THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 154

Record Number: 2017/466

Peart J.
McGovern J.
Costello J.

BETWEEN:

TÍR NA N-ÓG PROJECTS (IRELAND) LIMITED

PLAINTIFF/RESPONDENT

- AND -

P.J. O'DRISCOLL & SONS (A FIRM), P.J. O'DRISCOLLS (A FIRM), AND FERGUS APPELBE

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 31ST DAY OF MAY 2019

1. This is an appeal from an order of the High Court (Ní Raifeartaigh J.) made on the 6th September 2017 whereby the appellants' application for security for costs brought pursuant to s. 52 of the Companies Act, 2014 ("the 2014 Act") was refused. The application was refused principally because the trial judge was satisfied, "not without some reservation", that the respondent company had overcome the burden of establishing special circumstances, namely that its inability to meet the costs of the appellants if it was unsuccessful in its claim for damages for professional negligence was due to the appellants' own wrongdoing, assuming that such negligence was established ultimately. The trial judge also had regard to what she considered to be a lack of *bona fides* on the appellants' part in relation to a particular aspect of their asserted defence to the proceedings, which I will describe in more detail in due course.

2. It was not in dispute between the parties that the respondent company would be unable to meet the appellants' costs if it was unsuccessful at trial. As stated by the trial judge in her judgment, the issues to be determined on the application for the purposes of s. 52 of the 2014 Act were (i) whether the appellants have established that they have a *bona fide* defence to the claim, and if so (b) whether there are any special circumstances which should disentitle the appellants to an order that security for costs be provided.

3. The trial judge was satisfied that the appellants had established a *bona fide* defence under the Statute of Limitations Act, 1957, as amended, despite reliance by the respondent on s. 71 of the Act of 1957. There is no cross-appeal against that finding.

4. This appeal is focussed firstly on the trial judge's conclusion that there were special circumstances justifying the refusal of the order sought; and secondly on her conclusion that there was an absence of good faith on the part of the appellant firm amounting to a further special circumstance justifying the refusal of the application. The trial judge found that there was a lack of *bona fides* in respect of a part of the appellants' asserted *prima facie* defence, namely that the respondent had never instructed the firm to bring the judicial review proceedings about which the respondents complain, because, as the trial judge stated in her judgment the exhibited correspondence "clearly shows that it did; and that the defendants, who are professional solicitors, wrongfully continued to act for him after they became aware they had failed to institute judicial review proceedings within the appropriate period, and failed to advise them of their negligence/conflict of interest".

5. In so concluding in relation to the *bona fides* of the appellants, the trial judge went on at para. 49 of her judgment to state as follows:

> "49. There is undoubtedly a danger in an application such as the present one of reaching conclusions which are properly matters for determination at the trial, if one is ultimately held. In this regard, I am mindful that no premature conclusion should be reached regarding the ultimate issue of negligence, nor indeed a final conclusion on the factual issue of whether the plaintiff company instructed the defendants to institute judicial review proceedings prior to the expiry of the relevant deadline. However, on the evidence currently available to the court, it does seem that the documentary evidence presented by the plaintiff, described in detail above, directly contradicts the defendant's position that the plaintiff company did not instruct the defendants to institute judicial review proceedings prior to the expiry of the relevant deadline. Based on this evidence, I would have serious concern about the *bona fides* of the defendants and this is a matter which I am also taking into account."

6. The factual background to the present appeal is admirably and clearly set forth by the trial judge in her judgment. It is unnecessary for me to recite it to the same degree of detail. But essentially what happened was that the respondent company, having obtained a planning permission in 1995 for the development of 33 houses and a leisure centre, did not carry out the development within the life of the permission and it was allowed to lapse. In February 2002 it re-applied for permission. The planning authority failed to make a decision on that application within the statutory period of two months, which meant that the respondent company was entitled to a default permission, provided that the development did not constitute a material contravention of the Development Plan in force at the time.

7. In July 2002 the respondent company instructed the appellant firm. It appears from the correspondence that a director of the respondent company, Mr Shoenmakers, wrote to the third named appellant, Mr Appelbe, a partner in the firm, stating that he had

been advised by an architect that they should write to the county council requesting an immediate grant of permission, allowing them two weeks maximum within which to do so, and in the event of refusal then to apply to the High Court for an order of mandamus against the county council.

8. It appears that by response dated 23rd July 2002 Mr Applebe stated that he would like to be positively advised by an expert in planning whether the development would amount to a material contravention or not. An opinion from counsel was first obtained shortly thereafter which advised that the council should be called upon formerly to acknowledge that a default permission was deemed to be granted on 15th June 2002 and to issue the grant of permission forthwith. It also appears that around the same time a planning expert expressed his view that the proposed development did not materially contravene the Development Plan for the area.

9. In the event, the default permission did not issue. The proceedings against the appellant firm arise from the fact that no judicial review proceedings were commenced seeking an order of *mandamus* within the period of time provided for the commencement of such applications. Eventually some plenary proceedings were commenced against the planning authority seeking certain declarations, but those proceedings never progressed in the face of objection by the authority that the time limits in respect of judicial review proceedings could not be circumvented by the issue of plenary proceedings where effectively the reliefs sought were judicial review reliefs. It is alleged by the respondent that the failure to have sought an order of *mandamus* was negligent, and deprived the company of a default planning permission to which it was entitled, resulting in the respondent's inability to carry out the development, thereby causing substantial losses to the company.

10. It is accepted on all sides that the respondent will be unable to meet the costs of the appellant firm should the professional negligence proceedings be unsuccessful. That acknowledged impecuniosity is blamed upon the very act of negligence alleged against the appellant firm, namely the failure to obtain the default planning permission which would have enabled the respondent company to carry out the development.

11. In an affidavit replying to the appellants' grounding affidavit in the High Court, Mr Schoenmakers exhibited some of the correspondence between his company and the appellant firm, and stated that the impecuniosity of his company arose from the fact that the housing development could not proceed, which in turn was due to the appellants' negligence in failing to commence judicial review proceedings for an order of mandamus within the appropriate period. An affidavit filed on behalf of the appellants in response to Mr Schoenmakers' affidavit disputed that there was any causal link between the wrong alleged against the appellant firm and the impecuniosity of the respondent. It went on to state that the folio for the lands in question indicated that the respondent company did not own the property in respect of which the planning permission was being sought, and also that the company was already in poor financial circumstances prior to the application for planning permission in 2002. Financial accounts for the years 2001 and 2002 were exhibited in support of those averments. It was averred also that even if the planning permission had been obtained, the respondent company did not have the necessary resources to develop the property, and in that regard reference was made to the fact that the respondent company had not been in a position to carry out the housing development on foot of the earlier 1995 planning permission.

12. In response, Mr Schoenmakers filed a second affidavit in which he provided further details of the respondent company. The trial judge at para. 32 of her judgment summarises the contents of that affidavit detailing the financial position of the respondent company and its history. As the trial judge notes, the assertion that the company did not have the resources to develop the project in 2001 and 2002 are disputed for reasons appearing in the affidavit, including by reference to the healthy state of the Irish economy at the particular time, and that there would have been no difficulty in selling the houses had the default planning permission been secured on foot of an order of mandamus in 2002.

13. In her judgment commencing at para. 33 thereof, the trial judge considered the provisions of s.52 of the 2014 Act, and the nature of the discretion which the court enjoys on such applications. In that regard she referred to the judgment of Morris P. in *Inter Finance Group Limited v. K.P.M.G Peat Marwick* [1998] IEHC 217, where the principles applicable on these types of application (albeit that case was brought under the earlier s.390 of the Companies Act, 1963) are set out as follows:

> "to succeed [in obtaining security for costs] there is an onus on the moving party, the defendant, to establish:
>
> (a) that he has a prima facie defence to the plaintiff's claim and
>
> (b) that the plaintiff will not be able to pay the defendant's costs if successful in his defence.
>
> On establishing these two facts then the order sought should be made unless it can be shown that there are specific circumstances in the case which would cause the court to exercise its discretion not to make the order sought. Such special circumstances might be:
>
> (a) that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flows from the wrong allegedly committed by the parties seeking the security; or
>
> (b) there has been delayed by the moving party and seeking the relief now claimed;
>
> (c) some other circumstance which might arise in the case."

14. In considering the question of whether the impecuniosity of the respondent company had been established by the respondent as emanating from the very wrong alleged against the appellant firm, the trial judge referred to the well-known judgments in *Peppard & Co. Limited v. Bogoff* [1962] I.R. 180, and Jack *O'Toole Limited v. MacEoin Kelly Associates* [1986] I.R. 277, and then went on to set out the four requirements to be satisfied on such applications as stated by Clarke J. (as he then was) in his judgment in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, as follows:

> "(i) that there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
>
> (ii) that there was a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
>
> (iii) that the consequence (s) referred to in (ii) had given rise to some specific level of loss in the hands of the plaintiff which loss was recoverable as a matter of law (for example by not being too remote); and

(iv) that the loss concerned was 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."

15. Having considered the facts in *Connaughton Road* and the reasons why in that case security for costs had been refused, the trial judge then turned to the not dissimilar factual background to the present case, and stated her conclusions as follows:

> "46. The present case appears to me to be somewhat different from previous cases. For example, a project involving the building of holiday homes in 2002-3 in Kerry, a period of boom in the construction industry in this country, could not be described as 'speculative' in the same way as the petroleum exploration project at issue in the Lough Neagh case. Nor were any issues raised by the defendant similar to those which arose in the Connaughton Road case, involving apportionment of profits as between different parties (in that case, the company itself and a principal in the company), or whether social housing obligations might diminish profits to a highly significant extent, which also arose in that case. On the other hand, the plaintiff company appears to have had no assets at the time of the proposed project, and the evidence put forward on this motion in support of the suggested figure of €4 million profit that was to be realised was thin. On the other hand, I note that the suggested costs figure put forward by the defendants was approximately €0.25 million, which allows for a considerable margin. Not without some reservation, I have reached the conclusion that the plaintiff company has overcome the threshold for establishing that its inability to meet the potential costs of an unsuccessful negligence action was due to the defendant's wrongdoing, assuming that negligence in that regard is ultimately established."

16. The appellants argue that the trial judge erred in concluding that it had been established to a *prima facie* level of proof that the respondent's impecuniosity was caused by the alleged wrongdoing on its part, and submits that the evidential basis for this finding was absent. It is submitted that, for example, the trial judge failed to give sufficient weight to the fact that following the 1995 planning permission the company had failed to build the development for which permission had been granted, and further to the fact that it is undisputed that in 2002 the company had no assets, and in fact did not even own the lands on which the development was to be undertaken. They refer also to the trial judge's finding that the evidence put forward by the respondent company as to the projected earnings of €4m. from the development project had it gone ahead was "thin".

17. The appellants emphasise that the onus is upon the respondent to establish the necessary evidential basis for a finding that its impecuniosity resulted from the wrongful actions of the appellants complained of. They submit that the argument made that this causal connection is made out is mere assertion, and not supported by actual evidence. In this regard they have referred to the judgment of Lynch J. in *Lismore Homes Ltd (in receivership) v. Bank of Ireland Finance Ltd* [1999] 1 I.R. 501 at p. 519 where he stated:

"In all the circumstances I am satisfied that the allegations made on behalf of the plaintiff in the second action against the first two defendants are *no more than bald assertions without any substantial evidence to support them* that the inability of the plaintiff in the second action to pay the costs of the first two defendants if the latter were successful in their defences, was brought about by the very wrongs complained of by the plaintiff in the second action in its action against them. I would therefore dismiss the plaintiff in the second action's appeal against the orders for security for costs made by the High Court in favour of the first two defendants." [Emphasis provided]

18. The respondent on the other hand submits that the trial judge was justified in coming to a conclusion that the evidence on which the respondent based its argument that its inability to meet a costs order was due to the appellants' own wrongdoing met the required *prima facie* threshold, and went beyond mere assertion and speculation, as was found to be the case by Clarke J. in *Connaughton Road*. She considered that the present case did not have the same type of complicating factors as were present in *Connaughton Road* such as the division of profits between Mr Molloy and the company, or a social housing requirement which could significantly reduce the level of profits. The respondent points also to the fact that the estimate of costs in the present case is about €250,000 as opposed to a figure of €632,500 in *Connaughton Road*, and to the trial judge's comment in that regard that the figure of €250,000 for costs "allows for a considerable margin". In other words, it is easier to demonstrate that the company's inability to pay costs in the amount of €250,000 results from the wrongdoing of the appellants, than it was in *Connaughton Road* to show the same in relation to the much greater figure at play in *Connaughton Road*.

19. Before considering the evidence adduced by the respondent by way of *prima facie* evidence of special circumstances, it is helpful to say something about this Court's jurisdiction in relation to an appeal against what is essentially an order of a discretionary nature. This question was comprehensively considered by this Court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27. The Court considered some diverging authorities, but concluded that the true position is that stated by MacMenamin J. in *Lismore Builders Ltd (In Receivership) v. Bank of Ireland Finance Ltd* [2013] IESC 6 which "best accord[s] with the balance of authority and, indeed, with first principles". In his judgment in *Lismore* MacMenamin J. stated in relation to the circumstances in which an appellate court might review an order made by a High Court judge in the exercise of a discretion:

> "Although great deference will normally be granted to the views of the trial judge, this court retains the jurisdiction of exercising its discretion in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. MGN* [2009] 1 I.R. 737 …".

20. At para. 79 of this Court's judgment in Collins, the Court stated:

> "79. For all these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in *Lismore Homes* [sic], namely that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great respect to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

21. Having identified this Court's jurisdiction on appeal, I will now consider the evidence that was before the trial judge by way of *prima facie* evidence that the inability of the respondent to discharge an order for the appellants' costs should it be unsuccessful at trial results from the very wrongdoing alleged by it against the appellants.

22. The respondent's impecuniosity was referred to quite briefly in Mr Schoenmakers' first replying affidavit. He deals with it at paras 35 – 36 only. He stated as follows:

> "35. I agreed that the plaintiff will not be in a position to discharge the defendants' legal costs if an order for costs was

made against it. I say however that the reason this is so arises from the conduct complained of by the defendants. As was made known to the defendants from the outset of their involvement with the plaintiff, it was always the intention that the plaintiff would benefit from applying for and being granted planning permission sought in 2002 and it was always known to the defendants that the plaintiff had no other activity. I say and believe that it is the defendants' failings in representing the plaintiff in connection with its sole activity that is the subject of these proceedings and that were it not for the defendants' acts and omissions in this regard, these proceedings would not have been brought.

36. In particular, I say and believe that it cannot be gainsaid that had the defendants instituted the proceedings sought by the plaintiff within the appropriate time, one way or another the current proceedings would not have been instituted. It seems that the defendants have based their intended defence on the proposition that the plaintiff never gave instructions in regards [to] the institution of judicial review proceedings which it in fact did give, as set out herein, and gave instructions in regards [to] the institution of plenary proceedings which it in fact did not give, again as set out herein."

23. In answer to these averments Mr Hallissey. for the appellants. made the point that the respondent has no other assets and was in a poor financial position in 2002, and he exhibits financial accounts which he states indicate that it could not have developed the project even if the default permission had been obtained. He goes on to state that it would have been necessary to obtain investment from its shareholders as it would not have been in a position to obtain a bank loan, and that therefore it cannot be said that the alleged wrongdoing of the appellant firm was the cause of the company's impecuniosity. Mr Hallissey denies that the appellant firm knew that the proposed development "was to be a lucrative development" as stated by Mr Schoenmakers.

24. In his second affidavit Mr Schoenmakers responds to the affidavit of Mr Hallissey, and does so at paras. 14 *et seq*. in relation to the financial position of the respondent company. He states that as far back as 1993 he and "a wealthy Dutch national", Mr Janssen, had set up a company named PC & M Project Consultancy and Management Limited for the purpose of pursuing development projects, and that they had agreed that this company would acquire land in Kenmare, Co. Kerry, and further, that a subsidiary company would be set up to pursue the first project – namely the respondent company.

25. The same solicitor was engaged on behalf of the two said companies, namely Mr Appelbe of the appellant firm. He states that all legal fees were paid in respect of legal services provided by Mr Appelbe until a dispute arose in 2008 with regard to fees in relation to litigation with Kerry County Council. He states that the costs paid up to that date amounted to some €39,202, which included some work for a different company.

26. He goes on to refer to the dispute that arose in October 2008 in relation to fees claimed by the appellants arising from work done in relation to the planning permission at issue. He states that by then Mr Janssen was frustrated by the progress of the litigation and that in reality they had lost the development opportunity.

27. Mr Schoenmakers went on at para. 18 of his second affidavit to state that on the establishment of the company PC&M he and Mr Janssen had made an initial investment in the company of €63,478, and that in subsequent years they had lent the company further sums in order to purchase the Kenmare lands, and to provide for operating costs, in order to obtain the planning permission, construct a model house, and infrastructure, as well as the development of sales tools and marketing expenses. He goes on to state that he personally is owed some €502,000 and Mr Janssen a sum of €600,000 by that company. He does not dispute that both companies are insolvent, but states that both their own personal losses and those of the companies, result from the negligence of the appellant firm.

28. There are also important averments contained in paras. 20-23 of Mr Schoenmakers' second affidavit, which I will set forth *verbatim* rather than in summary form:

"20. The assertion that the plaintiff did not have the resources to develop the project in 2001/2 is also incorrect. In 1998 we built the first model house, having been advised that we needed to do so to attract purchasers. The lack of any finished building to show prospective clients was cited to us as the principal reason we had not made sales in the mid-to late 1990s. Through 1998 market research the German LBS Bank identified that some 41,000 Germans would be interested in buying in Ireland, preferably at or near the sea and we engaged in extensive negotiations with them in order to both comply with Irish legislation and to approach the German public in an attractive way.

On foot of these negotiations LBS developed its own brochure and I beg to refer to a copy of same upon which marked "2 FS4". I have endorsed my name prior to the swearing hereof. The financing plan involved customers purchasing off-plan, allowing the plaintiff to construct through pre-finance and instalment payments provided by the customer. LBS had used this financing model in the same way in projects in Spain and Florida and I beg to refer to a true copy of the financing plan proposed by it for the plaintiff's project upon which marked "2 FS5". I have endorsed my name prior to the swearing hereof.

22. At the same time as engaging with LBS and other potential marketing agents in the Netherlands, Belgium and Germany, the plaintiff sought professional assistance in Ireland to avail of the best financial and tax treatment for the project. In July 2000 it was confirmed that Holiday Homes Tax Relief was available for the project and also at the same time the local branch of the Bank of Ireland decided to offer mortgages to off-plan purchasers of the plaintiff's villas. With regard to the tax relief, I beg to refer to a true copy of a letter dated 27th July 2000 from C. Maxwell & Associates, Taxation and Financial Consultants upon which marked "2 FS 6". I have endorsed my name prior to the swearing hereof.

23. As noted in correspondence with the defendants in 2002, the project became progressively more urgent in 2002 as we also had investors seeking to acquire parts of the development. In addition, although we had no interest, we were offered loan finance from Allied Irish Banks plc. The Irish economy at the time was on the crest of a wave, prices were increasing annually and there would have been no difficulty selling the holiday homes/villas had we secured default planning permission through a judicial review in 2002.

24. I therefore say and believe that the sole reason for the plaintiff's inability to pay the costs of these proceedings is that it did not secure planning permission in the early 2000s when the market for holiday homes in Kenmare, County Kerry was at its peak. That this occurred was due to the failure of the defendants to seek an order for mandamus for a default planning permission when requested to do so in July 2002. Their delay in first not doing so and in then pursuing plenary proceedings which were bound to fail resulted in the plaintiff having lost the opportunity to develop the lands. The planning permission would have provided for 28 standard villas on 22 acres at an estimated profit of €4,065,150 with PC&M retaining a further 57 acre site for future projects."

29. I have set out in considerable detail the evidence which was adduced by the respondent company in support of its contention that its inability to discharge any order for costs that might be made against it if unsuccessful at trial, as well as the appellants' response to that evidence, as this evidence is what the trial judge considered "not without some reservation" to meet what she referred to as "the threshold of establishing that its inability to meet the potential costs of an unsuccessful negligence action was due to the defendant's wrongdoing, assuming that negligence in that regard is ultimately established". Given that the trial judge at para. 42 of her judgment had clearly referred to the fact that the four matters identified by Clarke J. in *Connaughton Road* must be established only to a prima facie level, it can be presumed that when she states in para. 46 that these matters are "established" she means to that level, and not on the balance of probabilities.

30. It is worth recalling what is meant by the phrase "*prima facie*". It is a lower standard of proof than proving a matter on the balance of probabilities. According to *Murdoch's Dictionary of Irish Law* (4th ed. LexisNexis) the Latin phrase translates as "of first appearance" and means:

> "On the face of it; a first impression. A *prima facie* case is one in which there is sufficient evidence in support of a party's charge or allegation to call for an answer from his opponent. If a *prima facie* case has not been made out, the opponent may, without calling any evidence himself, submit that there is no case to answer, whereupon the case may be dismissed".

31. It seems to me that in order to satisfy the requirement that special circumstances be established on a *prima facie* basis, as opposed to a balance of probabilities, the plaintiff must do more than merely assert the proposition on affidavit, but must bring forth some evidence which is cogent and credible, which corroborates the contention being made. Any affidavit filed in response by the defendant may affect the trial judge's view as to that cogency and credibility, but the trial judge's task remains to decide if *prima facie* evidence has been adduced, and not to determine as a matter of probability whether or not the impecuniosity of the plaintiff has or has not been brought about by the wrongdoing alleged against the defendant. That seems to me to be what is intended by the requirement to establish the matter, and has been consistently stated to be the level of proof required by the decided cases from *Jack O'Toole Limited v. MacEoin Kelly Associates* in 1986 up to *Connaughton Road* in 2009, which has been consistently followed in later cases.

32. In my view the second affidavit of Mr Schoenmakers added flesh to the bones of the respondent's contention as to impecuniosity as described and set forth in his first affidavit. He provided rational and cogent detail as to the history of the appellant company and its financial history, including the financial contributions made by both he and Mr Janssen. He exhibited relevant materials which, at least on a *prima facie* basis, rationally support what the company contends. The correspondence from the taxation and financial consultants and the LBS brochure also tend to corroborate Mr Schoenmakers' affidavit evidence again, as I say, to a *prima facie* level of proof.

33. There was no affidavit filed by the appellants in response to Mr Schoenmakers' second affidavit, though counsel in his submissions sought on this appeal to cast doubt on the reliability and cogency of the evidence.

34. I would take the same view as the trial judge on this question, though I would not have the same reservation about the conclusion as she expressed in her judgment. In my view, the respondents adduced sufficient to demonstrate on a *prima facie* basis that its inability to discharge any costs order that might be made against it was the result of the negligent wrongdoing of the appellant firm, should that negligence be proven at trial.

35. In such circumstances it is unnecessary to address the ground of appeal in relation to the finding of a lack of *bona fides* on the part of the appellants which the trial judge also had regard to in reaching her overall conclusion. The question whether a lack of *bona fides* on the part of an applicant for an order for security for costs should debar a party from obtaining an order to which it would otherwise have established an entitlement should await another case in which the matter directly arises. In the present case, for the reasons stated, I am not satisfied that the appellant has established that entitlement, and therefore the question of *bona fides* does not need to be determined.

36. I would dismiss this appeal.