[2020] IEHC 329

THE HIGH COURT

[2018 No. 7052P.]

BETWEEN

CARE PRIME HOLDINGS FC LIMITED, FIRSTCARE IRELAND LIMITED

AND

BENEAVIN CONTRACTORS LIMITED

PLAINTIFFS

AND

HOWTH ESTATE COMPANY

AND

JULIAN GAISFORD-ST LAWRENCE

DEFENDANTS

RULING of Mr. Justice Allen delivered on the 6th day of July, 2020

1. For the reasons given in a written judgment delivered electronically on 12th June, 2020 I acceded to a motion on behalf of the plaintiffs for leave to amend their statement of claim. Following an exchange of correspondence between the solicitors in the meantime there is broad agreement as to the consequential orders, but the court is asked to rule on the question of the costs of the motion for leave to amend.

2. The plaintiffs argue that they succeeded on the motion and that the costs should follow the event. Further, they argue that the costs of the application were significantly increased by the fact that it was strenuously defended.

3. The defendants argue that they have incurred and will incur substantial additional costs by reason of the amendment which has been permitted. They submit that the opposing party is in general entitled to the costs consequential on an amendment. Further, they submit that if the plaintiffs do not succeed on the issues introduced by the amendment, the amendment, and the application for leave to amend, will be shown to have been unnecessary and that the costs of the amendment and the motion will have been effectively wasted. The defendants argue that the costs of the motion should be reserved to the trial judge who, it is said, will be in a better position to adjudicate on the question of costs.

4. Order 99, r. 2(3) of the Rules of the Superior Courts (which was substituted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019 with effect from 3rd December, 2019 and superseded the previous O. 99, r. 1(4A) which had been introduced in 2008) provides:-

   "(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."

5. In *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 Clarke J. (as he then was) having noted the introduction of O. 99, r. 1(4A) of the Rules of the Superior Courts, continued, at para. 8 of the judgment:-

> *"The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will be especially so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by the motion."*

6. About two and a half years previously, in Farrell v. Bank of Ireland [2013] 2 I.L.R.M. 183 Clarke J. said:-

> *"Furthermore the courts have become more prepared, in recent times, not least because of changes in the Rules of Court, to look at individual elements in the conduct of proceedings to ascertain whether parties have acted in such a way as has, irrespective of the ultimate outcome of the case, led to additional and unnecessary costs being incurred. Apart from the undoubted justice of that approach same has the added advantage of discouraging parties from bringing unnecessary and unmeritorious applications, resisting appropriate applications or adding unnecessarily and inappropriately to the complexity (and the cost) of proceedings by adding a multiplicity of claims or a multiplicity of defences."*

7. The judge who will eventually come to try this case will have to decide the substance of the issue the subject of the amendment but he or she will not have to revisit the circumstances in which the amendment came to be made. The issue on the motion to amend was not whether the plaintiffs were or might be entitled to succeed on the substantive issue but merely whether the proposed plea was frivolous or vexatious or whether the plaintiffs were seeking to make the amendment for an improper purpose. It seems to me that this was a purely procedural motion in which the judge who has heard the motion is better placed to decide where the justice of where the costs of the motion should lie.

8. I accept, as a general proposition, the argument that the opposing party is generally entitled to costs consequential on an amendment. This is expressly provided for in O. 28, r. 13 in the case of amendments permitted without leave and it seems to me that the principle underlying this rule extends to the costs of and occasioned by an amendment for which leave is required: but subject to the important proviso that those costs should not have been substantially increased by the manner in which the application for leave to amend has been met. The respondent to a motion for leave to amend which can be and is dealt with in the Monday motion list, even if he objects, may have a good argument to make that he had to be there anyway. That argument may be weakened where, as here, he was advised in advance of the motion issuing of the opposing party's wish to amend and invited to consent. It is, in my view, largely displaced in a case, such as this, where the motion was vigorously opposed and was transferred from the Monday list into the list to fix dates and assigned a half day for hearing, in advance of which written submissions were filed on behalf of the defendants.

9. In my view (and I am satisfied I am better placed that the trial judge would be to form a view) the costs of the plaintiffs' amendment application were greatly increased by the manner in which it was met and fought. It was, for the reasons given in my judgment of 12th June, 2020, an appropriate application which was inappropriately and, in the event, unsuccessfully resisted.

10. While I decline to accede to the defendants' submission that the costs of the motion be reserved, it does not follow that the plaintiff is entitled to all of the costs.

11. The evidence on the motion to amend was that the plaintiffs were unaware at the time of delivery of their statement of claim of the newspaper reports on which the proposed amendments were based, but the objective fact is that the announcement of the deal in principle was made before, if only a week before, the delivery of the statement of claim.

12. Without counting the folios or pages of the affidavits, or dividing the half day duration of the hearing by the twenty minute rule applicable to the Monday motion list, I estimate that the plaintiffs' costs of the motion to amend as it was met and fought were something in the order of five times what they would have been if the defendants had acquiesced in it, or even if the defendants had limited their objection to such points as might have been briefly made in the Monday list. The other side of that coin is that the plaintiffs would in any event have incurred some costs in obtaining the leave to amend which is required by the rules.

13. From the defendants' point of view, it seems to me that the just application of a policy of fixing the opposing party with any costs unnecessarily and inappropriately added to the cost of procedural motions requires a recognition that the opposing party is entitled to take such advice and counsel as is proper to make a careful and measured assessment of the merits on the application. In this case the first suggestion of the proposed amendment was made in a letter dated 23rd December, 2019 which invited the defendants' solicitors to consent to the proposed amendment, but that letter was primarily directed to the question of what documents were relevant and necessary by reference to the pleadings as they then stood. In my view it was not unreasonable for the defendants to wait and see what case the plaintiffs might make in the affidavit grounding the motion to amend for the proposed amendment and to make their assessment at that stage of the prospects of successfully resisting it. The costs incurred in connection with that exercise could fairly be said to have been necessitated by the motion to amend.

14. Taking a broad view, it seems to me that the plaintiffs have succeeded on their application for leave to amend which, in view of the manner in which the motion was met, is an event. However, I think that the justice of the case requires a deduction from the plaintiffs' costs which should be paid by the defendants in respect of the costs that would have been incurred by the plaintiffs in any event. I measure that deduction at 20%.

15. In my view, a just assessment of where the unnecessarily increased costs of the application should lie requires that account should be taken of the costs that were or would have been necessarily and properly incurred and which, but for the manner in which the application was met, would likely have been awarded against the moving party. Applying the approach laid down in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, [2006] IEHC 240, this allowance is to be made by way of set-off. If, on the view I have taken of the application, the defendants had recognised the motion to amend for what it was – an application for a simple amendment which would not give rise to any real prejudice – and had consented to it or acquiesced in it, they would probably have been allowed their costs of the motion. The defendants' costs of answering the motion, however, would not have been the same as the plaintiff's costs in mounting it. It seems to me that the justice of the case will be met by allowing a further deduction in respect of that element of the defendants' costs by way of set-off of 10%.

16. The net result then, is that the plaintiffs are entitled to recover from the defendants 70% of the costs of the motion. My recollection is that while written submissions were filed on behalf of the defendants, the plaintiffs did not file such submissions. If I am wrong in that, the plaintiffs' costs will include the cost of written submissions: not because the motion necessarily warranted written submissions but because the plaintiffs were entitled – if they were so advised and did – to mark the defendants' written submissions with their own.

17. As suggested or anticipated by the plaintiffs' solicitors, there will be a stay on execution of the order for costs until the final determination of the action.

18. As to the consequential orders, there is, as I have said, broad agreement but some bickering about the necessity for some of the steps suggested by the defendants' solicitors and complaint of slippage in a timetable previously agreed for the exchange of affidavits on the discovery motions. Like the plaintiffs' solicitors, I do not immediately see what additional particulars might be required of the additional plea, or what additional discovery request might be necessary, but without knowing what the defendants' solicitors might ask for I am not prepared to preclude any request for either.

19. The timetable proposed by the defendants' solicitors will see the exchange of amended pleadings completed by no later than 31st July, 2020; will provide for an armistice in August; and will see the motions for discovery ready for a date in October. That is sensible and reasonable.

20. On either proposed timetable the amended statement of claim will by now have been formally delivered. The order will allow the delivery of an amended defence by no later than 17th July, 2020 and an amended reply by no later than 31st July, 2020. These dates are deadlines, not targets. If the amended pleadings can be exchanged sooner, so much the better.

21. I do not propose to give any directions as to the further progress of the discovery motions but I gently remind the parties that those motions – on both sides – have been

complicated and probably made more expensive by each side setting unreasonable deadlines for replies to correspondence and then issuing motions immediately on the expiration of those deadlines, with the result that the exchange of points of view on the relevance and necessity of the various categories of discovery which should be in correspondence has instead been in a protracted exchange of affidavits. When the discovery motions are ready, an application may be made to the chancery list registrar for a date.