Neutral Citation Number: [2011] IEHC 83

THE HIGH COURT

2007 2511 P

BETWEEN

RONBOW MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

SOROHAN BUILDERS LIMITED (FIRST DEFENDANT)

AND

JOSEPH SOROHAN (SECOND DEFENDANT)

AND

JOSEPH BOWE (THIRD DEFENDANT) CLAIRE M. CALLANAN (FOURTH DEFENDANT) NIALL COLEMAN (FIFTH DEFENDANT) MARIE CUNNINGHAM (SIXTH DEFENDANT) JOHN W. CUNNINGHAM (SEVENTH DEFENDANT) GABRIEL C. DALY (EIGHT DEFENDANT) AISLING B. FOLEY (NINTH DEFENDANT) AISLING C. GANNON (TENTH DEFENDANT) AINSLEY P. HEFFERNAN (ELEVENTH DEFENDANT) MARK J. HESLIN (TWELFTH DEFENDANT) RICHARD LIDDY (THIRTEENTH DEFENDANT) ADRIAN C. MARSH (FOURTEENTH DEFENDANT) KATE A. O'CONNOR (FIFTEENTH DEFENDANT) MAITIU O'DONAILL (SIXTEENTH DEFENDANT) SHAUN G. O'SHEA (SEVENTEENTH DEFENDANT) MARK PERRY-KNOX-GORE (EIGHTEENTH DEFENDANT) IMELDA REYNOLDS (NINETEENTH DEFENDANT) GARY RICE (TWENTIETH DEFENDANT) PHILIP HOWARD SMITH (TWENTY FIRST DEFENDANT)
JOHN C. WHITE (TWENTY SECOND DEFENDANT) CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF BEAUCHAMPS SOLICITORS, BRYAN O'ROURKE, AND PETER MORRISSEY CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF PETER MORRISSEY AND COMPANY SOLICITORS.

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered the 10th day of February 2011

The plaintiff in these proceedings is the respondent in the current Motion dated the 19th March, 2010, brought by Sorohan Builders Limited and Joseph Sorohan, the first and second named defendants, seeking security for costs pursuant to O. 29 of the Rules of the Superior Courts and additionally or alternatively s. 390 of the Companies Act 1963. The plaintiff is a company limited by guarantee not having a share capital and was incorporated on the 23rd of May, 2001, with the principal object of managing and administering the communal open spaces, grouped car parking areas, private access roads and other communal facilities within a residential complex of 37 freehold and leasehold townhouses, known as Elton Court, Sandycove, Co. Dublin. Membership of the plaintiff is limited to and mandatory for the owners and occupiers for the time being of townhouses and car parking spaces. The first named defendant, Sorohan Builders Limited was the developer of Elton Court. The first named defendant was also the vendor of the leasehold interest and, the second named defendant was the vendor of the freehold interest in the property to the individual purchasers of the 37 town houses and of the common areas to the plaintiff. The proceedings have not been served on and no relief is now sought by the plaintiff against the 23rd and 24th named defendants. The 23rd named defendant is an architect who furnished a Statutory Declaration of Identity to the other defendants dated the 1st May, 2001 and the 24th named defendant was the sometime solicitor for the first and second named defendants.

The 3rd to the 22nd named defendants, carrying on the practice of Solicitors under the style and title of Beauchamps Solicitors, obtained, on the 5th February, 2010 and Order from this Court (Laffoy J.) pursuant to the provisions of s. 390 of the Companies Act 1963, directing the plaintiff to furnish security for costs in such amounts and in such manner as the parties should agree or, in default of agreement to be determined by the Master of the High Court. Letters were sent by the Solicitors for the 3rd to the 22nd named defendants to the Solicitors for the plaintiff dated the 10th February, 2010 and the 25th February, 2010, seeking security for costs on foot of the Judgment of Laffoy J. but without response. At the hearing of the instant application, this Court was informed that an Appeal has been taken to the Supreme Court by the plaintiff against the whole of the judgment and Order of Laffoy J.

As is found in the Judgment of Laffoy J. delivered on the 5th February, 2010, Beauchamps Solicitors acted as Solicitors for the first and second named defendants, vendors in the sales of the individual town houses at Elton Court. They also acted for all parties, - the plaintiff (therein referred to as Ronbow Limited rather than Ronbow Management Limited) the first named defendant and the second named defendant, - in the preparation and execution of a Management Company Agreement made 30th April, 2001, and for the plaintiff and for the first named defendant and the second named defendant in relation to a Deed of Conveyance and Assignment made the 31st January, 2005, pursuant to the terms of that Management Company Agreement. In her Judgment delivered on the 5th February, 2010, Laffoy J. found that what was conveyed to the plaintiff were the common areas within the Elton Court complex including, the access from the public roadway at Breffni Road and, the access from the public roadway at Casetlepark Road.

Part of the plaintiff's claim against Beauchamps Solicitors is that while acting as Solicitors for the plaintiff, they were guilty of negligence and breach of contract in that the title to the Common Areas at Elton Court acquired by the plaintiff by virtue of the said Deed of Conveyance and Assignment made on the 31st of January, 2005, is defective in a number of respects.

In the course of her Judgment delivered on the 5th February, 2010, Laffoy J. held as follows:-

> "It is important to emphasise that the title to Elton Court is extremely complicated and what I understand to be the alleged defects will only be outlined in general terms.
>
> First, the title created by the 1863 lease in the areas coloured yellow on the Gibbons map is outstanding. Those areas, which are roughly "T" shaped, comprise a laneway which extends from Breffni Road along the rear of houses on Castlepark

Road as far as No. 16 Castlepark Road and a laneway which extends from that laneway along the rear of the premises designated Breffni Terrace on the Gibbons map. The title position, as I understand it, is that both laneways were included in the 1863 lease but the first defendant had acquired only the freehold interest in both laneways subject to and with the benefit of the 1863 lease and had not acquired the leasehold interest created by the 1863 lease therein. Accordingly, by virtue of the 2005 conveyance, all the plaintiff acquired was the freehold reversion on the 1863 lease, which will fall into possession just under one hundred years hence. As I understand it, the applicants accept that such was the effect of the 2005 conveyance.

Secondly, there is an area coloured yellow and cross-hatched in black on the Gibbons map which extends from Castlepark Road along the side of what was formerly No. 16 Castlepark Road and further west along the rear of houses on Elton Park. On the Gibbons map this area is designated as "Elton Park lane". As I understand it, what was formerly No. 16 Castlepark Road and the part of this area contiguous with it now forms the entrance into Elton Court from Castlepark Road. The plaintiff's complaint is that the first defendant had no title whatsoever to this area when it executed the 2005 conveyance. Although, on a superficial comparison of the Gibbons map with the map on the 2005 conveyance, this area would appear to be within the area outlined in red and depicted on the latter map, on a superficial comparison of the Gibbons map and the map on the 1863 lease, it would appear that this area was not comprised in and demised by the 1863 lease. Therefore, for present purposes, I am assuming that the contention of the plaintiff is correct and that the first defendant did not have any title to this area at the date of the 2005 conveyance, because, so far as is relevant, its title, both freehold and leasehold, related to lands comprised in and demised by the 1863 lease.

Thirdly, by virtue of an order dated 18th July, 2007 made by Mr. Justice Smyth in the Circuit Court proceedings (Record No. 2005/05698) referred to in the statement of claim, being proceedings between Thomas Byrne and Philomena Byrne, as plaintiffs, and the plaintiff in these proceedings, as defendant, the Court made a declaration to the following effect:

> '. . . that the Plaintiffs, their heirs, assigns and successors in title are entitled to an easement to park and maintain one motor car on that part of the defendant's property contiguous to the Plaintiffs' property to a depth of 2.4 metres.;

The 2005 conveyance was expressed to be made subject to 'the verbal agreement with Mr. and Mrs. Thomas Byrne in respect of the area coloured blue on the map annexed hereto'. The position adopted on behalf of the applicants in the affidavit sworn by Kate O'Connor on 26th June, 2009 grounding this application is that Mr. and Mrs. Byrne asserted a prescriptive right to park at a location within Elton Court and their right was upheld, but a finding in their favour on the basis of a prescriptive right would have arisen against the plaintiff irrespective of the nature of the interest held by the plaintiff in Elton Court. Adopting that position, it seems to me, misses a point. I would have thought the point is whether the order of the Circuit Court gave Mr. and Mrs. Byrne a greater interest, and thereby created a greater burden on the common areas in Elton Court, than would have arisen under the verbal agreement referred to in the 2005 conveyance."

This Court will accept and adopt the finding of Laffoy J. that as of the 5th February, 2010, the Court was satisfied that there was credible evidence to believe that the plaintiff would be unable to pay the 3rd to the 22nd named defendants (Beauchamps Solicitors) estimated legal costs of €94,450 exclusive of VAT. That the plaintiff is found not to have large amounts of cash or valuable free assets up to or exceeding this sum is something which could scarcely be suggested must come as a surprise to the first or the second named defendants. The only asset of the plaintiff is the common areas of the Elton Court complex and no evidence was put before me that this had any marketable value. The plaintiff's only source of income is the service charge payable by the owners or occupiers for the time being of each of the 37 townhouses and various car parks at Elton Court. No Financial Statements for the plaintiff, other than those for the year ending 31st December, 2007, and for the year ending the 31st December 2008, which had been considered in depth by Laffoy J. were put before this Court at the hearing of the instant application.

In her Judgment delivered on the 5th February, 2010, Laffoy J. held that she was unable to form a view as to whether the owners of the townhouses were, by their covenant to pay this service charge, legally obligated to pay a contribution towards any legal costs which might be incurred by the plaintiff in these proceedings. She was unable to do so because no full and entire Deed of Conveyance, Assignment and Confirmation from and by the first named defendant, the second named defendant and the plaintiff to the purchaser of an individual townhouse was produced in evidence at the hearing before her. One such Deed was admitted into evidence before me at the hearing of the present application and, the parties accepted that it was representative of all the other Deeds as regards the covenants and agreements relating to the nature and payment of the service charge.

By para. 3 of the Fourth Schedule of the Deed, the purchaser agreed and covenanted to pay, without deduction, one 37th of the costs and expenses incurred by the plaintiff in carrying out the obligations and in giving effect to the provisions contained in the Fifth Schedule of the Deed, subject to certain specified terms and conditions. This service charge is agreed to be calculated by reference to an Auditors Certificate, which is deemed to be conclusive evidence of the service charges actually incurred by the plaintiff. The Fifth Schedule contains covenants on the part of the plaintiff to keep and maintain the common areas in good and substantial repair and condition; to insure; to appoint managers and to employ solicitors and other persons, firms and companies and to pay them all proper fees, charges, salaries, wages, costs, expenses and outgoings; to pay rates; to provide proper lighting, to employ auditors, to enforce the performance and observance of covenants; to provide for other matters necessary for the running of the estate as a high class residential development and to:-

> "Build up a reserve fund (if necessary) to meet contingencies, to meet major repairs and capital replacement in respect of such matters referred to in this clause as [the plaintiff] may deem appropriate."

While not attempting to decide the question, something the Court should not undertake without the matter being fully argued, for the purpose of the present application, the court is not sufficiently satisfied that an enforceable obligation to contribute to a claim of this nature by the plaintiff comes within any of the above defined service charges or could be so implied as necessary to give business efficiency to the terms of the Deed.

I do not consider it necessary to endeavour to come to a conclusion as to why the Legal Costs Accountants should estimate the legal fees likely to be incurred in defending these proceedings at €94,450 exclusive of VAT in the case of Beauchamps Solicitors, the solicitor/agents, and €145,000 exclusive of VAT in the case of their principals, the first and second named defendants. I am satisfied that there is credible evidence before the Court that the plaintiff would be unable to pay the lesser of these two sums.

At para. 7 of her affidavit grounding this application, sworn on the 19th March, 2010, Susan O'Reilly, Solicitor of Arthur Cox, Solicitors for the first and second named defendants, states that the first and second named defendants at all times relied upon the expertise

of Beauchamps Solicitors so that their substantive defence to the plaintiff's claim is the same. Given the nature of this application no defence has yet been delivered on the part of the first named defendant, the second named defendant or the 3rd to the 22nd named defendants. In the statement of claim delivered on the 24th October, 2008, the plaintiff claims damages for breach of contract, negligence, breach of duty, misrepresentation and breach of title warranty against the first and the second named defendants and against Beauchamps Solicitors. The plaintiff also claims damages solely against the 3rd to the 22nd named defendants for acting in conflict of interest and in preferring the interests of the first and the second named defendant to the interests of the plaintiff in assembling, and purporting to make title to the common areas, roads, footpaths, services and utilities at Elton Court. The plaintiff further claims an order for specific performance against the first named defendant and additionally or alternatively against the second named defendant of the Management Company Agreement dated the 30th April, 2001.

It was found by Laffoy J. that Beauchamps Solicitors had satisfied her that they had a *prima facie* defence to the plaintiff's claim. This is sufficient for the purposes of an application for an order for security for costs. The "substantive" defence of the first and second named defendants is stated by their Solicitor on affidavit, to be the same as that of Beauchamps Solicitors. Given the relationship of principal and solicitor/agent which had existed between them and, the nature of the plaintiff's claim this is entirely understandable. In such circumstances, as regards the plaintiff's claim for damages, for negligence, breach of duty, misrepresentation and breach of warranty of title, this Court should and does adopt and follow the decision of Laffoy J. and finds accordingly that the first and second named defendants have satisfied the Court that they have a *prima facie* defence to these claims by the plaintiff.

The plaintiff's claim for damages for acting in conflict of interest relates solely to Beauchamps Solicitors and does not concern and is not taken against the first or the second named defendant. I am satisfied that the first and the second named defendants have a *prima facie* defence to the plaintiff's claim against them or one or other of them for specific performance. It appears from the statement of claim and from the affidavits filed in the instant application and, in the course of the proceedings had before Laffoy J. which were fully opened to this Court during the hearing of the present application by the first and second named defendants, that the plaintiff is not willing to accept the title which the first and second named defendants or one or other of them can give. It has been decided in this jurisdiction that in such circumstances the Court will not exercise its equitable jurisdiction in favour of the party seeking specific performance.

I am quite satisfied that there has been no delay on the part of the first or the second named defendants such as would justify this court in refusing to make the order sought by them. Laffoy J. found that there had been no culpable delay on the part of the 3rd to the 22nd named defendants in seeking security for costs. In the course of her judgment, Laffoy J. set out a chronology of the pleadings and proceedings had between the parties up to the date of the Motion by Beauchamps Solicitors seeking security for costs on the 16th March, 2009. The Judgment of Laffoy J. was delivered in the matter on the 5th February, 2010. Two letters dated the 10th February, 2010, and 25th February, 2010, to which no response was received, were exhibited at para. 6 of her affidavit grounding this application, sworn by Susan O'Reilly on the 1st March, 2010. The Notice of Motion in the instant application is dated the 19th March, 2010. At para. 4 of her said affidavit Susan O'Reilly states:-

> "The first and second named defendants refrained from issuing a Motion thus far so as to avoid a proliferation of motions with consequential wasted costs in the matter: indeed the first and second named defendants are concerned that the costs of contested motions will prove very difficult to recover."

In my judgment this was a reasonable and proportionate attitude for the first and the second named defendants to have taken and is wholly justified in the circumstances. I am not satisfied that the plaintiff has demonstrated by affidavit evidence any prejudice to the plaintiff by reason of this application having been postponed until after the judgment of Laffoy J. The plaintiff did not proffer any evidence on affidavit other than in respect of the alleged delay, that the first and second named defendants or one or other of them had so conducted themselves as to lead the plaintiff reasonably to believe and, upon which belief it had acted to its detriment, that the first and the second named defendant would not seek an order for security for costs.

Apart from a reiteration of the alleged misconduct on the part of Beauchamps Solicitors which was rejected by Laffoy J. in her judgment delivered on the 5th February, 2010, no affidavit evidence was adduced by the plaintiff in the instant application of any separate and deliberate misconduct on the part of the first and second named defendants or one or other of them such as should disentitle them to an order for security for costs. Even where an applicant/defendant establishes, by credible evidence, that it has a *prima facie* defence to a claim made against it by a plaintiff and, further establishes that there is good reason to believe that if its defence is successful the limited company plaintiff will be unable to pay such costs as would ordinarily follow the event, this Court retains a discretion to disallow the application if it is satisfied that in the special circumstances of the case it would be unjust and unreasonable to order the plaintiff to provide security for costs to the defendant. It is now well decided law that the power conferred on this Court by s. 390 of the Companies Act 1963, to require a plaintiff to provide security for costs is discretionary; the empowering word "may" when employed in an Act of the Legislature is to be interpreted as permissive and not as mandatory.

I have already addressed two sets of circumstances in which the courts here have in the past exercised this jurisdiction: delay and reprehensible conduct on the part of an applicant/defendant. However, in my judgment it was never intended that these should be considered exhaustive of the power of this Court in special circumstances to decline to make an order for security for costs.

In the instant case the first and second named defendants are undoubtedly entitled to opt to fully defend the plaintiff's claim against them and, so long as that claim is maintained and defended by them to fully participate in the proceedings with separate representation. However, so far as this instant application is concerned this Court cannot disregard the fact that so far as the plaintiff's claim is concerned there is effectively a common defence shared by the first and second named defendants and the 3rd to the 22nd named defendants (Beauchamps Solicitors). In this respect I would refer to para 7 of the grounding affidavit of Susan O'Reilly, Solicitor acting on behalf of the first and the second named defendants sworn on the 1st March, 2010.

It is clear from the affidavit evidence produced to this Court on the present application that to date the burden of defending the plaintiff's claim has in fact been borne entirely by Beauchamps Solicitors. In the special circumstances of this case, I do not consider that in order to defend any right of theirs or to ensure that justice is done between them and the plaintiff that the first and second named defendants must take a full active part in the conduct of the defence. They must of necessity take some part, in the form of pleadings and, may perhaps have to participate in or initiate some interlocutory matters. The plaintiff is not concerned with claims for indemnity or contribution between the defendants themselves in the event of any such arising. Insofar as it may be considered that the oral testimony of the second named defendant or of some officer, employee or agent of the first named defendant is essential to the defence of the plaintiff's claim, one must infer that this expense has already been included as an item in the estimate of costs prepared on behalf of Beauchamps Solicitors by William J. Brennan and Company Legal Costs Accountants and, put in evidence before Laffoy J. and which she held had not been challenged by the plaintiff.

It was submitted on behalf of the first and second named defendants that it would be necessary for them to take a full part in the

action in order to protect themselves against the possibility that the 3rd to 22nd named defendants might decide not to defend the plaintiff's claim or to compromise the proceedings. Beauchamps Solicitors are unquestionably entitled to pursue such a course without having to obtain the consent of the first or the second named defendants. Were Beauchamps Solicitor to adopt either course then the plaintiff's action would almost certainly end there with a judgment against them or in a negotiated settlement agreement. In any event there was no affidavit evidence whatsoever before this Court that Beauchamps Solicitors intend to adopt either of theses courses. In fact the affidavit evidence before this Court indicates that the 3rd to the 22nd named defendants are vigorously defending the plaintiff's claim.

A complaint was made to Laffoy J. which she rejected, that the 3rd to 22nd named defendants were acting in abuse of process by delivering prolix and unnecessary requests for particulars and by aggressively attempting to coerce the plaintiff into withdrawing the proceedings and accepting an Indemnity Bond and joining in an effort to persuade Dunlaoghaire Rathdown County Council to take the access roads at Elton Court in charge as public roadways. This Court can only assess the merits of the application by reference to the issues and facts disclosed by the pleadings, proceedings and affidavits before it. For the purpose of an application seeking security for costs, the court must assume in the absence of clear affidavit evidence to the contrary (ie. the existence of a preliminary issue which would determine the entire matter), that the action will take its full and normal course and assess the defendants exposure to possibly irrecoverable costs accordingly. However, in my judgment, the court is also entitled to expect that in the interests of saving costs and court time that defendants with a common defence to a plaintiff's claim will reach a rational and reasonable agreement with regard to the conduct of that defence at trial and, so far as possible, in interlocutory proceedings also.

On the evidence before me I do not think that it is either necessary or proper for the first and second named defendants to incur the estimated costs of €145,000 in order to attain justice or to defend some right of theirs in these proceedings. I consider that there are special circumstances in this case why it would be oppressive of the plaintiff and unjustly restrictive of its right of access to this Court, if the Court were to make the order for security for costs sought by the first and the second named defendants. If the court were to make the order sought, in my judgment, it would deprive the order of any effect were the Court to exercise the discretion conferred on it by s. 390 of the Companies Act 1963, and decline to stay the proceedings until security had been given by the plaintiffs. I have not taken any account of the probability on the evidence before this Court that any costs awarded to the first and the second named defendants which are irrecoverable from the plaintiff could probably be otherwise recouped by them. The Court will therefore decline to make the order for security of costs sought by the first named defendant and by the second named defendant in this application.