The Monaghan Anti-Pylon "Security for Costs" Hearing – High Court Judge lends sympathetic ear to community concerns

Brian Morgan, Partner in Morgan McManus Solicitors, reports on a recent case (COUNTY MONAGHAN ANTI-PYLON LIMITED Plaintiff –v- EIRGRID PLC Defendant delivered 30th March 2012) where the High Court refused the Defendant `s Application for Security for Costs.

The plaintiff company, Monaghan Anti-Pylon, was formed for the purpose of opposing the routing through Monaghan county of above-ground electric cables on pylons pursuant to a scheme referred to as the Meath-Tyrone 400kw interconnector. This scheme involved the construction of routes throughout Ireland for delivering very high power levels of electricity as an infrastructure project. Some people feel that installing highly charged electric cable above ground constitutes a danger to human health. Putting such cables under the ground, they claim, is the only safe way to install an electric interconnector infrastructure throughout the island.

The scheme to bring such pylons from Tyrone to Meath cuts across County Monaghan and had aroused concerted opposition. This manifested itself in a committee and later, on the 7th of May 2010, the plaintiff company was incorporated. Its basic object is to oppose the scheme in favour of a buried electricity interconnector network.

This case concerned an application by the defendant Eirgrid, for security for costs against the plaintiff company, under s. 390 of the Companies Act 1963, as amended. That section provides:-

"Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given".

This means that the Plaintiff company would be obliged to pay in advance of the Hearing the Costs of the Action by way of deposit to enable it continue with the Proceedings. It was accepted that Monaghan Anti-Pylon would not be able to pay the costs of this action should Eirgrid defend it successfully. Monaghan Anti-Pylon is a company limited by guarantee

Background

In December 2009 Eirgrid applied for planning permission under the *Planning and Development (Strategic Infrastructure) Act 2006* to An Board Pleanála for the scheme in question. The Board decided that an oral hearing was appropriate. Two inspectors were appointed. It is important to bear in mind, that because of a delay in amending the Act of 2000 to provide for costs, no costs could be awarded at that time by the Board to those who participated in the planning enquiry.

The oral hearing of the planning enquiry on the Meath-Tyrone 400kw interconnector began on the 10th of May 2010 and it went on to the 28th of June of that year. On the 23rd day of the hearing, counsel for Eirgrid announced that the hearing could go no further: there had been a mistake in the newspaper advertisements necessary in the process whereby the height of the proposed pylons had been misstated and the application was therefore withdrawn. That was the end of the enquiry. The planning application was thus never reported on to the Board and was never ruled on. In his

Decision Charleton J stated his belief that it was close to certain that another application to pursue the development of this scheme by Eirgrid would be made.

Monaghan Anti-Pylon subsequently issued High Court Proceedings claiming damages from Eirgrid. Essentially, the case of Monaghan Anti-Pylon was that Eirgrid owed a duty of care to the objectors not to waste their time and money in participating in a planning process which they terminated due to their own negligence thereby causing them loss. Charleton J made it clear that he was making no comment on the applicable principles of proximity, duty of care and public policy. It sufficed to record that the case made was that there was a voluntary assumption of a relationship by Eirgrid sufficient to found liability.

Monaghan Anti-Pylon claimed to have raised and spent about €100,000 prior to incorporation, when it was then a committee, and about €150,000 after becoming a company, in preparing for and participating in the oral hearing. All of this has been lost in the futile manner outlined. The bulk of the money was spent on lawyers' fees and on funding a report from an expert group on above-ground as against buried electricity interconnection. Their kitty was now cleaned out. In the result they would have no chance of returning to the donors who funded them the first time in order to seek return appearances at whatever future oral hearing takes place. This case was about recovering those lost monies in order to make it possible for Monaghan Anti-Pylon to be represented in the future.

Security for Costs

When making an Order against a company for security for a defendant's costs to be lodged in advance of a hearing there are two basic requirements before an Order for security for the costs of a defendant may be made. The defendant must show, firstly, that it has a reasonably sustainable defence. Secondly, a defendant must show that the plaintiff company is either insolvent or is so financially challenged that it will not be able to pay the defendant's costs if successful.

Amount

An order for security for costs, if made, must be for the full sum of the costs. This would therefore have presented an almost impossible impediment to the Monaghan Anti-Pylon company proceeding with its Claim had the Court granted an Order.

Special circumstances

Charleton J stated there are a number of special circumstances which have been identified in various aspects of the case law as allowing the court in its discretion to decline to make an Order for security for costs. One instance noted by the Judge was where the plaintiff may be able to reasonably contend that the damage which it has sustained in terms of its damaged solvency, or the individual in terms of his or her ability to pay costs in the event of unsuccessfully pursuing the case, was sustained in consequence of the actions of the defendant - in other words that it was ruined by the action in suit.

Another instance noted was where a point of law for decision in the case may be so important that the process of the case should not be interrupted by making an Order for security for costs. That point of law necessary to exercise the discretion against the Order must not be simply the ordinary common or garden point of law that comes before the courts every day. Instead, to refuse an Order on this basis a point of law must be identified which transcends the interests of the parties and requires as a matter of public interest that it should be decided for the benefit of the community as a whole.

Another factor noted was where a point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a concern of great moment. Charleton J commented that such an issue will arise rarely, as suits between private entities are of their nature compensatory or restoratory in nature. It is only in the most extreme circumstances that the points of contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs.

The Judge stated that the categories of special circumstances are not closed whereby the court will decide against ordering security for costs notwithstanding that a company is shown not to be able to pay the costs of a successful defendant which demonstrates a prima facie defence. That is because the jurisdiction to make this Order is a matter of discretion in all the circumstances.

This case

Eirgrid claimed that Monaghan Anti-Pylon has proved no loss but Charleton J noted that there was sworn evidence meticulously detailing specific items of expenditure that were related to the abandoned oral hearing. Furthermore, but for the unfortunate conclusion to the oral hearing, whatever money that the company had raised would have been available for funding participation in an oral hearing. Importantly, had the oral hearing not been abandoned this action for damages would not have been taken. Equally, the abandonment of the oral hearing has been shown to have resulted in the waste of monetary resources which would have seen the plaintiff into meaningfully participating in that process.

Charleton J commented that it was decisively to allow democratic participation in physical development that is at the heart of the planning code in Ireland. The Judge believed that this special circumstance as demonstrated to the court required the court to exercise its discretion against the grant of the Order sought. The Court therefore declined in the exercise of its discretion to make an order in favour of the defendants, as moving party on this motion, for security for costs as against the plaintiff company.

Conclusion

Many community organizations are precluded from taking an active part in democratic objection to major developments which affect their locality. Fear of large Costs awards in the event that their objection is unsuccessful will often prevent the objection getting off the ground in the first instance. In this case the Monaghan Anti-Pylon group formed a company limited by Guarantee in order to protect its members against an Order for Costs but, in doing so, it enabled Eirgrid to establish the basis for a Security for Costs Application which could effectively have wiped out the ability of the company to participate any further in this campaign.

What however this Decision has indicated is that, while Security for Costs Applications can be used successfully by Defendants against Plaintiffs in a commercial context, where the cause of the Plaintiff is to engage in wide consultation and serious debate before major projects are allowed to proceed the Court will not allow the Defendant to use such an Application to terminate such public interest proceedings.

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