Neutral Citation Number: [2012] IEHC 103

HIGH COURT

COMMERCIAL

2011 11382 P

BETWEEN:-

COUNTY MONAGHAN ANTI-PYLON LIMITED

PLAINTIFF

AND

EIRGRID PLC

DEFENDANT

Judgment of Mr Justice Charleton delivered on the 30th day of March 2012

1. This is an application by the defendant, which I will call Eirgrid, for security for costs against the plaintiff company, hereafter Monaghan Anti-Pylon, under s. 390 of the Companies Act 1963, as amended. That section provides:-

> *"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, require sufficient security to be given for those costs and may stay all proceedings until the security is given".*

2. It is accepted that Monaghan Anti-Pylon will not be able to pay the costs of this action should Eirgrid defend it successfully. Monaghan Anti-Pylon is a company limited by guarantee. The plaintiff company was formed for the purpose of opposing the routing through Monaghan county of above-ground electric cables on pylons pursuant to a scheme referred to as the Meath-Tyrone 400kw interconnector. What this is about is the construction of routes throughout Ireland for delivering very high power levels of electricity as an infrastructure project. Some people feel that installing highly charged electric cable above ground constitutes a danger to human health. Putting such cables under the ground, they claim, is the only safe way to install an electric interconnector infrastructure throughout the island. The Court expresses no view on this. The scheme to bring such pylons from Tyrone to Meath cuts across county Monaghan and has aroused concerted opposition. This manifested itself in a committee and later, on the 7th of May 2010, the plaintiff company was incorporated. Its basic object is to oppose the scheme in favour of a buried electricity interconnector network.

Background

3. The Planning and Development (Strategic Infrastructure) Act 2006 introduced the concept of planning applications for important infrastructural projects being made in the first instance to An Board Pleanála instead of to a local planning authority. This was done by introducing new sections to the Planning and Development Act 2000, the relevant one here being s. 181B. When a planning application is made the Board may, in its absolute discretion, organise a public enquiry whereby a team of inspectors look into the proposal, hear evidence and submissions and then report back on the core issue of the conformity of the proposal with proper planning and sustainable development. The Board will on consideration of the report decide in favour of or against planning or will, in respect of these projects, exercise the power to state a provisional view under s.182C(5)(b) that were certain alterations to be made it would be appropriate to grant permission.

4. In December 2009 Eirgrid applied for planning permission to An Board Pleanála for the scheme in question. The Board decided that an oral hearing was appropriate. Two inspectors were appointed. At a preliminary hearing in April 2010, the inspectors made it clear that because of a delay in amending the Act of 2000 to provide for costs in such circumstances, that no costs could be awarded by the Board to those who participated in the planning enquiry. Apparently, the necessary consequential change to the Act of 2000 had not been made when the new strategic infrastructure provisions were introduced. Since the introduction of s. 64 of the Planning and Development Act 2010, which came into force, I am told, in November of that year, s. 182B of the Act of 2000 has been amended to allow the Board to grant costs in circumstances that include a possible award to those participating in an oral hearing. If, however, the Board never gets to make a decision, for instance when an application is withdrawn, there is no provision for anyone to be awarded costs.

5. The oral hearing of the planning enquiry on the Meath-Tyrone 400kw interconnector began on the 10th of May 2010 and it went on to the 28th of June of that year. On the 23rd day of the hearing, counsel for Eirgrid announced that the hearing could go no further: there had been a mistake in the newspaper advertisements necessary in the process whereby the height of the proposed pylons had been misstated and the application was therefore withdrawn. That was the end of the enquiry. The planning application was thus never reported on to the Board and was never ruled on. It is close to certain that another application to pursue the development of this scheme will be made.

6. Those are the circumstances out of which this case arises whereby Monaghan Anti-Pylon claims damages from Eirgrid. Essentially, the case of Monaghan Anti-Pylon is that Eirgrid owed a duty of care to the objectors not to waste their time and money in participating in a planning process which they terminated due to their own negligence thereby causing them loss. I make no comment on the applicable principles of proximity, duty of care and public policy. It suffices to record that the case made is that there was a voluntary assumption of a relationship by Eirgrid sufficient to found liability.

7. Monaghan Anti-Pylon claim to have raised and spent about €100,000 prior to incorporation, when it was then a committee, and

about €150,000 after becoming a company, in preparing for and participating in the oral hearing. All of this has been lost in the futile manner outlined. The bulk of the money was spent on lawyers' fees and on funding a report from an expert group on above-ground as against buried electricity interconnection. This is called the Askon Report. On not all days were Monaghan Anti-Pylon represented at the oral hearing but it is fair to conclude that on such days as they were there, it cost money. It is also averred to by them that about €41,000 was spent on the expert report. Thus, they claim to have incurred liabilities or spent money with the result that their kitty is cleaned out. In the result they will have no chance of returning to the donors who funded them the first time in order to seek return appearances at whatever future oral hearing takes place. This case is about recovering those lost monies in order to make it possible for Monaghan Anti-Pylon to be represented in the future.

Security for costs

8. Making an order against a company for security for a defendant's costs to be lodged in advance of a hearing is a matter of discretion that is exercised on settled principles. There are two basic requirements before an order for security for the costs of a defendant may be made. The defendant must show, firstly, that it has a reasonably sustainable defence. That does not just mean a barely arguable defence, since there is little that cannot be argued. It has to be demonstrated that if there is a legal defence that it is potentially sustainable on a practical view of the law or, if the defence is one of fact, that if what the defendant alleges in answer to the plaintiff is proven in court that it will defeat the plaintiff's claim. And then, secondly, a defendant must show that the plaintiff company is either insolvent or is so financially challenged that it will not be able to pay the defendant's costs if successful; *Connaghton Road Construction Ltd. v Laing O'Rourke Ireland Ltd*. [2009] I.E.H.C. 7 (High Court, unreported, Clarke J., 16 January 2009). The latter point is admitted. I return to the first point as it is central to this application.

9. In *Tribune Newspapers (In Receivership) v Associated Newspapers Ireland* (High Court, unreported, 25 March 2011, Finlay Geoghegan J) useful guidance was offered as to the nature of what level of sustainability of defence will be required to invoke the security as to costs jurisdiction. In the course of an extempore ruling Finlay Geoghegan J analysed the nature of what had been considered to be a *prima facie* defence in prior case law. From the transcript, I quote her conclusion on this issue:

> *"… both the Supreme and High Courts have used slightly different terminology to describe the nature of the defence which must be established on an application for security for costs. Whilst there is generic use of prima facie defence there is it appears also references, apparently in the alternative, to good defence, real defence or even to the plaintiff's case as being required to be unanswerable, with the consequential impact on the defendant's defence. What appears from the judgments, in a manner similar to the judgment sin relation to summary judgment [cases], is that a defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertion will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits. If such evidence is adduced then the defendant is entitled to have the court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the court may arrive at based upon such evidence. In so far as the plaintiff is admitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission. Such an exercise would inevitably require the court at the interlocutory stage of the application for security for costs to assess the strength and weakness of the respective parties' contentions and cases. The decisions of the Supreme Court already referred to appear to me to clearly rule out such an approach. Accordingly, in my judgement, 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 the trial judge, provide a defence to the plaintiff's claim. I propose applying this test. Further, it appears to me that such a test is supported by section 390 as enacted by the Oireachtas, which I am applying in this application for security for costs. The section as enacted contains no express reference to the establishment of a prima facie defence. The application of the prima facie defence test is applicable for the purposes of this section, in the sense that the section requires the company to provide security where it would be unable to pay the course of the defendant if successful in its defence. It is therefore relevant to consider that, or whether or not, a defendant has a prima facie a defence in the sense that he might succeed but does not warrant the imposition of a higher threshold. Unless the defendant has a prima facie a defence the purpose of this section would not come into play".*

10. I adopt that reasoning as to the nature of the defence that must be established before the discretion of the court to order security for costs may be invoked. In *Usk and District Residents Association Limited v. The Environmental Protection Agency* [2006] I.L.R.M. 363, Clarke J for the Supreme Court held at p 372 that it was open to a defendant seeking to establish a prima facie defence to rely on "any factual matters which are properly before the court" by way of affidavit or exhibit "and also to rely on any legal argument which may be open on the basis of the of the facts asserted by the plaintiff or facts which have been *prima facie* established in the materials before the court." As well as by assertion of fact, the existence of a prima facie defence may be established by reference to legal argument alone.

Amount

11. An order for security for costs, if made, must be for the full sum of the costs: the court has no discretion in that regard to merely award a percentage; *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd.* (No. 3) [2001] 3 I.R. 536. The amount to be set may be subject to conflicting estimates by costs drawers and will be settled by the Master of the High Court.

Special circumstances

12. As against these principles, inability to pay the costs of a successful defendant and that such defendant show a prima facie defence, which give the jurisdiction to make an order to secure a defendant's costs, there are a number of special circumstances which have been identified in various aspects of the case law as allowing the court in its discretion to decline to make an order for security for costs. A court may take into account the strength of the plaintiff's claim and the conduct of the applicant for security for costs; *Irish Commercial Society Limited v Plunkett* [1988] I.R. 1. In that case Costello J, at page 5 of the report, noted that in exercising the discretion of the court all of the circumstances of the case can be taken into consideration, which would include those two factors. I briefly note the relevant principles identified as special circumstances entitling a court to refuse to order security for costs, which are not closed, remembering that no judge has an entitlement at an interlocutory stage to decide facts, but merely to see what is potentially, and on a reasonable basis, capable of proof at trial. The burden of demonstrating such special factors is on the plaintiff company once the defendant has shown a prima facie defence and that the plaintiff company is not capable of meeting a costs order against it; *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd*. [1999] 1 I.R. 501

13. Firstly, the plaintiff may be able to reasonably contend that the damage which it has sustained in terms of its damaged solvency,

or the individual in terms of his or her ability to pay costs in the event of unsuccessfully perusing the case, was sustained in consequence of the actions of the defendant - in other words that it was ruined by the action in suit; the *Usk* case and *Interfinance Group Limited v. K.P.M.G. Pete Marwick* (Unreported, High Court, Morris P., 29th June, 1998). In the latter case Morris P referred to the most commonly occurring special circumstance as that "where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party". If so, the application may be properly refused; see also *Framus Ltd. & Ors v. C.R.H. plc. & Ors* (unreported, Supreme Court, 22nd April 2003). In *Connaghton Road Construction Ltd v Laing O'Rourke Ireland Ltd* [2009] I.E.H.C. 7 (High Court, unreported, Clarke J, 16 January 2009) at para 3.4 identified that to invoke this principle there must be: an actionable wrong such as a breach of contract or a tort on the part of the defendant; a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff; a resulting level of specific loss which is recoverable in law by the plaintiff; and a demonstration that the loss alleged suffices 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.

14. Secondly, there may be delay in bringing a security for costs application. The reason for that may be important. Such delay, however, can be an important factor in refusing to make that order; *S.E.E. Co Ltd v Public Lighting Services Ltd* [1987] I.L.R.M. 255. In the *Interfinance Group* case, Morris P referred to delay by the moving party as being among the most common examples of special circumstances for refusing to make the order. The court would need to analyse the nature of the delay, in the light of the means of knowledge of the moving party as to what that party knew or ought reasonably to have known, and assess its impact on the course of the case in order to decide whether the order should be made. Delay as a reason for refusing to make the order can occur where the plaintiff company has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security; S*.E.E. Co. Ltd. v. Public Lighting Services Ltd*. [1987] I.L.R.M. 255.

15. Thirdly, a point of law for decision in the case may be so important that the process of the case should not be interrupted by making an order for security for costs. That point of law necessary to exercise the discretion against the order must not be simply the ordinary common or garden point of law that comes before the courts every day. Instead, to refuse an order on this basis a point of law must be identified which transcends the interests of the parties and requires as a matter of public interest that it should be decided for the benefit of the community as a whole. That clearly emerges from the decision of Morris P. in *Lancefort v An Bord Pleanála* [1998]2 I.R.511 at 516.

16. A fourth factor can arise where there is a corporation as a plaintiff and an individual as a co-plaintiff. If both are making the same factual case, and the corporation is insolvent but the individual has sufficient funds to meet an eventual costs order against him or her, then the order may be refused because the defendant if successful is not going to be impeded in recovering costs; this aspect of the discretion of the court emerges from the judgment of Kingsmill Moore J. in *Peppard v Bogoff* [1962] I.R. 180. The same may be said of two corporations as plaintiffs. If one is financially buoyant and the other challenged, an order for security for costs may be refused. If there are two individual plaintiffs in the same circumstances where one is outside the jurisdiction or the European Union for the purposes of Order 29 rule 1 of the Rules of the Superior Courts and the other is within the same rule may apply, though I am not ruling on this. In addition to the jurisdiction under the Companies Act and the Rules of the Superior Courts as it applies in the High Court, the Supreme Court under Order 58 rule 17 on an appeal may order security for costs and the factors applied are similar; *West Donegal Land League v. Udaras na Gaeltachta* [2007] 1ILRM and *Moorview Developments Others v First Active plc and Others* [2012] IESC 22.

17. There can also be a fifth factor. A point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a concern of great moment. Such an issue will arise rarely, as suits between private entities are of their nature compensatory or restoratory in nature. It is only in the most extreme circumstances that the points of contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs. An example is the issue of pig feed contamination and the withdrawal of Irish pork products internationally that is part of the decision in *Millstream Recycling v Tierney* [2010] I.E.H.C. 55 (High Court, unreported, Charleton J., 9 March 2010). The result of the contamination was the condemnation throughout the world of Irish pork products as unfit for human consumption. An important industry was affected and not just in a manner confined to an individual sector. The entire reputation of Ireland as a source of healthy agricultural food was undermined for a substantial time by the circumstances that led to that case. This factor has not been accepted in any other case than that cited.

18. Other factors may be identified apart from those already outlined. The categories of special circumstances are not closed whereby the court will decide against ordering security for costs notwithstanding that a company is shown not to be able to pay the costs of a successful defendant which demonstrates a prima facie defence. That is because the jurisdiction to make this order, whether under s 390 of the Companies Act 1963 or under Order 29 rule 1 of the Rules of the Superior Courts, is a matter of discretion in all the circumstances. This is established by the judgment of Finlay P, as regards the jurisdiction under the Rules, in *Collins v. Doyle* [1982] I.L.R.M. 495 where that judge stated that *prima facie* there is a right to an order for security for costs where there is a defence demonstrated and an inability to pay; however, the right is not an absolute one and the court must exercise its discretion based on the facts of each individual case. In the company law jurisdiction, the judgment of Costello J in the Irish Commercial Society Limited case analysing the nature of the plaintiff company's claim and the conduct of the defendant demonstrates the discretionary nature of the relief; see also *Comhlucht Páipear Riomhaireachta Teo (in voluntary liquidation) v Údaras na Gaeltachta* [1987] I.R. 255.

This case

19. The main defence raised to these proceedings is that Monaghan Anti-Pylon has proved no loss. Since loss is a constituent of the tort of negligence, it is argued by Eirgrid that as a matter of law that the claim for damages is flawed.

20. I am not at all convinced by this argument. The accounts of Monaghan Anti-Pylon filed in the Companies Office showed no income and expenditure for the relevant period and declare that the defendant holds no assets. As against that there is sworn evidence meticulously detailing specific items of expenditure that are related to the abandoned oral hearing. It is not for the court at this interlocutory stage to make choices between these conflicting pieces of potential evidence. As a matter of common sense, however, experts have to be paid for and lawyers are in the business of making a living from law and advocacy. Insufficient has been put forward to demonstrate the absence of any harm as a result of the abandonment of the oral hearing.

21. In addition to that, while Monaghan Anti-Pylon was never a trading company, absent the unfortunate conclusion to the oral hearing whatever money that company had raised would have been available for funding participation in an oral hearing. While, therefore, had the oral hearing not been abandoned this action for damages would not have been taken. Equally, the abandonment of the oral hearing has been shown to have resulted in the waste of monetary resources which would have seen the plaintiff into meaningfully participating in that process. The ordinary special circumstance argued in hearings of this kind is of ruination of a plaintiff company due to the actions of a defendant. That special circumstance embraces not simply commercial damage but can extend to a

plea of factors causing loss which result in a plaintiff company being unable to pursue the purpose of which it was set up. It can be argued that companies especially formed for the purpose of participation in planning hearings are not to be judged on the same basis as economic undertakings and are, in some instances, a nuisance. It is, however, decisively to allow democratic participation in physical development that is at the heart of the planning code in Ireland. The ruination of the environment through improperly considered projects in other countries can be an eloquent testament to the utility of wide consultation and serious debate before major projects are allowed to proceed. Some examples of what can happen may be found in Robert Emmet Hernan - *This Borrowed Earth: Lessons from the Fifteen Worst Environmental Disasters around the World* (London, 2010). Where the process of enquiry and consultation is followed, the scope for judicial review is similar to that remedy in any other branch of administrative law.

22. In so far as it can be argued, therefore, by Eirgrid that Monaghan Anti-Pylon may fail in establishing proximity or a duty of care for the purposes of negligence or in so far as it may be argued that notwithstanding the foreseeable nature of the loss, the proximity of the parties, the damage suffered and it being foreseeable, that public policy should bar recovery, this special circumstance as demonstrated to the court requires the court to exercise its discretion against the grant of the order sought.

Result
23. The Court therefore declines in the exercise of its discretion to make an order in favour of the defendants, as moving party on this motion, for security for costs as against the plaintiff company.