Neutral Citation [2012] IEHC 560

THE HIGH COURT

[2011 No. 784 P]

BETWEEN

MIKE O'DWYER MOTORS LIMITED

PLAINTIFF

AND

MAZDA MOTOR LOGISTICS EUROPE NV (TRADING AS "MAZDA MOTOR IRELAND")

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 21st day of December, 2012.

The application

1. On this application, which was initiated as recently as 29th November, 2012, the defendant seeks an order for security for costs against the plaintiff. While the defendant has also invoked Order 29 of the Rules of the Superior Courts, in reality, the application was moved under s. 390 of the Companies Act 1963, which provides as follows:

> "Where a limited company is plaintiff in any action . . . 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, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

The application was heard on 18th December, 2012. The urgency of the matter is that these proceedings have been listed for hearing on 16th January, 2013 and, by agreement of the parties which was given effect to by an order of the Court made on 26th January, 2012, other proceedings entitled Mazda Motor Logistics Europe NV (trading as Mazda Motor Ireland) and Mazda Motor Corporation v. Mike O'Dwyer Motors Ltd. (Record No. 2011/10673P) (the related proceedings) have been linked to, and listed for hearing together with, these proceedings. Both matters are listed for hearing for three days.

5. Four affidavits have been filed in support of, and in response to, the application, namely:

> (a) two affidavits of Steve Jellis, the Director of Market Support of the defendant, one being the grounding affidavit, which was sworn on 4th December, 2012, and the other being a second affidavit, which was sworn on 12th December, 2012; and
>
> (b) two affidavits sworn by Mike O'Dwyer, the Managing Director of the plaintiff, the first, in response to the grounding affidavit, having been sworn on 11th December, 2012, and the second, in response to Mr. Jellis's second affidavit, having been sworn on 17th December, 2012.

The law

3. As the analysis of s. 390 contained in Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at para. 13 – 56 sets out clearly, s. 390 requires a defendant to establish two separate matters, namely:

> (a) that he has a prima facie defence to the plaintiff's claim; and
>
> (b) that the plaintiff will not be able to pay the defendant's costs if successful in his defence.

The authors make it clear (at para. 13 – 58) that s. 390 does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant and that the Court retains a discretion which may be exercised in special circumstances. As to where the onus of proof lies, it lies on the defendant to establish a *prima facie* defence and that there is reason to believe that the plaintiff would be unable to pay the defendant's costs if the defendant is successful, whereas the onus lies on the plaintiff to establish "special circumstances" which may justify the Court in refusing to order security.

4. I propose considering each of the components of the application as outlined in the previous paragraph in turn, but before doing so I propose summarising the plaintiff's case, as pleaded, and the defendant's answer to it, as pleaded.

The plaintiff's case as pleaded and the defendant's response to it as pleaded

5. The statement of claim, which was delivered on 5th December, 2011, discloses that the plaintiff entered into two agreements with the defendant on 1st July, 2006, one being a Mazda Dealer Agreement (the Dealer Agreement), and the other being a Mazda Authorised Repairer Agreement (the Repairer Agreement). The Dealer Agreement was terminated by the defendant by letter dated 30th March, 2010 and such termination is not challenged by the plaintiff. The issues in these proceedings arise from the contention of the defendant that it has terminated the Repairer Agreement. In the statement of claim the plaintiff has pleaded that the assertion by the defendant in a letter dated 9th April, 2010 that the Repairer Agreement had terminated in tandem with the Dealer Agreement was manifestly false and constituted the adoption of a position by the defendant which was in gross violation of the Repairer Agreement. The position of the plaintiff as pleaded is that the Repairer Agreement was not terminated in accordance with its terms and, in particular, Article 16 thereof, on the grounds, *inter alia*, that no written notice was given. So, the position of the plaintiff is that the Repairer Agreement remains in force. It is the plaintiff's contention that it has suffered loss, damage and expense, as well as loss of good will and damage to its reputation and standing as a Mazda Authorised Repairer and in the motor business generally, by reason of the defendant having conducted itself from 30th March, 2010 as if the Repairer Agreement had been terminated, which conduct the

plaintiff alleges to be wrongful, unlawful and in breach of agreement. Further, the plaintiff has pleaded that in August 2010 the defendant wrote to numerous customers of the plaintiff, possibly its entire customer base, falsely and maliciously stating that the plaintiff was no longer within the defendant's network, that the defendant had "re-appointed" the customer in question to an alternative Mazda dealer, and that such "re-appointment" was necessary to ensure that the customer was looked after and would continue his or her "Mazda experience". It is the plaintiff's case that it has suffered loss and damage in consequence of those communications, which it alleges were published falsely and maliciously by the defendant.

6. In additional to replies to particulars dated 19th October, 2012, the plaintiff has contended that, but for the matters the subject of the proceedings, "it would have sustained an average annual turnover of approximately €1,000,000 higher" than it achieved, as tabulated in the turnover table in the replies, "with an approximate gross margin of twenty per cent, giving an annual loss of €200,000 which is claimed for a five year period". The table, which covers the five years from 1st June, 2007 to 31st May, 2012, shows a turnover in respect of, *inter alia*, new car sales, second-hand car sales and servicing and repairs decreasing over the five years. In his first affidavit Mr. O'Dwyer has referred to the replies and has averred that the unlawful actions of the defendant have had a devastating effect on the business of the plaintiff, with an estimated loss of turnover to May 2012 of €1m and further loss of turnover is expected over the next five years. In his second affidavit Mr. Jellis has taken issue with the accuracy of the figure of €1m and has also asserted that the loss of turnover is due to economic circumstances or the actions of the directors of the plaintiff, not the actions of the defendant. At the hearing, counsel for the plaintiff submitted that the economic downturn only accounted for part of the diminution of the plaintiff's turnover, which he also attributed to the effects of the communications by the defendant to its customer base. In reality, it is not possible for the Court, and it would be wholly inappropriate, to express any view on the quantum of the plaintiff's claim for damages.

7. The defendant in its defence delivered on 13th March, 2012 traversed all allegations of wrongdoing against it and asserted that the Repairer Agreement had been terminated on various bases, for example, by fundamental breach by the plaintiff, by mutual agreement, and in consequence of its entitlement to repudiate, which it had done by letter of 3rd February, 2012. Estoppel was also pleaded against the plaintiff. The defendant denied that the Repairer Agreement remains in force and it also denied all wrongdoing. As regards the communication with customers of the plaintiff, which was denied, it was asserted that the plaintiff's claim has failed to disclose any cause of action for the alleged damage due to the communications complained of. In general, the defendant has denied that the plaintiff has suffered any loss of damage attributable to its conduct.

8. As regards the related proceedings, the defendant in these proceedings, which is one of the plaintiffs in the related proceedings, the other plaintiff being a Japanese company which is the owner of the "Mazda" Trademark, seeks various injunctive reliefs against the plaintiff in these proceedings restraining the use of the brand name "Mazda" and its logo, the "Mazda" Trademark and so forth. In its defence, which was also delivered in February 2012, the plaintiff in these proceedings has denied all wrongdoing alleged by the Mazda companies against it, but has asserted that it remains "an authorised Mazda repairer". It has denied that the Mazda companies are entitled to any of the reliefs claimed against it.

Inability of the plaintiff to meet the defendant's costs established?

9. In the grounding affidavit Mr. Jellis has averred that the defendant's costs in defending the proceedings will be significant, and, based on a four day hearing with two expert witnesses and at least four witnesses of fact, he has averred that he has been advised by his solicitors that the costs of defending the plaintiff's claim would be in the region of €150,000 to €200,000 plus VAT. No cost accountants' assessment has been exhibited in support of that proposition. Apart from that, as I have already recorded, these proceedings and the related proceedings are listed for hearing for three days commencing on 16th January, 2013. There is no information whatsoever in the evidence adduced on behalf of the defendant that the related proceedings will not be proceeded with. Therefore, one must harbour a degree of scepticism as to the accuracy of the quantum of the costs of defending these proceedings suggested by Mr. Jellis. However, in the overall scheme of things that is a minor point.

10. Essentially, Mr. Jellis has advanced three reasons for the defendant's concern that the plaintiff may be unable to meet the defendant's costs, if the defendant is successful. They are:

> (a) That the status of the plaintiff as recorded in the Company Registration Office is "in receivership". That is correct. It appears from the documentation before the Court that Mr. Tom Doheny of Deloitte was appointed a receiver over certain assets of the plaintiff by ACC Bank Plc on 20th September, 2012. However, there is no copy of the appointment exhibited in the affidavits before the Court.
>
> (b) The plaintiff is defending summary proceedings brought against it by ACC Bank Plc in the Commercial Court, the sum being claimed by the Bank being €1,925,463.25. A motion for summary judgment was heard in the Commercial Court on 15th November, 2012 and judgment was reserved.
>
> (c) There are other proceedings in being in the High Court Chancery List against the plaintiff (the reference to the defendant in paragraph 11 of the grounding affidavit is clearly erroneous). Those proceedings are proceedings by Mr. Doheny seeking directions under s. 316 of the Companies Act 1963 as to the validity of the debenture under which he was appointed and as to the validity of his appointment as receiver. Those proceedings were first returnable on 26th November, 2011 and were adjourned to 10th December, 2012. On that day, the proceedings were adjourned to 21st January, 2013 for mention. The averment by Mr. O'Dwyer in his replying affidavit that the Court "refused to grant the directions sought" is incorrect. The Court made no determination on the application and merely adjourned the matter for mention until 21st January, 2013.

11. In his second affidavit, Mr. O'Dwyer has been, as counsel for the plaintiff put it, "up front". He has averred that the capacity of the plaintiff to discharge such order for costs as might be made against it is dependent to some extent on the outcome of the proceedings in the Commercial Court, which have been vigorously contested by the plaintiff, and also upon the outcome of the application under s. 316, which I reiterate was not refused on 10th December, 2012, but which was adjourned to 21st January, 2013. Mr. O'Dwyer has averred that he is "not in a position to swear that [the plaintiff] would as a matter of certainty or probability be able to discharge any order for costs" but he has added a rider that he cannot say "that it is impossible that such order could be discharged".

12. Having regard to the evidential position, I think it is proper to conclude, for the purposes of this application, that the defendant has established an inability on the part of the plaintiff to meet its costs if it is successful in defending the proceedings.

Prima facie defence to plaintiff's claim established?

13. In the grounding affidavit, Mr. Jellis merely averred that he had been advised by the defendant's solicitors and counsel that the defendant has a full defence to the plaintiff's claim and he referred to the defence. He further averred that such of the facts and

circumstances and denials as are set out in the defence as are within his own knowledge are true and accurate and "such few" that are not he believes the same to be true and accurate. In his second affidavit he averred that "in tandem" with the termination of the Dealer Agreement, the defendant terminated the plaintiff's status as an authorised repairer, that the plaintiff accepted and acknowledged such termination and by letter dated 13th April, 2010 applied to the defendant for reinstatement of the Repairer Agreement. He further averred that the defendant denies that the Repairer Agreement was not terminated or that it was terminated falsely and he reiterated that it was terminated in or about March 2010. He also asserted that averments made by Mr. O'Dwyer in his first affidavit were incorrect, and I will return to that assertion later.

14. Counsel for the plaintiff took the Court through the provisions of the Repairer Agreement on "Duration/Termination", that is to say, Article 16 and also Attachment 5B ("Exceptional Events" Termination) referred to in Article 16. In particular, counsel for the plaintiff focused on Article 16(6) which provides that the notice of termination must be in writing, and suggested that it would be a simple matter for the defendant to exhibit the notice of termination in writing, if such existed. Counsel for the plaintiff certainly raised issues as to whether the Repairer Agreement was in fact terminated, in the context in which he submitted that the core issue in these proceedings is whether the Repairer Agreement was validly terminated.

15. Counsel for the plaintiff submitted that the test to be applied by the Court in determining whether the defendant has established that it has a prima facie defence to the plaintiff's claim is the test set out by Finlay Geoghegan J. in *Tribune Newspapers v. Associated Newspapers Ireland* (High Court, 25th March, 2011), which is referred to in paragraph 13 – 65 of Delany and McGrath (*op. cit.)* The test outlined by Finlay Geoghegan J. in that case is summarised as follows by the authors:

> "Finlay Geoghegan J. stated that she was satisfied that a defendant seeking to establish a prima facie defence which was based on fact had to objectively demonstrate the existence of the evidence on which it would rely to establish those facts and that mere assertions would not suffice. Where such evidence was adduced, the Court should determine whether the defendant had established a prima facie case based on an assumption that the evidence would be accepted at trial. In addition the defendant would have to establish an arguable legal basis for the inferences or conclusions which it put forward based upon the evidence adduced. To summarise, she stated as follows:
>
> 'In my judgment, what is required for a defendant seeking to establish a *prima facie* defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial Judge, provide a defence to the plaintiff's claim'."

16. The response of counsel for the defendant was to refer to the judgment of Barrington J. in the Supreme Court in *Lismore Homes Ltd. (In receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501, and, in particular, the following remarks (at p. 506):

> "The most important thing to remember about an application for security for costs is that it is an interlocutory motion. It will usually be made when the facts of the dispute have yet to be established. Our law recognises an oral hearing and cross-examination as the primary method of resolving disputed questions of fact. It is dangerous to attempt to resolve such questions on affidavit unless there is objective evidence which points conclusively in one direction or the other."

Barrington J. then quoted from the judgment of Sir Nicholas Browne-Wilkinson V.C. in *Porzelack K.G. v. Porzelack (U.K.) Ltd.* [1987] 1 WLR 420 (at p. 423), the last paragraph of which was as follows:

> "Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure."

17. It is unquestionably not the function of the Court on an interlocutory application, such as an application for security for costs, to address the merits of the case or to assess the strength of the case of either party or who is likely to succeed. On the other hand, in order to discharge the onus of establishing a *prima facie* defence, a defendant bringing an application for security for costs must meet a certain threshold; it cannot be sufficient merely to assert that it has been advised that it has a good defence. It seems to me that the implementation of the test summarised by Finlay Geoghegan J. in the passage quoted above avoids straying into territory into which the Court should not stray, but at the same time requires the defendant to do more than refer to a defence which is largely a traverse of allegations made against it.

18. Accordingly, the question for this Court is whether Mr. Jellis has objectively demonstrated the existence of admissible evidence, which is supported by relevant arguable legal submissions applicable thereto, which, if accepted by a trial Judge, would provide a defence to the plaintiff's claim. While I have set out the substance of Mr. Jellis's averments in support of his contention that the defendant has established a *prima facie* defence accurately above, it is necessary to focus on one aspect of his answer to Mr. O'Dwyer's contention that a *prima facie* defence had not been made out. In paragraph ten of his first affidavit, Mr. O'Dwyer set out his belief that the defendant's assertion that the Repairer Agreement has terminated "in tandem with" the Dealer Agreement was manifestly false and was in violation of the Repairer Agreement and also of Commission Regulation (EC) 1400/2002. Mr. O'Dwyer then outlined the various grounds on which it was alleged that the Repairer Agreement had not been terminated referring, *inter alia*, to Article 16, to the fact that no written notice had been given, and to the fact that no "Exceptional Event as outlined in Attachment 5B" had arisen. In his second affidavit Mr. Jellis merely averred that "the averments at paragraph 10 . . . are incorrect" and he went on to deny that the Repairer Agreement was not terminated, as I have recorded. In my view, for the purposes of this application for security for costs, in merely answering the plaintiff's contentions in paragraph 10 of Mr. O'Dwyer's first affidavit on the basis that they are "incorrect", the defendant has not objectively demonstrated the existence of admissible evidence which, if accepted by the trial Judge, would provide a defence to the plaintiff's assertion that the Repairer Agreement has not been terminated. Emphasising that I have formed no view as to the strength of the plaintiff's case or the defendant's defence or as to the likelihood of either party being successful in the action, I have come to the conclusion that, for the purposes of this application, the defendant has not met the appropriate threshold of establishing that it has a *prima facie* defence to the plaintiff's claim. On that basis alone the application for security for costs may be dismissed.

19. However, I propose to consider the arguments made on behalf of the plaintiff that there are "special circumstances" which, in any event, would justify refusal of an order for security for costs.

Any special circumstances established?

20. In his first affidavit Mr. O'Dwyer has listed no less than seven factors which he describes as "exceptional circumstances". In reality, there are only two factors which I consider it necessary to consider, namely, the continuance of the related proceedings and

the issue of delay.

21. It is interesting to note that, despite the bait cast by Mr. O'Dwyer in his first affidavit, the defendant has not indicated whether it proposes pursuing the related proceedings on 16th January, 2013 or not. Accordingly, it must be assumed that it does intend to proceed with the related proceedings. However, the plaintiff has advanced no convincing argument as to why the defendant should be deprived of an order for security for costs merely because the related proceedings are probably proceeding. While this is wholly hypothetical, presumably, if the plaintiff were to successfully defend the related proceedings, it would be in a position to have any stay on these proceedings in consequence of the non-compliance with an order for security for costs vacated.

22. Delay or, more correctly, the late stage in the proceedings at which the application for security for costs was brought, in my view, is a relevant factor. In this connection, the following passage from the judgment of Clarke J. in *Mooreview Developments Ltd. v. Cunningham* [2010] IEHC 30 explains the rationale in treating delay as a special circumstance to be considered on an application for security for costs:

> "In my view, the rationale behind the delay special circumstance jurisprudence is that a party is entitled (where security is to be ordered) to be able to include that factor in its judgment as to whether to progress the proceedings from as early a time as is reasonably practicable. The test is not as to whether the relevant plaintiff might not nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up."

23. There is a factual dispute on the affidavit evidence as to when the defendant became aware of the plaintiff's financial frailty. In his second affidavit Mr. Jellis has averred that the defendant's solicitors were not aware of the appointment of the receiver to the plaintiff "until quite recently" and that the existence of the Commerical Court proceedings against the plaintiff came to the attention of the defendant in November and it moved with haste and counsel retained by the defendant was instructed to attend the Commercial Court "on a watching brief". Mr. O'Dwyer, on the other hand, in his second affidavit, has averred that the defendant had been well aware from the outset of the proceedings that the plaintiff was in financial difficulty and, although this point was not pressed, that it was the acts and omissions of the defendant, the subject matter of these proceedings, that cost significant financial loss to the plaintiff. That controversy cannot be resolved on this application.

24. It is not surprising that any previous concerns of the defendant as to the financial status of the plaintiff were exacerbated by the appointment of a receiver and the existence of the Commercial Court proceedings being in the open. However, what is surprising is that the defendant has brought an application for security for costs, very late in the process at a time when the validity of the appointment of the receiver is before the Court and whether there will be summary judgment against the plaintiff in the Commercial Court proceedings remains to be determined. Moreover, while the defendant has been accommodated by the Court with an early hearing of this application, nonetheless it has had to be heard and decided almost on the eve of the date fixed for the substantive hearing, given the intervention of the Christmas vacation from 21st December, 2012 to 11th January, 2013. That highlights that the defendant moved at a time when it was aware, and the evidence indicates, that the plaintiff had taken all the steps necessary to have the proceedings ready for hearing on 16th January, 2013.

25. Mr. O'Dwyer, in his second affidavit, has averred that the plaintiff's affidavit of discovery was sworn on 19th October, 2012, yet the defendant had not sought inspection of the documents discovered. In addition, in the additional replies to particulars dated 19th October, 2012, to which I have referred above, it was stated that the plaintiff's accountant was willing to liaise with any accountant retained by the defendant in relation to the table containing the turnover summary. However, there had been no response to that invitation. The fact that the plaintiff has obviously incurred very substantial costs in bringing its claim to the point where it is ready for hearing on 16th January, 2013 is a factor to be taken into account in determining where a fair balance lies as between the rights of the parties. While it must be acknowledged in this case that the rights are finely balance, I think it is probable that the likely prejudice to the defendant in refusing to make an order, when balanced against the likely prejudice to the plaintiff of making an order at this late stage in the process, militates against making an order.

26. Finally, I should make it clear that the practical difficulties which were adverted to during the hearing of the application of having the security to be awarded quantified at this late stage has not influenced the decision I have reached. Such practical difficulties can always be overcome.

Order

27. There will be an order dismissing the defendant's application.