THE HIGH COURT

RECORD NO. 3747/2011P

P. SHIELS PLANT HIRE LIMITED

Plaintiff

and

MEATH COUNTY COUNCIL

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 9th February, 2016.

Part 1: Introduction

1. The plaintiff is suing Meath County Council for an alleged breach of contract and unlawful interference in the plaintiff's commercial and/or economic interests arising out of the operation of an online quotation and/or tendering system in which Meath County Council has participated. (The precise legal character of the system is one of the issues in dispute). The Council comes now to court seeking an order for security for costs. This is because the Council is concerned that if it triumphs in the overall dispute between the parties and the plaintiff company is ordered to pay the Council's costs of defending the dispute, it (the company) does not have sufficient resources to meet those costs. This would have the result that the Council, and ultimately the taxpayer, would be left seriously 'out of pocket' despite having succeeded in its defence of the claim, a *prima facie* defence having been furnished to this Court on affidavit as part of the within application. In short, the cost of coming represented to the High Court is now of such a formidable scale that even a local authority, with access to resources beyond those available to most individual citizens, balks at the thought of having to meet them.

Part 2: Which statutory provision applies to this application?

2. At the time when the notice of motion for the within application issued, the relevant provision of statute was s.390 of the Companies Act 1963. By virtue of s.5 and Sch.6, item 8(1) of the Companies Act, 2014, the application falls now to be decided pursuant to s.52 of the Act of 2014. This is because item 8(1) provides that:

> *"Any thing commenced under a provision of the prior Companies Acts, before the repeal, by this Act of that provision, and not completed before that repeal, may be continued and completed under the corresponding provisions of this Act."*

3. There is no reason to believe that this general provision does not apply to an application under the old s.390. Section 390 was repealed on 1st June, 2015, through a combination of s.4 and Sch.2, Pt.1 of the Act of 2014, and reg. 3 of the Companies Act 2014 (Commencement) Order 2015. Section 52 of the Act of 2014 provides as follows:

> *"Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."*

4. Apart from a change in reference from a "*limited company*" to a "*company*" and the inclusion of the genders "*his or her*" in lieu of "*his"*, s.52 replicates the text of the old s.390. This has the effect that the case-law relating to s.390 applies directly and *in toto* to applications under s.52.

5. Perhaps the most significant aspect of s.52 is the extent to which the court is afforded discretion and is not subject to obligation: "*any judge…may…require security to be given…and may stay all proceedings*". [Emphasis added]. Indeed, the level of discretion conferred upon the court is such that it is possible – though it would seem generally unlikely in practice, absent immediate provision of required security –that the court could require that security be given but not order a stay on proceedings pending the provision of such security.

Part 3: Is there credible testimony that the plaintiff will be unable to pay costs?

6. The evidence before the court indicates that there is good reason to believe that the plaintiff company in this case will be unable to pay the costs of Meath County Council, if the Council is successful in its defence.

Unavailability of financial information

7. The plaintiff company was incorporated in 1996 but has filed no annual returns (including accounts) with the Companies Registration Office since the end of 2007. It maintains that this is because of a fraud that has been perpetrated on the company and a letter from the company's accountants has been tendered as evidence of the company'sgood faith in this regard. For its part, the court has some difficulty in accepting this line of argument. It is, for example, a sorry reality of life that practically all financial institutions in the country have likely suffered some level of financial fraud at some stage in their respective histories, yet they still manage always to produce and file annual accounts. Moreover, there seems no reason why suitable provision cannot be made and appropriate annotation included in such accounts as would be prepared. And it defies belief that a company could function properly without ever preparing *ad hoc* monthly or quarterly management accounts. Yet none of this information is available publicly or has been offered privately to the County Council.

Chequered history?

8. The company has a somewhat chequered history in terms of compliance with its legal obligations. It appeared on the tax defaulter's list in 2003. The following year it was fined by the Director of Corporate Enforcement for failing to keep proper books of account. It has had a judgment registered against it by a company in the ESB group of companies. And, somewhat unusually for a company of its size, it has been a defendant in multiple law-suits, including one brought by a financial institution. Taxes should be paid, proper books of account should be maintained, and most persons avoid becoming defendants to multiple law-suits. None of these by themselves are necessarily 'mortal sins' when it comes to an application under s.52. However, in combination they are, at the least, venial transgressions which, coupled with the general unavailability of financial information, suggest that the plaintiff company is not entirely averse to straying from what is required of it – and there is no reason to believe that this would not be true in respect of an order of costs. Again, were the company's current financial information available in some form it is possible that the court would not consider that the company's 'chequered history' necessarily merited an order for security for costs under s.52.

Is the plaintiff company trading?

9. Despite enquiries and investigations, the Council has been unable to find any evidence that the plaintiff company continues to

trade. The company, it seems, has ceased to place advertisements concerning its business and, despite the nature of its business, and a past history of seeking business from the Council, it has not sought to enter into any further business arrangements with the Council. The Council's concerns in this regard appear to be borne out by the affidavit evidence of Mr Sheils, a director of the plaintiff company, who refers, *inter alia*, to "*the financial predicament in which the Plaintiff Company now finds itself*", to the fact that "*the company has not been in a position to trade"*, and to its "*trading despite the difficulties it now finds itself in"*, averments between which there seems to be some level of inconsistency but which collectively suggest that the plaintiff company is very likely something of a 'poor mark' when it comes to the Council's prospects of recovering costs in the event that it succeeds in the within proceedings.

10. The court notes in passing that "*the financial predicament in which the Plaintiff Company now finds itself*" is claimed by Mr Sheils in his affidavit evidence to be "*due in part to the arbitrary manner in which the Defendant acted"*. This is a perfectly valid line of argument to raise in an application for security for costs and one to which the court would likely have been disposed to be sensitive were there the slightest evidence before it that Mr Sheils' averment in this regard is true. But the complete absence of any financial information before the court means that it cannot place any weight on what is claimed in this regard. If support for the court's conclusion in this regard is to be sought in precedent, it may be found in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7.There, Connaughton Road claimed that its inability to pay costs in its case was attributable to the alleged wrongdoing of the defendant in that case. In this regard Clarke J., in the High Court, observed, at 15:

> *"[I]n normal circumstances one would expect that a company such as Connaughton Road would put before the court some evidence of its current financial position prior to the incident giving rise to the alleged wrongdoing, and some evidence to suggest that all, or a sufficient portion of, the difference in position can be attributed to the wrongful actions of the defendant."*

11. Clarke J. goes on to indicate, at 16, that in the case before him, no evidence as to the current financial position of Connaughton Road was put before the court. As it was there, so it is here. Meath County Council, and indeed the court, are both confronted with a near-complete vacuum as regards the financial position of the plaintiff company.

Part 4: Delay

12. The plenary summons in this matter issued on 27th April, 2011. The notice of motion for this costs application issued on 4th April, 2014. At first glance, this seems rather a long time, especially when one has regard to the fact that at no time in this period has the company filed any returns with the Companies Registration Office; nor did it for three-plus years before the plenary summons issued. In this regard, the plaintiff company has referred the court to the decision of the Supreme Court in *Hidden Ireland Heritage Holidays v. Indigo Services Limited* [2005] IESC 38. In the course of his judgment in that case, Fennelly J. noted as follows, at pp.8–9:

> *"Where a defendant can produce [Fennelly J. at this point quotes from s.390 of the Act of 1963] 'credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence' and evidence of a prima facie defence, I believe the order [for security] will follow almost as a matter of course….[T]he Court retains discretion to refuse to make the order. However, that will depend on a showing of special circumstances. In that respect…the burden of proof falls on the plaintiff.*
>
> *The special circumstance most commonly advanced is…that the wrongs complained of in the action caused or contributed to the very impecuniosity of the company upon which the defendant relies. However, the discretion is not limited to that element. The Court may have regard to any relevant circumstance which, as a matter of justice, would cause it to conclude that the order should not be made.*
>
> *The plaintiff, in the present case, puts delay by the defendants in seeking the order in the forefront. It is the principal special circumstance invoked. The rationale for this, according to counsel, is that the plaintiff may incur costs in going on with the preparation of the case. In the present case, counsel relies on the extensive work done in preparing the replies to the defendants' very extensive and detailed notice for particulars and the pursuit of the defendants own implied invitation to seek discovery. He also points that the second named Defendant in his capacity of secretary of the plaintiff, had the particular advantage of knowledge of the plaintiff's position as far back as 1995."*

13. The above-quoted text does not equate to an endorsement by the Supreme Court of a 'delay and be damned' rule in the context of s.390 (and now s.52) applications. In fact, Fennelly J. goes on to note as follows at pp.9–10 of his judgment:

> *"A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances, and, in the end, will seek to find a fair balance."*

14. A singular difference between *Hidden Ireland* and the within application is that Hidden Ireland's accounts were made available to the court. A not dissimilar distinction can be drawn between the facts of the present case and those presenting in *Interfund Global Services Limited v. Pascarn Services Limited* [2014] IEHC 164. There, Barr J. appears to have been confronted with apparent defendant misbehaviour of a type that simply does not present in the within proceedings, though, with every respect, it may be that Barr J. pitches matters too high when he states, at para.16, that "*It has long been held that delay in seeking security for costs will disentitle a party to the reliefs sought"*. It may so disentitle a party. However, this Court's respectful view is that the authorities do not suggest that delay will necessarily disentitle a party so.

15. There is the fact too that delay by one party is not a factor to be viewed in splendid isolation. It has ever been the case that in deciding whether or not to grant discretionary reliefs, the court will have regard to the conduct of both parties so that it may "*truly… act as a court of conscience". (McMahon v. Kerry County Council* [1981] I.L.R.M. 419, 421). Such conduct is among the "*facts of the particular case*" and/or comprises "*other surrounding circumstances*" to which Fennelly J. refers as matters to which the court may legitimately have regard when the issue of delay is raised in a s.390 (now s.52) application. It makes no sense in logic or law that a plaintiff company could keep practically all financial information from a defendant, and also the court, yet expect that this would not be treated by the court as a most significant factor in determining how to exercise its discretion, regardless of any delay arising. Moreover, beyond the most general of assertions in the within application that the plaintiff company has incurred some level of expense in advancing proceedings, which in any event fall to it to advance, there is no reason why suitable application could not be made in this regard when the issue of costs falls ultimately to be decided after judgment is given in the substantive dispute between the parties. If the plaintiff company is successful, it will recover its costs from the County Council (a good 'mark' for damages and costs). If it loses, it will have lost but it can still make its case as to any unnecessary expense that it may have incurred by virtue of the manner in which Meath County Council has conducted the within proceedings.

Part 5: The taxpayer and the public interest

The taxpayer

16. In passing, when it comes to those "*other surrounding circumstances*" to which Fennelly J. makes reference in *Hidden Ireland*, the court considers that it is appropriate to have regard to the fact that what the plaintiff company, by resisting the within application for security for costs, is seeking in effect that public monies provided ultimately by the taxpayer should be placed in potential jeopardy so that it can litigate proceedings in which it has given only the blandest of assurances as to its ongoing financial position and never given, to the Council or to the court, an iota of meaningful financial information about its affairs. Taxpayers are entitled, as a matter of principle, to expect that they will not be exposed by any branch, office or officer of government to unnecessary financial risk, or treated as any the less entitled to basic fairness just because cases are fought by the identifiable few and taxes paid by the hard-pressed many. In the absence of meaningful financial information as to the trading position of the plaintiff company, there is no basis presenting in the within application that would justify this Court in exposing the Council (and ultimately the taxpayer) to such risk by refusing the application now made.

The public interest

17. On a separate note, it was contended by the plaintiff company, by reference to the decision of the court in *Dublin Waterworld Limited v. National Sports Campus Development Authority* [2014] IEHC 518, in particular pages 19–20 of that judgment, that the within proceedings raise a point of law of exceptional public importance. In that, it is claimed, lies justification for refusing the application now made. However, the court does not see any point of law of exceptional public importance arising in the dispute arising between the parties. That dispute in essence involves 'but' an alleged breach of contract and alleged unlawful interference in the plaintiff's commercial and/or economic interests arising out of the operation of an online quotation and/or tendering system. Given that Meath County Council is a public body, the dispute is likely to attract some degree of public attention as it proceeds. However, as the court noted in *Dublin Waterworld*, at para.34, just because "*disputes are likely to be of interest to the public…does not make their resolution a matter of public interest"*.

Part 6: Conclusion

18. Our courts have historically prescribed various criteria that seek to ensure that the fairest possible conclusion is arrived at in applications for security for costs. But however well-intentioned the applicable case-law, and it is well-intentioned, it cannot do the impossible. It seeks to fashion as fair a solution as can be achieved in the context of a system that presents a level of cost which is frightening for many SMEs and those on middling means who hope never to be involved in a legal dispute for fear of the costs arising. The true solution lies in restructuring the system so that such inherent unfairness does not present. But that is for another day. In the within case, in accordance with previous authority, some of it binding, for all of the reasons stated above, and having especial regard to the unavailability of meaningful financial information concerning the plaintiff company, the correct decision, by reference to applicable law and precedent, is for the court to grant the order here sought by Meath County Council.