THE HIGH COURT

[2023] IEHC 42

Record No. [2020 8416 P]

BETWEEN

THE HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

ROFTEK LIMITED

DEFENDANT

Costs ruling of Mr. Justice Mark Heslin delivered on the 31st day of January 2023

1. This short ruling in relation to the question of costs must be read in conjunction with the judgment of this court delivered on 15 December 2022 ("the judgment"). Written submissions were furnished by both parties and I have carefully considered same.

2. For the reasons set out in the judgment, I refused the defendant's application. Thus, it is entirely fair to say that the plaintiff/respondent was "*entirely successful".* The significance of this is clear from s. 169(1) of the Legal Services Regulation Act 2015 Act ("the 2015 Act") which states:

> *"A party who is* ***entirely successful*** *in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including–*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*
>
> *(e) whether a party made a payment into court and the date of that payment,*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
>
> *(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."* (Emphasis added).

3. Order 99 makes explicit reference to the 2015 Act in that rules 2 and 3 provides:

> *"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.

3. (1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs."

4. Being the entirely successful party, the plaintiff/respondent enjoys a presumptive right, under statute, to a costs order and they are entitled to an award of costs unless there are particular circumstances (which the Court must identify) which mean that the interests of justice require otherwise. In other words, although the court enjoys a discretion with regard to costs, there are limitations with regard to the exercise of that discretion. It could not be properly exercised unfairly, such as would be the case if this court's discretion was exercised in a manner inconsistent with the 2015 Act or unfairly.

5. Having carefully considered what is urged on behalf of the defendant/applicant, I am satisfied that the facts and circumstances are wholly insufficient to justify a departure from the 'general rule' that 'costs' should 'follow the event' (and it is fair to say that s.169 of the 2015 Act gives statutory expression to the 'general rule').

6. I am satisfied that, taking full account of the particular nature and circumstances of the case and the conduct of the proceedings (including but not limited to the matters specified in subsections (a)-(g) of s.169(1) of the 2015 Act) that it would be an entirely unfair and inappropriate exercise of this Court's discretion, and would be to create an injustice, if the entirely successful party were not to be awarded the costs of the present application.

7. As the judgment made clear (see paras. 16 to 19), the hearing proceeded on the basis that the plaintiff accepted that the plenary summons incorrectly specified Sections 3, 4 or 5 of the 'Brussels Recast' (instead of Article 7) but contended that there was no prejudice to the defendant by this error and no basis on which this Court ought to refuse jurisdiction of the claim. In that, the plaintiff was correct.

8. The plaintiff relied on certain authorities (see *Croke v. Waterford Crystal Ltd*. [2005] 2 IR 383; *Palamos Properties Ltd. v. Brooks* [1996] 3 IR; *Cropper v. Smyth* (1884) 26 Ch. D. 700; *Abama & Ors. v. Gama Construction Ireland Ltd.* [2011] IEHC 308; *Abama & Ors. v. Gama Construction (Ireland)* [2015] IECA 179) and on certain Rules of the Superior Courts ("RSC") (in particular O. 28, r. 1 RSC and O. 19, r. 26 RSC).

9. The hearing proceeded on the basis of the contention by the defendant/applicant that the Court should *not* follow the approach identified in *Abama*. Rather, argued the defendant/respondent, there had been "*cumulative errors*" of the type explained in *Castlelyons Enterprises Ltd. v. Eukor Car Carriers Inc. & Anor* [2016] IEHC 537.

10. I rejected the argument by the defendant/applicant that there had been "*cumulative errors*" and also took the view that the facts in the present case were materially different to those which pertained in *Castlelyons.* In the manner explained in the judgment, I came to the view that this

Court was bound to follow the approach endorsed by the Court of Appeal in *Abama,* upon which the plaintiff/respondent relied. This was the first of the two significant issues which took up most of the hearing and I will presently refer to the second.

11. The hearing before me proceeded on the basis that service was not an issue in the case. In oral submissions, counsel for the plaintiff made clear his client's intention to apply to amend the proceedings appropriately, in the event that this Court refused the defendant's application.

12. At para. 34 of the judgment I held that: *"…the court should not strike out the present proceedings for what, in essence, is a drafting-error capable of amendment without causing prejudice to the defendant. I do not accept as valid any criticism of the plaintiff for not bringing an application to amend. The reasons why I take this view are as follows: -*

(i) The proceedings were served in the United Kingdom on 11 February 2021 and a conditional appearance was entered on 25 February 2021. This made clear that the appearance was "without prejudice and solely to contest the jurisdiction of the court" but very obviously did not set out the basis for the jurisdictional challenge.

(ii) The conditional appearance was followed, relatively soon afterwards, by the present motion, which issued on 19 April 2021. It was only at that juncture that the plaintiff was put on notice of the basis for the challenge to jurisdiction.

(iii) From para. 11 onwards of Mr. Madigan's grounding affidavit, the inappropriate reference to Sections 3, 4 or 5 of the Regulation is set out. Another principal basis for challenging jurisdiction is the defendant's contention that the present proceedings are governed by Article 25 of Regulation EU 1215/2012, specifically, that the Courts of England and Wales have exclusive jurisdiction, in light of the defendant's trading terms and conditions which, it contends, formed part of the relevant agreement with respect to the purchase of the Dome.

(iv) In light of the foregoing, it seems to me that even if the plaintiff had issued an application to amend, immediately upon receipt of the defendant's 19 April 2021 motion, the application to amend could not have been determined by the court until after the court ruled on the application to strike out (and, as I referred to earlier, the plaintiff, through its counsel, has clearly flagged an intention to make an application to amend if the defendant's motion is unsuccessful)."

13. As well as being entirely unsuccessful in the submission that the proper approach to the determination of the defendant/applicant's motion was for the court to follow *Castlelyons Enterprises Ltd,* the defendant/applicant was entirely unsuccessful in persuading the court that these are proceedings governed by Article 25 of Regulation EU 1215/201 (i.e. that the Courts of England and Wales enjoy exclusive jurisdiction, on the basis that the defendant's trading terms and conditions supposedly formed part of the relevant agreement with respect to the purchase of the Dome in question). The latter was the second of the two main issues canvassed during the hearing.

14. As the judgment makes clear (see para. 50) I rejected the submission made on behalf of the defendant/applicant that the evidence before the court allowed for a finding that the terms and conditions were, as a matter of fact, received by the plaintiff.

15. I also rejected the related submission made on behalf of the defendant/applicant that *"… in seeking to rely on the warranty contained within the general terms and conditions of sale, it is submitted that the plaintiff is aware of the said terms and conditions of sale"* and for reasons explained in the judgment I held that the evidence which was before the court did not support a finding that the plaintiff ever sought to rely on the warranty contained in the defendant's general terms and conditions (see para. 54). Again, the defendant/applicant was entirely unsuccessful in this line of argument, given the facts which emerged from the evidence.

16. I do not accept that the concession made by the plaintiff/respondent (to the effect that the jurisdictional endorsement in the relevant Summons was incorrect) amounted to fact, circumstance or conduct which would justify depriving the entirely successful party of their presumptive entitlement to costs. The trial ran on the basis of the concession having been made and, thus, it was not an issue which featured at, or caused any elongation of, the hearing. In other words, the issues were 'netted down' at the very outset of the hearing but, as I have explained, the two main arguments upon which the defendant/applicant sought relief were entirely unsuccessful from its perspective.

17. Nor do I accept that a failure to bring an application to amend the summons, or to signal such an intention earlier, deprives the plaintiff/respondent of a costs order. This is something I touched on in the judgment and para. 34 (iv) of same bears repeating:

> *"(iv) In light of the foregoing, it seems to me that even if the plaintiff had issued an application to amend, immediately upon receipt of the defendant's 19 April 2021 motion, the application to amend could not have been determined by the court until after the court ruled on the application to strike out (and, as I referred to earlier, the plaintiff, through its counsel, has clearly flagged an intention to make an application to amend if the defendant's motion is unsuccessful)."*

18. It is self-evident that, up to the determination of the present application, the defendant would *not* have consented to an amendment of the Summons, regardless of when such consent might have been sought. Rather, the defendant/applicant plainly took the view that it was entitled to have the present proceedings 'stuck out' for want of jurisdiction. That application has failed and, in those circumstances, it is not open to defendant/applicant to seek to avoid a liability to pay the entirely successful party's costs on the basis that the latter should have made an application to amend (which it clearly would not have consented to and which plainly could not have been determined before the outcome of this application became known).

19. The defendant/applicant acknowledges that, as of 27 January 2022, it had evidence of the fact that the proceedings were received by the relevant receiving agency in the United Kingdom prior to the end of the relevant (post–'Brexit') withdrawal period. Thus, this was not an issue which featured at the trial. Nor, however, did it result in the defendant/applicant withdrawing their application at that point.

20. Therefore, insofar as the defendant/applicant argues that it was *necessary* for them to issue the present application in circumstances where, as they see it, the plaintiff/respondent had not proved service, that argument falls away as of 27 January 2022 (over 9 months before the contested hearing). It is also noteworthy that, as a matter of fact, service had been effected directly on the defendant at its registered office on 11 February 2021 by the relevant UK authorities – something which did not feature in the affidavit grounding the motion or in any affidavit sworn on behalf of the defendant.

21. It is also the case that the defendant took issue with whether the relevant UK authorities had received the documents prior to the expiry of the transition period set out in the 'Brexit" Withdrawal Agreement. The averments and exhibits to the affidavit sworn by Ms Kenny on 11 March 2022 addressed this matter but went unanswered and the issue itself was abandoned on the morning of the hearing.

22. It also seems entirely fair to say that, rather than withdrawing the application and, for example, indicating a consent to an amendment of the Summons, the defendant/applicant, who has long known the nature of the case made against it by the plaintiff (i.e. an allegedly defective mortuary tent, sold by the defendant to the plaintiff for use in this jurisdiction) took a different course. I am not for a moment suggesting that the defendant/applicant was obliged to abandon the present motion or that they had any obligation to signal an intention to consent to an amendment of the jurisdictional endorsement in the Summons. My point is that, having decided to proceed with the present application, as they were perfectly entitled to do, this came with a costs *risk,* in the event that it was *unsuccessful* and the defendant's application has been entirely unsuccessful.

23. For these reasons, I am satisfied that it would be to create a patent injustice to do what the defendant/applicant argues for (i.e. to award the costs of this application to the defendant/applicant). On the contrary, having maintained this application and having been entirely unsuccessful (given the facts, as found) on *both* of the main bases which were the focus of the hearing, the justice of the situation is met by awarding the costs of the application in favour of the plaintiff. I have also considered all circumstances and factors, including the non-exhaustive list of 7 matters referred to in s.169(1) of the 2015 Act and, having done so, I am satisfied that there is nothing which would merit imposing a 'stay' on the said costs order (a 'stay' being something which the plaintiff explicitly opposes).

24. To conclude this short ruling, it seems to me that the findings in the judgment and in this costs ruling require that orders are made to the following effect:

- dismissing the application by the defendant/applicant;

- granting the costs of the application in favour of the plaintiff/respondent (i.e. the entirely successful party), to be adjudicated in default of agreement;

- granting the plaintiff a period of 21 days within which to apply to amend the plenary summons in question;

- directing that service of the amended plenary summons be by registered post and by email to the solicitors for the defendant (identified on the 'conditional' Appearance entered on 25 February 2021);

- directing the entry, by the defendant, of an Appearance within 5 weeks of service by the plaintiff of the amended summons;