Neutral Citation Number: [2008] IEHC 401

THE HIGH COURT

2006 2233 P

BETWEEN

PARKBOROUGH LIMITED T/A THE MORTGAGE ADVICE SHOP

PLAINTIFF

AND
MARIA KELLY
AND
REA MORTGAGE SERVICES LIMITED T/A REA MORTGAGE CHOICE

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 26th day of November, 2008

1. The application before the Court is on foot of a notice of motion in which the plaintiff seeks the following reliefs:-

> (1) an order that it was reasonable that the plaintiff's action be brought in the High Court notwithstanding the fact that ascertainable damages fall within the jurisdiction of the Circuit Court;
>
> (2) such further or consequential order in relation to costs as may be appropriate; and
>
> (3) if necessary and without prejudice to the reliefs sought above, an order remitting the matter to the Circuit Court.

2. The unusual nature of the application is revealed when the sequence of events which preceded it is outlined.

3. When these proceedings commenced the plaintiff and the second defendant were competitors for mortgage broking business in Waterford. The first defendant was an employee of the plaintiff for a period during 2003 and from July 2004 to 22nd March, 2006 when she handed in her notice because she had been "headhunted" by the second defendant.

4. Prior to the initiation of these proceedings the plaintiff's solicitors by letters dated the 4th May, 2006 wrote to both defendants alleging wrongdoing on the part of both in exploiting the plaintiff's client base and seeking undertakings to:-

> (1) return all of the plaintiff's property (whether in hard copy or computer format) taken by the first defendant on or since her departure from the plaintiff, including the list of persons canvassed, solicited or approached for the purposes of obtaining mortgages for them,
>
> (2) furnish the plaintiff with a list of all information and/or documentation concerning the plaintiff's business, finances, dealings, transactions or other affairs disclosed and/or divulged since or on the first defendant's departure from the plaintiff,
>
> (3) cease and desist from utilising or exploiting in any manner whatsoever the plaintiff's confidential information,
>
> (4) observe all common law duties of confidentiality to the plaintiff, and
>
> (5) furnish a list of all the plaintiff's customers whom the defendants or their servants or agents or anyone acting in concert with them had contacted with a view to providing mortgage brokerage services and provide the plaintiff with copies of all such correspondence.

5. By letter dated 9th May, 2006, Messrs. O'Mara Geraghty McCourt (the defendants' solicitors) responded on behalf of the defendants denying the alleged wrongdoing and stating that the question of giving undertakings did not arise.

6. The proceedings were commenced by plenary summons which issued on 24th May, 2006. The primary relief claimed by the plaintiff was injunctive relief framed in such a way as to give effect to the substance of the undertakings which had been sought. Damages were also claimed. In the statement of claim, which was delivered on 25th July, 2006, special damages were itemised at €5,125. A defence was delivered on behalf of both defendants on 23rd January, 2006 following a motion for judgment in default. The substance of the defence amounted to a traverse of all of the plaintiff's allegations of wrongdoing. Discovery was exchanged between the parties.

7. Subsequently, by letter dated 30th April, 2008, the defendants' solicitors wrote to the plaintiff's solicitors giving an undertaking on behalf of the defendants and each of them. The undertaking was expressed to be given "without any admission of liability or wrongdoing whatsoever". The terms of the undertaking mirrored four of the paragraphs in the endorsement of claim on the plenary summons in which the plaintiff had sought injunctive relief. In relation to the fifth paragraph, which sought a mandatory order requiring the defendants to yield up records in relation to the plaintiff's business, it was stated that the materials sought had already been dealt with by way of discovery. The defendants' solicitors emphasised that, notwithstanding the undertakings given, the defendants reserved the right to deal with, trade or enter into business relations with any persons or corporation who approached them. The penultimate paragraph of the letter was in the following terms:-

> "It is our view that the proceedings are now moot in the light of the undertaking proffered above. Our clients do not believe that the plaintiff has suffered damages at all. The damages, which are denied by the defendants, never warranted proceedings being instituted in the High Court. If warranted at all, which is not accepted, proceedings should have been instituted in the Circuit Court. If necessary we shall pursue our costs on this basis".

8. That letter triggered this application. In the affidavit grounding the application, the deponent, the managing director of the plaintiff, averred that as a result of the defendants' recent agreement to provide the undertakings, the plaintiff's ascertainable damages fell below the jurisdiction of the High Court. In the replying affidavit filed on behalf of both defendants, it was asserted by the deponent, a director of the second defendant, that the plaintiff never had a basis for damages at all, let alone damages within the High Court jurisdiction and that no evidence at all of any damage had been laid out by the plaintiff. The defendants sought the remittal of the matter to the Circuit Court but on the basis that the defendants be awarded the cost of the High Court proceedings to date or, alternatively, that the issue of costs of the proceedings in their entirety be left to the Circuit Court Judge following remittal.

9. Before the plaintiff's application came on for hearing, on 15th October, 2008, the second defendant went into voluntary liquidation. As a result, the defendants' solicitors brought a motion seeking liberty to come off record in the proceedings. In the affidavit

grounding that application it was averred that the defendants' solicitors had agreed to act for both defendants on the basis that the second defendant would pay the costs for both defendants. By order made on 28th October, 2008, the defendants' solicitors were allowed to come off record. The plaintiff's application was adjourned to enable both defendants to consider their position. Subsequently the Court was informed on behalf of Mr. Ken Fennell, the liquidator of the second defendant, that he did not intend taking part in the application. On the hearing of the application the first defendant was represented by counsel.

10. At the hearing, the plaintiff persisted in the contention that an order should be made by the Court at this juncture awarding the costs of the proceedings to date as High Court costs to the plaintiff against the defendants, if the Court was satisfied that it was reasonable for the plaintiff to have taken the steps it had taken in prosecuting the proceedings in this Court to date.

11. The jurisdiction of this Court to remit or transfer an action is to be found in s. 25 of the Courts of Justice Act 1924. That section provides, *inter alia*, that when any action shall be pending in this Court which might have been commenced in the Circuit Court, any party to such action may apply to this Court that the action be remitted or transferred to the Circuit Court. If the Court considers that the action is fit to be prosecuted in the High Court, it may retain such action, or, if it does not consider that the action is fit to be prosecuted in the High Court, it may remit or transfer it to the Circuit Court. The remittal or transfer is "subject to such conditions as to costs or otherwise as may appear to be just". Section 25 was amended by section 11(2) of the Courts of Justice Act 1936 which provided:-

> "Notwithstanding anything contained in section 25 of the Principal Act the following provisions shall have effect in relation to the remittal or transfer of actions under that section, that is to say:—
>
> > (a) an action shall not be remitted or transferred under the said section if the High Court is satisfied that, having regard to all the circumstances, and notwithstanding that such action could have been commenced in the Circuit Court, it was reasonable that such action should have been commenced in the High Court".

12. Order 49, Rule 7 of the Rules of the Superior Courts 1986 in essence repeats the provisions of section 25 which I have outlined above, including that the remittal or transfer shall be "subject so such conditions as to costs or otherwise as may appear just". The fundamental rule as to who is to bear the cost of proceedings in this Court is Order 99, Rule 1(4), which provides that the costs of every issue of fact or law raised upon a claim or counter-claim shall, unless otherwise ordered, follow the event.

13. It would appear that throughout the history of the State, the statutory provisions in relation to costs on remittal have given rise to very little contention. At any rate, the only authority to which the Court has been referred is a decision of the High Court in *McEvoy v. Fitzpatrick* [1931] I.R. 212. In that case, the plaintiff had brought an action in the High Court, which was within the jurisdiction of the Circuit Court – for £25 for goods sold and delivered. The defendant applied to have the matter transferred to the Circuit Court. The application was acceded to. The order of the High Court made by Hanna J. provided "that the defendant's costs of the proceedings in this Court, including the costs of this hearing, be costs in the action". The plaintiff was successful in the Circuit Court and got a decree for the amount claimed. The costs were referred to the County Registrar, who taxed the costs incurred prior to the action being transferred to the Circuit Court (i.e. the costs in the High Court) at £17 18s 6d. On the case coming again to the Circuit Court, the Circuit Court Judge awarded that amount as costs. The defendant appealed from so much of the decree as related to costs. The head note in the report, in my view, summarises the effect of the judgments in the High Court (Meredith J. and Johnston J.) accurately in stating that it was held that, having regard to the jurisdiction conferred by section 25 as to costs when transferring an action, Hanna J. must be regarded as having fully exercised the powers given him by the section and, as he did not allow the plaintiff any costs in the High Court, the Circuit Court Judge had no power to allow the plaintiff any such costs, only having jurisdiction to deal with the costs incurred in his own Court. In other words, while recognising that section 25 gives full power to the High Court when transferring an action to deal with the question of costs, as a matter of interpretation of the order in that case, Hanna J. had only addressed the eventuality that the defendant would succeed and had not addressed the eventuality which, in fact, happened, that the plaintiff succeeded.

14. It is true, as is pointed out in Delany and McGrath on *Civil Procedure in the Superior Courts*, 2nd Ed. at para. 8.12, that the decision is *McEvoy v. Fitzpatrick* lays down that the question of the costs accrued in the High Court should be dealt with in the High Court and that the Court has a wide discretion in that regard. In a foot note it is stated:-

> "The practice is that if the costs of the proceedings in the High Court are reserved, a successful party who is awarded reserved costs will be entitled to the costs of the proceedings in the High Court up to the date of remittal at the High Court scale."

15. What was urged by counsel for the plaintiff was that the statement by Johnston J. in *McEvoy v. Fitzpatrick* (at p. 214) that the effect of section 25 is to give full power to the High Court, when transferring an action, to deal with the question of costs "in whatever manner it thinks right" was authority for the proposition that in this case, at this juncture, the Court is entitled to, and should, make an order awarding the full costs of the High Court proceedings to date to the plaintiff against the defendants. In my view, that proposition is not correct, no more than the proposition advanced in the defendants' replying affidavit that the defendants should be awarded costs at this juncture is correct. The plaintiff initiated a plenary action in this Court. The defendants defended it. The outcome of a defended plenary action is determined by a plenary hearing on oral evidence. There has been no such hearing in this case. If the order to remit is acceded to, and I have already indicated to the parties that I intend acceding to it, the plenary hearing will take place in the Circuit Court. The outcome will identify "the event" by reference to which the fundamental rule in relation to where liability for costs should lie will be determined, although, of course, it will be at the discretion of the Circuit Court Judge whether the fundamental rule is applied. Until then, the Court has no jurisdiction to make an order as to who is to be liable for the costs. In this case, the contest between the parties is still alive. While the defendants proffered the undertakings sought, they did so without admission of liability and in the context that they were contesting allegations of wrongdoing on their part.

16. It was submitted on behalf of the first defendant that the Court has no jurisdiction to declare that it was reasonable that this action be brought in this Court. It was pointed out that under s. 11(2)(a) of the Act of 1936 the question of reasonableness only comes into play in the context of an action not being remitted or transferred. I do not accept that that argument is correct. The breath of the discretion which is given to the Court under s. 25 must encompass consideration of whether the plaintiff acted reasonably in initiating the proceedings in the High Court or not. If the Judge of the High Court, when dealing with the application to remit, could conclude that it was not reasonable to commence the proceedings in the High Court, no doubt it would be open to him or her to provide for displacing the normal practice by ordering that the reserved costs should be at the lower Court scale, if the plaintiff was ultimately awarded costs. In this case, I propose following the normal practice. While I do not propose to make a formal declaration to this effect, I am of the view that it was reasonable for the plaintiff to initiate these proceedings in the High Court because the primary relief sought was injunctive relief and the quantification of special damages had to await discovery. I reject the argument made on behalf of the first defendant that the fact that the plaintiff did not seek interlocutory injunctive relief is relevant to

the costs issue which has to be addressed at this juncture.

17. There will be an order remitting the proceedings to the Dublin Circuit Court. The order will follow the usual template and provide that "the question of the costs of the proceedings in this Court on both sides including the costs of this hearing be reserved".