Neutral Citation Number: [2011] IEHC 423

THE HIGH COURT

2006 5683 P

BETWEEN

HOLLYBROOK (BRIGHTON ROAD) MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

ALL FIRST PROPERTY MANAGEMENT COMPANY LMIITED

AND

GINA FARRELL (ALSO KNOWN AS EUGENIA PACELLI) TRADING AS GINA FARRELL CLEANING SERVICES

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 16th day of November, 2011.

1. This judgment is concerned with the issue of the costs of these proceedings in which I gave judgment on 5th October, 2011 ([2011] IEHC 375). The Court has had the benefit of comprehensive written and oral submissions from counsel on behalf of the plaintiff and counsel on behalf of the second named defendant, who was the only defendant in the proceedings when they came on for hearing.

2. The right to costs of proceedings in the High Court is governed by Order 99 of the Rules of the Superior Courts, 1986 (the Rules). While under rule 1(1) it is provided that the costs of and incidental to every proceeding shall be at the discretion of the Court, rule 1(4) provides that the costs of every issue of fact or law shall "follow the event" unless otherwise ordered.

3. However, s. 17 of the Courts Act 1981 (the Act of 1981), as amended by substitution by s. 14 of the Courts Act 1991, puts a limitation on the amount of a plaintiff's costs in certain proceedings. Sub-section (1) of s. 17 provides as follows:

> "Where an order is made by a court in favour of the plaintiff . . . in any proceedings (other than an action specified in subsections (2) and (3) of this section) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court."

Sub-sections (2) and (3) of s. 17 have no application on the facts of this case. Section 17(1) is mandatory and, as regards the scale on which the costs are coverable, is not impinged on in any way by the discretion conferred by Order 99.

4. Sub-section (5) of s. 17 provides as follows:

> "(a) Where an order is made by a court in favour of the plaintiff . . . in any proceedings . . . and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant . . . in the proceedings by the plaintiff
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> . . . of an amount not exceeding whichever of the following the judge considers appropriate:
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> (i) the amount, measured by the judge, of the additional costs as between party and party incurred in the proceedings by the defendant . . . by reason of the fact that the proceedings were not commenced and determined in the said lowest court, or
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> (ii) an amount equal to the difference between –
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> (I) the amount of the costs as between party and party incurred in the proceedings by the defendant . . . as taxed by a Taxing Master of the High Court . . . , and
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> (II) the amount of the costs as between party and party incurred in the proceedings by the defendant . . . as taxed by a Taxing Master of the High Court . . . on a scale that he considers would have been appropriate if the proceedings had been heard and determined in the said lowest court."

Paragraph (b) of subs. (5) provides, in effect, for set-off of costs awarded to a defendant under subs. (5) against costs awarded to a plaintiff under subs. (1). The jurisdiction of a court to make what is sometimes referred to as a differential costs order under subs. (5)(a) is discretionary.

5. As to the application of the foregoing provisions to this case, the position of counsel for the plaintiff may be summarised as follows:

> (a) The plaintiff having succeeded, the costs should follow the event and be awarded to the plaintiff against the second defendant.
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> (b) Having regard to s. 17(1) of the Act of 1981, it was acknowledged that the plaintiff was only entitled to Circuit Court costs. However, a certificate for senior counsel was applied for and the entitlement to such a certificate was not disputed by counsel for the second defendant.

(c) It was submitted that no differential costs order should be made. In this regard, counsel for the plaintiff reminded the Court of the various adverse findings the Court had made as to the manner in which the second defendant had defended the action and, in particular, the finding that the second defendant had falsified the concierge logs at Hollybrook with the objective of misleading the plaintiff (para. 7.3 of the judgment).

6. Counsel for the plaintiff referred the Court to an amendment to the Rules by the Rules of the Superior Courts (Mediation and Conciliation) 2010 (S.I. No. 502/2010), which came into operation on 16th November, 2010 and which inserted Order 56A into the Rules. Order 56A provides that a court, on the application of any of the parties or on its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order proceedings or any issue therein to be adjourned for such time as the Court considers just and convenient and invite the parties to use an ADR process to settle or determine the proceedings or issue. However, rule 4 of Order 56A provides that, save where the Court for special reason to be recited in the Court's order allows, an application for an order under Order 56A shall not be made later than twenty eight days before the date on which the proceedings are first listed for hearing. By virtue of S.I. No. 502/2010, Order 99 of the Rules is amended by the insertion of a provision that –

> ". . . the High Court, in considering the awarding of the costs of . . . any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

As I recorded in my judgment (para. 1.11), on the first day of the hearing of these proceedings the Court invited the parties to mediate, but that did not happen, primarily due to the second defendant's unwillingness to mediate at that stage. The Court made no order under rule 2 of Order 56A. It made a practical suggestion, which was not taken up. If the Court had been asked to make an order under rule 2 of Order 56A, the probability is that, having regard to rule 4, it would have been refused. In the circumstances, I consider that S.I. No. 502/2010 has no bearing on the issue of liability for the costs of these proceedings, as counsel for the plaintiff properly conceded. I am of the view that no weight should be attached to the failure of the second defendant to take up the Court's invitation to mediate in determining the costs issue.

7. The position adopted on behalf of the second defendant as regards costs, as I understand it, may be summarised as follows:

(a) the plaintiff should not be entitled to any costs against the second defendant; or

(b) alternatively, the plaintiff's entitlement to costs should be confined to the pursuit of the elements of the claim on which it was successful; and

(c) the second defendant should be entitled to costs against the plaintiff for defending the elements of the claim on which the plaintiff did not succeed; and

(d) the second defendant should be entitled to an order against the plaintiff under s. 17(5) of the Act of 1981, presumably as regards the elements of the claim on which the plaintiff succeeded.

8. The basis on which it was contended on behalf of the second defendant that the plaintiff should not be entitled to any costs primarily revolved around the involvement of Mr. Sean Dunne in the proceedings, as found in the judgment, and the contractual arrangements between Mr. Dunne indirectly through a company he controls and the plaintiff in relation to the costs of the proceedings. Save to the extent that I have taken account of Mr. Dunne's involvement in reaching conclusions as to the liability of the second defendant, I consider that Mr. Dunne's involvement on behalf of, and with, the plaintiff is not a matter to which the Court should have regard in exercising its discretion as to costs. The arrangements between Mr. Dunne and the plaintiff are a separate issue from the issues which arose in these proceedings between the plaintiff and the second defendant. The only other basis on which it was submitted that no order for costs should be made was the assertion that it is arguable that the plaintiff did not suffer any loss because the common areas at Hollybrook were, in fact, cleaned on a daily basis. Not to reject that submission would implicitly recognise that no award of damages should have been made. The reason the plaintiff was awarded damages was that it suffered loss by reason of the second defendant not fulfilling her end of the bargain in relation to the cleaning contract at Hollybrook. I am not satisfied that the second defendant has advanced any sustainable argument on the basis of which the Court could determine that the plaintiff is not entitled to any costs.

9. It is convenient at this juncture to summarise the various elements of the plaintiff's claim and the outcome of the proceedings in relation to each element. The position is as follows:

(a) The plaintiff claimed the sum of €43,952 as representing an overcharge to the plaintiff by the second defendant arising from "duplicate invoices". That element of the plaintiff's claim failed because, while the Court found that the second defendant duplicated the charges for services she provided in respect of the common areas in Hollybrook, the consequential loss was incurred by DCD Builders Limited, which was the proper plaintiff to recover the duplicated payments from the second defendant (para. 6.6 of the judgment).

(b) The plaintiff claimed sums aggregating €23,675 in respect of overcharging on the basis that the second defendant did not have the contracted number of cleaners present in Hollybrook for the contracted hours. The plaintiff was almost entirely successful on that claim, having been awarded the sum of €22,518.40 (para. 9.8 of the judgment).

(c) A claim for €4,104 in respect of auditors' fees incurred in relation to reconstituting the books and records of the plaintiff, was eventually dropped on the sixth day of the hearing (para. 3.2 of the judgment). That claim should not have been pursued against the second defendant, but, in reality, no time was devoted to it at the hearing.

(d) A claim for recoupment of alleged payment in excess of the contract price to the second defendant in the amount of €29,926, which was introduced on the seventh day of the hearing, failed (para. 9.1 of the judgment).

(e) The plaintiff's claims for pre-judgment interest and aggravated damages also failed.

10. In support of its submission that the plaintiff should not be entitled to the costs of pursuing the elements of the claim on which it failed and that the defendants should be entitled to the costs of defending those elements of the claim, counsel for the defendants relied on the decision of this Court in *Fyffes Plc v DCC Plc* [2009] 2 I.R. 417, the decision in relation to costs being at p. 674.

11. The authority primarily relied on by counsel for the second defendant in support of his contention that the Court should exercise

its discretion under s. 17(5) of the Act of 1981 in favour of the second defendant was the decision of the Supreme Court in *O'Connor v. Bus Átha Cliath* [2003] 4 I.R. 459. In that case the majority (Murray J. and Hardiman J.) held that the trial judge had erred in exercising his discretion under s. 17(5) not to make an order in favour of the defendant, where the plaintiff's claim for future loss of earnings should not have been made and his claim should more appropriately have been brought in the Circuit Court, rather than in the High Court. The claim in that case concerned personal injuries sustained by the plaintiff in a road traffic accident. The High Court hearing concerned the assessment of damages, liability not being an issue. The claim for future loss of earnings was abandoned at the trial after the plaintiff's direct evidence. The application of s. 17(5) on the facts of that case was, I venture to suggest, a lot less complex than its application to the facts of this case. Nonetheless it is instructive to consider the underlying rationale of the decision of the Supreme Court.

12. Having considered the policy considerations which underlie the provisions of s. 17 of the Act of 1981 – that they facilitate the efficient administration of justice, and are of convenience to all the parties in bringing their cases, where appropriate, before the courts of local and limited jurisdiction, and usually mean that lower costs are incurred by both the plaintiff and the defendant than if the proceedings had been brought to the higher court – Murray J. continued (at p. 493):

> "It is clearly in the public interest that claims are in principle brought before the lowest court having jurisdiction to hear and determine the claim with a view to the proper and efficient administration of justice and for the purpose of minimising the cost of litigation generally and in particular for the parties. There is therefore an onus on a plaintiff to bring the proceedings before the court having the appropriate jurisdiction.
>
> In my view, when the order made by a court in favour of a plaintiff falls well within the jurisdiction of a court lower than that making the award, it is incumbent on the trial judge to have specific regard to the nature of the claim and all the reasons for which the plaintiff's claim fell within the lower jurisdiction or as the section puts it, all the circumstances of the case. An unsuccessful defendant should not be wantonly burdened with the costs of defending a claim in the higher court when it could reasonably have been brought in the lower court."

13. In his judgment, apropos of when s. 17(5) comes into play, Hardiman J. stated (at p. 506):

> "In my view the sole fact which triggers the discretion is that the plaintiff was awarded a sum, in the High Court, which a lower court would have had power to award. This fact alone does not, of course, require the Court to make an order under s. 17(5). For example, where the award is very close to the limit of the jurisdiction of the lower court or where there has been some unpredictable development during the trial which has an effect in reduction of the ostensible value of the claim, there may be good reason for exercising the discretion in favour of the plaintiff."

The examples given in the last sentence were obviously obiter. Later, in a passage relied on by counsel for the second defendant, Hardiman J. stated (at p. 508):

> "What is relevant is this: the plaintiff's claim was never one appropriate to the High Court jurisdiction; the claim for future loss of earnings was one which should never have been made and, once made, should have been withdrawn years before the full hearing at which it was in fact withdrawn; and the case could have been more quickly and more cheaply resolved in the Circuit Court. The fact that this did not happen was due either to total inattention on the part of the plaintiff to the value of his claim or alternatively to the pursuit by him of some perceived tactical advantage in taking his case in the High Court. In either event the mischief of litigation which is more elaborate and more expensive than it should be is precisely the mischief at which s. 17(5) is aimed. Unless the Court, by the exercise of its discretion, imposes a price on those who thoughtlessly, or in pursuit of tactical advantage, embark on litigation which is elaborate and expensive when it could have been simpler and cheaper, the intention of the legislature will in my view be frustrated. Litigation which is unduly elaborate and expensive imposes a cost on others: most directly on the defendant but on wider groups and on society as a whole in the form of a social cost. The legislative intent in s. 17(5) is, in an appropriate case, to impose the cost of overblown litigation, or part of it at least, on those who make it so."

14. Before setting out my conclusions on the costs issue, I think it is pertinent to reiterate what I stated at para. 1.11 of the judgment, namely:

> "A lot of what ensued, in my view, involved a waste of the time and the resources of the High Court and the public monies which fund the High Court, for which both sides share responsibility."

While the plaintiff succeeded on one element only of the claim, the element outlined at (b) in para. 9 above, in order to establish entitlement to the damages awarded on that element, the plaintiff had to rebut the defence of the second defendant, and indeed the assertion made by her on oath, that she did not falsify the concierge logs with the objective of misleading the plaintiff. That conduct of the second defendant in the defence of the plaintiff's action, in my view, was the key contributory factor in the unnecessarily prolonged duration of the hearing. More importantly, the act of falsification of the concierge logs permeated the entirety of the plaintiff's case.

15. I have come to the conclusion that the proper exercise of the Court's jurisdiction would be to allow the plaintiff its costs against the second defendant on the Circuit Court scale, with certificate for senior counsel, on the basis of what I consider would be a fair estimate of the length of time the hearing of the action would have taken in the Circuit Court, if it had been limited to the element of the plaintiff's claim on which it succeeded, but was defended in the manner in which it was defended in the High Court until the second defendant gave evidence and admitted that she had altered the concierge logs. I estimate that the hearing, to include the evidence of Dr. Audrey Giles, would have taken three days. I come to that conclusion on the basis that Dr. Giles's evidence took up a full day of the hearing in the High Court (para. 7.4 of the judgment). For the avoidance of doubt, the plaintiff is entitled to the costs of obtaining expert advice from, and calling, Dr. Giles to give evidence.

16. I have come to the conclusion that it would not be a proper exercise of the Court's jurisdiction to make an order in favour of the second defendant under s. 17(5) of the Act of 1981, notwithstanding that the elements of the claim referred to at (a), (c), and (d) at para. 8 above should not have been pursued against the second defendant by the plaintiff. Obviously, on the basis of my experience of having had to spend seventeen days of High Court time during what is probably the busiest period of the year on this case, I am acutely conscious of what Hardiman J. referred to in *O'Connor v. Bus Átha Cliath* as "the mischief of litigation which is more elaborate and more expensive than it should be" and the necessity of the Court to impose a price with a view to deterring such conduct. However, as Murray J. emphasised in the same case, the Court must have regard to all of the circumstances of the case. In this case, I cannot overlook the finding of dishonesty on the part of the second defendant both before her joinder in these proceedings and in her conduct of the proceedings. Nor can I make an order under s. 17(5) which, in reality, would condone such

conduct.

17. Accordingly, there will be an order for costs in favour of the plaintiff against the second defendant on the Circuit Court scale, to include a certificate for senior counsel, on the basis of a hearing that would have taken three days in the Circuit Court.