THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 16

Appeal Number: 2016/280

Peart J.
Whelan J.
Baker J.

BETWEEN:

CAMIVEO LIMITED

PLAINTIFF/RESPONDENT

- AND -

DUNNES STORES

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 29TH DAY OF JANUARY 2019

1. By order made on the 1st June 2016 the High Court (McGovern J.) refused the defendant/appellant's motion which essentially was to dismiss/stay the plaintiff's proceedings, or make an order for further and better discovery in these proceedings which were due to be heard in the Commercial Court over a four day period commencing one week later. It was, as the trial judge remarked in his ex tempore ruling "an eleventh hour application". Essentially, the appellant had contended that in the affidavit by which it purported to make discovery the plaintiff had failed to properly particularise its claim to privilege over certain documents, and that it had wrongly redacted certain parts of the discovered documents on the basis of commercial confidentiality. The trial judge was provided with the disputed documents, and concluded that the defendant's application for further and better discovery should be refused.

2. The defendant filed and served notice of appeal on the 8th June 2016 ("the discovery appeal"). The substantive action proceeded to a hearing, the conclusion of which was that the plaintiff's claim succeeded. An appeal against the determination of the substantive proceedings has been filed and served ("the main appeal"). That main appeal is listed for hearing in this Court in March 2019.

3. The respondent to the present appeal has submitted that the discovery appeal was a purely tactical appeal as it was lodged some seven days before the main action was due to commence, in the hope that should the defendant lose the main action, something might inure to its benefit in due course from the discovery appeal. The respondent, while resisting this appeal also on its merits, contends that the discovery appeal should be dismissed *in limine* on the basis that it is moot, since there is no live controversy as to discovery between the parties, the main action having concluded.

4. It suffices to provide a brief background to the appellant's motion.

5. The respondent is the owner of a shopping centre in Galway where the appellant is a tenant. At a certain point the appellant ceased paying the rent under its lease which led to the commencement of summary summons proceedings for the recovery of same. Certain defences asserted by the defendant were rejected as not arguable. Judgment was entered. This led to the defendant closing its doors to the public, which the plaintiff in the present plenary proceedings contended was a breach of certain covenants in its lease, including covenants related to planning permission, fire safety and insurance. It was in the context of these claims that the defendant's solicitors sought voluntary discovery of certain categories of documents by letter dated 4th November 2015. Some slight variations to the discovery to be provided were agreed, and ultimately the plaintiff made its discovery by affidavit of discovery sworn on the 18th January 2016.

6. Almost four months later by letter dated 12th May 2016 the defendant for the first time raised an issue relating to a perceived inadequacy in the affidavit of discovery furnished by the plaintiff. This delay has to be seen in the context of these being proceedings in the Commercial Court, and in the light of the fact that the hearing (which lasted some three weeks) had been fixed many months previously to commence on the 7th June 2016.

7. Following the defendant's letter dated 12th May 2016 to the plaintiff's solicitors, further correspondence ensued. This culminated in a letter from the defendant's solicitors dated 24th May 2016 stating, *inter alia*, that since the plaintiff's discovery was inadequate the defendant would issue its motion to strike out the plaintiff's claim for failure to make full and proper discovery, or alternatively for an order that discovery be made in accordance with the agreed categories of documents. The plaintiff maintained the position that it had complied with its agreed discovery obligations. That motion was issued on the 25th May 2016 (one day following the said letter of 14th May 2016) and was returnable before McGovern J. in the Commercial Court on Monday 30th May 2016.

8. The motion came before McGovern J. on the 30th May 2016. He was very concerned to say the least at the lateness of the application to strike out the plaintiff's claim on the basis that discovery had not been properly made, and the delay between January and May 2016 before any complaint was made by the defendant in this regard. There was clearly no question of the trial date of the 7th June 2016 being vacated, particularly where the hearing was estimated to last several weeks. Rather than refuse the motion on that basis alone, the trial judge commendably agreed to review overnight the disputed documents over which privilege/commercial sensitivity was claimed. On the following morning, the 1st June 2016 he gave his *ex tempore* ruling on the matter. He expressed himself satisfied that claims of privilege had been properly made, and that the plaintiff was entitled to make the redactions in some of the documents on the basis of commercial sensitivity, and refused the orders sought.

9. The defendant immediately lodged the present discovery appeal against that refusal. Meanwhile, a week later the trial commenced and proceeded to a conclusion, which, as I have already indicated, resulted in the plaintiff succeeding in its action, and obtaining an award of damages. That order is also under appeal ("the main appeal").

10. That is a very brief outline of the background against which the plaintiff contends that the discovery appeal is purely tactical and

moot. The plaintiff asks reasonably what benefit any success in the discovery appeal can possibly yield to the defendant at this stage even if its discovery appeal was successful. It is suggested that even if it was successful, and some documents over which privilege had been claimed were ordered to be handed over, it could only avail the defendant in its main appeal in the event that those further documents were permitted to be adduced as new evidence on the appeal, and that the defendant could not satisfy the requirements laid down in *Murphy v. Minister for Defence* [1991 2 I.R. 161, including that "the evidence sought to be adduced must have been in existence at the time of the trial and must have been such that *it could not have been obtained with reasonable diligence for use at the trial*" [Emphasis provided]. In relation to the highlighted sentence, the point being made is that with reasonable diligence i.e. raising complaint about the claims of privilege without the four-month delay which occurred, the defendant would have obtained the documents in question in sufficient time for the trial on 7th June 2016.

11. I agree with that submission. I am not satisfied that that the appellant could derive any real benefit in the main appeal from a successful outcome on the discovery appeal because it has not satisfied me that it would be possible to deploy any such documents in the main appeal for the reasons referred to in the previous paragraph. Furthermore, the Court has not been referred to any ground of appeal in the main appeal to which the privileged documents would be relevant, were privilege lifted by the result of the discovery appeal. In these circumstances, the main appeal would not be usefully furthered by any such additional discovery of documents.

12. If this Court is to be required to determine the discovery appeal on its merits in circumstances where the main action has concluded, it must be satisfied that some real and tangible benefit could inure to the defendant. I have not been so satisfied for the reasons stated. In my view the discovery appeal is moot, and I would therefore dismiss it.