Neutral Citation Number: [2012] IEHC 216

THE HIGH COURT

[2011 No. 8979P]

BETWEEN

TICKET GENERATOR LIMITED

PLAINTIFF

AND

DUBLIN AIRPORT AUTHORITY PLC, RYANAIR LIMITED AND RYANAIR HOLDINGS PLC

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 24th day of May, 2012.

1. The issue addressed in this judgment is the issue which is identified at para. 7.2(c) of the judgment on the application by the second defendant (Ryanair) for security for costs against the plaintiff, which I delivered on 11th May, 2012. Having indicated that there would be an order pursuant to Order 29 of the Rules of the Superior Courts 1986 (the Rules) that the plaintiff do furnish security for costs to Ryanair, I raised the question whether, given that the order for security was being made under Order 29, the amount of the security ordered should be one-third of the estimated costs, in accordance with the decision of the Supreme Court in *Thalle v. Soares* [1957] I.R. 182. The Court has had the benefit of very helpful written submissions and oral submissions from each side on the issue.

2. When I raised that issue, I was unaware that a similar point had been *Harlequin Property (SVG) Ltd v. O'Halloran* [2012] IEHC 13. In those proceedings, Clarke J. had previously made an order under Order 29 of the Rules that the plaintiff, a company incorporated in the Caribbean region should provide security for costs. In the judgment relevant to the issue now being considered, which was delivered on 191h January, 2012, he considered a number of issues in relation to the quantification of the amount of security, including the question whether, given that the order for security for costs was made under Order 29 rather than under s. 390 of the Companies Act 1963 (the Act of 1963), it was appropriate to follow the common practice in orders made under Order 29 to direct security at one-third of the total amount of the costs estimated as being likely to arise. In addressing the so called "one third rule", Clarke J. referred to various authorities: the decision of the Supreme Court in *Thalle v. Soares* and the decision of the Supreme Court in *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380, both of which he analysed in depth, noting that the High Court is bound by the jurisprudence of the Supreme Court in those cases, which established that the one third practice should not be lightly departed from, but also noting that that jurisprudence evolved in cases involving personal, rather than corporate, plaintiffs (*cf* para 4.12); and the decision of the Supreme Court in *Lismore Homes Ltd v. Bank of Ireland Finance Ltd.* (No. 3) [2001] 3 LR. 536. In the latter case, the Supreme Court held that the meaning of the wording of s. 390 of the Act of 1963 was clear. If a court given was sufficient security for the costs of the defendant, on the basis that the word "sufficient" in its plain meaning signified adequate or enough and was directly related ins. 390 to the defendant's costs.

3. Very recently, in *Goode Concrete v. CRH Plc & Ors*. (Unreported, the High Court, 15th May, 2012), Cooke J. followed the approach of Clarke J. in the *Harlequin* case. But for the submissions made on behalf of the plaintiff, I would have no difficulty in adopting a similar approach in this case, because the underlying rationale of the *Harlequin* decision is compelling.

4. The kernel of the decision of Clarke J. in the *Harlequin* case is to be found at the end of para. 4.15 and the beginning of para. 4.16 of his judgment where he stated:

> "Where, however, as here, the court has already been satisfied that the tests for the making of an order for security under s. 390 of the 1963 Act were met, save only for the fact that the corporate entity concerned was not Irish, then it seems to me that there is a compelling logic in applying the same regime for the calculation of the amount of security required as would apply arising out of a successful application for security under s. 390 of the 1963 Act.
>
> For that reason alone, I am satisfied that it is appropriate to approach the fixing of security on the facts of this case on the basis of full security rather than by the application of the one-third practice."

The basis on which this Court decided in these proceedings that the plaintiff should provide security for costs was, as set out at para. 5.6 of the judgment of 11th May, 2012, that, on the evidence, one had to conclude that, as a matter of probability, the plaintiff would not be able to pay Ryanair's costs of defending the proceedings, if Ryanair is successful.

5. However, counsel for the plaintiff submitted that it is not open to the Court on this application not to apply the one-third rule, because the Court is bound by the decision of the Supreme Court in *Framus Ltd. v. CRH Plc* [2004] 2 I.R. 21, which it would appear was not drawn to the attention of Clarke J. at the hearing of the *Harlequin* case.

6. The decision of the Supreme Court in the *Framus* case arose out of an application for discovery by the plaintiffs against the defendants under Order 31, rule 12 of the Rules, which was introduced in 1999. The jurisdiction of the Court under that rule was stipulated in sub-rule (2) as follows:

> "On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of sub-rule 4(1), or make such order on such terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit."

It was the words "or make such order on such terms as to security for the costs of discovery" in sub-rule (2) which gave the High Court in the *Framus* case jurisdiction to make an order requiring the plaintiffs to provide security for costs to the defendants against whom discovery orders had been made in the amount of €77,000. The issue before the Supreme Court which is of relevance for

present purposes arose on an appeal by the plaintiff on the ground that the High Court Judge should have provided security for a lesser amount and should have followed the decision in *Thalle v. Soares*. The outcome of the appeal was that the Supreme Court did follow *Thalle v. Soares* and reduced the amount of the security for costs to €27,000.

7. In his judgment in the *Framus* case, Murray J., with whom the other Judges of the Supreme Court concurred, considered the unanimous judgment delivered by Kingsmill Moore J. in *Thalle v. Soares* in detail. In a passage in his judgment (in para. 77 at p. 57), which was heavily relied on by counsel for the plaintiff, he set out his conclusions as to the scope of the discretion conferred by Order 31, rule 12 as follows:

> "In my view, the principles and scope of the discretion to be exercised by the court in an application for security for costs pursuant to 0. 31, r.12, being an exercise by the court of its inherent jurisdiction pursuant to the rules of court are the same as those outlined by Kingsmill Moore J. in relation to Order 29. The discretion to be exercised is, as he stated, a very broad one and certainly, where it is appropriate, account may be taken of any particular factors which other to the security for costs of proceedings. Different considerations may arise where an application is made pursuant to s. 390 of the Companies Act, 1963, where the discretion in relation to the amount for which security should be ordered is more constrained by reason of the express provisions of the section."

8. That passage, which counsel for the plaintiff submitted assimilates the jurisdiction under Order 31, rule 12 and the jurisdiction under Order 29, obviously addresses the jurisdiction to make an order for security for costs, as distinct from the principles which apply to determining the amount of security, if security is ordered. The latter discrete issue was addressed by Murray J. in another passage from his judgment relied on by counsel for the plaintiff (in para. 86 at p. 59), in which he stated:

> "As regard the amount of the security to be ordered, I think it is helpful to recall that Finlay, C.J. in *Fallon v An Bord Pleanála* ... at 389 stated 'I would accept the statement of Mr Justice Fitzgibbon quoted with approval by the court in *Thalle v Soares and Ors* ... that in fixing security for costs, whilst the discretion must necessarily be general and particularly dependant on the individual facts of each case and the balance of justice arising in it that, broadly speaking, the security is not either to be so high as to be an indemnity Justice was in the minority as to how the discretion was to be applied on the particular facts of that case, his views on the nature of the discretion to be exercised by the court are also reflected in the judgment of Hederman J. in *Fallon v An Bord Pleanála* ... (who along with McCarthy, J. dismissed that appeal) where he stated 'both prior to and subsequent to the decision in *Thalle v Soares* ... the customary order when fixing the amount for security for costs was one third of the costs to be incurred by the party against whom the order for security had been obtained. No case had been brought to the attention of the Court where a sum greater than one third was in fact ordered by the courts. I do, however, accept there is a discretion in the Court as to the amount of the security to be fixed and that that amount would be fixed having regard to the individual facts of each case based on the balance of justice arising in that particular case'. As previously indicated, I consider that this approach is equally applicable to an application for security of costs under Order 31, rule 12."

9. As Clarke J. pointed out in the Harlequin case, *Fallon v. An Bord Pleanála* was a highly unusual case, in that it concerned security for costs of an appeal to the Supreme Court from the High Court (which is governed by Order 58, rule 17 of the Rules), which upheld an order granting retention permission in a planning matter in made an order for security, notwithstanding that the plaintiff was resident within the jurisdiction because circumstances were such that the Supreme Court was satisfied that, as a matter of probability, the plaintiff had been selected precisely because he was not a mark for costs, had no special interest in the result of the action and was, in substance, a representative of other parties who were not before the Court, together with the fact that the plaintiff had failed to contradict an allegation that the proceedings had been taken with the intention of preventing the completion of the development in question.

10. In the *Framus* case, Murray J. continued to address the amount of the security which the Court has jurisdiction to order (in paras. 87 and 88 at p. 60) as follows:

> "I think the authorities also demonstrate that the plaintiffs were incorrect when they submitted that security for costs pursuant to the inherent jurisdiction of the court should be confined to a maximum of one third of the estimated costs. In my view, the practice, and the expressions of approval of that practice, reflect what the courts have found to be a good compass point between Scylla and Charybdis in seeking generally to achieve a balance of justice between the parties with a view to ensuring that the security is not a mere token and at the same time not an obstacle to a full and fair disposal of the issues between the parties. There may of course be circumstances which in a particular case would warrant a different approach.
>
> In my view, there are not such special circumstances which would indicate that this court should depart from the practice of awarding 'an amount not more than about a third of the costs which would probably be incurred'. (*per* Fitzgibbon J.)"

11. It was submitted by counsel for the plaintiff that Murray J., in the last paragraph of the judgment quoted above (para. 88), would appear to suggest that the onus is on the defendant to satisfy the Court that there are special circumstances which should persuade the Court that it should depart from the application of the onethird rule. I think it is debatable whether that is a correct interpretation of what Murray J. meant, particularly having regard to the manner in which he went on to determine the amount of security on the facts before the Supreme Court. He identified two important factors to which he considered the trial Judge had not attached sufficient weight, namely, that the plaintiffs would be seriously handicapped in making their Claim if the amount of security was fixed at such a level that there was a real likelihood that they would be unable to proceed with discovery, which factor was presumably put before the Court by the plaintiffs, and the fact that the estimated costs of discovery were likely to be a relatively small proportion of the likely overall costs of the proceedings. He also stated that he had taken into account the acknowledged practice of providing for security of about one-third of the costs, although he would have come to the same conclusion in the circumstances of the case even if one disregarded that practice. The amount fixed by the Supreme Court, €27,000, actually represented approximately 30% of the estimated costs.

12. Predictably and understandably, it was submitted on behalf of Ryanair that the decision in the *Framus* case, which related to an application under Order 31, rule 12, whereas this Court is concerned with an application under Order 29, is not in point. That distinction is certainly there, but the question which remains is whether it is a distinction which would allow this Court to follow the approach adopted in the *Harlequin* case.

13. On my reading of the *Framus* decision, the *ratio decidendi* of the decision of the Supreme Court is to be found in paragraph 87 quoted earlier. It is that, in determining the amount of security for costs under the Court's jurisdiction which is now governed by the Rules, the objective is to achieve a balance between the parties. That balance is reflected in the one-third rule, although a different

approach may be warranted on the facts of a particular case. What is of particular significance for present purposes is that, in the application of the provisions of the Rules, the Supreme Court did not distinguish between an individual, on the one hand, and a corporation, on the other hand, against whom an order for security may be made. However, it was recognised that the application of s. 390 of the Act of 1963, which applies only to a limited company incorporated in the State, may give rise to different considerations in the judgment of the Supreme Court in *Thalle v Soares*, Murray J. recorded that there Kingsmill Moore J. had contrasted the position under the Rules with the provisions of the analogue of s. 390 then in force, which expressly made provision, as s. 390 does currently, for "sufficient security" for the costs of the proceedings, which at first sight would mean security for such an amount that would be equal to the probable amount of the costs payable (*cf* para. 75 at p. 56).

14. Although the matter is anything but "black and white", with a considerable degree of diffidence I have come to the conclusion that this Court is bound to adopt the approach taken in *Thalle v. Soares*, as explained in the *Framus* case, and to apply the one third practice as to the amount of security ordered, notwithstanding that the order for security is against a limited company incorporated outside the State, unless there are special circumstances indicating that it should be departed from. I find no such special circumstances in this case.

15. Like so many aspects of the law, the jurisdiction conferred on the Court in relation to ordering that security for costs be given and fixing the amount of the security is a mire of lacunae and anomalies. It is interesting to note that in the "General Scheme of Companies Consolidation and Reform Bill" (Pillar A) the Company Law Review Group recommended deleting the word "sufficient" from the re-enactment of s. 390, so as to give the Court a discretion as to the amount of Companies Bill published on the website of the Department of Enterprise, Trade and Innovation just a year ago (*cf* s. 53). The enactment of such a provision would eliminate the anomaly which this decision highlights.