

**THE HIGH COURT**

[2021] IEHC 779  
[2014 No. 3292 P]

**BETWEEN**

**ACTION ALARMS LIMITED TRADING AS ACTION SECURITY SYSTEMS**

**PLAINTIFF**

**AND**

**EMMET O'RAFFERTY AND TOP SECURITY LIMITED**

**DEFENDANTS**

**JUDGMENT of Humphreys J. delivered on Tuesday the 21st day of December, 2021**

1. The plaintiff's claim is for alleged breach of contract in that it is pleaded that the defendants were under contractual obligation to pay commission to the plaintiff in respect of customers who were connected to the defendant's monitoring system.
2. The action was instituted on 21st March, 2014 and was ultimately set down for trial on 14th May, 2019.
3. The matter came on for hearing before Pilkington J. on 19th November, 2019 and after a 7-day hearing, judgment was reserved on 5th December, 2019.
4. Unfortunately, Pilkington J. became indisposed in Spring, 2021 before she had had an opportunity to finalise the judgment, and in October, 2021, it was decided that the matter should be reassigned to me for a fresh hearing. Accordingly, in November, 2021 I fixed 11th January, 2022 as the new hearing date, on a provisional basis subject to further submissions of counsel, which I have now received.
5. The plaintiff has objected to the proposal for a complete re-hearing of the matter indicating in a brief written submission that its "primary position" was that the matter should await Pilkington J. being in a position to deliver judgment. Unfortunately, that is not an appropriate solution because that matter has already been explored, and given the inevitable lead-in time when returning from any period of indisposition, and the need to accommodate an equally inevitable quantity of work-in-progress in such a situation, the overall obligation to provide a speedy determination of the present litigation would not be satisfied by that option. Admittedly, additional costs are a factor where the question of a re-hearing arises, but even if it becomes necessary to return at a later stage in this case to possible solutions for that, I don't think the risk of costs in itself can require a matter to be unduly postponed.
6. The plaintiff's second proposal is that "the re-hearing should be conducted on the basis of the transcript evidence already heard and no additional oral evidence should be required." It submits that the parties have already had their witnesses give evidence and the principal areas of disagreement related to the interpretation of events rather than the events themselves and indeed that there was much agreement between the witnesses.
7. Reliance is also placed on authority in British Columbia to the effect that where an original trial judge is unavailable, a rehearing can take place on the transcript only (*Parmar v.*

*Bayley* [2001] B.C.J. No. 2063, *Liszkay v. Robinson* [2004] B.C.J. No. 2516, *Walsh v. GMAC Leasco Corp.* [2012] B.C.J. No. 127).

8. In *Parmar*, Williamson J. noted at para. 14 that “it is often possible to resolve matters of credibility upon a transcript especially where there has been extensive cross-examination which I am told is the fact in this case.” Thus it was directed that the rehearing should be on transcript with a right to determine that a particular witness should be recalled if credibility was an issue.
9. I would accept the proposition that where a matter has to be reheard before another judge the court has an inherent jurisdiction to proceed on the basis of the transcript if satisfied that this would be in the interests of justice, with consideration being given to specific orders for the oral evidence of particular witnesses in the event of credibility issues arising. But any such jurisdiction should be approached with caution, for two reasons.
10. The first is the absence of any provision in the rules or statute law backing up that procedure. It must be noted that in the British Columbian context there was a specific rule of court that permitted this to happen.
11. The second and broader reason is that, for all the latter-day deprecation of demeanour as an issue, there is nonetheless something unique and irreplaceable about the value of seeing live witnesses in the box and how they respond both under direct examination and under cross-examination. That simply cannot be fully replicated by transcript, even bearing in mind the transcripts can at times be vivid and informative in terms of how they convey the atmosphere of trial. This was a point I endeavoured to make at para. 13 of *Transdev Ireland Ltd v. Caplis* [2020] IEHC 403, [2020] 6 JIC 2302 (Unreported, High Court, 23rd June, 2020), to the effect that seeing and hearing the witnesses is something to which no review on paper can really do justice: see also *per* Hyland J. in *Conway v. Department of Agriculture, Food and the Marine* [2020] IEHC 665, [2020] 12 JIC 1407 (Unreported, High Court, 14th December, 2020), at para. 37. Desk-bound law is in that sense a little bit lifeless compared to the white heat of the real-time combat of witnesses, in which humanity and drama, as well as the friction and fog of forensic war, are combined in an unreproducible mêlée from which, hopefully, the truth, or at least the balance of probabilities, emerges. That doesn’t mean one could never depart from that process or limit it (say by replacing examination-in-chief with written witness statements as in England and Wales), but one would have to carefully weigh the trade-offs involved.

**Order**

12. Under such circumstances it seems to me that the safest and most appropriate course is to maintain the default position of a full rehearing on oral evidence, save to the extent otherwise agreed by the parties between now and the trial date, but in doing so I would encourage the parties to narrow the issues insofar as they can. Subject to what counsel propose in due course, and taking into account whatever time estimates they wish to suggest, I may also consider time-limiting any oral submissions that might arise immediately following the conclusion of evidence. Separate from the foregoing, I have recently been made aware that counsel for the plaintiff unfortunately has an overlapping

commitment on the proposed trial date (which seems to have existed for some time but I was only told about it on 17th December, 2021), but in all the circumstances, especially where that commitment relates to a long case which may go on for several months, it would unfortunately not be appropriate to regard convenience of counsel and the natural desire of the plaintiff for continuity of representation to be a sufficient basis for an adjournment, especially given that the case is now approaching its eighth anniversary. Thus the order will be as follows:

(i). the existing default position of a full rehearing on oral evidence will remain in place save to the extent otherwise agreed by the parties; and

(ii). the adjournment request is refused and the provisional hearing date is confirmed so that the case will be listed for hearing on 11<sup>th</sup> January, 2021.