THE HIGH COURT

2017 No. 10CA

Between:

FABIELE MARQUES de ABREU

Plaintiff

– and –

FINDLATER HOTELS LIMITED TRADING AS THE CASTLE HOTEL

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Background

1. Ms Marques de Abreu is a Brazilian national who lived in Ireland for a time in the past. While here, she worked at The Castle Hotel in Great Denmark Street in Dublin City. She returned to Brazil a number of years ago and now works there as a flight attendant with a Brazilian airline. Thus she is neither resident nor ordinarily resident in Ireland.

2. Ms Marques de Abreu appears to have suffered an injury while she was working at The Castle Hotel. It is claimed that a door with some sort of closing mechanism closed on one of her hands while she was carrying a glass, thereby occasioning a laceration of the hand. Following on the just-described incident, Ms Marques de Abreu instituted the within personal injuries proceedings. The proceedings failed before the Circuit Court; however, Ms Marques de Abreu intends bringing an appeal to the High Court. It is estimated by counsel for The Castle Hotel that the all-in cost of bringing the High Court appeal will be €25k. But this does not include the existing costs order made in favour of The Castle Hotel by the Circuit Court. So if Ms Marques de Abreu were not to succeed on appeal and a further costs order were made against her, she would be liable to The Castle Hotel for a substantial sum of money.

II. Application Now Made

3. The Castle Hotel is concerned at the scale of costs presenting and has brought the within application seeking security for costs. Such an order falls to be made (if made) under O.29, r. 3 of the Rules of the Superior Courts 1986, as amended. The court indicated at the close of hearing that it would make the order sought and that it would return with written reasons as to why it would do so. Those reasons are set out in this judgment.

4. Order 29, rule 3 provides as follows:

> "*No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits*."

5. Such an affidavit has been provided in the within application. Indeed, counsel for Ms Marques de Abreu made no objection to the satisfactoriness of the affidavit, conceding that where, as here, a defence has succeeded in the court below, following consideration by the learned trial judge, there can be no doubt but that a defence upon the merits exists.

III. Some Key Points Made

6. Counsel for The Castle Hotel, in advancing his client's case, referred to the scale of the anticipated cost presenting, the scale of the costs order outstanding at the Circuit Court level, and the fact that Brazil, being so very far away, presents practical challenges as regards enforcing orders of the Irish courts (which challenges, it can reasonably be anticipated, would entail even further cost). Counsel for The Castle Hotel rightly conceded that if Ms Marques de Abreu were now living in another European Union member state, he would not succeed in the within application, given the relative ease with which judgments can now be enforced in the other 27 member states of the European Union. (See in this regard, *inter alia*, *Maher v. Phelan* [1996] 1 I.R. 95, *Proetta v. Neil* [1996] 1 I.R. 100, *Pitt v. Bolger* [1996] 1 I.R. 108, and *Salthill Properties Ltd v. Royal Bank of Scotland plc* [2010] IEHC 31).

7. Ms Marques de Abreu has not averred that if an order for costs were now to issue that that would effectively foreclose the continuation of the within proceedings. What Ms Marques de Abreu has averred, and what her counsel has contended, is that for the court to make the order for security for costs now sought would be unlawfully to discriminate against her on the grounds of her nationality. Her counsel went further and contended that to grant the order for security for costs on the basis now sought "*would be to impose a bar on non-EU citizens from litigating claims arising from the time they spent living and working in this jurisdiction*". These contentions are respectfully not accepted by the court for the reasons set out in the next section of this judgment.

IV. The Suggestion of Discrimination

8. The Oxford Online Dictionary defines the word "*discrimination*" as follows:

> *"1. The unjust or prejudicial treatment of different categories of people…*
>
> *2. Recognition and understanding of the difference between one thing and another."*

9. The unjust or prejudicial treatment of different categories of people is anathema to our system of law, and rightly so. Ms Marques de Abreu was welcome to work in Ireland; indeed one of the great pleasures of present life in Ireland is the great breadth of diversity that exists within contemporary society. Ms Marques de Abreu is also welcome to bring and continue the within proceedings in Ireland. However, it is not unjust or prejudicial treatment of Ms Marques de Abreu for the courts of Ireland to recognise that there is or may be a difference of consequence arising between the situation where a foreign national (i) resident in Ireland or another European Union member state is prosecuting court proceedings here in Ireland and (ii) a foreign national resident in a far-away jurisdiction that is not within the European Union is prosecuting proceedings here in Ireland. The situation referred to at (i) does not entail the same potential difficulties as regards enforcement that can arise in (ii). To recognise that potential difficulty does not involve the court in unjust or prejudicial treatment. Rather, it involves the court seeking to achieve the greatest fairness possible between the parties to such proceedings by making a proper differentiation as to circumstance and seeking to ensure, assuming it

makes the order for security for costs sought, that if the party situate in Ireland triumphs in those proceedings, the said party has a prospect of recovering some of the costs of the proceedings. As to the contention that for the court to grant an order for security for costs on the basis now sought "*would be to impose a bar on non-EU citizens from litigating claims arising from the time they spent living and working in this jurisdiction*", there is no such bar arising. Non-European Union citizens who reside and/or work for a time in Ireland and then leave are entirely free to litigate claims before the Irish courts arising from their time here. But where such persons have moved on to live outside and far from the European Union, they may find that, in a bid to achieve the greatest fairness possible between the respective parties, an Irish court will make an order for security for costs, if sought, so that (again) if the party situate in Ireland triumphs in those proceedings that party has a prospect of recovering some of the costs of the proceedings. Justice for all, not injustice to any, is ever the object of the court, and so it is in an application for security for costs.

V. Applicable Case-Law

10. The court has been referred to five previous decisions of the Superior Courts, each of which it now turns to consider in chronological order.

(i) *Flynn v. Rivers*

[1951] 86 I.L.T.R. 85, HC.

11. This case involved an application for security for costs brought by Mr Rivers, the defendant, against Mr Flynn, the plaintiff, who was then living in England. Mr Flynn averred in his replying affidavit that he had continuously resided all his life, bar the previous six years, in Ireland. Thereafter he had resided in England where he worked as a labourer. He also averred that as a labourer, he was contributing the greater part of his wages to support his family and thus was unable to furnish any security for costs. In the High Court, Casey J. held that he was "*satisfied that having regard to the financial circumstances of the plaintiff to make an order for security for costs would be tantamount to a judicial determination of the action*" and in order to avoid this he refused the order. However, as will be seen below, the exclusive focus by Casey J. on the plaintiff's financial circumstances was the subject of criticism by the Supreme Court in its later decision in *Heaney*, such that *Flynn* ought no longer to be treated as involving a good statement of applicable law or of its operation in practice.

(ii) *Heaney v. Malocca*

[1958] I.R. 111, SC.

12. Ms Heaney, an impoverished widow living in Newry commenced personal injuries proceedings in this jurisdiction after suffering injury at a restaurant shop and premises in Dundalk. Ms Malocca brought a motion for security for costs. In ordering the security for costs, Maguire C.J., for the Supreme Court observed, *inter alia*, as follows, at 114-5:

> "*In* Flynn…*Mr Justice Casey did not consider any circumstance other than the poverty of the plaintiff and refused to make the order on the ground that to do so would be tantamount to a judicial determination of the action. In my opinion this goes too far….*[T]*he position is that prima facie a defendant is entitled to an order for security for costs where the plaintiff resides outside the jurisdiction. In order to deprive him of this right some special circumstance must be shown, e.g., that there is no defence to the action…or where there is shown to be ample assets within the jurisdiction*."

13. Although it remains the case today that to focus on the financial circumstance of the plaintiff alone would be to err in law, the decision of the Supreme Court in *Heaney* needs itself to be viewed in light of the Supreme Court's own later decision in *Malone*, considered elsewhere below.

(iii) *Collins v. Doyle*

[1982] I.L.R.M. 495, HC.

14. Here the plaintiff, who resided in England, claimed damages for personal injuries which he alleged were caused by the defendant's breach of duty to him as an invitee on the latter's premises. Notably, however, Finlay P. was confronted with a plaintiff who claimed that, by reason of the injuries suffered by him in the accident complained of, he had been unable to earn money and so was unable to provide security for costs. (By contrast, Ms Heaney was an impoverished woman whose limited circumstances were not claimed to have been occasioned by the incident in respect of which she brought her proceedings. Ms Marques de Abreu has made no substantive averment as to the state of her finances).

15. Per Finlay P., at 496, following a review of *Flynn*, *Heaney* and certain other precedents:

> "*From these decisions the following principles of law appear to arise*.
>
> *(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*.

In this application the case made by the plaintiff on his affidavit precisely is that his inability to give security for costs arises from an inability to earn caused by the defendants wrong.

Although I accept the disapproval expressed by the Supreme Court in Heaney*…of the decision in* Flynn*…holding poverty in effect to be an absolute answer to an application for security I am impressed by the apparent injustice of requiring a person who cannot*

provide security to do so when his inability may flow from the wrong of the defendant. In general it would appear to me that the principle underlying a defendant's right to security for costs must be that he should not suffer from an inability to recover the cost of successfully defending the claim arising from the fact that the unsuccessful plaintiff resides and has his assets outside the jurisdiction of the court. 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 that plaintiff which is on the individual facts irrelevant to the reality of recovering costs."

16. There is no suggestion in the within case that Ms Marques de Abreu has been impoverished as a consequence of the defendant's behaviour. Thus the basis on which Finlay P. was able to ground a refusal of the application for security for costs in *Collins* does not present in the within proceedings.

(iv) *Malone v. Brown Thomas & Company Limited*

[1995] 1 I.L.R.M. 369, SC

17. Ms Malone sued the respondents for damages consequent upon certain alleged torts. Because she was resident outside Ireland, Brown Thomas brought an application for security for costs, which was furnished by her in the form of a lodgement for £7,500. Ms Malone's claim against the respondents was dismissed and she was ordered to pay the respondents' costs. She served a notice of appeal from this decision. Brown Thomas then applied unsuccessfully to the Supreme Court for an order for security for costs, the Supreme Court holding, *inter alia*, that :

> (i) the ordering of security for costs is a matter for the discretion of the court, and in the exercise of its discretion, the court must consider all the circumstances of the case;
>
> (ii) per Hamilton C.J., at 372 (by reference to the decision of the then Supreme Court in *Perry v. Stratham Ltd* [1928] I.R. 580) "*neither mere residence outside the jurisdiction nor the poverty of the appellant is a sufficient justification for compelling an appellant to lodge security for costs*";
>
> (iii) the onus is on the applicant to establish reasonable grounds for his entitlement to the order of security for costs;
>
> (iv) access to the courts is the constitutional right of every citizen and no unnecessary monetary obstacle should be placed in the path of those who seek access to the courts.

18. Notably, the Supreme Court in *Malone* stated that poverty *alone* did not offer such a justification: it could offer a justification when viewed in tandem with all the other circumstances of the case.

19. In *Malone*, the fact that Ms Malone (i) intended to return permanently to Ireland within seven months of the date of judgment in the security for costs application, (ii) had lodged £7,500 (which would be a not insignificant sum in the context of the within proceedings, never mind proceedings in motion in 1995), and (iii) was bringing an appeal focused in part on her constitutional right of access to the courts, the Supreme Court was satisfied in all the circumstances presenting to decline to make the order for security costs sought of it. No like factors present in the within proceedings.

20. In passing, the court would note that it is difficult to see that the Supreme Court did not in *Malone* resile considerably from the position staked out by it in *Heaney*. In the earlier case, Maguire C.J. had, in the text quoted previously above, stated that "prima facie *a defendant is entitled to an order for security for costs where the plaintiff resides outside the jurisdiction*"; he then went on to describe this as a "*right*" of which a defendant could only be deprived if "*special circumstance*" was shown. Thus, applying *Heaney*, mere residence outside the jurisdiction *would* suffice as a basis for an order for security for costs (absent some special circumstance presenting). By contrast, in *Malone*, the Supreme Court adopted a more nuanced approach whereby "*neither mere residence outside the jurisdiction nor the poverty of the appellant is a sufficient justification for compelling an appellant to lodge security for costs*".[1] If *Malone* marked the suggested departure from *Heaney*, then it is difficult to see that it does not also supersede the above-quoted observations of Finlay P. in *Collins* except as regards point (4) and thereafter.

[1] The *Oxford Online Dictionary* defines poverty as 'the state of being extremely poor'. However, given the scale of legal costs now so often presenting as an aspect of court proceedings and the fact that many people do not have the many thousands of euro necessary to commence and continue such proceedings, the court would make the *obiter* observation that it may be that the concept of 'poverty' in this particular regard is a relative concept that falls properly to embrace the many on middling means who cannot reasonably afford the present cost of High Court litigation and not just those on even more limited means who, regretfully, find it a challenge to afford much at all.

(v) *Jahwar v. Betta Livestock 17*

[2001] 4 I.R. 42, HC

21. This was primarily a *forum non conveniens* application. However, it also involved an application for security for costs against an individual whom, if the court was to make the order sought would, per Barr J., at 51, "*be prevented from pursuing a claim for a basic right, i.e., payment of wages and master's disbursements in connection with his employment as captain of the ship*". No such basic right is at stake in the within proceedings. And, again, Ms Marques de Abreu has made no averment that if an order for costs were now to issue that that would effectively foreclose the continuation of the within proceedings.

VI. Conclusion

22. Having regard to all of the foregoing and having considered all the facts of this case, in particular the fact that: (i) Ms Marques de Abreu is neither resident nor ordinarily resident in Ireland; (ii) Brazil, the country where she now resides, is a far-away jurisdiction that is not a European Union member state; (iii) challenges will present as regards enforcement of any (if any) costs order that would be made in favour of the defendant after the within proceedings are heard by the High Court, as well as the order for costs of the Circuit Court (if that is allowed to stand on appeal); (iv) Ms Marques de Abreu has not averred that if an order for costs were now to issue that that would probably determine the within proceedings; (v) no claim is made by Ms Marques de Abreu in her appeal as to her constitutional right of access to the courts, and (vi) no basic right such as that at issue in *Jahwar* is in play in the within proceedings, the court will acquiesce to the application made by the defendant and grant the order for security for costs now sought.