THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 327

Record No's 2014 1170

2014 1210

[Article 64 transfer]

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

USED CAR IMPORTERS OF IRELAND LIMITED

PLAINTIFF /

APPELLANT

- AND -

MINISTER FOR FINANCE, REVENUE COMMISSIONERS,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 15th day of December 2017

1. In these proceedings the plaintiff company, Used Car Importers of Ireland Ltd., ("UCII") has challenged the entire system of vehicle registration tax ("VRT") as provided for by the Finance Act, including the manner in which it has been operated by the Revenue Commissioners. As its name implies, UCII specialised in the importation of used cars from other right-hand car markets and where vehicle taxes (however described) tended to be lower. Most of the vehicles were imported directly from Japan, but the evidence also established that 44 vehicles were imported from Northern Ireland.

2. UCII maintains that the system as operated is *ultra vires* the parent legislation because it contends that the Revenue Commissioners have adopted an artificial and non-transparent method of valuing imported cars, thereby inflating the true value of these vehicles. The effect of this was that – or so the argument ran – these used vehicles attracted a much higher registration tax when they were first presented for registration upon arrival in the State. The company also contends that insofar as the (allegedly) arbitrary method of the valuation of the vehicles is in fact *intra vires* the parent Act, the said legislation is unconstitutional, which argument is based on case-law such as *Brennan v. Attorney General* [1984] I.L.R.M. 355. It further contends that the VRT system violates Article 78 of the Sixth VAT Directive (now Directive 2006/112/EC) by providing for a tax to be calculated on the value of the vehicle (including the VAT element) of that vehicle.

3. Although these proceedings were commenced as far back as 1995, quite remarkably they have not yet come to a final conclusion. The High Court proceedings were, admittedly, determined in 2012 following a 33 day hearing. Some measure of the complexity of the issues presented on this appeal can be gauged by the fact that the judgment of Murphy J. runs to over 200 pages. The plaintiff company's action was, however, dismissed and an order for costs was made against it.

4. The plaintiff duly lodged an appeal with the Supreme Court, but that appeal was transferred to this Court following the establishment of this Court on 28th October 2014 pursuant to Article 64 of the Constitution.

5. The issue which is presented now is whether the State defendants are entitled to security for costs in respect of this appeal. It should be said immediately that it is accepted that UCII faces considerable financial difficulties and it is accepted that the company is not currently in a position to discharge the High Court order for costs.

The jurisdiction to order security for costs on appeal to the Court of Appeal

6. The first thing to be considered is the basis of this Court's jurisdiction to order security for costs. The State's motion for security was issued on 27th April 2016 and the basis for the security sought was expressed to be either s. 390 of the Companies Act 1963 ("the 1963 Act") or s. 52 of the Companies Act 2014 ("the 2014 Act") or Ord. 86, r. 9. This jurisdictional issue is of some importance because there are or, at least, may be differences between the various statutory provisions or Rules of the Superior Courts so far as the requirement to order security is concerned.

7. A further complication is presented by the fact that s. 52 of the 2014 Act came into force on 1st June 2015 and to that extent s. 390 of the 1963 Act is no more. It is true that the motion which was issued post-dated the repeal of s. 390 of the 1963 Act, but it is at least arguable that given that s. 390 of the 1963 Act was in force at the date on which the proceedings were commenced and, indeed, on the date on which the original appeal to the Supreme Court was lodged it nonetheless applies to this motion. What is clear, however, that if an order for security is made under s. 390 of the 1963 Act it applies to the full quantum of the costs: see *Lismore Homes Ltd. v. Bank of Ireland (Finance) Ltd.* [2001] IESC 79, [2001] 3 I.R. 536. The wording of s. 52 of the 2014 Act is slightly different again from that of s. 390 of the 1963 Act and there is, accordingly, an argument that the full quantum requirements of *Lismore Homes* no longer apply even where security is directed under the terms of the new s. 52.

8. Some of these issues were raised by members of the Court with counsel in the course of the hearing of this application. Counsel for

the State, Mr. Maurice Collins S.C., acknowledging the existence of some of the legal issues associated with the statutory provisions, elected to ground the application for security on the provisions of Ord. 86, r. 9, albeit that he submitted that some of the existing case-law arising under s. 390 of the 1963 Act was at least applicable by analogy in respect of any such application.

The provisions of Order 86, r. 9

9. Order 86, r. 9 provides:

> "The Court of Appeal may under special circumstances direct that a deposit or other security in the amount fixed by the Court of Appeal be made or given for the costs to be occasioned by any appeal."

10. This language is similar – but not identical to – the wording of the former Ord. 58, r. 17 which applied to appeals to the Supreme Court prior to the establishment of this Court in October 2014.

11. The reference to "special circumstances" may, however, be taken to imply that the requirement as to security is generally not required and is, to some extent, at least, confined to special or clearly identified categories of cases. While the categories of what may constitute "special circumstances" for the purposes of Ord. 86, r. 9 are never closed, the existing case-law dealing with the analogous provisions of the (old) Ord. 58, r. 17 had identified a number of categories. In one of the leading authorities on the point, *Midland Bank Ltd v. Crossley-Cooke* [1969] I.R. 56, 61, Walsh J., having reviewed relevant authorities up to that time, said the following:

> "Four points emerge clearly from these cases. They are, first, that the Court was free to order security in any type of case. Secondly, that poverty alone was not sufficient to warrant the making of such an order. Thirdly, that poverty, or insufficiency of assets on the part of the appellant, was an essential prerequisite for the making of an order. Fourthly, if a point of law of public importance was in issue, that the Court would not make such an order, even if all the other circumstances existing in the case would themselves have ordinarily caused the Court to make the order, if the effect of making the order would be to prevent the point of law in question being decided. It would appear that in the circumstances of any particular case the Court could have felt itself justified in making such an order when there was a combination of poverty of the appellant and any one or more of the several factors mentioned in those cases, such as a party being resident out of the jurisdiction, or there being no apparent prima facie grounds for the appeal, or the complexity of the issues, or long delays on the part of the appellant in the conduct of the litigation, or where the appellant is simply a nominal appellant; or, where there are several appellants and poverty is common to each of them, a combination of that and one or more of the other factors even if the other factors affect only one of the appellants."

12. It is worth emphasising, however, the application for security at issue in *Crossley-Cooke* concerned a natural person. As I propose to show later, different considerations obtain in the case of a limited liability company such as the plaintiff.

13. The other key decision is that of the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 43, [2013] 2 I.L.R.M. 183 which also concerned an individual. In that case Clarke J. stressed that the object of the security rule was to ensure fair process as between the parties, i.e., allowing access to the courts but balanced against the potential injustice to a defendant if it were forced to incur unnecessary expense in defending an appeal. As Clarke J. explained ([2013] 2 I.L.R.M. 183, 200):

> "In order that a requirement that security for costs be provided might amount to a proportionate interference with the right of an appellant to this court to have a fair process in pursuing an appeal, it seems to me that two factors need to be present. First, there must be a countervailing potential interference with the right of the respondent such as would justify directing security for costs as a proportionate response to the situation shown to exist. Second, the nature and scope of the security directed must, itself, be a proportionate response to that situation."

14. It should be stressed, however, that as *Crossley-Clarke* makes clear, in all of the following categories poverty or impecuniosity is a prerequisite to the making of an order for security and the discussion which follows must be read or understand as being subject to that important proviso.

Whether no arguable grounds

15. The first such category is that, as identified by Walsh J. in Crossley-Cooke, where the appeal discloses no arguable grounds or any reasonable prospect of success. The established case-law has made it clear that neither this Court nor the Supreme Court will generally extend time for the purposes of an appeal if no arguable grounds are shown: see Éire Continental Trading Co. v. Clonmel Foods Ltd. [1955] I.R. 170. The reason for this is manifest, because the courts have long recognised that it is rather pointless to extend time where the appellant has no real prospect of success.

16. By a parity of reasoning the same can be said of applications for security under Ord. 86, r. 9. If one of the reasons for not ordering security for costs is where, as I put it in *CMC Medical Operations Ltd. v. VHI* [2015] IECA 68, this "would stifle a genuine claim", the converse must equally be true where the claim has little prospects of success. In those circumstances, the otherwise impecunious appellant cannot realistically be heard to complain if he is required to put up at least some security to ensure that the respondent has at least some prospect of recovering costs where the appellant loses.

17. In the present case, however, there can really be no suggestion that the appellant has not disclosed arguable grounds of appeal. The very length and complexity of the judgment demonstrates that these proceedings presented weighty issues of statutory interpretation, EU free movement of goods and taxation law, the interpretation of the 6th VAT Directive, constitutional law and much more besides. This Court could not possibly form a view as to the underlying merits of any of these issues: it is, nevertheless, sufficient for present purposes to say that the appellant has established arguable grounds of appeal.

Impecuniosity of a limited liability company plaintiff

18. As I have already indicated, the impecuniosity of a limited liability company who is a plaintiff is another acknowledged category of special circumstances for the purposes of the application of the rule. As Barrington J. said in another iteration of the Lismore Homes litigation, *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501,507: "insolvent limited liability companies are in a different category simply because the liability of their shareholders is limited." As Clarke J. further observed in *Farrell*, this category reflects in any event a consistent underlying legislative policy as found in s. 390 of the 1963 Act and as re-stated in s. 52 of the 2014 Act. Unlike a personal plaintiff security may require to be given even at first instance.

19. So far as the present application is concerned, it is true that the plaintiff is still trading. It is nevertheless not really disputed but that this plaintiff is impecunious and in its written submissions the appellant quite realistically accepts that the scale of the company's liabilities are such that it is unlikely to be able to meet any costs award in favour of the State defendants. It is has nonetheless not

been suggested that the applicant would not be able to proceed with this appeal were an order for security for costs now to be made.

20. In these circumstances, the case for directing the provision of security is compelling unless there are countervailing circumstances which would make such an order inappropriate. Counsel for UCII, Ms. Quigley, submits that there are two such countervailing circumstances why no such order should be made. First, she submits that the plaintiff's impecuniosity was caused by the defendants' wrongful conduct. Second, she submits that the present appeal involves a point of law of public importance (or, if needs be, a point of exceptional public importance). These submissions can be examined in turn.

Was the plaintiff's impecuniosity caused by the defendants' wrongful conduct?
21. It is true that the plaintiff can resist an order for security where it can shown that the defendant's wrongful conduct has caused or perhaps contributed to the plaintiff's impecuniosity: see *Collins v. Doyle* [1982] I.L.R.M. 495, 496, per Finlay P.. *Collins* was, however, a straightforward action for personal injuries. The present case is, however, a rather different one, since it involves a complex action for damages for negligence, breach of EU law and breaches of constitutional rights.

22. So far as the action for negligence is concerned, it is clear from the Supreme Court's decisions in leading cases such as Pine Valley Developments Ltd. v. Minister for Environment [1987] I.R. 23 and *Glencar Exploration v. Mayo C.C.* [2002] 1 I.R. 84 that a finding of invalidity or even unconstitutionality would not in itself be enough to ground an action in negligence. As Keane C.J. said in *Glencar Exploration*, it would be necessary for a plaintiff to go further to show that it would be just and reasonable to impose a duty of care regarding the operation of the statutory scheme. It is unnecessary to express any concluded view on this question, save to observe that the very of existence of such a duty of care in a case such as this must be at least open to question.

23. The same can be said of a *Francovich* claim for damages for breach of EU law. It is clear from the recent decision of the Supreme Court in *Ogieriakhi v. Minister for Justice, Equality and Law Reform* [2017] IESC 52, [2017] 2 I.L.R.M. 340 that not only must the plaintiff in this case establish that the VRT scheme was operated unlawfully, but also that this breach of EU law was manifest or obvious. And so far as the claim for damages for breach of constitutional rights is concerned, it would generally be necessary for the plaintiff to show that the existing law of torts was insufficient to protect these constitutional rights: see *Hanrahan v. Merck, Sharpe & Dohme Ltd*. [1988] I.R.M. 606, 626, *per* Henchy J.

24. One may therefore fairly say of all three heads of claim that establishing liability thereunder will not be straightforward or obvious, even if the plaintiff were to succeed on appeal in showing that the defendants had acted *ultra vires* or in breach of EU law or pursuant to an unconstitutional statute. This in itself means that establishing a link between the impecuniosity of the plaintiff and any allegedly wrongful conduct of the State defendants which might sound in damages is in itself problematic. The present case is a far cry from, say, the classic instance of a plaintiff who has been seriously injured and unable to work by reason of the allegedly negligent driving of the defendant and who resists an application for security on the ground that his impecuniosity was caused by the negligence of the defendant.

25. For my part, I struggle to see how the plaintiff's argument in this respect goes much further than what amounts to an assertion on its behalf. It may well be that the plaintiff would have prospered – or, at least, have had a better chance of doing so - had the VRT system not operated the way it did, not least given that a key part of the plaintiff's claim is that the imported vehicles were valued by the Revenue Commissioners at an artificially higher rate so that they attracted a higher rate of VRT. But this is far from saying that there is a direct causal link between any impecuniosity on the part of the plaintiff and any actionable wrongdoing on the part of the defendants.

Does the case present a point of law of exceptional public importance?
26. It is clear from the authorities that security will not always be ordered where a case presents a point of law of exceptional public importance: see *Fallon v. An Bord Pleanála* [1992] 1 I.R. 380, 384 per Finlay C.J. It is true that in *Fallon* that test was calibrated by reference to the then existing provisions of s. 29 of the Courts of Justice Act 1924. This later provision provided for a right of appeal from the Court of Criminal Appeal to the Supreme Court where a certificate had been granted to the effect that the case presented a point of law of exceptional public importance. Given, however, that the Court of Criminal Appeal has been replaced by this Court and given further that Article 34.5.3 of the Constitution now provides that the Supreme Court can grant leave, *inter alia*, where the point of law is one of general public importance, it seems now appropriate in the light of these constitutional changes to ask whether the appeal presents a point of law of general public importance rather than, as such, a point of law of exceptional public importance. In any event, it may be observed that in *Farrell* Clarke J. when drawing attention to the importance of ensuring that points of law of public importance were determined by the Supreme Court (or, now, as the case may be, by the Court of Appeal), spoke of points of law of public importance and did not qualify that requirement by insisting that the point of law be of *exceptional* public importance.

27. Viewed thus, it seems hard to say that the present appeal does not present a point or points of law of general public importance. As I have already acknowledged, the legal issues arising on this appeal are complex and not necessarily straightforward. The proper operation of the VRT system is undoubtedly of considerable importance to the State, motorists and the car industry generally. A further consideration is, of course, that the Constitution itself places great weight on the right of appeal to this Court in those cases where (as here) the constitutionality of a law is at stake, since Article 34.4.2 provides that no law can except the appellate jurisdiction of this Court in respect of such appeals. While these are important considerations, I do not think that they are in themselves are necessarily dispositive of the point.

28. It has to be recalled that the present claim is fundamentally one for damages in which the validity of the operation of the VRT system falls to be determined as an essential prelude to the potential success of any such claim. In reality, therefore, this action involves a claim for damages brought by a private company. That, of course, is not a criticism of the plaintiff, but this really underscores the private interests which are at stake in this litigation. To that extent, the present case is a world away from either the litigants who commenced constitutional litigation because it involves issues of structural importance impacting on the citizenry in general (such as, *e.g.*, *Crotty v. An Taoiseach* [1987] I.R. 713) or where the impugned legislation impacted on fundamental constitutional rights personal to the citizen of which *McGee v. Attorney General* [1974] I.R. 287 provides perhaps the paradigmatical example.

29. The net effect of this, however, is that the action must nonetheless be viewed essentially as an ordinary claim for damages, so that the ordinary rules as to security applicable at appellate level continue to govern this claim.

Conclusions
30. It follows, therefore, that for the reasons just stated, this is a case which clearly does come within the scope of Ord. 86, r.9 so that it is appropriate to order the payment of a deposit or other security. Given that the plaintiff is itself an impecunious limited liability company, this also represents a case where security will generally be ordered absent sufficiently weighty countervailing

circumstances. I do not believe that the plaintiff has established the existence of such countervailing circumstances.

31. In the light of this conclusion and bearing in mind the comments of Clarke J. in *Farrell* to the effect that the existence and quantum of any such security must constitute a proportionate response to ensure that fair process between the parties is respected, I would now invite the parties to make further submissions as to the extent and amount of such security for the purposes of Ord. 86, r. 9.