject of a court's determination the court would consider that it is right that the costs of the motion should be awarded to the party which was successful on the application. In such circumstances, the costs are following the event, and that will be the just thing for the court to do in most cases. But that is different from saying that on interlocutory applications costs "*shall follow the event*" (emphasis added), thereby muddying the waters somewhat in circumstances where as in the present case there was not determination of the motion, but rather there was either a concession by the respondent to the motion, or perhaps an agreed order (save for costs).

In my view the argument that there has been no 'event' in these circumstances and that therefore the Court must or ought to reserve the costs to the hearing is misplaced, and I believe that a careful reading of O.99, rule 1, sub-rules 1, 3, 4 and 4A support this. Sub-rule 2 is not relevant for present purposes. It is clear that r.1(1) provides a general or overarching principle that costs of and incidental to "every proceeding" shall be at the discretion of the Court. One sees then that under r.1(3), but now subject to rule 4A, a derogation from the general rule of discretion is provided specifically in r.1(3) in respect of matters tried by a jury. That does not apply here. Costs of such matters "shall follow the event". A second derogation from the general rule of discretion is provided in r.1(4) where again subject to sub-rule 4A, it is provided specifically that the costs of any issue of fact or law raised upon a claim or counterclaim "*shall follow the event*". That does not apply here. But new rule 1(4A) contains no such derogation from the general rule of discretion contained in r.1(1). It simply provides that upon determining any interlocutory application "*shall make an award of costs*" save where it cannot justly adjudicate upon the costs liability.

There is no reference to costs having to follow any event. In other words, the Court is required simply to exercise its discretion, and is not constrained by any rule that says that the costs shall follow the event.

In so far as this new rule speaks of "*upon determining any interlocutory application*" and any suggestion that in the present case the Court did not determine the application because the defendant proffered an undertaking, it must be pointed out that this is an undertaking proffered to the court and accepted by the court, and consequently is an undertaking the breach of which constitutes a contempt of court. The acceptance of that undertaking by the court determined the application. It brought it to an end - even if all the issues raised on the application were not individually the subject of a determination by the Court.

In these circumstances, it seems to me that while the Court is now required by the introduction of new rule 1(4A) RSC to make an award of costs upon the determination of the application in question, it is not necessary that there has been what in other sub-rules is referred to as an 'event', and that the Court must make an award of costs by reference to the general rule of discretion contained in O.99, r. 1(1) RSC.

The absence of any reference in r.1(4A) of any reference to an 'event' makes complete sense. Interlocutory applications are many and varied. Interlocutory injunctions are just one of many other more frequent motions of an interlocutory nature brought between the commencement of proceedings and their final determination. The simplest and most common form of interlocutory motion is perhaps the application for judgment in default of defence. The vast majority of such motions are disposed of by the plaintiff agreeing a short extension of time for the delivery of the defence. Invariably also the parties agree that the plaintiff should be awarded its costs of having to bring the motion. But what if there is no agreement in relation to the costs of the motion? There has been no 'event' as such, but it could not be seriously argued that in such circumstances the Court could not exercise its discretion under r.1(1) and award costs against the party in default of pleading, even though no 'determination' of the issues as such has taken place. That seems to be the intention behind the new rule.

I have no hesitation in exercising my discretion in favour of the plaintiff herein. The plaintiff was perfectly entitled to take seriously the threat that a Petition would be presented when it received the letter dated 141h June 2103 by fax and by post. The response by Michael Powell solicitors on the plaintiff's behalf on the 19th June 2013 was the appropriate response, and in particular by calling for an undertaking that the threat of a Petition would not be followed through. Where there was no response to that letter, let alone the provision of the requested undertaking, it was reasonable that on the 20th June 2013 they should institute proceedings in order to seek an interim injunction, and if necessary an interlocutory injunction. Almost five weeks passed during which the plaintiff incurred

significant additional costs in dealing with the replying affidavits of the defendant, and ultimately the matters appears to have been listed for hearing in the Chancery list on 23rd July 2013. It was only at the outset of the hearing when the matter was called in the list that the defendant through its counsel informed the court of the defendant's willingness to give an undertaking to the court in the terms of the plaintiffs motion. This undertaking did not emanate or result from any prior negotiations with the plaintiffs legal team. It was in that sense unsolicited, though obviously it had been requested some five weeks previously. It is precisely the undertaking that had been sought by Michael Powell solicitors at the outset.

In such circumstances it is obvious in my view that the costs of the Notice of Motion should be awarded to the plaintiff. The motion should never have to have been brought in the first place. The defendant is entitled to seek to resist the motion of course, but must be prepared to have the costs of doing so awarded against it if the Court decides that the justice of the matter requires that its discretion as to costs be exercised in favour of the plaintiff, even if the application does not proceed to a hearing and determination.

This case is to be distinguished from the case of *Callagy v. Minister for Education and others*, unreported, Supreme Court, 23rd May 2003, where the plaintiff had unilaterally decided not to proceed with his case due to certain developments in the case.