Neutral Citation: [2013] IEHC 473

**THE HIGH COURT**

**[2011 No. 10923P]**

**BETWEEN**

**SRI APPAREL LIMITED**

**PLAINTIFF**

**AND**

**REVOLUTION WORKWEAR LIMITED, DONAL O'SULLIVAN, PAUL BOND AND SAFETY WORLD LIMITED**

**DEFENDANTS**

**Note of judgment of Ms. Justice Laffoy delivered on 10th day of October, 2013.**

1. The outstanding issues in this matter are as follows:

> (a) where liability for the costs of the proceedings to date as between the plaintiff, on the one hand, and the first defendant, the second defendant (Mr. O'Sullivan) and the fourth defendant (collectively referred to as "these defendants"), on the other hand, should lie; and
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> (b) the hearing and determination of the claim of these defendants for indemnity and contribution against the third defendant (Mr. Bond), if it is proceeding.

2. As regards the latter issue, primarily as an *aide memoir* for myself, it is to be recalled that, at the commencement of the hearing of the action against these defendants, the Court was informed by counsel for the plaintiff that an interim agreement had been reached between the plaintiff and Mr. Bond and that the plaintiff was not interested in pursuing Mr. Bond at that stage. The proceedings by the plaintiff against Mr. Bond were adjourned by consent of those parties with liberty to re-enter. The claim on foot of the notice of indemnity and contribution which had been served by these defendants against Mr. Bond remained to be heard and determined, insofar as necessary (*cf*. para. 17 of the judgment dated 21st June, 2013). When the matter was before the Court on 12th July, 2013, the issue of the claim for indemnity and contribution against Mr. Bond was adjourned to 24th July, 2013 and on that date it was further adjourned to 10th October, 2013.

3. As regards the issue of costs, the Court heard the submissions of the parties on 12th July, 2013 and this judgment is based on those submissions.

4. In my judgment of 21st June, 2013, I made a general observation that I found it difficult to understand why the parties could not have settled the outstanding issues between them and avoided the costs of the proceedings (para. 103). That observation was made against the background of the action having been at hearing for seven days.

5. On the issue of costs, it was not in dispute between the parties that this is a case in which the "normal rule", namely, that costs follow the event, should apply. However, it was submitted on behalf of these defendants that the costs should be limited to the costs of a one or two days' hearing. It was also submitted on behalf of these defendants that the order for costs should be made against the first defendant only, whereas counsel for the plaintiff submitted that the order for costs should be made against the first defendant and Mr. O'Sullivan jointly and severally.

6. In support of his submission that costs should be limited, counsel for these defendants referred to the tabulation of the money element of the plaintiff's claim in the judgment (para. 23) and of the defendants' counterclaim (para. 41). The aggregate sum claimed by the plaintiff under the three headings itemised in the table in para. 23 was €1,166,520. The defendants' position, as set out in the table, was that it could only have liability for €184,394. In fact, the Court awarded damages of €183,157 to the plaintiff. However, the reality of the situation as outlined in the judgment (para. 24) was that the defendants' ultimate position was that it did not owe any of the sums claimed by the plaintiff on the basis of the legal arguments which were advanced.

7. On the other hand, counsel for the plaintiff, in essence, invited the Court to ignore the fact that the Court had held that the plaintiff was not entitled to recover any sum in respect of item 2 of its claim (Schedule E of the 2011 Agreement), on the basis that the Court had recorded that that element of the plaintiff's claim arose out of an attempt to mitigate the plaintiff's loss (para. 32 of the judgment). Further, in essence, the Court was invited by counsel for the plaintiff to ignore the fact that as regards item 3 of the claim (sales compensation/rebates) the Court disallowed the claim in respect of claims post the 2011 Agreement, which amounted to €776,000, on the basis that the Court had recorded that that element of its claim was a "fall-back" position (para. 38). I do not think that any weight should be attached to either of those arguments, because, in reality, the plaintiff lost on both elements of the claim. On the contrary, some weight has to be attached to the fact that the plaintiff lost on those elements, because, both as regards evidence and the legal issues raised, the duration of the hearing was extended by reason of the unsustainable claims made by the plaintiff, one of which (the claim for €776,000) was characterised as being "utterly absurd" in the overall scheme of things in the judgment (para. 10).

8. The amount recoverable by the plaintiff on its claim was reduced by €68,206 on the basis of the amounts found due by the plaintiff to these defendants on foot of their counterclaim, although that figure represented less than one third of the amount for which the defendants counterclaimed (€228,241). Aside from that, the Court dismissed these defendants' counterclaim for general damages for breach of contract.

9. Counsel for the plaintiff submitted that the length of the case was not attributable to the plaintiff's conduct but rather to the range of defences pursued by the defendants. Given that addressing the range of legal issues raised by way of defence by these defendants to the claim against them for breach of contract (for example, alleged breach of competition law, alleged material non-disclosure, alleged unenforceability due to uncertainty, and alleged automatic termination by default) ranged over eighteen pages of

the judgment, I think it is not incorrect to find that the duration of the hearing of the action was largely attributable to the defence of the claim against them by these defendants.

10. Apart from the remedy in damages, the plaintiff was also granted permanent injunctive relief, the defence advanced by these defendants that the plaintiff had not come to court with clean hands having been rejected.

11. The claim against Mr. O'Sullivan in the proceedings was against him in his status as a guarantor of the obligations of the first defendant to the plaintiff under the 2009 Agreement. Again, the fact that the Court addressed the defences raised by Mr. O'Sullivan to the claim against him as guarantor over thirteen pages in the judgment indicates the range and intensity of the submissions made on behalf of Mr. O'Sullivan in the defence of the claim against him as guarantor. While, having found against Mr. O'Sullivan, the only relief granted by the Court to the plaintiff was a declaration that Mr. O'Sullivan has not been discharged as guarantor under the 2009 Agreement on any of the grounds alleged by him, it is important to emphasise the basis for that limited relief. In the judgment (para. 99), it was stated that the Court was satisfied that Mr. O'Sullivan remains secondarily liable for the indebtedness of the first defendant to the plaintiff, which, as I have outlined, was determined at €114,951. His liability is a secondary liability and it exists only to the extent that the first defendant does not discharge its liability to the plaintiff. Accordingly, the submission made by counsel for the defendants that the Court should have regard to the fact that no finding was made in relation to money due by Mr. O'Sullivan to the plaintiff in the case, which, it was asserted was a case "about money", is wholly without merit.

12. Counsel for the parties did not refer to any of the recent jurisprudence on the application of the rule that costs follow the event and, in particular, to the developing jurisprudence on cases in which multiple issues are raised, which is helpfully outlined in Delany and McGrath on *Civil Procedures in the Superior Courts* (3rd Ed.) at para. 23 – 02 *et seq*. That being the case, I do not propose to analyse the recent jurisprudence. However, I consider that it is useful to recall that, even though the traditional approach of the courts, as outlined in Delany and McGrath at para. 23 – 05, was that, in applying the rule that costs follow the event, the event was defined in terms of which party has won the case and not individual issues and, although it was open to the Court to do so, it generally refrained from awarding costs according to the relative success of the parties. As support for the proposition that it was open to the Court to do so, the authors refer to the following dictum of McCracken J., with whom the other Judges of the Supreme Court agreed, in *Mangan v. Independent Newspapers (Ireland) Limited* [2003 1 I.R. 442 (at p. 446):

> "It is not uncommon for a trial judge to limit the costs to a specified number of days for reasons to do with the conduct of the trial, or because the successful party may have failed on certain issues."

13. There is absolutely no doubt but that the plaintiff won the case and that the plaintiff is entitled to its costs. The question which has to be addressed is whether, as counsel for these defendants submitted, the costs should be limited to a specified number of days and, if so, how many days. Taking an overview of the matter, I am satisfied that fairness and justice dictates that there should be some limit imposed, but not the limit of one day or two days' costs as submitted on behalf of the defendants. For a number of reasons, I consider that it is appropriate to limit costs to which the plaintiff is overall entitled to four days costs. First, the proceedings related to a commercial transaction between the parties and to a business context in which one would expect the central players to adopt a sensible businesslike approach, which did not occur on either side. Secondly, the plaintiff pursued a monetary claim for a sum in excess of €1m, but recovered less that one tenth of the sum claimed. Thirdly, while the defendants advanced a wide range of defences none of which succeeded, the rigorous basis on which the defendants defended the claim is to some extent justifiable because of the egregiously inflated nature of the plaintiff's claim.

14. A more difficult question is which of these defendants should be made liable for the plaintiff's costs and on what basis. As I have already recorded, it was submitted on behalf of the plaintiff that the first defendant and Mr. O'Sullivan should be jointly and severally liable for all of the costs of the plaintiff. In support of that proposition it was submitted that Mr. O'Sullivan was in control of the first defendant and that he participated actively in the trial of the action. That argument, in my view, is wholly misconceived: the first defendant and Mr. O'Sullivan are distinct and separate legal entities. The plaintiff's contractual relationship was with the first defendant. The plaintiff joined Mr. O'Sullivan in these proceedings and sought relief against him on the basis that he was secondarily liable for the liability of the first defendant to the plaintiff on foot of the guarantee. The outcome was that Mr. O'Sullivan was held to be liable on foot of the guarantee, although the Court was not in a position to quantify in money terms what might ultimately be Mr. O'Sullivan's liability, if any. In the circumstances, Mr. O'Sullivan must bear so much of the costs as relate to the defence of the claim under the guarantee. While it is difficult to be precise on this point, I estimate that, if the claim on the guarantee against Mr. O'Sullivan had been omitted, the hearing should have been shorter by one day. Accordingly, I consider that it is appropriate that Mr. O'Sullivan should be jointly and severally liable with the first defendant for costs, as outlined at para. 16 below.

15. For completeness, it should be recorded that the fourth defendant was almost completely peripheral to the issues in the proceedings. As I understand it, the plaintiff did not seek costs against the fourth defendant and, in any event, I see no basis on which costs could be awarded against the fourth defendant.

16. There will be an order that the plaintiff is awarded the costs of the proceedings against the first defendant, the costs to be taxed in default of agreement and the costs to be limited to four hearing days. The order shall provide that as regards the costs of prosecuting the plaintiff's claim on the guarantee against Mr. O'Sullivan, but limited to one hearing day, Mr. O'Sullivan is to be jointly and severally liable with the first defendant.

17. The Court was informed on 12th July, 2013 that Mr. O'Sullivan may appeal to the Supreme Court the decision of the Court against him on the claim on foot of the guarantee and in that event Mr. O'Sullivan will be seeking a stay. I think it would be appropriate to grant such a stay.