[2020] IEHC 26

THE HIGH COURT

[2019 No. 6239 P.]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

PETER BELLEW

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 27th day of January, 2020

1. For the reasons given in a quite a long judgment delivered on 23rd December, 2019 I came to the conclusion that the plaintiff's claim for an injunction restraining the defendant from going immediately to work for a competitor of the plaintiff failed, and that the action must be dismissed.

2. I put back the question of costs to allow the parties time to consider my judgment and heard counsel on 15th January, 2020.

3. Mr. Rogers, for the defendant, asks for the costs of the action on the basis that they should follow the event.

4. Mr. Hayden, for the plaintiff, quite rightly accepted that the burden of displacing the general rule that costs should follow the event rested with the unsuccessful plaintiff. He argued the trial had taken much longer than it should have, that the defendant lost more than he won, and that he should have to contribute to the plaintiff's costs; or least that there should be no order as to costs.

5. The trial of this action occupied the court for two weeks. The case was fought tooth and nail on both sides. Perhaps with the benefit of hindsight, or perhaps in the light of my judgment, the parties are now agreed that the trial took much longer than it might have. Each blames the other for the prolongation of the trial.

6. The statement of claim was short and focussed. The defendant, it was said, had signed a contract of employment which incorporated post termination restrictions, in particular a covenant that he would not for a period of twelve months after the termination of his employment work for any competitor. The defendant, it was said, had given six months' notice of his resignation and intended to go immediately to a direct competitor. The defendant, it was said, in the course of his employment, was privy to confidential and sensitive commercial and operational information, which would be valuable to the plaintiff's competitor, and the disclosure or use of which would be damaging to the plaintiff.

7. The defence admitted that the defendant had signed what he had signed but raised three defences. Firstly, it was said, the consideration for the post termination restriction had wholly failed. Secondly, it was said, the restraint was excessive, unnecessary and unenforceable at law. Thirdly, it was said, the conduct of the plaintiff and in particular its chief executive officer towards the defendant had been such that it was entirely

appropriate for the defendant to have terminated his employment and that, if the restraint was enforceable, it would be unjust and inequitable to make an order enforcing it.

8. The plaintiff delivered quite a long reply. The response to the defendant's third line of defence was particularly robust. Having joined issue with the defendant's allegations of unfair and unreasonable treatment, the plaintiff countered that the defendant had resigned from his position in recognition of his inability and incompetence to perform his functions in a company of the size and dynamism of the plaintiff.

9. The defendant had given his notice in July, 2019 and soon after announced his intention to join the plaintiff's competitor on 1st January, 2020. The plaintiff promptly issued proceedings, and the parties co-operated in the exchange of pleadings, particulars and discovery with a view to having the action disposed of by the end of the year. The trial opened on 3rd December, 2019.

10. In practical terms, the issue which the court needed to decide was whether the defendant would be allowed to take up his new employment on 1st January, 2020.

11. Mr. Hayden now argues that the defendant lost on every issue other than the breadth of the restraint. He submits that the reason why the case took so long was that the defendant threw in the kitchen sink. He points in particular to para. 24 of the defence where the defendant introduced his allegation of unfair and unreasonable treatment.

12. Mr. Rogers agrees that the kitchen sink was thrown in but argues that it was the plaintiff and not the defendant who really threw it in. He points in particular to para. 20 of the reply, where the defendant's competence and ability to perform his functions was put in issue.

13. I am quite clear in my view that it was the defendant who put in issue the manner in which he was treated during his employment. That plea was directed to engaging the discretion of the court not to enforce a covenant which it might have found to be enforceable. Paragraph 20 of the reply addresses, specifically, para. 24 of the defence. While it is true that the discretion which the defendant invoked would not have been engaged unless the clause was otherwise enforceable, the issue needed to be addressed, on both sides, in the preparation and presentation of the case.

14. Mr. Rogers now argues that what he calls the equitable defence raised by para. 24 of the defence would only arise if the clause was enforceable. I agree. He goes on, however, to suggest that it was unnecessary for Mr. Hayden to have led evidence in relation to the defendant's allegation of unfair and unreasonable treatment until he had established that the clause was enforceable. I cannot agree. There was no application in this case for a modular trial. Both parties needed to present their evidence in relation to all of the issues disclosed by the pleadings. The plaintiff had to go first and had to meet the case pleaded and particularised. Mr. Hayden could not, except by agreement and the permission of the court, have safely confined the evidence to the justification for the clause. Had he

done so, Mr. Hayden would have allowed the defendant a free run at any issue, including the alleged failure of consideration and the alleged unreasonable treatment of the plaintiff, which had not been addressed.

15. The issue as to the enforceability of the covenant called for evidence as to the nature and extent of the confidential information which it was said it was necessary to protect. A split trial would have meant recalling some or all of the witnesses as to the nature and extent of the confidential information to deal with the allegations of unfair and unreasonable treatment. No less, such a course would very likely have left the parties without a decision by the end of the year: which was what they had been striving for.

16. I find that the issues as to the defendant's treatment, including his participation in the share option scheme, were introduced by the defendant and that once they had been introduced, the plaintiff had no option but to deal with them. It is common case that these issues added significantly to the length of the trial, and it is the fact that the defendant lost on them.

17. The principles of law to be applied on an application such as this are reasonably well established. There is broad agreement between the parties as to what the law is, but some difference of emphasis as to how it is to be applied in this case.

18. The starting point is the long established rule in O. 99 of the Rules of the Superior Courts that unless there is good reason otherwise, the costs should follow the event. The event in this case is the dismissal of the plaintiff's action.

19. As to the circumstances in which the court will depart from the ordinary rule, the *locus classicus* of the law is the decision of Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81. That was a case in which the court had directed the trial of a preliminary issue as to whether the applicants had complied with the requirements of the Rules of the Superior Courts by applying for the review of the award of a public contract at the earliest opportunity or, if they had not, whether they had demonstrated that there was good reason for extending the period. The decision was that the application was out of time, but the court extended the time in respect of two of the three grounds which the applicant had advanced.

20. *Veolia* was a complex commercial case. Clarke J., at para. 18 of his judgment, cautioned that the approach he applied in that case, and which he had previously taken in other complex cases, may not be appropriate in more straightforward litigation, notwithstanding that some element of the plaintiff's case or of the defence might not have succeeded, unless it could reasonably be said that the raising of the additional issue affected the overall cost of the litigation to a material extent.

21. This was not a terribly complex case but neither, I think, could it fairly be categorised as straightforward litigation. After a two week trial, it does fall into the category of cases where there are substantial sums of money at stake and so into the category in which justice requires that the court should consider fashioning an appropriate order for costs.

22. This is a case in which it is clear which party was successful. The issue is whether, or the extent to which, the costs of the proceedings have been increased by the fact that the defendant raised issues on which he was not successful.

23. In *Veolia* Clarke J. was concerned in particular with the extent by which the hearing had been extended, but it seems to me that the same principle applies to the preparation of the case for trial. That, it seems to me, is implicit in the decision of Laffoy J. in *Fyffes plc v. DCC plc* [2009] 2 I.R. 417 that care is required lest a percentage reduction dilute the costs recoverable by the successful party that would have been incurred in any event.

24. Mr. Hayden pointed in particular to paras. 12 to 18 of the judgment of Clarke J. in *Veolia*., starting with the last sentence of para. 12, where he said:-

> *"Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful."*

25. Mr. Rogers, as he put it, did not doubt *Veolia* in any respect but emphasised the requirement that it must be reasonable to assume that the costs were increased. He pointed to the fact that the plaintiff's evidence took most of six days and the defendant's less than two. With respect, I think that this is too simplistic. The question is not how long the evidence took but the issues to which it was directed. A defendant may first test the evidence called on behalf of the plaintiff before deciding whether, or the extent to which, he will contest it. The number of witnesses called on behalf of a defendant, or the time spent with them, is not a reliable indicator of the relevance or necessity of the evidence led on behalf of a plaintiff.

26. In this case the defendant signed his non-compete clause in return for the opportunity to participate in the plaintiff's share option scheme. By the plea that he had received nothing in return for his promise, the defendant raised an issue as to what, if anything, he had received: which the plaintiff had to deal with. This issue was complicated by a further proposition, which the defendant sought to advance at the trial by reference to some of the discovered documents, that the chief executive officer of the plaintiff had withheld from the defendant something which he had been given by the board.

27. By the plea that he had been unfairly and unreasonably treated in a number of respects, the defendant raised a litany of issues as to whether, on this occasion or that, he had been unfairly or unreasonably treated or criticised. It has to be said that the evidence led by both parties, and the cross examination on behalf of each of the witnesses called on behalf of the other, often appeared to be directed to establishing the objective fact of the events which were canvassed, rather than the reasonableness of the point of view of the other. It might, I suppose, be said that the plaintiff could have defended the actions of its chief executive otherwise than by attacking the competence and ability of the defendant but in the cut and thrust of bitter litigation I do not believe that the plaintiff is

to be criticised for the strategy it adopted. More to the point, perhaps, the issue to which most of the evidence called on behalf of the plaintiff was directed was the discretion of the court to make the orders sought. That issue was the alleged unreasonable and unfair treatment of the plaintiff, and not his capacity or competence.

28. Mr. Rogers argues that the claim was pursued by a reputational attack on the defendant. I cannot agree. It is true that a good deal of evidence was led which was critical of the defendant's performance and that the defendant was cross examined as to his performance, but this was not in pursuit of the claim, but in defence of the defendant's case that the clause, if enforceable, should not be enforced. To the extent that there was a row about who treated who badly, it was the defendant who started it.

29. For the purposes of the costs application, the plaintiff's solicitors undertook a forensic analysis of the time taken for the examination, cross examination and re-examination of each of the witnesses and produced a spreadsheet showing that counsel for the plaintiff spent a total of 10 hours and 39 minutes with witnesses, compared to 16 hours and 40 minutes taken by the defendant's counsel. It is a carefully prepared document which obviously took a good deal of time to create and I hope that no one will be offended if I say that I find it to be of no assistance in assessing how much time was spent on the evidence in relation to the issues on which each of the parties won and lost.

30. On the pleadings, and as a matter of law, the onus was on the plaintiff to establish that the defendant's employment was such that he would come by confidential and sensitive commercial or operational information such as warranted protection by restricting his future employment after he ceased to be employed by the plaintiff; and that the restraint went no further than was necessary and reasonable to achieve that end. Insofar as the defendant is criticised for not admitting these matters in his defence, I do not believe that such criticism is warranted. The assessment by the court as to the justification for, and reasonableness of, the covenant was always going to require an understanding of the nature of the information and the plaintiff's business.

31. The evidence of the witnesses called on behalf of the plaintiff in relation to these matters was anxiously scrutinised by detailed cross examination. The plaintiff's witnesses stood their ground and when the time came, their evidence in relation to those matters was not contested. For example, at one stage, and for quite a long time, Mr. Rogers appeared to be trying to get the witnesses to agree that Ryanair was not in competition with easyJet. None of them would, and when Mr. Bellew came to give evidence he readily conceded that it was. In assessing who won and who lost the issue of the enforceability of the covenant, I do not believe that it would be appropriate to seek to isolate the extent to which the evidence led on behalf of the plaintiff was challenged, or that on the run of the case there was no serious challenge to the duration, as opposed to the breadth, of the restraint.

32. In my view, if the defence had been confined to a traverse, the evidence would have been confined to the nature of the information which the defendant had and the nature of the plaintiff's and its competitors' businesses: and the case could comfortably have been

disposed of in three days, or four at the very most. It follows (and it is my view independently) that the majority of the trial was devoted to examining the issue as to the adequacy of the consideration for the covenant and the alleged unfairness and unreasonableness of the way the defendant was treated. The defendant lost on both issues. I do not accept Mr. Rogers' submission that the issue of consideration was not heavily paraded before the court. Whether it was directed to the plea that the consideration for the covenant had wholly failed, or the alleged unreasonable treatment of the defendant, every line of the documents discovered by the plaintiff in relation to the share option issues was minutely examined.

33. I find that the trial was greatly prolonged by the separate issues raised by the defendant and on which he failed.

34. The court being satisfied that the costs were increased by the pursuit by the defendant of additional issues on which he failed, the next step, following the approach mandated by *Veolia*, is that the court should attempt, as best it can, to reflect that fact in the order for costs. That is to be done by disallowing any costs attributable to those issues, and by providing by way of set off for the costs of the other party attributable to those issues.

35. In *Veolia* Clarke J. spoke first in terms of witnesses whose evidence was directed solely towards, and discrete items of expenditure incurred solely in respect of, issues on which the overall successful party may have failed but went on to say that the same approach is to be taken where the length of the trial is increased. The amount of the costs awarded to the successful party is to reflect not only the refusal to the overall successful party of the costs of the elongated hearing but his obligation to pay the additional costs incurred by the overall losing party. The setting off of the additional costs attributable to an issue on which the overall successful party has failed is illustrated by the decision of Cregan J. in *Sony Music Entertainment (Ireland) Ltd. v. UPC Communications Ireland Ltd. (No.3)* [2015] IEHC 388 which was affirmed by the Court of Appeal [2017] IECA 96. Cregan J. found that the issues on which the overall unsuccessful defendant had succeeded accounted for 20% to the overall costs. Rather than awarding the plaintiff 80% of its costs and the defendant 20% of its costs, Cregan J. set off the defendant's costs and awarded the plaintiff 60% of the costs.

36. Mr. Rogers urged that if the court were inclined to make any adjustment in the costs to be awarded to the defendant, it should do so in terms of the duration of the trial – a day or whatever – rather than by a percentage. He referred to the summary in *Delany and McGrath on Civil Procedure* (Fourth Edition) at paras. 24-27 and 24-28 where the authors note that in some cases, for example *McAleenan v. AIG (Europe) Ltd*. [2010] IEHC 279 and *Sony Music Entertainment (Ireland) Ltd. v. Universal Music Ireland Ltd*. [2017] IECA 96, a deduction has been effected in percentage terms. Mr. Rogers drew particular attention to the para. 24-28 where the authors suggest, citing the decision of Laffoy J. in *Fyffes plc v. DCC plc* [2009] 2 I.R. 417, where, as *Delany and McGrath* put it, the court cautioned against the potential danger that a percentage reduction of costs might have a

blunt effect on the amount of trial costs recoverable by the successful party, even though those costs would have been incurred in any event

37. I accept the two passages relied on as a correct summary of the law. The percentage approach is appropriate in a case, such as *Sony*, where the losing party succeeds on a number of issues which contributed to the overall complexity, length and cost of the proceedings. The disallowance of the costs of identified witnesses or discrete items of expenditure is appropriate in a case, such as *Veolia*, where the evidence of the witnesses or the subject of the expenditure can be clearly linked to an issue on which the overall unsuccessful party has prevailed. I do not understand the court to be confined to one or other approach but to have a broad discretion to assess the reason, or combination of reasons, why the costs of the winning party are greater than they should have been and to fashion such order for costs as will do justice between the parties. An example of such a combined approach was the order made by Laffoy J. in *Fyffes plc v. DCC plc* where, for the reasons given, the court awarded the successful defendant its costs but limited the costs of making discovery to 80% and limited the number of days allowed to 25 days when the trial had lasted 87 days.

38. As was explained in *Fyffes plc v. DCC plc*, care must be taken in choosing the approach, or combination of approaches, taken to avoid unfairly diluting the consequences of the plaintiff not having succeeded.

39. In this case, by reason of the issues introduced by the defendant and on which he failed, the trial took at least twice as long as it otherwise would have. It does not follow, however, that the four days spent on the issues on which the defendant failed cancel out the four days spent on the issues on which the plaintiff failed. Modern litigation is expensive to run, but it is more expensive to mount. The time spent on issues at trial is not necessarily a reliable guide to the time and work involved in preparation for trial. The issues on which the defendant failed were issues of fact, whereas the issue on which he won was a combined issue of law and fact. To the extent that there was a contest as to the applicable law, the defendant won. On the other hand, the discovery which was made by both sides – which the parties agreed was relevant and necessary for the fair disposal of the action – was directed to the issues raised by the defendant, on which he lost.

40. The judgment of Clarke J. in *Veolia* gives clear guidance as to the principles to be applied in deciding upon the award of costs in complex litigation. It is important to recall, however, that before coming on to the principles set out at paras. 12 to 18 of the judgment on which the argument focussed, Clarke J., at paras. 8 and 9, re-emphasised two matters which remain of the highest significance. The first is that costs always remain discretionary, and the second is that the starting position should remain that costs should follow the event.

41. The defendant lost two significant and costly battles, but he won the war. I am persuaded that the defendant added to the cost of preparation of the case and prolonged

the trial, but not that the circumstances are such that there should be no order as to costs.

42. The defendant, having won, should have an order for costs. The defendant having raised and lost two issues that significantly added to the costs, there must be a substantial adjustment to the order. I am not satisfied that I have sufficient insight into the work done in preparing for the case to be able to safely impose a percentage restriction on the recoverable costs but what is quite clear is that the discovery, on both sides, was necessitated by the issues raised by the defendant.

43. I have come to the conclusion that it would be unjust to order the plaintiff to pay the defendant's costs of making discovery in relation to the issues on which he failed, or the defendant's costs of the additional days spent at trail. The costs order should reflect the fact that the defendant has increased the plaintiff's costs, but I am not satisfied that the justice of the case would be met by simply setting off four days against four days.

44. In my view the justice of this case is to be met by making an order for payment by the plaintiff of the defendant's costs, excluding the costs of discovery, and limited to two hearing days.