THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 75

Kelly J.
Hogan J.
Mahon J.

Appeal No. 2014/1446

[Article 64 Transfer]

BETWEEN/

The National Private Hire and Taxi Association Limited

Plaintiff/Respondent

- and –

AXA Insurance Limited

Defendant/Appellant

Judgment of Mr. Justice Mahon delivered on 17th day of April 2015

The Proceedings

1. The plaintiff company was party to a contract with the defendant whereby it facilitated the provision by the defendant of motor insurance policies to approximately 5,500 taxi drivers. In respect of this service the plaintiff maintains that the defendant agreed to pay the plaintiff €27.50 per policy, and to give twenty four months notice of the termination of the contract. The plaintiff claims that in relation to the period October 2010 to September 2012 the defendant unilaterally reduced the fee paid per policy from €27.50 to €15.00, and that it thereafter and without notice terminated the payment of all fees to the plaintiff, and that both steps were in breach of contract. The plaintiff's claim is for the difference between the agreed figure of €27.50 and the reduced figure of €15.00 in respect of the above said period, and the loss of €27.50 commission for the period of two years from 1st October 2012. The potential value of the claim, if successful, may be in the region of €150,000. A full defence has been delivered by the defendant. It denies the existence of a contract as pleaded by the plaintiff and that, if any such agreement existed, there was a requirement to give twenty four months notice of termination.

2. By Notice of Motion dated 12th November 2013, the defendant sought an Order pursuant to s. 390 of the Companies Act 1963, directing the plaintiff to provide security for costs. That application was determined by the High Court (Binchy J.) on 5th December 2014 when the application was dismissed.

3. Section 390 of the Companies Act 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 defendant if successful in his defence, requires sufficient security to be given for those costs and may stay all proceedings until the security is given.*

The Appeal

4. This is the defendant's appeal against the said Order of the High Court that it is not entitled to an Order for security for costs. The defendant seeks in its place an Order to the effect that it is entitled to security for costs and an Order providing for the costs of the application both in the High Court and of the appeal to this Court.

5. The defendant's grounds of appeal are stated as follows:

> *(i) The learned trial judge erred in law in fact in holding that the defendant was not entitled to security for costs against the plaintiff as set out in the Order of the High Court and the judgment of Mr. Justice Donald Binchy as follows:*
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> *(a) in holding that the defendant was not entitled to an Order for security for costs against the plaintiff;*
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> *(b) in failing to hold that on the basis of the undisputed affidavit evidence of Mr. John Harding, Forensic Accountant, that all income of the plaintiff had been paid out to its principal, Mr. Christy Humphries, and that as a result the plaintiff had failed to establish a Causal connection between the plaintiff's inability to pay the defendants costs and the alleged wrongdoing of the defendant;*
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> *(c) in holding that had the monies been paid as per the plaintiff's claim there would be sufficient funds to meet any award of costs thereby ignoring the uncontroverted evidence that the manner in which the company conducted itself was to pay out all sums each year to ensure no capital reserves would exist and therefore there would be no such sums available had the company continued to trade;*
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> *(d) in failing to give due and proper weight to the uncontroverted evidence that the plaintiff had identified no members for which it could maintain a claim in the said proceedings and in failing to find that the letters sought to be relied upon gave rise to the existence of any agreement as between the plaintiff and the defendant;*
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> *(e) in holding that the plaintiff had established a causal connection between the plaintiff's inability to*

pay the defendant's costs and the alleged wrongdoing of the defendant;

(f) in holding that the plaintiff had made out a specific loss arising from the defendant's wrongdoing;

(g) in holding that the alleged specific loss was sufficient to make the difference between the plaintiff being in a position to meet the defendant's costs in the event that the defendant was successful;

(h) in holding that the plaintiff had satisfied the test that the plaintiff's inability to pay the defendant's costs was due to the defendant's alleged wrongdoing.

6. In its written legal submissions the defendant quoted from the High Court Judge's judgment as follows:-

> *"…that the Company has only made a profit for four years of its fourteen years of existence and that all of its income over the years had been paid to its sole shareholder. I believe that this argument goes further than is necessary for the purposes of considering the fourth of the criteria set out by Clarke J. in Connaughton Road Construction Limited v. Lane O'Rourke Ireland Limited [2009] I.E.H.C.7. In my view all that is necessary to establish under the heading is that the losses claimed by the plaintiff/respondent would, if established, be sufficient to put the plaintiff in a position to discharge the costs of the Appellant/Defendant, if successful;*
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> *And, I am now turning to consider the question of whether the losses claimed by the plaintiff/respondent would, if established, be sufficient to put the plaintiff/respondent in a position to discharge the costs of the Appellant/Defendant in the event that the plaintiff/respondent should succeed in the proceedings.*
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> *And in regard to the latter, if the plaintiff/respondent succeeds in the proceedings he may well succeed in recovering a sum deemed by the Court to be an appropriate amount by way of termination payment in lieu of notice. Depending on the nature of the contract, it would be unusual for such entitlements, in the absence of provisions regarding notice in the contract, for a Court to measure a payment by way of compensation in lieu of notice in the range of six to twelve months commission.*
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> *In the last year in which the Appellant/Defendant paid commission at the full rate (2009) the plaintiff/respondent received commission from the Appellant/Defendant in the sum of €127,180. Accordingly, if the plaintiff/respondent is successful it is not unreasonable to expect that a Court might measure damages under this heading from anything in the range of half of this amount up to a maximum of €127,180. This element of the claim may therefore give rise to an award under the heading in the range of €63,590 to €127.180. To this, the sum of €77,000 should be added, in respect of the reduced commission payments made between October 2010 and July 2012 bringing about a potential award of damages in the range of €133,590 and €197,180. From these amounts, the amount owing to the Revenue Commissioners in the sum of €13,356 must be deducted and the excess of liabilities over assets as appearing in the amended accounts of the company (as referred to in para. 5 above) must also be deducted, resulting in total deductions of €43, 166. This results in the potential net award in favour of the plaintiff/respondent in the range of €90,424 and €154,014. Since the Appellant/Defendants estimate of its own costs is of the order of €75,000 to €100,000 (which may well be somewhat greater than such costs as will tax on a partial party basis in proceedings having the values described above) I am satisfied that the plaintiff/respondent has met the fourth of the tests set out by Clarke J. for the purpose of such applications i.e. that the potential loss of the plaintiff/respondent that may be recovered in the proceedings is sufficient to make the difference between the plaintiff/respondent being in the position to meet the costs of the Appellant/Defendant in the event that the Appellant/Defendant should succeed and the plaintiff/respondent not being in such a position.*

7. The High Court judge was satisfied that the plaintiff established a prima facia case of a breach of contract on the part of the defendant. He stated:-

> *"The respondent has established a prima facia case of a breach of contract by the defendant, i.e. the unilateral reduction in commission payments payable by the defendant/appellant to the plaintiff/respondent. From a previously agreed amount of €27.50 per policy sold to €15.00 per policy sold, and also the subsequent termination of payment commission altogether, without notice; the payment of which the defendant/appellant admits having been previously made to the plaintiff/respondent and which the defendant/appellant also admits to having firstly, imposed an unilateral reduction in the amount of commission paid as described above and secondly, to having terminated payment of same."*

8. There was a particular focus on the part of the defendant on what it maintained was evidence of an underlying financial weakness on the part of the plaintiff arising from the fact that over a number of years the practice was that all, or almost all, of its income was paid out to the effective owner of the plaintiff company, Mr. Humphries, and that little or nothing was retained from year to year to meet ongoing or future liabilities. Its entire income was derived from the defendant. The contention on the part of the defendant therefore was that the plaintiff company was merely a collecting agent for Mr. Humphries in respect of its entire income, and that, in general its finances were managed in deficit.

The manner in which the plaintiff managed its financial affairs

9. While it is undoubtedly the case that most of the plaintiff's annual income generated from the defendant was paid to Mr. Humphries over the years, this did not always occur. It could certainly be said that the company was permitted to normally run with an annual deficit although, probably in all the circumstances, prior to the reduction in its income from the defendant, and subsequently, when that income ceased altogether, that deficit was, in general terms, manageable and did not contribute to any significant build up of liabilities. It is also a fact that Mr. Humphries has not taken a salary from the plaintiff since 2010, and has thereafter not received any remuneration from his company for approximately four years. As of mid 2012, there was a sum owing to the Revenue Commissioners of €13,356. It could not however be said that the company was over burdened with debts as it transacted its business from year to year.

10. There are many limited companies (and which are sometimes referred to as "one man" companies), which are owned and managed by one or two people and where all or most of the profits generated by the company are paid out to one or two individuals on an annual basis. There is nothing inappropriate or improper about such companies operating in this manner, or individuals conducting their business affairs in this way. Many larger companies and corporations happily do business with such "one man" operations, and one such company happy to do so was the defendant in its dealings with the plaintiff over many years. The defendant was content to engage in that business association with the plaintiff over a number of years to their mutual benefit, and in circumstances where the defendant was aware that the plaintiff was dependant on it for all, or almost all, of its income.

11. The defendant submits that its appeal is essentially on the basis that the High Court judge erred in law in concluding that the plaintiff had, by way of affidavit evidence, satisfied the test which enables a plaintiff contend that his inability to discharge the defendant's costs flowed from the wrong-doing of the defendant. Thus the order sought was refused by the High Court.

12. In his affidavit grounding the application to the High Court, the defendant's solicitor, Mr. McNamara, refers to, in particular, a number of matters in support of his client's application, including:-

> (i) There was no agreement between the plaintiff and the defendant, as alleged by the plaintiff.
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> (ii) A judgment registered against the plaintiff by the Revenue Commissioners on 13th September 2012 in the sum of €13,326 remains unsatisfied.
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> (iii) Based on the plaintiff's balance sheet as of 31st December 2011, the plaintiff then had *net current liabilities* of €32,866, and *a deficiency of assets* in the sum of €32,866.
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> (iv) *The present financial position and indeed the insolvency of the plaintiff…clearly indicates* that the plaintiff will be unable to discharge the defendant's legal costs in the event that the defendant is successful in its defence of the plaintiff's claim.
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> (v) The defendant has a *substantial and bona fide* defence to the plaintiff's claim.

13. In *USK and District Residents Association Limited v. The Environmental Protection Agency* [Unreported, Supreme Court, Clarke J., 13th January 2006] the Supreme Court approved what was described as a helpful summary of the law by Morris P. in *Interfinance Group Limited v. KPMG Peat Marwick* [Unreported, High Court, Morris P., 29th June 1998]. As adopted by the Supreme Court in USK the test set out by Morris P. in *Interfinance* is in the following terms.

> "(i) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
> (a) that he has a *prima facie* defence to the plaintiff's claim, and
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> (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.
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> (ii) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought.
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> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought. The list of special circumstances referred to is not, of course, exhaustive."

14. In this case it was accepted, and was so found by the judge, that the defendant has a *prima facie* defence to the plaintiff's claim, and that the plaintiff will be unable to pay the defendant's costs in the event that the defendant successfully defends these proceedings.

15. In his judgment in the case of *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC7, Clarke J. stated:-

> "It follows that security ought to be required unless *Connaughton Road* can show that there are special circumstances which ought to cause the court to exercise its discretion not to make the order sought. The special circumstances ascertained in this case are, perhaps, the most common category of such circumstances where it is ascertained that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party. It is common case, and clear from the authorities, that the onus of establishing that fact rests on *Connaughton Road.* It is also common case and clear from the authorities …that the obligation of *Connaughton Road,* in those circumstances, is to establish a *prima facie* case to the effect that its inability to pay the costs of the defendant, in the event that the defendant were successfully, stems from the wrongdoing alleged in these proceedings… Before going on to the application of the relevant principles to the evidence in this case, I should therefore, briefly touch on certain aspects of what might be called *inability due to wrongdoing* in special circumstances to which I now turn."

16. In this case the High Court judge found that the plaintiff had established, on a *prima facie* basis that there was *actionable wrongdoing* on the part of the defendant, namely, the defendants alleged breach of contract. The breach of contract alleged by the plaintiff is the unilateral reduction in commission payments payable by the defendant to the plaintiff from a previously agreed amount of €27.50 per policy sold to €15.00 per policy sold, and the subsequent termination of payment of commissions altogether, without notice. I agree with the finding of the High Court judge in this regard.

17. In his judgment in the *Connaughton Case*, Clarke J. went on to say:-

> "In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing ascertained, it seems to me that four propositions must necessarily be true:-
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> (i) That there was actionable wrongdoing on the part of the defendant (*e.g.* a breach of contract or a *tort*);
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> (ii) That there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
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> (iii) That the consequences referred to in (ii) have given rise to some specific levels of loss in the hands of the plaintiffs which loss is recoverable as a matter of law (*e.g.* by not being too remote), and
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> (iv) That the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

18. In this case, there is a *causal connection* between the alleged breach of contract on the part of the defendant and a practical consequence or consequences for the plaintiff. A clear and fairly obvious practical consequence is the initial reduction and eventual cessation of a substantial flow of income into the plaintiff company as had been the case for a number of years.

19. The third *Connaughton* test appears to me to have also been satisfied. The consequences for the plaintiff have given rise to a specific level of loss in its hands which, in the event that the plaintiffs claims is successful, is recoverable as a matter of law.

20. The fourth test has also, I believe, been satisfied by the plaintiff. The decision to reduce the fees payable to the plaintiff, and more importantly, the decision to cease such payments altogether without notice, did have, particularly in regard to the fact that the plaintiff derived all or almost all its income over a number of years from the defendant, serious consequences for the plaintiff. The result was that the loss arising there from was such as to make the difference between the plaintiff being in a position to meet the defendant's costs in the event that the defendant successfully defended the action, and the plaintiff not being in such a position. Establishing any such loss is however dependent upon proof that a contract as pleaded by the plaintiff existed, and was breached by the defendant, and these are matters for a trial of the action.

21. The High Court judge in the course of his judgment went to some lengths to estimate the likely loss of income to the plaintiff as a result of the actions of the defendant, assuming of course that the plaintiff was to succeed in his claim in this regard.

22. I agree in general terms with the view as expressed by the High Court Judge and, again in general, with his figures. It is also relevant to note in this regard that although it was the practice with the plaintiff's company to pay out all or almost all its income stream from the defendant to Mr. Humphries, it was also the case that in more recent years that this has not occurred. The evidence does not suggest to me that if there had not been an interruption in the plaintiff's income from the defendant, the plaintiff, if engaged in litigation with a third party, would have failed to ensure that sufficient income was left in the company over a period of two or three years to meet the costs of that third party in the event that it was ordered to pay such costs. The evidence did not indicate that, over a period of more than ten years, the plaintiff did not habitually pay its bills as they arose. It cannot therefore be fairly or reasonably suggested that had the defendant honoured the terms of its agreement with the plaintiff (as alleged by the plaintiff) it would not have been able to make provision for the payment of the legal costs it might occur in any litigation in which it was involved, and that it would not have done so.

23. I would therefore dismiss the defendant's appeal against the Order of the High Court refusing an Order pursuant to s. 390 of the Companies Act 1963 directing the plaintiff to provide security for costs.