THE HIGH COURT

[2020] IEHC 693

[2019/7337/P]

BETWEEN

EMMA THOMPSON

AND

BEAUTIFUL MINDS CRECHE AND MONTESSORI LIMITED

PLAINTIFFS

AND

STEPHEN TENNANT AND PROMENTORIA (ARAN) LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Nuala Butler delivered on the 17th day of December, 2020

1. This judgment relates to an application made by the plaintiffs for the costs of an interlocutory injunction granted by the court against the defendants in a judgment delivered on 12th November, 2020 (see [2020] IEHC 594). Both parties have filed helpful written submissions in which their respective positions are clearly set out. The plaintiffs are seeking an order for costs pursuant to O. 99, r. 3(1) of the Rules of the Superior Courts and s. 169(1) of the Legal Services Regulation Act, 2015. The defendants are looking for costs to be reserved to the trial of the action or to be made costs in the cause. The defendants' submission also refers to a recent judgment of Keane J. in *Hafeez v CPM Consulting Limited* [2020] IEHC 583 in which a "calibrated" order for costs was made under which the successful defendant's costs, but not those of the plaintiff, were made costs in the cause. The defendants have not however made any specific argument as to how that judgment should be applied to the circumstances of this case in which the defendants have not successfully resisted the application that was brought against them and, instead, the plaintiff has been granted the interlocutory relief sought.

Applicable rules and principles:

2. Traditionally the costs of an interlocutory injunction were reserved to the trial of the action where they would be adjudicated on by the trial judge in light of the substantive analysis undertaken by the court of the issues and the evidence in the case. That position was materially changed in 2008 by the introduction of the former O. 99, r. 1(4A) as part of a suite of new costs rules, which provided that on the determination of any interlocutory application the court should make an order for costs "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". The text of the former O. 99, r. 1(4A) is now reproduced as O. 99, r. 2(3). The effect of this change was to reverse the pre-existing position: instead of the costs of interlocutory applications generally being reserved to the trial of the action and only decided upon following the outcome of the interlocutory application in exceptional circumstances they are now as a general rule to be decided upon following the outcome of the interlocutory application and to be reserved to the trial of the action only exceptionally and where it is not possible for the court to justly adjudicate upon liability for costs at the interlocutory stage. Consequently, much of the case law since 2008 has focused on the circumstances in which it is not possible for a court justly to adjudicate on costs on the making, or refusal, of interlocutory orders.

3. A revised version of O. 99 was introduced to the Rules of the Superior Courts by S.I. 584/2019. This S.I. was introduced largely to give procedural effect to the provisions of Part 10 (Legal Costs) and Part 11 (Legal Costs in Civil Proceedings) of the Legal Services Regulation Act, 2015. For present purposes the relevant provisions of the 2015 Act are s. 168 which confers the formal power to award costs in civil proceedings on courts and s. 169 which is headed "Costs to Follow Event". Significantly, s. 168(1) envisages the court exercising its power to award costs on the basis of an application made by a party to civil proceedings "at any stage in, and from time to time during, those proceedings". This reinforced the principle to which expression had been given in the change to the rules in 2008 that a party may apply for, and a court may award, costs in respect of the various stages of legal proceedings at the time those stages have been undertaken and that it is not necessary to await the outcome of the entire proceedings before such an application can be made and adjudicated upon.

4. The plaintiffs place particular reliance on the principle enshrined in s. 169(1) of the 2015 Act to the effect that "a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise". This gives statutory form to the principle that costs follow the event meaning that a party who has succeeded in an application should be awarded the costs of that application against a party who has opposed it and conversely, a party who successfully opposes an application should be awarded the costs of having done so. The text of s. 169(1) does not refer to interlocutory applications nor to "any stage in the proceedings" and so, on its face, it might be read as applying only to the outcome of the substantive proceedings, a reading which will be consistent with the reference to the party having been "entirely successful in civil proceedings". However, the plaintiff relies on the fact that the new version of O. 99 introduced in 2019 includes at O. 99, r. 3(1) the following:

> "The High Court, in considering the awarding of the costs of any action or step in any proceedings, … in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.".

Thus, O. 99, r. 3(1) imports the statutory provisions relating to costs following the event into the court's consideration of an award of costs in respect of any step in the proceedings including the making of interlocutory orders.

Arguments of the parties

5. The plaintiffs make three arguments in support of their application. Firstly, based on the statutory provisions and rules set out above, that having succeeded in obtaining an interlocutory injunction the plaintiffs should be awarded their costs as costs should follow the event; secondly that the defendant's actions were aggressive and unreasonable and effectively forced the plaintiffs to bring the application and thirdly that the application was based on agreed (or in any event not disputed) documentation and not on disputed facts. The relevance of whether facts are or remain in dispute after the interlocutory stage arises from a series of judgments commencing with *AIB v Diamond* [2011] IEHC 505 (although the relevant comments are contained in a subsequent *ex tempore* ruling which

is not included in the judgment); *Tekenable Limited v Morrissey* [2012] IEHC 391, Laffoy J. and *ACC v Hanrahan* [2014] IESC 40, Clarke J.

6. In *ACC v Hanrahan* Clarke J. was considering whether the refusal of summary judgment and a direction that matters proceed by way of plenary hearing was an "event" to which the rule that costs should follow the event would apply. He drew a distinction between interlocutory applications in which an issue (such as the entitlement to discovery of documents) was finally determined and interlocutory applications where the matters in issue would be revisited at the substantive hearing. He addressed the matter as follows: -

> "Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in *Allied Irish Banks v Diamond* [2011] IEHC 505, and as approved by Laffoy J. in *Tekenable Limited v Morrissey* [2012] IEHC 391, somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in *Diamond* and which Laffoy J. cited in *Tekenable* 'turn on aspects of the merits of the case which are based on the facts.'
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> It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependant [sic] on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.
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> However, the point made in *Diamond* is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts in which the plaintiff's claim is predicated or rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the Court at the interlocutory stage, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts finally determined by the Court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures

an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted."

Both parties rely on these passages and their application in subsequent High Court cases in support of their respective arguments. Barrett J. characterised the distinction drawn in *ACC v Hanrahan* as being one between cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at trial (see *Glaxo Group Limited v Rowex Limited* [2015] IEHC 467) and see also Quinn J. *in Downes and Howard Limited & Ors v Everyday Finance DAC* [2020] IEHC 388).

7. In the course of the application for the interlocutory injunction the plaintiffs identified three arguments, two of which were found to meet the required threshold of a fair question to be tried. For the purposes of the costs application the plaintiffs analyses both of the successful arguments. The plaintiffs acknowledge that the first of these, namely whether there was an expressed or implied tenancy in existence between the second plaintiff and the second defendant, is an assertion of fact which will be revisited at the substantive hearing. However, the plaintiffs contend that the second argument namely that the receiver did not validly accept his appointment, is one based entirely on the documentation that was before the court which was not disputed although the legal consequences flowing from those documents remains in issue between the parties. Thus, the plaintiffs argue that even if the court were to treat the issue relating to the alleged existence of a tenancy as being one which in respect of which it would not be possible for the court to justly adjudicate upon costs at this stage (and the plaintiff does not concede that this is the case), as the second issue also met the relevant threshold and is not fact-dependent they should still be entitled to their costs.

8. The defendants' submission focuses on the first of these two issues which they describe as the "principal case" made by the plaintiffs. They point to the fact that there was limited affidavit evidence before the court and that the substantive trial, which may involve oral evidence and discovery, might well reach a different conclusion. As a different picture may emerge on the facts, the defendants submit that the trial court would be in a better position to assess the justice of the costs of the interlocutory hearing.

Analysis

9. There are two difficulties with the approach adopted by the defendants. Firstly, the plaintiffs do not actually dispute the contention that the tenancy issue is a factual one upon which a different conclusion may be reached at trial. However, the only factual evidence adduced on the tenancy issue for the purposes of the interlocutory hearing was the averments of the first plaintiff and exhibited documentary evidence in relation to the alleged payment of rent. The defendants in contrast relied on an inference drawn from the defendants' records by a deponent who did not have any personal involvement in or knowledge of the events. While it may well be that the defendants will adduce different

evidence at trial, the decision to oppose the interlocutory injunction was made in circumstances where the plaintiffs had adduced positive evidence on this issue whereas the defendants had not. Further, the defendants do not engage at all with the second of the two issues and, apart from characterising the first as the "principal case" do not offer any reasons why costs should not follow the event in relation to the second issue which the plaintiffs also establish constituted a fair question to be tried.

10. The other difficulty with the defendant's argument is that O. 99, r. 2(3) requires the High Court to make an award of costs upon determining an interlocutory application unless it is not possible justly to adjudicate upon liability for costs. The fact that the trial court may be in a better position to assess the costs of the interlocutory application after the substantive trial is held does not mean that it is not possible for the court which has determined the interlocutory application to justly adjudicate upon costs. There is quite a conceptual distance between something not being possible and the alternative being better. The defendant's submission is tantamount to inviting the court to revert to the pre-2008 position and to leave the resolution of the interlocutory costs to the conclusion of the substantive trial simply because the trial court will be in possession of all the evidence the parties wish to adduce and arguments they wish to make. The test is not whether the trial court will be better placed to make that adjudication but whether it is not possible for the interlocutory court to do so – accepting of course that it must be possible to carry out that adjudication "justly".

11. In the circumstances of the present case I am satisfied that it is possible for this court to adjudicate justly upon the interlocutory application at this stage. The plaintiffs have succeeded in circumstances were the defendants contested both whether they had raised a fair question to be tried and where the balance of convenience lay. Thus, having regard to the principle that costs should follow the event unless there is compelling reason why the court should order otherwise, the court will make an order for the plaintiff's costs of the interlocutory application. However, mindful of the fact that there is ongoing litigation between the parties and of the fact that the questions which have been raised may not at trial be disposed of in the plaintiff's favour I am prepared to stay the execution of that order pending the trial of the action.

12. Finally, although it has no bearing on the order which I have made, I should note that I do not accept the argument made by the plaintiff that the defendant's actions were aggressive and unreasonable and that this should have some bearing on the question of costs. The defendant's actions were predicated upon their having certain legal entitlements pursuant to the charge which had been executed by the plaintiffs in favour of their predecessor in title. The substantive proceedings will determine whether the defendants were correct in this regard but it certainly cannot be said on the basis of the evidence and material which was before the court at the time of the interlocutory application that the defendants were acting outside the scope of the legal powers which they reasonably believed that they had. The reference to "conduct" in s.169(1)(a) of the Legal Services Regulation Act 2015 as a matter to which a court is entitled to have regard in considering an application for costs is deliberately broad and expressly intended to

include matters other than the conduct of the proceedings by the parties. However, I do not regard the refusal to give undertakings in lieu of interlocutory orders being sought as being the type of conduct which should impact negatively on a party's position as regards costs. In requesting an undertaking in these circumstances, the plaintiffs effectively asked the defendants to concede the plaintiffs' entitlement to restrain them acting on foot of their powers to appoint a receiver and to act as receiver respectively, a proposition the defendants were entitled to dispute. By giving statutory force to the "costs follow the event" principle, s. 169(1) together with Order 99, r3(1) already penalises the litigant who erroneously chooses to litigate or defend litigation unsuccessfully. Thus, having unsuccessfully opposed the injunction application, the defendants were inevitably exposed to an application for costs against them. Their jeopardy in that regard should not be increased by reason of the decision to dispute the application and not offering the undertaking being regarded as "conduct" to be weighed in the balance against them in addition to the exposure they already have.