

BETWEEN/

ADM LONDIS PLC

PLAINTIFF

AND

RANZETT LIMITED, RAY DOLAN AND

ANNALIESE McCONNELL (NO.4)

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 6th day of February, 2015

1. Where a defendant is awarded a sum of costs which, when taxed, are likely to reduce significantly (or, perhaps, even exceed) an award of damages made in favour of a plaintiff, is it appropriate that the award of costs and the award of damages should be mutually set off as against each other in accordance with O.99, r.4 of the Rules of the Superior Courts? This is the issue which now arises at the conclusion of these proceedings.

2. This issue arises in practice rather less often than might otherwise have been supposed. It really only arises in the present case because the plaintiff's claim to a liquidated sum pursuant to certain invoices was relatively straight forward and did not take up a great deal of court time. The defendants' counter claim, on the other hand, was heard for the better part of nine days and raised difficult questions both of law and fact. The plaintiff succeeded on its claim and the defendants substantially succeeded on its counter claim. This left a net award of some €97,284 (plus Courts Act interest running from 3rd June 2009) in favour of the plaintiff while the defendant had the better part of the costs order in as much as 7 days costs were awarded in its favour. The plaintiff was also awarded one half days' costs which were set off as against that costs order.

3. There is, accordingly, a balance in favour of the plaintiff in terms of monetary award and a balance in favour of the defendant in costs. Quite obviously, as things stand, the defendants' costs have not been taxed so that it is difficult at this junction to estimate what that sum might eventually be. These costs are, however, likely to be substantial and they may well approach the figure of €97,284 awarded to the plaintiff and may even exceed that sum. The plaintiff submit that in these circumstances this court should exercise the right of set off provided for in O. 99, r. 4, RSC.

4. Rule 4 provides:-

"A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

5. In my view, it is clear from the authorities that this is a case where the power of set-off should be exercised. The leading modern authority is the judgment of Barrington J. in *Larkin v. Groeger* [1990] 1 I.R. 461. In that case the plaintiff obtained an arbitral award of some IRE45,600 against the defendants. He was, however, dissatisfied with that award and commenced High Court proceedings by which he sought to have that award set aside. He failed in that attempt and an order for costs was made against him. The defendants then sought to have those High Court costs set-off against their liability on foot of the arbitration award. This application was opposed by the plaintiff's solicitors (who had acted for him in both the arbitration proceedings and in the proceedings in this Court to have the order set aside) who had brought a motion seeking a charging order under s. 3 of the Legal Practitioners (Ireland) Act 1876 in favour of their costs from the proceeds of the arbitral award.

6. Barrington J. acknowledged that this was a case which did not come within the scope of O. 99, r. 4 at all, because the while the parties were identical, the proceedings involving the arbitration award did not involve the same "cause or matter" as the proceedings in this Court. That, however, did not conclude the matter, because Barrington J. went on to say that the Court could permit a set-off pursuant to its inherent jurisdiction "if the interests of justice require it." Barrington J. then continued ([1990] 1 I.R. 461, 467):

"...the arbitration procedures and the High Court proceedings are separate proceedings. But they arise out of the same dispute and the same firm of solicitors acted for the plaintiff in both proceedings. This is not a case where a fund recovered by one solicitor in one set of proceedings have been put in danger by the outcome of different proceedings conducted by different solicitors.

It is sad when one has to decide which of two innocent people is to bear a loss. But it appears to be that the defendants have considerable merits in their present case. They may not have been completely happy with the arbitrator's award but they were prepared to accept it. They were put to the expense of defending the award in the High Court proceedings in which they were successful and in which they got an order for costs. They have no chance of recovering their costs unless they can deduct them from the monies payable by them to the plaintiff on foot of the arbitration award. They owe no duty to the plaintiff's solicitor and, in all the circumstances, it appears to be that it would be unjust to them not to allow them to set-off their costs, when tax has been ascertained, against the amount payable by them to the plaintiff on foot of the arbitrator's award notwithstanding the plaintiff's solicitors' lien."

7. It seems to me that the decision in *Larkin* is entirely on point so far as the present case is concerned, save in one respect which, if anything, re-inforces the case for a set-off. Unlike *Larkin*, the present case does come within the scope of O. 99, r. 4 because the monetary award and the award of costs both arise from the same "cause or matter".

8. The principle underlying the judgment in *Larkin* nevertheless remains the same. As Barrington J. pointed out in that case, the underlying problem remains the same in that this Court is unfortunately forced to choose which of two innocent parties is likely to bear a loss. As in *Larkin*, it seems likely that the plaintiff has little prospect of recovering its judgment against the defendants unless

it can set-off that award as against the award of costs. Nor does the plaintiff owe any duty to the defendant's solicitor and it does not seem to me that that solicitor's lien over those costs can rank in priority to the plaintiff's entitlement to set-off, even if in other circumstances that lien would protect the solicitor as against other third parties.

Conclusions

9. For the reasons stated, therefore, I consider that the plaintiff is entitled to set-off the monetary award already made in its favour as against the award of costs made in favour of the defendants when taxed and ascertained.