Neutral Citation Number: [2010] IEHC 279

THE HIGH COURT

COMMERCIAL

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BETWEEN

FIONA MCALEENAN

PLAINTIFF

AND

AIG (EUROPE) LIMITED

DEFENDANT

JUDGMENT ON COSTS of Ms. Justice Finlay Geoghegan delivered on the 16th day of July, 2010

1. On 6th May, 2010, I gave judgment in the above entitled proceedings and dismissed the plaintiff's claim against the defendant.

2. The defendant now applies for its costs against the plaintiff. Counsel, on its behalf, submits that it should be entitled to a full order for costs.

3. Counsel for the plaintiff submits that the plaintiff was successful on three significant issues, namely, (1) (2) and (3) in the summary of findings and conclusions at para. 129 of my judgment, and that these were issues of fact and law arising by reason of defences raised by the defendant which greatly increased both the complexity of the proceedings and the time taken at the hearing. The primary submission of counsel for the plaintiff was that those issues increased the complexity of the proceedings and took up the preponderance of the time at the hearing and, in such circumstances, he asks the court to make no order as to costs.

Applicable principles

4. The parties are in agreement that O. 99 of the Rules of the Superior Courts applies and, of particular relevance, are O. 99, r. 1(1) and (4) which provide:

> "I. Right to costs.
>
> 1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
>
> (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
>
> ....
>
> (4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

5. Counsel for the defendant submits that the starting point of any consideration by the Court of the exercise of its discretion should be that costs should "follow the event" and that the relevant event is that the defendant has succeeded as the plaintiff's claim has been dismissed. He also submits, in accordance with the Supreme Court decision in *Grimes v. Punchestown Developments Company Ltd*. [2002] 4 I.R. 515, that the burden is on the plaintiff to show that the order for costs should not follow the general rule that the successful party be granted a full order for costs. These two propositions are not disputed by counsel for the plaintiff.

6. The primary submission of counsel for the plaintiff is that as the major part of the case was devoted to the issues upon which the plaintiff was successful, there should, on the particular facts of this case, be no order as to costs. Further, that it is consistent with the approach of the Court to litigation in the Commercial List that if, as on the facts of this case, a defendant determines to raise and pursue multiple issues by way of defence and is unsuccessful on a number of the issues, that its success in defending the proceedings by winning on one or more issues should not necessarily mean that its win carries the costs of both parties litigating the issues on which it was unsuccessful. Whilst he was not able to point to any particular authority on the point, his submission was that the Court should look at the issues upon which the plaintiff and defendant had succeeded and their contribution to the overall time and complexity of the litigation which, on the particular facts of this case, he submitted, made no order as to costs the appropriate order.

7. In response, counsel for the defendant sought to draw a distinction in principle between cases where the losing party in proceedings might win an issue or issues which would give rise to either partial relief for him or a reduction in the relief being sought by the other party and those, such as the present case, where the losing party might win on a number of discrete issues, but not obtain any relief in the proceedings. Counsel did not refer to any authority for this proposition. There does not appear to me to be any such general principle and that any such principle would be contrary to the decision of the Supreme Court in *Dunne v. The Minister for the Environment* [2008] 2 I.R. 775, and in particular, to the judgment of Murray C.J. (Denham J., Hardiman J., Geoghegan J. and Kearns J. concurring) where, at paras. 27-28, he stated:

"27. Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue.

28 Accordingly, any departure from the general rule is one which must be decided by a court in the circumstances of each case. In *Curtin v. Dáil Éireann* [2006] IESC 27, (Unreported, Supreme Court, 6th April, 2006) this court stated:-

> 'The general rule is that costs follow the event subject to the court having a discretion, for a special reason, to make a different order. It is a discretion to be exercised in the circumstances and context of each case and is one which is so exercised from time to time.
>
> Counsel for all parties referred to previous decisions of this court and the High Court, in which a discretion was exercised to make an order concerning costs which did not follow the general rule. It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are to be made to the general rule. For the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions of such a question are always of limited value.'"

8. Counsel for the plaintiff is, in my view, correct that it is in accordance with the approach of the Court in litigation in the Commercial List that on an application for costs by a successful party in complex litigation, if the other party has been successful on a number of issues which have contributed to the overall complexity and length of the litigation, the Court should consider, in the exercise of its discretion, the appropriate order for costs. The starting point of any consideration will be the successful party's *prima facie* entitlement to an order for costs and the burden will be on the losing party to satisfy the Court that, on the particular facts of the case, there are factors which, warrant a departure from a simple order for costs in favour of the successful party. This appears to me consistent with the decision of the Supreme Court in *Dunne v. The Minister for the Environment* and the approach of Clarke J. in the Commercial List in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81.

9. The defendant decided to pursue, as part of its defence, that the plaintiff was a partner of Mr. Lynn; that the Policy was a joint policy; and that even if it was a composite policy, the defendant was entitled to avoid the policy as against the plaintiff by reason of the alleged fraudulent non-disclosure of Mr. Lynn. It was unsuccessful on all three issues. I am satisfied that those issues added significantly to the evidence adduced; to the extent of the legal submissions and to the length of time of the hearing of the case. As the plaintiff succeeded on those issues, it appears to me that it would be unjust, on the facts of this case, if the defendant were to recover from the plaintiff its costs of unsuccessfully pursuing these issues. Further, it appears to me that any order for costs must take into account the fact that the plaintiff incurred additional costs in relation to her claim by reason of the defendant unsuccessfully pursuing these issues as part of its defence.

10. The submission of counsel for the plaintiff is that these issues took up the major part of the hearing time. Counsel for the defendant disputes this. He submits that of the nine days of hearing, approximately three days were spent in submissions and six in evidence and submits that much of the factual evidence would have had to be given for the issues upon which the defendant was successful.

11. In reaching my decision on costs, I have concluded that the issues upon which the plaintiff was successful contributed very significantly to the overall complexity, and, in particular, to the legal issues in the proceedings and did significantly increase the overall length of time of the hearing. I have also taken into account that there were residual issues, in particular, in relation to alleged non-disclosure of potential claims arising out of multiple undertakings which had been given, upon which I did not reach a conclusion. Having regard to the complexity of the proceedings, the fact that evidence given did not always relate only to one issue, and that certain issues were not decided I consider that it would not be appropriate to make separate orders in favour of the plaintiff and the defendant on different issues, but rather that I should form a view as to the probable percentage contribution of the issues upon which the plaintiff was successful to the overall cost of the proceedings, and offset the plaintiff's entitlement to an order in her favour for such percentage of the costs against an order for the balance of the costs to which the successful defendant is entitled against the plaintiff.

12. I have concluded that the issues upon which the plaintiff succeeded, as a matter of probability, contributed as to 40% to the overall complexity and length of these proceedings and, accordingly, to the cost of the proceedings. In such circumstances, in accordance with the approach set out above I have decided that the defendant should not be entitled to recover 40% of the costs from the plaintiff (or put positively only entitled to recover 60% of the costs) and the plaintiff should be entitled by way of offset to recover 40% of the costs from the defendant.

13. In the exercise of my discretion, for the reasons stated I will make one order for costs in favour of the defendant against the plaintiff for 20% of the costs of the proceedings, such costs to be taxed in default of agreement.