THE COURT OF APPEAL

[2014 No. 1170]

Ryan P.

BETWEEN

USED CAR IMPORTS OF IRELAND LIMITED

PLAINTIFF

AND

THE MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ryan P. delivered on 7th July 2016

1. This is an application brought before me sitting alone. The defendants, the respondents in this appeal, seek an order requiring the plaintiff/appellant to provide security for their costs in the appeal. The motion is brought pursuant to O. 86, r. 9 of the Rules of the Superior Courts and/or s. 390 of the Companies Act 1963 and/or s. 52 of the Companies Act 2014. I have jurisdiction to entertain such an application under s. 8 of the Court of Appeal Act 2014 which inserted a provision in the Courts (Supplemental Provisions) Act 1961 at s. 7A (6). That allows for a procedural matter or application or a motion to be heard by me or a nominated judge. In circumstances where I have jurisdiction to deal with the matter sitting alone, I would normally proceed to do so unless there was reason to the contrary. As I will presently explain, I think there is reason in this case why I should not exercise the jurisdiction and should instead list the matter for hearing by a full court of three judges.

2. The appeal concerns an action that began a long time ago with the issue of a plenary summons in March 1995. The plaintiff company was engaged in the business of importing used cars, principally though not exclusively from Japan. The case concerned the company's challenge to the system of Vehicle Registration Tax which came into force in the State at the beginning of 1993. The hearing in the High Court took place eventually between March and June 2012, occupying 33 days and in which evidence was given by some 23 witnesses including experts. The costs were very substantial and the applicants in their submissions say that disbursements alone were more than €447,000. Murphy J. delivered his judgment extending to some 240 pages on 15th March 2013 in which he dismissed the plaintiff's action, rejecting all of the many separate grounds of challenge. The judge ordered the plaintiff to pay the costs of the defendants/respondents. They remain unpaid.

3. The plaintiff appealed to the Supreme Court and the case was transferred to the Court of Appeal pursuant to Article 64 of the Constitution. That is how the motion for security for costs now comes to me. The respondents, as the successful parties in the High Court, submit that it is clear that the plaintiff will not be in a position to discharge their costs in the event that this Court upholds the decision of the High Court and awards costs accordingly. The company accepts that the respondents have established a prima facie case, but they argue that there are special circumstances which are sufficient to justify this Court in withholding the order sought. UCII puts forward four grounds as special circumstances justifying/warranting refusal of the Revenue application, namely:

> (i) The company's inability to pay was caused by the Revenue Commissioners.
>
> (ii) Significant issues were not dealt with by the trial judge in his judgment.
>
> (iii) Delay in making the application for security.
>
> (iv) The issues in the case are matters of exceptional public importance such as justify a refusal of an order for security which would otherwise be made.

These points are the issues to be decided in the application.

4. One of the witnesses who gave evidence in the High Court was a former director of the plaintiff company, Mr. O'Dowling, who testified that he had provided funding to finance the plaintiff's action. In his grounding affidavit for this motion, Mr. Declan Sherlock, Deputy Revenue Solicitor, says that it was made clear to the High Court that the plaintiff company was not able to fund its own litigation costs and that Mr. O'Dowling confirmed that he was financing the action. In light of that evidence, the defendants brought a motion dated 15th March 2013 in the High Court pursuant to O. 5, r. 13 of the Rules and/or s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 or pursuant to the inherent jurisdiction of the court. The application was to join Mr. O'Dowling as a defendant in the proceedings and an order directing that he be made personally liable for the costs incurred by these defendants in defending the proceedings. That motion came before Gilligan J. who delivered a written judgment on 27th of February 2014 in which he refused the relief sought. The applicants have appealed to this Court against that judgment and order and the matter is now before me for directions pursuant to a notice of application in that regard dated 28th April 2016. That appeal now standing before the court is the circumstance that brought me to reconsider the appropriateness of dealing by myself with the application for the security of costs of the appeal.

5. I do not see the issue as a question of law, but rather as one of practicality and fairness. Let me look at one or two possible scenarios. First, there is something inconsistent, as I see it, in having a judge alone dealing with one matter of costs and three judges dealing with another that is closely related. Second, if my decision is to accede to the application and order security for costs to be provided by the plaintiff company, in light of the evidence in the High Court and having regard to the submissions on this motion, the result may be that Mr. O'Dowling has to spend his own resources to enable the appeal to go ahead. He will then have to deal with the defendants' appeal against the order refusing to make him liable for the High Court costs of the company. That appeal is before me for directions, as mentioned above, and Counsel applied to let the matter stand until judgment is given in this security for costs application. That makes obvious sense, because although one is not dependent on the other, there is clearly a close relationship between the two motions. It could happen that Mr. O'Dowling is obliged to make a painful choice between putting up the money to fund the appeal or allowing the company to lose the opportunity for want of security, at the same time as he is personally facing the defendants' appeal to make him liable for the High Court costs. While I can see the logical distinction between the two issues, applications and appeals, it strikes me, nevertheless, that it is less than just, satisfactory and efficient as a procedure.

6. This issue did not arise at the hearing of the motion for security, which proceeded in the usual fashion with written and oral submissions, directed principally to the question of special circumstances. In the course of reviewing the case for the purpose of preparing judgment, I came to reflect on the two appeals that are now before the court. While I do not think that there is any manifest injustice in proceeding to adjudicate on the application for security against the company, it does seem to me that procedural fairness is better secured by arranging for this motion and the appeal from Gilligan J. to be heard by the same court of three judges, simultaneously or successively, and that efficiency is not thereby compromised.

7. My conclusion, accordingly, is that the proper course is that this motion should be listed with the appeal against the judgment of Gilligan J. for hearing prior to the substantive appeal in respect of the dismissal of the plaintiff's claim by Murphy J.