Neutral Citation Number: [2011] IEHC 310

THE HIGH COURT

COMPETITION

2010 10685 P

BETWEEN

GOODE CONCRETE

PLAINTIFF

AND

C.R.H. PLC, ROADSTONE WOOD LIMITED AND

KILSARAN CONCRETE

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 28th day of July 2011

1. There are at present two sets of motions before the Court in this litigation. The first set is an application by the defendants for security for costs based on the assertion, which is not disputed, that the plaintiff (which ceased to trade in February of this year) will be unable to pay the defendants' costs of the proceedings should the claim be defeated. The second and immediate pair of motions arises in the context of that application and are applications to strike out as scandalous or to rule inadmissible, evidence contained in four affidavits sworn in response to the motion for security for costs. This application is based upon O. 40, r. 12 of the Rules of the Superior Courts and on the inherent jurisdiction of the Court. It is directed at the entirety of three affidavits and part of a further affidavit. The three affidavits are those of Tom Goode sworn on the 21st June, 2011, Barry Goode sworn on the 20th June, 2011 and Ger Corr sworn on the 22nd June, 2011. In the fourth affidavit of Peter Goode sworn on the 22nd June, 2011, exception is taken to the material in paragraphs 8-18 and 57-68.

2. Briefly stated, the attack on these affidavits by the defendants is based on the contention that the facts and allegations they contain are wholly irrelevant to the issue that falls to be decided on the motion for security for costs and are matters which relate to facts, events and allegations which, for the most part, predate by many years the facts and events upon which the claims presented in the statement of claim purport to be based. It is argued that these affidavits have been introduced belatedly not for the purpose of proving that the plaintiff's inability to pay future costs has been caused by the wrongdoing pleaded in the statement of claim (which is the essential issue to be decided by the Court on the defendants first motion,) but for the purpose of embarrassing the defendants and impeding or frustrating their prosecution of the motion for security for costs by requiring them to answer claims and allegations which are irrelevant to the action and spread back over many years. It is further claimed that the evidence is for the most part hearsay and, as such, inadmissible even in an interlocutory application heard on affidavit.

3. The plaintiff insists that all of the evidence, which is not by any means predominantly hearsay, is both admissible and relevant and cannot be characterised as scandalous. The evidence, it is said, testifies to an historical pattern of serious anti- competitive conduct and cartel arrangements in the cement and concrete markets both in Dublin and elsewhere in the State over many years. It is contended that this pattern of conduct continues to the present time and includes the particular claims of wrongdoing made in the statement of claim. It is argued in particular that this evidence is directed at establishing the *prima facie* case of wrongdoing on the part of the defendants and that the plaintiff is required to present this evidence in order to resist the order for security for costs because of the defendants' claim made in the grounding affidavits that the claims advanced in the statement of claim are devoid of any evidential basis. The affidavits, they say, contain the evidence which can be given at the substantive trial to prove the defendants anti-competitive conduct, the domination of the relevant markets and the collusive links between the first and second named defendants and the third named defendant.

4. In the judgment of the Court, a clear distinction falls to be made between the issue now before it on the motions for security for costs on the one hand and the diverse issues which it will be required to consider at the trial of the substantive claims, on the other. It follows that evidence that is irrelevant or inadmissible in respect to the issues on the forthcoming motions for security for costs may still be relevant and admissible at the trial. As pointed out in the case law opened to the Court by both sides and particularly the judgment of Clarke J. in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] I.E.H.C. 7, to succeed in a obtaining an order for security for costs a defendant must show that it has a prima facie defence to the claim made by a plaintiff and secondly that the plaintiff will be unable to pay its costs if that defence succeeds. If those conditions are met, an order for security for costs will normally be made unless the plaintiff establishes some special circumstance which will justify the court in refusing it. The most common such special circumstance is that it is the impugned wrongdoing of the defendant which has brought about the plaintiff's inability to pay costs. The matter is put by Clarke J. at para. 3 of his judgment as follows:

> "3.1 As I have already noted, there is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that his inability to pay the costs of the defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing which he asserts in the proceedings.
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> 3.4 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 four propositions must necessarily be true:-
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> > (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 wrongdoing and a practical consequence or consequences for the plaintiff;

(3) that the consequence referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is 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."

5. In the view of the Court the "actionable wrongdoing" referred to there is the particular wrongdoing which forms the basis of the plaintiff's substantive claim. It is not arguable, in the view of the Court, that a plaintiff can resist an order for security for costs by pointing to some unrelated wrongdoing or wrongdoing on another occasion on the part of a defendant. The rationale of the principle upon which the exception in favour of a financially distressed plaintiff is based, is that it would be manifestly inequitable to allow a defendant to defeat the pending claim by exploiting to its advantage the very poverty which its alleged unlawful conduct is said to have brought about.

6. In the present case the wrongful conduct in respect of which relief is claimed in the statement of claim is explicitly based upon particular anti competitive conduct and collusive arrangements in a specific market within a given span of time, namely, the market for readymix concrete in the Dublin area between 2007 and 2010. More specifically the issue this Court will be asked to try is whether the plaintiff was put out of business in early 2011 as a result of the alleged collusive activities of the defendants in the below cost selling of readymix concrete in the Dublin market in those years including, in particular, collusive tendering for specific contracts identified in the schedule to the statement of claim.

7. Accordingly, on the motions for security for costs, the position the plaintiff must establish in order to avoid an order for security for costs (its inability to pay being conceded,) is that it was this collusive pricing on tenders for contracts between 2007 and 2010 that caused the losses which resulted in the plaintiff being obliged to cease trading. That proposition is not proved by evidence of things that were done and said in relation to cement imports in the 1980s or by evidence of cartel activities in a relevant or related market in Galway. It will be established, if at all, by such evidence as has already been put forward by the plaintiff in the first round of replying affidavits in which detailed consideration has been given to the losses actually incurred and to the estimated financial position on the plaintiff had the Company not been excluded by the collusive activities of the defendants from the typical number of such contracts it might otherwise have expected to win.

8. In the judgment of the Court the material to which objection has been taken in these affidavits is accordingly inadmissible as irrelevant to the immediate issue arising on the motions for security for costs. It is therefore evidence which this Court will disregard in hearing that motion so that no necessity arises for the defendants to reply to those affidavits in that regard. The Court therefore so rules in this judgment and will proceed to hear and determine the applications for security for costs on that basis.

9. Nevertheless, the Court will also make it clear that the proposed evidence as to past or continuing cartel type arrangements, collusive activity and abusive conduct in the relevant or related markets whether in Dublin or elsewhere or prior to 2007, cannot in these circumstances be characterised as scandalous in the sense of O. 40, r. 12 of the Rules of the Superior Courts, such that it is necessary that the material be struck from the record of the Court.

10. It is noted that although many of the averments in the objected affidavits are admittedly based on hearsay at this point, there is much that alleges meetings, conversations and events which are particularised in time and place and in which named representatives of the defendants or their associated undertakings are identified and alleged to have been present as participants. If such allegations are the subject of direct testimony by these deponents or by the individuals named as the source of the information at the trial, it could not now be said that such evidence will necessarily be inadmissible, irrelevant or without probative value in support of the claims made in the statement of claim. As counsel for the plaintiff has correctly pointed out, anti-competitive conduct and collusive tendering arrangements are always likely to be shrouded in secrecy so that a plaintiff will be in an obviously weak procedural and evidential position in making good claims of that nature, at least until discovery is obtained. It is perhaps understandable that individuals implicated in allegations of this kind may be outraged and scandalised that they should be so accused, but the Court must nevertheless be slow at an interlocutory stage to conclude that such material should be characterised as scandalous and struck out once there is some objective and *prima facie nexus* between the facts and events alleged and the particular wrongdoing upon which the claim is to be based.

11. It must also be borne in mind in this regard that by virtue of the European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) Regulations 2004 (S.I. No. 195/2004) the High Court has been designated a competition authority for the purposes of Article 35 of Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (as amended). As a result, the Court ought not to prejudge the future relevance or admissibility of evidence or unnecessarily preclude itself from receiving or examining possible future evidence alleging serious infringements of what are now Articles 101 and 102 TFEU, particularly if it is claimed that the consequences of such conduct are continuing or have continued until recently.

12. For the purpose of O. 40, r. 12 of the Rules of the Superior Courts, allegations made on affidavit may be "scandalous" when they are not only irrelevant in relation to the issue to be determined by the Court but so gratuitous and vexatious in relation to the subject matter of the cause as to amount to an abuse by a party of the privilege that attaches to evidence given in the course of litigation. That is not the case here. It is accordingly sufficient in these circumstances to rule the objected averments inadmissible at this point as irrelevant to the issue arising on the motions for security for costs and to proceed to hear those applications accordingly.