Neutral Citation No. [2010] NICA 16 | *Ref:* **GIR7828**

Judgment: approved by the Court for handing down | *Delivered:* **27/04/10**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

DANIEL McATEER and AINE McATEER

Defendants-Appellants

and

SANJEEV GURAM and ANOOP GURAM

Plaintiffs-Respondents

GIRVAN LJ AND COGHLIN LJ

GIRVAN LJ_(delivering the judgment of the Court)

Introduction

[1] This is an application by the plaintiffs, the respondents to the appeal ("the plaintiffs") who seek an order for security for costs in relation to the appeal brought by the defendants ("the defendants") against the judgment of Deputy Judge Smith QC and the Order made by him.

[2] The proceedings related to an agreement between the plaintiffs and the defendants whereby the plaintiffs agreed to sell licensed premises known as the Roebuck Inn to the defendants for £500,000. The defendants further agreed to lease the premises to the plaintiffs for a term of 5 years at an annual rent of £50,000 with the plaintiffs having an option to repurchase the premises for £500,000 and giving 2 months notice in writing of their intention to do so.

If they had not already purchased the premises they were bound to repurchase them for £500,000 on the fifth anniversary of completion. The conveyance and the leaseback were executed on 16 November 2001 and the purchase price was duly paid and the plaintiffs discharged the legal fees and the stamp duty.

[3] By a writ issued on 26 February 2003 the plaintiffs sought rescission of the transaction claiming that they were induced to enter into the contract by the undue influence of the defendants. They also alleged negligence and breach of fiduciary duty on the part of the defendant Mr McAteer.

[4] Having seen and heard the parties giving evidence the trial judge formed the clear belief that the plaintiffs were telling the truth and that their evidence was substantially correct. He formed an adverse view of the first defendant, Mr McAteer, and considered that he was not a truthful witness, particularly on the vital issues of the degree of influence he enjoyed over the plaintiffs and whether he caused them to enter into the sale and leaseback agreement by deliberately misleading them. The trial judge concluded that the plaintiffs had proved that they were induced to enter the sale and leaseback agreement by the undue influence of Mr McAteer. He concluded that there was a relationship of dependency between the plaintiffs and Mr McAteer and that he induced them to enter into the agreement as a result of false representations.

The plaintiffs' argument for security for costs

[5] Mr Maxwell who appeared for the plaintiffs contended that this was a proper case for the court to exercise its power to order security for costs under Order 59 Rule 10(5) which empowers the court to order security in special circumstances. Relying on authorities discussed at paragraph 59-10-33 of the Supreme Court Practice 1999 ("the White Book") counsel pointed out that impecuniosity is one of the special circumstances. He argued that there was clear evidence from which to infer that if Mr McAteer were unsuccessful in his appeal he would not be able to pay the costs of the plaintiffs. Inability to pay can be established by inference (Farrar v Lacey Hartland & Co [1885] 28 Ch Div 482 at 485). It was submitted that the allegation of the defendants' inability to pay costs had not been answered. It was denied that the plaintiffs caused Mr McAteer's impecuniosity. Once impecuniosity was shown the onus lay on the defendant to show grounds on which the court could exercise its residual discretion to decline to order security. To avail of the residual discretion Mr McAteer had to demonstrate a reasonable prospect of success in the appeal. The grounds for the appeal must be real and substantial – Foecke v University of Bristol (30 July 1996 unreported). There was no manifest error or inconsistency in the trial Judge's judgment. Given the relationship between the parties Mr McAteer faced a formidable hurdle in challenging the Judge's findings of fact.

The relevant principles

[6] The impecuniosity of an appellant may constitute a special circumstance calling for the imposition of an order providing for security for costs. In Humberclyde Finance v McFarland [1997] BNIL 105 and in Re SOS (NI) Limited [2002] NIJB this court has indicated that security will ordinarily be ordered if the respondent can show that the appellant if unsuccessful will be unable to pay the costs of the appeal because of impecuniosity. As Carswell LCJ said in Re SOS (NI) Limited [2002] NIJB 252 at 255 paragraph 8:

> "[8] Order 59 rule 10(5), in accordance with the authority conferred by Section 38(1)(h) of the Judicature (Northern Ireland) Act 1978, provides:
>
> > `The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.'
>
> It has long been the practice of the Court of Appeal to order that security for costs be furnished if the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal: see E G Hall v Snowden, Howard & Co [1899] 1 QB 593 at 594 per A L Smith LJ. The jurisdiction is in this respect wider than that exercised under Order 23, when impecuniosity alone will not generally suffice to ground an order for security (except in the case of a limited company, which is governed by Article 674 of the Companies (Northern Ireland) Order 1986."

The court will consider all the relevant circumstances including the merits of the appeal or the lack of them, the timing of the application for security, the balance of hardship (eg the appellant cannot afford security and would be barred from an appeal even though the outcome of the appeal will make or destroy him and the extent to which the appellant's impecuniosity is the result of the respondent's alleged wrongdoing. The principles which govern the award of security for costs at the Court of Appeal stage are wider and stricter than those applicable in relation to security for costs in a first instance trial. The court takes into account the fact that the appellant has already had a full trial in the court below and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs where the respondent will be unable to enforce against the appellant any order for costs. The court however retains a discretion. Obviously if the appellant shows real grounds for questioning the correctness of the lower

court's decision it may well be unjust to impose a security for costs which may have the consequence of depriving him of a real prospect of a successful appeal.

Determination of the appeal

[7] The judgment of the lower court was reached by the trial judge in the light of hard fought evidence and in the light of his assessment of the credibility and honesty of the witnesses. The judgment was reached on findings of fact decided by the trial judge who had the benefit of seeing and hearing the witnesses in the witness box. In such a case an appellant carries a relatively heavy burden to establish that the conclusions reached were legally unjustifiable. While the court at this stage should avoid reaching any conclusion as to the correctness of the decision in the court below, the judgment of the trial judge is not one which it could be said that the appellants have strong chances of successfully challenging. The relative lack of strength of the appeal on the merits is a factor which this court must take into account in determining whether it should decline to order security for costs when there is evidence showing that it is unlikely the defendant would be able to meet the plaintiff's costs of the appeal if unsuccessful.

[8] The evidence indeed points to the conclusion that if the defendants are unsuccessful the plaintiffs are unlikely to recover in full or substantially the costs of the appeal. The history of the defendants' involvement with the Legal Services Commission; the representations made to it on his behalf; the number of other transactions giving rise to liability on foot of other costs orders; and the contents of his own statements and affidavits to the court point to the conclusion that he is unlikely to be able to meet a costs order in the event of his appeal being unsuccessful.

[9] We have considered the question whether the plaintiffs have a de facto security in the sense of being able to set off appeal costs against the sum payable by them to enable them to effect rescission of the transaction pursuant to the Order in the court below. The calculation of what, if any, equity in the premises subsists in favour of Mr McAteer and hence in his entitlement in the sum payable by the plaintiffs to achieve effective rescission and restitution is, to say the least of it, problematic. Under the Order for rescission the plaintiffs will have to repay £500,000 and interest (credit being given for payments made for interest and rent and other sums together with interest thereon). They are also entitled prima facie to their costs of the proceedings of the trial below. If, as it claims, the Bank of Ireland is entitled to security over the premises for Mr McAteer's full liability to it there will be no equity left in the premises. At this stage it has by no means been demonstrated that the plaintiffs have an effective de facto security for appeal costs against the sum repayable to effect rescission.

[10] We have also considered whether it could be said that Mr McAteer's impecuniosity has been shown to have been caused or contributed to by the plaintiffs in such circumstances as would render it inequitable to order security for costs. We have not been persuaded that Mr McAteer has established this. It was suggested that the plaintiffs' solicitors effectively stymied Mr McAteer's claims for legal aid in the trial at first instance and that the plaintiffs' withholding of rent and the payment of interest to the Bank of Ireland in the circumstances in which it was paid contributed to his current financial difficulties. We are not persuaded that the evidence has established that these actions caused the plaintiffs' impecuniosity. The actions of the plaintiffs and their solicitors would not in themselves have caused Mr McAteer's impecuniosity, the causes of his financial difficulties being multifactorial.

[11] We conclude accordingly that this is a case in which security for costs should be ordered. The most recent suggested Bill of Costs fixed the costs at £49,662.75. This included a figure of £3,105 for a forensic accountant at the appeal stage. This does not appear to be an allowable recoverable item in respect of the appeal. A more realistic assessment for the costs would be of the order of £45,000. The Irish authorities such as Fallon v An Bord Pleanala [1992] 2 IR 380 suggests the court will rarely order more than one-third of the estimated Bill of Costs although English practice does not appear to impose such a limitation. We do not consider it necessary to determine which of the practices is more appropriate in Northern Ireland because in the context of this present case we propose to follow the Irish practice. Accordingly, we consider that the appropriate order for security should be in the sum of £15,000.

[12] In accordance with the usual practice as set out in the commentary in White Book at para 59/10/4 we direct that security be provided within 28 days. We stay the appeal in the meantime and order that in default of the appellant giving security within 28 days by paying the said sum into court the appeal do stand dismissed with costs without further order. It is for the plaintiffs' solicitors to give written notice to the court in the event of default.