Neutral Citation [2016] IEHC 686

THE HIGH COURT

[2008 No. 732 P]

BETWEEN

WILLIAM CONNOLLY AND SONS LIMITED TRADING AS CONNOLLY'S RED MILLS

PLAINTIFF

AND

TORC GRAIN AND FEED LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 28th day of November, 2016

1. This action came on for hearing before the court on 23rd November, 2016. The plaintiffs claim is for damages for breach of duty, misrepresentation, negligence, breach of statutory duty and breach of contract.

2. The plaintiff was at the institution of these proceedings a limited liability company but since 24th February, 2009 is registered as an unlimited liability company. The plaintiff produces supplies and distributes food stuffs for the horse racing industry.

3. The defendant according to the statement of claim was at all material times the importer, supplier and distributor of ground nut and related products for use in the production of horse feed and in particular had supplied the plaintiff with horse feed materials since 1980. At the end of September, 2002 the plaintiff agreed to purchase 400 tonnes of ground nut from the defendant for an agreed sum. It was agreed in writing between the parties in February, 2002 that the said product would be of a certain quality and fitness.

4. After the delivery of the first load of consignment of ground nut the defendant phoned the plaintiff advising that the results of the official tests were available, and indicated that the ground nut was in breach of an agreement between the parties. The ground nut contained Elfatoxin B1 to a level that it nearly exceeded the EU limit and due to the poor quality of the product the plaintiff did not accept any further deliveries from the 400 tonnes of ground nut which had been shipped to New Ross. The plaintiff claims that the ground nut consignment supplied by the defendant contained significant quantities of morphine. The plaintiff's clients sustained severe loss, damage, inconvenience, expense and loss of reputation as a result.

5. The plaintiff used the defendant's product for the production of horse feed which had been sold on to the horse racing industry, as a result of which a number of race horses tested positive for the banned, illegal and prohibited substance morphine during late November, 2002 and early December, 2002. Horses were disqualified and prize money was lost. Plaintiffs engaged P.R. consultants to address the resulting very high profile crisis caused to the plaintiff's business and reputation. Further, the plaintiff lost a number of customers as a result of the contamination with morphine. The plaintiff had to assign a number of its employees to work on the illegal substance contamination problem which had caused additional financial loss. The plaintiff sought a recall of the product and race horse trainers had to be notified. Following on from a notice for particulars from the defendant solicitor, the defence was delivered on 13th July, 2011 by solicitors on behalf of the defendant. The following preliminary objections were raised in the defence:

> (a) The plaintiff had been guilty of inordinate and unconscionable delay in the commencement of the proceedings and secondly the defendant has suffered irreparable prejudice by reason of the plaintiff to keep safe and available by the defendants the ground nut allegedly purchased by the plaintiff from the defendant. The defendant also denied that it was the importer, supplier and distributor of ground nut and related products for use and the production of horse feed.
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> (b) The defendant also denied that it knew or it was informed by the plaintiff that the products supplied by the defendant were ever intended for use by race horses.
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> (c) The products supplied by the defendant to the plaintiff did not contain the banned illegal substance.
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> (d) The defendant was not guilty of the said or any breach of contract.

6. In opening the case, counsel for the plaintiff having outlined the statement of claim and the defence, he then referred to correspondence which his solicitor had received on 16th November, 2016 one week before the trial was due to commence. The relevant portion of this letter states "with regard to the recent updated particulars of special damaged furnished, we would repeat that same are irrecoverable, particularly in light of the terms and conditions of the contract upon which the plaintiff sues". This appears to the Court to be the first mention of the terms of the contract which would make the special damages irrecoverable, and this was not contradicted by the defendant/

7. Accompanying that letter was a copy of a sales invoice dated 22nd October, 2002 in the sum of €4574.05 in respect of 29510 tonnes of ground nut and also a contract dated 22nd October, 2002 which referred to the said ground nut. The conditions of sale included the following statement "goods are sold subject to the special conditions printed overleaf". The relevant condition on the printed sheet is para. 4 "the seller accepts no liability whatsoever for indirect or consequential loss, injury, damage or expenses of any kind howsoever caused arising out of or contracted with the subject matter of the sales contract".

8. Counsel on behalf of the plaintiff stated that the terms of this contract should have been pleaded in the defence and he said he would object to any cross-examination on this basis.

9. Counsel for the defendant said this contract governs the terms under which the 29.5 tonnes were supplied to the plaintiff in 2002. It was always the defendant's assumption that the plaintiff had myriad copies of this contract. The defendant's primary position is that they are not in breach of contract. He said he would like to put in the particulars by way of defence, but said he did not think it changed the shape of the case in any shape or form. He noted that when the defence sent the letter with the contract (a week before the hearing of the action), it did not come back with violent correspondence highlighting that the defence had not pleaded this limited liability clause. He referred to the correspondence sent from the plaintiff's solicitor to the defendant's solicitor saying that the plaintiff never got a written contract. Whether there was an oral or written contract is a matter for evidence. He said "what is at issue now is whether counsel for the plaintiff is suitably apprised of the defence and a central issue is whether the plaintiff has suffered irrecoverable loss." He quoted O. 28, r. 12 that amendments should be permitted to allow the Court to arrive at issues that are germane between the parties.

10. In response, counsel on behalf of the plaintiff said that the defendants had indicated that this clause is a very important part of their case, in fact an essential part of the defence case as far damages are concerned. Counsel for the defendant had still not given an explanation as to why, if this is so important, it was not in the defence from the very start and the plaintiffs were apprised of this particular issue at a week prior to the trial. He said that the courts have allowed amendments to a defence right up to the date of trial but there has to be some consequence for dropping something so late in the trial and the Court should consider what the penalty should be. He suggested at this late stage the Court should consider making an order for costs against the defendant up to and including the start of the trial. Counsel for the plaintiff said it changed the context of the case significantly and that the defendants were trying to obliterate with one paragraph a massive portion of his claim for damages. In response, counsel for the defendant asked how the plaintiff had been disadvantaged by this clause being omitted.

11. This Court asked counsel for the defendant was he asking the Court to give leave to amend. Counsel said that he would apply if counsel for the plaintiff wanted to plead it formally.

12. Counsel for the plaintiff said it did not matter if he knew about this clause existing, the point he makes is that he did not know the clause was being relied upon. A significant amount of the preparatory work may have been a complete waste of his client's time and money- if someone comes in on the day of the hearing looking for an amendment of a defence then some penalty has to be paid by the defendant.

13. In accordance with O. 28, r. 12 the Court will in this case permit the defendants to amend their defence by including references to this term of the contract.

14. It also is clear to the Court that the plaintiffs are entitled to be given some time if they wished to take that time to prepare a response to that amendment by way of amending their statement of claim. It is not the role of the Court to advise on proofs but it certainly seems that the issue of fundamental breach of contract must arise. The Court will give the plaintiff 4 weeks with which to amend their statement of claim and the Court will give a further 3 weeks to the defence to reply to same. The Court will make that order provided the plaintiff wishes for this time, if not then the Court will proceed to hear the case, now that the amended defence has been lodged.

Wasted Costs Order

15. The plaintiff seeks an order for costs of the action to date having regard to the lateness of the application and the fundamental nature of the issues relating to para. 4 of the contract.

16. Counsel for the defence submits that the amendment of the defence was limited in its application to the case. It is a quantum issue and does impinge on the first issue of liability. The amendment only has relevance if the plaintiff succeeds in proving that the consignment of ground nut which it purchased was contaminated with traces of morphine. The quantum issue is essentially based on the schedule of losses in the statement of claim which are specific sums which the plaintiff asserts were incurred as a result of the disqualification of the horses. No extra legal costs have been incurred as a result of the amendment. It relates to a legal argument as to the interpretation of the terms of the written document. This issue will be addressed at the conclusion of the evidence. He also states that the plaintiff did not seek any relief from the Court consequent to the amending of the proceedings such as an adjournment to reappraise or prepare the case or call additional evidence.

17. Counsel for the defendant stated that the term "costs thrown away" is quite particular. It is a penalty provision. The term covers all the costs incurred as of the trial date. It is a draconian measure and in his experience, it is very rarely imposed, save in specific circumstances such as a fundamental and comprehensive amendment of the pleadings. The usual order for costs is "costs of the day" which allows the effected party to recover witness expenses resulting from the loss of a day at hearing and he quoted *Wolfe v. Wolfe* [2001] 1 I.R. 313. He also referred to *Aer Rianta v. Walsh Western* [1997] 2 I.L.R.M. 45 a majority judgment which approved the principle of law "the object of the courts is to decide the rights of the parties, not to punish them for mistakes they made in the conduct of their cases… courts do not exist for the sake of discipline but for the sake of deciding matters in controversy".

18. Counsel on behalf of the plaintiff submitted the judgment of Herbert J. in *Wolfe v. Wolfe* and also the decision of Clarke J. in *Porterridge Trading Limited v. First Active plc. & Ors.* [2008] IEHC 42.

19. The most helpful authority provided to the Court was that of *Porterridge Trading Limited v. First Active plc. & Ors.* [2008] IEHC 42. Clarke J. set out the issues in relation to the costs of the motion to amend the proceedings. He set out 3 headings:

> (a) the costs of the application to amend;
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> (b) the consequential lost costs of the amendments sought in the solicitor's letters; and,
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> (c) the costs thrown away.

20. Clarke J. in para. 6.1 of his judgment stated:-

> *"The relevant sequence of events needs to be noted. The case had been listed for hearing. There were some difficulties about the precise starting date having regard to what was said to be outstanding interlocutory issues. It was also intimated that Counsel on behalf of Porterridge might have a difficulty with a revised starting date which was proposed."*

Clarke J. specified the costs under the thrown away category are costs which have been thrown away by the very belated application for an adjournment at a time when those issues were ready for trial.

21. This case has been listed for hearing and a week beforehand an application was made to raise the issue of para. 4 of the contract. This case involves a very important issue which arises in the context of the highly regarded industry in Ireland of horse racing and horse breeding. And it is at this last minute that the defendants wish to amend its defence.

22. Counsel for the plaintiff says that the costs thrown away by virtue of being at such a high state of readiness for an anticipated trial ought to be awarded against the defendants by reason of the late nature of the application to amend. Against this, counsel for the defendants said the issues which will go to trial will still remain for decision. However in these circumstances and having regard to the important issues arising in this trial, and having regard to the significant contribution of the horse racing industry to the economy of Ireland it appears to the Court that costs should be awarded to the plaintiff against the defendant from the letter written by Frances X. Burke & Co., Solicitors, dated 16th November, 2016 to the starting of the action, costs to be taxed in default of agreement.

23. The Court notes the amended defence and now gives an opportunity to the prosecution to indicate whether or not they wish to have some time to consider their response.