Neutral Citation: [2015] IEHC 51

HIGH COURT

COMMERCIAL

[2014 No. 61 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO THE EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES (FRAMEWORK) REGULATIONS 2011 (SI No. 333 OF 2011) AND IN THE MATTER OF COMMUNICATIONS REGULATIONS ACTS 2002 TO 2011

BETWEEN

EIRCOM LIMITED

APPELLANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

AND BY ORDER OF THE COURT

VODAFONE IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Cregan delivered the 13th day of January, 2015

Introduction

1. This is an application by the notice party (Vodafone) seeking its costs against Eircom Limited in these proceedings. The proceedings have been settled by agreement between Eircom Limited ("Eircom") and the Commission for Communications Regulation ("ComReg").

2. The notice party is seeking its costs against Eircom only and not against Eircom and Comreg.

Background

3. In these proceedings Eircom brought an appeal against the Comreg decision dated 9th January, 2014 entitled "Assessement of Eircom's Universal Service Fund Application for 2009-2010 ("the decision").

4. In its originating notice of motion Eircom sought the following reliefs:

> 1. An order setting aside the respondent's decision of 9th January, 2014 insofar as it refused Eircom's request for funding of the positive net cost of its universal service obligations.
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> 2. A declaration that the positive net cost of Eircom's universal service obligations constituted an "unfair burden" within the meaning of article 13 of Directive 2002/22 EC on universal service and users rights relating to electronic communications networks and services.
>
> 3. An order directing Comreg to establish a "sharing mechanism" pursuant to regulation 12 (2) of the European Communities (Electronic Communications Networks and Services) Universal Service and Users Rights (Regulations SI 337 of 2011)
>
> 4. Alternatively an order remitting the appellant's universal service fund application for the year 2009-2010 to the respondents for consideration in accordance with the directions of the court.

5. By notice of motion dated 26th February, 2014 the notice party brought an application seeking an order that it be made a notice party to the proceedings. That application was not opposed by either Eircom or Comreg but, it was submitted by Eircom, that Eircom was careful to indicate to the court at that time that as far as Eircom was concerned Vodafone's participation in the proceedings would be at its own cost. By order dated 3rd March, 2014 Vodafone was joined as a notice party to the appeal proceedings.

6. The full case was at hearing before the High Court for two weeks in July 2014 and it almost certainly would have required a further two weeks to complete. The underlying facts in the case and the regulatory regime in the telecommunications industry are complex. In addition the legal issues raised in the appeal were complex. A significant number of expert reports on affidavit were furnished to the court. In addition numerous affidavits and voluminous exhibits also formed part of the application and were opened extensively during the course of the hearing.

7. On or about 21st October, 2014 the proceedings were settled between Eircom and Comreg. The terms of the settlement were reduced to writing and were produced to the court. It is not necessary to set out the terms of the settlement in full. However some of the elements of the settlement were that:

> (a) Eircom would withdraw its appeal;
>
> (b) The parties would bear their own costs in connection with the appeal;
>
> (c) The parties agreed that the respective positions of each party adopted in the course of this funding appeal would be

preserved for the purpose of any appeal from a future decision of Comreg concerning an application by Eircom for USO funding and that neither party would be estopped from relying on any of the grounds raised in the current appeal. In particular Comreg agreed that it would not rely on the withdrawal of the appeal in this case (on agreed terms) to assert in any future challenge to a Comreg decision that Eircom was in any way estopped from raising the same grounds in any future challenge relied upon by Eircom.

8. On 4th November, 2014 Eircom wrote to the notice party to say that it had agreed with Comreg to strike out its appeal and that Eircom and Comreg were agreed that no order would be made as to their respective costs. The notice party submitted that no agreement had been reached with it in respect of its costs and that it had not been privy to any discussions between Eircom and Comreg and had not made any concession in relation to its costs arising from the proceedings.

Submissions of the parties.
9. The notice party is seeking an order for costs against Eircom primarily on the grounds that Eircom, as part of the settlement terms, agreed to withdraw the appeal and that therefore the decision of ComReg still stands.

10. Vodafone also submitted that it sought to be joined to this proceedings on the primary but not exclusive basis that it was "vitally interested" in the third relief of Eircom's notice of motion (i.e. an order directing the establishment of a sharing mechanism in respect of the cost of providing the universal service obligation in Ireland). It submitted that if this relief was granted it would have a detrimental effect on Vodafone and could impose a financial burden upon it. Vodafone submitted that it could not simply depend on Comreg to defend the decision in the expectation that, should the appeal be successful, Vodafone would enjoy a further right to be consulted in relation to any sharing mechanism which Comreg might be required to consider. Thus Vodafone submitted that the nature of the relief sought by Eircom meant that Vodafone's interests could be adversely effected by the outcome and that its interests and those of Comreg might not necessarily be identical.

11. Vodafone also submitted that, in considering whether to apply to be joined as a notice party, it was mindful that in a previous case - *Vodafone Ireland Limited v. Comreg* (2012/465 MCA) Cooke J. (in an *ex tempore* ruling on 30th September, 2013) had held that it was not appropriate to allow third party operators make submissions in relation to remedies in circumstances where they had not availed of an earlier opportunity to be joined as notice parties to proceedings challenging the relevant decision.

12. Vodafone also sought to place some emphasis on the fact that on days 2 and 4 of the hearing, Eircom indicated that - although it was not abandoning the third relief in its notice of motion - it recognised it might be unlikely to obtain such a relief and that at the close of day 4 Eircom indicated that reliefs 2 and 3 might be "left behind" and that a successful challenge could result in a remittal to Comreg. However in my view that was by no means a concluded view on the part of Eircom and Vodafone accept that the relief was never formally abandoned.

13. In opposing the application, Eircom submits that the appeal centred on two major issues. These were:

> (a) The allegation that Comreg had failed to correctly calculate the positive net cost to Eircom of its universal service obligations and
>
> (b) The allegation that Comreg had erred in the manner in which it assessed whether the acknowledged burden imposed on Eircom was in fact "unfair". (This is set out at para. 1 of the notice of motion.)

14. By contrast Eircom submitted that the third issue on the notice of motion i.e. whether the court might direct the establishment of a sharing mechanism was not central to the dispute between the parties. Eircom also submitted that it was clear, even on Vodafone's own case, that the primary basis why Vodafone sought to be joined as a third party was because of the possibility that the court might direct the establishment of a sharing mechanism to which Vodafone might ultimately be required to contribute. In my view that is a fair assessment of the central issue in the case. The issues that Vodafone were concerned about, whilst important, were not central to the dispute.

15. Eircom also argued that Vodafone made submissions in support of both sides on different issues. These were:

> (a) The issues of prematurity, ripeness for review and the right to an effective appeal. (On these issues Vodafone supported the position adopted by Eircom in the appeal proceedings)
>
> (b) The inclusion of consultancy costs as a reckonable cost in assessing the burden on Eircom of providing universal service. (On this issue Vodafone supported Comreg's stated position.)

16. Thus Vodafone supported Eircom on one issue and supported Comreg on another. Thus Eircom argued that it was difficult to see as a matter of principle as to why Vodafone should be awarded its costs against Eircom.

Applicable legal principles and review of authorities
17. Order 99 r.1 (1) provides – that "The costs of and incidental to every proceedings in the superior courts shall be in the discretion of those courts respectively".

18. Order 99 r. 1 (4) provides

> "The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

19. In *O'Connor v. Nenagh UDC* [2002] IESC 42 Denham J. set out some general principles relevant to the determination of the costs entitlement of notice parties stating as follows:

> *"Essentially the matter of costs is at the discretion of the court.*

The learned judge then set out O.99 r.1 and r.4 and continued:

> *"A court gives great weight to the views of the learned trial judge. I am satisfied that the trial judge in this case applied the correct principles. I would not interfere with the exercise of his discretion. It is clear that:*
>
> *(a) Whereas there was an element of public interest, the application as originally drafted sought specific remedies*

potentially detrimental to the notice party;

(b) The notice party was a necessary party;

(c) The notice party participated fully in the trial;

(d) The notice party was an entirely innocent party and acted in good faith at all times;

(e) The notice party was successful in the proceedings;

(f) No compelling reasons have been established as to why the costs should not follow the event;

(g) The learned trial judge exercised his discretion in accordance with law;

20. In the present case given that the proceedings have settled there is "no event" which the costs shall "follow". Therefore in my view O.99 r.1 (4) has no application.

21. The question then is what are the principles which should be applied by a court in considering the exercise of its discretion in a case such as this.

22. The notice party submitted that a public law challenge which results in the decision appealed against remaining intact and the proceedings struck out is "tantamount to an abandonment of the claim or a discontinuance of proceedings". It was submitted that the court in those circumstances remained entitled to exercise its costs jurisdiction and relied in this regard on *Call agy v. Minister for Education* (unreported Supreme Court 23rd May, 2003) and *Nearing v. Minister for Justice* [2009] IEHC 489.

23. However in my view this analogy is incorrect. There is a difference in principle between proceedings which have been settled by agreement between the parties – even if the decision being appealed against remains intact – and other proceedings where the claim is abandoned or discontinued. In the latter case there is no element of settlement or agreement to the compromise of the proceedings. Moreover, in my view, this argument of the notice party is to ignore entirely the fact that the settlement agreement in this case, like the settlement agreement in many cases, is agreed as a finely balanced exercise of concessions and reliefs, of advantages and disadvantages. It is inappropriate to select one feature only of the settlement agreement (i.e. the fact that Eircom agreed to withdraw its appeal) and to ignore entirely the other agreed terms of the settlement agreement

24. The notice party also relies on *USK and District Residents Association v. Environmental Protection Agency* [2007] IEHC 30, where Clarke J awarded costs to the notice party (Greenstar) who had been awarded a waste licence by the EPA which was being challenged by the applicant.

25. However an important point of distinction between *USK* and the present case is that in *USK* the matter went to a full judicial hearing as opposed to the present case where the proceedings were settled by agreement between Eircom and ComReg. It seemed to me that, as a matter of principle, fundamentally different considerations apply to cases which are settled.

26. The notice party also placed considerable reliance on a decision of Herbert J in *Eircom v. Director of Telecommunications Regulations* [2002] IEHC 72 because it also involved a telecoms regulatory appeal, an agreement between the applicant and the respondent to strike out the proceedings without regard to the notice parties and an application by the notice party for their costs. In that case Herbert J made an order for costs in favour of the notice parties as against the applicant on the grounds that the applicant had in effect conceded the right of one notice party to be joined and unsuccessfully opposed the application of the other to be joined.

27. However in that case the dispute between Eircom and the Director of Telecommunications Regulation (which concerned an application for an order of *certiorari* quashing a decision of the respondent) became moot through circumstances entirely outside the control of either the applicant or the respondent. Again there is a difference in principle between such a case and the present case. In *Eircom* the proceedings became moot and both parties agreed to strike out the proceedings as a consequence; in this case the parties agreed a settlement between them and as a consequence they agreed to strike out the proceedings.

28. I have also considered the case of *Telefonica O2 v. Comreg* [2011] IEHC 380. In this matter the High Court considered the issue of the costs of a notice party of an inspection motion in a telecoms judicial review where the substantive proceedings were subsequently settled between the appellant and Comreg.

29. As Clarke J. stated in *Telefonica* at para. 7.2 :

> *"The motion is now moot. However, the reason why it has become moot is because of the actions taken by O2 and Comreg in settling the proceedings. It should be emphasised that the settlement of litigation is a desirable end in itself and the parties should neither be criticised for nor discouraged from resolving their differences. Be that as it may, it may remain the case that there are loose ends which are not necessarily disposed of as a result of the settlement of litigation. There may, for example, be other parties to the litigation generally, whose position needs to be considered. In the ordinary way, one might expect that where some but not all of the parties to a case agreed to settle their differences, the settlement will make some provision for how the position of any non settling parties are to be dealt with. While not strictly speaking in that latter category, this case is one where at the time of settlement, there was outstanding the question of the costs of both the Minister and BT of their involvement in the motion. In the absence of O2 and ComReg having agreed, as part of their settlement, as to how they are to approach those costs, then the court must deal with them as best it can.*
>
> *7.3 It seems to me that the balance of justice favours the award of costs to the Minister and to BT. For the reasons already analysed, the involvement of those parties was necessary, reasonable and proportionate to the interests which they sought to advance. The manner of their involvement was not such as added in any inappropriate way to the costs of the motion with which I am concerned. No final result of that motion was determined and will not, for the reason set out, now be determined. However, the reasons why BT and the Minister have been deprived of the opportunity of satisfying the Court that they were entitled to resist the motion from the beginning is because of the settlement of the proceedings generally. To take but a simple example, if the result of the first module had been to the effect that the standard of review went no higher than O'Keeffe irrationality, then it is clear the motion for inspection/discovery would necessarily have failed. In those circumstances, and having regard to the involvement of the notice parties, it is difficult*

to see how they would not have been entitled to their costs. However, we will now never know what the result of the first module might have been. It would seem to me to be a greater injustice to deprive the notice parties of their costs in circumstances where they might well have achieved a situation of winning the motion, thus entitling them to their costs, where the reason why we will never know whether they would have won has been the settlement of the proceedings between O2 and ComReg.

7.4 While it remains true that O2 might equally have been successful in obtaining some disclosure which was resisted, it is O2's own action in settling the proceedings which has created the situation whereby we will never know whether O2 would have succeeded. On that basis, the equities are not, in my view, equal.

8.1 It follows that the Minister and BT are entitled to their reasonable costs of participating in the motion.

8.2 In summary, I will, at this stage determine that both the Minister and BT are entitled to their costs as against either or both of O2 and ComReg but leave over the question as to the entity or entities against whom the order should be made to further argument."

30. However the issue in the *Telefonica* case was quite different and the involvement of the notice parties arose in a different way. In those proceedings O2 sought to challenge a decision of Comreg and in the context of that challenge O2 sought access to documentation relating to an agreement between the Minister and BT for the provision of emergency call services. That documentation was, it appeared, in the possession of Comreg and whilst Comreg had no objection in principle to disclosing the relevant documents both the Minister and BT objected to its production on the grounds of confidentiality. Thus when an application for disclosure was made the court directed that the Minister and BT be notice parties to that application because of the confidential nature of the arrangement entered into between the Minister and BT.

31. It is also of some significance that in the present case the notice party is only seeking its costs against Eircom. In the Telefonica case the parties sought a costs order against both parties to the settlement. As Clarke J. stated in para. 2.4 of his judgement

"There is a final complication. Counsel for the Minister indicated, quite properly, that he was unclear as to which of O2 and Comreg ought to be the target of his application for costs for as he put it, he was unaware of "who had won and who had lost the settlement. In fact, the notice parties sought their costs against both parties."

32. Eircom placed considerable reliance on *Treasury Holdings v. NAMA* [2012] IEHC 518. In this case Finlay Geoghegan J. considered the principles to be applied in relation to the application by a notice party for its costs in proceedings which it was joined as a notice party on its own motion. In this case Finlay Geoghegan J. dismissed the applicant's claim for orders of *certiorari* of decisions made by NAMA. KBC a notice party to the proceedings then made an application for its costs in the proceedings against the applicant. In her decision Finlay Geoghegan J. stated as follows

" Rather than commencing from any prima facie entitlement to costs, it appears to me that it must be a matter for the Court to consider, having regard to all the circumstances of the case, including, in particular, the extent of the interest of the notice party in the issues which are the subject matter of the judicial review application, and the extent to which it may be regarded as reasonable for the notice party in all the circumstances of the case to independently to oppose the application to determine whether an order for costs in its favour against an unsuccessful applicant should or should not be made".

33. Finlay Geoghegan J. refused the application by reason of the fact that KBC was not a necessary party to the proceedings but rather it had sought to be joined and was permitted to be joined for the purpose of protecting its own commercial interests.

34. However the above case whilst important can be distinguished because in Treasury Holdings the case went to a full hearing and in her judgment the trial judge dismissed the applicant's claim for orders of certiorari. In the present case however the proceedings were settled by agreement.

Assessment of legal principles

35. This settlement agreement – as all settlement agreements do –simply records the agreed settlement terms and (naturally) not the reasons behind the decision of each of the parties to settle the proceedings. Therefore it would be both inappropriate and unwise for a court to speculate on any of the reasons which might bring either or both parties to the realisation that the proceedings should be settled. Moreover it is clearly in the interests of the parties – and indeed in the interest of the administration of justice - that complex commercial proceedings are settled between parties wherever that is possible.

36. Moreover in circumstances where proceedings have been settled by agreement it is difficult to see on what basis in principle a notice party could seek its costs against one party to the settlement rather than the other. In this case it is difficult to see on what principled basis Vodafone should seek its costs against Eircom rather than against both parties. However the reason the notice party has not done so and has instead sought to obtain its costs against Eircom is based on its analysis that "Eircom has elected to strike out its appeal and the consequence of that the impugned Comreg decision remains intact". However that is, in my view, to single out one element of the settlement agreement to the exclusion of all others. It is true that Eircom withdrew its appeal to the actual decision under challenge. However it did so as part of a carefully calibrated settlement agreement with Comreg. It withdrew its appeal on agreed terms. Moreover it expressly reserved the right to argue again its points in relation to the decision under appeal in respect of any future decision Comreg might make.

37. Moreover the court should also consider the regulatory context in which this appeal was brought. Whilst the decision under review remains intact, a similar decision may have to be made in subsequent years by Comreg and it may be the case that issues emerged in the running of this case which gave both parties an opportunity to reflect on matters afresh. Clearly it had this effect as the parties agreed to settle the proceedings rather than pursue them to a court decision. In a complex regulatory regime such as the telecommunications regime the court should have regard to the fact that some regulatory decisions may have to be made on an annual basis or must be revisited every number of years. In those circumstances it is possible that parties might agree to settle proceedings and to leave a regulatory decision intact in order to fight the battle in a different way on a further occasion.

38. Whilst it was of course reasonable for the notice party to seek to be joined as a notice party to the proceedings, it does not follow as a matter of logic that it is therefore entitled to its costs when those proceedings are subsequently settled.

39. The question then becomes one of principle as to who bears the risk of a notice party's costs in cases where proceedings settle. Much depends on the circumstances of the case.

40. However where as here, a notice party applies of its own motion for its own commercial interests to be joined as a notice party to the proceedings then it seems to me it must run the risk that the proceedings might settle without reference to it and its costs.

41. In the circumstances I am of the view that it would be unjust and unfair to award the costs of the notice party against Eircom and I refuse the application.