



THE COURT OF APPEAL

Record Number: 96/2017
High Court Record Number: 2017/1230P
Neutral Citation Number [2022] IECA 68

Donnelly J.
Noonan J.
Haughton J.

BETWEEN/

CORNELIUS MINIHANE

PLAINTIFF/RESPONDENT

-AND-

SKELLIG FISH LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 22nd day of March, 2022

1. This appeal is brought from the judgment of the High Court (Twomey J.) of the 27th February 2017 granting the respondent (“the plaintiff”) an interlocutory injunction against the appellant (“the defendant”) together with costs. The only issue arising in this appeal is the question of costs, largely, if not entirely, because the substantive issues have become moot, although that is not agreed by the parties.
2. The plaintiff is in the fishing business and was, in 2016, interested in acquiring additional licenced fishing capacity. There is a finite limit on such capacity, which is a

valuable commodity and is traded as such. The plaintiff, who had existing fishing vessels, wished to obtain this additional capacity with a view to the construction of a new vessel. On the 1st March, 2016, the plaintiff and two members of his family met with Mr. Liam Quinlan, who was at the material time a director and shareholder of the defendant company.

3. The meeting took place in a hotel in Sneem in Co. Kerry at which it was agreed that the defendant would sell 324 gross tonnes (709 kilowatts) of fishing capacity to the plaintiff for €900,000. The plaintiff says that Mr. Quinlan indicated that he would need to confirm the deal with the other directors of the company and he telephoned the plaintiff with confirmation the next day.

4. A few days later, on the 4th March, 2016, a document entitled “Capacity Sale Agreement” was signed by the plaintiff and by Mr. Quinlan. It was impressed with the company seal. The terms of the agreement are relatively simple and appear on one typed page. They provided for the payment of a deposit by the plaintiff of €90,000, which was paid, but the agreement contained no specific provisions concerning the closing of the sale or when that was to occur. The contract was drawn up by the plaintiff’s solicitor, Ms. Moya O’Donnell, and Mr. Quinlan nominated the firm of Harrison O’Dwyer of Killorglin to represent the company.

5. It subsequently emerged that at the time the agreement was executed, or shortly thereafter, Mr. Quinlan was in the process of exiting the company and divesting himself of his shareholding to Spanish investors, who already held a substantial stake in the company.

6. The plaintiff says that on foot of this agreement, he commissioned the construction of a new vessel at a cost of some €6m which was funded by bank borrowings. Throughout 2016, the plaintiff’s solicitor corresponded with Harrison O’Dwyer and there appears to have

been no particular urgency about completing the transaction, presumably in circumstances where the vessel was in the course of construction.

7. On the 9th January, 2017, the plaintiff's solicitor contacted Harrison O'Dwyer indicating that her client was in a position to complete the transaction. Harrison O'Dwyer responded that their client was on holidays and they would attend to matters on his return.

8. On the 26th January, 2017, Harrison O'Dwyer wrote to the plaintiff's solicitor to say that they had received an authority from another firm of solicitors, Messrs Conways, to act on behalf of the company. This authority appears to have been signed by one of the Spanish directors of the company. In response, by letter of the 26th January, 2017, the plaintiff's solicitor called upon the defendant to execute a capacity assignment note, to complete the transaction, by return failing which legal proceedings would be issued. This was followed up on the 31st January 2017 by a letter to Conways Solicitors seeking an undertaking within five days from the defendant not to alienate, transfer, pledge or deal with the capacity and secondly, to formally assign the capacity within fourteen days.

9. This was replied to by Mr. Dermot Conway of Conways on the 2nd February, 2017. Mr. Conway said that because the file was still with Harrison O'Dwyer, he could not comment on whether or not there was an agreement between the parties. He suggested that Harrison O'Dwyer were dealing with the matter on behalf of Mr. Quinlan and not the company itself. No undertaking was given in the letter. Mr. Conway indicated that a copy of the agreement could be sent to him and he would be prepared to deal with the matter, but he had no authority to bind his client. Ms. O'Donnell sent him the agreement on the 6th February, 2017.

10. A plenary summons was issued on the 9th February, 2017 seeking specific performance of the agreement and an injunction restraining the defendant from dealing with the capacity

pending transfer to the plaintiff. An interim injunction was sought from the High Court (Gilligan J.) on the same date, which was granted, and the motion for an interlocutory injunction was made returnable to the 16th February, 2017. On the latter date or shortly thereafter, the interlocutory application was heard by Twomey J. who delivered judgment on the 27th February, 2017. The formal order was perfected on the 3rd March, 2017.

11. One replying affidavit, sworn by Mr. Conway, was delivered by the defendant. The essential gravamen of the case made in that affidavit is that the injunction application was unnecessary and premature in circumstances where Mr. Conway had not yet got the file and could not advise his clients. He questions the validity of the contract in circumstances where it was never approved by the defendant's board of directors. He also seems to raise a potential question of the contract being void for uncertainty in the absence of a closing date or mechanism for closing the sale. He says at the same time, however, that the defendant has never indicated an intention to not complete the agreement and there was no basis for the concern that the defendant might deal with the capacity contrary to the agreement. Finally, he suggests that damages would be an adequate remedy.

12. In his *ex tempore* judgment of the 27th February, 2017, the trial judge rejected these arguments. His view was that damages would not in fact be an adequate remedy and gave his reasons for reaching that conclusion. He was clearly of the view that the plaintiff had raised a fair issue to be tried and that the balance of convenience favoured the plaintiff. Thus, the trial judge applied conventional and well settled principles concerning interlocutory injunctions in granting the relief sought.

13. With regard to the question of costs, the order of the court records that the costs were reserved to the determination of the proceedings. However, the parties are agreed that this is inaccurate and in fact the judge directed that costs be "costs in the cause".

14. The notice of expedited appeal herein was served on the 8th March, 2017.

15. On the 24th March 2017, the defendant's solicitor sent an email to the plaintiff's solicitors in the following terms: -

“We have now had the opportunity to review the file which has been furnished to us, and we have had the Spanish representatives of the majority shareholders come to Dublin to meet with Senior and Junior Counsel.

They have expressed the view that, in spite of the rather unconventional circumstances of the conclusion of the Contract (which was done solely by the Irish director using a firm of solicitors instructed by him, rather than the ordinary company solicitor) in addition to the unusual aspects of the drafting of the contract, the same is enforceable. It has taken us some time however, in reaching such conclusion, to determine what exactly the contract purports to sell. This has now been clarified.

We are therefore now in a position to confirm that

1. An enforceable contract exists between the parties which provides for etc...”

16. The email went on to make certain proposals concerning the mechanics of progressing the matter to conclusion and continued: -

“1. It is clear to this office that you are proceedings were prematurely issued, particularly in light of the clear request by our client for time to clarify the position. As such our clients demand their costs of the interlocutory and main proceedings. Unless we receive adequate proposals in respect of the same, we will seek the determination of the Court both by prosecuting our Appeal in respect of the interlocutory motion, and in respect of the main proceedings...”

17. The email went on to contend that this brought matters to a conclusion save for the issue of costs.

18. A further application to the High Court was necessary to amend the order of Twomey J. in order to facilitate the closing of the sale, which ultimately occurred on the 6th June, 2017. Thereafter, on the 1st May, 2018 the plaintiff amended his statement of claim to include a new claim relying, *inter alia*, on the contents of the above email as having, in effect, conceded his claim but that notwithstanding that concession, there was a substantial delay on the part of the defendant in closing the sale which resulted in further loss and damage to the plaintiff. Arising from that, a claim for damages is made.

19. On the issue of costs, counsel for the defendant submitted at the hearing of this appeal that, although the injunction application was now in effect moot, the court could review the merits of that application in coming to a conclusion on whether the judge was in error in making the costs order he did. Reliance in that regard was placed on the judgment of this Court in *Heffernan v. Hibernia College Unlimited* [2020] IECA 121. Counsel argued that such an analysis ought to have led the trial judge to refuse the injunction application and award the defendant its costs accordingly.

20. On the other hand, counsel for the plaintiff objected to arguments based on mootness being advanced by the defendant in circumstances where mootness did not feature in either the grounds of appeal or the written submissions of the defendant. Counsel said that the case was not in fact moot by virtue of the amended claims to which I have referred, which remained to be determined. Counsel contended that the defendant was in reality suggesting that it should get its costs, even though it failed to acknowledge the contract, failed to give any undertaking, lost the injunction application and having done so, then admitted the

contract. It was submitted that in relation to matters of costs, this court should be reluctant to interfere with the discretion of the trial judge.

21. In *Heffernan*, the plaintiff sought an interlocutory injunction against the defendant college restraining it from withdrawing his place on a particular course by virtue of having failed a garda vetting procedure. Shortly before the matter was due to be heard, the defendant made an open offer to revisit the garda vetting procedure. The plaintiff did not respond but instead, proceeded with his injunction application. The court refused the application on the basis that the offer constituted an adequate remedy for the plaintiff's complaint and there was, therefore, no basis for seeking a mandatory injunction.

22. The court also expressed the view that damages would in any event be an adequate remedy as an additional basis for refusing the injunction. The defendant applied for its costs and the judge awarded costs to the defendant from the date when the open offer had been made. He did not however address the issue of costs prior to that date which this Court found to be erroneous.

23. In his judgement, with which the other members of the court agreed, Murray J. reviewed the relevant legal principles, saying (at p. 13): -

“30. It is also clear that the exercise by the High Court of its discretion in calibrating these various considerations should not be lightly upset by an appellate court: as the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders ‘*it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court*’ (*Waterford Credit Union v. J&E Davy* [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of

first instance decisions in respect of costs (see Delaney and McGrath “*Civil Procedure*” 4th Ed. (Dublin, 2018) *at paras. 24.777 – 24.285*). However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relevant to the particular decision in hand (*Godsil v. Ireland* [2015] IESC 103; [2015] 4 IR 535 *at para. 69*).”

24. In reviewing the merits of the High Court judgement, Murray J. came to the conclusion that it could not be regarded as outside the range of any order which could reasonably have been made. Although he considered that it might have been preferable if the trial judge had approached the matter differently, he could not conclude that he had exceeded his discretion in proceeding as he did.

25. I pause here to note that this court has, in recent times, on many occasions laid emphasis on the fact that where interlocutory applications are concerned, this court will afford a wide margin of discretion to the High Court and will in general not interfere unless a clear error of principle or an injustice arises. The fact that the appellate court might have reached a different conclusion is not material once it is shown, as in *Waterford Credit Union*, that the order made was within the range open to the court of first instance. That is doubly so in circumstances where the order under appeal relates purely to the question of costs decided in an interlocutory application.

26. In *Heffernan*, the appeal had become moot by virtue of the fact that by the time it was heard, the plaintiff had agreed to undergo a second garda vetting procedure which, on this occasion, was favourable, thereby allowing him to proceed with his course. Murray J. considered that this, to some extent, appeared to engage the principles in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222, to the effect that in

considering the costs of moot proceedings, the court ought not embark on any consideration of the merits of the claim, but is only concerned with the circumstances in which the mootness had arisen.

27. However, Murray J. held that no evidence had been put before the Court of Appeal which would enable it to consider the circumstances in which the mootness had arisen and thereby reach a view about it. That is somewhat analogous to the situation that arises here because neither party was inviting the court to hold that the matter was moot, notwithstanding the events I have described, and further no specific ground of appeal or written submission was directed to this question. Accordingly, it seems to me that this Court is left in a position similar to that which arose in *Heffernan*.

28. Murray J. summarised the position thus (at p. 24): -

“52. As I explained in my judgment in *P.T. v. Wicklow County Council* at para. 20, the principles in *Cunningham* should not be applied inflexibly, and were clearly intended by the Supreme Court to be operated having regard to the particular features of each case. The situation of cost orders made within an interlocutory application which, by the time the order is appealed has become moot, raises particular issues arising from the very nature of those orders. Because interlocutory orders of the kind in issue here and the cost orders that may attend them are discretionary, an appellate court is in some cases in a position to reach a decision as to the appropriateness of the cost order without delving deeply into the merits of the underlying decision. That, I think, enables a decision to be made on the appeal of a cost order in some interlocutory matters that have since been rendered moot in a manner that is fair to the parties, reduces the cost attending such an appeal while at the same time observing the spirit of rules precluding the court from hearing moot proceedings and respecting the

principles outlined in *Cunningham*. This case shows that in at least some circumstances, this can be done.”

29. In my view, this presents a close analogue of the present appeal. It is possible to take a broad overview of the merits here without, as Murray J. noted, delving too deeply. I do not think that the order made by the judge in this case could reasonably be regarded as other than within the range of orders that were open to him. He considered both the adequacy of damages and the balance of convenience on conventional principles and came down on the side of the plaintiff. He gave clear and cogent reasons why he did so.

30. It is correct to say, as the defendant does, that another judge might possibly have arrived at a different view for equally legitimate reasons. It is of course not the function of this court to rehear the matter and come to its own conclusion, less still in circumstances where there is no longer any live controversy as to the substance of the matter but only the issue of costs.

31. In that respect, having regard to the outcome, I cannot accept the proposition that an order directing costs to be costs in the cause is outside the range of orders reasonably open to the High Court. One might reasonably have thought that if any party had reason to be disappointed about that order, it was the plaintiff, who had after all succeeded in the application where normally, the costs would follow that event. However, the defendant has lived to fight another day on the issue of costs, which may yet be awarded in its favour if it prevails at the trial.

32. In my judgment, the defendant has fallen well short of establishing an error of principle or an injustice arising by virtue of the costs order made by the High Court in this case and for that reason, I would dismiss this appeal.

33. My provisional view in relation to the costs of the appeal is that as the plaintiff has been entirely successful, he is entitled to his costs. Should the defendant wish to contend for a different order, it will have liberty to apply to the Court of Appeal office within 14 days of the date of this judgment for a short supplementary hearing on the issue of costs. If such hearing is requested and does not result in a different order, the defendant may be additionally responsible for the costs of the supplemental hearing. In default of such application, the order proposed will be made.

34. As this judgement is delivered electronically, Donnelly and Haughton JJ have indicated their agreement with it.