THE HIGH COURT

[2011 No.255 MCA]

IN THE MATTER OF THE ARBITRATION ACTS 1954-1998

AND

IN THE MATTER OF ORDER 56, RULE 7 OF THE RULES OF THE SUPERIOR COURTS

AND

IN THE MATTER OF AN ARBITARTION

BETWEEN

ABM CONSTRUCTION

CLAIMANT

AND

HABBINGLEY LIMITED

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 15th day of February, 2012.

1. The application and its context

1.1 On this application the respondent seeks an order pursuant to s. 22 of the Arbitration Act 1954 (the Act of 1954), as amended, directing the claimant to furnish security for costs to the respondent and ancillary orders. A very sensible approach was adopted by both sides on the hearing of the application, in that certain concessions were mad e for the purposes of the application, but not for any other purpose, which I will record later.

1.2 It i s common case that the arbitration between the claimant and the respondent commenced prior to the coming into force of the Arbitration Act 2010. Accordingly, it is common case that the Court has the same power of making an order in respect of security for costs as it has for the purpose of, or in relation to, an action or matter in the Court pursuant to s. 22 of the Act of 1954. However, it is the claimant's contention that, having regard to the legal personality and the factual circumstances of the claimant, the Court has no jurisdiction to make an order for security for costs.

1.3 It is clear from the evidence that the claimant was originally incorporated as a company limited by shares in 1994. However, in 2007 it was re-registered as an unlimited company. The issued share capital of the company is €100 divided into 100 shares of €1 each. As regards ownership of those issued shares, an unlimited company incorporated in the Isle of Man, ABM Ventures, is the owner of one ordinary share and a limited company registered in the Isle of Man, ABM International Limited, is the owner of the remaining ninety nine ordinary shares. The claimant's registered office is in Swords, County Dublin. All its directors and its secretary reside in Ireland. The claimant is a construction company and the evidence is that it is involved in substantial construction projects in the State.

1.4 The dispute between the parties which is the subject of the arbitration has arisen out of the engagement by the respondent of the claimant to carry out construction work, including renovation and extension of existing buildings, at Mullingar Retail Centre under a contract based on the standard RIAI articles of agreement entered into in 2004. The claimant's claim is for a sum in excess of €1.6m (exclusive of VAT) and the claimant also claims interest and damages for breach of contract. For the purposes of this application, but for no other purpose, it is acknowledged by the claimant that the respondent has a prima facie defence to the claimant's claim. The respondent is pursuing a counterclaim against the claimant for liquidated and ascertained damages and for counter charges in excess of €4.8m. As I understand it, the arbitration is ready for hearing but has been held up because this application, which was initiated in August 2011, was pending. For the purposes of facilitating the Court's task in determining whether an order for security for costs should be made, but for no other purpose, the parties have agreed the estimated costs of the respondent defending the claimant's claim at arbitration at €450,000 (exclusive of VAT).

2. The issues

2.1 The application raises an issue which, apparently, has not previously been determined by an Irish court, namely, whether the Court has jurisdiction to make order for security for costs in favour of a party to litigation against the other party which is an unlimited company which is registered in the State. If the Court has such jurisdiction, a further issue which arises is the identification of the principles which the Court should apply in determining whether to make an order for security for costs.

2.2 The Court has had the benefit of comprehensive and helpful written legal submissions from both sides on those issues. Insofar as is necessary, I will outline the points raised in the written submissions and on the oral submissions.

2.3 There are two well established sources of the Court's jurisdiction to make an order for security for costs in litigation: s.390 of the Companies Act 1963 (the Act of 1963); and Order 29 of the Rules of the Superior Courts 1986 (the Rules). While it was conceded on behalf of the respondent that the jurisdiction conferred by s.390 of the Act of 1963 does not apply to the respondent's application for an order for security against the claimant, I propose considering s.390 first. Counsel for the respondent invoked the jurisdiction conferred by Order 29 and he also invoked the Court's inherent jurisdiction. The position of the claimant was that the Court does not have jurisdiction either under Order 29 or under its inherent jurisdiction to make the order sought. I will consider each invoked source of jurisdiction in turn.

3. Section 390
3.1 Section 390 of the Act of 1963 provides as follows:

"Where a limited 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 defend an t if successful in hi s defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

As the claimant is not "a limited company", the respondent properly conceded that s.390 does not apply to it. As was pointed out by Arden L.J. in her judgment in *Jirehouse Capital v. Beller* [2009] I WLR 751, s. 726 of the Companies Act 1985, which was in force in England and Wales at the relevant time and the wording of which was almost precisely the same as s. 390, in its original form predated even the Companies Act 1862. Therefore, in the legislation in relation to companies, the power to make an order for security for costs against a company has been confined to limited companies for over one hundred and fifty years. One must assume that the approach which has been adopted over such a long time span represents deliberate legislative policy.

4. Order 29
4.1 Order 29 provides, *inter alia*. as follows:

"1. 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.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. 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.

4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."

I have quoted rules 1 to 4 of Order 29 because they were quoted by Keane J., as he then was, in *Pitt v. Bolger* [1996] 1 I.R. 108 as a preliminary to outlining the nature of the jurisdiction conferred by Order 29 as follows (at p. 114):

"As to the general nature of the jurisdiction exercised by this Court under 0.29, the language of the Order, as noted by Murphy J. in *Proetta v. Neil* [1996)1 I.R. 100 assumes the existence of an existing practice rather than defining it in precise terms. The nature of the jurisdiction was, however, explained by Finlay P. (as he then was) in *Collins v. Doyle* [1982) I.L.R.M. 495 in a judgment which was subsequently approved of by the Supreme Court in *Fares v. Wiley* [1994] 2 I.R. 379. In *Collins v. Doyle*, Finlay P., having pointed out that *prima facie* a defendant establishing a prima facie defence to a claim made by a plaintiff residing outside the jurisdiction is entitled to an order for security for costs but that this was not an absolute right, went on to say that amongst the matters to which a court might have regard in exercising its discretion against ordering security was a *prima facie* case by the plaintiff to the effect that his inability to give security flows from the wrong committed by the defendant. He went on:-

> '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'."

4.2 As is pointed out in Delany and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed.) at para. 12-05, citing the dictum of Keane J., an order for security for costs under Order 29 can only be made if the plaintiff is resident out of the jurisdiction. Delany and McGrath go on to outline the impact of EU law on security for costs at paras. 12-55 *et. seq*. and it is sufficient for present purposes to record their conclusion that, effectively , EU citizens now "have the same status as Irish citizens vis-á-vis security for costs" (quoting Barr J. in *European Fashion Products Ltd. v. Eenkhoorn* (High Court, 21st December, 2001)).

4.3 Even though the terminology used in Order 29, for example, the reference to the circumstance that "the plaintiff resides" in Northern Ireland in rule 2 and the reference in rule 4 to a plaintiff who is "ordinarily resident out of the jurisdiction" is suggestive of a plaintiff who is a natural person, nonetheless Order 29 can be invoked against a plaintiff which is a body corporate, provided it "resides" outside the jurisdiction.

4.4 As to how one determines where a body corporate is "resident" or "ordinarily resident", reference is made in Courtney in *The Law of Private Companies* (2nd Ed.) at para. 6.029 to the decision of the English High Court in *Re Little Olympian Each Ways Ltd*. [1994] 4 AIIER 561. In that case, Lindsay J. was considering a rule then in force in England and Wales analogous to Order 29. As the headnote succinctly records. he held that a plaintiff corporation was "ordinarily resident" out of the jurisdiction for the purposes of the relevant rule if the central control and management of the company actually abided and was exercised overseas. That decision is no longer of relevance in England and Wales since the introduction of the Civil Procedure Rules which were addressed by the Court of Appeal in the *Jirehouse Capital* case. The Civil Procedure Rules now expressly provide that the Court may make an order for security for costs if "the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so". It was held in the *Jirehouse Capital* case that an unlimited company came within the ambit of that rule.

4.5 In reality, the respondent has not attempted to show that, as a matter of fact and law, the claimant is "resident" outside the jurisdiction and has ignored that requirement, which is a pre-condition to the application of Order 29. Instead, what counsel for the respondent urged the Court to do was to apply the test stipulated in s.390 for determining whether security should be ordered - that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence - in the manner laid down by Arden L.J. in the .*Jirehouse Capital* case, where, having rejected an argument that the test of "reason to believe" must be elevated to a test of balance of probabilities, she stated (at para. 29):

> That which has to be established is something that will occur only after the order for security is made. I t can therefore only be a matter of evaluation. A person can have a reason to believe that a future event will occur."

The Court was also referred by counsel for the respondent to the following statement by Arden L.J. (at para. 33):

> "Since the event in question (non-payment of an order for costs) is a future one, what the court has to do was to evaluate the risk, or the danger, of that event occurring."

What counsel for the respondent overlooked was the fact that in the *Jirehouse Capital* case the Court of Appeal was applying a rule of court which, as the segment of the rule quoted earlier clearly illustrates, stipulated the same test as is stipulated in s.390. That is not the test which determines whether security should be ordered under Order 29.

4.6 Having regard to the evidence. I consider that a finding that the claimant "resides" outside the jurisdiction and has its assets outside the jurisdiction is not open. Although the corporate structure is such that the shares in the claimant are held by two companies incorporated in the Isle of Man, the evidence indicates that the central control and management of the claimant takes place in this jurisdiction, where it is registered and has its registered office, where its directors reside, where its accounts are audited, where it pays its taxes, where it complies with its statutory obligation to file its annual return together with a copy of the auditor's report pursuant to s.128(6B) of the Act of 1963 attached, and where it is involved in substantial construction projects, in many cases under contract to public authorities in this jurisdiction.

5. Inherent jurisdiction

5.1 Counsel for the claimant submitted that the Court does not have inherent jurisdiction to make an order for security for costs against an unlimited company in reliance on the maxim *expressio unius exclusio alterius*, as outlined in Dodd on *Statutory Interpretation in Ireland* at para. 5.89 *et. seq*. By virtue of s.390 of the Act of 1963 the Oireachtas chose to identify a particular circumstance in which an order for security for costs could be made against a particular type of body corporate, a limited company, and it cannot have intended that the Court would exercise the power t hereby conferred so as to include a type of body corporate not expressly covered by the section, it was submitted. While I agree with that submission, i t goes to the construction of s.390, which the Court does not have to consider because of the concession made on behalf of the respondent that it cannot rely on s.390.

5.2 A more relevant submission made on behalf of the claimant is based on the nature of the Court's inherent jurisdiction as explained in authorities in this and other jurisdictions. In particular, counsel for the claimant drew the Court's attention to the exposition of the concept of inherent jurisdiction set out in the judgment of Murray J. (as he then was) in *G. McG. v. D.W. (No. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1 . Murray J. stated (at p. 26):

> "The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possess implicity *(sic)* whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express."

Having outlined the issue with which the Supreme Court was concerned, namely, the jurisdiction of the courts to join the Attorney General in proceedings brought pursuant to s. 29 of the Family Law Act 1 995 and whether the courts could be called upon to exercise an unspecified inherent jurisdiction in the face of the jurisdiction delineated by the Oireachtas in that provision, Murray J. stated:

> "Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would und ermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."

5.3 I consider that the context in which Murray J .made those observations is much more relevant to the issue the Court has to consider in this case than the context in which the ambit of a court's inherent jurisdiction was considered in the two cases from Northern Ireland which were cited by counsel for the claimant. The earlier was the decision of the High Court in *Brailhwaite & Sons Ltd. v. Anley Maritime Agencies Ltd.* [1990) N.I. 63, where the issue was whether the Court had an inherent jurisdiction to dismiss actions for want of prosecution and was entitled to exercise that jurisdiction in situations falling outside the ambit of the Rules of the Supreme Court. It was held by Carswell J. that it had, which is the position which was adopted in this jurisdiction by the Supreme Court in *Primor Pic. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The later was the decision of the Court of Appeal of Northern Ireland in *R. v. Bothwell* [2007] N.I. 58, where the issue was whether the Court of Appeal should exercise it s inherent jurisdiction to confer rights of audience on two solicitor advocates in circumstances where the legislation in force was framed to reflect the traditional position that solicitors would not normally have a right of audience in the Court of Appeal. Having reviewed the *Braithwaite* case and the authorities referred to in it. Kerr LCJ stated that the question whether the Court should exercise its inherent jurisdiction to confer rights of audience on the solicitors in question required to be answered primarily by considering whether it was necessary in the interests of justice that it should be done and concluded that it was not (para. 22).

5.4 Of much more relevance to the issue this Court is concerned with are the observations of Clarke J. in *Salthill Properties Ltd. and Brian Cunningham v. Royal Bank of Scotland Plc and Ors*. [2010] IEHC 31. In that case, the first and second defendants were seeking security for costs against both plaintiffs, in the case of *Salthill Properties Ltd*. in reliance on s.390 of the Act of 1963, and, in the case of Mr. Cunningham in reliance on Order 29, and, additionally, in the case of both plaintiffs they invoked the inherent jurisdiction of the Court (para. 1.5). As regards Mr. Cunningham, as he did not come within Order 29 because he was resident within the jurisdiction, Clarke J. had to address whether an inherent jurisdiction to award security or a like jurisdiction under Order 29, arose in special circumstances where the plaintiff concerned was within the jurisdiction. Having pointed to the absence of authority on the point, which he suggested was almost certainly due to the fact that no one had considered that such jurisdiction existed, Clarke J. went on to say (at para. 5.5):

> "It seems to me, therefore, that in order to determine that there should be a jurisdiction to make an order for security for costs against an individual plaintiff who is resident in the jurisdiction or within countries covered by the Brussels Regulation. it would be necessary to engage in a significant expansion of the traditional jurisprudence. It does not seem to me that it would appropriate to take that step without either legislative or rule change. It is possible to envisage circumstances where there might be some legitimate basis for such a change. Under the traditional jurisprudence persons needed to be both not resident in the relevant jurisdiction and not have sufficient

assets within the, jurisdiction as well. A case where a relevant person may reside within the jurisdiction but might be found to have placed their assets outside any relevant jurisdiction for the deliberate purpose of causing those assets not to be available in the event of a costs order, is one which would merit some consideration. The underlying rationale behind the rule might be said to cover such a situation. Against that it could be argued that, as long as the person concerned remains within the jurisdiction (or a relevant jurisdiction), then such person is amenable to any appropriate court process which can, at least in many cases, be made to apply to assets wherever situate. There would, in my view, be important policy considerations underlying any decision to extend the jurisdiction to order security for costs to cases involving persons resident in this jurisdiction or in Brussels Regulation countries. Such an expansion would, in my view, if desirable, be properly brought about by a change in the rules or legislative intervention. To embark on what would be a radical change in the relevant law on the basis of judicial decision would be going too far."

I respectfully agree with those observations, in particular, the observations in the last two sentences.

5.5 As regards a corporation, such as an unlimited company, which does not come within the terms of the specific statutory provision which has expressly provided for the Court making an order for security for costs against a company, but has confined the jurisdiction to a limited company, for at least one hundred and fifty years, currently s.390 of the Act of 1963, if the Court were to find that it has an inherent power to exercise a parallel jurisdiction to s.390 against such a corporation, in my view, it would be usurping the functions of the Oireachtas or the secondary legislature which is statutorily empowered to make rules for the administration of the business of the Superior Courts, the Superior Courts Rules Committee. Accordingly, I am satisfied that the Court has no inherent power to order security for costs against an unlimited company. such as the claimant.

6. Summary of conclusions/observations

6.1 As was acknowledged on behalf of the respondent, it cannot claim security for costs against the claimant, an unlimited company, under s.390. As regards Order 29, while I am satisfied that the Court has jurisdiction to order security for costs against an unlimited company thereunder, provided the established pre-conditions to the ordering of security are fulfilled. I am satisfied that in this case the pre-condition in issue, namely. that the claimant resides outside the jurisdiction of the Court, has not been met. Accordingly, it is not open to the Court to make the order sought under Order 29. Finally, I am satisfied that the Court does not have an inherent power to order security for costs against the claimant. That being the case, it is unnecessary to consider what would be the appropriate test for the Court to apply in determining whether security should be ordered.

6.2 Notwithstanding those conclusions, I think it is appropriate to make the following observations. The factual basis on which the application was grounded initially was that the claimant would be unable to meet the respondent's costs if the claimant was unsuccessful. Initially, the respondent relied on what could only be regarded as circumstantial evidence and speculation in support of that contention. In fairness, given that the claimant is an unlimited company and is not under an obligation to file accounts or abridged financial statements in the Companies Registration Office, the respondent was at a disadvantage in assessing the current and likely future financial state of the claimant. However, in response to the application, the audited accounts of the claimant for the year ended 31st October, 2010 were exhibited by the director of the claimant who swore the replying affidavit, as were redacted bank statements, which showed that the claimant had credit balances aggregating almost €3m at the date of the swearing of the replying affidavit, that is to say, on 1st November, 2011. The replying affidavit was supported by an affidavit sworn on 1st November, 2011 by a chartered certified accountant employed by the accounting firm which is the claimant's independent auditor, who averred that, as of 31st October, 20 10, the claimant's net assets amounted to almost €5m.

6.3 It is true that, by way of response, the audited accounts of the claimant for the year ended 3151 October, 2010 and unaudited management accounts for the eleven months ended on 301h September, 2011 were analysed in an affidavit sworn on 17'h January, 2012 by a chartered accountant on behalf of the respondent. His ultimate conclusion was that the balance sheet as at 30th September, 2011 indicated that the claimant was solvent with net assets of €1.98m. However, he commented that, included in the net assets, were some significant debtor balances which might or might not be recoverable, raising a question about the solvency of the claimant "from the perspective to assets v liabilities". In a further affidavit sworn on 31st January,2012, the chartered certified accountant in the firm which is the independent auditor of the claimant addressed the issues which had been raised in the affidavit of 17th January, 2012 at length and concluded by stating that he was of the view that the claimant is in good financial standing and that the claimant would be in a position to discharge a costs order if it were made against it in the arbitration. While, strictly speaking, the question does not arise, if it did, I would incline to the view that the respondent has not discharged the onus under s.390 of establishing by credible testimony that there is reason to believe that the claimant will be unable to pay the costs of the respondent if the respondent is successful in its defence.

6.4 I have recorded at the outset certain concessions made by both sides on the hearing of the application. It is also appropriate to record that in his closing submissions. counsel for the respondent acknowledged that, if the Court were to order security for costs, the security would amount to no more than one third of the estimated costs, in accordance with the established practice where an order for security is made against an individual under Order 29, and not an order providing for full security as is the established practice in relation to a limited company under s.390. However, the concession is immaterial given that the respondent has not discharged the onus of showing that the claimant is a litigant against which an order may be made under Order 29.

7. Order

7. 1 There will be an order dismissing the respondent's application.

APPROVED