THE HIGH COURT

[2008 No. 9814 P]

BETWEEN

JOE SIMPSON

PLAINTIFF

AND

ALAN TORPEY, EDUARDO DOANDES, PAUL DOODY AND GERRY COSGRAVE, TRADING AS R.I. INVESTMENT GROUP

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 23rd March, 2012

1. Introduction

1.1 On the 4th August last I gave judgment in these proceedings (*Simpson v. Torpey & Ors* [2011] IEHC 342 ("the principal judgment")). The conclusions which I had reached were set out at paras. 8.1 and 8.2 of the principal judgment in the following terms:-

> "8.1 In conclusion, therefore, it seems to me that the defendants were the contracting party with Mr. Simpson and are liable to pay him the sum of €16,667 for arrears of salary, €46,154 for pay in lieu of notice and, for the reasons already set out, are also obliged to pay €50,000 in respect of bonus. Nothing is allowed in respect of expenses. The defendants are also required to pay €24,712 into an appropriate pension fund nominated by Mr. Simpson.
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> 8.2 Mr. Simpson is not entitled to a profit share arising out of the Titan deal but is entitled to two-thirds of 5% of the net value of the development projects the subject of these proceedings. The defendants will be directed to produce a valuation of that sum based on professional assistance. Mr. Simpson will be entitled to two-thirds of 5% of that value or such higher value as the court may ultimately determine should Mr. Simpson dispute the defendants' valuation."

1.2 On the day when the principal judgment was delivered there was some possibility, initially urged by counsel for Mr. Simpson, that a partial order be made on the day in question. However, later that same day it was agreed by all concerned that it would be appropriate to leave over the making of any order until such time as all issues in the case had been concluded.

1.3 As is clear from the passage from the principal judgment cited above, the defendants were directed to produce a valuation of the net value of the development projects, the subject of the proceedings. That question along with that of the costs of the proceedings generally were the two main issues remaining to be decided. The matter has now come back before the court for the purposes of making a final order. In order to fully understand the issues which I now have to decide, it is relevant to set out a brief history of what occurred since August of last year.

2. Procedural History

2.1 The case was adjourned from time to time to review progress in obtaining the valuation to which reference has been made. Eventually such a valuation was forthcoming which suggested that, in the light of prevailing property values in Romania at the relevant time, the net value of the projects was negative. If that view were to be accepted, then it is clear that no additional sum would be due to Mr. Simpson under that heading.

2.2 The matter was then further adjourned to allow Mr. Simpson to take his own advice. A different view was expressed as to the relevant net value by experts employed by Mr. Simpson. In those circumstances I indicated that it would be necessary that there be an oral hearing for the purposes of attempting to resolve the dispute as to value. Unfortunately for Mr. Simpson, he proved unable to procure the attendance of any relevant witness and ultimately abandoned any claim under the relevant heading. It does also have to be recorded that it was intimated on behalf of the defendants that they too were experiencing some difficulty in relation to procuring the attendance of a witness on their side although it is not clear whether the possibility of calling such a witness had been fully abandoned prior to an intimation on the part of Mr. Simpson's advisers that he was not pursuing the claim. In any event, there is now no longer any claim in respect of a share in the net value of the development properties concerned.

2.3 Against that background a number of issues were canvassed by the parties when the matter came back before me for the purposes of making final orders. They were as follows:-

> A. The question of Mr. Simpson's entitlement to pay in lieu of notice;
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> B. A claim that it would be appropriate to make an order in favour of Mr. Simpson in respect of part of, what is described in the principal judgment as, "the Titan monies" which, on the evidence, it is said, went into a project which had nothing to do with the defendants or RI Investments and in respect of which it is, therefore, said by Mr. Simpson that he should be entitled to an appropriate share; and
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> C. Costs.

I propose dealing with each in turn.

3. Pay in Lieu of Notice

3.1 It is correct to say that, in the unapproved version of the judgment delivered on the 4th August, no mention was made of an answer to the question as to whether Mr. Simpson was entitled to pay in lieu of notice. That omission was mentioned by counsel for Mr. Simpson in the afternoon when the parties came back into court (while other matters were being dealt with) for the purposes of indicating that they would not require any court order at that stage. I made, at the time in question, a comment that it seemed to me that the pay in lieu had been set off against certain benefits which Mr. Simpson had retained. However, at the time when I made

that comment I had not the benefit of the unapproved judgment before me. When I proceeded to review the judgment for the purposes of approval it became clear to me that what was set off against the benefits obtained by Mr. Simpson was a very small claim for expenses. It followed that I had not dealt with the question of his claim for pay in lieu of notice. In those circumstances the approved version of the judgment (which has been available on the Courts Service website since the 26th September last) contains a clear finding that Mr. Simpson is entitled to pay in lieu of notice. That fact is, indeed, reflected in the conclusions section from the approved judgment which I have cited earlier.

3.2 In those circumstances no issue arises. The facts are simply that I omitted to deal with that issue at the time of making an unapproved judgment available to the parties and immediately corrected the matter as soon as it was brought to my attention. The sum is, as set out in the approved judgment, due by the defendants to Mr. Simpson.

4. The Titan Monies

4.1 For the reasons set out in the principal judgment, I came to the conclusion that Mr. Simpson was not entitled to the Titan monies. It is now sought on his behalf to suggest that he might be entitled to a portion of those monies because some of the monies were, on the evidence, reinvested into a project in which he had no involvement. It will be recalled that my reason, for rejecting his claim to a share in the Titan monies, was my finding that he had at least tacitly gone along with the situation, where those monies were being reinvested in other projects in which he would have had a share, and that he could not now be heard to claim an entitlement to the Titan monies having gone along with that course of action. While it is correct to say that the evidence supported the proposition that Mr. Simpson was unaware of monies going into the so called "Gold Avenue" project, it is also correct to note, as was urged by counsel on behalf of the defendants, that under Mr. Simpson's contract any profit share to which he was entitled was to be calculated on the basis of each of the defendants being entitled to take a salary of €500,000 from the projects before the calculation of any profit was carried out. It is common case that the amounts that were paid into the Gold Avenue project were just over half of the €2m which the defendants would have been entitled to pay themselves either actually (or notionally for the purposes of calculating any of Mr. Simpson's entitlements) in the relevant year. Given that the defendants did not, on the evidence, have drawings on anything like a sufficient scale to use up the balance of the relevant sum of €2m, it seems to me that no claim of the type now sought to be maintained could have been brought home in the first place. It follows that it is unnecessary to consider whether the claim should now be entertained for it would have failed in any event. I, therefore, do not propose to make any order under this heading.

4.2 In the light of those findings it is necessary to consider the form of the final order.

5. The Final Order

5.1 The one item of difficulty, in the matters as set out in para. 8.1 of the principal judgment, is the direction that the sum of €24,712 be paid into a pension fund nominated by Mr. Simpson. It is common case that Mr. Simpson has nominated such a fund and that the monies have not been paid into it. In those circumstances it seems to me that Mr. Simpson is entitled to judgment in that sum.

5.2 It follows that Mr. Simpson is entitled to the total of each of the four sums mentioned in para. 8.1 which comes to €137,533. It also seems to me that Mr. Simpson is entitled to interest on those sums under s. 22 of the Courts Act 1981, to run from the 1st November, 2008. Clearly on the basis of the findings in the principal judgment, those sums should have been paid on or before that date and arise in a commercial context. The final issue which arises is in relation to costs.

6. Costs

6.1 Counsel for the defendants places reliance on the fact that the final award which has now been made in favour of Mr. Simpson falls a long way short of the claim originally made. That is true as a fact. However, it seems to me that two points need to be noted in that regard. The first is that, insofar as claims were made arising directly out of the ordinary terms of the employment contract in question, same were largely successful save to the extent that a reduction was made to the bonus awarded. Even that reduction itself needs to be seen in the context of the fact that the defendants did not, as was their contractual obligation, properly consider a bonus and make a decision on it, thus leaving it open to the court itself, for the reasons set out in the principal judgment, to carry out that exercise. What Mr. Simpson claimed was the maximum amount of bonus to which he might have been entitled. Insofar as there had to be a debate about what he should actually get, then that debate was, in the main, caused by the failure of the defendants to deal with the bonus issue at all. There is nothing, therefore, in respect of those aspects of the claim which arose directly out of the ordinary terms of Mr. Simpson's employment on which he can be reasonably criticised at all.

6.2 It next does need to be noted that Mr. Simpson failed in respect of the Titan issue and that is a factor that needs to be taken into account. However, so far as the profit share is concerned, it is clear that I found that Mr. Simpson was, at the level of principle, entitled to a profit share but, for the reasons already noted in this judgment, it is not now possible to proceed with such a claim because of the difficulty on Mr. Simpson's behalf in presenting evidence as to the value of any such claim to counter the contention of the defendants that that value is, in fact, zero. However, those are not the only facts that need to be taken into account. It does also need to be noted that Mr. Simpson's claim was based on a set of values which came directly from the defendants' own books and records. He can hardly be blamed for that. The defendants had not, prior to the case commencing, put forward any coherent set of figures which suggested that the position was that the net asset value was zero. On any view it was only after such a valuation was provided that the .final decision not to go ahead with the claim under this heading was made by Mr. Simpson. If the defendants had carried out a proper valuation of the projects at the time of Mr. Simpson's departure (which was, after all, the time at which his contractual entitlements needed to assessed) and if they had presented him with such a valuation which showed that there was no net value available, then Mr. Simpson's pursuit of a claim under that heading might legitimately be subject to some criticism unless he was able to bring home a claim based on the court being persuaded that the defendants' valuation was incorrect. However, at the time these proceedings were commenced, and during which they were maintained until recently, Mr. Simpson was entitled to the benefit of a contract which gave him such a share, in particular where no document had been produced setting out a valuation which showed that that entitlement was worthless. His pursuit of the claim under that heading needs, again, to be seen against the background of the fact that it was the defendants failure to carry out a valuation by reference to which his entitlements could be calculated that led to the problem in the first place.

6.3 It is against that background that the question of costs needs to be assessed. It is unnecessary to restate the principles which have now evolved for dealing with costs in complex cases deriving from *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 and other cases which followed on from it. (See generally *Mennolly Homes Ltd v. Appeal Commissioners & Anor* [2010] IEHC 56; *Mc Aleenan v. AIG [Europe] Ltd* [2010] IEHC 128; and *John Ronan and Sons & Ors v. Clean Build Ltd & Ors* [2011] IEHC 499). The first question is to determine whether the plaintiff had to come to court to get something which he could not have achieved had he not come to court. The answer to that question can only be yes in the context of this case. I have found Mr. Simpson to be entitled to a sum of €137,533 as against the defendants on a joint and several basis in circumstances where, if he had not come to court, he would not have the benefit of such a finding. The starting point has to be, therefore, that the defendants denied Mr. Simpson an

entitlement to something which the court has found him to be entitled to and the *prima facie* position has to be, therefore, that he is entitled to any costs reasonably expended in achieving that end.

6.4 The second leg of the question, which the court must ask itself in accordance with the *Veolia* principles, is whether, notwithstanding that a party has succeeded, that party may have materially added to the costs of the case by raising other unmeritorious issues. The court is not, of course, required to attempt to count up how many points either side won. Rather, the question is to determine whether it can be said with any degree of confidence that an otherwise successful party added materially to the costs by raising unmeritorious points.

6.5 For the reasons which I have sought to analyse earlier, it seems to me that the claims made under the ordinary employer/employee aspects of the case were, to a very large extent, resolved in favour of Mr. Simpson, and insofar as they were not, the problems can be attributed to the failure of the defendants to address the bonus question in the first place. It seems to me that like considerations apply to the issues concerning the profit share, at least up the point when the principal judgment was delivered. Insofar as that claim is now abandoned and that it might, therefore, be said that Mr. Simpson has failed in respect of it, I have already analysed the case which Mr. Simpson put forward which was based on the defendants own documents and in circumstances where the defendants, at the time of the trial, had not put forward a coherent contrary view as to the net value of the assets. I am not satisfied that it is appropriate, in those circumstances, to treat any costs associated with the valuation issue, up to and including the trial, as being costs which derive from an issue on which Mr. Simpson failed. It would be quite different if, prior to the commencement of proceedings, or at some stage in advance of trial, a proper valuation had been put forward which suggested that the net value was zero. If, in the teeth of such a valuation, Mr. Simpson had continued with his claim and abandoned it in the circumstances which have now arisen then the position would be significantly different.

6.6 It is also necessary to have regard to the fact that a significant portion of the time at the trial was taken up with the question, on which Mr. Simpson succeeded, as to who the contracting party was. I have, therefore, concluded that the only issue which was raised by Mr. Simpson and which might, on one view, have lengthened the case and thus added to the costs, and on which he failed, was the Titan issue. In all the circumstances it seems to me to be appropriate to reduce the costs to which Mr. Simpson might be entitled by one day to reflect, in substance, that a half a day's costs ought to be awarded to the defendants to reflect the fact that the case took longer and was thus more expensive by reason of Mr. Simpson raising, and failing on, the Titan issue. As the substantive hearing lasted for four days it seems to me that Mr. Simpson is entitled to the full costs of this action based, for the purposes of taxation, on a claim of the scale which succeeded, and on the basis of a three day action. However, it is clear that Mr. Simpson cannot be entitled to any costs since the principal judgment was delivered. On the basis set out in the principal judgment, the defendants were required to bear the cost of the initial valuation report themselves. Any costs on the defendants' part, which have arisen in relation to the valuation issue, since judgment was delivered (excluding the cost of the report in question), can reasonably be set off against any costs of Mr. Simpson in having the proceedings finalised through the present judgment.

6.7 In relation to the contention that the claim was a lot larger than the amount ultimately awarded, it does also have to be noted that there are a number of devices which a defendant, faced with a claim which that defendant believes to be excessive, can use to affect the costs of the relevant action. Money can be lodged in court under O. 22 of the Rules of the Superior Courts. A so called Calderbank letter can be written. Admissions can be made in the defence. By any or all of these devices a defendant can effectively set a bar which the plaintiff has to reach to justify going ahead with the case. The defendants in this case took none of those options. Their position was that they owed Mr. Simpson nothing. Mr. Simpson had to run the case to get something. The fact that he did not get as much as he sought needs to be seen against the background of the fact that he still had to run the case to get what I have found to be his entitlements and against the position of the defendants that he was entitled to nothing. In those circumstances it is only appropriate to reduce his costs in circumstances where it can be said that he raised unmeritorious issues which had the effect of making the proceedings more expensive. In reducing his costs from four days to three I have dealt, to the extent that I consider to be appropriate, with that issue. There is no further reason for reducing Mr. Simpson's costs based on the scale of the award.

6.8 Finally, it is necessary to deal briefly with the costs of some interlocutory orders which were reserved to the trial judge. It does not seem to me to be necessary to deal with any orders in respect of which the court made no order or any orders where the costs were directed to be costs in the cause. Mr. Simpson is entitled to his costs generally and that includes any costs which were made costs in the cause. On that basis there seems to be only three orders in respect of which costs were reserved, being an order of the 9th March, 2009, when Lavan J. struck out a motion for judgment in default of appearance with costs reserved, an order of Kearns P. on the 2nd December, 2009, in which costs were reserved on an application for case management and an order of the 26th January, 2010, when O'Neill J. reserved costs while dismissing an application made by the defendants to have Mr. Simpson's claim dismissed as being frivolous and vexatious. Given that his claim has succeeded in part, it is clear that that application was totally unmeritorious. It seems to me that Mr. Simpson is entitled to the costs of each of those matters as forming part of the natural run of the case.

6.9 In summary, therefore, Mr. Simpson is entitled to an award of €137,533 with Courts Act interest from the 1st November, 2008, together with the costs of the proceedings to be taxed on the basis of an award of the scale actually made and on the basis of a three day action (but excluding any costs arising after the delivery of the principal judgment). Mr. Simpson is also entitled to the three items of reserved costs to which reference has already been made.