Neutral Citation [2012] IEHC 403

THE HIGH COURT

[2011 No. 8823 P]

BETWEEN

CAOIMHE HAUGHEY (SUING BY HERSELF AND LAWLINE SOLICITORS)

PLAINTIFF

AND

DAVID SYNNOTT

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 8th day of October, 2012

Purpose of judgment

1. The purpose of this judgment is to set out and explain my decision on an application made by the plaintiff for the costs of two aspects of these proceedings which have been dealt with on an interlocutory basis. They are:-

> (a) The plaintiff's application for interim and interlocutory injunctive relief, which was the subject of an order made on 4th October, 2011, on foot of an application made to the court *ex-parte* on behalf of the plaintiff, and a further order made on 7th October, 2011, on foot of a notice of motion issued by the plaintiff on 4th October, 2011.
>
> (b) An application by the defendant pursuant to a notice of motion dated 12th October, 2011, in which the defendant sought an order for the appointment of a receiver or of a receiver and manager in respect of the assets of the partnership in the solicitors practice known as "Lawline", which application was considered in the judgment which I delivered on 12th December, 2011 (Neutral Citation 2011 IEHC 467), in which, for the reasons outlined therein, I determined that there should be an order dismissing the defendant's application.

2. The background to the proceedings and the applications is dealt with in the judgment of 12th December, 2011 (the Judgment), to which I will refer below so far as is necessary.

The relevant provision of the Rules and the relevant jurisprudence

3. Order 99 of the Rules of the Superior Courts 1986 (the Rules), which deals with the issue of costs, was amended with effect from 21st February, 2008 by the insertion of rule 1(4A) which provides as follows: –

> "The High Court or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

4. The rationale underlying that rule and the manner in which it has been applied during the past three years is outlined in Delany & McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at paras. 23 – 42 to 23 – 52. The following general commentary on rule 1 (4A) is set out at para. 23 – 43:

> "It is clear from the use of the word 'shall' in rule 1(4A) that the effect of the rule is that a court is required to adjudicate upon and make a costs order in respect of an interlocutory application rather than to reserve the costs of the application. However, the Court retains a wide discretion in deciding what costs order to make in respect of the application and the options available include making an order awarding all or part of the costs to one party, making no order as to costs or making the costs of the application costs in the cause. It is only permissible to reserve costs, thereby deferring an adjudication upon the entitlement to costs, where it is not possible, at that juncture, justly to adjudicate upon the costs of the application."

Later, (at para. 23 – 44) the authors refer to the judgment of Clarke J. in *Veolia Water U.K. Plc v. Fingal County Council* (No. 2) [2008] IEHC 42, where Clarke J. suggested that the courts should be prepared to deal with the costs of contested interlocutory applications as a discrete "event" on the basis of an analysis of whether there were proper grounds for bringing, on the one hand, or resisting, on the other hand, the relevant application. At paragraph 23 – 46 the authors helpfully summarise the important factors which should inform the Court in dealing with an application for costs of an interlocutory application stating:

> "Important factors in determining how to deal with the costs of an interlocutory application will include whether an application was required to be brought in any event, the success, or degree of a success of a party on the application, whether the party bringing the application gave the opposing party an adequate opportunity to deal with the subject matter of the motion prior to its issue and whether the opposing party acted reasonably in refusing to deal with the particular matter on a consensual basis."

5. As experience has shown, the prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief after the determination of the application is less likely than in the case of other forms of interlocutory applications, for example, interlocutory applications dealing with procedural matters. That is because, in the case of an application for interlocutory injunctive relief, it is frequently "not possible justly to adjudicate upon liability for costs" at that juncture, so that the case comes within the saver in rule 1(4A). The features of an application for interlocutory injunctive relief which give rise to this distinction were analysed in *Civil Procedure in the Superior Courts* (at para. 23 – 49) by reference to the decision of Clarke J. in *Allied Irish Banks Plc v. Diamond* (High Court, 7th November, 2011) where it is stated:

> "[Clarke J.] went on to draw a distinction between cases where the decision on an interlocutory injunction application turns on issues relating to the merits of the proceedings such that a different picture may emerge at the trial and cases

where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application whereas the same risk may not arise where the application does not turn on the merits of the proceedings."

Application of rule 1 (4A) to the applications for injunctive relief.
6. The crucial factual context in relation to this aspect of the proceedings is that, as recorded in the Judgment (para. 1.2), on 26th August, 2011 the plaintiff gave the defendant notice of the dissolution of the Lawline Partnership to take effect from Friday, 30th September, 2011 and she sought the defendant's co-operation for an orderly wind-down of the affairs of the partnership. The defendant's response (as recorded in the Judgment (para. 1.3) was that the notice of dissolution was of no effect and that the only manner in which the plaintiff could unilaterally bring the partnership to an end was by retiring as a partner and that, in the events which had happened, the defendant was entitled to treat the plaintiff as an outgoing partner. As I have stated in the Judgment (para. 1.4) what provoked these proceedings was action which was taken by the defendant on 2nd October, 2011. It was that action to which the plaintiff's application for interim and interlocutory relief was addressed. The plaintiff's application was designed to reverse the actions taken by the defendant on that day, which was a Sunday, in entering the offices of the Lawline Partnership and in removing files and in interfering with computers and the server and suchlike. The application for interim relief was made on the morning of Tuesday, 4th October, 2011. It was regarded as of such urgency by the Court that the plaintiff was given leave to issue a notice of motion seeking interlocutory injunctive relief returnable for 2pm on the same day. The application for interlocutory relief was adjudicated on by the Court on 7th October, 2011. The terms of the order made by the Court are summarised in the Judgment (para. 1.6) and included orders against the defendant to return the files of the practice of Lawline to the plaintiff that day, to reinstate in working order the computers and server of the practice as soon as possible, and not to interfere with telephone communications to the offices of the practices.

7. The substantive action in this matter is proceeding. The basis on which the defendant is defending the action became clearer on the hearing of the defendant's application to appoint a receiver in respect of the assets of the Lawline Partnership. As I have outlined in the Judgment (para. 4.1), the defendant accepts that the Lawline Partnership is at an end and that, in the event that the Court were to find that there was a written partnership agreement governing the partnership, which the defendant contends there was, his remedy against the plaintiff sounds in damages only. As I put it in the Judgment, the defendant accepts that the Lawline Partnership has been dissolved, subject to his right to argue at the trial of the action that the plaintiff ought to have adhered to what he contends were the terms of the written Partnership Agreement, so that he is entitled to damages for the loss he has suffered as a result of her failure to do so. It was made clear, however, that the defendant was not conceding that the notice of dissolution served by the plaintiff was valid.

8. The dispute between the parties as to the existence of a written Partnership Agreement between them will fall to be resolved at the hearing of action, as will the efficacy, if any, of the notice of dissolution served by the plaintiff. Irrespective of the outcome on those issues, in my view, it is possible in this case to determine who should bear the costs of the plaintiff's applications for interim and interlocutory injunctive relief, which were contested by the defendant, as a discrete "event" on the basis suggested by Clarke J. in the *Veolia Water* case without any risk of injustice. Before the defendant embarked on the high-handed behaviour on 2nd October, 2011, which gave rise to the necessity for the plaintiff to seek injunctive relief, there had been correspondence between the plaintiff's solicitors and the defendant's legal adviser. It was obvious that there was a fundamental difference of opinion between the parties as to their respective legal obligations to each other. It should have been obvious to the defendant that, if the differences between the parties could not be resolved by agreement, there would have to be litigation. The course adopted by the defendant on 2nd October, 2011 was certainly not going to resolve the issues between the parties. The defendant should have anticipated that his actions would necessarily give rise to an application for injunctive relief by the plaintiff. That is what happened. The plaintiff was successful on the applications in obtaining the relief for which there was immediate urgency. This is a case, in my view, where the costs should follow that event.

9. Accordingly, the plaintiff is entitled to the costs of the applications for interim and interlocutory relief against the defendant.

Application of rule 1(4A) to application to appoint a receiver
10. The defendant's application to appoint a receiver over the assets of the Lawline Partnership and to confer powers on him, which, in the context of a solicitor's partnership, was a very unusual application, has been addressed comprehensively in the Judgment. For the reasons set out in para. 5.1 and the succeeding paragraphs of that judgment I came to the conclusion that the application was misconceived and should be dismissed. The order gave rise to a clear discrete event on which the outcome of the substantive action can have no bearing. Therefore, I can see no basis for concluding that determining at this juncture where the burden of the costs of that application should lie could give rise to an injustice, so as to come with the saver in rule 1(4A). According, I consider that the costs of that application must be awarded to the plaintiff against the defendant.

Stay
11. It was submitted on behalf of the defendant that it would not be right for the Court to make an order for costs against the defendant without putting a stay on execution of the order until the determination of the trial of the action. Counsel for the plaintiff objected to a stay. In the overall context of the issue of costs, the Court was referred by the defendant to commentary on the costs of a partnership action in *Lindley & Banks on Partnership* (19th Ed., 2010) at para. 23 – 120 and the commentary in Twomey on *Partnership Law* (Tottel, 2000) at para. 20.115 and the authorities referred to therein. I consider that it would be wholly inappropriate to make any observation whatsoever as to how the costs of the substantive action are likely to be dealt with by the Court. However, it is probable that, at the conclusion of the proceedings there will be financial adjustments to be made between the parties arising from the issues, possibly including the issue of costs, in the proceedings. In the circumstances, it does seem sensible to put a stay on execution of the orders for costs which I propose making until the determination of the proceedings. I propose making an order to that effect. However, that does not in any way deter the plaintiff from proceeding to have the costs taxed, if that is necessary.