Neutral Citation Number: [2006] IEHC 32

THE HIGH COURT

2002 No. 1183 P

BETWEEN

FYFFES PLC

PLAINTIFF

AND
DCC PLC
S & L INVESTMENTS LIMITED
JAMES FLAVIN
AND LOTUS GREEN LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 10th February, 2006.

1. I have considered the submissions made on behalf of the defendants and the plaintiff on the issue of the costs of the proceedings on 26th January, 2006.

2. It is common case that the right to costs is governed by Order 99 of the Rules of the Superior Courts, 1986. Rule 1(1) of Order 99 provides that the costs of and incidental to the proceedings are at the discretion of the Court. Rule 1(3) deals with the costs of an action, question or issue tried by a jury and stipulates that the costs shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct. Rule 1(4), which is the relevant sub-rule in this case, provides as follows:

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

3. It was submitted on behalf of the defendants that there is no reason why the normal rule, that costs follow the event, should not be applied in this case. The defendants won and they should get full costs, including all reserved costs. While the plaintiff did not dispute that the event had been decided in favour of the defendants, it was submitted on its behalf that the court, in the exercise of its discretion, should exclude the costs of the dealing issue, which was decided against the defendants, from the award of costs in favour of the defendants.

4. Counsel were able to point to very little in the way of authority, which would give guidance as to how the discretion provided for in Order 99 should be exercised.

5. Counsel for the defendants relied primarily on the decision of the Supreme Court in *Cooper-Flynn v. Radio Telefis Éireann* [2004] 2 I.R. 72. That decision arose out of an action tried by a jury, in which the issue of costs fell to be determined in accordance with rule 1(3), rather than rule 1(4), of Order 99. That being the case, it seems to me that it is not apposite. There is a difference in terminology between rule 1(3) and rule 1(4), which governs the issue of costs here. The extent to which that difference is significant, if at all, was not addressed by counsel. In any event, it was not contended on behalf of the plaintiff that it obtained "something of value" (the terminology used in *Reynolds v. Times Newspapers* [1998] 3 all E.R. 961, which was also relied on by counsel for the plaintiff) from the findings on the dealing issue.

6. Counsel for the plaintiff relied on one Irish authority, the decision of the Supreme Court in *Grimes v. Punchestown Developments Co. Ltd.* [2002] 4 I.R. 515. In that case, which concerned an application under s. 27 of the Local Government (Planning and Development) Act, 1976, as amended, for an injunction restraining the respondents from holding a "rave" concert at Punchestown Racecourse, the unsuccessful applicant was ordered to pay the respondents' costs. The appeal to the Supreme Court, which related only to the order for costs, was dismissed. Counsel for the plaintiff relied on the following passage from the judgment of Denham J., with whom the other judges agreed, at p. 522, as setting out the principles by which the court should be guided in exercising its discretion:

> "In this application the High Court was exercising its discretion in relation to the remedy provided under s. 27 … This discretion was also exercised by the High Court in its determination on the issue of costs. The discretion is exercised in accordance with law. The normal rule is that costs follow the event. However, there are circumstances when a court on the facts of a case determines that the normal rule will not apply. Indeed, a successful applicant may not succeed in obtaining an order for costs if the facts indicate features which are unsatisfactory as to the way in which they acted, see for example *Donegal County Council v. O'Donnell* (Unreported, High Court, O'Hanlon J., June 25th, 1982). The burden is on the party making an application to show that the order for costs should not follow the general rule. In this case I am of the opinion that the applicant has not discharged this burden so as to take it out of the general rule. There are no such circumstances in this case which would take it out of the general rule."

7. Denham J. then outlined certain factors which the trial judge had identified as discretionary factors relevant to the substantive issue and stated that it could be inferred that these were relevant also to his determination as to costs. If they were, they were not inappropriate, she stated. They indicated a careful analysis of the facts and surrounding circumstances of the case. They were reasonable factors to consider in the circumstances.

8. Counsel for the plaintiff submitted that the judgment in the *Grimes* case acknowledges an entitlement in the exercise of the court's discretion to take into account substantive factors distinct from the issue as to which side wins the event.

9. Counsel for the defendants advanced a different analysis of the judgment in the *Grimes* case. He suggested that the true analysis was that it was a case in which discretionary factors which were relevant to the substantive matter were said to be appropriate in exercising the court's discretion as to costs. That is not, it was submitted, authority for the proposition that the court looks to the substantive issues in the case or, that, where, as here, the party which was unsuccessful overall has won on one or more of the substantive issues, that of itself is a factor to be taken into account in the exercise of the discretion in relation to costs.

10. Aside from the statement of principle in the judgment of Denham J., which I have quoted, the decision in the *Grimes* case turned very much on its own facts. It would appear that the applicant/appellant was endeavouring to have the award of costs against him reversed on the basis that it was a public interest challenge, a point which had not been made in the High Court.

11. The only other authority to which the plaintiff referred is an Australian case, a decision of the Supreme Court of Victoria in *Byrns v. Davie* [1991] 2 V.R. 568. Counsel properly drew the court's attention to the statutory provision or rule in relation to costs which

was being applied in that case. The relevant statutory provision which was quoted in the judgment of Gobbo J., was to the effect that, unless otherwise expressly provided by the Act or any other Act or by the rules, the costs of and incidental to all matters in the court were in the discretion of the court and the court had full power to determine by whom and to what extent the costs were to be paid. The relevant rule was not quoted, but it is to be inferred that it replicated, in substance, the statutory provision. In other words, unlike Order 99(1), the rule did not point to a position of general application, that costs follow the event, which might be displaced in the exercise of the court's jurisdiction.

12. In his judgment Gobbo J. referred to a number of English authorities. One was a decision of the House of Lords in *Donald Campbell & Company v. Pollak* [1927] A.C. 732, which he used to distinguish a decision of the Court of Appeal, which had been relied on by the defendants: *Ritter v. Godfrey* [1920] 2 K.B. 47. He quoted the following passage from the judgment of Viscount Cave L.C. at p. 811:

> "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

13. The text of the rule which was under consideration by the House of Lords in that case is set out in the judgment at p. 805. It provided that, subject to the provisions of the relevant Act and the Rules, the costs of and incidental to all proceedings should be in the discretion of the court or judge, but it contained a proviso that where an action was tried with a jury, the costs should follow the event unless the judge should, for good cause, otherwise order.

14. Gobbo J. also referred to a more recent English decision, the decision of the Court of Appeal in *Gold v. Patman & Fotheringham Limited* [1958] 2 All E.R. 497. Gobbo J. quoted a statement from Sellers L.J. (at p. 503) to the effect that, if a plaintiff makes unnecessary and unfounded claims, they can well be segregated and he may be penalised in costs; but a greater latitude is given to a defendant. That statement seems to have been made in exchanges with counsel on the question of costs following the determination on the substantive appeal. The basis on which the Court of Appeal ordered that the successful defendants should only be awarded half their costs at first instance is set out in the judgment of Hodson L.J. as follows (at p. 503):

> "This is a course which the court does not often take, because, when a defendant has an action brought against him he is entitled to raise such defences as are available to him, but I think that in this case there was an opportunity for the defendants to take a clear cut point of law which depended on the construction of the document and on which this case has ultimately turned, and if that course had been taken a very large expenditure of money would have been saved. On all the issues of fact which were raised by the defendants by calling evidence to prove or disprove certain facts, the learned judge in the court below found against them. For these reasons I think this is a case in which the court is justified in taking an unusual course and not giving the successful party the whole of the fruits of his victory in the court below."

15. Both Romer and Sellers L.JJ. agreed, each pointing out that the defendant could have sought the determination of a preliminary point of law on the question of the construction of the contract raised by them.

16. On the facts in *Byrns v. Davie*, Gobbo J. stated that the plaintiffs had failed in their action on what was essentially a threshold matter, namely, the construction of a covenant, but had succeeded in respect of other matters that occupied a large proportion (70%) of the hearing. Those other matters had been both pleaded and contended for by the defendants and related to questions as to whether the plaintiffs had consented to the breach of covenant, whether there was any effect on a view and, in particular, whether there was any damage by way of depreciation in value to the higher land owned by the plaintiffs. His conclusion was that substantial justice would be done if the defendants who raised those other issues recovered only 40% of their taxed costs, including reserved costs.

17. Counsel for the plaintiff submitted that Gobbo J. had approached the issue of costs in a manner similar to the manner approved of by the Supreme Court in the *Grimes* case, in recognising an entitlement to have regard to the substantive issues and the facts of the particular case and whether something was unnecessary in the context of the case.

18. Counsel for the defendants emphasised two points in relation to the *Byrns v. Davie* decision in response. First, he emphasised the significance of the difference between the rule being considered in that case and the rule under consideration here and, in particular, that the latter points the court to the general provision that costs shall follow the event. Secondly, he commented on the factual similarity between *Byrns v. Davie* and *Gold v. Patman & Fotheringham Ltd*., in each of which the defendant succeeded on the narrow question of the construction of a document. It was submitted that Gobbo J. was influenced in his conclusion that what he called "a threshold issue" could have been dealt with by way of preliminary issue. It was not suggested, nor could it be, that in this case the price-sensitivity issue could have been dealt with as a preliminary issue. Therefore, it was submitted that the Australian case is not as helpful as might appear on first impression.

19. What the decision of the Supreme Court in the *Grimes* case clearly establishes is that the court's discretion to award costs in a case to which rule 1(4) of Order 99 applies is considerably tempered by the provision which stipulates that, as a general rule, costs should follow the event. The burden of displacing the general rule rests with the party who asserts it should be displaced. Whether the general rule should be displaced is determined by reference to the facts of the particular case, not extraneous matters. I understand that to mean all facts in relation to the particular case, including the conduct of the parties leading to, and in the course of the prosecution of, the proceedings. As to whether the decision of the Supreme Court is authority for the proposition that the court is entitled to have regard to the fact that a defendant, who was successful overall was not successful on substantive issues raised and prosecuted by him on his defence, in the context of an application by the unsuccessful plaintiff to be relieved of some of the costs which would be awarded against him under the general rule, in my view, it is. The decision of the Supreme Court does not, either expressly or by implication, preclude the court from considering any matter connected to the case. While not articulated in the *Grimes* case, it seems to me that the test must be whether the requirements of justice indicate that the general rule should be displaced.

20. Turning to the submissions made in relation to the factual situation which arises in this case, counsel for the plaintiff acknowledged that it was for the plaintiff to prove the two components of its assertion of unlawful dealing: the dealing and that the third defendant was in possession of price-sensitive information at the time of the dealing. The approach adopted by the defendants on the dealing issue was complicated in that a different stance was adopted in relation to the first and second defendants, the third defendant, and the fourth defendant, he submitted, but I think he captured the essence of the defendants' approach to the dealing issue as a defence on liability in his submission that the different stances coalesced in a response that there was no dealing on the part of any defendant to which the statutory remedy could attach, even if the court were to determine that the third defendant was

in possession of price-sensitive information on the relevant dates. Counsel for the plaintiff also acknowledged that the defendants were entitled to take whatever points they wished, but submitted that, if they did and they were calculated to occasion unnecessary expense, it would be fundamentally unjust for the plaintiff to be liable for the defendants' costs. The question posed by counsel for the plaintiff was whether it is just that the plaintiff should have to bear the cost of a position deliberately adopted by the defendants which was undoubtedly going to, and did, lead to an unnecessary prolongation of the proceedings and the incurring of unnecessary expense by both parties, in particular, by the plaintiff who had to expose what counsel described as "an artificial construct that was put forward to confuse the reality". The answer offered by counsel was that it would be wholly unjust to overlook that position which the defendants persisted in throughout the trial.

21. An added factor in this case, it was submitted by counsel for the plaintiff, was that the third defendant was a director of the plaintiff at the relevant dates (which, of course, is true in relation to the first two trades, on 3rd February and 8th February, 2000) and should have given a complete and accurate picture of what happened, at any rate following receipt of the transcripts of the Davy dealing room tapes on 3rd December, 2001. Particular emphasis was attached to a letter of 4th December, 2001 from the defendants' solicitors and to the final letter from the defendants' solicitors prior to the commencement of the proceedings, a letter dated 11th January, 2002, in the last paragraph of which it was reiterated that the disposals of the shares were effected by the fourth defendant and that no person or persons other than the directors of the fourth defendant caused or procured the making of such disposals.

22. In summary, counsel for the plaintiff submitted that the court should exercise its discretion and not allow the defendants the costs of the dealing issue for the following reasons:

> (i) the exceptional nature of the case, by reason of its length and the issues raised;
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> (ii) the fact that the dealing issue is identifiable as a separate discrete issue, which was based on facts internal to the defendants and known only to the defendants; and
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> (iii) that before the initiation of the proceedings the plaintiff sought a clear and unambiguous description of the share sales from the defendants and that was not given, notwithstanding that the third defendant at the material time had been a director of the plaintiff.

23. In replying to the plaintiff's application that the award of costs in favour of the defendants should exclude the costs of the dealing issue, counsel for the defendants advanced an analysis of the dealing issue, which on a broad view is correct, namely, that it was concerned with whether the third defendant dealt and the capacity in which the corporate defendants dealt. He submitted that the resolution of those sub-issues turned on what were the correct inferences to be drawn from largely uncontroversial facts, together with the correct application of quite complex legal principles against the background of a difficult statute. He referred to a comment in the judgment delivered on 21st December, 2005 that "I did not get the impression that the witnesses as to fact did not have a belief in the veracity of the position they were presenting". It was submitted that the substance of the comment was equally true of the pre-trial correspondence. Counsel postulated a different scenario which he suggested might constitute the special circumstance envisaged in Order 99 which might prompt the court to make an order of the type sought by the plaintiff: a scenario in which there were clear findings to the effect that on simple issues of fact a defendant, who was successful overall, had no honest belief in what he was putting forward to the court on the particular ground which was decided against him.

24. Counsel for the defendants also analysed the submission made on behalf of the plaintiffs that, while the defendants were entitled to raise any issue they thought fit in the proceedings, the decision should not be devoid of consequences. The thrust of that submission, it was submitted, was that, if the defendants had conceded the dealing issue from the outset, the trial would have been shorter and less costs would have been incurred all round. Accepting that that reasoning has a certain logic, it was submitted that, if one extends the logic to the plaintiff, which lost on the price-sensitivity issue which turned on facts which were internal to the plaintiff, if the plaintiff had conceded the price-sensitivity issue, there would have been no trial and no cost to anybody. It is difficult to argue against that logic. However, logic and justice are not always commensurate. Counsel for the defendants also made the point that what the court was concerned with in this case was commercial litigation at a high level, initiated for the purpose of recovering a financial gain, where everybody went in with their eyes wide open, fully advised and, in the plaintiff's case, fully advised as to the necessity to win on the two crucial issues.

25. There was a difference of approach between the plaintiff and the defendants as to the form the order should take, if the court were disposed to disallow the defendants the costs of the hearing issue. Counsel for the plaintiff submitted that there should be an order that the defendants are entitled to their costs of the proceedings save and except or excluding any costs referable to the dealing issue. The plaintiff's preferred alternative to that form of order was an order that a percentage of the costs be disallowed and the "fall-back" alternative was that the defendants should not be allowed the costs of all of the hearing days. Counsel for the defendants argued against a general order excluding the costs referable to the dealing issue because of the difficulties inherent in that approach for the cost accountants who would be dealing with the taxation of costs and the solicitors instructing them and also for the Taxing Master. Of the alternatives, a percentage reduction or disallowance of a number of hearing days, counsel for the defendants submitted that the latter was the more appropriate where there were two issues in the case on which the plaintiff had to succeed to win the case. Counsel for the defendants also itemised some of the issues which arose on the dealing issue on which the plaintiff did not succeed and he also took issue with an analysis of the court time involved on the dealing issue carried out by the plaintiff's solicitors, which was put before the court.

26. In relation to the requirements of fairness and justice in this case, counsel for the defendants observed that in all litigation there are costs, both tangible and intangible, which are not recovered by a successful party even with a full award of costs. He instanced the management time invested in the preparation and defence of the case and the "knock-on" consequences it has on commercial activities from which management have been diverted. It seems to me that that is a factor which arises in every case. He also instanced the significant reputational damage flowing from the prosecution of this action. That, if it occurred, is not a matter that goes to the issue of costs; the redress is in the outcome of the action.

27. In considering whether there should be a limited departure from the general rule that costs follow the event as advocated by the plaintiff, in my view, the starting point must be that, adopting the terminology used by counsel for the defendants, this is commercial litigation at a high level and it is commercial litigation between two major public companies in this jurisdiction. That being so, only exceptional circumstances would justify departure from the general rule. In my view, the facts of this case were exceptional to the extent that the shares in issue were an asset of the DCC Group and the holding was so treated in the consolidated balance sheet of the DCC Group. The profit which accrued on the sale of the shares accrued to the DCC Group. The third defendant was a director of the plaintiff on 3rd February, 2000, which I consider to be the material date because the subsequent sales flowed from what happened on that day. Although he was elected to the board of the plaintiff in the ordinary way, in reality the third defendant was a

director of the plaintiff by reason of the DCC Group holding. The approach adopted by the defendants on the dealing issue, which was based on the fact that the legal and beneficial ownership of the shares had been segregated for a purpose which was not associated with these proceedings, deliberately ignored the reality that the third defendant's connection with the plaintiff was attributable to the ownership of the shares and that the shares were owned and sold and that the profit generated was owned by the DCC Group. That approach added considerably to the complexity and to the duration of the case. I think it would be fair and just to take that fact into account in the exercise of the court's discretion in relation to costs.

28. As to the manner in which this should be done, I have come to the conclusion that the proper approach is to disallow the defendants the costs of making discovery in relation to, and the hearing dates taken up with, the dealing issue. That approach does not, as a percentage reduction would, unfairly dilute the consequences of the plaintiff not having succeeded in an action in which it brought a claim of unlawful dealing against the defendants. It also avoids the additional cost which would undoubtedly be involved in segregating the cost of dealing from the balance of the bill in the quantification of the defendants' bill of costs and its taxation.

29. Therefore, there will be an order that the defendants have the costs of the proceedings except –

(a) 80% of the costs of making discovery, and

(b) the costs of 25 hearing days.