

THE HIGH COURT
COMMERCIAL

[2010 No. 6631 P]

[2010 No. 239 COM]

BETWEEN

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) AND KENNETH KRYSS

PLAINTIFFS

AND

CITCO BANK NEDERLAND NV, STICHTING SHELL PENSIOENFONDS AND ATLANTA BUSINESS INC.

DEFENDANTS

JUDGMENT (RELIEF AND COSTS) of Ms. Justice Finlay Geoghegan delivered on the 25th day of June, 2012

1. On 28th February, 2012, I delivered judgment in the above entitled proceedings. This judgment on the declarations to be included in the Order to be made pursuant to the judgment and costs needs to be read in conjunction with that judgment. In that judgment, I specified the relief to be granted and refused in the following terms:-

"The plaintiffs are entitled to the declarations sought in relation to recognition of the order for the winding up of Fairfield and the appointment of Mr. Kryss as liquidator.

The plaintiffs are not entitled to the declarations that each of the orders of conservatory garnishment are not entitled to recognition in the State pursuant to the Regulation.

It also appears that the plaintiffs are not entitled to the declaration sought that Citco holds the monies in the Dublin Account to the order of the liquidator having regard to the underlying dispute with Citco and their failure on the issue of non recognition of the orders of conservatory garnishment."

2. The declarations to which the plaintiffs are entitled in accordance with the above and their statement of claim are:-

(i) A declaration that a decision and order of the High Court of Justice of the Eastern Caribbean Supreme Court dated 21st July, 2009 bearing Record No. BVIHCV 2009 136 and entitled "*Deutsche Bank International (Cayman) Limited Trustee of the Elvira Trust, together with other persons named in the Schedule hereto, Applicant and Fairfield Sentry Limited, Respondent*" and which said order declared that the first named plaintiff be wound up in accordance with the provisions of the Insolvency Act 2003 of the British Virgin Islands be recognised in the State.

(ii) A declaration that the said order insofar as the appointed, the second named plaintiff as liquidator of the first named plaintiff be recognised in the State.

3. The plaintiffs, in addition, had sought a number of declarations in relation to the money held in the Dublin Account i.e. Account No. 52.358105.001 of the first named plaintiff (Fairfield) with the first named defendant (Citco) at its Dublin Branch which were refused. In the statement of claim, the plaintiffs had also sought "such further and other order as to this Honourable Court may see fit".

4. In the proceedings, there were in dispute between the plaintiffs and the second and third named defendants (Shell and Atlanta respectively), a number of contractual and proper law issues in relation to the Dublin Account. Several of those issues were resolved in favour of the plaintiffs in the judgment delivered on 28th February, 2012. Upon delivery of the judgment, the Court gave the parties an opportunity of considering whether, having regard to the judgment, there should or should not be any further declaration included in the order to be made.

5. The parties anticipate that there may be further proceedings in the Netherlands in relation to matters in dispute between the parties, concerning the monies in the Dublin Account of Fairfield. Primarily, having regard to that possibility, the plaintiffs sought to have certain declarations included in the order to be drawn pursuant to the judgment delivered on 28th February, 2012. The further declarations sought are:-

"1. A declaration that the Dublin Account is governed by the General Conditions.

2. A declaration that the Dublin Accounts is not governed by the Custodian Agreement.

3. A declaration that the proper law of the contract for the Dublin Account is Irish law.

4. A declaration that the place of payment obligations is Dublin.

5. A declaration that the balance on the Dublin Account is repayable to the Liquidator in Dublin and not elsewhere in Dublin unless the Liquidator otherwise directs and consents that payment may be made elsewhere."

6. It is not in dispute that the Court now does have jurisdiction to make declarations consistent with the judgment already delivered, notwithstanding that the specific declarations were not sought in the statement of claim. The plaintiffs submit that the Court should exercise its discretion to make the declarations as they relate to matters which were in dispute between the parties, and for the

purposes of clarity, in the context of any future proceedings in the Netherlands. Counsel for Shell opposes the application, primarily upon the basis of a lack of necessity, and queries the consistency of the declaration sought at para. 5 above with the judgment delivered. Counsel for Atlanta did not make submissions for or against the declarations.

7. On the unusual facts of this case, having regard to the further potential litigation in the Netherlands, I have concluded that the Court should exercise its discretion to make the declarations sought insofar as they are precisely consistent with the judgment delivered. It is not intended by this decision to add to or vary in any way the judgment delivered on 28th February, 2012. Insofar as the Court, in the judgment of 28th February, 2012, decided issues of fact or law in dispute between the parties, those issues *are res judicata* subject to any appeal to the Supreme Court. The granting of declarations in an order does not add to the status of the decisions on these issues in the judgment delivered but insofar as the plaintiffs consider that it may clarify matters, it appears the court should grant the declarations.

8. The declarations sought at paras. 1, 2 and 3 above are consistent with the decisions at para. 40 of the judgment. Where a court is granting a declaration in an order, it will normally not confine descriptions to definitions used in the judgment and accordingly, the appropriate form of declarations appear to be:-

(i) A declaration that Account No. 52.358105.001 of the first named plaintiff with the first named defendant at its Dublin Branch ("the Dublin Account") is governed by the general conditions of Citco Bank Netherlands N.V. Dublin Branch ("the General Conditions").

(ii) A declaration that the Dublin Account is not governed by the Custodian Agreement dated 3rd July, 2006, between the first named plaintiff, the first named defendant, Dublin Branch and Citco Global Custody N.V.

(iii) A declaration that the proper law of the contract for the Dublin Account is Irish law.

9. The conclusions reached in accordance with Irish law in relation to the place at which the first named defendant is obliged to make payment of the monies in the Dublin Account are those set out at paragraph 58 of the judgment. The declarations sought at paras. 4 and 5 above are not, in my judgment, fully consistent with the conclusions in paragraph 58. The declaration to which the plaintiffs are entitled pursuant to paragraph 58 of the judgment is:-

(iv) Dublin is the place at which the first named defendant is obliged to make payment of monies in the Dublin Account when demanded by or on behalf of the first named plaintiff.

Costs

10. The plaintiffs seek an order for 75% of their costs against Shell and Atlanta. They do so by reason of the issues upon which they were successful, including the recognition of the orders for winding up and appointment of the liquidator and their success on the issues relating to the contractual terms and proper law of the contract relating to the Dublin Account. They do so, notwithstanding their failure to obtain a declaration that the Dutch orders of conservatory garnishment are not now entitled to recognition in this jurisdiction, and their consequent failure to obtain a declaration that the first named defendant holds to the order of the second named plaintiff as liquidator of Fairfield, the monies in the Dublin Account in the sense sought i.e. not being subject to the Dutch orders of conservatory garnishment.

11. Shell and Atlanta each seek orders for full costs against the plaintiffs or, alternatively, with some small reduction on the basis that the central issue in the case was whether or not Citco holds the monies in the Dublin Account to the plaintiffs' order subject to the Dutch orders of conservatory garnishment. The plaintiffs contended that they were not so held primarily on the basis that the Dutch orders of conservatory garnishment are not entitled to recognition in the State. The plaintiffs failed on those issues and the defendants were successful in their defence of that part of the claim.

12. Citco seeks no order for costs in the proceedings.

13. All parties agree that the court should apply the principles set out by Clarke J. in *Veolia Water UK Plc. & Ors v. Fingal County Council* [2007] 2 I.R. 81, and by me in *McAleenan v. AIG (Europe) Limited* [2010] IEHC 279. In that judgment on costs, I stated at para. 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.

14. In these proceedings, Shell and Atlanta must be considered to be the successful parties. I accept the submission made on behalf of Shell and Atlanta that the central issue in the case was whether or not the Dutch orders of conservatory garnishment were entitled to recognition in this jurisdiction and that they were successful and the plaintiffs were unsuccessful on that issue. Accordingly, in exercising the court's discretion in accordance with O. 99, r. 1, of the Rules of the Superior Courts the starting point must be Shell and Atlanta's *prima facie* entitlement to an order for costs.

15. Nevertheless, this was complex litigation; the plaintiffs were successful on a number of discrete issues relating to the contractual provisions and proper law relating to the Dublin Account. The plaintiffs' contentions on those issues were disputed by both Shell and Atlanta. Whilst counsel for Atlanta sought to distance his client from those disputes, it does not appear to me that he is entitled to do so. Atlanta adopted the submissions made by Shell and relied on them in the proceedings. Further, the disputed contractual and proper law issues did contribute to the overall complexity and length of the litigation. The issues are set out and dealt with at paras. 29 to 60 inclusive in the judgment delivered on 28th February, 2012. Whilst there was limited oral evidence given on these issues, there were significant legal submissions and the disputes gave rise to the need for delivery of interrogatories to Citco. Whilst the plaintiffs were also successful on the recognition issues, those issues in my judgment did not add to the complexity or length of the litigation.

16. This trial lasted five days. The disputed issues upon which the plaintiffs were successful, and which added to the complexity as well as the length of the trial, also necessitated additional preparatory work. In such circumstances, it appears preferable to consider the reduction to be applied on a percentage basis of the overall costs. In my judgment, the disputed contractual and proper law issues upon which the plaintiffs were successful contributed in the amount of 25% to the overall complexity and length of the proceedings and accordingly to the costs of the proceedings. In such circumstances, I have concluded that each of Shell and Atlanta are entitled to an order against the plaintiffs for 75% of their costs and the plaintiffs are entitled to an order for 25% of their costs against Shell and Atlanta; all such costs to be taxed in default of agreement.

17. In making the above costs orders, I do not intend to vary or interfere with any prior order for costs made which I have taken into account in reaching my decision.