

THE HIGH COURT

COMMERCIAL

[2015 No. 3905 P.]

BETWEEN

NUTRIMEDICAL B.V.

AND BY ORDER

AYMES INTERNATIONAL LIMITED

PLAINTIFFS

AND

NUALTRA LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 7th day of July, 2016

1. This is an application brought by the defendant to expel these proceedings from the commercial list of the High Court pursuant to the inherent jurisdiction of the court. The application also seeks various costs orders; however, these orders are no longer sought as they have been disposed of in the settlement of the counterclaim which was delivered by the defendant with the defence on 28th September, 2015.

2. The proceedings are brought in respect of an alleged trademark infringement whereby the plaintiffs seek injunctions, damages and other ancillary relief. In the counterclaim, the defendant claims damages for unlawful interference with the trade or business of the defendant and aggravated and/or exemplary and/or punitive damages against the second named plaintiff arising out of a "poison pen" letter concerning a product made by the defendant and a malicious telephone call from an individual purporting to be from the Clinical Commissioning Group – East of England Division – of the National Health Service in the United Kingdom. The second named plaintiff has admitted to being responsible for the forged "poison pen" letter which purported to come from the NHS and furthermore that the malicious telephone call was made by a person connected with the second named plaintiff. These matters are referred to in *Nutraceutical B.V. and Anor. v. Nualtra Ltd.* [2016] IEHC 261 at Part 2 thereof, entitled "Some Peculiar Behaviour" wherein Barrett J. gave judgment on a discovery application.

3. In the meantime, the plaintiffs have settled the defendant's counterclaim and the settlement includes the costs associated with that counterclaim. To that extent, the conduct of the second named plaintiff concerning these matters is no longer in issue save insofar as it may affect the credibility of the plaintiffs on any issues that may arise in prosecuting their claim.

4. On any view of the matter, the conduct of the second named plaintiff was reprehensible and it now forms the basis of the application before the court to remove the case from the commercial list.

5. The court's attention has been drawn to the judgment of Kelly J. in *P.J. Carroll & Co. Limited v. Minister for Health (No. 2)* [2005] 3 I.R. 457, where the learned judge discussed the jurisdiction of the court to transfer a case out of the commercial list. At paras. 46-48 he said as follows:-

"The defendants accept that there is no express provision of O. 63(A) of the Rules of the Superior Courts 1986 which permits the court to make an order of the type sought. They therefore place reliance upon the inherent jurisdiction of the court.

The absence of an express jurisdiction conferred by Order 63(A) of the Rules of the Superior Courts 1986 suggests that the Superior Court Rules Committee never envisaged an application of this sort. It clearly anticipated that once a case entered into the list it would remain there until completed. If a party is dissatisfied with an order transferring a case into the commercial list it can appeal. In the absence of a successful appeal however the rules committee seems to envisage that once in the list the case should remain there.

The plaintiffs accept however that there is an inherent jurisdiction which would enable the court to make an order of the type sought in an appropriate case. In making that concession I believe the plaintiffs are correct."

6. The judgment of Kelly J. suggests that the default position is that, once a case is admitted into the commercial list, it should stay there unless there is an appeal against the order transferring it into that list. Nevertheless, there is a residual discretion in the court to transfer the proceedings out of the commercial list in exceptional circumstances.

7. There is no doubt that the matters complained of by the defendant in these proceedings and raised in the counterclaim amount to circumstances which are both disturbing and unusual and could certainly be described as "exceptional". To that extent the court can exercise its discretion in deciding whether or not to transfer the case out of the commercial list. It is accepted by everyone that the lawyers acting on behalf of the plaintiffs were not, in any way, complicit in the disreputable conduct already referred to and are blameless in the matter.

8. On its face, the proceedings are "commercial proceedings" coming within the scope of O. 63A, r. 1(e) of the Rules of the Superior Courts and were so admitted. The underlying trademark infringement dispute still remains. The conduct complained of by the defendant in this application formed the basis of the counterclaim which has since been settled both as to damages and costs.

Counsel for the plaintiffs relies on the observation of Hamilton C.J. in *Mercantile Credit Company of Ireland v. Heelan* [1998] 1 I.R. 81, where Hamilton C.J. said at p. 85:-

"The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

9. In *Lough Neagh Exploration Limited v. Morrice* [1999] 4 I.R. 515 at 523, O'Sullivan J. adopted those remarks in the context of a failure to provide security for costs as directed by the court and said that the powers given to the court for the purpose of ensuring compliance with the rules should be used for that purpose and not to punish a party that is not in compliance with a court order.

10. I accept the contention made by counsel for the defendant that nobody on behalf of the plaintiffs has explained the conduct of the second named plaintiff. While that is so, and may be a matter of legitimate comment and may give rise to a credibility issue at the substantive hearing, the matters complained of in this application have now been disposed of in the settlement of the counterclaim.

11. Counsel for the defendant drew the court's attention to the fact that in a statement of truth delivered by the second named plaintiff in the within proceedings in proceedings before the High Court of England and Wales, it maintained that it was a "*very small player in a large market*" whereas in the Irish proceedings it pleads that it is a big player in the market. Is that a ground for transferring the proceedings out of the commercial list? I do not think so, although it may again give rise to issues regarding the credibility of the plaintiffs.

12. Counsel for the plaintiffs has informed the court that they have complied with all directions given to date since these proceedings have been admitted into the commercial list and that the court should have regard to this in considering whether to exercise its discretion upon any application to transfer proceedings out of the commercial list.

13. The court has been told that one related proceeding has been stayed pending this action and that, in another High Court proceeding, an application to enter the matter into the commercial list has been adjourned pending the outcome of this application. The only steps that remain to be taken in these proceedings are the discovery as ordered by Barrett J. in his judgment of 26th May, 2016, an exchange of witness statements and submissions and the fixing of a trial date.

14. If the matter is taken out of this list and transferred to the chancery list, it will not get on for some time and this may have a knock on effect on the other proceedings which I have referred to above.

15. Having regard to the fact that the conduct of the plaintiffs, giving rise to this application, was in large part the basis of the counterclaim and furthermore, on the basis that that counterclaim and the associated costs issue have now been settled, no useful purpose can be served by transferring this case out of the commercial list. I have reached this conclusion for four reasons:-

- (i) on its face, the proceedings are commercial proceedings coming within the scope of O. 63A, r. 1;
- (ii) the inherent jurisdiction of the court to transfer the case is one which should not be used to punish an offending party but to ensure compliance with the rules and any directions given;
- (iii) the plaintiffs have complied with all directions given since this matter was admitted to the commercial list; and,
- (iv) the issue giving rise to this motion has been settled and is no longer a live issue in the proceedings.

16. In the exercise of my discretion I refuse the application to transfer this case out of the commercial list.