Neutral Citation [2015] IEHC 360

THE HIGH COURT

[2012 No. 1528 P]

BETWEEN

SEAMUS SMYTH

PLAINTIFF

AND

O'SHEA FISHING COMPANY LIMITED AND

FINTRA INVESTMENTS LIMTED

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 9th day of June, 2015.

1. This is an application for a security of costs brought by way of motion dated 28th June 2013. The matter came on for hearing on the 17th of April, 2015. The defendants make this application pursuant to Order 29, rule 1 of the Rules of the Superior Courts on the grounds that the plaintiff resides outside the jurisdiction.

2. In order to be eligible to bring such an application it is well established that a defendant must have at least a *prima facie* defence to the proceedings. At the outset of the application, counsel for the plaintiff acknowledged that this is a low threshold and conceded, for the purposes of this application, that the defendants have a *prima facie* defence.

3. Order 29 Rule 1 of the Rules of the Superior Courts provides:-

> *"When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security."*

4. Following a review of the authorities, Finlay P. (as he then was) in *Collins v. Doyle* [1982] I.L.R.M 495 set out the following principles of law applicable to such applications, which remain the key principles applicable, as follows:-

> *" (1) Prima facie, a defendant establishing a prima facie defence to a claim made by a plaintiff residing outside the jurisdiction has got a right to an order for security for costs.*
>
> *(2) This is not an absolute right and the court must exercise a discretion based on the facts of each individual case.*
>
> *(3) Poverty on the part of the plaintiff making it impossible for him to comply with an order for security for costs is not even when prima facie established, of itself, automatically a reason for refusing the order.*
>
> *(4) Amongst the matters to which a court may have regard in exercising a discretion against ordering security is if a prima facie case has been made by the plaintiff to the effect that his inability to give security flows from the wrong committed by the defendant."*

5. In subsequent cases, emphasis has been placed on the principle that there is no absolute right to security for costs, that the order is a discretionary one and that the court must exercise its discretion based on the facts of each particular case (*Deirdre Malone v. Brown Thomas & Co Limited and Federal Security Services Ltd.*, Supreme Court [1995] 1 I.L.R.M 369). The constitutional right of access to the courts has also been stressed. See, for example, the decision of the Court of Appeal (delivered by Mahon J.) in the case of *CMC Medical Operations Limited (In Liquidation) t/a Cork Medical Centre v. The Voluntary Health Insurance Board* [2015] IECA 68 where he said:-

> *"A court should be slow to take any step which has the effect of curtailing litigation or unduly restricting the constitutional right of access to the courts. The requirement that a party effectively defending an application for security for costs should be expected to delve unduly deeply into complex matters which constitute the subject matter of the litigation itself may produce this result."*

6. Notwithstanding these reservations, the principles outlined in Collins v. Doyle remain the guiding principles to be applied in such applications. However, even where a defendant establishes, *prima facie*, an entitlement to an order for security for costs, there are a number of exceptions any one of which may operate to deny the defendant the relief:-

> 1) Where the defendant is the cause of the plaintiff's impoverishment. As Finlay P. said in Collins v. Doyle:-
>
> > *"Such a principle does not seem to me to justify giving to a defendant an adventitious protection against the claim of a plaintiff whom he may have impoverished, by reason of the place of residence of the plaintiff which is on the individual facts irrelevant to the reality of recovering costs."*
>
> 2) Where the defendant has delayed in making the application for security and as a consequence of which the plaintiff has incurred costs in progressing the proceedings. This exception was again acknowledged recently in the case of *Interfund Global Services Limited v. Pascarn Service Limited* [2014] IEHC 164 where Barr J. cited the decision of the Supreme Court in *SEE v. Public Lighting Services* [1987] I.L.R.M 255:-

> *"It has long been held that delay in seeking security for costs will disentitle a party to the reliefs sought. In SEE v. Public Lighting Services [1987] I.L.R.M 255, McCarthy J., giving the unanimous judgment of the Supreme Court, held that a delay of seven months between the serving of a notice of appeal and the bringing of the motion was excessive, having regard to the fact that during that period the plaintiff/appellant had undertaken the expense of preparing a transcript of the evidence from the notes of counsel."*

7. Turning to the facts of this case, the plaintiff's claim is for inter alia, damages and declaratory relief arising from the alleged wrongful termination of a contract of employment between the plaintiff and the defendants on or about the 14th July 2008. The plaintiff is a fisherman and claims to have been employed initially by the first named defendant in or about the year 2000. Following the transfer of the business of the first named defendant to the second named defendant in October 2002, (of which the plaintiff claims he had no knowledge), the plaintiff claims that either he remained an employee of the first named defendant or that alternatively his employment was transferred to the second named defendant upon the same terms. The precise legal relationship between the plaintiff and the defendants is central to the dispute between the parties in these proceeding. The defendants maintain that by reason of a number of decisions of the High Court including the decision of Costello P. in *DPP v. McLoughlin* [1986] I.L.R.M 493 and Carroll J. in *Griffin and Deasy v. Minister for Social, Community and Family Affairs* [2002] 2 I.C.L.M.D, the crew of a fishing vessel who are remunerated by way of a share in the proceeds of the catch are not, as a matter of law, regarded as employees but rather are regarded as partners in a joint venture.

8. In 2006, the first defendant lost its licence to catch mackerel leading to a reduction in fishing activities. This in turn gave rise to the issue of a notice from the defendants to crew members requiring crew members to remove all of their belongings from the vessel of the defendant's and to deliver any keys or other items of property belonging to the defendants to the defendants no later than 5pm on the 14th July, 2008. The plaintiff claims that this notice constituted a notice of termination of his employment with the defendants. The plaintiff further claims that as a result of this termination, he was left with no alternative but to emigrate in order to seek alternative employment in Australia where it appears the plaintiff is now employed as the skipper of a vessel. According to replies to particulars delivered by the plaintiff on 20th August, 2012, in the year ended 30th of June, 2012, he was in receipt of a gross income of AUS$118,741 equating to approximately €78,000. According to a letter of the Revenue Commissioners dated 17th September, 2013 this is more than the plaintiff would have received in one single year while working in Ireland.

9. The plaintiff states in his affidavit of 26th November, 2013 opposing this application "that the imposition of an order compelling me to make security for costs to the defendants would quite likely have the effect of prohibiting me from progressing this case to hearing in circumstances where I am unlikely to be able to discharge such a sum by way of security in the immediate future. In those circumstances I believe that there is a serious risk that such an order would amount to a *de facto* determination of the substantive proceedings." Since it appears that the plaintiff's income in Australia is as good as, or more likely, better than income earned by him while working in Ireland, no argument can be made that he would be unable to meet an order for security for costs by reason of the actions of the defendants, and for this reason the plaintiff did not advance such an argument.

10. However, the plaintiff makes the additional complaint that, but for the actions of the defendant, he would not have had to leave the country to find alternative employment. Obviously if he did not have to leave the country, the defendants would not be in a position to advance this application. This opens up the possibility of another exception to the entitlement of a defendant to seek an order for security for costs which is analogous to the exception that is already recognised whereby relief may be denied where a plaintiff can satisfy the court, *prima facie*, that his impecuniosity arises from the conduct of the defendant. Similarly, if the conduct of the defendant causes a plaintiff to leave the jurisdiction for employment, why should the plaintiff be entitled to an order for security for costs which he would not be entitled to if the plaintiff was able to continue to reside within the jurisdiction, but for the conduct of the defendant?

11. While this argument has been advanced by the plaintiff, the plaintiff has not established a *prima facie* case to this effect. In my view, to succeed in resisting an application for security of costs on this ground, the plaintiff should at least aver to the efforts he made to secure alternative employment within the jurisdiction and exhibit such documentation as is available in regard to those efforts. No evidence at all was exhibited by the plaintiff in support of this averment.

12. The plaintiff also claims that the defendant should be denied the relief sought on the grounds of delay. He claims that the defendants were at all times aware that he was resident in Australia. In response to this, it is submitted on behalf of the defendants that they did not become aware that the plaintiff was permanently resident in Australia until the plaintiff delivered replies to a notice for particulars of the defendants, which replies which were delivered on 18th July 2013. In earlier replies to the same notice delivered on 20th August 2012, the plaintiff had stated "Following the defendant's summary dismissal of the MFV Sheanne's crew on the 14th July 2008, it became clear to the plaintiff that he no longer had work in Ireland. It was not until after his dismissal that the plaintiff made long-term arrangements to move to Australia in search of work".

13. Furthermore, the statement of claim, delivered on 15th March 2012, states in the first paragraph that "the plaintiff is a fisherman and resides at 2/61 Moran Court, Beaconsfield, Perth, WA6162, Western Australia." Under the heading of particulars of special damages, the plaintiff claimed an estimate of cost of emigrating in the sum of €10,000.

14. Moreover, it seems likely that defendants were, as the plaintiff avers, at all material times (and in any event prior to the issue of proceedings) aware that the plaintiff was outside of the jurisdiction. In paragraph 16 of her supplemental affidavit of 13th March 2014, Ms Ann O'Shea, Director of the defendant companies states as follows: "I say that when a partial quota was obtained in October 2008, and the MVF Sheanne returned to fishing, the plaintiff was not in this jurisdiction and had never contacted the defendants, its servants or agents with regard to his ability to work on board ship nor had he given an address where he could be contacted. A position on board ship was in fact available for him until January 2012. The defendants only learned from the fishing community that the plaintiff had immigrated to Australia. The defendants had no idea what the plaintiff's intentions were. He never contacted the company to inform them that he was going to Australia."

15. While the defendants may not have known the plaintiff's precise intentions it is clear that the defendants were aware, at latest on the date on which the statement of claim was delivered, but more likely long before the issue of proceedings, that the plaintiff had emigrated to Australia. In their Notice for Particulars of 4th July, 2012 the defendants asked the following:

> "(a) Please state the date the plaintiff emigrated to Australia.
>
> (b) Please provide the date the plaintiff applied for a visa to work in Australia.
>
> (c) Please provide a copy of the application for a visa to work in Australia."

The replies to particulars were delivered on 20th August 2012 and stated that, "it was not until after his dismissal that the plaintiff made long term arrangements to move to Australia in search of work." In my view the defendant by this time could have been under no illusion at all but that the plaintiff was resident in Australia. However, the defendant did pursue a further inquiry on 1st of November, 2012 as to the date on which the plaintiff made an application for a permanent working visa. The solicitors for the plaintiff replied to these inquiries on the 18th of July 2013. On that basis the defendants maintain that it was only from that time onwards that they could have been expected to bring this application.

16. The chronology of the proceedings is as follows:-

1) Plenary Summons issued - 15th February 2012

2) Statement of Claim served on the defendants - 15th March 2012

3) Defence delivered - 2nd May 2012

4) Notice for particulars of defendant - 4th July 2012

5) Reply to defence delivered on behalf of plaintiff - 12th July 2012

6) Issue of motion for discovery by solicitors for plaintiff - 16th July 2012

7) Replies to notice for particulars delivered by plaintiff - 20th August 2012

8) Hearing date of discovery motion - 5th November 2012

9) Letter seeking further and better particulars served by the defendant's solicitor on plaintiff's solicitors -1st November 2012

10) Delivery of affidavit of discovery - 20th December 2012

11) Issue of notice of motion for security for costs - 28th June 2013

12) Hearing of motion to compel replies to particulars - 29th July 2013

13) Delivery of further replies to particulars by plaintiff - 22nd November 2013.

17. It is apparent from the above that this matter was actively progressed from the time of the issue of proceedings and required all of the usual steps taken in the litigation process. These steps included consideration of the defence by the plaintiff and his legal advisors following delivery of same on 2nd May, 2012, dealing with replies to particulars and requests for further and better particulars and discovery. And while the above sets out the steps taken in the pleadings, there was of course a considerable amount of correspondence exchanged between the parties' legal advisors as matters progressed. I am quite satisfied that even if the defendants did not know as a matter of certainty that the plaintiff had emigrated prior to the issue of the proceedings, the statement of claim contained sufficient information to put the matter beyond any doubt, in that the plaintiff clearly stated that he is resident in Australia and was seeking in the proceedings, the recovery of the cost of his emigration to Australia as an item of special damage. For the purpose of advancing this application, it was not necessary in my opinion to await more detailed information regarding the precise date on which the plaintiff applied for a permanent visa. Order 29 of the Rules of the Superior Courts refers to a plaintiff "being resident out of the jurisdiction." It is not necessary for the defendant to establish the precise legal status of the plaintiff, although it would be reasonable for the defendant not to bring such an application if it were obvious or apparent that the plaintiff is outside of the jurisdiction on a temporary basis only. In this instance however, it seems likely that the plaintiff was aware of the defendants' residence in Australia as far back as 2008, and, as stated above, his residence was put beyond any doubt in the statement of claim.

18. For all of these reasons, in my view the defendant should have requested the plaintiff to provide security of costs without delay after the delivery of the statement of claim, and if it was not forthcoming at that stage, the defendant should have brought forward this motion soon after the refusal of such request. Indeed, if the plaintiff was not resident in Australia at that time, he would no doubt have replied accordingly in response to such request. The consequence of the defendants not bringing forward this motion until late June, 2013 is that the plaintiff has had to incur the expense of considering and replying to the defence of the defendants; of seeking discovery of documentation (and in this regard it appears there was a contested motion for discovery of documents); of considering the affidavit of discovery at documents delivered and also of delivering replies to particulars requested by the defendant. Indeed, it appears that the proceedings are all but ready for hearing except for this motion.

19. Accordingly, it would, in my view, be quite unjust to direct the plaintiff at this stage in the proceeding to provide security for costs in circumstances where he has had to incur very considerable expense between the time of the delivery of the statement of claim and the bringing forward of the within motion. I therefore refuse the application.

Counsel for the plaintiff: Mr. Paul McGarry SC, instructed by DP Barry and Co Solicitors, Donegal.

Counsel for the defendant: Ms. Marguerite Bolger SC, instructed by O'Boyle Solicitors, Sligo.