Neutral Citation No: [2019] NIQB 23	*Ref:*	**McB10883**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**27/02/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

WINEMARK (THE WINE MERCHANTS LIMITED)

Plaintiff

and

KILMONA PROPERTY LIMITED

Defendant

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McBRIDE J

Introduction

[1] This is an application by the parties requesting the court to make a costs order in circumstances where they have resolved the application before the court, being an application for an interim injunction, but have been unable to agree costs.

[2] Mr Richard Shields of counsel appeared on behalf of the plaintiff and Miss Agnew of counsel appeared on behalf of the defendant. I am grateful to all counsel for their well-researched and clearly presented skeleton arguments and I am particularly grateful to Miss Agnew for bringing to the court's attention a number of relevant authorities on this specific issue.

Background

[3] The plaintiff is a tenant in Carryduff Shopping Centre ("the Centre"), which is owned and operated by the defendant.

[4] On 28 April 2014 the plaintiff entered into a lease in respect of Unit 13 of the centre. At that time the majority of the centre was vacant.

[5] Under the terms of the lease the lessor entered into a number of covenants. In particular, in accordance with Schedule 2 paragraph 21, the defendant covenanted to be responsible for "the reasonable and proper cost of maintaining and renewing the security devices, firefighting equipment, smoke alarms, sprinkler systems, internal telephones and communication system in the common parts of the shopping centre and in relation to the facilities".

[6] The defendant wishes to redevelop the centre and has issued a notice to determine the plaintiff's tenancy. The plaintiff has applied for a new tenancy in accordance with the Business Tenancy Order (Northern Ireland) 1996 and proceedings are presently pending before the Lands Tribunal.

[7] On 4 May 2018 the plaintiff issued a writ seeking loss and damages and injunctive relief for alleged breaches of the lessor's covenants contained in the lease.

[8] On 18 October 2018 the plaintiff's solicitors wrote to the defendant's solicitors enclosing a report from CBRE together with a fire risk assessment. This report alleged that there were a number of health and safety breaches. The letter required the defendant to address these issues within 7 days failing which the plaintiff's solicitors indicated that they were instructed to commence injunctive proceedings.

[9] The defendant's solicitors did not reply within the 7 day period whereupon the plaintiff immediately issued an application for injunctive relief on 26 October 2018. It had a return date of 12 November 2018.

[10] The defendant's solicitors responded to the plaintiff's solicitor's letter on 8 November 2018 setting out their response to each of the alleged health and safety breaches. The letter concluded as follows:-

> "In light of the above, it is apparent that your client has no grounds whatsoever to seek the injunctive relief sought and we have firm instructions to contest the injunction application listed for hearing on 12 November 2018 should you propose to proceed with it. Alternatively, we would invite you to formally withdraw your application dated 26 October 2018 and provide us with written confirmation that this has been done."

[11] When the matter was reviewed at court on 12 November 2018 the defendant initially denied that it was in breach of the covenants contained in the lease. After discussions between the parties, they agreed to adjourn the application on the basis that two fire safety experts would attend on site. Following this joint visit the defendant then agreed to carry out a number of works to address various health and safety issues identified by the two experts. On 29 November 2018 the defendant gave a number of undertakings to the court in relation to the carrying out of certain works.

[12] When these works were completed the parties agreed that the court was not required to adjudicate upon the interim injunction application as all matters relating to the interim injunction had been resolved save that the parties were unable to agree costs. It was agreed between the parties that the court should be asked to resolve the costs of dispute.

Relevant Legal Principles

[13] The question, "When and what order the court should make when it is asked to adjudicate upon costs when the parties have resolved the substantive dispute?" was considered by Scott Baker J in *Boxall v London Borough of Waltham Forest* [2000] All ER (D) 2445. After reviewing the authorities he set out the following principles:

(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the claimant is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the decision will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.

[14] These principles were adopted by Longmore LJ in *Brawley v Marczynski and another (No:1)* [2002] EWCA Civ 756 and also by Judge Seymour QC in *Pathology Group Ltd v Reynolds* [2011] EWHC 3958.

Submissions of the parties

[15] The plaintiff submits that it is entitled to costs on the basis that:

(a) The plaintiff won the case.

(b) Even though the application was for an interim injunction the court should make a final costs order – see *Taylor v Burton* [2014] EWCA Civ 21.

(c) As this case involved the enforcement of an express covenant, an injunction is a primary remedy and accordingly the plaintiff is entitled to an order for costs.

[16] The defendant resisted the plaintiff's application for costs on the basis that:

(a) The plaintiff pursued litigation aggressively and thereby incurred unnecessary expense. The dispute could have been resolved without the need to resort to litigation by holding an experts' meeting on site. Therefore in determining the question whether the plaintiff was justified in commencing proceedings for an injunction when they chose to do so, the answer was clearly no and consequently, in accordance with the dicta of McCloskey J in *Libra Ltd v AM Developments (UK)* [2010] NICh 5 the invariable practice of the court is to reserve costs.

(b) The plaintiff had not won the case because it had only obtained partial relief and the nature of the works required to remedy the breaches were very modest compared with the nature of the works the plaintiff indicated the defendant needed to carry out to remedy the breaches.

(c) This was an interim injunction application and the usual order when a claimant obtains an interim injunction is for costs to be reserved – *Picnic Vast Cuts Inc v Derigs* [2001] FSR 2.

(d) Significant questions of fact remain to be determined at the final hearing of the writ and in the proceedings before the Lands Tribunal. In such circumstances costs ought to be reserved until all the factual matters are resolved.

Discussion

[17] This case is somewhat unusual in that it was resolved, save that the parties could not resolve the question of costs and the parties agreed that the court should determine the costs dispute. In the vast majority of cases, resolution of the issue of costs forms part and parcel of the settlement terms entered into by the parties. It will only therefore be in exceptional cases that the court will be asked to determine costs when the substantive issues have resolved. Whilst the Court has power to make such a determination, it will only do so when it can form a view about who would have won the case without delving deeply into the previously unresolved substantive issues which were in dispute between the parties. If the Court considers that it would be required to undertake an extensive examination of all the substantive issues as well as the conduct of the parties, which will be both time consuming and expensive, it will usually in those circumstances then either reserve

costs where there are ongoing proceedings or alternatively it will make no order as to costs. The amount of time the court will spend delving into such issues may depend upon the amount of costs at stake. Therefore, if the court can form a view about these issues without imposing a disproportionate burden of additional costs on the parties, then it should normally make an order determining costs.

[18] In determining whether costs should be awarded in this case I adopt the principles set out by Scott Baker J in *Boxall*. Consequently, the overriding objective of the court is to do justice between the parties without incurring unnecessary court time and consequently additional costs.

[19] To determine the overall objective of doing justice I consider it is necessary to answer a number of questions. First, was it necessary for the plaintiff to issue proceedings when they did so? I consider that the plaintiff was "quick off the mark" in that proceedings were issued immediately upon termination of the 7 day period set out in the plaintiff's solicitor's letter dated 18 October 2018. In such circumstances I may have been slow to accept that the plaintiff was required to commence proceedings at that early stage. I note however that the defendant not only failed to respond to the correspondence, even by way of a holding letter, but more importantly when it did respond on 18 November 2018 it was clear from the terms of that reply that the defendant intended to robustly defend any application for an injunction. In addition when the matter was listed before the court at the return date the defendant again asserted that there was no merit in the application as the defendant was not in breach of any terms of the lease. Given the robust correspondence and the initial approach taken at court at the first review, I am satisfied that even if the plaintiff had given the defendant a longer time to respond before it issued proceedings such a delay would not have obviated the need for the present injunction application to be issued. I am further satisfied that the plaintiff only obtained relief in this case because it issued proceedings. I therefore consider it was necessary for the injunction application to be commenced in this case.

[20] The second question I have to consider is whether it is obvious which side won the substantive case.

[21] I consider that I can determine this question without delving too deeply into the unresolved substantive issues and thereby imposing a disproportionate costs burden on the parties. The defendant submits that the plaintiff did not win this case because a large proportion of its claim has been abandoned. I do not accept this argument. It is clear from the correspondence that the proceedings were issued to have a number of health and safety breaches remedied. Ultimately all these breaches were all resolved by way of the defendant giving undertakings to carry out certain works. Whilst the fire safety issues were resolved in a manner which involved less substantial works than the plaintiffs anticipated, nonetheless, I consider the plaintiff won the case because the defendant remedied the breaches in a way that meant he was no longer in breach of his covenants under the lease. The fact the nature of the works required to remedy the breaches was less than the plaintiffs anticipated does

not mean the plaintiff did not win the case. I consider the plaintiff won as he succeeded in obtaining a complete remedy for the alleged breaches.

[22] The third question I have to determine is whether, notwithstanding this is an interim injunction application I should nonetheless make a costs order. Bean on Injunctions (17th Edition) points to a judicial move towards awarding the plaintiff's costs in interim injunctions. Whilst I consider that such an order may not be appropriate in interim injunction applications where a number of matters remain in dispute and will only be resolved at the final hearing, I do consider that a costs order in favour of the plaintiff may be appropriate where the interim injunction effectively amounts to a final order.

[23] I consider that this is a case in which the relief obtained by the plaintiff constituted a final order as all the breaches set out in the interim injunction application were finally resolved by the defendant carrying out certain works. I note that a number of other issues set out in the Writ remain to be adjudicated upon. I further note that there are pending Lands Tribunal proceedings. The matters to be resolved in respect of the Writ and the Lands Tribunal proceedings however, relate to completely different issues. Accordingly, I consider that the undertakings given by the defendant in this case and the carrying out of the works to remedy the breaches in respect of health and safety, amounted to a final resolution of the matters set out in the interim injunction application.

Conclusion

[24] I therefore consider that the plaintiff was entitled to issue proceedings in this case; that the plaintiff won the case and the resolution of the dispute amounted to a final determination of the interim injunction. Accordingly, I make an order condemning the defendant in costs.