Neutral Citation [2015] IEHC 388

HIGH COURT

COMMERCIAL

[2014 No. 806 P]

[2014 No. 13 COM]

BETWEEN

SONY MUSIC ENTERTAINMENT (IRELAND) LIMITED

UNIVERSAL MUSIC IRELAND LIMITED

WARNER MUSIC IRELAND LIMITED

PLAINTIFFS

AND

UPC COMMUNICATIONS IRELAND LIMITED (No. 3)

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on 17th day of June, 2015

Introduction

1. I have already delivered two judgments in these proceedings. The first judgment delivered on the 27th day of March was my decision on the substantive issues raised in the hearing. In that decision I decided to grant an injunction against UPC. I then adjourned the matter for further consideration as to the exact form of the order. I subsequently gave a second judgment on a number of issues between the parties in respect of the form of the order. This third judgment deals with the issue of costs. The parties are agreed that this application raises two separate issues of costs. The first is the costs up to the date of my first judgment and the second is the costs after that judgment. I will deal with each in turn.

Costs up to the giving of judgment

2. The plaintiffs' first submission is that they should get an order for their costs in their entirety as the costs follow the event. Mr. McDowell SC, for the plaintiffs submitted that the plaintiffs called upon the defendant to agree to a system of Graduated Response, but the defendant refused to give such undertakings prior to the proceedings being issued and heard. He also submitted that although there was an evolution of proposals through the exchange of letters (which are set out in my first judgment), the defendant did not at any time consent to the making of any injunction orders. He submitted that the essential issue at the hearing of the action was the plaintiffs' application for an injunction. This was contested in its entirety by the defendant. The Court found in the plaintiffs' favour and therefore the plaintiffs were entitled to their costs. Indeed Mr. McDowell pointed to the evidence of Mr. Bryan Brown, for the defendant, to illustrate that the defendant's attitude was not to take any action voluntarily but only on foot of a court order. Therefore, he submitted, the plaintiff had no option but to institute and pursue these proceedings. Thus he argued that the "event" in these proceedings was the issue of the injunction, the plaintiffs were successful on this issue and therefore the costs follow the event.

3. Mr. Ferriter S.C. for the defendant submitted that the Court should depart from the normal rule that costs follow the event in this case because of the special circumstances of this case. The first "special circumstance" on which he relied was that this was an entirely novel application for an injunction for a Graduated Response, that it was the first application within the E.U. for such an order and the first application under the relevant Irish legislation. He submitted that the approach of UPC was responsible, constructive and appropriate. He also submitted that the relief as granted was different to the relief sought. He submitted that, in their opening submissions, the plaintiffs had indicated they were not particularly wedded to the form of Graduated Response sought in their notice of motion and that as the hearing progressed the plaintiffs' position evolved.

4. The second special circumstance relied on by Mr. Ferriter SC was that UPC was not a wrong- doer. It accepted that there was a significant problem of internet piracy by its subscribers, but he submitted that these acts were done by third parties and it was at all times accepted that UPC was not a wrong- doer in respect of these actions. In this regard he relied on the decision of Arnold J. in *Twentieth Century Fox Film Corporation v. British Telecommunications Plc (No. 2)* [2012] 1 All ER 869.

5. Mr. Ferriter SC also submitted that UPC was successful on many of the issues which had been raised in this case, albeit it was not successful on the main issue, of the injunction. He submitted that although UPC had lost the injunction, nevertheless there were significant elements of the Graduated Response sought by the plaintiffs which the Court had rejected. Thus, the issue that UPC should suspend some of its subscribers did not form any part of the final order; the suggestion that UPC should terminate its subscribers had not been included in the scheme; the plaintiffs' suggestion that UPC should bear all of the costs of the scheme also did not form part of the order. Most importantly, the quasi- judicial administrative scheme of adjudication which the plaintiffs had sought also did not form any part of the order.

6. As a result, Mr. Ferriter SC submitted that because the defendant had won on a number of issues, the principles in *Veolia Water (UK) and Ors v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 applied. Mr. Ferriter SC submitted that the defendant had "won" on the question of the level of capital expenditure and operational expenditure and a significant amount of evidence had been given on these issues.

7. Mr. McDowell SC, in reply, rejected these arguments and stated that in respect of the defendant's proposals, many had been held by the Court to be ineffective or unworkable. He also submitted that although the ISPs were not wrong- doers and although they had

immunity from suit under EU law, a *quid pro quo* for that was that it was possible for injunctions to be granted against them.

The applicable legal principles
8. Order 99 rule 1 of the Rules of the Superior Courts provides as follows:

> *"Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:*
>
> *1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
>
> *(3) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

9. In *Veolia* Clarke J. set out the principles to be considered when dealing with costs in complex litigation. As he stated at para. 7 of his judgment

> *"7 Having said the above it seems to me that two matters traditionally taken into account by the courts in the award of costs remain of the highest significance and require to be re-emphasised.*
>
> *8 The first is that costs always remain discretionary and anything which is said concerning the principles which ought normally to apply in considering the award or refusal of costs should be subject to the caveat that the court always remains open to the suggestion that, by virtue of special or unusual circumstances, it is appropriate to depart from what otherwise might be the normal course in respect of an order for costs in a particular case. What I am about to outline is, therefore, in my view, properly described as the default position which should apply in the absence of such special or unusual circumstances. It should not be taken as, in anyway, diminishing the court's entitlement to depart from such a position in an appropriate case.*
>
> *9 Secondly, the overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, again prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."*
>
> *11 Before departing from this latter aspect of the matter, it is worth noting that there are certain cases where even a determination as to what the "event" is, may be a matter of some complexity. For reasons which I will address in due course, this case is one of them.*
>
> *12 However, as indicated above, it seems to me that the starting point of any consideration of costs has to be to identify what the "event" is and, thereby, identify the winning party……*
>
> *Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.*
>
> *13 Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue.*
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> *14 Similarly, where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily, award to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful."*

10. I turn now to the application of these principles to the facts of this case. The first point to note is that the issues raised in this application were novel and complex. Of course, the courts are regularly presented with novel and complex issues in complex legislation. However what was particularly novel about this case was that the problem of internet piracy is obviously a worldwide problem and the responses of different countries to the problem (whether by legislation or by court order or by an industry consensus) have varied from country to country. It was submitted by the defendant (and the plaintiffs did not disagree) that this was the first time an application of this type had come before any court within the European Union. It was also a matter which was governed by EU law, as implemented into Irish law. I also heard expert evidence on legislative responses to the problem in France, New Zealand and the UK. In my view that is a special circumstance to which I give some weight.

11. In this case, the plaintiff sought an injunction, the defendant resisted an injunction and I decided that an injunction should be granted. To that extent, the "event" is the granting of an injunction and the costs should follow that event.

12. However that is not the end of the matter. It was not only the principle of whether an injunction should be granted, but also the terms of that injunction which were a key battleground in these proceedings. The plaintiffs sought an injunction in particular terms but it did indicate at the outset that it was not wedded to that particular formulation. That was a helpful approach and it permitted the defendant an opportunity to engage constructively on what the terms of an injunction might be, were one to be granted. Both parties then engaged in a constructive exchange of correspondence. I have set out the evolution of all of these proposals and counter - proposals in detail in my judgment. In my view, the defendant took what I would regard as an entirely constructive, and

indeed, helpful, approach in trying to argue what should or should not form part of the terms of the injunction. Whilst it is true, as Mr. McDowell says, that some of its earlier proposals were found to be ineffective or unworkable, that is not the end of the matter because the defendant sought to refine its proposals as the hearing progressed. In my view, this exchange of proposal and counter proposal identified certain difficulties with the orders which the plaintiffs were seeking and also highlighted certain legal impediments to certain elements of the injunction which the plaintiffs were seeking. In certain aspects of the terms of the injunction, I found for the defendant. Thus, although the plaintiffs succeeded in obtaining an injunction, the exact terms of that injunction included certain terms which had been argued for by the defendants or - to put it a different way - did not include certain terms which the plaintiffs sought to have included and which the defendants successfully resisted. In my view, the UPC approach was both responsible and appropriate.

13. I have also considered the judgment of Arnold J. in *Twentieth Century Fox* above and I note his comments. However the issues in this case are different to the issues set out in that case. Although I have considered the analogy with Norwich Pharmacal costs, I am of the view that there are fundamental differences between the application in this case and the Norwich Pharmacal jurisdiction. In my view, the principles outlined by Clarke J. in *Veolia* are of more assistance in considering the issues which arise in this case.

14. Having considered all the issues in this matter and given that the primary rule is that the costs of proceedings "shall be in the discretion of the court" and that the costs of every action, question or issue should follow the event, unless there are special circumstances to the contrary, I am of the view that the appropriate and fair order to be made in this case is that the plaintiffs should recover 60% of their costs up to the giving of judgment from the defendant. The plaintiffs were successful in obtaining an injunction, which was the main issue in the proceedings. However the defendant was successful on certain issues which formed part of the terms for such an injunction.

The costs from the giving of judgment and thereafter
15. After I gave my first judgment in this case, I invited submissions from the parties as to the form of the order. Both parties then engaged in extensive correspondence and a number of further issues arose. There were five or six discreet issues on which I heard further submissions about the form of the order. I have set out those matters in my second judgment. The honours were even in respect of those issues. The plaintiffs succeeded in some as did the defendant.

16. I am of the view therefore, in regard to those matters, that the appropriate order to make for the costs incurred after the giving of judgment is that each side should bear their own costs.

Conclusion
17. I would therefore conclude

1. That the plaintiff should recover 60% of its costs up to the giving of judgment.

2. That each party should bear their own costs which were incurred thereafter.