Neutral Citation: [2009] IEHC 372

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THE HIGH COURT

BETWEEN:

CORK PLASTICS (MANUFACTURING) AND (BY ORDER) HANIMEX (IRELAND) LIMITED AND CORK PLASTICS AND CORK PLASTICS SYSTEMS LIMITED

Plaintiffs

AND

INEOS COMPOUNDS (UK) LIMITED (FORMERLY KNOWN AS EVC COMPOUNDS LIMITED) AND (BY ORDER) TIOXIDE EUROPE LIMITED

Defendants

Judgment of Mr. Justice Hanna delivered on the 24th day of July, 2009

The Background
This case has not yet been determined. However, I have been asked to give a final ruling on certain aspects of the costs of these and related proceedings. It would be inappropriate to delve in any detail at this juncture into the background facts. A brief outline as to how and why we have come to this point will suffice.

The first named plaintiff, Cork Plastics (Manufacturing), supplies and manufactures extruded plastic products including fascia and soffit boards. The first named defendant, Ineos Compounds (UK) Limited, supplies and manufactures finished white rigid PVC extrusion compound to be used in the manufacture of plastic products including fascia boards. The plaintiffs claimed that the product supplied to it by the first named defendant was not of merchantable quality in that some of the finished white rigid PVC extrusion compound has caused a "pinking effect" to the fascia boards manufactured by the plaintiffs. The defendants entered a full defence to the claim on 15th July, 2002. An amended defence was served on 27th April, 2005 to reflect the addition of another defendant and again a further amended defence was served on 13th November, 2006, this time with a number of admissions. Then, by letter dated the 6th March of this year, four days before the allotted trial date, the defendants effectively withdrew the issue of liability describing such concession as "…a commercial decision with the intention of shortening the proceedings and the overall time to final resolution of the litigation". The plaintiffs in these proceedings, together with the plaintiff in a related set of proceedings, Floplast Limited, (taken against the plaintiffs and where the defendants have taken up the role of their indemnifiers) are now seeking the costs of the proceedings to date, including the costs of preparing for trial.

The Plaintiffs' Submissions
The plaintiffs seek an order for the costs of prosecuting their claim to date in circumstances where the defendant has admitted liability and the only matter to be decided by the Court is the quantum of damages. Rather than waiting to make their application for costs until the end of the proceedings in their entirely, the plaintiffs claim that they are significantly out of pocket as a result of preparing for the trial of the liability issue and that the costs issue can and should be dealt with now, notwithstanding the fact that the quantum hearing has not yet taken place. For the plaintiffs, Mr. Maurice Collins S.C. submits that as the defendants have admitted liability, they have succeeded in their claim and that, as costs follow the event, they are entitled to an order for their costs at this juncture and do not have to wait until the issue of quantum is decided.

The plaintiffs rely on O. 99 of the Rules of the Superior Courts which provides, *inter alia*,:-

> "…Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an Order for the payment of costs may require the costs to be paid forthwith **notwithstanding that the proceedings have not been concluded**." (Emphasis added)

The plaintiffs in these proceedings are the defendants in the proceedings brought by Floplast Limited. Both the plaintiff in this case and Floplast Limited place emphasis on the phrasing in O. 99 in support of their common argument that costs may be dealt with at any stage in the proceedings, even prior to the conclusion of the trial.

Counsel for Floplast Limited, Mr. Eoin McCullogh S.C., in urging the Court to exercise its discretion to deal with the costs issue now rather than at the close of the trial, referred to *Veolia Water UK plc v. Fingal County Council* [2007] 2 I.R. 81, a case involving the costs complex litigation in which Clarke J. held as follows:-

> "…costs always remain discretionary and anything which is said concerning the principles which ought normally to apply in considering the award or refusal of costs should be subject to the *caveat* that the court always remains open to the suggestion that, by virtue of **special or unusual circumstances**, it is appropriate to depart from what otherwise might be the normal course in respect of an order for costs in a particular case." (Emphasis added)

The Defendants' Submissions
On behalf of the defendants Mr. John Gordon S.C. stated that they have made a lodgement in this case and argued that it would be inconsistent with the lodgement procedure as envisaged in the Rules of Court to make an order for costs prior to the quantum issue being decided as it is possible that the plaintiff may not "beat the lodgement", a potentiality which would have ramifications for the plaintiff's entitlement to costs. The defendants relied on O. 22, r. 6 of the Rules, the relevant portion of which provides:-

> "If the plaintiff does not accept…the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:

(1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.

(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.

(3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid

(4) The costs mentioned at paragraphs (2) and (3) hereof shall be set off against each other; and if the balance shall be in favour of the defendant, the amount thereof shall be satisfied *pro tanto* out of the money remaining in Court and, in so far as the money remaining in Court is not sufficient to satisfy the same, shall be recoverable from the plaintiff; or if the balance shall be in favour of the plaintiff, the amount thereof shall be recoverable from the defendant…"

The defendants argued that the Court does not have any discretion to make an order for costs prior to the quantum of damages being decided in a case where a lodgement has been made. In the alternative, it was argued that even if they are wrong in that submission and the Court does have power to award costs to the plaintiffs at this stage, the Court ought not to embark on the hazardous task of making an order for costs at a time when the full outcome of the case is not yet known and that the normal rule should apply.

Conclusion
It is generally the case that the successful party gets his or her costs -"costs follow the event". This is a general rule and may be departed from in appropriate circumstances. It may at times be necessary for the courts to give a more detailed analysis of the costs issue and to depart from the rule in certain "special or unusual" cases. (See the decision of Clarke J. in *Veolia Water UK plc v. Fingal County Council* [2007] 2 I.R. 81).

However, in the instant case, we are dealing with a lodgement. Order 22 of the Rules of the Superior Courts provides a mechanism whereby a defendant can lodge a sum of money in court which they say is sufficient to meet the plaintiff's claim. Availing of that mechanism has certain costs implications. This mechanism was availed of by the defendants and with the result that if the plaintiffs are awarded less than the amount lodged, they will be damnified in costs. Order 22, r. 6 sets out, in effect, the "ground rules" for the tactic employed by the defendants. In ordinary circumstances, a lodging party would be entitled to expect the final award to trigger the costs mechanism in r.6 rather than finding itself pounced upon for a payment on account in the shape of an order of costs to date. Furthermore, insofar as the amount of the final award may be a factor in determining the quantum of costs, in the absence of the award not being known, how could costs be taxed without running the risk of subsequently revealed significant injustice to either party?

Of course, as can be seen from O.99 of the Rules, the Court does have a discretion to award costs at any stage of proceedings. But in the case of a lodgement O.22 appears to me to limit the exercise of that discretion to the final determination of the litigation or, more bluntly, an award of money. That figure determines which of the rules of O.22 spring into operation. Yes, there is a discretion vested in the Court to depart from the stipulated costs mechanism but only at trial and for special cause shown and mentioned in the order. It is at that point that the totality of the conduct of various parties to proceedings can be viewed should one or other of them seek to invoke the Court's discretion.

I make no reference, of course, to the circumstances of this case or it's near relative proceedings brought by Floplast Limited. Suffice to say that these are undoubtedly proceedings of great complexity. It will involve marshalling, no doubt, a formidable array of expert and other testimony, even in the absence of a liability contest. The plaintiffs have obviously incurred considerable expense in mounting their case on the liability front. It may or may not be the case that the discretionary aspect of O.22 will be visited at the case's end.

However, given the magnitude of these proceedings it would seem to me to be a hazardous exercise to decide costs to the date of the lodgement in the absence of an express concession from the defendants and given the difficulties which might be encountered on taxation of costs.

I am of the view that it is desirable to defer consideration of this issue to the end of the trial when the Court will have a fuller picture of all of the matters which may have a bearing on its discretion. As a final observation, although several authorities were opened to be by counsel, there was no case to which O. 22 applied where an order of the type sought in this application was made before the proceedings were concluded.

The Court is not in a position to form a thorough view on the manner in which the parties have conducted the litigation to date. Yet, the conduct of the parties is clearly an example of the type of factor which may influence the exercise of the Court's discretion when it comes to making an order for costs.

The Court refuses the order sought and defers determination of the issue of costs until after judgment or other resolution of this matter.