Neutral Citation No. [2010] NICh 5

Ref:	**McCL7792**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**23/03/10**

2005 No. 20926

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

LEBREH LIMITED
HERBEL RESTAURANTS LIMITED

Plaintiffs:

-and-

AM DEVELOPMENTS (UK) LIMITED

Defendant:

RULING ON COSTS

McCLOSKEY J

Introduction

[1] As appears from the ensuing paragraphs, this ruling relates to two discrete issues. The first is whether the court, in principle, is disposed to make the ruling requested by the Plaintiff, at this stage. If the court is thus disposed, this raises a second issue, which concerns the substantive merits of the ruling.

The Litigation

[2] The subject matter of these proceedings is alleged damage to the Plaintiffs' commercial premises, with consequential losses, at 33 Ann Street, Belfast ("*the premises*") as a result of building operations carried out on behalf of the Defendant in connection with the then evolving Victoria Square Development in Belfast city centre. The Writ of Summons was issued on 25th May 2005 and the Statement of

Claim served approximately one month later. It is convenient to divide the proceedings into three phases:

(a) By Writ of Summons issued on 25th May 2005, the Plaintiffs claimed relief which included an injunction restraining the Defendant and its agents from carrying out works of excavation and piling in the vicinity of the premises. The Plaintiffs' Statement of Claim was served on 21st June 2005. This claimed the remedies of an injunction and damages.

(b) On 29th July 2005 [a Friday], in an *inter-partes* setting, an order was made in favour of the Plaintiffs. The substance of the order of the court is the recording of an undertaking by the Defendant that it would "*cease piling operations in the area hatched within the green line on the map attached to the draft order*". As the title confirms, this was not an injunction. It was, rather, an "*order containing an undertaking to the court instead of an injunction*". The hearing was adjourned to the following Monday, 1st August 2005, at which stage there materialised an agreement between the parties to the effect that the Defendant would demolish and reinstate the Plaintiffs' premises and would compensate the Plaintiffs for loss of profits sustained during the intervening non-trading period. As appears from the terms of the order, costs were reserved.

(c) Subsequently, the Defendant's Counterclaim became the hallmark of the second phase of the litigation, giving rise to a hearing before the court in November/December 2009. This resulted in consensual resolution, reflected in the order of the court dated 10th December 2009 and the terms scheduled thereto. This was concerned with the issue of liability in respect of the Defendant's Counterclaim. Full and final settlement of this issue is recorded in the schedule. By paragraph 2 of the order of the court, the Plaintiffs are to pay the Defendant's costs "*in relation to determination of the liability issue*", to be taxed in default of agreement.

(d) The third, and final, phase of the litigation is incomplete. This entails determination of the quantum of the Defendant's Counterclaim, in respect whereof a trial date of 24th May 2010 has been allocated by the court.

[3] As the relevant matrix, including the parties' arguments, before the court appears complete, I am prepared to determine the 'first phase litigation' costs issue at this stage. Furthermore, I consider that to dispel this uncertainty should enhance the prospects of consensual resolution of the balance of the litigation.

The Legal Framework

[4] The legal framework within which the issue of costs is to be resolved by the court is constituted by (a) Section 59 of the Judicature (Northern Ireland) Act 1978 (which invests the court with a discretion and contemplates that this will be subject to Rules of Court), (b) RSC Order 62, Rule 3 (which establishes the general, but not inflexible, rule that costs should follow the event) and (c) the decision of the Northern Ireland Court of Appeal in ***Re Kavanagh's Application*** [1997] NI 368, which, properly analysed, is an illustration of the operation of the general rule: see per Carswell LCJ, p. 382A – 383A. The decision in ***Kavanagh*** also serves as a reminder that the general rule is more difficult to apply in a case such as the present, where there is no judicially determined "*event*" (in the conventional sense) viz. no judgment and no final order of the court.

The Plaintiffs' Arguments

[5] Against this background, the Plaintiffs suggest that the first phase of the litigation, as described above, should be treated as self-contained and complete; that the costs thereof should properly be determined by the court at this stage; and that such costs should be awarded in their favour. It is submitted that they were successful, in all respects, as regards this phase.

[6] The Plaintiff's submissions also direct attention to the affidavit of Michael Herbert. This was sworn on 27th July 2005, the date when the Plaintiffs' application for the interim injunction was filed and served. This affidavit refers to the installation of ground anchors by the Defendant's agents under part of the premises, pursuant to a written agreement dated 31st January 2005. Pursuant to this agreement, the Defendant was authorised to carry out these installations, in consideration of a payment of £50,000 to the Plaintiffs. Mr. Herbert's affidavit acknowledges "*regular contact between professional advisors acting on behalf of both parties hereto*", since early 2005. On the basis of the exhibited reports of their professional consultants, Mr. Herbert, on behalf of the Plaintiffs, deposes to two structural matters of concern. The first is significant movement in the premises, occasioned by the Defendant's works, to the extent that it had become necessary to cease trading. The second is the necessity to erect a hoarding to protect members of the public in Ann Street. Continuing, the affidavit describes a meeting attended by representatives of both parties on 25th July 2005, giving rise to the averment that the fact of serious structural damage to the premises is not significantly contentious and the suggestion that "*… the only matter in dispute between the parties appears to be the nature of the remedial action required*". The affidavit concludes with these averments:

> "*The Plaintiffs are advised by their architects and engineers that, unless urgent works are carried out, irreparable damage will be caused to the premises. A schedule of works has been prepared by the engineers engaged on behalf of the Plaintiffs …* [exhibited]".

[7] Amongst the materials exhibited to Mr. Herbert's affidavit is a communication dated 21st July 2005 from Kirk McClure Morton ("*KMM*", consulting structural engineers), which addresses the twofold undertaking given by the Defendant's solicitors on 18th July 2005 (see paragraph [9](c), *infra*) and continues:

> "*… AM Developments are proposing to cease all work activities in the narrow strip of land located to the rear of 33 Ann Street, Belfast. This undertaking does not prevent them from carrying out works within the confines of the sheet pile wall …*
>
> *It should be noted that damage due to the loss of support has already occurred at 33 Ann Street and that daily monitoring data provided by AM Developments indicates that this is an ongoing phenomena* [sic]. *Monitoring records for the past few days indicate that movement is continuing …*
>
> *In our view therefore they will be unable to comply with this undertaking as given the movements related to the loss of support, we believe that there will be further movement and hence further loss of support*".

Also exhibited is a KMM note generated by a meeting of the parties' respective representatives on 25th July 2005, entitled "Summary of Agreed Technical Points" and incorporating the following:

> "*Movement of 33 Ann Street is believed to be due to the works being executed …*
>
> *Further movements have occurred and hence further loss of support. Something has happened to initiate a fresh cycle of movement. Partial demolition was suggested as an option. From a technical perspective this was considered acceptable, subject to addressing issues of support to neighbouring properties*".

Certain points of action were also noted.

[8] The second affidavit filed by the Plaintiffs in support of the interim injunction was sworn by Mr. Gregory of KMM. This deposes to his on site observations between 26th and 28th July 2005. He avers that piling works were taking place in the "exclusion" area which was the subject of undertaking (a) in the letter dated 18th July 2005 from the Defendant's solicitors. On the basis of certain further averments of a technical nature, he deposes:

> *"It is self-evident that the activities referred to in* [paragraph] *3 above are likely to trigger further ground movements and thus potentially destabilise the property further …*
>
> *I believe that the works are in clear breach of the undertakings given by the Defendant and in breach of the assurance that five days notice would be afforded before such works were initiated*".

In the substantial documentary materials furnished to the court, there appears to be no affidavit on behalf of the Defendants disputing or contradicting these averments.

The Defendant's Arguments

[9] The main thrust of the argument on behalf of the Defendant is that the Plaintiffs were not justified in initiating proceedings on 29th July 2005 and did so prematurely. It is submitted, with some emphasis, that this step was taken at a point during a process when determined and conscientious efforts were being made by the Defendant to address the Plaintiffs' concerns and achieve resolution. The court's attention is drawn to an extensive chain of correspondence spanning the period mid-May to late July 2005, exchanged between the parties' respective solicitors. Particular emphasis is placed on the following elements thereof:

(a) A letter dated 7th July 2005 from the Defendant's solicitors to the Plaintiffs' solicitors, which seems to acknowledge that any abandonment of the premises by the Plaintiff on health and safety grounds, in light of professional advice received, would not be challenged, in which event the Defendant "*… will be responsible for any reasonable, verified consequential loss due to closure of the business from the date of closure until the completion of the remedial works to the building by our client's contractor or until agreement has been reached between the parties in respect to* [sic] *the purchase of the building*".

(b) By letter dated 8th July 2005, the Plaintiffs' solicitors requested, in terms, an undertaking that no further works potentially affecting the premises would be executed.

(c) By letter dated 18th July 2005, the Defendant's solicitors undertook to address the aforementioned request urgently and stated "*It is likely that your clients' concerns can be comprehensively dealt with in the immediate future, thereby avoiding any need to proceed to court*". On the same date, the Plaintiffs' solicitors responded to the effect that, in accordance with their clients' instructions, they would "*… proceed to draft ex parte docket on foot of the already issued proceedings*". The exchanges of 18th July 2005 were completed by a further letter from the Defendant's solicitors providing the twofold undertakings sought. This prompted the reply

that the Plaintiffs' architect and structural engineers would monitor the works to ensure compliance.

(d) By letter dated 22nd July 2005, the Defendant's solicitors noted that the premises were no longer occupied [which appears uncontentious] and sought the Plaintiffs' consent … "*to allow our client to carry out the remedial works necessary to the building … Time is very much of the essence*".

(e) The Plaintiffs' solicitors rejoined by letter dated 22nd July 2005, adverting to advice from their clients' structural engineer that since provision of the undertakings the building had moved by more than 1.5 mm and requesting immediate backfilling of the relevant excavation, to provide the necessary support. The solicitors further represented that senior counsel had advised that the only prudent course of action would be to apply for an injunction, in the absence of immediate and satisfactory backfilling proposals. In a further communication of the same date, the Plaintiffs' solicitors rejected the Defendant's suggestion of an immediate meeting and intimated that they would apply for an injunction if sufficient backfilling had not occurred by close of business on 25th July 2005. The Defendant's solicitors intimated that on 25th July a meeting "*involving all relevant engineers*" would be convened.

(f) By further letter dated 25th July 2005, the Defendant's solicitors communicated a series of proposals, involving partial demolition of the premises within a period of one week and the installation of "*the necessary bracing and propping to support the adjoining buildings*". By a subsequent letter dated 26th July 2005, it was explained that the partial demolition would be confined to the "rear return" of the premises and a joint survey by the parties' respective engineers was proposed. An inspection by the Defendant engineer ensued on 27th July and, by letter of the same date, the Defendant's solicitors represented that the engineer's report should be available by the following morning and that this would be disclosed.

(g) At 3.35pm later that day, 27th July 2005, the Defendant's solicitors received the following letter from the Plaintiff's solicitors:

"*Please find enclosed Notice of Motion, Certificate of Urgency and grounding affidavit … returnable Friday 29th July 2005*".

(h) The following day, by letter dated 28th July 2005, the Defendant's solicitors reiterated that the engineer's report would be shared upon receipt and represented "*It is therefore clearly in everyone's interests that*

due consideration be given to this report", which was, in the event, shared later that day.

[10] As observed by the Lord Chief Justice in ***Kavanagh***, the discretion in play "… *should be exercised along well settled lines*" [p. 382], while the immediately succeeding quotation from the judgment of Atkin LJ speaks of "*a wholly successful Defendant*". The context to which the relevant principles fall to be applied here is one of an emergency application for an interim injunction, which did not entail any determination of the merits by the court. Rather, an undertaking by the Defendants disposed of the matter. Within this context and against this background, no adjudication by the court was ultimately necessary, given the consensual resolution of the parties' differences, achieved three days later. It is not difficult to understand why, in interim injunction proceedings, it is the almost invariable practice of the court to reserve costs. At the stage of such interim proceedings, typically only a snapshot of the overall picture is available, the evidence is usually incomplete, both the parties and the court are required to act with indecent haste and the situation is normally an evolving and fluctuating one. These general observations seem to me to apply to the present case.

[11] I consider the key question to be whether the Plaintiffs were justified in commencing proceedings for an interim injunction at the stage when they chose to do so. Having reviewed all of the evidential materials extensively, I determine this question in their favour. The Plaintiffs were in receipt of detailed and considered expert advice from consultants which expressed substantial concerns about continuing and progressive threats to the stability of the premises related directly to the works of the Defendant's agents. This advice also questioned the viability of the undertakings given on behalf of the Defendant and suggested strongly that one of these undertakings had been breached. At the time when the proceedings in question were initiated, no concrete and final remedial proposals had been advanced by the Defendant. Applying the criterion of reasonableness, I conclude that the Plaintiffs acted reasonably when they initiated proceedings for an interim injunction on 27th July 2005. Furthermore, their decision to do so was duly vindicated when, two days later, the Defendant undertook to the court that piling operations would be discontinued within a delineated area and, a further working day afterwards, they secured a remedial arrangement acceptable to them.

[12] I conclude, therefore that the Plaintiffs are entitled to recover from the Defendant the 'first phase litigation' costs.

<u>Postscript</u>

[13] Following a suggestion by the court, the parties agreed that the issue addressed in this ruling should be determined through the medium of a paper exercise. Unfortunately, some significant and pre-eminently avoidable complications and deficiencies ensued thereafter:

(a) While the Plaintiffs' written submission was plainly relying on the affidavits of Messrs. Herbert and Gregory, with their extensive exhibits, none of this material was supplied. When I arranged for it to be requested, it was then provided in its entirety by e-mail arriving (in consequence) in loose, unbound form, out of sequence and, in certain places, of poor legible quality.

(b) On the Defendant's behalf, only its *second* written submission was provided. The existence of a *first* written submission became apparent to the court only upon reading the single submission filed. Furthermore, these submissions purported to rely on certain items of correspondence "*attached*" – but, sadly, nowhere to be found. When this deficiency was pursued by the Court Office, it elicited the response that the missing "*attached*" letters – which were extensive in nature – could be found by the judge on trawling through one of the major bundles prepared for the purposes of the substantive trial. This was a surprising and quite unacceptable response.

[14] In contemporary practice, the court is endeavouring to encourage the determination of certain issues on paper, where this course is considered appropriate. See ***Kerr –v- Ulsterbus*** [2010] NIQB2 and ***Quinn –v- McAleenan*** [2010] NIQB 31. Self-evidently, if the court does not receive the necessary co-operation from the parties, this exercise will degenerate into the kind of frustrating paper chase which materialised in the present instance, causing several drafts of this ruling to be prepared (each one responding to receipt of some further materials, on a drip feed basis) with resulting delay and waste of limited judicial time. In the absence of the affidavits of Messrs. Herbert and Gregory, belatedly provided in the wholly unsatisfactory manner noted above, this ruling would not have been in the Plaintiffs' favour. In the midst of all this unecessary untidiness, the overriding objective became a major casualty.

[15] The parties' solicitors must bear equal responsibility for these unacceptable shortcomings. Thus, neither party will recover from the other the costs associated with this discrete aspect of the proceedings.