Neutral Citation: [2014] IEHC 660

THE HIGH COURT

[2009 No. 2354S]

BETWE EN/

ADM LONDIS PLC

PLAINTIFF

AND

RANZETT LIMITED, RAY DOLAN AND ANNALIESE MCCONNELL (NO.3)

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered the 19th day of December 2014

1. This judgment is supplementary to two earlier judgments already delivered by me in respect of the circumstances surrounding the termination of a franchise by the plaintiff, ADM Londis in December 2008. In the first of these judgments, *ADM Londis plc v. Ranzett Ltd.* [2013] IEHC 63, I held that the plaintiff was entitled to judgment as against the defendants in the sum of €561,283.91 in respect of unpaid invoices. I further held that the defendants succeeded in part in respect of their counter-claim as against the plaintiff by reason of what I held was the unlawful termination of a franchise agreement.

2. In the second judgment, *ADM Londis plc v. Ranzett Ltd. (No.2)* [2014] IEHC 000, I made an award of €464,000 in favour of the defendants on their counter-claim, along with a direction that the two sums could be mutually set off against each other. In addition, I also gave the parties an opportunity to adduce evidence regarding the value of certain re-possessed leasing equipment if it were to have been disposed of in an open market in 2009 or 2010.

3. While the present judgment must also be read in conjunction with the earlier two judgments, it probably suffices to say this dispute concerns the termination of a franchise by the well known retail company, ADM Londis plc ("Londis") of a Londis franchise at a retail outlet at the Black Bull premises, Dublin Road, Drogheda, Co. Louth in December 2008. The franchisees were Ray Dolan and Annaliese McConnell, the second and third defendants. This couple married in June 2007. The first named defendant, Ranzett Ltd., was the corporate vehicle by which the retailing business was operated by them.

4. As I observed in the second judgment, quite possibly as a result of an over-ambitious expansion, by the dates which are germane to these proceedings – namely, November and December 2008 - Mr. Dolan and his company, Ranzett Ltd., found themselves in a precarious position. Arrears on the trading account with Londis had grown to some €430,000 and the bank was refusing to honour direct debits.

5. At the hearing of the plenary action, evidence was given by Ms. O'Dea, the plaintiff's financial officer, to the effect that the total sum which ADM Londis was owed was €561,283.91 in respect of unpaid invoices (which figure of course also includes the sum of €400,000 in respect of which I had already given judgment). The defendants did not seriously dispute this figure and I gave judgment against the second and third defendants qua guarantors (the first defendant having been dissolved) for the further sum of €161,283.91. I further ruled that ADM Londis was also entitled to Courts Act interest.

6. In my judgment, however, I also ruled that the plaintiff was in breach of contract with regard to the giving of notice, the abrupt termination of the agreement and the closure of the trading account and the de-branding of the Black Bull premises on 4th December 2008: see paragraphs 131 et seq. of the first judgment. It was these breaches of contract which had brought about the total cessation of the defendants' business and the effective destruction of whatever value still remained in the business and (more especially, perhaps) its assets, especially by reason of the abrupt and immediate termination of the trading relationship between the parties. It was the very abrupt termination of the trading relationship which I found to be at the heart of the unlawful termination of the contract.

7. There are now three remaining issues for determination which I can summarise as follows:

(i) The claims in respect of the leasing equipment.

(ii) Mr. Dolan's claim regarding a loss of income.

(iii) Issues of costs.

8. I propose to address these issues in turn

Issue (i) : The claims in respect of the leasing equipment.

9. At the first hearing, Mr. Dolan, the second named defendant and the principal of the company, claimed that one consequence of the termination of the franchise was that expensive refrigeration equipment was re-possessed by the plaintiff and sold off at fire sale prices, thus crystallising a significant loss for the first defendant company, Ranzett Ltd. No other evidence was led on this point during the first hearing.

10. In the course of the second judgment assessing the damages, I indicated that I would give the parties a further opportunity to adduce further evidence on this point if desired. The reason I took that view was that I found myself simply unable to form any realistic view as to the extent of those losses based simply on what, with respect, was the purely general assertions of Mr. Dolan regarding the extent of such claimed losses.

11. As it happens, counsel for the plaintiff, Mr. Buttanshaw, urged that I could not properly have taken such a step at that juncture, as it was effectively inviting me to conduct a form of appeal from my own judgment. The defendants had had their opportunity to present evidence: it was not for this court to step into their shoes and enable them to bolster their evidence by giving them a

supplementary opportunity of this kind.

12. In the end, it is unnecessary to rule on this point because, which or whether, I was informed in the course of the present hearing by Mr. Conlan Smyth S.C., counsel for the defendants, that his clients did not intend to lead any further evidence on this question. In these circumstances, my original adjudication must therefore stand. This amounts to saying that as the defendants cannot establish that they suffered any loss in respect of the disposals of these items of equipment, they are not entitled to any claim for damages in respect of this item on the counter-claim.

Issue (ii). Mr. Dolan's claim regarding loss of income

13. The evidence from the first hearing showed that Mr. Dolan was drawing a salary of almost €45,000 a year from Ranzett Ltd. As I noted in the first two judgments, there is no doubt but that Ranzett itself was heavily under-capitalised and it faced a difficult trading future. I held nonetheless that the company was deprived of a critical opportunity to trade its way out of these difficulties by reason of the abrupt manner in which the franchise was terminated, thus setting in motion a chain of events leading to the forfeiture of the lease.

14. In the second judgment, however, I also noted that by the date of termination:

> "……the company had very little intrinsic value over and above the value of the lease, the fact that it occupied a good trading position just outside of Drogheda and its capacity to deliver an income from the retail business."

15. It is, I think, implicit in the second judgment that the reason why I did not award Mr. Dolan damages in respect of his loss of salary was that I did not think that Ranzett was in a position to pay that salary given its precarious financial position. In other words, the real loss to the company was the abrupt termination of the franchise which triggered the loss of the lease and other losses consequent upon that fact. But even if there had been no termination, it seems unlikely absent an immediate and significant injection of funds that the company could have afforded the payment of that salary.

16. It was for these reasons that I rejected the claim based on a loss of salary.

Issue iii: The question of costs

17. There then remains the issues of costs. The plaintiff has, of course, succeeded in the summary judgment application and it is accepted that it is entitled to those costs. That application lasted one day in December 2010 (when the application for summary judgment was heard). As a result of that application I awarded the plaintiff some €400,000, with the balance adjourned to plenary hearing.

18. The plenary action itself lasted the equivalent of nine hearing days. At that hearing short formal evidence was tendered by the plaintiff regarding the balance of the unpaid invoices. That evidence was not seriously disputed by the defendants. Accordingly, based on that evidence I made a further award in favour of the plaintiff of €161,283.

19. In reality, therefore, the plenary action essentially involved a counter-claim by which the defendants sought to set-off the principal debt. As it happens, the counter-claim was in reality a complex witness action, the resolution of which took a great deal longer than the application for summary judgment.

20. The first thing to note is that the action was treated as a counter-claim. As I remarked in the first judgment:

> "But the claim advanced by the defendants is one of counter-claim and not by way of defence. While there is a very clear and close overlap in practice between claims going to defence on the one hand and those which go by way of counter-claim on the other, it is clear from the Supreme Court's decision in Prendergast v. Biddle (1957) that defence and counter-claim cannot be entirely assimilated with each other, at least so far as the scope of equitable set-off is concerned. Although Prendergast v. Biddle (1957) acknowledged these differences, the judgment of Kingsmill Moore J. also makes it clear that any court called upon to do so enjoys a discretionary jurisdiction derived from standard equitable principles so as to permit equitable set-off as between the plaintiff's liquidated claim and the defendant's general counter-claim."

21. This proposition is not, I think, seriously doubted by counsel for the plaintiff, Mr. Buttanshaw. He makes the point, however, that at least for the purposes of costs, the defendants' plea was in reality a defence in disguise and not a true counter-claim. There is certainly authority for the proposition that where a plaintiff recovers a liquidated sum (even if abated by way of set-off by a judgment in favour of the defendant) that this should be treated as the event for the purposes of costs.

22. This issue arose in *James Crean & Son Ltd. v. J. Steen McMillan* [1922] 2 I.R. 105, a case where the plaintiff sued for breach of contract and was met with a defence and counter-claim. The essence of the claim was that the defendant had wrongly refused to accept delivery of some of the goods for which he had contracted. The defendant maintained that the goods in question had not been sent or tendered within the stipulated time and counterclaimed for damages for loss sustained by the plaintiff's alleged failure to deliver the goods within the time contracted for.

23. Both the action for breach of contract and the counterclaim were dismissed with costs. .It may be inferred that the proceedings in *James Crean* were far less complex than the present case, since both claim and counterclaim were disposed of a single day. The Taxing Master proceeded to tax the costs of the defendant as if there had been no counterclaim, deducting only such costs of the action as were attributable solely to the counterclaim. The plaintiff then sought to have the taxation set aside on the ground that the Master should have apportioned the coasts which were common to both the original action and the counterclaim.

24. The High Court affirmed the order of the Taxing Master. An appeal was taken to the Court of Appeal for Southern Ireland which affirmed that decision. An appeal was then taken to a new court, the High Court of Appeal. It is now almost forgotten that that Court was created by s. 43 of the Government of Ireland Act 1920 and during its short existence between 1921-1922 it provided for a "mixed" court consisting of judges from both parts of the island of Ireland. That Court came to end on 6th December 1922 with the establishment of the Irish Free State. Perhaps the most remarkable thing about the High Court of Appeal is that it furnishes almost the only example of where any governmental power (executive, legislative or judicial) was exercised on a cross-border basis following partition. The fact, however, that a court consisting of judges from both sides of the border could sit at all in the turbulent year of 1922 must be regarded as something of a minor miracle.

25. At all events, the High Court of Appeal (consisting of Ross C. and O'Connor M.R. from this side of the border and Andrews L.J. from Northern Ireland) affirmed the decision of the High Court. Sir John Ross observed ([1922] 2 I.R. 105, 127-128):

> "It is of importance to observe that the issue raised by the defence is precisely the same as the issue raised by the counterclaim…The cardinal point in this case is that the facts on which the defendant succeeded in the defence were identical with those put forward in the counterclaim. No doubt the claim for damages founded thereon, for some reason that is not clear to me, failed and costs were given in respect thereof against the defendant.
>
> Is there any reason in law or in commonsense why the defendant should be penalized unduly because he seeks to utilise facts already proved and arguments already put forward in the defence, merely because he fails to recover damages in respect thereof?"

26. Likewise O'Connor M.R. noted ([1922] 2 I.R. 105, 131) that "in the present case substantially all the costs actually incurred are attributable to the original claim, and an infinitesimal part is attributable to the counterclaim." Andrews L.J. also stressed ([1922] 2 I.R. 105, 136) that different considerations obtained where there was in substance a true counterclaim:

> "…..when, in other words, it is something in respect of which additional expense must reasonably be assumed to have been incurred – something which occasions a new work or a new service distinct from the work or service occasioned by the original claim."

27. A broadly similar view was taken by the House of Lords in *Medway Oil and Storage c. Continental Contractors Ltd.* [1929] A.C. 88 where the House stressed that the general rule was that where a claim and counterclaim were both dismissed with costs, then the claim should be taxed as if it stood alone and the counterclaim should bear the amount only by which the costs of the proceedings have been increased by it.

28. There can, however, be little doubt but that a true counterclaim is presented by the instant case. The plaintiff's claim was for payment in respect of goods supplied and delivered. It is true that the defendants' case also arose out of those facts, but their claim was in respect of an independent breach of contract, namely, the abrupt termination of the franchise agreement. In any event, this is undoubtedly a case where, to adopt the words of Andrews L.J. in *James Crean,* the defendants' counterclaim "is something in respect of which additional expense must reasonably be assumed to have been incurred." Indeed, in contrast to the facts disclosed in *James Crean*, the counterclaim here was a very substantial action in its own right which, in many respects, dwarfed the plaintiff's claim in terms of legal and factual complexity.

29. It is true that in one sense this brings about the conclusion which Mr. Buttanshaw observed would embarrass the legal system, namely, that the plaintiff will have obtained judgment for over €99,000, yet will be required to pay significant costs. But all of this is simply because it unsuccessfully contested a very substantial counterclaim which took much longer and was intrinsically far more complex than the main claim.

The decision in Veolia Water

30. It has not been suggested that the decision in *James Crean* is, as such, binding on me. But even if it were, that decision itself recognises that these rules as to taxation are not strict ones, but rather guiding principles which must yield where necessary to the special circumstances of the case. The very fact that the legal and factual issues associated with the counterclaim were so complex is itself a special factor which would argue for a different approach to the question of costs in this case..

31. In any event, the law in relation to costs has been transformed by the landmark decision of Clarke J. in *Veolia Water UK plc v. Fingal County Council (No.2)* [2006] IEHC 240, [2007] 2 I.R. 81. In that case, noting that both sides had succeeded in part and lost in part Clarke J. made no order as to costs in respect of respect of a review of a public procurement matter. Clarke J. explained his reasoning for the apportionment of costs thus:

"2.11 Thus, for example, in *O'Mahony v. O'Connor Builders* (Unreported, High Court, Clarke J. 22nd July, 2005) for the reasons set out in the judgment of that date, I concluded that the issue under consideration should be resolved in favour of the plaintiff (who was defendant on the issue concerned). However it is also clear from the judgment that in respect of a significant number of issues raised at the hearing I found against the plaintiff. At a subsequent hearing I concluded that the original hearing was lengthened by approximately one day by virtue of the fact that the plaintiff had raised those additional issues. The hearing took in total three days. In the circumstances I determined in respect of an application for costs that it was appropriate to award the plaintiff the costs of the issue but confined to a single day's hearing. That single day was calculated on the basis that the plaintiff was entitled, in general terms, to be regarded as the winner of the issue in that he had, as defendant on the issue, successfully resisted the making of the orders sought against him. However I was also of the view that the plaintiff was, prima facie, obliged to pay the defendant one day's costs to reflect the fact that the defendant had been, unnecessarily, put to the cost of an additional day's hearing by virtue of the plaintiff having raised unmeritorious issues.

2.12 Apart from the fact that such an approach seems to me, in general terms and subject to the overriding discretion to which I have already referred, to be calculated to meet the justice of similar cases, it also seems to me that such an approach has the merit of discouraging parties from raising additional unmeritorious issues. This applies to cases where a plaintiff may prolong litigation by relying on additional unmeritorious grounds further to the grounds upon which the plaintiff may be successful. It equally applies to a case, such as O'Mahony, where the defendant on the issue (i.e. the plaintiff in the overall proceedings) though successful in the overall sense in resisting the application, nonetheless prolonged the hearing by a significant margin by raising unmeritorious grounds of defence.

2.13 I adopted a similar approach to the costs of a hearing involving leave to seek judicial review of a planning decision which resulted in a judgment in *Arklow Holidays v. An Bord Pleanála and Others* [2006] IEHC 15. As appears from that judgment, the applicant obtained leave on some but not all grounds. An exercise similar to that adopted in relation to the costs in O'Mahony followed.

2.14 It seems to me that an approach along those lines is appropriate in more complex litigation involving a variety of issues even where, in the overall sense, one party may be said to have succeeded and the other party may be said to have failed. Before leaving the general principle I should, however, add that it seems to me that an approach such as that which I applied in *O'Mahony, and Arklow Holdings* and which I propose applying in this case, may not be appropriate in more straightforward litigation, notwithstanding the fact that some element of a plaintiff's case or a defendant's defence may not have succeeded. The fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have effected the overall costs of the litigation to a material extent."

32. The entire leitmotif of Veolia Water is, accordingly, to move away from the traditional "winner takes all" approach which was inherent in the traditional rule that costs more or less automatically followed the event. The change in approach is a recognition of the increasing complexity of litigation and the increasing practical necessity of a more nuanced view of costs, so that matters are

increasingly dealt with in on an issue by issue basis. This is especially true in the context of commercial litigation which lasts over several days.

33. It is that vein, therefore, that I consider the costs should be apportioned. The entire plenary hearing took the equivalent of 10 days (as I deemed two half days to count as one days' costs), together with a further day in respect of the submissions on damages. The defendants succeeded on their principal claim that the plaintiff was guilty of a breach of contract. They lost on some ancillary claims regarding the existence of a collateral contract regarding the stocking loan and, in terms of time, two relatively minor issues, namely, the loss of salary and the alleged fire sale in relation to the leasing equipment.

34. The plaintiff has established that it was entitled to summary judgment in respect of a large part of its claim for payment on the unpaid invoices. Ms. Mary Helen O'Dea gave evidence on 15th November 2012 at the main action regarding the balance the claim.

Conclusions on the costs question.
35. In these circumstances, I will make an award of 7 days costs only in favour of the defendants, reflecting the fact that there were issues in respect of which they did not succeeded which added somewhat to the length of the hearing. I will award the plaintiff the costs of the summary judgment application and one half day's costs in respect of the main action and direct that these costs be set off as against each other.