

## THE HIGH COURT

[2010 No. 11862P]

## BETWEEN:

**IBB INTERNET SERVICES LIMITED AND IRISH BROADBAND INTERNET SERVICES LIMITED (TRADING AS IMAGINE NETWORKS)  
AND IMAGINE COMMUNICATIONS GROUP LIMITED**

PLAINTIFFS

**AND  
MOTOROLA LIMITED**

DEFENDANT

**Judgment of Mr. Justice Barrett delivered on 1st May, 2015**

1. *Introduction.* This judgment concerns applications for costs that have followed on the judgment of this Court on the motions for discovery brought in *IBB Internet Services Limited & Others v. Motorola Limited* [2015] IEHC 54 by (a) the Plaintiffs against the Defendant, (b) the Defendant against the first and second-named Plaintiffs and (c) the Defendant against the third-named Plaintiff on similar but not identical form to the application referred to at (b). The Plaintiffs are now seeking an order for costs of the Plaintiffs' motion for discovery and also of the Defendant's motion. The Defendant contends that the costs of both motions should be costs in the cause; in the alternative, and in light of the Plaintiffs' position, the Defendant seeks the costs of the Defendant's motion for discovery. On the consent of the parties the court directed that the determination of the issue of costs should be dealt with by the furnishing of written submissions and replying submissions, without the need for any hearing. Having read and considered those submissions, the court now renders this judgment.

2. *The discovery proceedings and prior correspondence.* The court's judgment in the discovery proceedings runs to some 84 pages and considers in detail each of the grounds on which discovery was sought. The hearings which preceded that judgment took four days of court-time. The applicable legal principles were not disputed between the parties. Along with a general outlining by each party of its case and its views of the opposing case (in total, this occupied about two of the four days of hearings), the time at the hearings was taken up mostly by argument concerning issues of (i) necessity, (ii) relevance, and (iii) oppression, as they pertained to the various categories of discovery in dispute.

3. The motions for discovery were preceded by an exchange of letters on various dates between 27th May and 3rd July, 2014. Those letters were detailed, running to many hundreds of pages. Further correspondence was exchanged after the issuing of the motions. The motions were preceded by two meetings between the legal advisors to the parties who sought to narrow the issues in dispute. A third meeting followed the issuing of the respective motions but prior to them being heard. As one would hope, some further categories of discovery were, quite appropriately, agreed at this time.

4. The submissions and replying submissions in the hearings ran to many hundreds of pages. Notwithstanding the extensive engagement between the parties on the issues prior to the hearing of the motions, it proved impossible for sufficient consensus to be reached such as would have negated the necessity for the four days of hearings on the applications and issues arising.

5. *Applicable legal principles to the within applications for costs.* Subject to certain limited exceptions, none of which appear to the court to be relevant for present purposes, Order 99, rule 1(4A) of the Rules of the Superior Courts requires the court to determine costs on an interlocutory application unless it is not possible justly to adjudicate upon same. Without prejudice to the fact that the court's power under Order 99 is ultimately and essentially a discretionary power, the usual practice of the court in applications for costs is that 'costs follow the event'.

6. *The decision in Veolia Water.* In *Veolia Water U.K. plc v. Fingal County Council (No.2)* [2007] 2 I.R. 81, Clarke J. outlined a number of relevant considerations that arise in applications for costs in more complex cases. These can be summarised as follows. First, the overriding principle is that 'costs follow the event'. Second, the party who wins the 'event' should get full costs. Third, the court should consider departing from awarding full costs to such a party where it is clear that it materially added to the costs of the proceedings by raising arguments or grounds found by the court to be unmeritorious; in doing so the court should focus on whether the costs of the proceedings as a whole were materially increased. Fourth, there can be other factors relevant to the award of costs. Less than a decade after Clarke J. made his observations in *Veolia (No.2)*, they are now cited in so many applications for costs and have been relied upon in so many prominent cases (e.g. *Kavanagh v. Ireland & Ors* [2007] IEHC 389 (Smyth J.), *Mennolly Homes Ltd. v. Appeal Commissioners* [2010] IEHC 56 (Charleton J.), and *McAleenan v. AIG (Europe) Ltd.* [2010] IEHC 279 (Finlay Geoghegan J.)) that it does not seem premature to state that those observations ought now to be treated as, and in truth are, representative – indeed they were likely to some extent determinative – of current settled practice in this area.

7. *What is the 'event'?* Clarke J. recognised in *Veolia (No. 2)*, at para.2.6, that it was increasingly the case that due to the complexity and duration of interlocutory applications it was appropriate in such instances to treat the 'event' for the purposes of Order 99 as the issue determined by the interlocutory application. The starting-point for the court in an application for costs is to identify the 'event' and, thereby, the winning party. The court has to consider whether the moving party in an interlocutory application was required to bring the application to secure a particular entitlement which could not be secured without the hearing concerned. If the moving party was so required, that party is to be regarded as having succeeded "even if not successful on every point" (*Veolia*, para.2.8). It is only if the moving party has increased the costs associated with the hearing to a material extent by raising additional unmeritorious issues that full costs will not be ordered.

8. Having regard to the observations of Clarke J. in *Veolia (No.2)*, it appears to the court that the 'event' in discovery proceedings in which there was no argument as to the applicable legal principles is easily identified: it is the only issue that has in truth been determined by the interlocutory application, namely the scope of discovery to be made.

9. The Defendant, in its written submissions, contends that:

*"In the present case it is not possible to identify the 'event', owing to the number of categories (and sub-categories) of discovery sought in the Motions and the varying outcomes in respect of each category:*

*Agreed during the hearing of the Motion.*

*Withdrawn during the hearing of the Motion;*

*Ordered by the Court in amended form;*

*Ordered as sought without amendment;*

*Refused."*

The court does not accept this reasoning as good in the within proceedings for the reason stated above, viz. that, having regard to the reasoning of Clarke J. in *Veolia (No. 2)*, the 'event' arising is so easily identified. Moreover, it appears to the court that the logic offered by the Defendant in this regard is in any event mis-founded for at least three reasons:

- first, it appears implicitly to criticise the Plaintiffs for having agreed certain categories of discovery during the hearings notwithstanding that (a) such agreement is generally to be encouraged, however belated, and (b) some of the said agreement was conditioned on the basis that discovery of other related categories would be agreed by the Defendant and/or ordered by the court, and so, to this extent, was not at all belated.
- second, it appears to the court that in any substantial discovery proceedings all five of the matters that appear at the above bullet-points are likely to occur. So, were one to accept the Defendant's logic, the inexorable consequence would seem to be that in many, perhaps all substantive discovery proceedings, costs would invariably fall to be treated as costs in the cause, an approach that sits ill with the requirements of Order 99, rule 1(4A), the principles identified by Clarke J. in *Veolia (No. 2)*, and current practice.
- third, on a more general note it appears to the court that the above reasoning, were it generally to apply, could lead to an abuse of the discovery process. After all, were it the case that such complexity as is described above was necessarily and in all instances to result in costs of discovery applications being made costs in the cause, this would surely create the possibility that parties in mutual discovery motions such as those that were the subject of the within proceedings might 'game' the process by invariably seeking excessive discovery and then compromising what was being sought, with the result that an opponent's eventual application for costs of the motions would be frustrated by an ostensible miasma of complexity.

10. *The court's judgment on the Plaintiffs' application for discovery.* The court does not propose to recite what it ordered in its judgment of 3rd February last. The interested reader, if there be such, is referred to the text of that judgment. Here, the court intends merely to address some of the high-level issues that occupied it over the four days of hearings which preceded its earlier judgment:

(1) *I. Representations.* A number of arguments were advanced by the Defendant on the hearing of the Plaintiffs' motion pertaining to this category. These arguments occupied a significant amount of time and were ultimately rejected by the court. More particularly, (a) the court rejected the argument that the documentation sought would not be probative of any matter in issue in the proceedings, (b) the court rejected what might be called the 'fraud' argument, accepting instead that no claim of fraud was being made by the Plaintiffs, (c) the court accepted the contention made by the Plaintiffs, and contested by the Defendant, that the context in which a representation is made is relevant, and (d) the court did not accept that the Plaintiffs' reference to a 'rectification plan' was unclear. The court notes in passing that the Defendant in its written submissions appears to acknowledge that the court-time utilised in dealing with this category of discovery ought not to have been required. Thus counsel for the Defendant state in those submissions that:

*"A significant part of the hearing was taken up by an analysis of the claim of the Plaintiffs that they were entitled to discovery of Category I relating to representations. The Court rejected the Defendant's argument that the Plaintiffs were not entitled to discovery in these categories in light of the Court's rejection of the Defendant's argument that the discovery sought was directed to a plea of fraud which the Plaintiffs confirm formed no part of the proceedings."*

(2) *II. NSN.* This entire category of discovery was disputed by the Defendant; five-sixths of the documentation sought was ordered to be discovered by the court.

(3) *III. Business Plans.* The court accepted the relevance of the draft and first business plans to the claims made by the Plaintiffs. The court rejected the contention of the defendant that there was duplication between this category and categories III(bis) and IV.

(4) *III(bis). MCC.* The court rejected the contention that there was duplication as between this category and categories III and IV.

(5) *IV. Corporate Structure/Single Economic Entity.* The court accepted the relevance of the documentation sought to the Plaintiffs' pleaded claims and rejected the contention of the Defendant that there was duplication as between this category and categories III and III(bis). The court rejected the complaints of the Defendant that the category pertained to the 'universe' of the documents. The court also rejected the contention of the Defendant that discovery could not be obtained in respect of an alternative plea.

(6) *VIII. Contractual Timeline.* The Defendant dealt with this category on the basis that the Plaintiffs had withdrawn their claim in this regard. This, in truth, did not recognise the reality of matters, nor indeed the list of issues fixed by Charleton J. in *IBB Internet Services Limited & Ors. v. Motorola Limited* [2013] IEHC 541.

11. *The court's judgment on the Defendant's applications for discovery.* Again, the court does not propose to recite what it ordered in its judgment of 3rd February last. The interested reader, if s/he has persisted thus far, is again referred to the text of that judgment. Suffice it to note that the Defendant was substantively successful in its motion for discovery. A preponderance of the categories of discovery sought by it were either agreed to by the Plaintiffs or ordered by the Court in a manner that was satisfactory to the Defendant (and not in a form offered by the Plaintiffs). It is true that relatively few of the categories were ordered in the terms actually sought by the Defendant. It is true that in the majority of instances where discovery was ordered, the terms ordered were reflective of temporal limits/amendments imposed by the court and/or offered by the Plaintiffs. It is true that, in contrast to the position on the Plaintiffs' motion, the court did not conclude that any particular point of principle asserted by the Plaintiffs was unfounded. It is true that the court did consider that every instance in which the Defendant used the words "or relating to" in its requests for discovery was, in the context of the within proceedings and the particular category of discovery sought, an oppressive formulation. All that said, any fair assessment of the outcome on the Defendant's motion would have to arrive at the conclusion that the Defendant was substantively successful in it.

12. *Conclusions.* It does not appear to the court that the Plaintiffs' application for costs is one in which the court is required to engage in the detailed form of analysis identified by Clarke J. in *Veolia (No. 2)*. The Plaintiffs were successful in the overwhelming

majority of the points argued by them at the discovery hearings. The costs associated with same were not increased to a material extent by reason of the relatively few unsuccessful arguments that it made. The application for discovery was therefore justified by the result.

13. With regard to the Defendant's motion for discovery, it is apparent from the previous judgment of the court that there were proper grounds for the Plaintiffs to resist the Defendant's applications for discovery which they did successfully (wholly or partly) in the majority of contested instances. That said, the Defendant 'won' more categories than it lost, and in the greater number of categories secured orders in such form as were satisfactory to it or as had been agreed with the Plaintiffs. On the whole, therefore, it seems to the court that there is no principled distinction to be drawn between the parties' respective motions, or the outcomes in respect of same, that would justify the court in denying the Defendant the costs of its motion.

14. For the reasons stated above, the court (a) does not accept that the costs of both motions should be costs in the cause, (b) grants to the Plaintiffs an order for costs of the Plaintiffs' motion for discovery, and (c) grants to the Defendant an order for costs of the Defendant's motion for discovery.